



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**Form 27E—Appellant’s reply**

Note: See rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

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

BETWEEN S12/2026  
**ZONIA HOLDINGS PTY LTD (ACN 008 565 286)**  
Appellant

and

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

BETWEEN S13/2026  
**PHILIP ANTHONY BARON**  
First Appellant

**JOANNE BARON**  
Second Appellant

and

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

**APPELLANTS’ JOINT SUBMISSIONS IN REPLY AND IN RESPONSE TO THE  
PROPOSED CROSS-APPEALS / NOTICE OF CONTENTION**

**PART I: CERTIFICATION**

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

**PART II: PRELIMINARY MATTERS**

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2. ***“The TTR Issue” (RS/9)***: The *technological* cause of the problem was a “single IT coding error”. But “the Bank’s systems failed to detect that the late TTR problem was occurring over a long period of time” (FC[448]; [521]). That system-related deficiency is what led to the “extraordinary number of failures by the Bank to lodge TTRs on time”, with “each failure constituting a contravention of” CBA’s AML/ CTF obligations (FC[448]).

3. ***3 August 2017 announcement (RS/11)***: It is not entirely correct to say that, apart from  
 10 the issues identified in the pleaded information, the conduct described in the announcement was “unrelated to these proceedings”. That conduct comprised “additional failings by the Bank” (FC[570]) that AUSTRAC contended gave rise to AML Act breaches. Thus, CBA was responsible for the state of affairs that, as at 3 August 2017, there was more alleged wrongdoing for AUSTRAC to disclose in its announcement than just the pleaded contraventions (AS[57]).

4. ***Broker reports and quantification (RS/42)***: It does not lie well in the mouth of CBA to suggest that the brokers’ reports were not before the courts below as evidence relevant to quantification, whilst simultaneously contending that causation and quantification are intertwined (RS[18]). In any event: the appellants, through expert evidence, relied on brokers’ reports at trial to support one of their proposed pathways for quantifying loss (“economic  
 20 equivalence”) (PJ[735]-[737], [1248]<sup>1</sup>); CBA, through its experts, countered those arguments and that evidence (PJ[814], [821]); and on appeal, CBA cited analyst reports (including that identified at FC[524]) as evidence relevant to quantification.<sup>2</sup> The contention that CBA was denied an opportunity to adduce more evidence relevant to the broker reports should be rejected.

5. ***CBA’s pleading (RS/56)***: As to the proposed cross-appeal, CBA contends that it “pleaded additional underlying facts that made the pleaded information incomplete and misleading”. It did not. Nowhere in CBA’s Defence did it say that any facts rendered the pleaded information incomplete, misleading, or inappropriate to disclose.

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<sup>1</sup> See also appellants’ closing submissions (trial), Pt II (Loss) at [789(a)], [798] (ASBFM 12, 16).

<sup>2</sup> CBA’s submissions (appeal) at [211] (ASBFM 8).

**PART III: REPLY ON THE APPEALS**

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6. **Principles:** CBA does not challenge the synthesis of authorities and principle at AS[17]-[36]. Rather, it suggests that the appellants subvert those principles by introducing “a new and novel *prima facie* loss test” (RS[20]). CBA also submits that, given the nature of the loss asserted by the appellants, causation and loss were intertwined enquiries (RS[18]); and that the Court’s findings on materiality cannot be relied on to prove causation of loss because the test for materiality in s 674(2)(c)(ii) of the *Corporations Act* has nothing in common with an enquiry into causation of loss (RS[22], [24]). Each of these propositions should be rejected.

7. The appellants erect no new test; nor do they propose any threshold assessment of loss “in the abstract” (RS[19], [20]). They simply emphasise that causation of loss – assessing whether a plaintiff is factually worse off, in the class of adverse effects on which they rely, as a result of the wrong – must be addressed first, which is orthodox.<sup>3</sup> There is nothing special in this regard about economic loss conceptualised as payment of an excessive price for securities (cf RS[20]). Whether a common sense inference is available (AS[28]) that the wrongful non-disclosure adversely affected the appellants’ financial situation (by leading to the result that they paid too much for their shares) is a distinct question from the *extent* to which they overpaid.

8. Further, whilst the *evidence* used to prove quantum may overlap with that relied upon to prove causation of loss, this does not mean that an enquiry into quantum is wholly substitutable for the anterior assessment of whether damage has been suffered in the first place (cf RS[18], [25]). Such an approach forecloses the application of evidentiary principles (which CBA mistakenly characterises as some new “prima facie loss” standard: RS[20]) that may ultimately change the answer on quantum. Imagine that the Full Court had first determined that CBA’s wrong materially contributed to the circumstance that the price of the appellants’ shares was inflated upon acquisition (because the wrongfully non-disclosed information was very significant, the natural consequence in the market was a price distortion,<sup>4</sup> its release in combination with other information was followed by a decline in the share price,<sup>5</sup> nothing else was responsible for that decline,<sup>6</sup> and CBA had not demonstrated by evidence that the decline

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<sup>3</sup> See, eg, *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 211A; *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at [41]; *Arsalan v Rixon* (2021) 274 CLR 606 at [18]; *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [81], [83].

