HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27A—Appellant's submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

S12/2026

BETWEEN **ZONIA HOLDINGS PTY LTD (ACN 008 565 286)**
Appellant

and

10 **COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)**
Respondent

S13/2026

BETWEEN **PHILIP ANTHONY BARON**
First Appellant

JOANNE BARON
Second Appellant

and

COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)
20 Respondent

APPELLANTS' JOINT SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. ***Précis:*** Australia's largest bank, an ASX listed company, became aware that, during a multi-year period, it had failed to provide threshold transaction reports to AUSTRAC on over 53,000 occasions, and failed to conduct account-level monitoring for over 770,000 accounts. Those failures amounted to serious breaches of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML Act**). Contrary to its obligations under s 674 of the *Corporations Act 2001* (Cth), the bank did not tell the market. When the information later became public via the regulator, AUSTRAC presented it to the market in conjunction with two other pieces of information: that AUSTRAC had, by this time, sued the bank for the alleged breaches, and that the bank had also allegedly committed other contraventions. The bank's share price dropped. Shareholders sought compensation for the inflated value of their shares attributable to the bank's wrongful failure to inform the market. The bank argued that the shareholders should have proved the proportion of the share price drop referable to its impugned breaches. It did not itself seek to prove the proportion that was unrelated to those breaches. The Full Court found that the appellants failed to make out their case on quantification of loss.

3. ***Issues:*** Did the Full Court err in dismissing the appellants' damages claim at the level of *quantification of loss* without first having determined whether the wrongful conduct caused loss (and the nature of any such damage)? Yes. See **Ground 1(a).**

4. In a shareholder class action founded on wrongful non-disclosure of material information, can a plaintiff establish causation of *some* loss by: (i) a common sense assessment, having regard to the materiality findings that underpinned the findings of contravention and the evidence invoked by the Court in support thereof; and/ or (ii) a finding in an event study that revelation to the market of the material information, together with other information, caused the company's share price to drop? Yes. See **Grounds 1(c), 2.**

5. Having regard to: (i) that loss; (ii) CBA's failure to sheet home all or part of the share price drop to the other information; and (iii) CBA's responsibility for the difficulties in disentangling the effects of its wrong from other effects, should the Court have done the best it could on the evidence to quantify the appellants' loss, applying the principles established by ***Cessnock*** *City Council v 123 259 932 Pty Ltd* (2024) 281 CLR 39 and ***Placer*** *(Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768 at [38]? Yes. See **Grounds 1(b), 2.**

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

6. No s 78B notice is required.

PART IV: JUDGMENTS BELOW

7. These are: the primary judgment, *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 5)* [2024] FCA 477 (**PJ**); the main judgment on appeal, *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2025] FCAFC 63 (**FC**); and the Full Court's reasons for ordering declaratory and other relief, *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 2)* [2025] FCAFC 123 (**FC2**).

PART V: FACTS

10 **8.** The appellants were, and represented, shareholders of the respondent (**CBA**). CBA had monitoring and reporting obligations under the AML Act: FC[15]-[17].

9. ***Large scale breach of TTR obligations (late TTR issue):*** Under s 43(2) of the AML Act, CBA had to report to the CEO of the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) all "threshold transactions" as defined in s 5, including physical currency transfers of $10,000 or more: PJ[54]; FC[19]. Section 43(2), a civil penalty provision (s 43(4)), carried a potential penalty of 100,000 penalty units per contravention (s 175(4)), equating over the relevant period to a maximum penalty between $11m and $18m per contravention (*Crimes Act 1914* (Cth), s 4AA). In 2012, CBA began rolling out intelligent deposit machines (**IDMs**), but its system was missing a "flag" that should have linked the code to TTR reporting: FC[32],
20 [45]. Between 18 November 2012 and 8 September 2015, CBA failed to report 53,506 threshold transactions: FC[45], [53]. The error causing the problem was rectified by 8 September 2015 (FC[49]), and CBA lodged outstanding TTRs with AUSTRAC by 24 September 2015: FC[52]. It had, however, breached the AML Act on multiple occasions.

10. ***Large scale breach of account monitoring obligations (AMF issue):*** Section 82(1) of the AML Act required CBA to maintain and comply with an AML/CTF program, by monitoring accounts in various ways: FC[20]-[21]. Section 82(1), also a civil penalty provision, carried the same penalty per contravention (up to $18m). An error by CBA when updating profiles meant that for 778,370 accounts there was an account monitoring failure for various parts of the period from 20 October 2012 to 30 November 2015: FC[37], [41]. CBA identified this problem in
30 mid-June 2014 (FC[39]), and fixed it progressively but not until September 2016: FC[40].

11. ***Notification to AUSTRAC:*** On 8 September 2015, CBA notified AUSTRAC of the late TTR issue: FC[50]. AUSTRAC immediately expressed "serious concerns" about the scale of CBA's AML Act non-compliance and the period over which contraventions occurred: FC[57]. AUSTRAC investigated and liaised with CBA periodically, becoming aware of the AMF issue in the process: FC[58]-[66], [73]-[79], [86]-[97], [100]-[104].

12. ***AUSTRAC's media release:*** On 3 August 2017, AUSTRAC posted a media release to its website (**Release**), stating that it had initiated civil penalty proceedings against CBA for serious non-compliance with the AML Act: FC[104]. This referred to five issues: the late TTR issue, the AMF issue, and three other statutory breaches asserted by AUSTRAC: FC[106].[1] CBA's share price then dropped substantially: FC[4]. There was a statistically significant "abnormal" result in the price of CBA's shares over the ensuing two day "event window", in the amount of $3.29/ share: FC[104]-[107], [539]. Later, in AUSTRAC's civil penalty proceedings, the Court ordered CBA to pay a pecuniary penalty of $700m for contraventions of the AML Act: FC[4].

