HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 30 Apr 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S12/2026
File Title:	Zonia Holdings Pty Ltd (ACN 008 565 286) v. Commonwealth
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions (S12/2026 and S13/202
Filing party:	Respondent
Date filed:	30 Apr 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)
Respondent

BETWEEN: S13/2026

PHILIP ANTHONY BARON
First Appellant

JOANNE BARON
Second Appellant

and

COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES PRESENTED BY THE APPEAL

2. ***Notices of appeal***. The appellants' statement of issues at **AS [3]-[5]** incorrectly assumes that the Full Court did not determine the question of loss (see **AS [3]**). That assumed premise infects their statement of issues. The sole issue is whether the Full Court correctly found that the appellants did not establish any loss (Grounds 1(a), 2). Two sub-issues are raised: (1) whether the Full Court correctly rejected the appellants' conflation of materiality (a forward-looking and narrow assessment of likely effect) with loss (a backward-looking and wider assessment of actual effect) (Ground 1(c)); and (2) whether the Full Court correctly rejected the appellants' attempt to rely on the facilitation principle to establish loss (rather than facilitate proof of it) (Ground 1(b)). Each should be answered "Yes", and the appeals should be dismissed.

3. ***Notices of cross-appeal/contention***. By its notices of cross-appeal/contention, the respondent/cross-appellant (**CBA**) contends that the Full Court erred in rejecting that the pleaded "information" was not required to be disclosed because it was misleading and incomplete, and in finding that certain information was material. There are three issues raised: (1) do s 674(2) of the *Corporations Act 2001* (Cth) (**Act**) and ASX Listing Rule 3.1 necessarily contemplate for disclosure to the market only "information" that is complete and not misleading; (2) is the question of whether the information is complete and not misleading a threshold matter (to be determined separate from materiality); (3) does the test for materiality require focus on the extent to which information would affect decisions by investors? Each should be answered "Yes", the Full Court's findings to the contrary should be set aside, and the cross-appeals/contention allowed.

PART III: SECTION 78B NOTICE

4. A notice under 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: FACTS

5. ***Contested facts***. *First,* the appellants incorrectly confine the information released on 3 August 2017 to AUSTRAC's "media release" at **AS [12]**. That release was defined below as the **3 August 2017 announcement**, and comprised AUSTRAC's media release, concise statement and Tweet: **J [348] CAB 92, FC [105] CAB 463**. The case has

proceeded at all times on the basis that AUSTRAC's media release was to be read *with* the concise statement, which was hyperlinked in the release: **FC [104]-[105] CAB 463.**[1]

6. *Second,* the appellants' summary of what the Full Court decided at **AS [16]** is materially inaccurate. The Full Court did not find the appellants failed to prove what "proportion" of the $3.29 return on 3 August 2017 was attributable to the undisclosed information; it rather found the appellants had not proved any loss at all: see [25]-[27] below.

7. *Third,* the submissions at **AS [60]-[61]** do not fairly reflect the evidence or findings below. The availability of different methodologies to calculate loss, which the appellants chose not to deploy in this case, was not a "theoretical possibility" or "hypothetical". The Full Court found that there were several methods available on the evidence, consistently with the authorities, and that such steps were not "impossible" as the appellants contended: **FC [585]-[601] CAB 615-619**. CBA's unchallenged expert evidence on this issue was accepted (**FC [586] CAB 615**), and contrary to **AS [60]** the Full Court found that the appellants' own evidence (of Professor Easton) pointed to "precisely the sort of analysis that can, and should, be carried out": **FC [591] CAB 616-617**. Professor Easton did not undertake such an analysis because he was instructed to assume that the pleaded information and information released through the 3 August 2017 announcement were "economically equivalent", an assumption that was sought to be made good by the evidence of the appellants' materiality experts but which was emphatically rejected below: **FC [558]-[581] CAB 604-615; J [1214]-[1230], [1248] CAB 282-285, 287**. There was no finding that the "confounding information was closely tied to the information wrongfully not disclosed" (*cf* **AS [60]**). Precisely to the contrary, the Full Court found (consistently with the primary judge's views) that those forms of information were a "far cry" from each other and the differences were "far-reaching" and "obvious": **FC [574], [579] CAB 613-614, J [947]-[948], [1219] CAB 221-222, 282-283**.

8. ***Additional facts***. CBA is Australia's largest bank. It had visibility of around 40% of all financial transactions in Australia. As at May 2015, it monitored around 7 million transactions per day, with a value of $219 billion: **FC [15]-[16] CAB 444**. CBA was required to monitor its transactions in accordance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML Act**): **FC [17]-[20] CAB 444-445**. If a reporting entity did not comply with its obligations there were several avenues open

[1] Indeed, the experts were cross-examined on the basis that the media release, Concise Statement, Tweet and CBA's response comprised the corrective disclosure: T792.41-T794.9 (30 November 2022) (**RBFM 285-287**)

to AUSTRAC, only one of which was commencing civil proceedings: **FC [22] CAB 445-446**. AUSTRAC's published enforcement policy was to seek cooperative engagement, and only consider enforcement action where engagement did not improve compliance: **J [80]-[82] CAB 34-35; FC [23] CAB 446**.

9. The **TTR Issue** involved the late reporting of certain **TTRs** to AUSTRAC (relevantly, transactions involving physical currency of $10,000 or more), because when fixing an unrelated IT problem in relation to intelligent deposit machines (**IDMs**) in November 2012, an additional transaction code (code 5000) was introduced for some IDM transactions but not factored into the process for generating TTRs: **FC [32] CAB 447**. Put simply, the cause of the problem was a single IT coding error. Once the error and its impact on TTRs was discovered, it was escalated to senior management, promptly self-reported to AUSTRAC, and rectified: **FC [45]-[50] CAB 450-452**.

10. The **AMF Issue** arose in the context of a fraud enhancement program, whereby a separate IT error was introduced in the process of updating account profiles in relation to certain CBA employee-related accounts. This meant that certain automated transaction monitoring rules were not applied to those accounts: **FC [34]-[38] CAB 448-449**. In total, 778,370 accounts were affected over a period of ~3 years between 2012 and 2015 (but for varying time periods: for example, 54,357 accounts were affected for less than one month) and a significant percentage (195,000) were inactive: **FC [41] CAB 449-450**. The error was corrected by September 2014: **J [977] CAB 229**.

11. Two years after the TTR Issue was reported to AUSTRAC, it commenced proceedings (without prior notice to CBA). This took CBA by surprise: **J [336] CAB 88.** AUSTRAC had consistently communicated to CBA that it had not decided whether to take any enforcement action, or if it did, what form, and assured CBA it would provide advance notification of what, if any, course it would pursue: **J [43], [263]-[332] CAB 26, 72-87**. While the 3 August 2017 announcement referred to the TTR Issue and AMF Issue, it also referred to a broad range of conduct unrelated to these proceedings, including allegations concerning criminal prosecutions, terrorism financing, money laundering and drug syndicates: **FC [100]-[107] CAB 452-464, FC [568]-[571] CAB 606-612**.

12. ***The primary judge*** considered as a threshold matter the completeness and accuracy of the pleaded information, finding that it was not complete or accurate, and that disclosure of it would have been misleading: **J [584] CAB 138**, **J [603]-[606] CAB 142-143**. In relation to the Late TTR Information, the primary judge explained why it was misleading

and materially incomplete, including for example because by September 2015 all of the TTRs had been lodged and the cause of the problem rectified. The omission of these facts would have left investors with the "wholly false impression the problem had not been rectified and was ongoing, with no apparent solution in sight": **J [577]-[595] CAB 137-140**. The primary judge similarly explained why the AMF Information was misleading, including on the basis it was "factually incorrect": **J [596]-[603] CAB 141-142**.

13. On materiality, the primary judge found that none of the pleaded information was material, dealing with the issues in consideration of the expert evidence advanced by both parties, which was directed specifically to investor decision-making: **J [942]-[1031] CAB 221-240**. The primary judge concluded that none of the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. Relevantly, his Honour accepted that, on the evidence, investors would likely have viewed the pleaded information as not material in the absence of AUSTRAC actually commencing proceedings or announcing it would commence proceedings. That evidence included, *inter alia,* that there was no impact on Westpac's share price following voluntarily disclosures of a similar kind to the counterfactual in this case (see [86] below) : **J [756], [766]-[773], [789]-[794], [842]-[873], [907]-[911], [993]-[997], [1008]-[1012] CAB 177, 179-181, 184-185, 194-203, 212-215, 231-232, 235-236**.

14. ***The Full Court*** upheld a narrow part of the appellants' liability case, in relation to the "threshold" issue and the materiality of *some* information, from 24 April 2017 only. On the threshold issue, it held that if CBA wanted to contend the information was incomplete, misleading or not in a form appropriate to disclosure, it was required to plead those contentions, including the additional information without which the pleaded information was incomplete/misleading, because the primary judge held the appellants to their form of the pleaded information, CBA should have been held to its pleadings too (for the sake of "consistency", and without determining whether the case had been run on this basis at trial): **FC [333]-[341] CAB 540-543**. It also held that this issue should not have been considered at the threshold, but rather as part of materiality: **FC [342]-[379] CAB 543-555**. This is the subject of ground one of the cross-appeals/contention.

