FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 2) [2023] FCA 1217

File number:	VID 1153 of 2018
Judgment of:	**MOSHINSKY J**
Date of judgment:	13 October 2023
Catchwords:	**CORPORATIONS** – continuous disclosure – share placement – where the defendant (ANZ) undertook a fully underwritten institutional share placement to raise $2.5 billion – where the Underwriters recommended that approximately $754 million of the shares (later adjusted to approximately $790 million of the shares) not be allocated to investors, and be taken up by the Underwriters, and ANZ accepted that recommendation – where ANZ's completion announcement stated that it had raised $2.5 billion in equity but did not refer to the fact that approximately $790 million of the shares had not been allocated to institutional investors and therefore would be taken up by the Underwriters – whether ANZ breached its continuous disclosure obligation under s 674(2) of the *Corporations Act 2001* (Cth) – whether the pleaded information was not "generally available" – whether the pleaded information was material – held: ANZ breached its continuous disclosure obligation
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth), s 19 *Competition and Consumer Act 2010* (Cth) *Corporations Act 2001* (Cth), ss 674, 675, 676, 677, 798H *ASIC Market Integrity Rules (ASX Market) 2010*
Cases cited:	*Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 964 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; 264 ALR 201 *Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 *Australian Securities and Investments Commission v Vocation Ltd* [2019] FCA 807; 371 ALR 155

	Bert v Red 5 Ltd [2016] QSC 302; 349 ALR 210 *Crowley v Worley Ltd* [2022] FCAFC 33; 293 FCR 438 *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627 *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149; 322 ALR 723 *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; 245 FCR 402 *Jubilee Mines NL v Riley* [2009] WASCA 62; 40 WAR 299
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	465
Date of hearing:	24, 26, 27, 28 April 2023 and 1, 9, 10 May 2023
Counsel for the Plaintiff:	Mr CM Caleo KC with Ms PP Thiagarajan and Mr L Hogan
Solicitor for the Plaintiff:	Johnson Winter Slattery
Counsel for the Defendant:	Mr J Sheahan KC with Mr PG Liondas
Solicitor for the Defendant:	Allens

ORDERS

VID 1153 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)** Defendant

ORDER MADE BY:	**MOSHINSKY J**
DATE OF ORDER:	**13 OCTOBER 2023**

THE COURT ORDERS THAT:

1. The matter be listed for a hearing on penalty on a date to be fixed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 The key events giving rise to this proceeding, which concerns whether the Australia and New Zealand Banking Group Limited (**ANZ**) breached its continuous disclosure obligation under s 674(2) of the *Corporations Act 2001* (Cth), are as follows.

2 On Thursday, 6 August 2015, at 8.38 am, a trading halt of ANZ's shares was announced, at the request of the company, pending the release of an announcement by the company. At 8.44 am that day, ANZ issued a media release that announced a fully underwritten institutional share placement to raise $2.5 billion (the **Placement**) and an offer to ANZ's eligible shareholders to participate in a share purchase plan (**SPP**) to raise around $500 million. (The focus of this proceeding is the Placement and not the SPP.) The media release stated that the final issue price for the Placement would be determined through an accelerated book-build to be completed that day in a price range up from $30.95, being the underwritten floor price. It was also stated that the Placement had been fully underwritten by Citigroup Global Markets Australia Pty Ltd (**Citi**), Deutsche Bank AG (**Deutsche**) and JP Morgan Australia Ltd (**JPM**) (together, the **Underwriters** or the **Joint Lead Managers**). Pursuant to an Underwriting Agreement entered into by the Underwriters and ANZ on that day, their respective proportions were: 40% for Citi; 30% for Deutsche; and 30% for JPM.

3 During the course of 6 August 2015, the Underwriters carried out a book-build process. They updated ANZ from time to time on the progress of the book-build.

4 At 8.35 pm on 6 August 2015, the Underwriters sent an email to ANZ attaching a draft allocation list for the Placement (the **Draft Allocation List**) that showed the book fully covered (at 103%), but approximately $754 million of shares "left to allocate" (that is, proposed to be taken up by the Underwriters). There is a factual issue between the parties as to whether: (a) as ANZ contends, institutional investors had made applications for more than $2.5 billion of shares (i.e. the book was fully covered) and the Underwriters recommended not allocating approximately $754 million of the shares; or (b) as the Australian Securities and Investments Commission (**ASIC**) contends, the book was actually not fully covered, as certain investors had amended their applications or because the real demand of certain investors was less than their application. In any event, during a conference call between the Underwriters and ANZ

shortly after 8.35 pm on 6 August, the Underwriters recommended that approximately $1.745 billion of shares be allocated to investors and approximately $754 million of shares (approximately 30% of the Placement) be taken up by the Underwriters. ANZ gave approval to the Underwriters to proceed to allocate in accordance with that recommendation.

5 At 2.26 am on Friday, 7 August 2015, the Underwriters sent an email to ANZ attaching a copy of a revised allocation list for the Placement (the **Final Allocation List**) that showed approximately $1.709 billion of shares to be allocated to investors and approximately $790 million of shares (approximately 31% of the Placement) "left to allocate" (and therefore to be taken up by the Underwriters).

6 At 7.30 am on 7 August 2015, ANZ published a media release, which was released to the market by the Australian Securities Exchange (**ASX**), that stated:

> **ANZ completes $2.5 billion Institutional Equity Placement**
>
> ANZ today announced it had raised $2.5 billion in new equity capital through the placement of approximately 80.8 million ANZ ordinary shares at the price of $30.95 per share.
>
> Settlement is scheduled to take place on 12 August 2015 with issue of the Placement shares to occur on 13 August 2015. The Placement shares are scheduled to commence trading on ASX on 13 August 2015. The new shares will rank equally with existing ANZ ordinary shares.
>
> Yesterday's trading halt in ANZ ordinary shares and other securities is expected to be lifted at market open today.

7 Importantly for present purposes, ANZ's media release did not refer to the fact that approximately $790 million of the shares had not been allocated to institutional investors and therefore would be taken up by the Underwriters. Further, ANZ did not disclose this information at any other time before the market opened on 7 August 2015.

8 In this proceeding, ASIC alleges that ANZ contravened its continuous disclosure obligation under s 674(2) of the *Corporations Act* (set out later in these reasons) (operating in conjunction with ASX Listing Rule 3.1) by failing to notify the ASX (either on the night of 6 August 2015 or, alternatively, prior to the recommencement of trading in ANZ shares on 7 August 2015):

(a) that, of the $2.5 billion of ANZ shares offered in the Placement, shares with a value between approximately $754 million and $790 million were to be acquired by the Underwriters (the **Underwriter Acquisition Information**); or alternatively

(b) that a significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters (the **Significant Proportion Information**).

9 The continuous disclosure obligation in s 674(2) has a number of elements. Among other things, for the obligation to apply, it is necessary that the information:

(a) is not generally available; and

(b) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the relevant securities.

10 Section 677 provides in part that, for the purposes of s 674, a reasonable person would be taken to expect information to have a material effect on the price or value of 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*.

11 Having regard to those provisions, ASIC alleges that each of the Underwriter Acquisition Information and the Significant Proportion Information:

(a) was not generally available to the market;

(b) if disclosed, was information that a reasonable person would expect to have a material effect upon the price of ANZ shares; and

(c) was likely to influence investors in deciding whether to acquire, and in deciding whether to dispose of, ANZ shares.

12 In its defence, ANZ contends that:

(a) applications at the price of $30.95 per share were received from institutional investors for *more than* the full amount of the Placement Shares; this was communicated to ANZ;

(b) the Underwriters recommended to ANZ that, notwithstanding that applications had been received from institutional investors for more than the full amount of the Placement Shares, having regard to the composition of the applications, the Underwriters should take up a portion of the Placement Shares by *scaling-back* the allocations to certain investors; a substantial reason for this recommendation was that investors such as hedge funds, if not scaled-back, might deal with their shares in such a way as to create a *disorderly, or volatile, after-market* for ANZ shares; this was communicated to ANZ;

(c) ANZ accepted that recommendation (during the conference call shortly after 8.35 pm on 6 August 2015); and

(d) prior to the commencement of trading in ANZ shares on 7 August 2015, the Underwriters had each indicated to ANZ their intention to promote *an orderly after-market in ANZ shares* and not to promptly dispose of any allocation of Placement Shares to them.

13 ANZ admits that it did not make a disclosure at any material time in the terms alleged or of the specific information alleged, but says that disclosure of the information alleged without the contextual matters set out in [12] above would have made any disclosure misleading or incomplete.

14 ANZ admits that the Underwriting Acquisition Information was not generally available. However, it contends that the Significant Proportion Information *was* generally available because it consisted of deductions, conclusions or inferences made or drawn from: readily observable matter; and/or information made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information, and where since that information was made known a reasonable period for it to be disseminated had elapsed (see s 676 of the *Corporations Act*, set out below).

15 ANZ denies that the information, if disclosed, was information that a reasonable person would expect to have a material effect upon the price of ANZ shares and/or was likely to influence investors in deciding whether to acquire, and in deciding whether to dispose of, ANZ shares. ANZ contends that any assessment of whether the information was of that character would need to have regard to the totality of relevant information or context, which includes some or all of the matters set out in [12] above.

16 Further, ANZ denies that the Underwriter Acquisition Information and the Significant Proportion Information were information "concerning it" within the meaning of ASX Listing Rule 3.1 (set out below).

17 My conclusions, in summary, are as follows:

(a) Both the Underwriter Acquisition Information and the Significant Proportion Information were information "concerning it", that is, concerning ANZ, for the purposes of Listing Rule 3.1.

(b) Both the Underwriter Acquisition Information and the Significant Proportion Information were not generally available at the relevant times (being the night of 6 August 2015 and prior to the recommencement of trading in ANZ shares on 7 August 2015).

(c) Both the Underwriter Acquisition Information and the Significant Proportion Information were *material* for the purposes of the relevant provisions.

18 It follows from the above that I have concluded that ANZ breached its continuous disclosure obligation in s 674(2) of the *Corporations Act* by failing to notify the ASX (either on the night of 6 August 2015 or prior to the recommencement of trading in ANZ shares on 7 August 2015) of the Underwriter Acquisition Information or the Significant Proportion Information.

Procedural background

19 This proceeding was commenced in September 2018. Subsequently, ANZ applied for a stay of the proceeding pending the outcome of related criminal proceedings. On 21 June 2019, I made an order that the proceeding be stayed until the hearing and determination of the criminal proceedings: *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 964. As noted in that judgment at [7], the criminal proceedings were based on allegations that during discussions on 7 and 8 August 2015 the Underwriters made arrangements or arrived at understandings in relation to the sale of ANZ shares by the Underwriters, and that they subsequently implemented those arrangements and understandings, in contravention of cartel offence provisions in the *Competition and Consumer Act 2010* (Cth). ANZ was alleged to have been knowingly concerned in the making of, and giving effect to, those arrangements and understandings.

20 The criminal proceedings did not proceed to trial. The charges were withdrawn. Accordingly, in early 2022 this proceeding was listed for a case management hearing and timetabling orders were made to take the matter to a hearing.

The hearing and the evidence

21 The hearing of this matter commenced on 24 April 2023 and took place over seven hearing days. The hearing dealt with all questions in the proceeding other than the amount of any pecuniary penalty.

22 ASIC relied on the following lay evidence:

(a) an affidavit of Kamilla Soos, an Information and Research Analyst at ASIC, dated 20 December 2022;

(b) an affidavit of Giovanna Morel, a Research Librarian at ASIC, dated 20 December 2022;

(c) affidavits of Michelle Burton, a lawyer employed by ASIC, dated 19 September 2022, 28 October 2022, 20 December 2022, 17 March 2023 and 22 April 2023; and

(d) an affidavit of Madison Lardner, a solicitor employed by Johnson Winter Slattery, the solicitors acting for ASIC, dated 23 April 2023.

23 Broadly, these affidavits related to documents relied on by ASIC. None of these witnesses was required to attend for cross-examination.

24 In addition, ASIC tendered a number of documents.

25 ANZ called the following lay witnesses:

(a) John Needham, the Head of Capital & Structured Funding of ANZ (a role he held both at the time of trial and at the time of the Placement); and

(b) Robert Jahrling, the Head of Equity Capital Markets Syndication at Citi, and a Director of Citi, at the time of the Placement.

26 Mr Needham prepared an affidavit dated 28 November 2022 and was cross-examined. He gave evidence in a very clear and straightforward way. His evidence was evidently intended to assist the Court. He made sensible concessions. I generally accept his evidence.

27 Mr Jahrling did not prepare an affidavit, but he had been examined by ASIC pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001 (Cth)* (the **ASIC Act**) (**Section 19 Examination**) and a transcript of that examination was in evidence (subject to a "limited use" ruling, as discussed below). Mr Jahrling was cross-examined. He gave evidence in a clear and straightforward manner. He demonstrated a good grasp of the facts and the evidentiary material. I generally accept his evidence.

28 ANZ also tendered a number of documents.

29 The documents in evidence were contained in a Court Book (**CB**), Supplementary Court Book (**SCB**) and Further Supplementary Court Book (**FSCB**), all of which were in electronic form.

30 There are two bodies of transcripts in evidence that it is useful to identify at this stage. These are:

(a) transcripts of examinations of persons involved in the Placement pursuant to s 19 of the ASIC Act (**Section 19 Transcripts**); and

(b) transcripts of telephone conversations (or conference calls) between two or more participants in the Placement (**Telephone Transcripts**).

31 During the course of the hearing, the parties agreed on a number of corrections to these transcripts and revised versions were provided to the Court and went into evidence (contained in the FSCB). In all but one instance, the parties were agreed on the text of the transcripts. The one exception related to the transcript of a telephone conversation that took place at 9.23 pm on 6 August 2015 (FSCB tab 19). The parties could not agree on the word or words at p 7, line 7 of the transcript, and I was invited to listen to the audio recording (which was also in evidence) and form my own view. I refer to this further below.

32 The parties agreed a process whereby, for all of the Section 19 Transcripts and for four of the Telephone Transcripts (FSCB tabs 20, 22, 23 and 24), the parties identified the particular passages upon which they relied – green highlighting was used for the passages relied on by ASIC and a blue box was used for the passages relied on by ANZ. The balance of each such transcript was the subject of a "limited use" ruling to the effect that its use was limited to providing comprehension and context for the passages relied on by the parties. In relation to three of these Telephone Transcripts (FSCB tabs 22, 23 and 24), there were "limited use" rulings in relation to the passages relied on by ASIC. In relation to the balance the Telephone Transcripts (FSCB tabs 16, 17, 18, 19 and 21), no particular passages were identified by the parties, and the whole of the transcript went into evidence without a "limited use" ruling.

33 An important document in evidence is a copy of the notebook kept by Mr Needham in which he made notes of several of the key telephone conversations (or conference calls) (CB tab 355).

34 During the hearing, the parties provided the Court with a document headed "Aide Memoire – Date and Time of Communications" (FSCB tab 27) that set out (with one exception) the parties' agreed position on the date and time (in Australian Eastern Standard Time) that particular documents (such as emails) were sent.

35 Each party called one expert witness:

(a) ASIC called Mr Grahame Pratt; and

(b) ANZ called Mr John Holzwarth.