<sup>4</sup> See *Re HIH Insurance Ltd* (2016) 335 ALR 320 at [74].

<sup>5</sup> See AS[28]; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1047-1048.

<sup>6</sup> Appeal transcript (AT) at 251.4-8 (ASBFM 40).

was wholly or partly caused by something else (AS[28]-[29])). Against that backdrop, the Court’s approval of Dr Unni’s evidence at FC[596] (stating that further attribution analysis could in theory be done but failing to do it), and conclusion that resources were “available” for linking parts of the “observed price reaction” to the pleaded information (FC[598]), would have been insufficient to support the finding that the appellants did “not ma[ke] good their case on quantification” (FC[619]) – because CBA failed to show that all or part of the price distortion was attributable to something other than its wrongful non-disclosure (AS[33]-[36]).

9. As for CBA’s attempt to marginalise the role that the Full Court’s materiality reasoning may play in analysing causation of loss (RS[21]-[24]<sup>7</sup>), this argument is unavailing because it fails to grapple with the “inherently hypothetical nature”<sup>8</sup> of the latter enquiry. Contrary to RS[23], the loss question *is* what “would have” happened had CBA disclosed the pleaded information to the market, because CBA in fact did *not* disclose it – so one cannot measure the adverse effects of what “did happen in the real world” (RS[23]) without comparing that world to a fictional world. Because “the hypothesis is false”, the “court must speculate to some extent”, meaning that the ascertainment of loss “involves an evaluation of possibilities, not establishing a fact as a matter of history”.<sup>9</sup> As Brennan and Dawson JJ reasoned in *Malec* at 639, “[h]ypothetical situations of the past are analogous to future possibilities: in one case the court must form an estimate of the likelihood that the hypothetical situation would have occurred, in the other the court must form an estimate of the likelihood that the possibility will occur”. The latter scenario describes the process of assessing materiality under s 674. The former describes the process of assessing the appellants’ loss.

10. **Loss:** The claim that the Full Court “necessarily concluded” that the appellants had not established any loss, and “affirmatively found” causation was not made out, is wrong: AS[39], cf RS[25]. The Full Court made clear that it would first decide whether the applicants “fail to make out their case of quantification of loss”, in which case “the outcome on causation will not matter”: FC[582]; [619]. The Full Court’s reasoning in FC2[16] is unequivocal. Referring to FC, it stated: “In those reasons, we concluded that the appellants’ case on quantification of loss failed and, in those circumstances, it was unnecessary to express a conclusion on causation: see

<sup>7</sup> As to RS[22], [24], note Mr Narev’s evidence in cross-examination that CBA’s customers or investors “would” be concerned about or influenced by information about the late TTR issue: trial transcript (T) at 440.14-441.14 (ASBFM 44-45).

<sup>8</sup> *Lewis* at [35], [178]; see also *Harriton v Stephens* (2006) 226 CLR 52 at [168].

<sup>9</sup> *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 639; see similarly at 642-643.

[582], [619]”. As to the Full Court’s answer to CQ10, that concerned the “*amount*” of inflation in the share price, and simply reflected its erroneous assumption that no consideration of causation was required: cf RS[26]. The Full Court amended the answer to CQ10 to avoid “suggest[ing] that we expressed a conclusion on causation, when we did not”: FC[16].<sup>10</sup>

10 11. To the contrary, the Full Court’s reasoning provides a basis for concluding, on this appeal, that CBA’s wrongful conduct caused some loss. That the observations cited in RS[27] were not made under the auspices of a causation analysis may readily be accepted. But that does not deny the reality that they proceed on the logical premise that the unlawful non-disclosures inflated the share price in some way. Tellingly, the final sentence of RS[27] omits the reference from  
FC[598] to the “extent to which” a price reaction is attributable to pleaded wrongdoing, and substitutes words (“*at all*”) which are absent from the judgment.

12. CBA’s submissions otherwise do not engage with any of the reasons advanced by the appellants as to why the Full Court should have been satisfied that CBA’s wrongdoing caused the appellants some loss: RS[28]-[31]; cf AS[40]-[55]. CBA instead proceeds, incorrectly, on the basis that the event study was the only available path of reasoning to a finding of causation: RS[30]. That overlooks the potential for causation to be established on a common sense basis or by reference to the brokers’ reports.<sup>11</sup> Moreover, it overlooks the causation case the appellants actually advanced. It was part of the appellants’ causation case that, since the 3 August 2017 announcement revealed the pleaded information, “at least some of the price drop  
20 must have been referable to the revelation of the pleaded information”: FC[540(b)]. So formulated, it did not depend on the equivalence assumption.