15. On materiality, the Full Court found that the primary judge had not erred in his assessment of the evidence going to materiality: **FC [509]-[511], [520] CAB 591-592, 594**. Notwithstanding, and discounting the primary judge's advantages, it found that the primary judge had erred in his assessment of materiality (**FC [445]-[472] CAB 574-582**),

went on to reconsider materiality without regard to *any* of the substantial volume of expert evidence specifically directed to investor decision-making relied on by the primary judge, and concluded that some of the information was material as at 24 April 2017: **FC [513]-[533] CAB 592-597**. This is the subject of ground two of the cross-appeals/contention.

PART V: ARGUMENT ON NOTICES OF APPEAL

Conceptualising the "damage": it is inflation in the price of shares

16. The appellants' excursus on loss (**AS [27]-[36]**) seeks to abstract the phenomenon of "damage" in this case as if it were something wholly different from the "damages" which needed to be assessed. In a case of this kind, that abstraction is unhelpful as a matter of principle and a distraction as a matter of practice. That is clear from the confusion in the appellants' own submissions about the loss actually in issue at **AS [40]** — the Full Court was not asked (and it would have been erroneous) to consider whether there had been a "diminution in share price". That is an assessment conducted at the wrong point in time, namely, at the point of any corrective disclosure, rather than at the time of the alleged contravention. The relevant "loss" question was whether there was inflation in the value of the shares at the time of acquisition, by reason of CBA's alleged contraventions.

17. At the level of principle, and as Gageler and Edelman JJ observed in *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 141, "[t]he initial question must always be: 'what loss or damage does the plaintiff allege'".[2] In this case (as in most shareholder class actions), what the appellants allege was their loss was not some esoteric "harm" (for example, in the nature of disease or disability or loss of enjoyment of life (*cf* **AS [30]-[31]**)). It was loss by reason of inflation in the price of shares at the time they were acquired by group members. The appellants contended that the contraventions "had the effect that the price of acquisition for CBA Shares was greater than their true value and/or the market price … that would have prevailed but for the [contraventions]".[3] Thus, whilst it might be correct to say that "economic loss" may take various forms, in the facts of this case, the economic loss could and did take one form only: inflation in price. This case concerns money, and only money.

18. At the level of practice, this means the question of causation of "some loss" may be intertwined with its quantification. So much was recognised by Brereton J in *Re HIH Insurance*, observing that "[t]he plaintiffs must establish, by evidence and/or inference,

---

2 (2020) 271 CLR 151 at [65].

3 Zonia Originating Application, Q5 (**RBFM 9**) Baron Originating Application Q5 (**RBFM 15**). See also *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 at [154] (Edelman J).

that the contravening conduct distorted the market price so as to cause the shares to trade at an inflated price", and that "whether the contravening conduct had the effect of inflating the market price of HIH shares is intertwined with the quantification of the plaintiffs' damages, if any".[4] Indeed, whilst the appellants place reliance on the statement in *Lewis v ACT* that "no threshold" of loss needs to be met before the counterfactual analysis is applied, they omit the critical observation in the sentence immediately following, that "[w]hether, and if so to what extent, compensable damage – 'loss or harm occurring in fact' has occurred is determined through the application of the same analysis".[5]

19. To introduce a general rule that trial judges must always first ask, in the abstract,[6] "was there 'some' damage" risks diverting attention from what is quintessentially an assessment of fact — here, has the plaintiff established inflation in the price of the shares — to some impressionistic conclusion about whether there has been "damage" in some abstract sense, or as the appellants contend, on a *"prima facie"* basis (**AS [42]**). The appellants are driven to invite the Court to recognise some new test of *prima facie* loss because they did not come up to proof on the factual question of inflation on the facts of this case. Hence, they now say inflation should have been assumed on a *prima facie* basis, *ipso facto* the Full Court's conclusion on materiality.[7] The idiosyncratic forensic choices the appellants made in this case provide an unlikely base from which this Court would develop and apply a new *prima facie* principle of loss in cases of this kind.[8]

20. Moreover, the authorities do not support recognition of a new and novel *prima facie* loss test. In *McRae v Commonwealth Disposals Commission* (relied on at **AS [30]**), the plaintiffs had still established that expense was incurred, and incurred because of the promise of a tanker.[9] That is why the plaintiffs had a "starting point", not because the Court would just assume that if a tanker was promised, expense must have been incurred. So too in the personal injury cases cited at **AS [31],** the plaintiffs claiming injury did not

---

4 (2016) 335 ALR 320 at [78]. See also **J [1257] CAB 289**.

5 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [31] (Gageler J) citing *Harriton v Stephens* (2006) 226 CLR 52 at [168], [251], [264]-[265].

6 *Cf Harriton v Stephens* (2006) 226 CLR 52 at [168] (Hayne J) observing that "[t]o say of a plaintiff that he or she has suffered 'damage' or 'harm' likewise invites comparison between what would have been and what is. That inquiry cannot be made in the abstract".

7 *Cf Davis v Wilson* [2025] FCA 108 at [1670(b)] (Shariff J).

8 Contrary to the orthodox principle that it is necessary to prove loss: see *Re HIH Insurance Ltd (in liquidation)* (2016) 335 ALR 320 at [78]-[80] (Brereton J); *Crowley v* ***Worley*** *Ltd (No 2)* (2023) 171 ACSR 410 at [169], [256] (Jackman J); ***McFarlane*** *atf S McFarlane Superannuation Fund v Insignia Financial Ltd* [2023] FCA 1628 at [659] (Anderson J) and the cases cited therein.

9 (1950) 84 CLR 377 at 414 (Dixon and Fullagar JJ).

establish *prima facie* damage by assertion; their injuries had to be proven in the ordinary way and the shifting onus occurred only after actual damage (*viz,* injuries) was established, and at the point of quantification. This Court recently declined to introduce a *prima facie* loss test in the context of undertakings as to damages in the *Sanofi* case, finding instead that a claimant "bore the legal and evidentiary onus of proof in relation to causation of loss".[10] (It also declined to introduce a rigid three-step test into that assessment, as similarly proposed here).[11] The concept of a *prima facie* standard is otherwise applied by courts in the context of an entitlement to interlocutory relief; it has no role to play in respect of orders that would affect rights and liabilities on a final basis.[12]

10 **Materiality does not establish loss (nor "*prime facie*" loss)**

21. The appellants' *prima facie* loss case is said to be established by the materiality of the pleaded information (**AS [42]-[47]**), which in turn is said to establish by "common sense" that the market in fact reacted to the information once disclosed. That proposition is wrong, both in principle and as a matter of fact (**AS [43]-[47]**). As the Full Court observed, "materiality does not, ipso facto, establish causation": **FC [619] CAB 624.**

22. As a matter of principle, the test for materiality is found in s 674(2)(c), which asks whether a reasonable person "would expect" the information to have a material effect on the price or value of the securities. As framed by reference to expectation, the test could say nothing as to whether the information in fact had any such effect. Section 677
20 provides a deeming provision by which s 674(2)(c) can alternatively be satisfied. It is this route that the Full Court purported to use to assess materiality here: **FC [515], [525], [532] CAB 593, 596-597.** Section 677 asks whether the information would, or would be "likely" (in the sense of a "real and not remote chance"[13]), to influence an investment decision. The Full Court drew no distinction between "would" or "would be likely to". As such, the satisfaction of this test could stand for nothing higher than there was a "real and not remote chance" that an investor would be influenced by the information. The nature of the statutory test for materiality is forward-looking, objective and

---

10 *Commonwealth v* ***Sanofi*** (2024) 282 CLR 30 at [13]-[16] (Gordon A-CJ, Edelman and Steward JJ), accepting that the authorities were to the effect that: "A prima facie case, or proof of only the possibility of loss, was insufficient; although the absence of a prima facie case would plainly prevent even an inquiry as to damages".

11 *Sanofi* (2024) 282 CLR 30 at [14] (Gordon A-CJ, Edelman and Steward JJ), and see also the exchange recorded at 282 CLR 30 at 33 in relation to the proposed "three step" test there.

12 See, eg, *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 421 ALR 483 at [23]-[24] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

13 ***James Hardie*** *Industries NV v ASIC* (2010) 274 ALR 85 at [183]-[185] (Spigelman CJ, Beazley and Giles JJA); *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209 at [633]-[634] (Edelman J).

hypothetical.[14] By contrast, loss is concerned with whether, after the fact, it actually did have that effect, and on the more exacting standard of the balance of probabilities.

23. Further, materiality is established if a *particular class* of investors would be likely to have been influenced by the information.[15] Establishing inflation in the price of shares necessarily looks to the market-wide reaction to the information. The vice in the appellants' reliance on materiality emerges most clearly in **AS [47]** where the appellants submit that the Full Court's materiality findings provided "ample basis upon which to conclude, as a matter of common sense, that the market would have reacted to the material information once disclosed" and that the information "would have had *some* adverse impact on CBA's share price". At the stage of assessing loss the question is not what "would have" happened or would have been likely to happen. It is what *did* happen, in the real world.

24. As a matter of *fact*, there may be myriad reasons why in a given case information which the Court concludes is "material" and not disclosed does not establish inflation in the share price. One reason might be the nature of the shareholders in issue: the expert evidence in this case established that CBA shares (and those of the other four major banks) were significant to "portfolio construction" and were held by a "large base of retail shareholders who are 'stickier' in their decision-making in relation to the holding of CBA shares": **J [999] CAB 233**. Similarly, while information might be material to one subset of investors (for example, retail investors) and so satisfy the statutory test, it may be irrelevant to those investors (for example, institutions) who in fact set the market price.[16] The Full Court's findings on materiality do not reach anywhere near a "starting point" or a "prima facie case" (let alone establishing actual proof of inflation) because the findings are made in the context of a different test, asking a different question, to an entirely different standard (*cf* **AS [47]**).