36 Mr Pratt held senior roles at ABN Amro / RBS Australia from 2001 to 2011. From 1996 to 2000, he held a senior position at AMP Investments. From 1992 to 1995, he held a senior position at SBC Warburg. Mr Pratt has worked in the stockbroking and funds management industries for 25 years. His roles and responsibilities have included advising private clients, sophisticated investors, institutional portfolio managers, research analysts and dealers, finance directors and company treasurers.

37 Mr Holzwarth is a partner of OSKR, LLC, a consulting firm specialising in economic and financial analysis in litigation proceedings. He has a BA in Economics cum laude from the University of Pennsylvania and an MBA from the Haas School of Business at the University of California at Berkeley. He is also a CFA® charterholder. During his career, he has developed expertise in financial and damages analysis. He has acted as an expert in several shareholder class actions in Australia.

38 The experts prepared a number of reports. They also prepared a joint report dated 7 March 2023 (the **Joint Expert Report**). They gave evidence concurrently during the hearing. I discuss their evidence later in these reasons.

Pleadings

39 The issues to be determined are identified in the parties' pleadings. The following is a summary of the pleadings.

FASOC

40 ASIC's latest pleading is its further amended statement of claim dated 4 June 2019 (**FASOC**). Paragraphs 3 and 4 relate to the Underwriting Agreement, which was entered into on the morning of 6 August 2015 (referred to as the "Placement Date" in the pleading). Paragraph 5 refers to ANZ securities being placed in a trading halt at about 8.38 am on 6 August 2015. Paragraph 6 states that, immediately prior to the trading halt, ANZ securities traded on the ASX at $32.58. Paragraph 7 refers to the media release issued by ANZ at about 8.44 am on 6 August 2015. Paragraph 8 pleads aspects of that media release. Paragraph 9 pleads that, at or about

that time, the Underwriters commenced the process of seeking and accepting applications in the book-build. These paragraphs are largely admitted.

41 In paragraph 10 of the FASOC, ASIC alleges that the Placement did not attract the level of interest from institutional investors that was anticipated by ANZ and/or the Underwriters. The particulars to this paragraph refer to a number of telephone conversations between participants in the Placement.

42 By paragraph 11, ASIC alleges that, during the course of 6 August 2015, there were communications between senior officers and employees of ANZ and representatives of the Underwriters to the effect that, because the level of demand from institutional investors was less than had been expected, there was a prospect of the Underwriters acquiring a significant portion of the shares that were the subject of the Placement (referred to as the "Placement Shares" in the pleading). The particulars to this paragraph refer to a number of telephone conversations between the participants in the Placement.

43 Paragraph 12 of the FASOC alleges that, shortly after 8.30 pm on 6 August 2015, ANZ accepted the Underwriters' proposed allocations of Placement Shares in the course of a teleconference. This paragraph is admitted.

44 Paragraph 12A of the FASOC alleges that the document "ANZ Book Allocations v6.xslx" (which is the document referred to in these reasons as the Draft Allocation List) recorded the value of allocated shares to be $1,745,030,819, and recorded that shares worth $754,969,181 were not allocated. This paragraph is admitted.

45 Paragraph 12B alleges that, by email sent at 2.26 am on 7 August 2015, Mr Rick Moscati and Mr John Needham of ANZ were provided with a copy of a revised allocation list, which showed that the value of the unallocated shares had increased to $790,871,681. (This document is referred to in these reasons as the Final Allocation List.) This paragraph is admitted.

46 By paragraph 14, ASIC alleges that the Underwriters allocated to themselves and, on about 13 August 2015, acquired approximately 31% of the Placement Shares, or a total of 24,653,710 ANZ shares with a value of $763,032,324.50.

47 Paragraph 16 of the FASOC alleges that, prior to issuing the media release at 7.30 am on 7 August 2015, ANZ held information that:

(a) shares with a value between approximately $754 million and $790 million were to be acquired by the Underwriters (referred to in the pleading as the "Underwriter Acquisition"); and/or

(b) a significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters.

48 Paragraph 17 alleges that the Underwriter Acquisition shares: amounted in number to about the equivalent volume of 3.77 to 3.95 days trading in ANZ shares on the ASX when compared with the Average Daily Trading Volume of ANZ over the preceding month; and amounted in value to about 0.85% to 0.89% of the issued share capital of ANZ.

49 Paragraphs 19-21 refer to the media release issued at about 7.30 am on 7 August 2015 (referred to in the pleading as the "Completion Announcement") and state that it did not disclose the Underwriter Acquisition or the fact that the Underwriters were to acquire a significant proportion of the Placement Shares. Paragraph 22 alleges that ANZ did not disclose the Underwriter Acquisition, or that the Underwriters were to acquire a significant proportion of the Placement Shares, to the ASX by other means at any stage.

50 Paragraph 23 of the FASOC is an important paragraph. It states:

> 23. The information described in paragraph 21 above:
>
> a. was not generally available to the market at the time (including to participants in the market for ANZ shares);
>
> b. if disclosed, was information that a reasonable person would expect to have a material effect upon the price of ANZ shares (and, therefore, was information falling within rule 3.1 of the Market Listing Rules for the purposes of s 674(2)(b) of the Act);
>
> c. was likely to influence investors in deciding whether to acquire and in deciding whether to dispose of ANZ shares for reasons including:
>
> (i) the size of the Underwriter Acquisition (whether it was described in quantum, percentage terms or generally as "significant"); and
>
> (ii) the expectation of both sophisticated and unsophisticated investors that the Underwriters would promptly dispose of the acquired Placement Shares and place downward pressure upon the ANZ share price;
>
> with the result *inter alia* that:

(iii) potential purchasers of ANZ shares would likely refrain from purchasing shares in anticipation that the disposal of the Underwriter Shares would present an opportunity to purchase at a lower price; and/or

(iv) sophisticated traders of ANZ shares would likely engage in trading activities such as shorting the shares in anticipation of being able to purchase them at a lower price.

51 In the course of opening submissions, an issue emerged between the parties as to the way in which the above paragraph was to be read. In summary, ASIC indicated that it relied on sub-paragraphs (i) and (ii) of paragraph 23(c) in the alternative (as well as cumulatively). ANZ submitted that it was not open to ASIC to rely on sub-paragraphs (i) and (ii) in the alternative, having regard to the text of the pleading and correspondence exchanged between the parties before the hearing. I considered it appropriate to rule on this issue so that the parties had clarity as to the issues in dispute. I ruled that it was open to ASIC to rely on sub-paragraphs (i) and (ii) in the alternative (as well as cumulatively), for reasons given during the hearing.

52 Paragraphs 24 to 26 of the FASOC relate to the resumption of trading in ANZ shares. It is alleged that: the halt upon trading in ANZ shares was lifted prior to the commencement of trading on 7 August 2015; on 7 August 2015, ANZ shares opened at $29.99 before hitting an intraday low of $29.80 and closing at $30.14; and more than $1.1 billion of ANZ shares were traded on 7 August 2015.

53 By paragraphs 27 and 28, ASIC alleges:

27. In the identified facts and circumstances, ANZ was required to notify the ASX of the Underwriter Acquisition and/or that the Underwriters were to acquire a significant proportion of the Placement Shares on the night of 6 August 2015 or, alternatively, prior to the recommencement of trading in ANZ shares on 7 August 2015.

28. ANZ failed to comply with its continuous disclosure obligations under s.674(2) of the Act by:

(a) failing to notify the ASX that, of the $2.5 billion of ANZ shares offered in the Placement, shares with a value between approximately $754 million and $790 million were to be acquired by its underwriters rather than placed with investors;

(b) alternatively, by failing to notify the ASX that a significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters.

I note that the information referred to in paragraph 28(a) above is referred to in these reasons as the Underwriter Acquisition Information, and the information in paragraph 28(b) is referred to in these reasons as the Significant Proportion Information.

54 By paragraph 29, ASIC pleads that the contravention arising from ANZ's failure as alleged in paragraph 28 above: materially prejudiced the interests of purchasers or disposers of ANZ shares, including those persons who participated in the retail shareholder share purchase plan announced by ANZ on 6 August 2015; was serious and attended by aggravating circumstances as alleged in paragraph 29. It is not necessary to detail these for present purposes.

Defence

55 By paragraph 9A of its defence dated 27 June 2022 (the **defence**), ANZ alleges that, in relation to the Placement:

(a) applications at the price of $30.95 per share were received from institutional investors, being eligible investors under cl 1(e) of the Underwriting Agreement, for more than the full amount of the Placement Shares;

(b) ANZ was informed by the Underwriters of the matters set out in (a) above;

(c) the Underwriters recommended to ANZ that notwithstanding that applications were received from institutional investors for more than the full amount of the Placement Shares, having regard to the composition of the applications, the Underwriters should take up a portion of the Placement Shares by scaling-back the allocations to certain eligible investors below their applications;

(d) ANZ accepted the recommendation referred to in (c) above (the particulars refer to the conference call shortly after 8.30 pm on 6 August 2015);

(e) a substantial reason for the Underwriters recommending scaling-back the applications of certain investors was that investors such as hedge funds, if not scaled-back, might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares;

(f) ANZ was informed by the Underwriters of the matters set out in (e) above;

(g) prior to the commencement of trading in ANZ shares on 7 August 2015, the Underwriters had each indicated to ANZ their intention to promote an orderly after-market in ANZ shares and not to promptly dispose of any allocation of Placement Shares to them;

(h) each of the Underwriters was obliged by s 798H of the *Corporations Act* to comply with the *ASIC Market Integrity Rules (ASX Market) 2010* (**ASIC Market Integrity Rules**); and

(i) the total shares ultimately allocated to the Underwriters represented:

(i) only approximately 3.4 days trading in ANZ shares based on the average daily trading volume of shares traded in the previous three months;

(ii) only approximately 0.9% of the issued share capital in ANZ, and around 0.27% of the issued share capital for JPM and Deutsche and around 0.37% for Citi; and

(iii) for each Underwriter only about one day of trading volume.

56 In the balance of the defence, ANZ refers back to paragraph 9A in its response to several of ASIC's allegations.

57 In response to both paragraphs 21 and 22 of FASOC, ANZ admits that no disclosure was made at any material time in the terms alleged or of the specific information alleged, but says that disclosure of the information alleged without some or all of the context of the matters set out in paragraph 9A would have made any disclosure misleading or incomplete.

58 In response to paragraph 23 of the FASOC, ANZ pleads:

> 23. As to paragraph 23, it:
>
> (a) admits the allegation in sub-paragraph (a) that the information described in paragraph 21(a) of the FASOC was not generally available;
>
> (b) otherwise denies the allegations in sub-paragraph (a) and says further that the information described in paragraph 21(b) of the FASOC was generally available because it consists of deductions, conclusions or inferences made or drawn from:
>
> (i) readily observable matter; and/or
>
> (ii) information made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information, and where since that information was made known a reasonable period for it to be disseminated had elapsed;
>
> (c) denies the allegations in sub-paragraphs (b) and (c), and says further or alternatively that any assessment of whether the information in paragraph 21 of the FASOC:
>
> (i) was information that a reasonable person would expect to have a material effect on the price of ANZ shares; or
>
> (ii) was likely to influence investors in deciding whether to acquire and in deciding whether to dispose of ANZ shares,
>
> would need to have regard to the totality of relevant information or context, which includes some or all of the matters alleged in paragraph

9A above;

(d) denies that the "information" in paragraphs 16 and 21 of the FASOC was "information concerning it" within the meaning of ASX Listing Rule 3.1;

(e) otherwise denies the allegations in paragraph 23.

59 ANZ denies the allegations in paragraphs 27 and 28 of the FASOC (that is, the alleged breach of s 674(2) of the *Corporations Act*).

60 In relation to paragraph 29 of the FASOC, ANZ partially admits the factual allegations and otherwise denies the allegations.

Reply

61 By its reply dated 20 February 2023 (the **reply**), ASIC responds to aspects of paragraph 9A of the defence.

62 In response to paragraph 9A(a) of the defence, ASIC says that if, at some time in the course of the book-build, applications at a price of $30.95 per share were received from institutional investors for more than the full amount of the Placement Shares (which is not admitted), then some applications were amended by institutional investors at or prior to close of the book-build and in an amount sufficient (cumulatively) so that, at the close of the book-build, the applications then remaining were for *less than* the full amount of the Placement Shares. The particulars under this paragraph refer to amendments of applications by six specific investors. Those investors were:

(a) Segantii Capital Management Limited (**Segantii**);

(b) Soros Funds Management LLC (**Soros**);

(c) DE Shaw;

(d) Myriad Asset Management (**Myriad**);

(e) Indus Capital (**Indus**); and

(f) Brevan Howard Asset Management LLP (**Brevan Howard**).

63 The case was conducted on the basis that ASIC's case in this regard was confined to these investors.

64 In response to paragraph 9A(e), ASIC says that, if the Underwriters recommended the allocation of Placement Shares to investors such as certain hedge funds at a level lower than the demand for Placement Shares recorded in respect of those investors in the documents

entitled "ANZ Placement" or "ANZ Book Allocations VF" circulating between Underwriters and ANZ on 6 August 2015, they did so for the following substantial reasons:

(a) those hedge fund investors had either (i) *amended* their bids for Placement Shares with one or more of the Underwriters to that lower figure or amount; or (ii) *indicated* to one or more of the Underwriters that they *did not want* an allocation of Placement Shares higher than that lower figure or amount;

(b) having regard to (a), the Underwriters considered that those hedge fund investors' *real demand* was for Placement Shares at or around the lower figure or amount proposed by Underwriters to be allocated to them;

(c) having regard to (a), there was a risk that those hedge fund investors would not sign and return confirmation letters in respect of allocations higher than the lower figure or amount.

Factual findings

65 In these reasons: all references to dates and times are to Australian Eastern Standard Time unless otherwise indicated; all references to "$" are to Australian dollars unless otherwise indicated; I use the expressions "Underwriters" and "Joint Lead Managers" interchangeably, generally adopting the expression used in the relevant document or other evidence; and I use the expressions "conference call" and "telephone conversation" interchangeably, generally adopting "telephone conversation" where there is a typed transcript, consistently with the label on the transcripts. To assist the parties' consideration of these reasons, I have included some source references to documents.