13. **Facilitation principle:** CBA’s attempt to avoid the facilitation principle incorrectly assumes that the appellants did not establish any loss: RS[34]. RS[33]-[36] otherwise replicates the Full Court’s error of rejecting Prof Easton’s opinion that it was impossible to attribute a specific portion of the \$3.29 to the wrong (FC[585]) in favour of generalised statements about alternative methodologies that *might* have been deployed: FC[595]-[596], [591], [598], [601]. CBA’s distorted variant of the *Armory* metaphor (RS[36], [38]) is patently inapt, not least as it assumes its own conclusion. There was no basis for concluding that the appellants, or *anyone*, had “in their pocket” a “receipt and valuation statement for the jewel”, because the proposition  
30 that disaggregation of the \$3.29 was realistically possible was sourced in speculation. And if

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<sup>10</sup> See also FC2[20], stating that answer 10(a) reflected its conclusion “on the quantification of loss issue”.

<sup>11</sup> Cf *Southernwood v Brambles Ltd (No 3)* [2026] FCA 418, finding causation established on the “mutually reinforcing” bases of an event study, analysts’ reports, and common sense: [4042], [4056], [4057]-[4061].

CBA (through Dr Unni) held a receipt and valuation statement, it needed to produce it and prove the jewel was worth less than the appellants said it was (AS[56]-[57], [62]).

10 **14. *Quantification:*** To now suggest that an event study was not a methodologically available means of proving causation and loss is inconsistent with CBA’s concession below: FC[539]; cf RS[40], [42]. To reject 3 August 2017 as an appropriate reference point also jars with (i) CBA’s submission that the appellants could have estimated loss through measured market reaction, commentary and news articles (RS[39]); and (ii) the reality that it was impossible to measure the market reaction to the news “at the earlier point of contravention” because CBA did not actually disseminate the news on that date ([9] above). And the allegation that “the event study alone did not demonstrate that the market reacted to the undisclosed information *at all*” (RS[40]) has obvious logical problems, given (i) CBA’s acceptance that there was nothing “other than the 3 August ’17 disclosure that may have contributed to the price decline in CBA shares”;<sup>12</sup> and (ii) the fact that the pleaded information *formed part of* that disclosure.

20 **15.** The unequivocal evidence of the appellants’ expert Prof Easton was that it was “impossible” to disentangle the effect of the pleaded disclosures from the other disclosures reflected in the abnormal \$3.29 return: FC[585]. That opinion’s force is not undermined by his acceptance that there might be some *other* case in which the effects of two qualitatively different sources of confounding information could be disentangled by reference to analyst reports on the discrete topics.<sup>13</sup> Prof Easton reviewed news articles published in the 3-4 August 2017 event window, and found that none related to a topic other than the AUSTRAC announcement: FC[590]. CBA advanced no evidence capable of refuting Prof Easton’s evidence that the strands of information in that announcement were too intertwined for their effects on the market to be measured separately: cf RS[39]. CBA’s own expert, Dr Unni, merely speculated that this could be done, without undertaking the exercise: FC[596]. That fell well short of demonstrating that other evidence could have been called, but was not: cf RS[41].

**16.** As for the Lieser paper (RS[43]; ASBFM 50-89)), tendered by CBA and introduced in the report of its expert, Dr Unni: the extracts cited at PJ[836]-[837] and FC[609] provide ample basis for treating the report as a yardstick from which a jury could infer that any moderation of the appellants’ *Armory*-style estimation of damages would be modest. Differences between

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<sup>12</sup> See fn 6 above and T213.28-30 (“what Dr Eaton [sic] and Dr Unni have agreed on as being the excess return is ... a reaction to all of the information that was released to the market on 3 August”) (ASBFM 42).

<sup>13</sup> Prof Easton was given the hypothetical example of an announcement with two distinct components, a profit forecast decrease and a lending arrangement: T1047.11-T1049.44 (ASBFM 47-49).

Australian and US law, and between the relevant causes of action, do not deny the report's relevance (accepted by CBA at trial) or availability as an appropriate reference point: cf RS[43].

17. Finally, CBA has no answer to the appellants' submission that their quantification case is supported by an event study conducted by CBA's own expert, Dr Unni: AS[65]. The NAB disclosure on which the appellants rely is that of 7 June 2021.<sup>14</sup> RS[44] mistakenly cites different event studies, being those referred to at PJ[856]-[867]. The study invoked by the appellants found a decline in the NAB share price after NAB announced AUSTRAC had "identified serious concerns" with its compliance with the AML Act, without any civil penalty proceeding having been announced or foreshadowed: PJ[856], [868].

10 **PART IV: CROSS-APPEALS/ NOTICE OF CONTENTION**

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**A. Special leave to cross-appeal should be refused**

18. CBA correctly acknowledges that the cross-appeals are necessary (RS[91]; see HCRs rr 42.08.1, 42.08.5 cf CAB2 at 711). Contrary to CBA's representations in the hearing before Gageler CJ,<sup>15</sup> the cross-appeals require this Court to revisit the "substantial volume" of evidence before the primary judge (RS[15]); and, worse, to do it by reference to hundreds of pages of cherrypicked extracts (RBFM), which the appellants must supplement to provide necessary context (ASFBM). Ground 2 does no more than seek to reargue the Full Court's application of orthodox doctrine governing ss 674(2) and 677 to the facts; there is no point of principle. The legal issue raised by Ground 1 (RS[46]-[50], [59]-[62]) only arises if CBA first succeeds  
20 both on a pleading point (RS[54]-[58]) and on the case-specific complaint that the pleaded information was "incomplete and misleading" (RS[51]-[53]). The fact that the appellants' appeal grounds invoke the Full Court's findings on materiality does not demonstrate that justice requires the reopening of almost every major issue litigated by the parties below. Cross-appeals should not be used as a dragnet to re-run intermediate appellate proceedings before this apex Court. Special leave to cross-appeal should be refused, either before or at the start of the hearing.