The appellants did not establish loss

<u>The Full Court determined that there had been no inflation</u>

25. The appellants' case for establishing error depends on the premise that the Full Court failed to consider whether they had suffered "some loss" (**AS [38]-[40]**). That premise is wrong. The Full Court affirmatively found that the appellants had not established any

---

[14] *James Hardie* (2010) 274 ALR 85 at [349] (Spigelman CJ, Beazley and Giles JJA); *NAB v Pathway Investments* (2012) 265 FLR 247 at [88] (Bell AJA, Bongiorno and Harper JJA agreeing).

[15] ***Grant-Taylor*** *v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402 at [115] (Allsop CJ, Gilmour and Beach JJ).

[16] Institutional investors account for 60-80% of turnover on the ASX: Singer Report at [29] (**RBFM 156**).

loss, that is, any inflation in the price of the CBA shares. In so finding, the Full Court necessarily concluded that the appellants had not established "some" loss (because they had not established *any* loss).

26. So much is clear from the Full Court's answers to the common question concerning loss. In answer to the question "[w]hat was the amount of the inflation in the CBA Shares during some or all of the Relevant Period", the Court ordered "[t]he Appellants have not established any amount of inflation in the CBA Shares during any part of the Relevant Period": **CAB 659, 665**. The reasons accompanying those orders make the point clear: "insofar as the claim of any appellant or any group member depends on establishing inflation in the CBA shares, statutory compensation is not recoverable": **CAB 648 [20]**. It is also clear from the Full Court's judgment, observing that the appellants had not taken steps "to attempt to arrive at a principled basis upon which a price decline that is plainly referable to a raft of 'bad news' going well beyond the pleaded information, can be attributed to the alleged contraventions", *viz,* it could not be attributed *at all* to the undisclosed information: **FC [593] CAB 617**. Similarly, the Full Court observed (adopting the trial judge's findings) that "the appellants had not established any "rational starting point for the valuation of the inflation"" that they alleged: **FC [608] CAB 621,** see also **[207], [554], 503-504, 604**.

27. The suggestion at **AS [53]** that it is "implicit" in the Full Court's reasoning that the undisclosed information contributed "at least *something*" to the abnormal market decline on 3 August 2017 should be rejected. Each of the statements relied on at **AS [53]** is taken devoid of its context to supply this necessary (and absent) step in proof of the appellants' case. The statement that the 3 August 2017 announcement "went far beyond" the pleaded information was to emphasise the obvious flaw in the evidentiary approach equating the undisclosed information (being a limited subset of the whole of the pleaded information) with the AUSTRAC announcement: **FC [575] CAB 613**. That was similarly the point of the reference to "much, much more" at **FC [599] CAB 618**. The reference to the "extent to which" at **FC [593] CAB 617** does not suggest the pleaded information caused some share price inflation, because Professor Easton (the appellants' expert) had not addressed that question at all. Similarly, at **AS [48]** the appellants suggest that the Full Court "effectively held" that the appellants' failure to prove "contribution" of the pleaded versus non-pleaded information to the price drop meant they had failed to prove "any" of the price drop was attributable to CBA's alleged contraventions. But it is the latter point of

which the Full Court was satisfied, not based on any assumptions as to "contribution" but because the appellants had not in fact established that the observed price reaction could "sensibly be attributed to the wrongdoing in question" *at all*: **FC [598] CAB 618**.

The Full Court was correct to find there was no inflation

28. The premise of the appellants' arguments that the Full Court should have engaged in some "common sense" assessment of loss is that they proved that "some" part (never sought to be quantified) of the $3.29 share price decline (following AUSTRAC's announcement) was attributable to the alleged contraventions (**AS [48]**).[17] That is the starting point from which they then contend that CBA was responsible for "disaggregating the market effect of the multiple parts of the Release". This jumble requires unpacking. What the appellants had to prove was that there was inflation in the price of CBA's shares as a result of the alleged contraventions (that is, the failure to disclose the pleaded information). The Full Court correctly found they had not done so.

29. *First,* the information released by AUSTRAC on 3 August 2017 was fundamentally different to the limited information which the appellants contended CBA should have disclosed (as found by the Full Court to be material). The latter, in summary, was that CBA had failed to lodge TTRs on approximately 53,506 occasions by reason of a systems error in November 2012 and had failed to conduct certain account level monitoring on 778,370 accounts: **FC [563]-[564] CAB 606**. By contrast, AUSTRAC's media statement recorded that it had commenced civil penalty proceedings against CBA and alleged three further categories of non-compliance (being failures to carry out ML/TF risk assessments of IDMs, a failure to report suspicious matters, and failure to monitor customers even after becoming aware of suspected money laundering: **FC [568]-[570] CAB 607**). AUSTRAC's concise statement drew attention to a broad array of serious matters: including that some transactions were connected with "money laundering syndicates being investigated and prosecuted by the Australian Federal Police", some transactions related to customers that CBA had assessed "as posing a potential risk of terrorism or terrorism financing", and that CBA had "ignored notifications by law enforcement of unlawful activity": **FC [571] CAB 607-612**. AUSTRAC contended that non-reporting and late reporting "hinders law enforcement efforts" and that CBA's conduct had "exposed the Australian community to serious and ongoing financial crime": **FC [571]**

---

[17] *Cf* the orders the Baron appellants sought in the Full Court, in an exact sum "being $3,290, or alternatively $2,630" (**CAB 423** [3a]) based on an inflationary measure at $3.29 per share, or a 20% discount on that figure.

CAB 612. None of these matters formed part of the undisclosed information or, indeed, related to the TTR Issue or AMF Issue at all: **FC [572] CAB 612**. There was no "substantial overlap" (*cf* **AS [51]**).

30. *Second,* the appellants failed to address these obvious and significant differences between the pleaded information and the 3 August 2017 announcement and in doing so, failed to address the critical question of what (if any) impact disclosure of the *pleaded information* would have had in the period between 24 April 2017 to 3 August 2017. That was because they sought to capture the whole of the $3.29 decline derived from their flawed event study, by instructing their expert to assume that the pleaded information was "materially equivalent" to AUSTRAC's announcement: **FC [540], [547], [559] CAB 599-601, 605**. That was an *explicit forensic decision.* It has a readily apparent purpose. But as the Full Court found (and the appellants do not challenge): there were "far-reaching" differences between the pleaded information and the AUSTRAC announcement: **FC [579] CAB 614**.

31. *Third,* the appellants attempt to then place the onus on CBA to establish which parts of the $3.29 decline were attributable to parts of the 3 August 2017 announcement that did not include the pleaded information (see **AS [54]**). But that sidesteps a necessary integer in proof of their case — that *any* part of the $3.29 decline was attributable to the pleaded information. That is the gravamen of the Full Court's conclusions on the appeal: that the appellants did not offer any principled basis on which it could be said that any part of the "price decline" could be attributed to the "alleged contraventions": **FC [599] CAB 618**.

The facilitation principle is not engaged

32. Against this backdrop, it is clear that the Full Court was correct to conclude that the facilitation principle could not assist the appellants.

33. *First,* the facilitation principle is only enlivened once it is shown that it would be difficult or impossible to establish loss with certainty.[18] That has not been shown here. The Full Court positively found that it was possible to take steps to prove loss (if loss had been suffered) and there is no finding that it would have been difficult for the appellants to do so. Rather, no attempt was made: **FC [585]-[601] CAB 615-619**.

34. *Second*, the appellants fail at the threshold point because they failed to discharge their

---

[18] ***Cessnock*** *City Council v 123 259 932 Pty Ltd* (2024) 281 CLR 39 at [127] (Edelman, Steward, Gleeson and Beech-Jones JJ).

onus of establishing the existence of any loss by reason of the alleged contraventions.[19] It has been repeatedly emphasised that the Court's obligation to "do the best it can" arises only *once* the plaintiff has first proven such loss.[20]

35. *Third,* the facilitation principle does not replace actual proof, particularly where the deficiencies in proof are caused by the plaintiff's failure to lead available evidence.[21] The Full Court set out in detail the evidence which was available to be adduced and not adduced by the appellants: **FC [595]-[601] CAB 617-619**. Those findings are not challenged. The deficiencies in proof were caused by the appellants' forensic choices, not any wrongdoing by CBA.

10 36. To take the appellants' example at **AS [35]** from *Armory v Delamirie,* the facilitation principle does not operate in circumstances where the plaintiff has a receipt and valuation statement for the jewel but declines to produce those items to the Court. The principled rationale is plain; plaintiffs do not get a "free ride" in facilitation of proof,[22] all the more so when the absence of proof is by reason of their forensic choice not to advance available evidence to the Court. To conclude otherwise would be to encourage the obscuring of available evidence on loss so that plaintiffs can take the benefit of facilitation. In practical terms, it would entirely reverse the onus of proof.

