HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: S12/2026

ZONIA HOLDINGS PTY LTD (ACN 008 565 286)
Appellant/Cross-Respondent

and

COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)
Respondent/Cross-Appellant

BETWEEN: S13/2026

PHILIP ANTHONY BARON
First Appellant/Cross-Respondent

JOANNE BARON
Second Appellant/Cross-Respondent

and

COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)
Respondent/Cross-Appellant

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT/CROSS-APPELLANT

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Loss (appeal) (RS [16]-[44])

1. The source of the right to recover damages is statutory: *Corporations Act,* ss 1317HA and 1325 (**JBA Tab 3**). The language of the statute reflects the compensatory principle.

2. The "facilitation principle" does not operate until a plaintiff discharges its onus of proving the existence of loss: *Cessnock City Council* (2024) 281 CLR 39 at [3], [7] (Gageler CJ), [48], [52], [58] (Gordon J), [121], [127], [129] (Edelman, Steward, Gleeson and Beech-Jones JJ), [236] (Jagot J) (**JBA Tab 11**); *Sellars v Adelaide Petroleum* (1994) 179 CLR 332 at 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 364 (Brennan J) (**JBA Tab 24**); *Aristocrat Technologies* (2007) 157 FCR 564 at [35] (Black CJ and Jacobson J) (**JBA Tab 28**).

3. The Full Court found that no loss (*viz,* inflation in the value of CBA shares) was established: see Orders (**CAB2 659**) and accompanying reasons (**CAB2 645-648 [12]-[21]**); see also **FC [207], [608] CAB2 503, 621)**. The question on "causation" was whether an outcome (inflation) was caused by an event (the contravening conduct). Having found no established inflation, there was nothing left to answer on "causation" (*cf* **CAB2 647 [16]; AR [10]**).

4. The Full Court was correct to find that the appellants had not established any inflation (**FC [542]-[580] CAB2 600-614**) The appellants' flawed event study was the "fulcrum" of their case on quantification and one of the two ways (together with the Lieser paper) that they sought to establish causation (**FC [540]-[541], [557], [609] CAB2 599-600, 604, 621**). There was no equivalence, nor material similarity, between the pleaded information and the 3 August 2017 announcement. Nor was the former subsumed within the latter. There are unchallenged concurrent findings of fact that each was information of a materially different character (**J [1190]-[1192], [1219] CAB1 276-277, 282-283**; *cf Crowley v Worley Limited* [2026] FCAFC 78 at [484], [488] (**JBA Tab 36**)).

5. The "facilitation principle" does not assist where a plaintiff has failed to adduce available evidence as to loss: *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136 at [70]-[75] (**JBA Tab 46**); *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty*

Ltd (2003) 196 ALJR 768 at [37]-[38] (Hayne J) (**JBA Tab 47**); *Financialstrategy.com.au Pty Ltd (in liq) v Bailey Roberts Group Pty Ltd (in liq)* [2026] NSWCA 74 at [121]-[123] (**JBA Tab 40**). There are concurrent findings of fact that the appellants chose not to adduce available evidence establishing loss (**J [1214]-[1227] CAB1 282-284; FC [583]-[600] CAB2 615-619)**. Those findings are not challenged: *cf* **AR [13]**. It was not impossible to disentangle the effects of the pleaded disclosure from the other disclosures reflected in the -$3.29 return (*cf* **AR [15],** see Dr Unni's unchallenged evidence (**FC [586], [596]-[597] CAB2 615-616, 618)** and Professor Easton's evidence, which went only to the impossibility of disentangling using an event study (**FC [585] CAB2 615; Supp ABFM 48, 418-419; Supp RBFM 269-271**).

6. Materiality does not establish loss: *Miller v Thane International Inc* 615 F.3d 1095 at [5]-[7] (9th Cir, 2010). The tests involve different considerations and methodologies (**RS [21]-[24]**). It is not open to the appellants to rely on the broker reports for quantification in this Court (*cf* **AR [4]**, relying on CBA's Closing Submissions (Trial) (**Supp ABFM 8**). If the appellants establish error and this Court were to engage in quantification, the Court would find there was no inflation in the value of the shares: see Westpac and NAB event studies and other evidence (**J [845]-[873] CAB1 195-203** and **RS [83]-[89]**, and note that despite the appellants' reliance now on the NAB event study as a "yardstick" (**AS [65]**), they submitted to the Full Court that it and the Westpac event study were "so far different" that they "provide no real guidance" and could not "provide a guide to valuing loss" (**Supp RBFM 295**)).

The threshold issue (cross-appeal/contention ground 1) (RS [45]-[62], RR [3]-[11])

7. Section 674 of the *Corporations Act* and ASX Listing Rule 3.1 refer to a unitary concept of "information" about specified events or matters that is required to be "immediately" disclosed if the statutory criteria are met: **JBA Tabs 3, 58**.

8. The purpose of the continuous disclosure regime is to ensure market integrity and efficiency: Listing Rules Introduction; Rule 19.2 (**JBA Tab 58**); *Grant-Taylor v Babcock & Brown Ltd* (2016) 245 FCR 402 at [92] (**JBA Tab 41**).