13. ***These proceedings:*** The appellants brought representative actions alleging that CBA had breached its continuous disclosure obligations under s 674 of the *Corporations Act* and r 3.1 of the ASX Listing Rules by not disclosing to the market, relevantly, the following (together the **Pleaded Information**) as at 24 April 2017 (FC[1]-[2], [128]-[129], [144]). *First,* from around November 2012 to 8 September 2015, CBA failed to give TTRs on time for approximately 53,506 cash transactions of $10,000 or more processed through IDMs; this represented approximately 80-95% of CBA's threshold transactions through IDMs in that period; those TTRs had a total value of, approximately, $624.7 million; and they had not been lodged at least in part because of a systems error occurring in or around November 2012 (**September 2015 Late TTR Information**). *Second,* from at least 20 October 2012 to 8 September 2015, CBA had failed to conduct account level monitoring with respect to 778,370 accounts (**September 2015 Account Monitoring Failure Information**).

14. The appellants contended that CBA's breach of its disclosure obligations meant that CBA shares traded on the ASX at a higher price than that which a properly informed market would have set; and that group members acquired CBA shares in that inflated market and, consequently, paid too much for them.[2] The loss for which they sought recovery was the

[1] Of those issues, the appellants pleaded the first three, and established liability in respect of the second and third. The fourth and fifth were the subject of the civil penalty proceedings but not the appellants' action.

[2] References to the appellants' loss in these submissions are to the loss of the Baron appellants. It was accepted before the Full Court that the personal claim by Zonia should be dismissed: see FC[9].

difference between that inflated price and the price they would have paid for their shares had the market been informed of the Pleaded Information: FC[124]. The availability of market-based causation as a means of quantifying loss was not in issue: FC[539]. The appellants sought compensation under s 1317HA, and damages under s 1325, of the *Corporations Act*.

15. The evidence the appellants relied on to establish causation and loss included an event study conducted by Professor Easton (FC[202]), which demonstrated the abnormal result described at [12] above. An event study takes market-wide information and seeks to isolate, on a statistically significant basis, the effect of company-specific information (without further attribution between particular pieces of such information). The premise of an event study is
10 that, because the market operates efficiently, "the public release of new information is quickly incorporated into a company's share price"[3]. It was uncontroversial below that the market for CBA shares operated efficiently. Further, the parties' experts accepted at trial that the $3.29 figure from the event study was a reasonable estimate of the price impacts of the Release (that is, of all information released in it, whether Pleaded Information or not).

16. On appeal, the appellants won on their liability case (as identified at [13] above). The trial judge having found that CBA was "aware" of the Pleaded Information by 24 April 2017, the Full Court held that this information was "material" within ss 674 and 677 of the *Corporations Act*, in that it would or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares; and that CBA contravened s 674 and
20 Listing Rule 3.1 by failing to disclose that information immediately (FC[515], [525]-[527], [532], [533]). However, the Full Court held that the appellants did not "ma[ke] good their case on quantification" of loss (FC[619]). It dismissed the appeal on that basis, without determining causation (FC[619]). The essence of the Full Court's reasoning was that the appellants had not proven what proportion of the $3.29 abnormal share price drop which ensued from 3 August 2017 was attributable to CBA's non-disclosure of the Pleaded Information revealed on that day.

PART VI: ARGUMENT

A. Principles

17. Sections 1317HA and 1325 of the *Corporations Act* have the beneficial purpose of compensating a person who has suffered loss as a result of a contravention of, relevantly, the
30 continuous disclosure provisions in Ch 6CA. Whilst these sections supply the legal norms

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[3] *TPT Patrol v **Myer** Holdings Ltd* (2019) 293 FCR 29 at [680]. See also PJ[1167], [1126]; *Goldman Sachs Group, Inc v Arkansas Teacher Retirement System* 594 US 113 (2021) at 3.

governing the determination of the appellants' claims for relief, "[t]he principles of common law, relevant to assessing damages in contract or tort … may provide useful guidance … [as] they have had to respond to problems of the same nature as the problems which arise in the application of"[4] the *Corporations Act*'s remedial provisions.

18. The following common law principles amount to an "accumulation of valuable insight and experience"[5] which should be applied by analogy to ss 1317HA and 1325 (a proposition supported by the features of those remedial provisions as identified below).

<u>Foundational concepts</u>

19. ***The sequential enquiries captured by "damage" and "damages":*** "<u>Damage</u>", or loss, is
10 "the phenomenon in respect of which an assessment of damages is made".[6] In tort, the phenomenon being isolated is "loss or harm occurring in fact",[7] or an "adverse effect experienced on" (relevantly here) a plaintiff's "financial position".[8] Conversely, "<u>damages</u>", described in some settings as compensation, means the measure or quantification of damage.

20. To assess damages in a given case, one must necessarily understand the underlying phenomenon that is being quantified. The first task is to identify the loss, in the sense of the particular prejudice the plaintiff has suffered (if any) due to the defendant's impugned conduct; the second is to work out "how to value that loss or damage".[9] If one attempts to determine quantum without first determining the nature of any damage that a plaintiff has proven, the quantification exercise occurs in a legal and factual vacuum – and, importantly here, without
20 the benefit of three critical guideposts: *first*, an understanding of the level of precision that is possible to achieve in representing the asserted loss in monetary terms ([33] below); *second*, an appreciation of any basis, in the evidence establishing loss, on which the plaintiff may also have established a prima facie case for quantifying that loss; and *third*, relatedly, a grasp of the factual circumstances that might properly ground a shifting evidentiary onus ([28], [35] below).

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[4] ***Henville*** *v Walker* (2001) 206 CLR 459 (concerning the *Trade Practices Act 1974* (Cth)) at [18] (Gleeson CJ); see also at [95]-[96] (McHugh J); ***Marks*** *v GIO Australia Holdings* (1998) 196 CLR 494 at [41] (McHugh, Hayne and Callinan JJ).

[5] *Henville* at [18] (Gleeson CJ).

[6] *Cessnock* at [7] (Gageler CJ), quoting from *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 367.

[7] ***Lewis*** *v Australian Capital Territory* (2020) 271 CLR 192 at [31] (Gageler J).

[8] *Lewis* at [146] (Edelman J).

[9] *Lewis* at [83] (Gordon J); see also, eg, ***Berry*** *v CCL Secure Pty Ltd* (2020) 271 CLR 151 at [65] (Gageler and Edelman JJ); *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 at [36].

21. The same methodological conclusion follows from s 1317HA(1), which empowers the Court to order a person to compensate another person for "damage suffered by the person" and then prescribes that the order "must specify the amount of compensation"; and from s 1325(1), which relevantly requires the Court to make an order that will "compensate [a person] in whole or in part for the loss or damage" that the court has found the person to have suffered. Determination of loss comes first. Determination of recompense for the loss follows thereafter.