Quantification of "loss"

37. In view of the foregoing analysis, it is apparent there was no error in the Full Court failing
20 to quantify the appellants' non-proven "loss" (*cf* **AS [56]-[61]**). The contention at **AS [56]** that the "correct starting point" was that "*some* portion of the inflated value of the appellants' shares … was caused by CBA's unlawful conduct" is unsound. As has been demonstrated, any difficulty which arose was because the appellants did not lead evidence capable of establishing, let alone which established, that CBA's shares were inflated in value at all. This instantiates the difficulty with the appellants' *prima facie* test — loss

---

19 *Cf Cessnock* (2024) 281 CLR 39 at [48] (Gordon J), [61], [127] (Edelman, Steward, Gleeson and Beech-Jones JJ); *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 80, 83-84 (Mason CJ and Dawson J), 138 (Toohey J), 153 (Gaudron J), 161 (McHugh J); *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257 at [37] (Hayne J).

20 *JLW (Vic) Pty Ltd v Tsiloglou and Others* [1994] 1 VR 237 at 241-246 (Brooking J); *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* (2007) 157 FCR 564 at [35] (Black CJ and Jacobson J), [102]-[103] (Rares J agreeing); *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247 at [170] (Bromberg J, Griffiths and Bromwich JJ agreeing); *Keys Consulting Pty Ltd v Scaturchio* [2019] VSCA 136 at [68]-[75] (Maxwell ACJ, Niall JA and Macaulay AJA).

21 *Cessnock* (2024) 281 CLR 39 at [129], [132] (Edelman, Steward, Gleeson and Beech-Jones JJ).

22 *Cessnock* (2024) 281 CLR 39 at [139] (Edelman, Steward, Gleeson and Beech-Jones JJ).

becomes assumed, rather than proven. But as the primary judge observed, "in the absence of appropriate evidence, there is no reason to assume that there has been or would have been loss": **J [1257] CAB 289**.

38. The submissions at **AS [57]** again suffer from the incorrect starting premise that the appellants "established" that CBA's "unlawful conduct contributed to the -$3.29 per share abnormal return". Buried in that submission is again the assumption the appellants had demonstrated that at least *some* part of the -$3.29 per share return was attributable to the undisclosed information; that assumption has not been made good. Rather than offering an analogy to the facts of *Armory,* it demonstrates its inapplicability, because what the appellants are seeking is not the substitution of the highest quality jewel but rather the valuation statement they have presented for some other jewel, all whilst failing to offer the receipt and valuation statement sitting in their pocket for the jewel actually in issue.

39. The suggestion that the Full Court imposed a "level of precision inappropriate to the subject matter" (**AS [58]**) ignores two matters. *First,* the Full Court expressly accepted that the steps that may and ought to be taken by plaintiffs will vary from case to case, such that "the extent of the steps that will be expected of applicants in large class actions with potential damages calculated in the multiple, if not hundreds, of millions of dollars, will be more extensive…": **FC [601] CAB 619**. Moreover, the Court was at pains to state that they did not require precision, noting "[o]ur observations should not be misunderstood as suggesting that this kind of analysis will necessarily yield mathematically rigorous exactitudes": **FC [599] CAB 618**. *Second,* the evidence demonstrated that the precision (hardly exacting) imposed by the Court was based firmly in the evidence which demonstrated what the appellants could have done, but *chose not to do.* The appellants' own expert evidence suggested that a reasonable estimation of loss could have been done by reference to "qualitative market reactions and commentary in the form of broker and analyst reports, and news articles": **FC [595] CAB 617**.

40. As to the first alleged error at **AS [59]**, the expert evidence, accepted by the primary judge and the Full Court, was that "statistical analysis alone cannot identify the particular elements of news that may have caused this return", and it was necessary to examine other records: **FC [596] CAB 618**. That is, the event study alone did not demonstrate that the market reacted to the undisclosed information *at all.* The Full Court's rejection of economic equivalence was a response to the appellants' case, but the finding that the appellants had failed to establish *any* loss was not dependent on that rejection. Moreover,

the appellants' submissions tend to obscure the problem that their event study did not substantively address the critical question at all, which is whether CBA's share price would have been affected if CBA had disclosed the information at the time of the alleged contravention. It was the hypothetical market effect of the information the appellants said should have been disclosed at the earlier point of contravention, not the actual market effect of what AUSTRAC subsequently disclosed on 3 August 2017 that was relevant.

41. As to the second alleged error at **AS [60]**, it is premised on the submission that what the Full Court required was the appellants to "disaggregate" various proven impacts on a $3.29 share price decline, of which the undisclosed information was one. The difficulty with that assumption is again that the evidence adduced by the appellants was incapable of establishing that the undisclosed information was relevant *at all* to the $3.29 share price decline. The approach of the Full Court falls squarely within the bounds of the principle from *Hellicar* that the appellants rely on at **AS [61]**, that courts should decide cases "according to the evidence that the parties adduce". The very next sentence of *Hellicar* makes the point pellucid: "there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard".[23]

42. The appellants' submissions on quantification commence from the wrong starting point of their so-called "*prima facie*" quantification of $3.29 per share. For this reason alone, the submissions which follow on how the Full Court (and apparently this Court) should determine the quantum of any loss should be rejected. However, if this Court were disposed to engage in that assessment, the approach urged by the appellants would be rejected. *First,* it would be erroneous to commence from a "starting point" of the Full Court's materiality findings (*cf* **AS [63]**), for the reasons set out at [21]-[24] above. *Second,* the appellants cannot maintain reliance on the "brokers' reports" in respect of the proof of *quantification* of damages before this Court. It was never suggested to the courts below that the brokers' reports were advanced for that purpose. If that had been suggested, this could have been met with evidence, because, at the very least, CBA would have asked its experts to opine on what the brokers reports demonstrated (if anything) about loss and led evidence about the practice of broker reporting (e.g. that they tend to pick up sensationalised news).[24] But in any event, the appellants' reliance on the brokers reports

---

[23] *ASIC v Hellicar* (2012) 247 CLR 345 at [165] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[24] *Cf Coulton v Holcombe* (1986) 162 CLR 1; *Suttor v Gundowda* (1950) 81 CLR 418.

does not take things anywhere, because the submission rises no higher than the submissions on materiality and suffers from the same deficiency as the appellants' economic equivalence theory, focusing on the market reaction to the 3 August 2017 announcement, not the hypothetical market reaction to undisclosed information at the time of the alleged contravention. That one broker referred to the maximum fine for the TTR breaches (also expressly stating that it was "unlikely to be material" **FC [522] CAB 595**) goes nowhere to establishing quantum of loss at all (*cf* **AS [64]**).

43. Finally, the appellants' allowances for a "discount" to their flawed starting figure of $3.29 based on the Lieser paper and the event study relating to the National Australia Bank do not assist (*cf* **AS [65]**). The Lieser paper examined three separate and distinct events (in the United States), the "revelation date" of potential misconduct, the actual filing of a class action lawsuit, and the date of conclusion of the lawsuit: **J [1020] CAB 237**. It had no relevance to a circumstance where the allegation is failure to disclose *some* underlying facts and the potential for "*regulatory* action": **FC [612] CAB 622**. The differences between Australian and US law in this area are notorious: US cases depend on a finding of *scienter*, necessarily taking matters into a more serious realm than contraventions of the continuous disclosure regime in Australia.[25] The Full Court correctly observed that it would be "entirely illogical" to apply a discount founded on this study: **FC [613] CAB 622**. Notably, despite asking this Court to engage in the quantification exercise on the basis of this paper, the appellants have not even provided the Court with it.

44. As for the appellants' reliance on the NAB event study, the evidence demonstrated that the voluntary disclosures by NAB of AML issues had no effect on the share price (**J [856]-[867] CAB 198-201**). It follows that the Court is left with *no evidence* on which it could engage in an exercise of quantification, because both the starting point of "$3.29" is flawed, as are the various methods of discounts the appellants advance.[26]

PART VI: ARGUMENT ON CROSS-APPEALS / CONTENTION

Ground 1: as a threshold matter, the information was incomplete and misleading

45. Ground one of the cross-appeals/contention raises two issues in relation to the proper

---

[25] Securities and Exchange Act of 1934, Section 10(b), and SEC Rule 10b-5; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-214 (1976); *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 319 (2007).

[26] In the alternative, and in the event this Court was minded to engage in an exercise of quantification of loss, CBA would rely on each of the matters set out at [83]-[89] below and contends that the Court would find that the appellants had not established any amount of inflation in the price of CBA's shares.

construction of s 674(2) of the Act. *First,* CBA contends the Full Court erred in failing to find that s 674 contemplates disclosure to the market of only "information" that is complete and not misleading (and instead finding CBA could not even advance this argument). *Second,* CBA contends the Full Court erred in failing to find that whether the information is complete and not misleading is appropriately a threshold matter for determination under s 674(2).

The proper construction of s 674(2)

46. The start (and end) point of the task of construction is the text of the Act and Listing Rules, in light of context and purpose.[27] As for the *text*, s 674(1) provides that s 674(2) "applies to a listed disclosing entity if provisions of the listing rules … require the entity to notify the market operator of information about specified events or matters…". It is concerned with a single collation of facts about "events or matters" – not individual facts cherry picked to present only part of the story about the relevant "events or matters". Similarly, the term "information" (as a unitary concept) is central to s 674 and Listing Rule 3.1, "aris[ing] from the fact that under the statutory regime: (a) it must be shown that the company 'has' that specific 'information'; (b) the company …must be 'aware of' that specific 'information'; (c) the identified 'information' must not be 'generally available'; (d) it must be shown that if the identified 'information' were generally available, it would have a material effect on price; and (e) it is 'that information' which the company must disclose to the ASX".[28] Application of the statutory test for disclosure starts with identification of a singular set of "information", to which the standards in ss 674, 677 and the Listing Rules are then applied, and ends with a requirement to disclose that "information". Because the "information" is to be disclosed to market participants, what must be contemplated is information in a form suitable to be disclosed, which must at least be accurate, *viz,* complete and not misleading.[29]

47. The statutory *context* is also important.[30] The Act prohibits misleading conduct in relation

---

27 ***Palmanova*** *Pty Ltd v Commonwealth of Australia* (2025) 99 ALJR 1362 at [4]-[5] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

28 *TPT Patrol v* ***Myer*** *Holdings Ltd* (2019) 293 FCR 29 at [1121] (Beach J).