**B. The "completeness and accuracy" issue (Ground 1)**

19. *The issues:* CBA tries to raise a point of principle about whether the completeness or accuracy of pleaded material information is a "threshold issue" that must be addressed before the requirements of s 674(2) of the *Corporations Act* can be applied (RS[59]). But the threshold

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<sup>14</sup> See Item 7 of the table at ABFM 14-15.

<sup>15</sup> T7.211-215 (ASBFM 97).

issue is never reached, as CBA did not plead it appropriately (or, indeed at all), and the defence failed on the facts anyway.

10 **20. CBA failed to plead the “completeness and accuracy” issue:** The Full Court correctly held that if CBA wished to run a contention at trial that the pleaded information was incomplete, misleading, or not in a form appropriate for disclosure, then CBA was required to plead that contention and plead the additional information said to be missing (FC[333]). The contention was a point of law said to make the appellants’ case unmaintainable, based on facts known to CBA, and one which might take the appellants by surprise (FC[335]). The suggestion seemingly made before this Court (and not made before the Full Court) that CBA *did* discharge its pleading obligations is unfounded; the Defence did not put the appellants on notice that they were facing a case that must fail because of a “threshold issue”: see [5] above. The argument made by CBA before the Full Court was that the appellants had acquiesced in CBA running the case outside its pleadings, and that contention was correctly rejected (FC[340]-[341]). The Full Court was the proper arbiter of the practice and procedure rules applicable to pleading matters before it, and CBA has not demonstrated either any error in principle, or any substantial injustice that would warrant this embarking on a review of this question.

20 **21. The Full Court correctly held CBA’s contentions as to “completeness and accuracy” did not negate materiality:** The Full Court addressed CBA’s arguments about the “completeness and accuracy” of the pleaded information in the context of materiality, and rejected them. Because that is so, whether those issues ought to be considered as a “threshold issue” does not arise for this Court’s consideration unless it considers the Full Court erred in respect of that large factual inquiry.

**22.** As to the Late TTR information (RS[52]), each of the contentions now made by CBA was carefully considered and rejected by the Full Court for cogent reasons. An announcement to the ASX disclosing the substance of that information would have been a simple statement of fact and cannot sensibly be said to be either incomplete or misleading by reference to these matters.

30 **(a) First,** the proportion the late TTRs bore to the total TTRs lodged by CBA and the total transactions monitored by CBA did not detract from the fact that there had been more than 53,000 TTR-related contraventions of the AML Act (an “extremely large” and “objectively high” number) which would be of concern to investors, even in the context of the CBA’s “vast operations” (FC[453]). The contraventions (each having a maximum penalty of \$11–18 million) exposed CBA to a potentially significant penalty and reputational damage.

(b) *Second*, the contention that the Late TTR information failed to inform investors that the issue had been rectified by lodgement was incorrect, given the (obvious) *implication* of the TTRs being described as “late” during a definite period of time (FC[449]-[450]).

(c) *Third*, while the Full Court accepted it was contextually relevant that the Late TTR information was caused by a single coding error, that made “little, if any, difference” to the materiality of the Late TTR Information because the error “led to an extraordinary number of failures” and the Bank’s systems failed to detect the error “over a long period of time” (FC[448]), leading to 53,000 contraventions (FC[453]). What was significant was not the technical cause of the issue, but its scale and how it exposed CBA to financial penalties and reputational damage (as submitted below).

(d) *Fourth*, CBA’s reliance on “AUSTRAC’s then-known position as to the late TTRs” to the contraventions is misplaced and difficult to understand. As at April 2017 (being the relevant date), the Full Court correctly found that AUSTRAC’s attitude was in fact that the contraventions were “serious, significant and systemic”, and CBA’s own CEO thought that civil penalty proceedings were “highly likely” (FC[456]).

23. As to the AMF information (RS[53]), the Full Court correctly held that details as to the number of accounts the subject of the monitoring failure varying from time to time over the identified period from 2012 to 2015 did not detract from the materiality of the information or render it inappropriate to disclose (FC[468]-[469]). Any inaccurate impression as to the extent of the monitoring failure that might be conveyed from the precise formulation of the AMF information in the pleading could be (and was) taken into account in assessing the materiality of its substance. (The substance of the information was not incorrect; there were in fact 778,370 accounts which were the subject of monitoring failures albeit for different periods.) Again, as submitted below, the information’s materiality arises from the consequences for CBA’s investors, which do not depend on the granular detail of how it arose in CBA’s operations.