22. ***"Damages" and the compensatory principle:*** The compensatory principle recognised in tort entitles the plaintiff to "a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the … tort had not been committed".[10] In contract, the governing principle is to similar effect.[11] And the same objective is reflected in s 1317HA's acknowledgment (through sub-ss (2) and (3)) that a compensation order is directed towards responding to "the damage suffered by" the person[12] (and see similarly s 1325(1)).

23. The compensatory principle sets a "ceiling on the overall damages to which a plaintiff is entitled".[13] But it also serves to emphasise that the assessment of damages is a "pragmatic subject" which "does not lend itself to hard-and-fast rules" – particularly given that the quantification of loss at common law for breach of contract or tort "was traditionally seen as a matter for the good sense of the jury".[14] Thus, English case law describes restoration by way of compensation as being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe".[15] The practical reality is that damages founded on hypothetical evaluations – attempting to "reach imaginatively" a result in which the *status quo ante* in fact is captured by the process of compensation[16] – "defy precise calculation".[17] "The court will not allow an unreasonable insistence on precision to defeat the justice of

[10] *Haines v Bendall* (1991) 172 CLR 60 at 63; see also *Lewis* at [2] (Kiefel CJ and Keane J), [30] (Gageler J), [65] (Gordon J), [139] (Edelman J).

[11] See *Robinson v Harman* (1848) 1 Exch 850 at 855, cited in eg *Cessnock* at [6] (Gageler CJ).

[12] See *Berry* at [64] (Gageler and Edelman JJ), addressing a relevantly analogous provision.

[13] *Cessnock* at [8] (Gageler CJ).

[14] *Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64 at 119 (Deane J), quoting in part from *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 at 69.

[15] *CCC v **Sheffield** Teaching Hospitals NHS Foundation Trust* [2026] UKSC 5 at [54], quoting *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* (1914) SC (HL) 18 at 29-30.

[16] *Sheffield* at [54].

[17] *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 499 (Dawson, Toohey, Gaudron and Gummow JJ), quoting *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 (Brennan and Dawson JJ).

compensating a claimant for infringement of his rights".[18] That need to balance proof with pragmatism is not confined to the field of the assessment of damages, but is relevant across other areas, such as where "the court has to quantify or value some right or species of property and does not allow itself to be put off by forensic difficulties". A "market rent may have to be assessed at a date when there are no remotely contemporaneous comparables" – and "[a]ssisted by experts, the court makes use of the best evidence available" to reach its conclusion.[19]

24. ***The relevance of counterfactuals:*** A counterfactual enquiry, seeking to isolate whether the defendant's impugned act made a difference to the plaintiff's claimed loss,[20] is a tool of causation that operates in aid of the compensatory principle. That kind of comparison is relevant to *both* stages of the assessment of loss: in ascertaining whether the plaintiff has suffered damage by reason of the wrong (and what that damage is), and then in "assessing the extent of relief (by way of damages) that is to be allowed".[21] And at both stages, "the inquiry necessarily proceeds by drawing inferences from known facts to find the counterfactual position on the balance of probabilities".[22] In practice, these propositions mean that evidence relevant to the existence and extent of loss may also bear on the proper quantification of that loss.

25. Within ss 1317HA(1)(b) and 1325(1), the requirements to identify loss that respectively "resulted[23] from the contravention", and was suffered "because of" the defendant's conduct, can usefully by informed by common law conceptions of factual causation[24] – whilst recognising that the scope and purpose of the underlying statutory contraventions, and the statutory language, is not limited by reference to common law analogies.[25]

26. ***The legal burden of proof in establishing loss and damages:*** A plaintiff claiming under (eg) ss 1317HA or 1325, just like a claimant in tort or contract, bears the legal burden of establishing the existence and the amount of the loss or damage that he or she suffers by the

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[18] ***Mastercard*** *v Merricks* [2020] UKSC 51 at [51], quoting *ASDA v Mastercard* [2017] EWHC 93 at [306].

[19] *Mastercard* at [50]; see also *Williams v Toyota Motor Corp* (2024) 98 ALJR 1282 at [209] (Jagot J).

[20] *Lewis* at [151] (Edelman J).

[21] *Harriton v Stephens* (2006) 226 CLR 52 at [168] (Hayne J).

[22] *Lewis* at [35] (Gageler J).

[23] Noting that "result", when used as a verb, includes "result indirectly": s 9.

[24] See, by analogy, *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 (Mason CJ, Dawson, Gaudron and McHugh JJ); *Adler and Anor v ASIC* [2003] NSWCA 131 at [709]; *DSHE Holdings Ltd v Potts* (2022) 163 ACSR 23 at [259].

[25] *Marks* at [38] (McHugh, Hayne and Callinan JJ).

defendant's impugned conduct.[26] However, that burden ("the ultimate burden of establishing [a] case on the balance of probabilities") differs from the burden of "introducing evidence"at relevant points in the proceedings; a burden that is "liable to shift constantly 'according as one scale of evidence or the other preponderates'". In proving "both the required connection with the contravention and quantum by inferences drawn from the whole of the evidence", a plaintiff may be assisted by a defendant's evidentiary silences ([28]-[31], [35] below).[27]

The correct methodology for identifying loss and then assessing damages

27. ***Step 1 – causation of some damage:*** Relevantly for present purposes, four important principles arise in undertaking the first enquiry (whether the defendant's wrong caused the plaintiff to suffer loss). *First*, conduct that "materially contributes" to the plaintiff's harm – in the sense that it plays "some part in contributing to the loss"[28] – "may be accepted as establishing factual causation" of that harm.[29] This more liberal causation test is directed in particular to the "cumulative operation of factors in the occurrence of the total harm in circumstances where the contribution of each factor to that harm is unascertainable".[30] In *Bonnington*, for example, an employee developed lung disease caused by gradual accumulation of silica particles in the lungs, and the origin of his exposure to the disease was dust from two sources, one of which did not involve any negligence by the defendant. Although the "greater proportion" of the noxious dust "probably" came from the latter source (at 622), the disease could not be "wholly attributed to material from one source or the other" (at 621). In the result, the fact that the negligent source "materially contributed to the disease" – as it was not "de minimis" – was enough to prove that the negligence caused some damage (at 621, 623, 626).