Key individuals

66 It may be helpful to identify the key individuals relevant to the events described below. They are (including their positions at the time of these events):

(a) ANZ:

- Jill Craig, Group General Manager, Investor Relations
- Shayne Elliott, Chief Financial Officer
- Richard Moscati, Group Treasurer
- John Needham, Head of Capital and Secured Funding
- Mike Smith, Chief Executive Officer

(b) Citi:

- Jarrod Bakker, Head of Hedge Funds Sales
- Anthony Hanna, Associate, Capital Markets Origination
- Robert Jahrling, Head of Equity Capital Markets Syndication and Director
- Adam Lavis, Co-Head of Australian Equities
- John McLean, Head Of Capital Markets Origination
- Angus Richardson, Co-Head of Australian Equities
- Stephen Roberts, Chief Country Officer, Managing Director
- Itay Tuchman, Head of Markets

(c) Deutsche:

- Michael Ormaechea, Head of the Institutional Bank of CB&S
- Michael Richardson, Head of Equity Capital Markets
- Geoffrey Tarrant, Managing Director, Head of Financial Institutions Group

(d) JPM:

- Mark Dewar, Head of Equities Trading
- Harry Florin, Analyst, Equity Capital Markets
- Richard Galvin, Head of Equity Capital Markets
- Jeffrey Herbert-Smith, Managing Director, Head of Markets, Australia and New Zealand
- Richard Newton, Head of Australia New Zealand Syndicate
- Malcolm Price, Head of Sales
- Robert Priestley, Chief Executive Officer, JP Morgan, Australia and New Zealand ASEAN Region

Background events

67 On Tuesday, 4 August 2015, a meeting of the Board of Directors of ANZ took place. A copy of the minutes is in evidence. The topic, "Capital Raising Options" was discussed. The discussion included:

- APRA has set a 1 July 2016 [deadline] for implementation of the increased capital requirements for Australian residential mortgages; …

- Management believes a placement coupled with a share purchase plan (SPP) is likely to be a more cost effective capital raising method than a series of consecutive [underwritten] DRPs;
- a placement and SPP will require the release of a cleansing notice to the ASX and this option also carries with it an ongoing continuous disclosure obligation during the course of the SPP (ie. the usual carve-outs to the continuous disclosure obligation cannot be relied upon);
- it is believed the market conditions for a placement and SPP have improved recently and are favourable; …

68 It was resolved that:

A authority be delegated to the Chief Executive Officer and Chief Financial Officer (together, the **Delegates**) to take any action required under or in connection with the issuance of up to AUD3B of fully paid ordinary shares in the Company by way of an equity placement to institutional investors and a share purchase plan to eligible shareholders, including, without limitation, the determination of the timing of the offer and issue, the discount and price of the ordinary shares to be issued, any scaling of investors and any media releases and ASX announcements (the **Placement and SPP**).

B any two of the Chief Executive Officer, Chief Financial Officer, Group Treasurer, Chief Risk Officer and Group General Counsel under the Power of Attorney (General) dated 18 November 2002 are authorised to do all things necessary or desirable, in the opinion of the attorneys, under or in connection with the Placement and the SPP, including, without limitation:

(i) agreeing the terms of and executing the underwriting agreement and each other document (including media releases, announcements, notices, agreements and deeds) under or in connection with the Placement and the SPP on behalf of the Company;

(ii) approving any alteration, amendment or modification to any of the documents (including media releases, announcements, notices, agreements and deeds) prepared or entered into by the Company;

(iii) applying to ASX and NZX for a trading halt in respect of the ordinary shares in the Company (and securities of the Company and its subsidiaries that convert into ordinary shares) of up to 2 days with respect to the Placement and doing all things reasonably necessary to make application to ASX or NZX for the quotation of the new ordinary shares; and

(iv) approving the terms of the SPP and the form of the offer booklet to be sent to shareholders under the SPP,

and to do any other act or thing that they consider in their absolute discretion may be necessary or desirable in connection with the Placement and the SPP.

The Board expressly confirmed that the authority conferred on Management by the above resolutions would not be exercised unless Management is of the view at the relevant time that the decision to proceed with the placement and SPP is commercially preferable in the interests of ANZ having regard to cost, certainty of outcome, risk and the other factors discussed at the meeting.

69 On Wednesday, 5 August 2015, the closing price for ANZ shares was $32.58.

The Underwriting Agreement

70 On the morning of Thursday, 6 August 2015, the Underwriters and ANZ entered into the Underwriting Agreement, which took the form of a letter from the Underwriters to ANZ, signed by each of the Underwriters, and accepted and agreed to by ANZ.

71 The Underwriting Agreement comprises 23 clauses and annexures A and B.

72 Clause 1(a) provided that the Underwriters would use their best endeavours to place the Placement Shares (defined as new fully paid ordinary shares in the capital of ANZ) with investors between 8.30 am and 6.00 pm on 6 August 2015 (referred to as the "Bookbuild Date"), with settlement of the Placement Shares expected to occur on 12 August 2015 (defined as the "Settlement Date").

73 Clause 1(b) provided that the issue price of the Placement Shares would be determined by the Underwriters, and agreed with ANZ (referred to as the "Issuer") via a book-build process and would be no less than $30.95 per Placement Share (referred to as the "Underwritten Floor"). I note that the underwritten floor of $30.95 price represents a discount of 5% to the closing price on 5 August 2015 ($32.58).

74 Clauses 1(c) and (d) stated:

> (c) The Underwriters will conduct a bookbuild during the period commencing at the Bookbuild Opening Time (as defined in the Timetable) and ending at the Bookbuild Closing Time (as defined in the Timetable), to determine demand for Placement Shares from Applicants (as defined below) at various prices above the Underwritten Floor (the "**Bookbuild**"). For the avoidance of doubt, the Underwriters and their respective Affiliates may bid into the Bookbuild. In this Underwriting Agreement, "**Affiliate**" of any person means any other person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such person; "**control**" (including the terms "**controlled by**" and "**under common control with**") means the possession, direct or indirect, of the power to direct or cause the direction of the management, policies or activities of a person, whether through the ownership of securities by contract or agency or otherwise and the term "**person**" is deemed to include a partnership.
>
> (d) The number of Placement Shares to be allocated to each Applicant who lodges a bid in the Bookbuild will be determined by agreement between the Issuer and the Underwriters (each acting reasonably), after conclusion of the Bookbuild and advised to investors prior to the Settlement Date in accordance with the Timetable.

75 The timetable was set out in clause 1(h), which was as follows:

> (h) The Issuer must conduct the Placement in accordance with the timetable set out below (the "**Timetable**"), the constitution of the Issuer ("**Constitution**"), the Corporations Act, the Listing Rules of ASX Limited ("**ASX**["]) ("**ASX Listing Rules**"), other laws and regulations, and any other legally binding requirement of any governmental, semi-governmental or judicial entity or authority, including a stock exchange or a self-regulatory organisation established under statute ("**Governmental Authority**").

Event	Date
Issuer requests that ASX impose a trading halt in respect of the Shares, the ANZ Capital Notes 1, 2 and 3 and the ANZ Convertible Preference Shares 2 and 3 ("**ANZ Capital Securities**") quoted on the Australian Securities Exchange	Before 9am on the Bookbuild Date
Issuer requests that NZX Limited ("**NZX**") impose a trading halt in respect of the Shares and the ANZ NZ Capital Notes ("**NZ Capital Security**") quoted on New Zealand Stock Market ("**NZSX**")	Before 7am on the Bookbuild Date
Bookbuild Opening Time	8:30am on the Bookbuild Date
Bookbuild Closing Time	6:00pm on the Bookbuild Date
Distribution of placement allocation and confirmation letters to placees	12:00pm on 7 August 2015
Issuer announces Placement details, provides ASX the information required by the ASX Listing Rules, applies for quotation of Placement Shares and requests end of the trading halt	By 9.30am on 7 August 2015
Settlement Date	12 August 2015
Delivery of Certificate (as defined below)	Before 9.00am on the Settlement Date
Allotment Date	13 August 2015
Issuer gives ASX the information required by the ASX Listing Rules and immediately gives a notice to ASX in accordance with sub-sections 708A(5)(e) and (6) of the Corporations Act	Before 9.30am on the Allotment Date
Quotation of Placement Shares commences	Allotment Date

> The Timetable may be amended by agreement between the Issuer and the Underwriters (each acting reasonably) and to the extent required (if any) if ASX and NZSX provide their prior written consent.

76 Clause 2 set out conditions precedent.

77 Clause 3 dealt with settlement of Placement Shares and payment. Clause 3(c) referred to the situation where the aggregate number of Accepted Placement Shares (a defined expression) was less than the total number of Placement Shares offered. In such a case, the number of Placement Shares equal to the difference in those numbers was referred to as the "Shortfall

Securities". Clause 3(c) provided that the Underwriters would notify ANZ of the number of Shortfall Securities by 4.30 pm on the business day before the Settlement Date.

78 Clause 3(e) provided:

> (e) No later than 3.00pm on the Settlement Date, each Underwriter must:
>
> (i) subscribe, or procure subscriptions for, its Relevant Proportion (as defined below) of the Shortfall Securities; and
>
> (ii) pay to the Issuer in cleared funds an amount equal to its Relevant Proportion of the Issue Price multiplied by the number of Placement Shares,
>
> unless that Underwriter has terminated this Underwriting Agreement in accordance with its terms in which case the Allocation Interests shall be cancelled (unless one or more of the other Underwriters has assumed the obligations of the terminating Underwriter in accordance with clause 9.3). In this Underwriting Agreement, the "**Relevant Proportion**" of each Underwriter is:
>
> (i) 40%% for Citi;
>
> (ii) 30%% for JPM; and
>
> (iii) 30%% for Deutsche.

79 Clause 7 dealt with announcements and provided as follows:

> The Issuer and the Underwriters agree that neither they nor any of their related bodies corporate will make any release, statement or announcement or engage in publicity in relation to the Placement or take any action in relation to the Placement which would result in disclosure being required under any law or the ASX Listing Rules without the prior approval of the other party, which approval must not be unreasonably withheld, unless such release or announcement repeats or is an extract from a public statement or announcement which has previously been approved by the other parties, is required by law or the ASX Listing Rules and provided that in any case where such a release or announcement is required by law or the ASX Listing Rules:
>
> (a) the party will use its reasonable endeavours to consult with the other party prior to making any such release or announcement; and
>
> (b) the release or announcement, as the case may be, will comply with all applicable laws and the representations, warranties and undertakings of such party in this Underwriting Agreement.
>
> Notwithstanding the foregoing, the Issuer will comply with its warranties in clauses 5.1(r) and 5.1(s) and each Underwriter will comply with its warranties in clauses 5.2(g) and 5.2(h) in respect of any public statement or announcement in relation to the Placement.

80 Clause 13 dealt with the relationship of the Underwriters. Clauses 13(a) and (b) provided:

> (a) Unless otherwise expressly provided for in this Underwriting Agreement, all obligations and liabilities of the Underwriters under this Underwriting Agreement are several and not joint or joint and several.

(b) Each Underwriter holds and may exercise its rights, powers and benefits under this Underwriting Agreement individually. Where the consent or approval of the Underwriters is required under this Underwriting Agreement, that consent or approval must be obtained from each of the Underwriters.

81 Annexure B to the Underwriting Agreement comprised a form of Confirmation Letter, which was to be sent to investors who had been allocated shares in the Placement. The Confirmation Letter confirmed the investor's agreement to acquire its allocation upon the terms of the letter and the Master ECM Terms dated 5 March 2015 (a copy of which is in evidence in this proceeding). The form of Confirmation Letter had a place for the price of the ANZ shares to be inserted, and a place for the following details of the investor's allocation to be inserted: the price per share; the number of securities; and the total amount. Appendix 1 to the Confirmation Letter was a timetable. Appendix 2 to the Confirmation Letter was a form of confirmation of allocation. This form was to be signed by the investor and returned to the Underwriters to confirm the investor's agreement to acquire the shares and pay the price for the allocation on the terms of the Confirmation Letter and the Master ECM Terms. Appendix 3 to the Confirmation Letter was a Confirmation of Allocation and Registration Details (or CARD) form, also to be completed by the investor and returned to the Underwriters.

The trading halt and announcement of the Placement

82 At 8.38 am on 6 August 2015, at the request of ANZ, the ASX announced a trading halt of ANZ's shares and certain other securities. The evidence includes a letter from ANZ's Company Secretary to the ASX dated 6 August 2015 requesting an immediate trading halt with respect to its ordinary shares, certain ANZ capital notes and certain ANZ convertible preference shares. The letter referred to ASX Listing Rule 17.1 and advised that:

- ANZ is seeking the trading halt pending the making of an announcement by ANZ to the market in relation to an ordinary share placement process involving institutional and sophisticated investors. The placement will commence today and is being conducted for the purpose of raising capital for general corporate purposes;
- ANZ wishes the trading halt to last until such time as it makes an announcement to the market concerning the outcome of the placement but, in any event, the trading halt will not last beyond the commencement of trading on Monday, 10 August 2015; and
- ANZ is not aware of any reason why the trading halt should not be granted.

83 At 8.44 am on 6 August 2015, ANZ issued a media release in relation to the Placement. This stated:

ANZ announces Institutional Placement (fully underwritten) and Share Purchase Plan to raise a total of $3 billion

ANZ today announced a fully underwritten institutional share placement to raise $2.5 billion. The Placement will be followed by an offer to ANZ's eligible Australian and New Zealand shareholders who will have the opportunity to participate in a Share Purchase Plan (SPP) to raise around $500 million. The SPP is not underwritten.

The Institutional Placement and SPP will allow ANZ to more quickly and efficiently accommodate additional capital requirements recently announced by the Australian Prudential Regulation Authority (APRA), in particular the increase in average credit risk weights for major bank Australian mortgage portfolios to 25% taking effect from 1 July 2016.

Details of the Institutional Placement include:

- The Placement size is fixed at $2.5 billion and will not be increased.
- The final issue price will be determined through an accelerated book-build to be completed today in a price range up from $30.95 (underwritten floor price).
- The Placement has been fully underwritten by Citigroup Global Markets Australia Pty Limited, Deutsche Bank AG, Sydney Branch and J.P. Morgan Australia Limited.

ANZ's shares have been placed in a trading halt with trading expected to resume at 10.00am on 7 August 2015.

ANZ Chief Financial Officer Shayne Elliott said "ANZ is currently well capitalised with a range of options available to increase capital in response to future regulatory changes.

"Recent announcements by APRA have provided greater certainty around the timing and quantum of capital changes, particularly in relation to Australian mortgages. Given current market conditions, APRA's compressed implementation timetable for the mortgage risk weight changes and the amount of capital to be raised, we believe a Placement on these terms provides more certainty for shareholders than other methods available such as consecutive underwritten Dividend Reinvestment Plans.

"This capital raising will supplement our organic capital generation since June 2015 and allow ANZ to achieve a Common Equity Tier One (CET1) Capital Ratio above 9% following the introduction of APRA's revised risk weightings next year. We expect that this will position our CET1 Capital Ratio in the top quartile of international banks on an internationally harmonised basis," Mr Elliott said.

On a 30 June 2015 pro-forma basis, the placement would add approximately 65 basis points (bps) to ANZ's CET1 Capital Ratio increasing it to 9.2%. If $500 million is raised under the SPP, on the same pro-forma basis this would add a further 13 bps increasing the CET1 Capital Ratio to 9.3%.

FINANCIAL PERFORMANCE FOR PERIOD NINE MONTHS TO 30 JUNE FY15

ANZ will release a scheduled Trading Update on 18 August. Ahead of that and to accompany today's capital raising announcement ANZ advises the following financial

results on an unaudited basis:

- For the nine month period to 30 June 2015, Cash Profit was $5.4 billion, an increase of 4.3% on the same period in 2014 ($5.18 billion). Profit before Provisions over the same period grew 5.1% (+3.4% on a constant Foreign Exchange (FX) basis).
- On a constant FX basis for the nine month period to 30 June 2015, revenue expense jaws were broadly neutral. Revenue for the three months to 30 June 2015 grew at a slightly faster rate than in the first half, while expense growth for the three month period slowed.
- The total provision charge for the nine month period to 30 June 2015 was 13% higher at $877 million. While the Individual Provision charge reduced 12.5%, the Collective Provision charge increased due to balance sheet growth coupled with some risk grade migration related to the resources and agriculture sectors. For the Full Year 2015, while loss rates are expected to remain well under the long term average, ANZ estimates that the total loss rate will be around 21 bps equating to a total provision charge of circa $1.2 billion given increased collective provisioning.
- Customer Deposits for the nine month period to 30 June 2015 grew 9.5% (+5% FX adjusted) with net loans and advances increasing 7.7% (+5.4% FX adjusted).
- During the third quarter (period 1 April to 30 June 2015) the Group Net Interest margin remained broadly stable assisted somewhat by slower growth in lower margin liquid asset holdings.
- The CET1 Capital Ratio was 8.6% at 30 June 2015.