24. *No implicit threshold requirement of “completeness” or “appropriateness”*: Section 674(2) of the Act requires (in summary) disclosure of information that the company has if the information is required to be disclosed under the ASX Listing Rules, is material, and is not generally available.<sup>16</sup> The only characteristic required of the information itself is that it be material. (Listing Rule 3.1A exempts certain information from disclosure, including information that is insufficiently definite to warrant disclosure.)

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<sup>16</sup> See *ANZ v ASIC* (2024) 305 FCR 383 at [29].

25. Three propositions are well established, were applied by the Full Court, and are not disputed. *First*, an applicant must plead with precision the information alleged to be material (FC[367]).<sup>17</sup> *Second*, because compliance with s 674(2) cannot require conduct that would contravene s 1041H, material information for the purpose of s 674(2) does not encompass information that is factually incorrect (FC[371]). *Third*, information must be assessed in its context in determining whether it is material (FC[445]).<sup>18</sup> CBA, however, contends that this Court should accept a radically different and novel proposition: that if the pleaded information is *incomplete in the sense that it does not include a contextual matter*, then contravention cannot be established. CBA seeks to introduce that (additional) inquiry between the stage at which the  
 10 Court considers awareness, and the stage when the Court considers materiality.

26. Before addressing this directly, the issue should be clarified. The appellants do not submit that s 674(2) could require disclosure of information that would be misleading or deceptive by omission, nor that a contravention of s 674 can be proven upon some artificially narrow form of “material” information that is literally correct but, when considered with other facts, is factually untrue or not material (*cf* RS[47]). However, CBA’s proposition is that s 674(2) requires disclosure of “accurate, *viz*, complete and not misleading” information, and that those matters are to be assessed *as a threshold issue* divorced from any consideration of the materiality of the information (RS[46]). As applied by CBA, that means that if *any* relevant matter of context is omitted, the case fails irrespective of the materiality of the information  
 20 considered in context (RS[52]-[53]).

27. That proposition should be rejected for the reasons stated by the Full Court (FC[364]-[372]), endorsing the Full Court’s recent consideration of that subject in *ANZ v ASIC*. It rightly held that contextual matters should ordinarily be dealt with when assessing the materiality of the pleaded information. The appellants add the following additional submissions to the Full Court’s reasons as expressed at FC[364]-[372].

(a) *First*, CBA’s proposition finds no footing in the statutory text. The “information” that is analysed at each stage of the s 674(2) inquiry must have the same consistent meaning, and the only test for assessing whether something qualifies as “information” is in the permissive and non-exhaustive definition in Listing Rule 19.12. Properly construed, this provides for a  
 30 broad and flexible standard which is then cut down at later stages of the analysis. Context

<sup>17</sup> *Cruickshank v ASIC* (2022) 292 FCR 627 at [120]-[122]; see also *TPT Patrol Pty Ltd v Myer Holdings Ltd* (2019) 293 FCR 29 at [1121].

<sup>18</sup> *ANZ v ASIC* at [56]-[62] (Lee J), [127]-[129] (Button J); *ASIC v Vocation* (2019) 136 ACSR 339 at [566].

said to make identified information more complete fits in, at least, at the materiality stage, and also potentially at the LR 3.1A stage (which explicitly exempts certain information, eg where the context shows it is deficient in specific ways, such as “incomplete” negotiations). CBA’s approach would introduce an (implied) threshold test that entirely subsumes and overwhelms (express) later stages of the statutory inquiry. Moreover, and critically, the test for materiality (as elaborated by the deeming provision in s 677) requires proof that the information be “likely to influence” investment decisions. There is no threshold for the degree of influence required.<sup>19</sup> It follows that contextual matters that bear on the *degree* of materiality of the information need not be incorporated within the information itself.<sup>20</sup>

10 (b) *Second*, as a matter of statutory purpose, if companies were required to disclose all relevant contextual matters in conjunction with material information, companies would be incentivised to bury material information within swathes of distracting “context”. Further, there is nothing stopping companies from adding explanatory context when disclosing material information anyway (*cf* RS[59]).

28. To the extent that CBA contends that the Full Court erred in holding that there was no “requirement for the applicant to plead the complete content of an ‘appropriate’ disclosure” (RS[55]; FC[367]), the statutory text of 674(2) does not require an applicant to plead (or even identify) a “disclosure” *at all*. Rather, an applicant must plead *information* which is material. Any issue about the content of a hypothetical disclosure (such as an ASX announcement) that  
20 the company would have made had it complied with the Act is a separate question relevant to the subsequent causation and loss inquiry.<sup>21</sup> CBA’s submission (at RS[61]) goes nowhere. It is open to a defendant to plead the content of a counterfactual *disclosure* that contained the material *information* for the purpose of assessing causation or loss (ie, if, contrary to denial, an obligation to disclose X arose, I would have disclosed X, Y and Z ...).

### **C. The Full Court’s findings on materiality were correct (Ground 2)**

29. *No point of principle*: CBA raises no point of principle regarding what constitutes material information for the purpose of s 674(2), and it points to no incorrect statement of the statutory test. It merely submits that the Full Court failed to “apply the correct statutory test” (RS[63], [73]) to what was necessarily a factually dense inquiry. CBA’s argument rises no

<sup>19</sup> *Southernwood v Brambles Ltd (No 3)* [2026] FCA 418 at [173] (Murphy J).