28. *Second*, economic loss may take various forms, and the plaintiff is "initially responsible for formulating how such loss or damage as they claim to have suffered is to be identified".[31] *Third*, where a plaintiff has made out by direct or circumstantial evidence a prima facie case that loss has resulted from the defendant's wrong, the defendant bears at least an evidential

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[26] *Berry* at [28] (Bell, Keane and Nettle JJ); but cf [32]-[33], [36].

[27] *Berry* at, respectively, [39] (Bell, Keane and Nettle JJ), [65] and [66] (Gageler and Edelman JJ).

[28] ***Hunt*** *& Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [45].

[29] ***Strong*** *v Woolworths Ltd* (2012) 246 CLR 182 at [26]; *Hunt* at [43]-[45]; *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at [70] (Gummow, Hayne and Crennan JJ); ***Bonnington*** *Castings v Wardlaw* [1956] AC 613 at 620; see also, in the context of statutory contraventions, *Henville* at [14].

[30] *Strong* at [25]; see also *Hunt* at [44]-[45].

[31] *Berry* at [65] (Gageler and Edelman JJ).

onus[32] to rebut that case in respect of some or all of the asserted loss.[33] If it does not do so, the Court will be entitled to draw the natural or common sense inference arising from the primary facts. As Windeyer J explained in *Purkess* (at 171):

> The ordinary conclusion when a man suffers a hurt is that all the consequences that follow it are attributable to the events that immediately caused it. If it be suggested that this is not so, that some of the apparent consequences are not causally related to it, then some material is required to support that suggestion. It is in this sense and at this stage that a burden of adducing evidence is upon the defendant.

29. Put another way, a "presumption of fact" may arise where the evidence supports inferences in favour of one party "unless and until some further or other state of fact is made to appear by evidence".[34]

30. This evidentiary approach has a long pedigree in the authorities. For example, in *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377, a breach of contract case, Dixon and Fullagar J explained (at 414) that, where the contract provided for a tanker to be in a particular place, "the breach assigned is that there was no tanker there", and "the damages claimed are measured by expenditure incurred on the faith of the promise that there was a tanker in that place", the plaintiffs had a "starting-point" or "prima facie case" to the effect that: "(1) this expense was incurred; (2) it was incurred because you promised us that there was a tanker; (3) the fact that there was no tanker made it certain that this expense would be wasted". The burden was then "thrown on the Commission of establishing that, if there had been a tanker, the expense incurred would equally have been wasted". In *Bonnington*, the pursuer having "proved enough to support the inference that the fault of the defenders … materially contributed to his illness", Lord Keith reasoned (at 626-627; see also at 622 per Lord Reid): "Prima facie the particles inhaled are acting cumulatively … The inference, of course, would have been different if it could be shown that the pursuer could not have inhaled any particles" from the negligent source, or that the negligently released particles were "released at intervals so

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[32] Some authorities indicate that the defendant may bear the *legal burden* to prove otherwise: see *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2025] AC 406 at [23], [58]-[64]; *Mitchell v Al-Jaber* [2025] 3 WLR 849 at [101]-[104]; and the reference to "the burden of proof" in ***Watts*** *v Rake* (1960) 108 CLR 158 at 159 (Dixon CJ). But the correct label may not matter: see *Cessnock* at [20] (Gageler CJ).

[33] ***Purkess*** *v Crittenden* (1965) 114 CLR 164 at 168 (Barwick CJ, Kitto and Taylor JJ), 170-171 (Windeyer J); *Gould v Vaggelas* (1985) 157 CLR 215 at 228-239 (Wilson J, Gibbs CJ and Dawson J agreeing), 250-51 (Brennan J); *Cessnock* at [20] (Gageler CJ), [121], [138] (Edelman, Steward, Gleeson and Beech-Jones JJ); *Stewart v Metro North Hospital and Health Service* (2025) 99 ALJR 1348 at [28] (the Court) and *R Lawyers v Mr Daily* [2025] HCA 41 at [143] (Gordon and Edelman JJ) each citing *Watts* at 159; *Wilmot v Queensland* (2025) 98 ALJR 1407 at [47] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ)

[34] *Watts* at 159 (Dixon CJ); *Purkess* at 171 (Windeyer J).

infrequent, or in quantities so insignificant, even taken cumulatively, as to make it unreasonable to regard them as a material contributing cause of the pursuer's disease". However, given that the defenders were "unable to show this", the pursuer satisfactorily had discharged his onus.

31. In *Watts*, rejecting the defendant's contention that part of the plaintiff's incapacity was "traceable to causes other than the accident" the subject of the defendant's negligence, Dixon CJ explained (at 160): "If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude", by satisfactory proof, "the operation of the accident as a contributory cause". And in *Purkess*, responding to an
10 argument that the plaintiff's chronic pain could be "apportioned" between the accident and other factors, Windeyer J stated that there was "nothing at all to sustain this entangled and difficult proposition", concluding that there was "no evidence sufficiently precise and definite to displace the inference that the disabling pain from which the plaintiff suffered after the accident was caused by the hurt she then received".[35]

32. *Fourth*, proof that *some* loss is attributable to the wrong is sufficient to require the Court to move to quantification. "No threshold of 'loss' needs to be met before the counterfactual analysis mandated by the compensatory principle is applied"[36] at the second stage (quantum).

33. ***Step 2 – quantifying the damage in money terms:*** Once the Court has found that the wrong caused some loss, it must then determine on the whole of the evidence the *quantum* of
20 the loss that the plaintiff has established, if any (see [26] above). The plaintiff must prove the amount of its loss "with as much precision *as the subject matter reasonably permit[s]*" (emphasis added).[37] The emphasised words are important. As Bowen LJ remarked in *Ratcliffe v Evans* [1892] 2 QB 524 at 532-533:

> As much certainty and particularity must be insisted on … [in] proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

34. That approach is not just explained by the need to do justice to the wronged plaintiff; it is also consistent with the court's need to deal with legal disputes "at a proportionate cost".[38]

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[35] *Purkess* at 171; see similarly at 168-169 (Barwick CJ, Kitto and Taylor JJ).

[36] *Lewis* at [31] (Gageler J).