29 It is additionally relevant that s 674 is a civil penalty provision and caution should be applied before accepting a "loose" construction: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ); see also *Palmanova* (2025) 99 ALJR 1362 at [59] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

30 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 (Isaacs and Rich JJ); ***Johns*** *v Australian Securities Commission* (1993) 178 CLR 408 at 452 (Toohey J).

to financial products.[31] Consistent with ordinary principles requiring a harmonious construction, it could scarcely be contemplated that s 674 would permit (let alone require) disclosure of information that would contravene other provisions of the Act.[32] Of course, it has long been recognised that an omission can render a disclosure materially misleading.[33] Information can be "literally true" but "substantively misleading if important matters of context" are omitted: **J [575] CAB 137**. That is, it is not necessary for information disclosed to be "factually incorrect" or "so vague and imprecise" for it to be considered misleading*: cf* **FC [368] CAB 551**.

48. The purpose of the continuous disclosure regime reinforces this construction. Its "main purpose is to achieve a well-informed market leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information".[34] The extrinsic material indicates the concern was to enact a "comprehensive scheme for the *full* and *accurate* disclosure of material matters on a timely basis" (emphasis added).[35] Precursor proposals made clear that the information to be disclosed should be "sufficiently complete to enable a reader to appreciate the significance of the material matter without reference to other material" and that directors would be required to attest that the disclosed matter "accurately discloses the material matter".[36] The central aim of the continuous disclosure regime enacted remained the same as these earlier proposals.[37]

49. This construction is also reinforced by the ASX's Guidance Note 8 which emphasises that an announcement under Listing Rule 3.1 must be "accurate, complete and not misleading".[38] It also prescribes that information disclosed should be "factual, relevant

---

31 See, eg, Act, ss 1041E and 1041H.

32 *Johns* (1993) 178 CLR 408 at 452 (Toohey J). See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] (McHugh, Gummow, Kirby and Hayne JJ).

33 See, eg, *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [14]-[16] (French CJ and Kiefel J).

34 *Grant-Taylor* (2016) 245 FCR 402 at [92] (Allsop CJ, Gilmour and Beach JJ). See also *James Hardie* (2010) 274 ALR 85 at [355] (Spigelman CJ, Beazley and Giles JJA); *Cruickshank v ASIC* (2022) 292 FCR 627 at [83] (Allsop CJ, Jackson and Anderson JJ); *Jubilee Mines NL v Riley* (2009) 40 WAR 299 at [87] (Martin CJ, with whom Le Miere AJA agreed); *ASIC v Chemeq Ltd* (2006) 234 ALR 511 at [45] (French J).

35 Companies and Securities Advisory Committee, *Report on Enhanced Statutory Disclosure System* (1991) (**CASAC 1991 Report)** at 3.

36 CASAC 1991 Report at Annexure 1, Item 5; see also at 25.

37 Second Reading Speech for Corporate Law Reform Bill 1993 (15 December 1993) at 1.

38 ASX Listing Rules **Guidance Note 8** section 4.15 (**RBFM 239**). The Guidance Note is referred to in the Listing Rules and is published to assist listed entities to understand and comply with their obligations: **FC [221] CAB 507**.

and expressed in a clear and objective manner".[39] Similarly, the notes to Listing Rule 3.1 also provide that the "information" to be disclosed may include information necessary to prevent or correct a false market, emphasising the focus of the Rules on ensuring a properly functioning market.

50. Having regard to the text, context and purpose of ss 674 and 677, the "information" referred to is information that is materially complete and accurate. Using the language of s 674(1) and 674(2)(b), a disclosing entity could not be "required" to disclose to the ASX information "for the purpose of" making that information available to market participants where that information is incomplete or misleading.

10 The appellants' pleaded information was incomplete and misleading

51. In this case, the appellants' pleaded information was incomplete and misleading, and for that reason was not capable of disclosure.

52. In relation to the Late TTR Information, the Full Court accepted that the pleaded information omitted relevant context, being that the late TTRs represented only between 1.08% and 2.3% of the total TTRs lodged by CBA and between 0.0002% and 0.0007% of the total transactions monitored by CBA: **FC [452] CAB 576**. The primary judge noted that this artificially inflated the significance of the late TTRs to CBA's business and its compliance systems: **J [586]-[587] CAB 139**. Having considered all of the evidence, the primary judge had also accepted that the pleaded Late TTR Information was incomplete
20 and misleading in other respects – including because it omitted any reference to the cause of the late TTRs (being a single coding error) having been rectified and the fact that the late TTRs had been lodged, and any reference to AUSTRAC's then-known position as to the late TTRs: **FC [162]-[163] CAB 479-481**.

53. In relation to the AMF Information, the Full Court found that the pleaded information gave a "misleading impression", including because it suggested that CBA "failed to monitor all of [the] accounts for [the] entire period": **FC [468] CAB 581**. In reality, "the account monitoring failure was intermittent for periods that varied between one day and 36 months; not all employee-related accounts were affected by the issue; and approximately 25% of the affected accounts were inactive": **J [499] CAB 122**.
30 Ultimately, the Full Court found that it was necessary to take into account four additional matters to "correct[] the misleading impression" created by the appellants' formulation:

---

[39] Guidance Note 8 section 4.15 (**RBFM 240**).

FC [468] CAB 581. It follows that the appellants had not pleaded a complete or accurate form of "information", such that the pleaded information was not suitable for disclosure.

The parties' respective pleading obligations

54. Notwithstanding, the Full Court found that the primary judge erred in finding that the pleaded information was incomplete and misleading, because it considered CBA had not pleaded those characteristics: **FC [341] CAB 543**. That was wrong for three reasons.

55. *First,* on the proper construction of s 674(2) it was necessary for the appellants to plead "information" that was complete and accurate, in order to found a complete cause of action under s 674(2). That is because s 674(2) contemplates only information that has those characteristics. This is aligned with the consistent judicial emphasis on the need for an applicant to "identify with some precision the information which the applicant alleges [the entity] was aware of and should have disclosed"[40] and "identify the case it seeks to make and do so clearly and distinctly", with the information said to have been disclosable to be "finally and precisely pleaded".[41] The Full Court erred in finding that there is no "requirement for the applicant to plead the complete content of an 'appropriate' disclosure": **FC [336]-[337], [367]-[372] CAB 541, 551-553**. It further erred in finding that it was for CBA to expressly plead in its defence the additional information which made the pleaded information not incomplete and not misleading: **FC [333] CAB 540**.

56. *Second,* and in any event, this was a matter expressly raised on the pleadings. CBA denied that the information was required to be disclosed under s 674 and pleaded additional underlying facts that made the pleaded information incomplete and misleading.[42] It was clear that one reason why CBA denied that the information was disclosable was due to the additional pleaded facts, which made the information materially incomplete.[43] If that were not enough, CBA also wrote to the appellants more than a year before trial to clarify the disclosure that the appellants contended should have been made. CBA received confirmation that the pleaded information was the "precise form of information that [they

---

40 *Myer* (2019) 293 FCR 29 at [1121] (Beach J). See also *Inabu Pty Ltd v CIMIC Group Ltd* [2019] FCA 1480 at [12] (Jagot J).

41 *Cruickshank v ASIC* (2022) 292 FCR 627 at [120] (Allsop CJ, Jackson and Anderson JJ).

42 CBA's Defence at [40], [40B], [48] and [70B]-[70C] (Late TTR Information); at [44], [45AB], [48] and [78B]-[78C] (AMF Information) (**RBFM 46-77**), see also particulars letter from CBA to the Appellants dated 26 August 2021 (d)–(e) (**RBFM 89**). CBA's Defence was relevantly identical in both the Zonia and Baron proceedings.

43 *Cf Alcoa of Australia Ltd v Apache Energy Ltd* (No 3) [2013] WASC 334 at [13]-[14] (Miere J); *Fuji Xerox Australia Pty Ltd v Whittaker* [2020] FCA 1611 at [22], [25] (Colvin J).

allege] should have been disclosed to the ASX": **FC [312] CAB 533**.[44] The appellants' case was no more, and no less, than that CBA was required to disclose to ASX their pleaded (misleading and incomplete) information.