<sup>20</sup> See *ANZ v ASIC* at [67].

<sup>21</sup> *ANZ v ASIC* at [63].

higher than a re-run of arguments that the Full Court rejected.

**30. *The statutory test:*** Section 674 of the *Corporations Act* is a remedial provision that is to be construed beneficially to the investing public.<sup>22</sup> Section 677 deems information material for the purpose of s 674(2) if it “would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of” the securities. These provisions require a court to assess the information from the perspective of the hypothetical class of persons who commonly invest in securities, which includes all kinds of investors — large, small, sophisticated, and infrequent (but not irrational).<sup>23</sup> The test of whether information would be “likely to influence” the notional class “is not a high threshold”.<sup>24</sup> The “legislature did not qualify the word ‘influence’ by reference to any requisite degree or extent”.<sup>25</sup> The threshold is met if the information would likely influence trading decisions in a “non-trivial” way.<sup>26</sup> CBA’s argument that s 677 focusses on “engendering the action” of trading in shares (RS[66]) is overstated; decisive (as opposed to influential) import for investors’ decisions is not required.

**31. *Applying the statutory test:*** Information is to be assessed on an *ex ante* basis at the time of the alleged nondisclosure.<sup>27</sup> *Ex post* evidence (such as evidence of what occurred after belated disclosure of the information) can be relevant as a check of the reasonableness of an *ex ante* assessment.<sup>28</sup> The assessment of materiality ultimately requires judgement taking into account all relevant facts. It has been widely recognised that assessment of materiality requires the application of commercial common-sense.<sup>29</sup> Expert evidence can be relevant (albeit not always useful)<sup>30</sup>; a court is entitled to give it the weight that it considers appropriate in the

<sup>22</sup> *Crowley v Worley Ltd* (2022) 293 FCR 438 at [159]; *Grant-Taylor v Babcock and Brown Ltd (in liq)* (2016) 245 FCR 402 at [93] (Allsop CJ, Gilmour and Beach JJ); *James Hardie Industries NV v ASIC* (2010) 274 ALR 85 at [356] (Spigelman CJ, Beazley and Giles JJA).

<sup>23</sup> *Grant-Taylor* at [115]-[116].

<sup>24</sup> *ANZ v ASIC* at [85] (Lee J), quoting *ASIC v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at [188] (the latter case overturned on other grounds: *Forrest v ASIC* (2012) 247 CLR 486). Markovic and Button JJ agreed with the reasons of Lee J regarding the principles of materiality: at [2], [117].

<sup>25</sup> *Brambles* at [173].

<sup>26</sup> *Grant-Taylor* at [96]; *Brambles* at [173].

<sup>27</sup> *Grant-Taylor* at [95], [116].

<sup>28</sup> *James Hardie* at [534]-[537]; *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [84(d)] (Beach J). See *Tillmanns Butcherries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367, 381-382 (Deane J).

<sup>29</sup> *ANZ v ASIC* at [52], [86]; *Brambles* at [3002]-[3003]; *Re Mayne Pharma Group Ltd* [2025] NSWSC 1204 at [388] (Black J); *ASIC v GetSwift Ltd* [2021] FCA 1384 at [1240], [1259] (Lee J); *Grant-Taylor v Babcock & Brown Ltd* (2015) 322 ALR 723 at [64] (Perram J); *ASIC v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 at [482], [490], [511] (Gilmour J) (affirmed on a different issue: (2012) 247 CLR 486).

<sup>30</sup> *ANZ v ASIC* at [52]; *James Hardie* at [228] (regarding investor reliance for the purpose of s 1041E).

circumstances, or to disregard it if it does not assist.<sup>31</sup> Importantly for this case, as the Full Court correctly held (FC[498]), “information can be material even if it does not, of itself, reveal” matters that will affect financial performance of the company. That holding is unchallenged by CBA. Confining material information to information about company “fundamentals” as conceived of by professional investors is inconsistent with the broad notional class of investors.<sup>32</sup> Nothing in s 674(2) demands proof of how investors would quantify the effect of the information in question on a company’s earnings, or that disclosure of the information would have a quantifiable impact on share price or value.<sup>33</sup>

10 **32. No error by the Full Court in setting aside the primary judge’s findings:** CBA contends that, in disturbing the primary judge’s conclusions on materiality, the Full Court discounted the judge’s advantages in seeing and hearing the evidence (RS[15], [63], [90]). But this was not a case where the primary judge’s findings turned on assessment of the credibility or reliability of witnesses based on in-court impressions.<sup>34</sup> The primary judge found each of the experts to be a satisfactory witness (PJ[48]). While trial judges gain an advantage from receiving and reflecting upon the entirety of the evidence (as the Full Court acknowledged),<sup>35</sup> the Full Court itself had the benefit of “appellate synthesis and perspective” afforded by having the issues debated over four days by experienced senior counsel at a remove from the cut-and-thrust of trial.<sup>36</sup> The Full Court was therefore in as good a position as the primary judge to draw conclusions from the material.<sup>37</sup> Senior counsel for CBA accepted that the Full Court had sufficient material to make  
20 findings on materiality (AT226:19 (ASBFM 448)).