[37] *Placer* at [37] (Hayne J); see also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350, 355-356 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[38] *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 at [217].

35. Related to this context-dependent lens for translating damage into damages, a cognate evidentiary principle applies (**facilitation principle**), facilitating discharge of the plaintiff's legal onus of proof. "[T]he nature and circumstances of the wrongdoer's conduct may support an inference or presumption that shifts the evidentiary burden".[39] Thus, "where the defendant's breach of an obligation results in uncertainty and difficulty of proof of loss for the plaintiff", the plaintiff is given an "evidential benefit of any relevant doubt", with "the practical effect of giving the plaintiff 'a fair wind' to establish loss".[40] "[T]he greater the difficulty in proof that results from the defendant's wrongdoing, the stronger the inference the court will be prepared to draw against the wrongdoer".[41] It is then for the defendant to displace that inference by 10 leading evidence concerning the uncertain matters.[42] In *Armory*, for example, the plaintiff could not prove the value of the stolen jewel because the defendant had not returned it. In the absence of evidence from the defendant demonstrating to the contrary, the Court directed the jury to infer that the jewel's value was "of the finest water that would fit the socket".

36. The rationale for the facilitation principle is that, in the interests of justice, the wrongdoer should "suffer the uncertainty resulting from its own conduct".[43] More broadly, it embodies "the robust practicality, informed by considerations of fairness and justice, that the common law takes to the assessment of damages".[44]

B. Errors in the Full Court's reasoning

37. ***Summary:*** The Full Court's approach to causation and quantification was infected by 20 three related errors which led it to overlook or misapply the principles concerning proof of loss and the assessment of damages. The Full Court:

(a) Proceeded directly to quantification (assessing *damages*) and dismissed the claim on that basis, without first determining whether the wrong caused loss (identifying the *damage*): FC[582], [619]. The Full Court thereby bypassed a consideration of whether the appellants had established *some* loss, albeit that such loss could not readily be quantified.

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[39] *Berry* at [29] (Bell, Keane and Nettle JJ).

[40] *Cessnock* at [139] (Edelman, Steward, Gleeson and Beech-Jones JJ); see also at [61], [129], and at [56] (Gordon J), [184] (Jagot J).

[41] *Cessnock* at [132] (Edelman, Steward, Gleeson and Beech-Jones JJ).

[42] *Cessnock* at [184] (Jagot J); ***Armory*** *v Delamirie* (1772) 1 Strange 505 at 505.

[43] *Berry* at [34] (Bell, Keane and Nettle JJ).

[44] *Cessnock* at [235] (Jagot J, speaking of contractual breach).

(b) Should have found that CBA's breach caused the appellants *some* loss. The Full Court should have reached that conclusion on a common sense analysis, having regard in particular to the fact (established by the event study, and uncontested on appeal) that the Release caused CBA's share price to fall abnormally by $3.29 per share.

(c) Should then have quantified the appellants' loss, doing the best it could on the evidence.

<u>First error: bypassing causation of loss after making adverse findings on liability (Ground 1(a))</u>

38. The Full Court's liability findings were adverse to CBA, and significant. The importance of those findings informed the Full Court's decision to grant declaratory relief even though the appellants' individual claims were dismissed: FC2 [4]-[11]. As the Full Court observed at
10 FC2 [9], "[i]t is no small thing that Australia's largest bank contravened the continuous disclosure provisions of the *Corporations Act*". The Full Court held and declared that CBA contravened Listing Rule 3.1 of the ASX Listing Rules and s 674 of the *Corporations Act* by failing to disclose, on or around 24 April 2017, the Pleaded Information (see [13] above).

39. The logical next step was to consider whether CBA's non-disclosures caused the appellants to suffer loss. Instead, the Full Court proceeded directly to quantification, on the premise that a determination of causation would have "no real utility" (FC[619]) and that "if the appellants fail to make out their case of quantification of loss, the outcome on causation will not matter" (FC[582]). That premise was flawed, and the approach contrary to the authorities ([19]-[21] above). The Court purported to address quantum without having first distilled the
20 nature of the loss (if any) that the appellants had proved, the manner in which the loss was sought to be inferred from the evidence, and the way that CBA had sought to counter that inference ([20]-[32] above). In the result, the Court approached the question in a legal and evidentiary vacuum, leading to the erroneous conclusion that the appellants failed to come up to proof on quantum (FC[599]-[600], [608], [618]).

<u>Second error: failing to find that the appellants established at least some loss on the evidence (Grounds 1(c), 2)</u>

40. The appellants relevantly advanced two routes by which they had proven that the contraventions caused at least some loss by way of a diminution in share price (FC[540(a)], [540(b)]). The *first* was on a common sense basis, having regard to the findings that: (i) the
30 non-disclosures were material (FC[525], [532]); and (ii) shares in CBA traded in an efficient market, such that market-based causation was an available means of quantifying group members' loss (PJ[1127]; FC[539]). The market would be expected to react quickly to new,

material information, including the Pleaded Information, when it was revealed (together with other information) on 3 August 2017. The appellants submitted that, while the inference that CBA's wrong caused at least some loss would have been displaced had CBA "establish[ed] that the whole of the price reaction following [the Release] was attributable to matters other than the [Pleaded Information], the Bank had not established that" (FC[540](a)) – or even attempted to do so. The *second* relied upon the abnormal $3.29 drop in the share price in the two-day window after the Release (see FC[539] and [12] above).

41. Had the Full Court undertaken a proper causation analysis, it should have found the appellants had established *some* loss resulting from CBA's contravention, by one or both routes. The primary facts in conjunction with the appellants' evidence comfortably supported the inference that CBA's failure to release the Pleaded Information to the market materially contributed to the inflation of the price of the appellants' and group members' shares; and CBA adduced no material to displace that inference (see [27]-[32] above).

42. ***Common sense assessment:*** A common sense analysis of causation would have started with the reasons for which the Full Court had concluded that two of the categories of information CBA failed to disclose were material: see FC[525] and [532]. Those conclusions were essential to the findings of contravention because the disclosure obligation in s 674 applies only where (relevantly) a listed disclosing entity has information that is not generally available (s 674(2)(c)) and "a reasonable person would expect the information, if it were generally available, to have a material effect on the price or value" of CBA's shares (s 674(2)(d)) (see FC[365]). A reasonable person is taken to expect information to have a material effect on the price or value of shares of a disclosing entity if the information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of" the shares (s 677(1)). The factors relied on by the Full Court to support its materiality findings founded a prima facie case (see [28]-[29] above) for causation of loss.