SHARE PURCHASE PLAN

The SPP will provide eligible holders of ANZ ordinary shares at 7.00pm (AEST) on 5th August 2015 with the opportunity to subscribe for up to $15,000 worth of ANZ ordinary shares without incurring brokerage or other transaction costs. An SPP Offer Booklet containing further details of the SPP offer will be sent to all eligible shareholders.

It is expected that the offer price per share under the SPP will be the lesser of:

- the offer price under the Placement; and
- the volume weighted average price of fully paid ordinary ANZ shares traded on the ASX over the five trading days up to, and including, the last day of the SPP offer less a 2% discount.

ANZ reserves the right to accept oversubscriptions and may also scale back applications under the SPP. The SPP is not underwritten.

	Quarterly results					9 month results	
	3Q14	4Q14	1Q15	2Q15	3Q15	Period to 30 June 2014	Period to 30 June 2015
Unaudited Cash Profit	$1.67 b	$1.93 b	$1.79b	$1.89b	$1.73b	$5.18b	$5.40b
Unaudited Statutory Profit	$1.65 b	$2.23 b	$1.65b	$1.86b	$2.07b	$5.04b	$5.58b
Provision Charge	$246m	$215m	$232m	$278m	$366m	$775m	$877m

(Footnotes omitted.)

The book-build (Thursday, 6 August 2015)

84 The book-build commenced soon after ANZ's media release of 8.44 am on 6 August 2015. The evidence includes an example of an email sent by one of the Joint Lead Managers (Citi) to an institutional investor (at 9.02 am on 6 August 2015) (CB tab 162). The subject line stated "NEW CITI DEAL – ANZ – A$2,500 million Primary Placement – BOOKS OPEN". The email commenced with a detailed paragraph regarding the scope of distribution of the communication. It then stated:

> ***By accepting this document, each recipient agrees to be bound by the terms of the Acknowledgements, Important Notice and Disclaimer at the end of this communication.***
>
> **Australia and New Zealand Banking Group Limited ("ANZ")**
>
> **PLACEMENT OF NEW FULLY PAID ORDINARY SECURITIES**
>
> Joint Lead Managers, Bookrunners and Underwriters: Citigroup Global Markets Australia Pty Limited ("**Citi**") Deutsche Bank AG, Sydney Branch ("**Deutsche Bank**") J.P. Morgan Australia Limited ("**J.P. Morgan**")
>
Issuer:	Australia and New Zealand Banking Group Limited ("ANZ")
Ticker:	ANZ.AU (listed on ASX and NZX)
Securities Offered:	New fully paid ordinary securities ("**New Securities**")
Offering Structure:	Fully underwritten institutional placement of New Securities ("**Institutional Placement**"). In addition, ANZ will undertake a Security Purchase Plan ("**SPP**") to provide eligible securityholders in Australia and New Zealand with the opportunity to participate in subscribing for up to a maximum of $15,000 of additional New Securities (subject to compliance with applicable regulatory requirements). The SPP will not be underwritten.
Ranking:	New Securities will rank equally with existing securities on issue
Offering Size ($):	A$2,500 million Institutional Placement. The Offering Size is fixed and will not be increased
Offering Size (Securities):	80.8 million New Securities for the Institutional Placement (2.9% of issued capital) at the underwritten floor price of A$30.95
Bids Accepted:	In 10c increments from the underwritten floor price of A$30.95 up to market
Discount (at the underwritten floor):	5.0% discount to last close of A$32.58 (5-Aug-2015) 5.1% discount to 5-day VWAP of A$32.63 (5-Aug-2015)

Institutional Offering:	* **The New Securities to be offered and sold in the Institutional Placement may only be offered and sold as follows:** * **Australia**: The Securities may be offered to "sophisticated" and "professional" investors as those terms are defined in section 708 of the Corporations Act 2001(Cth) * **Rest of World**: The Securities may be offered outside the United States to whom an offer can be lawfully made and in "offshore transactions" in compliance with Regulation S under the Securities Act * **United States**: solely to (i) QIBs, pursuant to Rule 144A under the Securities Act, or (ii) Eligible U.S. Fund Managers, in reliance on Regulation S under the Securities Act.
Use of Proceeds:	Proceeds will be used to supplement organic capital generation since June 2015 and allow ANZ to achieve a Common Equity Tier One (CET1) capital ratio above 9% following the introduction of APRA's revised risk weightings next year
Issuer's Information Materials:	An ASX announcement regarding the Institutional Placement and SPP dated 6-Aug-2015 has been filed by the Issuer with the ASX. A cleansing notice which will be issued on or about the Allotment Date.

Timetable*:

Launch:	Before market open, Thursday, 6-Aug-2015
Book Opens:	On launch
Book Closes (Australia, NZ)	3.00pm, Thursday, 6-Aug-2015
Book Closes (International):	6.00pm, Thursday, 6-Aug-2015
Allocations Advised:	Before market open, Friday, 7-Aug-2015
Trade Date (T):	Friday, 7-Aug-2015
ANZ recommences trading on ASX:	Friday, 7-Aug-2015
Settlement of New Securities (T+3):	Wednesday, 12-Aug-2015
ASX quotation of New Securities (T+4):	Thursday, 13-Aug-2015

**This timetable is indicative only and is subject to change without notice. All references to time are to Sydney, Australia time.*

85 The email contained a section headed "Acknowledgements, Important notice and disclaimer" that included:

> By bidding into the bookbuild, you confirm, and will be deemed to have represented, warranted, acknowledged and agreed upon submitting your bid (whether in writing or verbally) and, upon acquiring any New Securities, for the benefit of the Joint Lead Managers that:
>
> …
>
> (d) you are aware that your bid into the bookbuild is a binding and irrevocable offer to acquire the number of New Securities nominated by you (subject to final allocations in the discretion of the Joint Lead Managers) and is otherwise subject to the terms of the confirmation letter ("Confirmation") that will be provided to you by the Joint Lead Managers;
>
> …
>
> (g) you are aware that the Master ECM Terms dated 5 March 2015 (available from the AFMA website) and which may be applied by, incorporated by reference into or amended or supplemented in the Confirmation which will be provided to you separately by the Joint Lead Managers govern your bid and your agreement to acquire the New Securities;

86 During his Section 19 Examination (in a passage relied on by ANZ), Mr Jahrling gave evidence about the book-build process. He said that in the vast majority of cases the processing would occur via the sales trader; once the sales trader receives a bid, they would enter it into a system referred to as TicketManager or Dealogic (being the same system, with different names); the information that would get logged was the name of the client, the name of the sales trader who entered the bid, the order size (in terms of dollar amount), any particular price sensitivity as it relates to the share price, and a contact for the investor. Mr Jahrling said that other people had access to the system, but in most instances the sales traders have responsibility for entering bids. He said it was possible that the sales traders may not have personally received the client bid, but they would act on instructions from someone else to enter the bid. I accept this evidence.

87 In oral evidence-in-chief, Mr Jahrling gave evidence about a reconciliation process took place between the Joint Lead Managers. He gave evidence that Dealogic is the system by which orders are entered into the book by each bank (that is, each of the Joint Lead Managers); those systems are not linked, but they are ultimately linked in that each bank sends their book to the other two "bookrunners"; in this way, all orders are captured, and all the banks have exactly the same information to enable the reconciliation process to take place. During cross-examination, Mr Jahrling gave evidence that if there was a discrepancy as to what an investor

had bid, he would expect this to be recognised and addressed as part of the reconciliation process. I accept this evidence.

88 At 12.03 pm on 6 August 2015, Anthony Hanna (Citi) sent an email to Richard Moscati (ANZ) and John Needham (ANZ) attaching the "first bookbuild update" (CB tabs 151, 152). The email was copied to John McLean (Citi), Robert Jahrling (Citi), Michael Richardson (Deutsche), Richard Galvin (JPM) and Richard Newton (JPM). The spreadsheet attached to the email showed the level of demand at various prices (for ANZ shares), ranging from $30.95 per share (in the first column) to $32.25 per share (in the last column). In relation to the $30.95 price, the coverage was 46%. In relation to higher prices, the percentage coverage was lower.

89 Shortly after that email was sent, a conference call took place between the Underwriters and ANZ. It may be inferred from the calendar invitation for the call that Mr Moscati and Mr Needham of ANZ participated in the call. Mr Needham gave evidence in his affidavit (which I accept) that his general recollection is that during a call around this time the first book-build update was discussed, and that the discussion centred around which investors had already bid into the book, as well as which investors ANZ expected to bid into the book throughout the course of the day.

90 At 12.23 pm on 6 August 2015, Richard Moscati (ANZ) sent an email to Shayne Elliott (ANZ) and Jill Craig (ANZ) attaching the 12.03 pm spreadsheet. Mr Moscati's email stated: "slow start, real money yet to show their hand".

91 At 2.34 pm on 6 August 2015, Anthony Hanna (Citi) sent an email to Richard Moscati (ANZ) and John Needham (ANZ) attaching a "second bookbuild update" (CB tabs 182, 183). This email was copied to John McLean (Citi), Robert Jahrling (Citi), Michael Richardson (Deutsche), Richard Galvin (JPM), Richard Newton (JPM), Harry Florin (JPM) and Jessica Lin (Deutsche). The spreadsheet attached to this email was in the same format as the spreadsheet attached to the 12.03 pm email. For the price $30.95, this spreadsheet showed coverage of 81%.

92 Shortly after 2.34 pm, a conference call took place between the Underwriters and ANZ. It may be inferred from the calendar invitation that Mr Moscati and Mr Needham of ANZ participated in this call. Mr Needham gave evidence in his affidavit that it is possible that the notes on the page ending .0008 of his notebook relate to a call around this time. In any event, they relate to a call on the afternoon of 6 August 2015. The notes are as follows:

– Long only funds not there
– Demand
– Rewards for
– Retail
  – ANZ Private
  – Affiliates of JLMs
  – Morgans
  – BT Private
  – Shaws

– Trading result – be down ~2%

– US
  – Couple of big a/cs Hedge
  –
  – Wellington … Asian

93 In relation to the notes in his notebook generally, Mr Needham gave evidence in his affidavit (which I accept) that he took these notes during various calls and discussions; the notes generally record his impressions or general messages from those discussions rather than necessarily recording verbatim quotes of what was said. Mr Needham gave evidence during cross-examination (which I accept) that: he made the notes at the time of the calls; where he placed a person's name or initials next to a particular text, he was attributing the content of the information to that person and the note reflected the substance of what they said; where he did not record a particular name or initials, the note reflects that someone said something to that effect. Mr Needham accepted that his contemporaneous notes were the best source of information he could provide as to what was said during the calls.

94 In relation to the notes set out at [92] above and specifically the reference to "Long only funds not there", Mr Needham accepted during cross-examination that this reflected something that one of the Underwriters said during the call. Mr Needham also accepted that what he meant by "long only funds" in his note was investors who buy shares on the expectation of the share performing, and typically hold the shares for an extended period of time. Mr Needham gave evidence during cross-examination (which I accept) that the spreadsheet did contain some long-only funds, but the statement that long-only funds were not there was a general statement meaning a large number of them were not there. He accepted that there were far fewer than he had anticipated or expected. He accepted that, at this point in time, this was negative news.

95 Later during the afternoon of 6 August 2015, before the book-build closed at 6.00 pm, a further call took place between the Underwriters and ANZ. The ANZ representatives on the call were

Shayne Elliott, Richard Moscati and John Needham. Mr Needham took notes of the call in his notebook (being the notes on the page ending .0009). His notes are as follows:

– Fix at bottom of floor
– Indicate price at lower end?

– Not going
– Revised down 3 – 3.5%
– Perp + UniSuper. BT. Not in.
→ 5% too far

1. $29.75 — $30
2. Banks own it.

– Books close to 100%
– Allocate $1.5 - $1.8 bn

– 92% Coverage

– Provisions spooked 3-4%

96 In relation to the note "Not going", Mr Needham accepted during cross-examination that this was an incomplete note of a negative statement made by one of the Underwriter representatives. He accepted that it had the character of either "not going well" or "not really going" in the sense of not moving.

97 In relation to the reference to "Perp", UniSuper and BT in the notes set out above, Mr Needham gave evidence during cross-examination (which I accept) that this referred to Perpetual, UniSuper and BT, which were very significant shareholders in ANZ. Mr Needham accepted that these were shareholders who, at the start of the day, he had hoped would participate, and hopefully strongly, in the Placement.

98 In relation to the lines beginning with "1" and "2" in the notes set out above, Mr Needham accepted during cross-examination that they were noted in this way because they were two options or two alternatives. He accepted that they were discussed with the Underwriter representatives on the call. He accepted that the first option referred to the prospect of *repricing* the Placement. In response to questions during cross-examination, Mr Needham said that he did not recall discussing how, practically, they would do this. He accepted that repricing the Placement would be very significant and that it would be negative news. In relation to the second option ("Banks own it"), Mr Needham accepted during cross-examination that the notion of what they would own related to the text a couple of lines further down, where he had written "Allocate $1.5 - $1.8bn"; the notion was that the banks (i.e. the Underwriters) would

own *the balance*. Mr Needham accepted that, during this call, the second option presented to ANZ was for the banks to take between $700 million and $1 billion of shares.

99 Mr Needham gave evidence in his affidavit, which I accept, that: his recollection is that around this time (and potentially on this call) the Joint Lead Managers informed ANZ that the book was close to being fully covered; he also generally recalls that it was around this time that the Joint Lead Managers were recommending that, notwithstanding that the book was close to being fully covered, they would recommend only allocating shares to the value of $1.5 to $1.8 billion to those who had bid into the book.

100 Mr Needham also gave evidence in his affidavit that the Joint Lead Managers said that they made this recommendation because of the number and size of the hedge fund bids in the book, and because there was a risk that over-allocating to hedge funds could cause an unorderly after-market in ANZ shares following the Placement because of the risk of many of those hedge funds being short-term holders of the shares. I discuss later in these reasons whether I am satisfied that the Joint Lead Managers made statements to this effect.

101 Mr Needham gave evidence in his affidavit, which I accept, that: his understanding was that it was preferable for them to hold stock rather than over-allocating to hedge funds; this was because the Joint Lead Managers were large, well-capitalised financial institutions who were paid to take on risk under the Underwriting Agreement, and who had the ability to manage that risk such that they did not need to promptly dispose of any stock allocated to them or to dispose of it in a way that could affect the share price.