**33.** CBA also erroneously contends that the Full Court failed to engage with the expert evidence on materiality and overlooked the primary judge’s analysis of it (RS[73]). The Full Court extensively set out the primary judge’s analysis of the expert evidence on materiality at FC[174]-[193], and gave a detailed summary of the part of the judge’s reasons that CBA says the Full Court overlooked “entirely”: see FC[193]-[197] (summarising PJ[992]-[1020]). The

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<sup>31</sup> See, eg, *Brambles* at [3002]-[3005]; *ASIC v iSignthis Ltd* [2024] FCA 669 at [422]; *Fortescue* at [482].

<sup>32</sup> *ANZ v ASIC* at [90]-[94] (Lee J), [215]-[216] (Button J).

<sup>33</sup> *ANZ v ASIC* at [78]; *Earglow* at [84(d)]; *Brambles* at [3007].

<sup>34</sup> See *Lee v Lee* (2019) 266 CLR 129 at [55] (Bell, Gageler, Nettle and Edelman JJ).

<sup>35</sup> *Fox v Percy* (2003) 214 CLR 118 at [23] (Gleeson CJ, Gummow and Kirby JJ); see FC[446].

<sup>36</sup> *Yarrabee Coal Company Pty Ltd v Lujans* [2009] NSWCA 85 at [3] (Allsop P); see also *Jadwan Pty Ltd v Rae & Partners (a firm)* (2020) 278 FCR 1 at [405]; *Zurich Australian Insurance Ltd v CIMIC Group Ltd* (2024) 115 NSWLR 297 at [29].

<sup>37</sup> *Lee* at [55], quoting *Warren v Coombes* (1979) 142 CLR 531, 551 (Gibbs A-CJ, Jacobs and Murphy JJ).

Full Court’s reconsideration of materiality (FC[515]-[540]) followed a long section dealing with the grounds of appeal from the primary judge (FC[429]-[512]). It is plain from a fair reading of the whole of their reasons that the Full Court carefully considered the expert evidence (and, indeed, all the evidence) in making findings on appeal.

10 **34. *No error in the Full Court’s reconsideration of materiality.*** CBA invites this Court to embark upon the task of wading through voluminous evidence to reconsider the Full Court’s findings. It seems from RS[74], [76], [82] and [90] that the gravamen of CBA’s complaint is that the Full Court did not “accept” evidence led at trial that CBA says means materiality should not have been found. However, CBA does not demonstrate error on the part of the Full Court in reaching the findings it did on an appeal, where it had the full evidentiary record before it.

**35.** CBA’s approach now of putting a (small and curated) sample of evidentiary references before this Court is obviously unsatisfactory. It is not possible within the confines of this written outline of submissions for the appellants to do otherwise than take the same approach, identifying material in the voluminous Appellants’ Book of Further Material to which it will be necessary to refer the Court in order to address this ground, and explain why the Full Court’s findings of materiality were correct. We do so addressing the pleaded information (ie, both the September 2015 Late TTR information and the September 2015 AMF information) together as at 24 April 2017. We first submit why the Full Court was correct to conclude that it was material, then address CBA’s arguments to the contrary.

20 **36. *The pleaded information connoted financial consequences:*** The Full Court correctly found that the financial consequences for CBA of the statutory breaches revealed by disclosure of the pleaded information could have been significant (FC[516], [518], [529]). The appellants’ experts opined that investors would infer that CBA would be at risk of significant regulatory penalties and remediation costs.<sup>38</sup> CBA’s own experts conceded as much. Mr Singer said that investors would seek to roughly estimate CBA’s potential exposure to penalties, and accepted that investors would anticipate that AUSTRAC would seek a fine representing a sizeable proportion of CBA’s annual profit.<sup>39</sup> Dr Unni also accepted that investors would consider exposure to penalties to be a “value-relevant” implication of revelations of widespread regulatory contraventions.<sup>40</sup> As an *ex-post* check, brokers’ reports generally highlighted the

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<sup>38</sup> da Silva Rosa Report at [109(b)], [185(b)] (ASBFM 128, 145); Johnston Report at [98]-[104] (ASBFM 209-210).

<sup>39</sup> T775.27-776.15, T777.6-20 (ASBFM 464-466).