57. *Third,* and in any event, this is the basis on which the case was run.[45] The parties had dealt with the completeness and accuracy of the pleaded information in their submissions.[46] This issue was the subject of CBA's lay evidence.[47] CBA also clearly put those matters to its experts as assumptions[48] (and those assumptions were not challenged[49]). Consequently, those matters were dealt with in CBA's expert's reports,[50] in the materiality joint report,[51] and in the appellants' expert reports in reply (where one of the appellants' experts, Mr Johnston, engaged with those matters and opined on them).[52] Unsurprisingly, the experts were then cross-examined at length without relevant objection about whether or not the pleaded information was accurate and complete, and what impact facts missing from the pleaded information would have on investor decision-making.[53]

58. Notwithstanding, the Full Court appeared to conclude that because the primary judge held the appellants to their pleadings, it was inconsistent not to do to the same to CBA (**FC [341] CAB 543**). This "tit-for-tat" reasoning ignored the purpose of the rules of pleading, which is to avoid surprise and actual unfairness.[54] There is no rule of procedure that

---

44 Letter from CBA dated 3 May 2021 at 3 (**RBFM 80**); response dated 28 May 2021 at 3 (**RBFM 86**).

45 *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 (Mason CJ and Gaudron J). See CBA's Aide Memoire on the "Threshold Issue" (Full Court MFI 5) (**RBFM 300-309**).

46 CBA "squarely raise[d]" those contentions as a threshold point in its written and oral submissions at trial (**FC [307]-[321] CAB 531-536;** CBA Opening Submissions at [32]-[34], [37], [42]-[43], [48], [96], [101]-[124] (**RBFM 241-255**); T147.42-T149.7, T184.12-T186.6 (9 November 2022) (**RBFM 258-263**), and no objection was taken by the appellants in their oral opening. Instead they substantively engaged with the argument in their oral opening, responding to CBA's contention that CBA "couldn't release [the pleaded information] in isolation, it might lead to some confusion or misleading of the market…": T124.26-T125.4 (8 November 2022) (**RBFM 256-257**).

47 Affidavit of Ian Narev (CBA's CEO) at [52], [54], [55(c)], [153(b)-(d)], [155(a)] (**RBFM 93-98)**; Affidavit of Shirish Apte (CBA Non-Executive Director and Risk and Audit Committee member) at [41], [48(b)-(e)], [49], [59] (**RBFM 99-105)**; Affidavit of David Cohen (CBA's CRO) at [247], [248(a), (c)] (**RBFM 106-109**).

48 CBA expert assumptions at [5(q)-(u)] (Ali) (**RBFM 117-118**); [7(d)-(f), (i)] (Singer) **(RBFM 130-131).**

49 **FC [340] CAB 542-543**. The primary judge indicated that he would proceed on the basis that the factual matters the experts had been asked to assume were correct, unless one of the parties expressly identified an issue with them: T1232.31-T1233.17 (14 December 2022) (**RBFM 298-299**).

50 Singer Report at [96]-[97], [103]-[104] (**RBFM 165-168, 170-171**); Ali Report at [119]-[120], [123], [148] and [172] (**RBFM 135-137, 142-143, 149**).

51 Materiality Joint Report at [159]-[160] (Unni) (**RBFM 230**), [167]-[168] (Ali) (**RBFM 233-234**).

52 da Silva Rosa Reply at [74] (**RBFM 184**); Johnston Reply at [46]-[48], [54]-[58], [72]-[75], [80]-[83], [101(m)], [159(j), (m)], [177]-[178], [184]-[185] (**RBFM 188-193, 197-204, 208-209**).

53 T704.11-20, 29-33; T711.1-T712.3; T746.34-37; T747.33-41; T760.11-16; T762.13-20; T770.40-T777.25; T833.1-T835.17; T835.19-T836.18; T841.12-T846.7 (29-30 November 2022) (**RBFM 264-287**); **J [592] CAB 140-141**.

54 See *Federal Court Rules 2011* (Cth), r 16.08.

simply because a matter is not pleaded, it cannot be advanced; it is necessary in all cases to consider what, if any, the consequences of the matter being advanced are (or were at trial).[55] Here, the appellants have never contended they were taken by surprise, nor have they ever identified any unfairness in this issue being decided.[56] The primary judge, having seen the trial play out and heard the evidence, clearly considered the threshold issue to be part of the litigated dispute. The Full Court in turn made no finding that the appellants were taken by surprise by these matters or that there was any impingement on procedural fairness. In those circumstances, "the Court [was] permitted and possibly obliged to decide the proceeding on the further material facts and issues raised and addressed at trial".[57]

The completeness and accuracy of the pleaded information is a threshold issue

59. The completeness and accuracy of the pleaded information ought to be considered as a threshold issue, rather than only at the materiality stage. It is important that the function of s 674 is to prescribe a norm of conduct for listed companies. That norm necessarily requires disclosure of complete and accurate information. It would be nonsensical for the norm to operate in one way in the context of disclosure, but to be construed in a different way in the context of an action depending on contravention of it. As Martin CJ observed in *Jubilee Mines NL v Riley,* it would be "entirely contrary" to the "evident purpose" of the continuous disclosure regime, being "to ensure an informed market in listed securities", "to construe either the listing rule or the statutory provisions as countenancing the disclosure of incomplete or misleading information".[58]

60. The Full Court's approach was motivated by a concern the threshold approach would bring about a result where pleaded information is not required to be disclosed where, if the pleaded information were considered together with the additional information, it would be material and otherwise satisfy s 674(2): **FC [366]-[370], [372] CAB 551-553**. The error in this approach is that it artificially subdivides the "information" under s 674 into that part pleaded by an applicant, and that part that would otherwise be disclosable. The Act countenances no such distinction. Further, there is no barrier to an applicant properly pleading the "information" that should have been disclosed under s 674, rather

---

55 See *Monash Health v Singh* [2023] FCAFC 166; 327 IR 196 at [57] (Katzmann, Snaden and Raper JJ).

56 *Cf Bauer Consumer Media Ltd v Evergreen Television Pty Ltd* [2019] FCAFC 71 at [162]-[174] (Rangiah J); [251]-[254] (Burley J).

57 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at [51] (Keane CJ, Lander and Buchanan JJ) (appeal dismissed: (2012) 249 CLR 217).

58 (2009) 40 WAR 299 at [87]. *Cf ANZ v ASIC* (2024) 305 FCR 383 at [62]-[64] (Lee J).

than cherry picking from that information for an artificial effect. Contrary to the Full Court's reasoning, consideration of this as a threshold issue does not frustrate the object of the continuous disclosure regime. Rather, it facilitates it by properly identifying and focusing on whether there is "information" that requires disclosure.

61. The Full Court's approach instead countenances an analysis of materiality which proceeds artificially, on the assumed and potentially false presumption that the information is disclosable at all (*cf* **FC [371] CAB 552-553**). Further, if the excluded information affects the extent of materiality, but the pleaded information excludes that information, the assessment of damages would then proceed on a different basis to the assessment of materiality. The Full Court's acceptance that the threshold approach is appropriate where information is "incorrect", "vague" or "imprecise" but not where it is incomplete or misleading further introduces into the statute a distinction without a difference; between information which is expressly misleading and misleading by omission or lack of precision (*cf* **FC [368] CAB 551**). That distinction does not exist in the context of the misleading conduct provisions of the Act: see [47] above.

62. In any event, the concerns expressed by the Full Court ignore the burden of proof.[59] An applicant, properly equipped with the relevant facts following disclosure processes, can and should plead a complete and accurate form of information, and it is for the respondent to then defend the case on that basis. It is not for a respondent nor the Court "to refashion a plaintiff's pleaded case" by supplementing that information to make it complete and accurate at the materiality stage of the analysis: **J [388]-[389] CAB 100**. In the circumstances, and having regard to unchallenged facts which rendered the undisclosed information misleading and incomplete, the primary judge was correct to dismiss the claim on this threshold basis, and the Full Court erred in concluding otherwise.

Ground 2: the information was not material

63. The primary judge was correct to conclude that none of the pleaded information was material, and in concluding otherwise, the Full Court erred. *First,* it did not apply the correct statutory test, which is focused on the impact of information on decisions by investors (not whether the information is impressionistically serious). Its failure to apply the correct statutory test then, *second*, led it into error in setting aside the findings of the

---

[59] *Federal Gold Mine Ltd v Ennor* (1910) 13 CLR 276 at 284-285 (Barton J) quoting from *Pomfret v Lancashire and Yorkshire Railway Co* (1903) 9 K.B. 718 at 721 (Lord Collins).

primary judge, and *third,* led it into error in its "reconsideration of materiality". Allied to this third error, the Full Court failed to defer to the advantages of the primary judge in seeing and hearing the evidence, particularly where it expressly found no error in the primary judge's assessment of that evidence.

The statutory test

64. Section 674(2) of the Act asks whether "a reasonable person would expect" the information to have a material effect on the price or value. Consistently with that standard, Listing Rule 3.1 required immediate notification of information that "a reasonable person would expect to have a material effect on the price or value of the entity's securities". Under s 677 of the Act, for the purpose of s 674, "a reasonable person would be taken to expect information to have a material effect on the price or value" of those securities "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" securities.

65. *First,* it is important to note that the test is focussed on a particular perspective: persons who commonly invest in securities, and then only on a decision by such persons to acquire or dispose of the securities. It does not ask if the information would influence a reasonable person's opinion of the company, or even the Court's opinion of the company.

66. *Second,* it is not sufficient that the information "may" or "might" influence investors; the statutory test uses the language of "would", "would be likely" and "influence" in relation to a "decision".[60] That language focuses on engendering the action of acquiring or disposing of shares. It is not enough that the information might be interesting.

67. *Third,* in any given case a number of factors may bear on the impact of information on *investors,* which factors will vary depending on the nature of the entity at issue, and the relevant class of persons who invest under consideration. Thus, it is recognised that whether information would be expected to have a material effect on the price or value of shares is a "matter that is appropriately addressed by expert evidence".[61] The views of management are additionally relevant, though not determinative.[62] It follows that materiality is unlikely to be — and was not in this case — simply a matter of commercial

---

60 *Grant-Taylor* (2016) 245 FCR 402 at [96] (Allsop CJ, Gilmour and Beach JJ).