102 Subsequently during the afternoon of 6 August 2015, before the book-build closed at 6.00 pm, there was another call between the Underwriters and ANZ. Mr Needham participated and took notes in his notebook (being the notes at the top quarter of the page ending .0010). His notes are as follows:

> 95% – 99%
>
> - Fid not in. Still here
> - Blackrock may come small

103 During cross-examination, Mr Needham accepted that the reference to "Fid" was to the shareholder Fidelity Worldwide Investment, which was a very significant shareholder in ANZ. In relation to the note "Blackrock may come small", Mr Needham accepted during cross-examination that this was a reference, compendiously, to the various Blackrock entities who

were the most significant shareholder in ANZ in August 2015. Mr Needham accepted during cross-examination that these notes reflected news from the Underwriters that, for both of those names, there had been no bid yet, but there was a prospect that there may still be.

104 At 4.47 pm on 6 August 2015, Jill Craig sent an email to Richard Moscati and others at ANZ (copied to John Needham and others at ANZ) relating to a draft announcement to be made after completion of the Placement. Ms Craig's email stated:

> Given the current progress on the placement I've amended this and we can discuss. I think the more it is purely housekeeping the better
>
> Can discuss further after your next call with the Under Writers

105 The draft announcement attached to the email was marked up to show changes to a previous draft that had been circulated. The attached draft (including the marked-up changes) was as follows:

> **ANZ ~~successfully~~ completes ~~$[#]~~ $[3] billion institutional equity placement**
>
> ANZ today announced it had ~~successfully~~ raised ~~$[#]~~ $[3] billion in new equity capital through the placement of [#] million ANZ ordinary shares at the price of $[#] per share. ~~The placement was significantly oversubscribed, attracting support from a wide range of institutional investors and consequently a scale back of bids was required.~~
>
> Settlement is scheduled to take place on [#] 2015, with issue of the placement shares to occur on [#] 2015. The placement shares are scheduled to commence trading on ASX on [#] 2015. The new shares will rank equally with existing shares.
>
> The trading halt that was implemented this morning is expected to be lifted at market open tomorrow morning.
>
> As previously announced, ANZ also intends to offer retail shareholders the opportunity to purchase ordinary shares via a share purchase plan (SPP). The SPP will provide eligible ordinary shareholders with the opportunity, without incurring brokerage or other transaction costs, to subscribe for up to $15,000 worth of ANZ ordinary shares (subject to obtaining necessary relief from ASX). However, ANZ reserves the right to scale back applications under the SPP if total demand exceeds $[#] million. The SPP is open to eligible ordinary shareholders who were registered as holders of fully paid ordinary ANZ shares at 7.00pm (Melbourne time) on [#] 2015. Further details of the SPP will be provided to eligible shareholders in due course.

106 At 5.17 pm on 6 August 2016, a telephone conversation took place between Itay Tuchman (Citi) and Robert Jahrling (Citi). Mr Jahrling was in the United States at the time. A transcript of the conversation is in evidence (FSCB tab 16) (and not subject to any limited use ruling). Apart from some brief remarks at the beginning and end of the conversation, the conversation was as follows:

> MR JAHRLING: Hey, um, look, I'm going to have to jump on a flight to Boston, right, at 6 o'clock here, um, 6am. And, um, and so

I'm not going to be in this allocation room, right?

MR TUCHMAN: Okay.

MR JAHRLING: And I know obviously we're going to struggle to get this deal over the line, right? I mean, not over the line, but by the time you have to scale and all the rest of it, it's going to be a bit borderline, right? And we're probably going to own some, right, the way it looks at the moment. **Can I ask that we please don't blow up all the hedge funds?** Like, um, you know, we don't show them any cornerstones and any of our deals. Um, you know, I just don't want to land in Boston and 10 years of work has just been blown to pieces, right? I'm really worried about this, to be honest. So, you know, of course, I'm mindful of our own risk management, but, **you know, these guys, they cannot take the numbers that are in that book, right? They're not even going to be close to be able to take those numbers.** And I'm really worried that if we just shove it down their throat, the implication it's going to have for us, right?

MR TUCHMAN: Well, I mean, this is what I will say, Rob, because you're in a rock and hard place, because if we take a multi-hundred dollar position and we lose 15 or $20 million on this endeavour, right, you're going to blow up exactly what you're going to blow up but worse. So –

MR JAHRLING: I don't know, I don't know.

MR TUCHMAN: Right. So we're not making a choice between not blowing up some clients and – and – and you know, rainbows and – and – and sunshine, right? So the reason – you know, this is, this is my view, right? You guys put it in the book, right? I'm sensitive to what you have to say. Some of these guys are partners; some of these guys are not partners.

MR JAHRLING: Yeah.

MR TUCHMAN: But we've got to be smart and balance everything, but --

MR JAHRLING: Yeah.

MR TUCHMAN: -- you know, **that's why they put big numbers, because they – because they think they're going to get scaled** and they want their 50 million, right? And sometimes they get their 50 million; sometimes they get 80 or 90 million, right? Like, that's, that's the bit that we have to balance, right? We have to get the right number. And we're trying hard, I think, to get a few more people on to the book at the last second to try to minimise any of that, right?

MR JAHRLING: Yeah, no, mate. Don't worry, I've still got six guys to follow up, right? So I'm hustling away more than anyone, right. I get that, right? I'm, I'm not sitting here twiddling my thumbs, right, at 3 in the morning, so.

MR TUCHMAN: Yeah. Plus, plus we got these Deutsche and JP guys who, whatever we got, they got, and they're going to try to jam

it as, as hard as they can, too, right.

MR JAHRLING: Yeah, no, look, I understand. Right? It's just, you know, like, tomorrow morning we wake up and we, you know, Syndicate (indistinct) and who does it go to? The same people who have shown us the back end of their backside today, right? And the guys that are taking it for us on every deal are the guys that, you know, then the swing factor the other way, right?

MR TUCHMAN: Absolutely.

MR JAHRLING: Up to the absolute hilt, right. So --

MR TUCHMAN: Absolutely.

MR JAHRLING: -- you know, that's – that's just not a great partnership, right? I mean, look, I get it, right. That's the game, but, you know, it's just got to be – I don't know. Let's just be however balanced we can be, right, because it's always like, "Oh, well, they're hedge funds, let's fuck 'em," right. It just, just sits very – it's just a very delicate balance, right.

MR TUCHMAN: I – I - listen, I agree, Rob. I'm not trying to say it isn't. But, but, you know, these are not inexperienced market players, right? They, they, they understand the game they play, and hopefully the ones that are partners are going – I don't think – listen, it's a liquid stock, right. So the thing's not going to drop (indistinct) tomorrow.

(Emphasis added.)

107 During his Section 19 Examination (in a passage relied on by ANZ), Mr Jahrling was asked what he meant by his question "Can I ask that we please don't blow up all the hedge funds?" in the above transcript. He said that he drew a distinction between the allocable amount (i.e. the legally binding offer) and what you could allocate (being the amount that hedge funds and other were accustomed to receiving). He gave the following evidence, with reference to the above transcript:

> So, therefore, in my opinion, what I reference here is that if the book were to close in half an hour, as was originally contemplated, and the state of the book, in order for Citigroup and the other JLMs to not ultimately own any shares and without seeing the state of the book but, as I referenced earlier, must have been somewhere near covered or just covered, would have required an allocation percentage – and again I draw the distinction between dollars and percentage – and would have required or would have most likely required an allocation percentage much greater than what they're accustomed to.
>
> So what I refer to here is that I think by allocating a far greater percentage of the demand to those funds, in my mind, ran the risk or would have run the risk that those funds … would have potentially received this as – that the deal may be struggling or that, you know, they'd been over-allocated to what they had potentially anticipated and therefore could have led to heightened volatility in the aftermarket.

I accept that the evidence set out in this paragraph (including the above passage) reflects Mr Jahrling's views.

108 At 5.33 pm on 6 August 2015, a telephone conversation took place between Malcolm Price (JPM), Harry Florin (JPM) and Dave (his surname is not identified). A transcript is in evidence (FSCB tab 17) (and not subject to any limited use ruling). The conversation included:

MR PRICE:	Hi, buddy. Can you just tell me where we are on coverage on this thing now, with a few of the London orders (indistinct).
MR FLORIN:	Oh, I'm just putting Dave on. One sec.
DAVE:	Hi, mate. Hey, um, just one problem we're managing, right? I've just taken a couple of calls. Masso, Trafalgar, et cetera, saying, "Oh, how's it going? I just want a bit of an update". I'm going with a really positive statement. And they're going, "Oh, by the way, just with the allocation process, **what we thought we'd be getting is, say, 20 bucks.** How does that sound to you, right?" **And their bids 100**, right? So – and they're saying, well, look, we're hearing a lot of noise from other brokers that it's not going that well". You know, I've been trying to address that, but **what they're trying to do now is rather than pull their orders, they're trying to say, "Please do not allocate us"**, but you know? Which is predictable, right?
MR PRICE:	(Indistinct). Yeah, but I mean, you're going to have to manage that, right?
DAVE:	Absolutely.
MR PRICE:	They, they can't, they can't have the best of both worlds, right?
DAVE:	No, no. I know. I know.
MR PRICE:	(Indistinct). Come on. You know what it's like. I don't need to (indistinct).
DAVE:	I know. I know. I know. But I just want to let you know that, that what we're going to have to do here is fill the domestics, **and then we're going to have to scale the hedgies as much as we possibly can** and we just have to keep pushing for every additional order we can get until the sun rises tomorrow, with a view that - trying to make it --
MR PRICE:	But we're going to allocate this tonight, right? We're not going to have – we're not carrying this over into tomorrow.
DAVE:	No, I understand that, but we want to keep taking. Even if we allocate tonight, we – we – we – we may need to sort of be in a situation where we keep soliciting orders out of the US for as long as we possibly can **to try to get as much scaling as possible so that this thing trades okay**.

MR PRICE:	Yeah. Yeah. No, I – I – I get it. Anyway, we'll treat – we're definitely going to try and (indistinct).
DAVE:	Yeah. I just don't want to take the foot off the accelerator in terms of - -
…	
MR PRICE:	And then, look, I guess, you know, we've all got to remember that, you know, cutting back on the hedge funds too aggressively is just putting ourselves in a – you know, all of us in a balance sheet position.
DAVE:	Sure. Absolutely. I understand that. I understand.

(Emphasis added.)

109 At 6.00 pm on 6 August 2015, a telephone conversation took place between Sean Larcombe (Citi) and Adam Lavis (Citi). A transcript is in evidence (FSCB tab 18) (and not subject to any limited use ruling). The conversation included:

MR LAVIS:	Well, so – so – the – the – it's just [hard] to call, so we – we – it's covered at the bottom end, but that's pre-scaling.
MR LARCOMBE:	Right.
MR LAVIS:	So, you know, there – there's a chance that we're sort of – there's a chance there's a, say, a 10 per cent rump.
MR LARCOMBE:	So there's – so what you're saying is it **only barely got covered,** then?
MR LAVIS:	It's only – **yeah, it's only barely covered.** Now, there's still, there's still – orders are coming in in fucking fives and 10s and threes and all that sort of stuff.
MR LARCOMBE:	Yeah.
MR LAVIS:	But we probably need another 100 bucks of orders to get it, you know, to get it to the point where we don't get left with too much of a rump. So the rump is potentially, you know, in the sort of the 75 to $150 million bracket for our share.
MR LARCOMBE:	Right. And is it split thirds or each share?
MR LAVIS:	It's – we get 40 per cent, so 40, 30, 30.
MR LARCOMBE:	Okay. Shit. So okay, so there's going to be a bit of a rump out there, potentially.
MR LAVIS:	There – there could be a $250 million rump.
MR LARCOMBE:	Yeah.
MR LAVIS:	So – um, so I've – I've sold some SPI and some Aussie dollar, which actually has a reasonable correlation against it, just sort of --

MR LARCOMBE: Yeah.

MR LAVIS: -- just to get macro hedge on, in case - because the SPI's obviously - look, I started selling SPI into the close, but we're still sort of going now. So I've got, say, 35 bucks of SPI out, and I've got 25 bucks of Aussie against it. And ah, yeah, and we'll keep – keep working on it. So - John's still, he's still sort of confident. I mean, **it's going to depend how much they stuff the hedgies**, right?

MR LARCOMBE: Mmm.

MR LAVIS: So --

MR LARCOMBE: The point is – but, I mean, the more they – look, the more as you know, **the more they get stuffed full** and – I mean --

MR LAVIS: And **the worse the fucking follow-on is**.

MR LARCOMBE: Yeah. But it's a balancing act, isn't it? See, the fucking (indistinct) --

MR LAVIS: Well, that's – yeah.

MR LARCOMBE: -- carry that really small rump where you go, "Okay, we could get hurt on this." Or you carry a big one. They don't get back, they get scaled back more, but – shit, then you're left swinging in the wind a bit.

…

MR LAVIS: And, you know, a couple of the banks were ripping him. So – so basically, it's 5 per cent down but it's 3 per cent dilutive and there's probably a 2 per cent share price down grade in it anyway, so people are basically buying it flat or buying it at fair value.

MR LARCOMBE: Yeah, yeah, yeah. Yeah.

MR LAVIS: So – which is why a lot of the hedgies haven't --

MR LARCOMBE: Well, they're going to – fucking – they're going to, yeah. If they haven't come in, **the ones that have might just flick straight out of it, yeah**?

MR LAVIS: **Yeah.** And and – the – the – the risk is now that obviously --

MR LARCOMBE: What's the split like? How much hedgies and how much flippers do you think are in there?

MR LAVIS: There's- there's a pretty significant amount. I mean, so – look, hedgy demand is 800 bucks.

MR LARCOMBE: Right.

MR LAVIS: So – of which – you know, so there's, there's two and – two and a half yards of shorts in the, in the stock.

MR LARCOMBE:	Yeah.
MR LAVIS:	**So hedgy demand is – is 800,** you know, but like, that's – that's putting fucking Regal at 250 and --
MR LARCOMBE:	Okay, that's – yeah, they're (indistinct).
MR LAVIS:	**So hedgy real demand is probably closer to 250, right?**
MR LARCOMBE:	**Yep. Yep.**
MR LAVIS:	So yeah, so it's going to be a little bit squeaky bum. There's definitely gonna be some. There's definitely going to be some stubs. You know, it's – ah, yeah, we'll all just do what we can to manage the – the overall risk, but yeah, it's going to be – it is potentially going to be – potentially going to be ah, yeah, larger than I – than I expected it to be. …

(Emphasis added.)

110 There is an issue between the parties as to whether the book-build closed at 6.00 pm (which is the time it was scheduled to close). ANZ contends it closed at that time, while ASIC contends it remained open, referring to the fact that the Underwriters continued to seek applications after that time (as referred to in evidence set out below). On balance, I consider that the book-build did close at 6.00 pm. This was the scheduled time for it to close and there was no agreement reached or formal step taken to extend the time. An allocation meeting was held at about this time (as referred to in Mr Tuchman's second Section 19 Examination, in a passage relied on by ASIC) and a proposed allocation was sent to ANZ at 8.35 pm. To the extent that the Underwriters continued to seek applications, this can be seen as seeking applications for shares that the Underwriters would otherwise be taking up.