<sup>40</sup> T727.32-43, T729.14-17 (ASBFM 461, 462).

potential for substantial penalties.<sup>41</sup>

**37. *The pleaded information connoted reputational consequences and operational risk:***

The Full Court correctly found that disclosure of the pleaded information could have had significant reputational consequences for CBA (FC[518], [529]). That finding was amply supported by evidence.<sup>42</sup> In this context, reputation encompasses investors' confidence in a company to avoid "operational" losses (*ie* losses within its control). Research demonstrated that revelations of operational losses cause share prices to fall further than the financial value of the losses themselves would imply because investors will view the company as more risky and management less able to control those risks.<sup>43</sup> Mr Singer accepted that CBA's shares traded at a premium to the other major banks because of its strong reputation for "delivering both earnings and compliance".<sup>44</sup> As an *ex post* check, several brokers commented that reputational damage following the information disclosed on 3 August 2017 would diminish this premium.<sup>45</sup> Others identified the potential for reputational damage to affect CBA's overall valuation (see FC[522]-[523]). CBA's CEO accepted in cross-examination that disclosure of AML/CTF contraventions could cause reputational damage resulting in share price declines, and that CBA was concerned about investors' reactions to disclosure of the late TTR issue.<sup>46</sup>

**38. *The failures were serious:*** CBA contends that the Full Court erred in emphasising the "seriousness" of the compliance issues revealed by the pleaded information instead of their significance to investors (RS[78]-[80]). There was ample evidence showing that the seriousness of CBA's compliance failures was what mattered to investors; they would link the failures, exposure to penalties, reputational damage, and CBA's share price (see above at [36]-[37]).

**39. *CBA's arguments on the evidence should be rejected:*** *First*, that brokers overall did not reduce their price targets after 3 August 2017 is of little significance (*cf* RS[83]-[84]). Brokers' price targets are generally set over a 12-month period and brokers are reluctant to revise them.<sup>47</sup> Contrast the sharp share price fall following 3 August 2017 (taken as *ex post* support for the

<sup>41</sup> See FC[523]; da Silva Rosa Report at [124], [125], [127] (ASBFM 132-133). That one broker said that a \$500 million fine was unlikely to be material (RS[76]) is of little moment.

<sup>42</sup> As to expert evidence, see da Silva Rosa Report at [118] (ASBFM 130); Johnston Report at [130] (ASBFM 223); Johnston Reply Report at [59]-[60], [78]-[79] (ASBFM 327, 332-333).

<sup>43</sup> da Silva Rosa Report at [47]-[62] (ASBFM 115-118).

<sup>44</sup> T722.12-723.9 (ASBFM 459-460).

<sup>45</sup> See Johnston Report at [121], [125], [158] (ASBFM 217-220, 231).

<sup>46</sup> T276.3-13, T440.16-441.14, T451.11-13 (ASBFM 450, 455-456, 457).

<sup>47</sup> T854.16-23 (ASBFM 468).

materiality of the pleaded information). *Second*, Mr Ali’s “beta analysis” (summarised at FC[181]-[182]; PJ[889]-[900]) incorrectly uses *historical* beta (ie, share price volatility) to say that investors’ risk perceptions did not change after 3 August 2017. If anything, only changes in *forecast* beta before and after an event can shed light on risk perceptions (*cf* RS[85]).<sup>48</sup> *Third*, the Westpac and NAB case studies support the appellants’ case (*cf* RS[86]). Westpac’s initial disclosure of a “large number” of reporting failures did not move the market. But when the market was informed by AUSTRAC that there were 23 million alleged civil penalty contraventions over almost 5 years, the share price plummeted (see PJ[845]-[851]). It is to be inferred that the scale, duration and systemic nature of the issue was material to investors; so here the pleaded information. Similarly, the NAB case study (PJ[856]-[870]) shows that disclosure of “potential serious and ongoing non-compliance” with AML/CTF requirements caused a significant price decline even without AUSTRAC proceedings.<sup>49</sup> *Fourth*, CBA’s reliance on AUSTRAC’s cooperative approach to enforcement (RS[87]) cannot be squared with the CEO’s evidence (see 22(d) above<sup>50</sup>). *Fifth*, investors’ understanding that banks are exposed to operational risks does not mean it is immaterial for a bank to reveal that serious operational risks have materialised (*cf* RS[88]). *Sixth*, CBA’s point regarding “strict liability” offences is misplaced (RS[81]); nothing suggests that *any* defence was open on the facts (see FC[434(a)]). *Finally*, even if it were accepted that the market reaction on 3 August 2017 was “substantially the result of” AUSTRAC suing (RS[89]) (which is denied), it is obvious that what AUSTRAC was suing about also mattered. Disclosure of a huge number of serious contraventions would tell investors that penalties and reputational damage were likely to follow.<sup>51</sup>

#### **PART V: ESTIMATED TIME FOR ORAL ARGUMENT**

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The appellants estimate 2 hours will be required for their oral argument on the cross-appeal.

Dated 21 May 2026



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<sup>48</sup> Easton Reply Report at [30]-[32] (ASBFM 427-428).

<sup>49</sup> See T.851.25-33 (Mr Johnston explaining that brand damage, remedial costs, and potential AUSTRAC enforcement was material to investors) (ASBFM 467).

<sup>50</sup> See T.421-422 (ASBFM 452-453)

<sup>51</sup> See da Silva Rosa Reply Report at [50]; Johnston Reply Report at [90]-[91] (ASBFM 277, 336).

## 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)
<b>Commonwealth statutory provisions</b>					
1.	<i>Corporations Act 2001</i> (Cth)	Compilation number C79 (1 July 2017 to 18 September 2017)	Sections 674, 677, 1041E, and 1041H,	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