43. With respect to the <u>September 2015 Late TTR Information</u>, the Full Court found that information to be material in circumstances where CBA had failed to give threshold transaction reports on over 53,000 occasions – an "extraordinary" number of failures – relating to threshold transactions with a total value of over $620 million (FC[448], [516]). Each of those failures constituted a contravention of strict liability provisions of the AML Act, to which CBA had no apparent defence (FC[516]). CBA's contraventions were "a serious failure" to comply with legislation that was central to the conduct of banking operations, and went undetected over a lengthy period (FC[516], [521]). The maximum penalty for each contravention was between

$11 million and $18 million, meaning that the potential penalty if AUSTRAC were to bring proceedings was very large (FC[516]). The Full Court also considered it significant that CBA's failures to submit TTRs had affected a high proportion of the threshold transactions that occurred through CBA's IDMs, which would lead a reasonable investor to infer that CBA's failures had deprived Australian law enforcement of significant amounts of intelligence and AUSTRAC was likely to take this seriously (FC[517]). And the Full Court found that the prospect that AUSTRAC would take regulatory action increased over time (FC[456], [459]).

44. The Full Court reasoned that, although the probability of an AUSTRAC proceeding was uncertain, it was relevant in assessing materiality to consider the magnitude of the consequences of any such proceeding (FC[502]). The reputational consequences for CBA of a potential AUSTRAC proceeding could be significant, and the seriousness and number of the contraventions meant that any penalty could be expected to be substantial (FC[518]). The Full Court considered that "the seriousness and significance" of the late threshold transaction reports was reinforced by CBA's own reaction to the information once identified internally (in September 2015), which was promptly to elevate it to its CEO and Chair (FC[519]).

45. The Full Court also had regard to brokers' reports published after the AUSTRAC announcement. It gave three examples of reports which, in the Full Court's assessment, provided an "ex post confirmation" of the materiality of the September 2015 Late TTR Information, even accounting for the differences between the Pleaded Information and the information contained in the Release (FC[522]-[524]).

46. As to the <u>September 2015 Account Monitoring Failure Information</u>, the Full Court's reasons for concluding that this information was material were, similarly, pertinent to a common sense assessment of whether the unlawful non-disclosures caused the appellants' loss. The Full Court observed that it was common ground that CBA's failure to conduct account level monitoring contravened the AML Act (FC[528]).[45] That failure related to a large number of accounts over a long period and "represented a serious failure by the Bank to comply with its legal obligations under legislation that was (and is) central to the conduct of banking operations" (FC[528]). The Full Court repeated its observations, made in the context of the September 2015 Late TTR Information, that if AUSTRAC were to bring proceedings against

[45] The Full Court referred to civil penalty proceedings brought against CBA, in which the Federal Court by consent ordered CBA to pay a penalty of $700m in respect of an unascertainable, but potentially very significant, number of contraventions: *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited* [2018] FCA 930 at [20].

CBA, the reputational consequences and exposure to a civil penalty could be significant (FC[529]). The interactions between CBA and AUSTRAC indicated that AUSTRAC viewed the matter as serious and that its investigation was ongoing (FC[529]). The Full Court also regarded as significant the combined failure to disclose the September 2015 Account Monitoring Failure Information and the September 2015 Late TTR Information, which suggested CBA's error was not "a single failure, but potentially part of a broader compliance problem" (FC[530]).

47. The Full Court's materiality findings and analysis provided ample basis upon which to conclude, as a matter of common sense, that the market would have reacted to the material
10 information once disclosed. They overwhelmingly support the inference that the disclosure of this information to the market would have had *some* adverse impact on CBA's share price. That is particularly so given that the Full Court stated, with respect to both categories of material information, that its conclusion on materiality did not involve an acceptance of the proposition that the pleaded information was "economically equivalent" to the content of the Release: FC[520], [531]. The Full Court's powerful materiality findings and supporting reasoning were a "starting point" or "prima facie case" to the effect that CBA's wrong caused the appellants' shares to be priced too high (see [30] above) – and, in the absence of evidence led by CBA to displace that conclusion, allowed the plaintiffs to establish causation (see [22]-[25] above).

48. ***Abnormal share price drop:*** When the Full Court addressed the relevance of the
20 abnormal $3.29 share price decline at the quantification stage, it effectively held that the appellants' failure to estimate or demonstrate the "*contribution* of the pleaded versus non-pleaded information to the price drop" (FC[600]) meant that the appellants had failed to prove that *any* of the price drop was attributable to CBA's wrong. That was an inversion of the correct approach on the authorities ([28]-[31] above). It wrongly lay the burden of disaggregating the market effect of the multiple parts of the Release at the appellants' feet.

49. Undoubtedly, the information disclosed by the Release was more extensive than the Pleaded Information (FC[572]). By the time of AUSTRAC's announcement, the potentiality for legal proceedings had materialised, and more alleged wrongdoing by CBA had come to light: FC[574]. Further, the event study did not demonstrate that the whole of the -$3.29
30 abnormal return was attributable to the Pleaded Information (or, by extension, that portion of the Pleaded Information that was found to be material): FC[581].

50. But that did not mean that *no part* of the abnormal return was caused by CBA's wrong. The imperfect alignment between the Pleaded Information, and the facts announced on

3 August 2017, presented the not unfamiliar scenario of a single harm arising from multiple contributing causes. The common law has developed principles to address such a scenario ([28]-[31] above). Price inflation arising from a combination of market disclosures presents no harder problem than, for example, lung disease caused by the inhalation of different sources of particles. And there is no principled basis for approaching this case differently.

51. The proper application of principle in these proceedings results in the following conclusion. The substantial overlap between the Pleaded Information and the information announced by AUSTRAC, coupled with the undisputed fact that the information in the Release caused an abnormal drop of $3.29 in CBA's share price, amply supported the inference that
10 CBA's unlawful non-disclosures materially facilitated the abnormal market decline and were therefore *a* cause of the abnormal result. In the absence of any attempt by CBA to disentangle the purported extraneous causes, the Court could conclude that the appellants suffered loss in the form of share price inflation resulting from CBA's wrong.