The Draft Allocation List (8.35 pm on 6 August)

111 At 8.35 pm on 6 August 2015, Kristopher Salinger (Citi) sent an email to Richard Moscati (ANZ) (also referred to as Rick) and John Needham (ANZ) attaching the Draft Allocation List. The email was copied to John McLean (Citi), Richard Galvin (JPM), Richard Newton (JPM), Michael Richardson (Deutsche) and Geoffrey Tarrant (Deutsche). The email stated:

> Hi Rick / John,
>
> As discussed with John Mclean, please find attached the draft allocation list.
>
> The team will call you shortly to discuss.

112 The Draft Allocation List was an Excel spreadsheet with the name "ANZ Book Allocations v6.xlsx". A PDF version of the spreadsheet is CB tab 233. Mr Jahrling gave oral evidence-in-

chief that a spreadsheet in this format would be effectively a download from the Dealogic system referred to above.

113 The Draft Allocation List sets out the following summary figures at the top left of the spreadsheet:

Price	**30.95**
Demand (m)	83,291,006
Deal Size (m)	80,775,444
% of TSO	2.89%
Coverage	**103%**

114 These figures reflect the fact that, in the balance of the spreadsheet (which lists investors and the number of shares applied for), applications are recorded for 83,291,006 shares at $30.95 per share, representing a coverage of 103% of the $2.5 billion to be raised.

115 However, the Draft Allocation List also sets out the following details for proposed allocations of shares and the corresponding dollar value, at the top right of spreadsheet:

Total Allocated	56,382,256	$1,745,030,819
Left to Allocate	24,393,188	$754,969,181

116 This indicates that it was proposed to allocate $1,745,030,819 of shares to investors, leaving a balance of $754,969,181 of shares that would not be allocated and would be taken up by the Underwriters. Mr Needham accepted during cross-examination that this was a "pretty dreadful result for ANZ from this placement".

117 The Draft Allocation List included the following details about applications ("m shares" and "$m") and proposed allocations ("Allocation", "Value" and "% Fill") in relation to the six investors that are the subject of ASIC's reply:

Investor Name	**m shares**	**$m**	**Allocation**	**Value**	**% Fill**
Segantii Capital Management Limited	8,077,544	$250,000,000	2,100,162	$65,000,000	26%
Soros Fund Management LLC (New York	4,394,184	$136,000,000	2,746,365	$85,000,000	63%
DE Shaw	3,295,638	$102,000,000	2,261,712	$70,000,000	69%
Myriad Asset Management	3,231,018	$100,000,000	1,615,509	$50,000,000	50%
Indus Capital	1,318,255	$40,800,000	161,551	$5,000,000	12%
Brevan Howard Asset Management LLP	1,098,546	$34,000,000	323,102	$10,000,000	29%

118 As shown in the above extract, in the Draft Allocation List, the "Value" figures for both Segantii and Indus were shaded in brown. These were the only two Value figures shaded in the spreadsheet.

The conference call shortly after 8.35 pm on 6 August

119 Shortly after 8.35 pm on 6 August 2015, a conference call took place between the Underwriters and ANZ. The evidence is not clear as to which representatives of the Underwriters participated in the call. It appears likely to have been all or most of the representatives who were copied to the email of 8.35 pm (see [111] above). The ANZ participants on the call were Richard Moscati, John Needham and Jill Craig. Mr Needham took notes of this call in his notebook. His notes of this call (which appear on the pages ending .0010 and .0011) are as follows:

– Profit downgrade
– Dilution

Competing deal / CBA
– Some only pro-rata
– Strong interest from Asia,
but went backwards
– Hedge went backwards

– Going to continue in US
    – Grumble in the US for early close

– Allocate to the list now

– How manage this?
    – $50 – $100 in US
    – Still to think how will manage

– Not plan to manage collectively
– Whole trade 10 days only

– Large outflow from hedge

– No other choices

– Will look to manage independently
– Will consider how/if together

∴ 3 days trading

– Complete absence of long only

120 In relation to the notes "Strong interest from Asia, but went backwards", "Hedge went backwards" and "Large outflow from hedge", Mr Needham gave evidence in his affidavit (which I accept) that, to the best of his recollection, these notes reflected comments made by the Joint Lead Managers that some investors had altered downwards their bids since the last update on the book-build ANZ had received. In relation to these notes, Mr Needham accepted during cross-examination that these reflected statements made by the Underwriter representatives that demand that had been there earlier in the day was now receding or reducing.

121 In relation to the note "Going to continue in the US" and the following two lines, Mr Needham gave evidence during cross-examination (which I accept) that: the Underwriters were going to continue to facilitate a particular investor that had made comments to them earlier in the day; he thinks they were from the west coast of the US, and were not able to participate at the time that the transaction had been launched given the time zones. Mr Needham accepted that the Underwriters were informing ANZ on this call that they were going to continue to seek investors (with the price having been set at the bottom of the range).

122 In relation to the note "Not plan to manage collectively", Mr Needham gave evidence in his affidavit (which I accept) that he does not recall what this means, but it likely reflects something one of the Joint Lead Managers said.

123 In relation to the note "Whole trade 10 days only", Mr Needham gave evidence in his affidavit (which I accept) that his recollection is that this was a comment made by the Joint Lead Managers to the effect that, in their view, if the sale of any shares allocated to them was undertaken over about 10 days of trading, it would not affect an otherwise orderly market for ANZ shares.

124 In relation to the note "Complete absence of long only", Mr Needham accepted during cross-examination that this indicated that ANZ was continuing to be told that the long-only funds were largely still not coming in.

125 In relation to the conference call more generally, the following is a summary of Mr Needham's affidavit evidence:

(a) Mr Needham gave evidence that much of the discussion focussed on which investors had not participated in the book-build.

(b) He gave evidence that his understanding (based on the Draft Allocation List and the discussion that took place) was that the book was still fully covered notwithstanding

that some investors had decreased their bids (because other investors had increased their bids or new investors had come into the book).

(c) Mr Needham gave evidence that: during the discussion of the Draft Allocation List they discussed with the Joint Lead Managers whether all the shares should be allocated to the hedge funds who bid for them, such that all shares in the Placement would be allocated to the investors listed in the Draft Allocation List; the view that was expressed by the Joint Lead Managers was that that was not the way to go, and that it was better for the Joint Lead Managers to pick up a portion of the stock, for them to sell the stock over an extended period in an orderly way and not have an unorderly sale coming from the hedge funds; this was said by a number of representatives of the Joint Lead Managers during this call.

(d) Mr Needham gave evidence that, following this discussion, Mr Moscati and Mr Needham on behalf of ANZ agreed to the allocation recommended.

(e) Mr Needham also gave evidence that: he recalls general comments being made by representatives of the Joint Lead Managers that they had hedged their positions; and he recalls representatives of the Joint Lead Managers making statements to the effect that they were in no rush to sell any shares they acquired.

126 In relation to (d) above, while I accept that Mr Moscati and Mr Needham gave their approval for the proposed allocation during the conference call, it appears that it was also necessary for the proposed allocation to be approved by Shayne Elliott, and this occurred a little later during the evening. In the next section of these reasons, I discuss a telephone conversation between some of the Underwriters that commenced at 9.23 pm. During that conversation, the participants refer to approval having now been received from Mr Elliott in relation to the recommended allocation.

127 Mr Needham was cross-examined about this conference call. I note the following:

(a) Mr Needham accepted that he could not recall being told on this call anything about new bidders arriving to take the place of those who had reduced demand.

(b) Mr Needham gave evidence that he could not recall the Underwriters saying that an allocation of 100% of the Placement shares to investors was an available choice. He gave evidence that "the theme had been that that was not an action that we wanted to take".

(c) Mr Needham maintained that he understood that the demand in the book was at 103%, albeit the recommended allocation was substantially lower than that.

(d) Mr Needham accepted that his notes for this call do not contain any reference to the Underwriters saying that an alternative to the shares being taken by them was to allocate much more to the hedge funds.

(e) Mr Needham accepted that his notes for this call do not contain any reference to the Underwriters recommending against such an alternative on the basis that the hedge funds may cause an unorderly market in ANZ shares. However, he maintained this was the subject of, and the nature of, the call.

(f) It was put to Mr Needham that his memory was inaccurate and that the Underwriters had not in fact made the two forms of statement referred to in his affidavit, namely: (i) that the Underwriters were able to allocate 100% of the Placement to investors who had made bids; and (ii) that they recommended against that choice on the basis that the hedge funds may cause an unorderly market in ANZ shares. Mr Needham did not accept this, but he did accept that he did not actually recall the conversation and that he was being informed by the notes (i.e. the notes in his notebook set out above) as to the nature of the conversation. Mr Needham also accepted that he was looking at his notes and reconstructing what he imagined to be the effect of the conversation.

128 Having regard to the evidence set out above, I am satisfied that Mr Needham's *understanding* at the time of the call was that the book was fully covered. (Whether it was, in fact, fully covered is a separate matter, discussed later in these reasons.) Mr Needham maintained that this was his understanding during cross-examination and it is supported by the 103% figure in the Draft Allocation List, which he received.

129 As for Mr Needham's affidavit evidence that, during the call, *they discussed with the Joint Lead Managers whether all the shares should be allocated to the hedge funds who bid for them*, *such that all shares in the Placement would be allocated to the investors listed in the Draft Allocation List*, I am not satisfied that there was a discussion to this effect. Mr Needham accepted that he does not have a present recollection of the conversation. Mr Needham's notes do not refer to any such discussion. The evidence generally suggests that allocating to hedge funds the full amount of their applications (as listed in the Draft Allocation List) was not a viable option from the perspective of the Joint Lead Managers. In these circumstances, it is unlikely that they would have discussed this as an option. This conclusion is also supported

by the words "No other choices" in Mr Needham's notes of the call. This suggests that the Joint Lead Managers said words to the effect that there were no other choices (that is, no choices other than the proposed allocation).

130 As for Mr Needham's affidavit evidence that the Joint Lead Managers expressed the view that *it was better for the Joint Lead Managers to pick up a portion of the stock and not have an unorderly sale coming from the hedge funds*, on balance, I am satisfied that words to this effect were said. Mr Needham maintained his position on this during cross-examination. While not reflected in his notes, the notes are not a verbatim record of the conversation. It is consistent with Mr Needham's evidence during his Section 19 Transcript (in passages relied on by the parties). For essentially the same reasons, I am satisfied that words to this effect were said during the call discussed at [99]-[100] above.

131 Further, I accept Mr Needham's affidavit evidence that representatives of the Joint Lead Managers made statements to the effect that they had hedged their positions and that they were in no rush to sell any shares they acquired.

132 As a result of the recommended allocation, and its approval, the Underwriters were to take up approximately $754 million of shares (later revised to approximately $790 million of shares). In a number of conversations and communications on 6 and 7 August 2015 discussed below, reference was made to the "shortfall". It seems that this word was generally used to describe the shares that the Underwriters were to take up under the Underwriting Agreement (as a result of the recommended allocation and its approval), rather than as signifying that there was a shortfall in applications. This is consistent with the way the word was used by John McLean (Citi) in his second Section 19 Examination (in a passage relied on by ANZ).

133 Later in these reasons, I will consider whether the six investors named in ASIC's reply amended their applications (and therefore whether the book was fully covered) and whether the six investors expressed a view as to the maximum amount of shares they wanted. Also, later in these reasons, I will consider why the Underwriters made the allocation recommendation that they did.

The telephone conversation at 9.23 pm on 6 August

134 At 9.23 pm on 6 August 2015, a telephone conversation took place between Itay Tuchman (Citi), John McLean (Citi), Angus Richardson (Citi) and Michael Richardson (Deutsche). A transcript of this conversation is in evidence (FSCB tab 19) (and not subject to any limited use

ruling). The parties were unable to agree on the word or words at p 7, line 7 of the transcript (noted as "[unclear]" in the extract below). It can be inferred from the conversation that the references to "Rob" are to Robert Jahrling (Citi). It appears from other documents (and the parties' submissions) that the references to "Spider" are to Richard Newton (JPM).

135 The early part of the conversation included:

MR TUCHMAN:	We just got off the phone with Rob.
MR McLEAN:	Okay. Any good news.
MR TUCHMAN:	No. No, he just landed. No good news. We got what's his name from JP is calling him to scale back. It looks like we're going to be even at 800.
MR McLEAN:	Oh, fuck.
MR TUCHMAN:	It's fucking bad.
MR McLEAN:	Oh, fuck that.
MR McLEAN:	So we've been on with the client, **we've basically got an approval. We're just waiting on his posting of the CFO to come back to us. Got an approval to allocate to these numbers**, and we're proposing to do that, you know, send letters out and get these allocations out as soon as we can and **then just keep working through the night to try and pull in what else we can pull in**. And the message will be, you know, we've preserved some stock for US investors who are disgruntled given how late we launched the deal US time this morning.
…	
MR M RICHARDSON:	David Gray just called me back from JP Morgan saying he thinks the syndicate guys are having too much rein here. I'm very worried about getting an audit of this book book, which I will, because of the stick position and the loss. And when they look at this and go, "Hang on, you've just let off a pile of hedge funds, um, and cost your firm, you know, a large stick position. How do you justify that? Your allocations are out of whack with the long onlys. And, they- You know, how do you justify that?" Spider and Rob – and **I mean I've had the hedge funds, too, in my ear as well, but, um, Spider makes the point that they'll just renege on settlement, potentially**. Dave Gray says, "Well, they can't. They, you know, they've got a Bloomberg. There's a legal obligation to, you know, to keep – to take your allocation based on what was left in the book."
MR McLEAN:	So what are you- what are you proposing?
MR M RICHARDSON:	Well, Gray's proposing that we revisit it and just go a bit harder and say, "Sorry." He's just- he's just had the chat with Phil King and forced him to take 150. And he said,

	"Right, alright, I'll take it." Trafalgar was smart enough to pull theirs out, so you don't – they're not obliged. But he's saying things like Manikay and **Indus** and others, we need to just stump them up a bit more and say, "Sorry, that's what you've been allocated." Now, I'm sort of partially okay with that, but I'm also conscious of these accounts, you know. I don't know. Would they renege and say, "Fuck off. We're not selling it"? I don't know.
MR RICHARDSON:	On Senrigan, I mean, Rob's just landed in Boston and he's got an earful with the bloke saying, "I won't take a shitload at dollar value more than 50 bucks."
MR M RICHARDSON:	Yeah.
MR RICHARDSON:	And Spider said the same thing. You know, **Spider reckons DE Shaw amended their order**. **Well, he's [unclear].**
MR TUCHMAN:	Why is it not amended in the book?
MR McLEAN:	I know.
MR RICHARDSON:	**Um, and they're saying, you know, 55 Aussie**. We had them – we were trying to give them – the minimum was, the max was 60, we were trying to give them 75, I think.
MR TUCHMAN:	Really.
MR RICHARDSON:	Ninemasts said we can bump up to 550,000 shares. Um --
MR McLEAN:	Who?
MR RICHARDSON:	Ninemasts. It looks like those hedgies.
MR M RICHARDSON:	Yeah.

(Emphasis added.)

136 In relation to the word or words marked "[unclear]" in the above extract, ASIC contends that word used was "adamant", while ANZ contends that the words were "out of it" or that it is unclear. I have listened to the relevant part of the audio file (at about 3.48 minutes). The word is difficult to decipher because the two speakers speak over each other at this point. I think the position is unclear.

137 Although there is reference in the above passage to "working through the night" to try to attract additional applications, I nevertheless consider that (as I have stated above) the book closed at 6.00 pm, this being the scheduled time for it to close.