61 *Myer* (2019) 293 FCR 29 at [641] (Beach J); *ASIC v Big Star Energy Limited (No 3*) (2020) 389 ALR 17 at [240] (Banks-Smith J); *James Hardie* (2010) 274 ALR 85 at [228] (Spigelman CJ, Beazley and Giles JJA); *ASIC v GetSwift Ltd* [2021] FCA 1384 at [1100] (Lee J); *ASIC v Wilson (No 3)* (2023) 171 ACSR 1 at [149] (Jackson J); *Worley* (2023) 171 ACSR 410 at [256] (Jackman J).

62 *James Hardie* (2010) 274 ALR 85 at [454], [527] (Spigelman CJ, Beazley and Giles JJA).

common sense. Rather, as explained below, the complexity attending its determination was reflected in the evidentiary contest at trial.

The evidentiary landscape at trial

68. The evidentiary contest on materiality included: (a) **expert evidence** from five experts,[63] each of whom prepared detailed reports, participated in a conclave culminating in the preparation of a joint report, and gave evidence concurrently over two days; (b) **lay evidence** from relevant CBA senior decision-makers during the relevant period, including CBA's CEO, CBA's Chief Risk Officer and a CBA non-executive director who was also a member of the Risk Committee and Audit Committee (**J [16] CAB 20-21**), each of whom was cross-examined, over 4.5 days; and (c) the tender of hundreds of documents relevant to the question of the likely impact of the pleaded information on decision-making by a reasonable investor. The techniques deployed by the experts included several forms of empirical analysis, comparative case studies, literature reviews and analysis of the information released at the time of the corrective disclosure. Those are matters which required specialised knowledge based on training, study or experience. Indeed, the primary judge found that each expert "provided assistance in elucidating the issues before the Court that were within his field of expertise": **J [48] CAB 28**.

69. This type of expert evidence has featured in all of the decided shareholder class actions alleging continuous disclosure breaches in this country.[64] This was a case where "individual facts about the operation or behaviour of the market, the reasons why information was not disclosed and the impact of any subsequent disclosure on the price of the securities" were "admissible and relevant".[65]

70. The primary judge engaged in a comprehensive analysis of the evidence in applying the statutory test: **J [650]-[1031] CAB 151-240**. In so doing, his Honour made observations as to the characterisation of the evidence given by those witnesses (and its effect) based on his observations of them giving evidence: **J [743]-[749], [769]-[773], [805]-[812], [825], [986]-[991] CAB 174-176, 180-181, 187-188, 191, 230-231**. His Honour

---

63 For the appellants, Mr Rowan Johnston (expert in arranging, managing, underwriting, and advising on share issues) and Professor Raymond da Silva Rosa (expert in studying investor behaviour): **J [46] CAB 26-27**. For CBA, Dr Sanjay Unni (expert financial economist), Mr Mozammel Ali (expert in equity capital markets) and Mr David Singer (experienced investor): **J [47] CAB 27-28**.

64 In addition to *Myer* and *Worley*, see *Bonham v Iluka Resources Ltd* (2022) 404 ALR 15 at [519]-[611] (Jagot J); *McFarlane* [2023] FCA 1628 at [157]-[327] (Anderson J); *Southernwood v Brambles Limited (No 3)* [2026] FCA 418 at [2989]-[2991] (Murphy J).

65 *NAB v Pathway Investments* (2012) 265 FLR 247 at [88] (Bell AJA, Bongiorno and Harper JJA agreeing).

specifically considered the evidence of each relevant expert regarding investor decision-making (**J [665]-[709] CAB 154-165**), and the opinions of each expert on the pleaded information (**J [728]-[835], [903]-[922] CAB 169-193, 210-217**), before assessing that evidence as part of the conclusions on materiality (**J [942]-[1031] CAB 221-240**)

71. That analysis correctly focused on the impact of the information on *investors.* For example, a number of features were particularly relevant: (a) CBA shares were significant to portfolio construction such that investors were unlikely to be influenced by "micro announcements" (**J [999] CAB 233)**; (b) CBA had a large base of retail shareholders who were "stickier" in their decision-making in relation to the holding of CBA shares, rather than buying and selling shares in a heuristic manner (**FC [194] CAB 496-497**); (c) investors understand that financial institutions are not free of operational risk, including in respect of compliance with AML/CTF obligations (**J [963] CAB 225)**.

72. The Full Court correctly found no error in the primary judge's assessment of the evidence relevant to materiality, rejecting each of the appellants' grounds of appeal contending that the primary judge erred in his approach to the expert evidence (**FC [508]-[509] CAB 590-591**) and the lay evidence (**FC [510]-[511] CAB 591-592**).

The Full Court erred in setting aside the primary judge's conclusions on materiality

73. Notwithstanding, the Full Court found the primary judge had erred in respect of his consideration of materiality, for three reasons. *First,* the Court disagreed with the primary judge's treatment of the additional contextual information: **FC [446]-[460], [469]-[471] CAB 574-579**, **581-582**. That contextual information went, broadly speaking, to the significance of the issues in the context of CBA's business as a whole. *Second,* the Court disagreed with the primary judge's focus on whether the information would affect the financial performance of a company: **FC [497]-[499] CAB 587-588**. *Third,* the Court disagreed with the significance to materiality of whether AUSTRAC had resolved to commence proceedings or not: **FC [500]-[503] CAB 588-589**. The Full Court did so without engagement, at all, with the substantial body of expert evidence adduced at trial. That evidence, on which the primary judge's findings were based, demonstrated the significance of these matters to decisions *by investors.*[66] And even if that evidence could be put to one side, it is obvious that these matters are critical for investors; each of which

[66] Johnston Report at [81]-[87]; Singer Report at [39], [41]-[47], [55], [86]-[88], [91]-[92], [102]-[103] (**RBFM 179-180**); Materiality Joint Report at [6], [10], [22]-[23], [42]-[43], [46], [48] (**RBFM 214, 216, 220, 226-228**); T708.6-31; T710.34-37; T721.41-47; T772.32-37; T774.39-40 (29-30 November 2022) (**RBFM 264-297**); **J [688], [693], [699], [709] CAB 160-165**.

being ultimately concerned with how the information would actually affect CBA, and therefore actually affect investors. The analysis underscores the Court's misapplication of the test. It is telling that the Full Court referred at **FC [431] CAB 567** to the "core reasoning" of the primary judge on materiality being at **J [957]-[972], J [1023]-[1209]**, overlooking entirely the reasoning engaging with the evidence (and especially expert evidence in respect of investors) at **J [992]-[1020] CAB 231-237**. This is emblematic of the Full Court's application of the wrong test.

The Full Court erred in its "reconsideration of materiality"

74. That same error is evident in the Full Court's minimalistic "[r]econsideration of materiality". It ignored, almost entirely, the corpus of expert and lay evidence which had been canvassed on this issue at trial (**J [515]-[533] CAB 593-597**). As a matter of substance, it ignored the statutory test, finding materiality because *it* considered the information to be serious. So much is demonstrated by its reasons on each issue.

75. *First,* in respect of the Late TTR Information, the Full Court made observations about the seriousness and scale of the potential contraventions (**FC [516]-[517], [521] CAB 593-594**), the fact that the "potential penalty" if AUSTRAC commenced proceedings was "very large" (**FC [516], [518] CAB 593-594**) and that there could be significant financial and reputational consequences (**FC [518] CAB 594**), and the fact that the problem was elevated to and dealt with at senior levels within CBA (**FC [519] CAB 594**).

76. The only mention of the expert evidence was at **FC [520] CAB 594**, where the Full Court: first, said that it was unnecessary to consider the beta analysis conducted by CBA's expert (see [79] below) and second, "that, as the primary judge found, there were difficulties with aspects of the expert evidence led by the applicants". At **FC [522]-[523] CAB 595**, the Full Court said that the brokers' reports published after AUSTRAC's announcement provided "a form of ex post confirmation" of materiality. However, tellingly, in the example the Full Court extracted, the broker report recognised that, despite reflecting serious compliance issues, any fine was unlikely to have material consequences given the scale of CBA's business: "CBA has 1.73bn shares – so every $100m fine is worth 4 cents to stock price, i.e. a $500m fine is worth 20 cents to share price. So unlikely to be material". This was exactly the kind of analysis that was conducted by the experts, focused on investor decision-making, and that analysis was ignored entirely.

77. That the TTR Issue had been rectified some 18 months prior, with the TTRs lodged, was not considered by the Full Court to be relevant information that needed to be considered

to assess materiality: **FC [449]-[451] CAB 575-576**. This was because, in the Full Court's view, it "did not add to, qualify, or usefully clarify, relevant aspects of the September 2015 Late TTR Information". However, as the primary judge recognised, the appellants' expert conceded that failure to state that the issue had been rectified would, in this context, cause concern to investors and give them a misleading impression: **J [591]-[592] CAB 140-141**. Again, this evidence was ignored entirely.