52. *First,* as already explained, it was uncontroversial that, "starting when AUSTRAC published its 3 August 2017 release" (FC[539]), CBA's share price fell abnormally by $3.29 per share. *Second*, the matters announced to the market in that release *included* the Pleaded Information: see FC[106]-[107] (the first three issues in the Release "formed part of [the appellants'] case below"), [563]-[569] (*semble,* there was "correspondence between the pleaded information and the information conveyed by the first four bullet points in the" Release).

20 **53.** *Third*, it is implicit in the Full Court's reasoning that the Pleaded Information contributed at least *something* to the abnormal market decline. The assumption logically underpinning the Full Court's conclusion that AUSTRAC's announcement "went far *beyond*" the pleaded information (FC[575]), is that the Pleaded Information had *some* effect on the abnormal return. Similarly, the Court rejected Professor Easton's study as a measure of the loss by reasoning that it did not disclose the "*extent* to which" CBA's shares were inflated by reason of the established wrongdoing (FC[593]), and that Professor Easton had not adequately attempted to discern the Pleaded Information's "*contributions* to the price drop" (FC[595]). The Court found that the market's reaction to the Release was to "much, much *more* than the pleaded information" (FC[599]). And it held that the appellants had not properly tried to estimate the "*contribution*
30 of the pleaded versus non-pleaded information to the price drop" (FC[600]).

54. *Fourth*, CBA did not set out to prove that any particular component of the $3.29 price drop was referable to matters *other than* the release of the Pleaded Information. Its position was that the appellants bore the onus of establishing any apportionment (see FC[600]).

55. For those reasons, the Full Court should have found that the appellants had established that the non-disclosure of the material information caused the appellants' loss.

Third error: failing to quantify the loss (Grounds 1(b), 2)

56. ***The correct starting point:*** The Full Court's failure to properly identify the damage (via a causation analysis) means that its analysis of damages (at the quantification stage) adopted the wrong starting point. The starting point for quantification should have been that *some* portion of the inflated value of the appellants' shares – captured in the evidence by the -$3.29 per share abnormal return – was caused by CBA's unlawful conduct. The question was whether that figure should be moderated downwards and, if so, by how much. And it should have been
10 approached against the backdrop that the facilitation principle ([35]-[36] above) applied here. Given that (i) the damage being measured was the effect on the aggregated decision-making of individual investors about whether to sell, buy or hold shares, and (ii) a perfect test of the 24 April 2017 market reaction to the counterfactual disclosure was not possible in the real world, the situation was quintessentially one in which the circumstances and the subject matter called for much less than precision (see [33] above).

57. The facts of *Armory* provide an apt analogy ([35] above). Since 24 April 2017, CBA had been aware of the material information and yet had unlawfully withheld it from the market. The information did not become public until months later, via an announcement by the regulator. That the material information was disclosed simultaneously with other, related
20 information was a consequence of *CBA's* unlawful conduct in not disclosing the material information when it was required to do so. Further, the fact that AUSTRAC had to release the related information at all was also due to CBA's conduct – because it was information about more civil penalty contraventions allegedly committed *by CBA*. The appellants, having established that CBA's unlawful conduct contributed to the -$3.29 per share abnormal return, were entitled to propound the $3.29 figure as a yardstick for CBA to displace – the equivalent of the value of the highest quality jewel in *Armory*.

58. The Full Court identified no evidence capable of disaggregating the effects of CBA's unlawful conduct from the other matters the subject of AUSTRAC's announcement. Absent such evidence, the appellants were entitled to the full value of the diminution in share price.
30 Requiring the appellants to sheet home the full amount, or some unidentified material amount, of that diminution to CBA's wrong was to insist on a level of precision inappropriate to the subject matter and to a fair appreciation of CBA's role in creating the evidentiary uncertainty ([33]-[36] above). This was obscured by several factors wrongly emphasised by the Full Court.

59. The *first* such matter was the fact that the event study did not differentiate between the abnormal return caused by the unlawful non-disclosures, and the abnormal return attributable to other information announced by AUSTRAC. The courts below found that the Pleaded Information was not "economically equivalent" to the universe of information released on 3 August 2017: FC[579]; PJ[952], [1219]. Against that backdrop, the Full Court endorsed the primary judge's observation that the appellants had not established a "rational starting point for the valuation of the inflation": FC[608]; PJ[1256]. But the logic underpinning the rejection of "economic equivalence" was *not* that the appellants failed to establish prima facie loss. It was that the event study was not a conclusive empirical measure of that loss, as it did not prove the extent to which the -$3.29 abnormal return was attributable to release of the Pleaded Information. The methodological parameters of the event study did not change the proper characterisation of the $3.29 figure as the starting point, which CBA was required to displace.

60. The *second* factor that obscured the Full Court's consideration of quantum was the theoretical possibility that some different methodologies might have been available to disaggregate the $3.29 figure. CBA did not attempt such a disaggregation. The Full Court regarded as significant the observation by CBA's expert, Dr Unni, that an event study might be supplemented by a review of "news releases, analyst reports or other sources of information" which might identify, with more granularity, the particular elements of firm-specific news that the market regarded as significant: FC[596]. Dr Unni did not attempt such an analysis. Nor did his evidence establish that it *would have* been possible or effective in the present case, where the confounding information was closely tied to the information wrongfully not disclosed. The feasibility of disentangling the effects on the aggregate views of market participants of the various threads of information was far from self-evident, given their qualitative and interlocking nature.[46] Professor Easton's firm evidence was that it was not possible to do so: FC[585].[47]

61. The Full Court made an unjustified leap from identifying hypothetical alternative methods, to rejecting the appellants' submission that precise quantification was impossible: FC[594]-[595]. It reasoned that such alternatives should have been "attempt[ed]": FC[599]. But there was no warrant for imposing on *the appellants* the burden of pursuing methodologies which, on their expert's evidence, would have been futile, and which CBA did not pursue. This

[46] Cf *Myer* and *Crowley v Worley Ltd (No 2)* [2023] FCA 1613 (cited at FC[595]), where there was a *quantitative* difference between the actual and counterfactual disclosures.