138 In the next part of the conversation, there was discussion about Indus's application:

MR RICHARDSON:	**We still don't know where Indus is. Are they at 30 or are they at 2?**

MR M RICHARDSON: **We've got them at 5.** So what's your view? You think we can't really do it? How are you going to survive an audit?

MR McLEAN: So, we've used our best judgment, based on our commercial relationships with these guys.

MR M RICHARDSON: Yeah, (indistinct) allocations.

MR RICHARDSON: Um --

MR M RICHARDSON: Yeah, no, I don't think (indistinct).

MR TUCHMAN: John, I think we need to take this up the chain.

MR RICHARDSON: See, John, we can't have Spider agreeing things with hedge funds without --

MR TUCHMAN: I agree.

MR RICHARDSON: -- the Deutsche guy and you agreeing with him.

MR McLEAN: Yeah, yeah.

MR M RICHARDSON: I'm very worried about it --

MR McLEAN: Well he's made that – I mean, to be clear, he's made that point from the outset, though, Moose. He's not changed his tune, has he?

MR RICHARDSON: Well, he's sort of brought these down a little bit and Ninemasts up.

MR TUCHMAN: Listen, whoever put the orders in the book at that amount, is- that's an order, right?

MR McLEAN: Yeah.

MR McLEAN: Did you guys tell him that?

MR TUCHMAN: You know and --

MR RICHARDSON: **Well, he keeps saying, "Well, I've got a book, but it was changed.**" I said, "Well, we didn't – it's not changed on that- Anthony's spreadsheet."

MR McLEAN: Fuck.

MR RICHARDSON: But then, if it's his error and he's got a Bloomberg from the client at 4.30, then --

MR McLEAN: **Well, that's what he said. He said from the moment we walked into the room, guys. I mean, I hear you, but he did say it from the moment he walked into the room, and he had the Bloomberg.**

MR TUCHMAN: But why is it not changed in the book?

MR McLEAN: **Well, we have changed it in the – well, we- we put a, we put a bloody colour around it because we knew we had to check it, so that's what he's done**.

(Emphasis added.)

I infer that the last part of the above extract relates to Indus's application, given the earlier reference to Indus and the fact that the "Value" to be allocated to Indus was one of the two Values shaded in brown in the Draft Allocation List.

139 In the next part of the conversation, reference was made to DE Shaw, Soros, Brevan Howard, Segantii and Myriad:

MR RICHARDSON:	Ross doesn't think Manikay could possibly take more than 20 bucks.
MR McLEAN:	Well, that's what in there for, 20. So they're there for 20. We haven't changed that. So Spider is only talking about --
MR RICHARDSON:	**D E Shaw at 55 Aussie**.
MR McLEAN:	**He wants to make it 55 Aussie, does he**?
MR RICHARDSON:	**Well, that's what he's talking**. And I think we've got them in for 70.
MR McLEAN:	We do.
MR RICHARDSON:	Right. **Soros** they're talking to. What have we got them in for now?
MR M RICHARDSON:	Eighty-five.
MR McLEAN:	Eighty-five.
MR RICHARDSON:	Yeah. So Nine Masts can increase to 550,000 shares.
MR McLEAN:	Hang on, what's that add up to? 550 times – what was it – 30.95. That's 17 million.
MR RICHARDSON:	And what are they in it now?
MR McLEAN:	15.3.
MR RICHARDSON:	Oh, okay. **Brevan Howard**, he's saying 10, not 15.
MR McLEAN:	They are 10.
MR RICHARDSON:	Okay. And **Segantii's saying around number, make it 51 million – ie, around number in shares. I think he's already been yelling at Rob** --
MR TUCHMAN:	**Those are the – you know, those kind of numbers are the ones we have real problems with, right? I mean, the guy's in the book for 250; you're giving him 50**. You're giving Regal 150.
MR M RICHARDSON:	Yeah.
MR TUCHMAN:	Right? You're going to have a problem with that.

MR M RICHARDSON: That's a good point.

MR TUCHMAN: Right, **I know you guys are all scared shitless of this guy, Segantii, but somebody's going to have to make it clear – I'm not that comfortable giving him only 50 bucks**.

MR McLEAN: **We've got him in at 65, so Spider wants to bring him down, does he?**

MR TUCHMAN: **That's right. Apparently the guy screamed at him and screamed at Rob**.

MR McLEAN: Has Rob had that same conversation?

MR RICHARDSON: Yeah.

MR TUCHMAN: Yes.

MR RICHARDSON: So here's the point. What did Phil put in for? Two hundred?

MR McLEAN: 250.

MR RICHARDSON: 250, and we're giving him a 150 fill. And someone else has put a 250 and we're giving him a 51 fill.

MR TUCHMAN: That's the problem.

MR M RICHARDSON: So the- the rationale, of course, is that from a risk and, you know, the risk perspective --

MR RICHARDSON: Yeah.

MR M RICHARDSON: -- is, well, we did that because we could say to the market that the book was covered and we got, you know – we're only left with $780 million of shortfall in the end, once we allocated versus if we'd told them – if it wasn't covered and we had to give everyone full colour on that, we'd be owning a shitload more of it. We'd own 1.3 billion, or more.

MR RICHARDSON: **So you're saying that Segantii wasn't a real order**?

MR M RICHARDSON: That's the only conclusion you can draw. I mean, an auditor comes and has a look at it, that's what's going to happen.

MR McLEAN: **But it was a real order**. He was in early.

MR M RICHARDSON: Yeah.

MR McLEAN: And I think you described it well, Richo: they thought the domestics would come flooding in and they were going to get scaled back and it would be – you know, it would be a tight trade. And it didn't play out that way.

MR M RICHARDSON: Yeah.

MR McLEAN: I mean that's, that's the message to the auditor.

MR M RICHARDSON: Cricketers are 9 for 47. That's going well, too!

MR RICHARDSON: And what about **Myriad**? Fuck, I didn't ask Rob about Myriad. What are they in there – what- what- what was

Myriad's order for?

MR M RICHARDSON: Okay, bear with me. Myriad was 3.2 million, a hundred bucks. We've allocated 50 bucks.

MR RICHARDSON: Well, that's not too bad, is it?

MR M RICHARDSON: Not too bad.

MR RICHARDSON: It could go up 25, maybe. I don't know.

MR M RICHARDSON: Segantii – **Segantii's the real issue, isn't it**?

MR RICHARDSON: Yeah.

MR M RICHARDSON: I mean, others, you know, there are swings and roundabouts and there are some pretty – like, Manikay's pretty fucking ordinary, too – 20 per cent. That's even lower.

MR RICHARDSON: Well, Rob doesn't think he could settle above 20 bucks.

MR M RICHARDSON: Right. Fucking hell.

MR McLEAN: But, guys, I mean, what do we do? We make Segantii 75 - -

MR M RICHARDSON: There's still a rounding error.

MR RICHARDSON: No - -

MR McLEAN: Still [a] rounding error.

MR RICHARDSON: No, the answer – the question is do you make him 150?

MR M RICHARDSON: No, he – well, if you heard Rob, I don't know what the guy will do, **but assume he just doesn't settle**.

…

MR RICHARDSON: … Yeah, **just going back, here's another example. So Rob's saying – he reckons we could push him just to 65 and JP Morgans is saying 50**.

MR M RICHARDSON: For Segantii?

MR RICHARDSON: No, **for Myriad**.

MR M RICHARDSON: Right.

…

(Emphasis added.)

140 During the last part of the conversation, set out in part below, reference was made to the client (ANZ) giving its approval to the Underwriters to proceed to allocate:

MR M RICHARDSON: Right. Yeah, well, look, I'm quite worried about **Indus** in all those ones with a – I'm just going to take a call from my retailer. I just want to double check. Hey, Gerard. I'm good, how are you? Hey, sorry, I just want to check that.

(Indistinct)

MR McLEAN: Hello? Hello, Rick? Hello? Moose and Itay, are you still there? (Indistinct)

MR McLEAN: Yeah, I stepped out. **I spoke to the client. He's spoken to the CFO. He's like, "Okay, guys, just – if you need to allocate, allocate." So we've got the all clear to do that, when we decide to.** Um, I've got to post Tyler. When you say "up the chain", Itay, Patrick's aware, Steve's aware?

MR TUCHMAN: Yeah, I'm not talking about – you know, we're going to have whatever the rump is, right, like people are aware of what the position's going to be, but, you know, for me, you know, what got put in the book and left in the book at the close is not a good practice. Right? To me, you know, if you get an order for 50 or for 75 and it starts in the book at 200, by the time the book closes, it's got to be a lot closer to that. Otherwise we've got audit problems.

MR McLEAN: Yeah.

MR TUCHMAN: Right and- And whoever was doing that with the orders, I'm not, I'm not happy with.

MR McLEAN: Mmm-hmm. Well, I mean the clients are – I mean, as it relates to after the book closes is you're 100 per cent correct, **but until the book closes, an order can be altered or removed.**

MR M RICHARDSON: I can't --

MR TUCHMAN: I'm with you. **Then it has to be reflected in the book, right. If a client sends somebody a Bloomberg an hour before** –

MR McLEAN: Yeah, yeah.

MR TUCHMAN: **-- to alter the order, you can't let the book close with the order unaltered**.

MR McLEAN: Yep. Yep.

MR TUCHMAN: **And in this case, I think there was a number of instances where the orders were not altered in the system**.

MR McLEAN: Yep.

MR TUCHMAN: You know, and then we get into an audit problem. So that- that's the bit that I'm not comfortable with.

MR McLEAN: Understand. Anyway, I guess that's for tomorrow.

MR TUCHMAN: Right. Let's get all the allocations sorted out and then, and then we'll – you know, I'm going to head home. I'll be on mobile for the rest of the night and we'll- we can (indistinct) them out.

…
(Emphasis added.)

After 9.23 pm on 6 August

141 At 9.51 pm on 6 August 2015, Aditi Varghese (JPM) sent an email to Richard Newton (JPM) and Harry Florin (JPM) attaching a draft allocation spreadsheet (CB tab 247). The email stated:

> Hi Spider/Harry
>
> Draft allox attached – **as discussed, other than those who have specified real demand, we have filled allocations**.
>
> Suggested changes:
>
> Bell Potter = +1m shares
> Manikay = +0.5m shares
> Myriad = a touch less (100k shares)
> DB PWM = a touch higher (100k shares)
>
> Please let us know if you have any questions, we can log in from home and can be reached on our mobiles.
>
> (Emphasis added.)

142 I refer to information in the attached spreadsheet later in these reasons, in the context of considering the six investors referred to in ASIC's reply.

143 At 10.57 pm on 6 August 2015, Anthony Hanna (Citi) sent an email to a long list of recipients at the Underwriters attaching a draft allocation spreadsheet (being an Excel file). The email stated:

> All,
> See attached latest.
> Changes made during the last call are shaded in blue.
> We will wait for any final changes before issuing letters.
> Anthony.

144 A copy of the attached spreadsheet (in native format) is in evidence. It includes the following information in relation to the six investors that are the subject of ASIC's reply:

Investor Name	m shares	$m	Allocation	Value	% Fill
Segantii Capital Management Limited	8,077,544	$250,000,000	2,423,263	$75,000,000	30%
Soros Fund Management LLC (New York	4,394,184	$136,000,000	2,746,365	$85,000,000	63%
DE Shaw	3,295,638	$102,000,000	2,423,263	$75,000,000	74%
Myriad Asset Management	3,231,018	$100,000,000	2,261,712	$70,000,000	70%
Indus Capital	1,318,255	$40,800,000	161,551	$5,000,000	12%
Brevan Howard Asset Management LLP	1,098,546	$34,000,000	646,204	$20,000,000	59%

The blue shading indicated the latest changes that had been made to the spreadsheet.

Media articles late on 6 August or early on 7 August

145 Late on 6 August and early on Friday, 7 August 2015, a number of newspaper articles referring to the Placement were published. These are relevant to the issue of whether the relevant information was generally available.

146 On 6 August 2015, an article by Tony Boyd headed "Small investors lose out in fast moving markets" was published online in the Chanticleer column of the *Australian Financial Review.* A copy of the article in evidence (CB tab 995) indicates that it was first published at 12.55 am on 6 August and updated at 11.14 pm on 6 August. The parts of the article that refer to ANZ's capital raising and profit update were likely added in the updated version, as ANZ's announcement took place at 8.44 am on 6 August. The article commenced with:

> The proposition that small investors are the biggest losers in today's fast-moving equity markets is backed up by recent capital raisings by ANZ Banking Group and law firm Slater & Gordon.
>
> Further evidence of the small investor being left completely in the dark can be found in the mysterious world of short selling with its opaque stock lending fees and even-less transparent rules around movements of borrowed stock.

147 The article included:

> Exhibit one is ANZ's capital raising, which was done to meet the higher capital standards imposed by the Australian Prudential Regulation Authority.
>
> APRA's new rules on risk weighting of mortgages don't come into force until July next year but ANZ went hell for leather to get $3 billion in capital on Thursday. It made a placement of $2.5 billion in shares to the privileged institutions close to the investment banks handling the deal. That was clearly to the disadvantage of small shareholders in the bank.
>
> *Ownership interest diluted*
>
> Small shareholders will have their ownership interest in ANZ diluted while value is transferred to the institutions participating in the placement.
>
> …
>
> The profit update by ANZ was seen as a profit downgrade. That flowed through the banking sector. But the big hit to share prices of other banks was the sudden demand for stock as ANZ hit fund managers for bids in a very short time frame.
>
> Small investors watched the price of all their other bank stocks fall sharply as the big funds unloaded shares to pay for the ANZ share issue. **It would not surprise Chanticleer if there was short selling of the other banks by the underwriters of the ANZ issue to hedge their positions**.

148 Late on 6 August 2015 or early on Friday, 7 August 2015, an article by John Durie headed "Smith puts anz in a bind" was published online in *The Australian*. Although the date on the copy of the article in evidence is 6 August, the content indicates that it was intended to be read on 7 August (the references to "yesterday" are evidently to 6 August). The article included:

> The combination of an earnings downgrade and a perceived backflip on capital raisings gave the banks underwriting ANZ's $3 billion capital raising **some problems yesterday as they tried to sell the stock**.
>
> **Given it was underwritten ANZ is on one level unconcerned but in reality no one wants a truck load of stock left with underwriters because it leaves a stain on the stock.**
>
> **The talk in the market suggested that at close of business the banks were struggling to offload the stock but managed to cover the book just by nightfall**.
>
> …
>
> The underwriting banks erred in letting ANZ away with a 5 per cent discount on the same day that chief executive Mike Smith signalled the sector's easy run had come to an end and that the bad debt cycle, which for so long was benign, looks like getting worse.
>
> It had to come sometime.
>
> In the scheme of things the discount should have been larger, at the very least 6.5 per cent, and also by doing the deal through a placement there was no obligation to take the stock. As it stood, the issue was already 4.5 per cent dilutionary based on the new shares to be issued and then you had the earnings downgrade to push the issue further.
>
> (Emphasis added.)