9. The concept of "information" under the Act and the Listing Rules comprehends only information that is not misleading, which must include the facts necessary to make it materially complete: ASX Guidance Note 8 (**RBFM 239**), noting an announcement must be "accurate, complete and not misleading"; *cf Corporations Act* s 1041H (**JBA Tab 3**);

Jubilee Mines NL v Riley (2009) 40 WAR 299 at [87]-[88], [161]-[162] (**JBA Tab 45**); *James Hardie Industries NV v ASIC* (2010) 274 ALR 85 at [354]-[355] (**JBA Tab 43**); Report of the Company and Securities Advisory Committee (**JBA Tab 59**). The Full Court's conclusion undermines the statutory purpose (**FC [342]-[380] CAB2 543-555**).

10. The appellants' pleaded "Account Monitoring Failure" and "Late TTR" information was misleading and materially incomplete (**FC [448]-[455], [468] CAB2 574-577, 581**; **J [499], [577]-[606] CAB1 122, 137-143**). In the case of the "Account Monitoring Failure" information, the Full Court found that it gave a "misleading impression" for a number of reasons (**FC [468] CAB2 581**). In the case of the "Late TTR" information, the Full Court found that there were other matters unspecified in the information that were necessary to assess its materiality (**FC [448]-[456] CAB2 574-578**). This necessarily connoted it was materially incomplete.

11. CBA complied with its pleading obligations. In any event, the Full Court erroneously failed to apply the correct test, by failing to consider whether there was any procedural unfairness in the threshold issue being determined by the trial judge. Here, the trial was run on the basis that CBA contended that the pleaded information was misleading and materially incomplete, with no procedural unfairness to the appellants, as CBA submitted in the Full Court: *cf* **FC [340]-[341] CAB2 542-543**; see **J [382]-[391], [576]-[606] CAB1 98-100, 137-143;** FC MFI #5 (**RBFM 300-309)**; CBA's Defence (**Supp RBFM 145-146, 151-152, 158-163, 202-203, 213**); particulars letters (**RBFM 78-83, 84-86**); CBA's opening submissions (trial) (**RBFM 250-255**); appellants' oral opening (trial) (**RBFM 256-257**); expert witness cross-examination (**J [592] CAB1 140-141**); appellants' closing submissions (trial) (**Supp RBFM 274-275**); CBA's oral submissions to the Full Court (**Supp RBFM 283-289**); and see *Bauer Consumer Media Ltd v Evergreen Television Pty Ltd* [2019] FCAFC 71 at [251]-[254] (**JBA Tab 32**); *Betfair Pty Ltd v Racing NSW* (2010) 189 FCR 356 at [51] (**JBA Tab 33**).

Materiality (cross-appeal/contention ground 2) (RS [63]-[90], RR [12]-[15])

12. The statutory test in s 677 of the *Corporations Act* (**JBA Tab 3**) is asked from a particular perspective: that of investors. The statutory language ("would", "would be likely", "influence" and "decision") focuses on the decision of acquiring or disposing of shares; it requires more than that the information be interesting or serious. It is not enough that the information would influence a decision in a "non-trivial" way (*cf* **AR [30]**; see *Grant-*

Taylor (2016) 245 FCR 402 at [96] (**JBA Tab 41**) citing *TSC Industries v Northway Inc* 426 US 438, 448-449 (1976) (**JBA Tab 55**).

13. The language of "the" ED securities at the conclusion of s 677 calls for consideration of the nature of the entity in question as well as the class of investors: *Grant-Taylor* (2016) 245 FCR 402 at [103] (**JBA Tab 41**). The test is forward looking, but regard may be had to the market's reaction to the release of information as a cross check: *James Hardie* (2010) 274 ALR 85 at [537] (**JBA Tab 43**).

14. Both parties relied on expert evidence, and the Full Court found *no error* in the primary judge's findings in relation to the expert evidence (**FC [508]-[511] CAB2 590-592**). The primary judge made detailed findings about investor decision making, a beta analysis, and case studies involving the market's reaction to information voluntarily disclosed by Westpac and NAB (**J [665]-[1030] CAB1 154-240**).

15. The Full Court erred in setting aside those findings, by:

    (a) its siloed consideration of the contextual information (divorced from the primary judge's findings about how investors would react to that contextual information, based on the expert evidence) (**FC [447]-[457] CAB2 574-578**);

    (b) rejecting the primary judge's focus on whether the information would affect financial performance or be financially significant (which centred on findings about what mattered to investors) (**FC [497]-[499] CAB2 587-588**); and

    (c) applying a probability-magnitude test (**FC [502]-[503] CAB2 588-589**) and thereby neglecting to consider the primary judge's factual findings (in respect of which no error was found) that it was important to investors when making investment decisions to have certainty about AUSTRAC's position (**J [993]-[994] CAB1 231-232**).

16. These errors are also reflected in the Full Court's reconsideration of materiality **(FC [515]-[533] CAB2 593-597**).

17. Having regard to the primary judge's (now unchallenged) findings of fact in relation to the evidence, the information was not material and the Full Court erred in both setting aside the primary judge's finding and in concluding otherwise.

Dated: 11 June 2026

Noel Hutley SC **Elizabeth Collins SC**