[47] That some pieces of *unrelated* confounding information might be able to be disaggregated (eg earnings results cited at FC[590]-[591]) did not displace Prof Easton's opinion that this could not be done here.

approach jars with the tenet that courts should decide cases "on the evidence that parties adduce, not according to some speculation about what other evidence might possibly have been led".[48]

62. ***How the Full Court should have quantified the loss:*** Absent any evidence from CBA to displace the appellants' prima facie quantification, it was open to the Full Court to set the measure of damages at $3.29 per share. Alternatively, the Court should have considered the totality of the evidence to make a jury decision – applying sound imagination, a broad axe, and the facilitation principle – on how much of the $3.29 was fairly referable to CBA's wrong. The key evidentiary integers available to guide that jury assessment were as follows.

63. *First,* the starting point was again the Full Court's materiality findings, which underscored the seriousness of the wrongful non-disclosures. The Court concluded that this information was material because it communicated to investors breaches of money-laundering and counter-terrorism financing laws that were numerous, grave, undetected for a long time, apparently had no defence, and could lead to regulatory action, large fines and reputational damage. Viewing it in the mix with the other matters disclosed in the Release, it is impossible to characterise the material information as "de minimis" (see [27] above).

64. *Second,* these findings were supported by contemporaneous brokers' reports, which the Full Court regarded as "ex post confirmation of the materiality" of the September 2015 Late TTR Information, even taking into account the differences between AUSTRAC's announcement and the Pleaded Information: FC[522]. The brokers' reports were evidence that the non-disclosure of the September 2015 Late TTR Information – which the Full Court considered the more material of the two categories of information (FC[527]) – was regarded as significant by market analysts within the two-day event window the subject of the event study. The brokers' reports quoted at FC[522]-[523] expressly referred to the 53,000-odd reported TTR breaches and drew conclusions as to what a breach of that kind might mean for the size of CBA's likely penalty and the possibility of lasting reputational damage.[49]

65. *Third*, if a discount were to be applied to the $3.29 figure, two pieces of documentary evidence provided a rational basis for doing that. Whilst AUSTRAC's announcement revealed that regulatory proceedings, hitherto only a prospect, had actually been commenced (FC[569]), the "Lieser paper", cited by CBA's expert Dr Unni and subsequently relied upon by the

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[48] *ASIC v Hellicar* (2012) 247 CLR 345 at [165] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

[49] Similarly, CBA's statement to the ASX on 9 August 2017, which is an indication of what CBA regarded as material, detailed CBA's response to "the alleged issues relating to [TTRs] in the [IDMs]": ABFM 4.

appellants, reported on a study which suggested that the actual commencement of proceedings had only a modest marginal effect on share price where the underlying misconduct had already been revealed: FC[609]; and see PJ[836]-[837]. Also in evidence was an event study conducted by CBA's expert, Dr Unni, and relied upon by the appellants, which showed a decline in the share price of the National Australia Bank (**NAB**) after it voluntarily announced that AUSTRAC had "identified serious concerns" with NAB's compliance with the AML Act. The appellants submitted that the announcement was analogous in that, among other things, it expressly stated that AUSTRAC was "not considering civil penalty proceedings" (a statement which a contemporaneous analyst report considered "the market will mostly dismiss"): PJ[856],
10 [868].[50] While there were points of difference between that evidence and the counterfactual disclosure by CBA on 24 April 2017, the evidence nonetheless provided an available yardstick by reference to which the Full Court could have concluded that any moderation of the appellants' prima facie assessment of damages should be modest.

66. For those reasons, the Full Court should have concluded that the appropriate measure of the appellants' loss was $3.29 per share or a modest reduction on that figure.

PART VII: ORDERS SOUGHT

67. The orders sought are at CAB 692 (Zonia proceeding) and CAB 705 (Baron proceeding). Those orders contemplate that this Court can make findings on the quantification of loss or, if it declines to do so, remit that issue to the Federal Court.

20 PART VII: ESTIMATED TIME FOR ORAL ARGUMENT

The appellants estimate that 2.25 hours will be required for the presentation of oral argument on their appeal (including reply).

Dated 2 April 2026

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[50] The primary judge regarded the 7 June 2021 disclosure by NAB as distinguishable on the basis that it concerned different information and different market conditions: PJ[1015], [1253]; noted at FC[552]. The Full Court did not address the appellants' submission, relying on Dr Unni's event study, that the 7 June 2021 announcement was broadly analogous as to the "inferences the market would draw in terms of reputational damage, risk and the potential for penalty proceedings": see FC[598], and row 7 of "Appellants' Aide Memoire 5 – Response to MFI 10": ABFM 14.

ANNEXURE TO APPELLANTS' SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
			Commonwealth statutory provisions		
1.	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)	Compilation number C35 (27 November 2015 to 30 November 2015)	Sections 5 (as to the definition of "threshold transaction" only), 43, 82, 175	Act in force at the end of the period of contraventions by the respondent the subject of the TTR issue and the AMF issue (**AML contraventions**) (with no relevant changes in those sections in force during the balance of that period)	20 October 2012 to 30 November 2015
2.	*Crimes Act 1914* (Cth)	Unnumbered compilation (29 November 2012 to 11 December 2012)	Section 4AA	Act in force during the subperiod of AML contraventions indicated in the next column (with no relevant changes in the section in force during the balance of that subperiod)	20 October 2012 to 27 December 2012
3.	*Crimes Act 1914* (Cth)	Compilation number C106 (1 July 2015 to 30 July 2015)	Section 4AA	Act in force at the end of the subperiod of AML contraventions indicated in the next column (with no relevant changes in the section in force during the balance of that subperiod)	28 December 2012 to 30 July 2015
4.	*Crimes Act 1914* (Cth)	Compilation number C109 (27 November 2015 to 23 December 2015	Section 4AA	Act in force at the end of the subperiod of AML contraventions indicated in the next column (with no relevant changes in the section in force during the balance of that subperiod)	31 July 2015 to 30 November 2015

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
5.	*Corporations Act 2001* (Cth)	Compilation number C79 (1 July 2017 to 18 September 2017)	Sections 9 (as to the definition of "result" only), 674, 677, 1317HA, 1325	Act in force at the end of the period of contravention by the respondent of s 674 of the Corporations Act (with no relevant changes in those sections in force during the balance of that period)	24 April 2017 to 3 August 2017