78. *Second,* in respect of the AMF Information, the Full Court found that "considered in the context of the September 2015 Late TTR Information" this information was material "because it indicates that the error was not just a single failure, but potentially part of a broader compliance problem" (**FC [530] CAB 597**), and that it suggested a "serious" compliance failure (**FC [528] CAB 596**). It referred to the fact that "AUSTRAC[] viewed the matter as serious and its investigation was ongoing": **FC [529] CAB 597**. So much is self-evident. But on its own it says nothing, one way or another, about how *investors* would receive and consider that evidence. That was the very matter to which a whole corpus of evidence was addressed at trial and by the primary judge.

79. In respect to both types of information, the Full Court emphasised that it had not accepted the appellants' materiality experts' contention[67] that the pleaded information was "economically equivalent" to AUSTRAC's announcement of 3 August 2017 (**FC [520], [531] CAB 594, 597**). That did not excuse the Full Court from a proper assessment of the evidence. Most of it, particularly CBA's evidence, was not directed at the appellants' flawed theory of economic equivalence. Rather, it involved a detailed analysis of investor decision-making. For example, Mr Ali's beta analysis was an empirical analysis which demonstrated the Late TTR Information was not "value relevant" as the appellants contended, because investors did not in fact revise their estimates of CBA's operational risk in response to the wider AUSTRAC revelations: **J [889]-[900] CAB 207-210**. This served to exemplify that the Full Court failed to engage with the correct issue; what motivated investors.

80. The Full Court's high-level observations as to the seriousness of the potential AML contraventions stated the obvious – undeniably, CBA's failure to comply with its regulatory obligations was serious. The statutory test to be applied looked not to the impressionistic "seriousness" of the information, but to whether it was likely to have

---

[67] Addressed in the evidence of Professor da Silva Rosa and Mr Johnston: see **J [736] CAB 171; J [754] CAB 177**.

borne upon any investment decision by an investor, and thereby have influenced that investor in their decision to acquire or dispose of the securities.

81. *Finally,* the Full Court acceded to the proposition advanced by the appellants[68] that the information was material because the contraventions gave rise to strict liability on the part of CBA with "no apparent defence": **FC [516], [528]-[529] CAB 593, 596-597**. That was wrong. Since the enactment of the AML Act, s 236 has provided a defence to contravention of a civil penalty provision "if the defendant proves that the defendant took reasonable precautions, and exercised due diligence, to avoid the contravention". It follows that — at the time of the alleged contraventions, in April 2017 — it was not inevitable that liability would ensue, even if AUSTRAC was to take enforcement action, simply because CBA had not met a requirement of the AML Act. This erroneous assessment was evidently significant to the Full Court's assessment of materiality, because it went on to observe that the failures to give TTRs as required by the AML Act "represented a serious failure by [CBA] to comply with its legal obligations…" and referred to the maximum penalty being "very large" if AUSTRAC commenced civil penalty proceedings: **FC [516] CAB 593** (applied at **FC [528]-[529] CAB 596-597** to the AMF Information). To the extent the Full Court is to be understood as referring to the fact that CBA ultimately admitted contraventions in the AUSTRAC proceedings, this instantiates the wrong perspective from which the Full Court analysed materiality: with hindsight, having regard to the fact contraventions were admitted by CBA, and not on a forward-looking basis, having regard to what was actually known in April 2017 and apparently disclosable at that time.

The evidence at trial demonstrated the information was not material

82. The evidence at trial, as accepted by the primary judge and ignored by the Full Court, demonstrated that neither form of the undisclosed information was material.

83. *First,* of 11 analysts who published reports on or after AUSTRAC's announcement on 3 August 2017, only one decreased its price target (and then only by a modest amount, from $81.50 to $80.50) while other analysts either maintained or increased their price targets: **J [886], [1018] CAB 206-207, 237**.

84. *Second,* the conduct disclosed by AUSTRAC on 3 August 2017, which "on any view,

---

[68] As put below at T142.18-25 & T144.16-45 (20 November 2024) (**RBFM 311-312**); responding to the appellants' "strict liability contraventions" with "no known defence" submission at T3.20-21, 41-42 (18 November 2024) (**RBFM 310**), now repeated at **AS [43]**.

was far more egregious than the Late TTR Information (or any of the other pleaded forms of the information) – did not move analysts, in the main, to revise their estimates of [CBA's] share value": **J [887] CAB 207**.

85. *Third,* the beta analysis conducted by Mr Ali indicated that the market perception of the "riskiness" of CBA shares did not change in a way that was substantially different to other banks in the period after 3 August 2017, and in fact decreased after the 3 August 2017 announcement: **J [891]-[900] CAB 207-210**. That evidence indicated that investors did not see CBA as being inherently more risky in response to that disclosure. This directly contradicted the appellants' evidence that after the announcement, investors upwardly revised their estimates of CBA's operational risk with economically significant adverse consequences: **J [966], [976], [1007] CAB 226, 228, 234**.

86. *Fourth,* the results of a comparative case study with Westpac revealed that disclosures of a similar kind to the counterfactual contended for in this case by the appellants had not affected Westpac's share price: **J [842]-[843], [845]-[855], [1008]-[1009] CAB 194-198, 235**. Instead, it was only when AUSTRAC announced actual proceedings against Westpac that there was a material movement. A similar picture emerged from the case study with NAB: **J [856]-[873], [1010]-[1016] CAB 198-203, 235-236**.

87. *Fifth,* as to whether or not any penalty would be substantial, the unchallenged evidence was that AUSTRAC's usual and preferred approach to regulation was to seek cooperative engagement and only consider enforcement action where there was not improved compliance and, even when AUSTRAC took enforcement action, in nearly all cases it did not seek the imposition of a civil penalty: **J [83], [994]-[996] CAB 35, 232**. For CBA in particular, AUSTRAC's consistently communicated position as at the time of the alleged contraventions was that it had not decided whether it would take any enforcement action or, if it did, action it might take: **J [43] CAB 26; J [320] CAB 85**.

88. *Sixth,* the evidence was uniformly to the effect that investors would understand that financial institutions are not free of operational risks, including those with respect to regulatory compliance. This evidence included that CBA had consistently published disclosures in the relevant period "about the existence and consequences of the operational and reputational risks to which it was exposed, including by reason of regulatory non-compliance": **J [761], [963], [976], [1085] CAB 178, 225, 228, 253**.

89. *Seventh*, the evidence demonstrated that the market reaction on 3 August 2017 was substantially the result of AUSTRAC having commenced proceedings*:* see [13] above.

The Full Court erred

90. In ignoring the statutory test, discounting the advantages enjoyed by the trial judge in seeing and hearing the evidence (indeed, failing to consider that evidence at all), the Full Court erred in its ultimate conclusion on materiality. Neither the Late TTR Information nor the Account Monitoring Failure Information was material as at 24 April 2017.

Special leave to cross-appeal

91. Special leave to cross-appeal should be granted for these reasons. *First,* CBA only seeks to uphold the ultimate outcome of the Full Court's decision: that it is not liable to group members for inflation in the price of their shares. It seeks that result by way of its notice of contention. The cross-appeals are necessary only as a matter of procedure, to avoid inconsistent judgments, in consequence of the procedural nature of representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) involving answers to common questions (and here, declaratory relief given for the purpose of facilitating possible individual reliance case by one or more group members). *Second,* the cross-appeals seek to challenge the materiality findings of the Full Court which form the basis of the case now put forward by the appellants to establish causation and loss. If the cross-appeals are successful, the appeals would be unsustainable, and in those circumstances, "it would do injustice to determine the appeal alone".[69] *Third,* the issues raised by the cross-appeals involve questions of law or public importance. This Court has not yet had occasion to consider the statutory test for materiality. The continuous disclosure regime applies to all listed companies and affects millions of investors daily, and the cross-appeals seek this Court's definitive guidance on aspects of its operation. It is additionally important to the many proceedings presently on foot alleging breaches of the regime, including numerous class actions.

PART VII: ESTIMATE OF HOURS

92. CBA estimates that 2 hours will be required for presentation of oral argument on the notices of appeal, and 2 hours for presentation on the notices of cross-appeal.

Dated: 30 April 2026

Noel Hutley
nhutley@stjames.net.au
(02) 8257 2599

Elizabeth Collins
ecollins@sixthfloor.com.au
(02) 9223 8541

Imtiaz Ahmed
iahmed@sixthfloor.com.au
(02) 8067 6911

Naomi Wootton
nwootton@sixthfloor.com.au
(02) 8915 2610

Stephanie Crosbie
scrosbie@sixthfloor.com.au
(02) 8915 2658

[69] *Cf Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 602.

ANNEXURE TO RESPONDENT'S 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 No. C40 (1 July 2017 to 22 August 2017)	Section 236	Act in force at the time AUSTRAC commenced civil penalty proceedings against CBA (3 August 2017)	3 August 2017
2.	*Corporations Act 2001* (Cth)	Compilation No. C79 (1 July 2017 to 18 September 2017)	Sections 674, 677, 1041E, 1041H	Act in force at the end of the period of contravention found by the Full Court (with no relevant changes in those sections in force during the balance of that period)	24 April 2017 to 3 August 2017
3.	*Federal Court of Australia Act 1976* (Cth)	Compilation No. C57 (12 June 2024 to 1 October 2024)	Sections 27, 33Z	Act in force at the time of the judgment at first instance providing answers to the common questions (with no relevant changes in the section in force at the time of the Full Court hearing or judgment on 4 September 2025)	20 September 2024
4.	*Federal Court Rules 2011* (Cth)	Compilation No. C07 (2 May 2019 to 12 January 2023)	Rule 16.08	Rules in force at the time of the trial	7 November 2022 to 14 December 2022