149 Late on 6 August, an article by Michael Bennet headed "ANZ's $3bn dash for capital" was published online by *The Australian*. The date on the article is 6 August; the content indicates it was probably published late on 6 August. The article included:

> ANZ chief Mike Smith has officially dumped his return-on-equity target after the bank bit the bullet and raised up to $3 billion, sparking a sharp sell-off in the sector amid fears rival lenders would unveil discounted equity raisings.
>
> …
>
> The soft trading update caught institutional investors off-guard as ANZ asked them to take part in a fully underwritten placement to raise $2.5bn, expected to price near the bookbuild floor price of $30.95.
>
> …
>
> As ANZ's shares were halted at $32.58, several investors said they were shunning the placement because of the "skinny" discount, analyst earnings downgrades and the decision to undertake a placement rather than a rights issue.
>
> Commonwealth Bank shares were sold off more than 3 per cent to $84.55 as investors braced for a similar capital raising at its full-year result next week, while Westpac slid

3 per cent and National Australia Bank 2.2 per cent.

"Given the result was below consensus expectations due to a surprise increase in impairment expenses, a 5 per cent discount does not seem enough," said Paul Skamvougeras, head of equities at Perpetual, which is underweight the banks.

…

Also raising alarms for investors was the rise in ANZ's bad debt charge to $367m, or 25 basis points of gross loans, attributed to balance sheet growth and problems in the mining and agriculture sectors.

Third-quarter earnings fell to $1.73bn, from $1.89bn in the previous three months.

Morgan Stanley analyst Richard Wiles said while the capital raising was a "sensible decision", the trading update highlighted the risk to earnings.

Macquarie analyst Mike Wiblin added: "We don't think this capital raising is a particularly compelling proposition. Add to this the fact that 'new CEO' rebasing is still to come – when Mike Smith leaves – to address long-term capital intensity and business model issues."

150 At 12.00 am on 7 August 2015, an article by Bridget Carter and Gretchen Friemann headed "ANZ puts heat on CBA to lift capital buffers" was published online in *The Australian*. The article included:

> CBA has the largest retail shareholder base of the big four and its loyal cohort of mum and dad investors are expected to follow their money.
>
> **ANZ, on the other hand, faced some resistance from its domestic institutional investor base with JPMorgan, Deutsche and Citi unable to extract higher bids than the set floor price.**
>
> Much of the concern stemmed from the bank's third quarter earnings update, which missed analysts' numbers.
>
> One source pointed out the lower than anticipated figures weakened the bank's valuation and almost wiped out the placement's 5 per cent discount to the last traded price.
>
> Investors were also spooked by CEO Mike Smith's decision to avoid a conference call on the deal.
>
> (Emphasis added.)

151 At 12.15 am on 7 August 2015, an article headed "ANZ Banking Group and the $3b checkmate" was published online in the *Australian Financial Review*. The article was in the "Street talk" section. It included:

> ANZ priced the $2.5 billion placement, revealed by Street Talk Online, at $30.95 when the domestic book closed on Thursday. **Its brokers, said to have been called in on Wednesday, were seeking to attract offshore bids late into the night**. **But with the deal already covered** and the price fixed, it's hard to see how they would have been too motivated to beat the drum.

> A deal at the floor price probably wasn't the strong result ANZ had hoped for – but the raising took a heavy toll on rivals, Commonwealth Bank of Australia and Westpac Banking Corp.
>
> The two banks have yet to take material steps in addressing their capital position and, all of a sudden, the market is discounting them for a potential equity raising. CBA shares dropped 3.2 per cent on Thursday, while Westpac fell 3 per cent.
>
> (Emphasis added.)

Between 12.00 am and 2.26 am on 7 August

152 At 12.04 am on 7 August 2015, Anthony Hanna (Citi) sent an email to a long list of recipients at the Underwriters attaching a revised version of the allocation list. The email stated that all letters except for Soros would be sent shortly.

153 At about 12.30 am on 7 August 2015, Confirmation Letters were sent to investors.

154 At 2.08 am on 7 August 2015, Kristopher Salinger (Citi) sent an email to a long list of recipients at the Underwriters attaching a revised (final) version of the allocation list. The covering email stated:

> Dear All,
> After much discussion, we have agreed upon the following adjustments to the allocations:
> Soros now 2.25mm shares (previously $85mmm)
> Myriad now A$40mm (previously A$70mm)
> Finalized allocation list attached.
> We will send to the client and shortly.

The Final Allocation List (2.26 am on 7 August)

155 At 2.26 am on 7 August 2015, Kristopher Salinger (Citi) sent an email to Richard Moscati (ANZ) and John Needham (ANZ) attaching the Final Allocation List. The email was copied to John McLean (Citi), Robert Jahrling (Citi), Richard Galvin (JPM), Richard Newton (JPM), Michael Richardson (Deutsche), Harry Florin (JPM), Anthony Hanna (Citi) and others at the Underwriters. The email stated:

> Rick / John,
> Please find attached a copy of the allocations list for today's transaction.
> Confirmation letters / CARD forms have now been sent out to each investor allocated, due back to the JLMs by 11am Friday morning.
> Settlement will occur on 12 August as [previously] planned.

156 The Final Allocation List was an Excel spreadsheet with the name "ANZ Book Allocations vF.xlsx". A PDF version of the spreadsheet is CB tab 275.

157 The Final Allocation List sets out the following summary figures at the top left of the spreadsheet:

Price	**30.95**
Demand (m)	83,291,006
Deal Size (m)	80,775,444
% of TSO	2.89%
Coverage	**103%**

These figures were unchanged from the Draft Allocation List.

158 The Final Allocation List sets out the following details for proposed allocations of shares and the corresponding dollar value, at the top right of the spreadsheet:

Total Allocated	55,222,240	$1,709,128,319
Left to Allocate	25,553,205	$790,871,681

159 This indicates that it was proposed to allocate $1,709,128,319 of shares to investors, leaving a balance of $790,871,681 of shares not allocated. These would need to be taken up by the Underwriters.

160 The Final Allocation List included the following details of the applications and allocations in relation to the six investors that are the subject of ASIC's reply:

Investor Name	m shares	$m	Allocation	Value	% Fill
Segantii Capital Management Limited	8,077,544	$250,000,000	1,615,509	$50,000,000	20%
Soros Fund Management LLC (New York	4,394,184	$136,000,000	2,250,000	$69,637,500	51%
DE Shaw	3,295,638	$102,000,000	1,777,060	$55,000,000	54%
Myriad Asset Management	3,231,018	$100,000,000	1,292,407	$40,000,000	40%
Indus Capital	1,318,255	$40,800,000	161,551	$5,000,000	12%
Brevan Howard Asset Management LLP	1,098,546	$34,000,000	323,102	$10,000,000	29%

From 7.00 am to 10.00 am on 7 August

161 At 7.11 am on 7 August 2015, John McLean (Citi) sent an email to Richard Moscati (ANZ) with the subject "Message". The text of the email was as follows:

> Agreed Message
>
> • * The transaction priced at $30.95, representing a 5% discount to the prior close

- * Most shareholders took their pro rata
- * And we received strong demand from new offshore investors
- * The stock will resume trading at 10am tomorrow morning
- * Settlement date is Wednesday 12th August
- * Primary settlement agent Citi
- * Successful applicants will receive a confirmation and CARD form overnight, due back by 11am (AEST) on Friday 7th August

162 At 7.21 am on the same day, Richard Moscati forwarded the email to Shayne Elliott.

163 At 7.30 am on 7 August 2015, ANZ published a media release, which was released to the market by the ASX. The text of the media release is set out in the Introduction, but is reproduced here for ease of reference:

ANZ completes $2.5 billion Institutional Equity Placement

> ANZ today announced it had raised $2.5 billion in new equity capital through the placement of approximately 80.8 million ANZ ordinary shares at the price of $30.95 per share.
>
> Settlement is scheduled to take place on 12 August 2015 with issue of the Placement shares to occur on 13 August 2015. The Placement shares are scheduled to commence trading on ASX on 13 August 2015. The new shares will rank equally with existing ANZ ordinary shares.
>
> Yesterday's trading halt in ANZ ordinary shares and other securities is expected to be lifted at market open today.

164 At the time that it issued the above media release, ANZ was aware that approximately $754 million of the Placement shares were not going to be allocated to investors and were to be taken up by the Underwriters. This is clear from the conference call that took place shortly after 8.35 pm on 6 August 2015. The evidence does not deal in clear terms with the process of approval of the media release (although there is some evidence about this in Richard Moscati's first Section 19 Examination at pp 81-85). The evidence does not deal with whether consideration was given to disclosing the fact that approximately $754 million of the shares were to be taken up by Underwriters.

165 On the morning of 7 August 2015, before the market opened, Richard Moscati and John Needham had short separate calls with representatives of each of the Joint Lead Managers. Mr Needham gave evidence in his affidavit (which I accept) that, before those calls, and based on the conference calls on 6 August, his understanding was that the Joint Lead Managers would not quickly dispose of their shares in a way that might affect an otherwise orderly after-market in ANZ shares, and that they had the capacity and experience to achieve this. Mr Needham gave evidence in his affidavit (which I accept) that, although he cannot recall who suggested the calls with the Joint Lead Managers on the morning of 7 August, he recalls that one of the

purposes of the calls was for Mr Moscati to confirm with the Joint Lead Managers their (Mr Moscati's and Mr Needham's) understanding as set out above. To similar effect, during his first Section 19 Examination (in a passage relied on by both parties), Richard Moscati said that they (he and Mr Needham) started to have a series of discussions with the Joint Lead Managers on the morning of 7 August "to understand exactly what their intention was with that stock". He said that they had "already had some commentary that the leads were in no rush to exit their position".

166 During cross-examination, Mr Needham gave evidence that a purpose of the calls was to give ANZ reassurance that the Joint Lead Managers were not going to dispose of their very large holdings in ANZ shares over the course of only a few trading days. The following exchange took place during cross-examination:

> Yes. And you were seeking reassurance because you were conscious that if they did, in fact, dispose of their very large holdings over the course of only a few trading days, it would likely have the effect of revealing to the market that the underwriters [have] taken a significant proportion of shares from the placement?---I'm not sure that that was the consideration. I think, you know, our concern was, you know, the – the effect on the share price and the effect on – on retail investors.
>
> **So your concern was more direct. Your concern was that if they did trade in that way, that is dispose of their very large holdings over the course of only a few trading days, it may place downward pressure on the share price?---Yes.**
>
> And from your perspective what you wanted to achieve in the calls made that day was to alleviate that concern to the greatest extent you could?---Yes.
>
> You wanted to hear from them, the underwriters, that they would not dispose of their very large holdings over the course of only a few trading days?---Yes.
>
> (Emphasis added.)

I accept Mr Needham's evidence given during cross-examination as set out above.

167 At 9.00 am, Geoffrey Tarrant (Deutsche) and Michael Ormaechea (Deutsche) called Richard Moscati and John Needham. Mr Needham stated in his affidavit (and I accept) that Mr Tarrant was an investment banking representative, responsible for the relationship with ANZ, and Mr Ormaechea was the most senior Deutsche Bank capital markets person in Australia. Mr Needham took notes of the conversation in his notebook (the page ending .0012 and the first line on the page ending .0013). His notes are as follows:

> – Geoff & Omo – [phone number redacted]
>
> 1. Discretionary Contingent Fees for management
> 2. Neutralisation

1. Fees
– Force to co-ordinate – DB. Yes
– if concerned about after mkt.
– eliminate randomness of different risk

– Announcement of DRP underwrite
– Is it good message?
– Or concern not get $500m

– What does co-ordinate mean?
  – Appoint a person for a day
  + rotate

– RM open to a fee if consulted.
– Proportional to risk
– Omo – JPM weakest link.
– CBA – Rights issue

168 Mr Needham gave evidence in his affidavit, which I accept, that: during the phone call, Mr Tarrant and Mr Ormaechea raised different ideas as to an additional fee, as well as ideas as to how the securities might be managed; one of the ideas was an additional fee for coordinating or managing the shares that they were allocated; the context for this idea was that the Joint Lead Managers had been paid sub-market fees for the Placement in the first place, and now that the transaction came with additional risk they wanted to explore being compensated for that; that idea was not ultimately agreed to by ANZ and was never implemented. The idea of an additional fee for the Underwriters for managing the stock did not proceed. During his first Section 19 Examination, Mr Moscati said that it was "put to bed … very early".

169 At 9.10 am, Richard Moscati and John Needham spoke with Robert Priestley, the CEO of JPM in Australia. Mr Needham took notes of the conversation in his notebook (on the page ending .0013). His notes are:

Priestley
– ANZ concerned over aftermark
– Should look after it together
– Want relevant parties together
  + want to
– Talk about breakeven, open
  to a discretionary fee on mgt
  of position +
– Needs your support
    – Richard Newton - Synd
    – Jeff Herbert Smith - Head Risk
→ JP– Priestley recognise value
  its crazy+ should recover

170 Mr Needham gave evidence in his affidavit, which I accept, that: he believes that the note "ANZ concerned over aftermark[et]" reflects the substance of a comment made by Mr Moscati; Mr Needham's understanding, based on his discussions with Mr Moscati, was that he made comments of this nature to the Joint Lead Managers in order to seek to elicit responses that would confirm Mr Moscati's and Mr Needham's understanding of the Joint Lead Managers' intentions; the final note, "Priestley recognise value its crazy + should recover" reflected a comment made by Mr Priestley that he considered that the floor price at which JPM had acquired ANZ shares ($30.95) was "crazy" because it was too low and that he thought the price would recover; Mr Priestley did not make any comments that suggested that JPM was in any rush to sell its ANZ shares.

171 At 9.15 am on 7 August 2015, Richard Moscati and John Needham spoke with Stephen Roberts, the Chairman of Citi in Australia. Mr Needham took notes of the conversation in his notebook (the bottom third of the page ending .0013 and the top half of the page ending .0014). His notes are:

> Roberts
> – We deeply concerned over size of shortfall
> + @ price its crazy price
> – Want group to be co-ordinated
> – Where possible on a legal basis
> we can co-ordinated
> – SR - Important for relationship
> – Competitors doing negative things
> – Electronic comms between instos
> – Happy to hold. Want to discuss what happening
> – disappointing but they can hold
> – RM. Need to be aligned. This way
> strengthened
> – SR - Need to ensure no panic
> – Good idea to bring team together
> – SR, [/fay] Tuchman, John McLean
> – Call for 10am.
> – + Thank you for the call – **we**
> **will do the right thing**
>
> (Emphasis added.)

172 Mr Needham gave evidence in his affidavit, which I accept, that: his recollection is that the note "We deeply concerned over size of shortfall" reflected the substance of a comment made by Mr Moscati; again, Mr Needham's understanding, based on his discussions with Mr Moscati, was that he made comments of this nature to the Joint Lead Managers in order to seek to elicit responses that would confirm Mr Needham's and Mr Moscati's understanding of the Joint Lead Managers' intentions; and the notes "Important for relationship", "Happy to

hold", "disappointing but they can hold", "Need to ensure no panic" and "we will do the right thing" all reflected comments made by Mr Roberts to this effect. Mr Needham gave evidence during his Section 19 Examination (in a passage relied on by ANZ) (which I accept) that the note "we will do the right thing" was referring to ensuring no panic and an orderly after-market.

173 At 9.17 am on 7 August 2015, an article headed "ANZ's Mike Smith may make retail shareholders pay a hefty price" by Philip Baker was published online in the *Australian Financial Review*. The copy of the article in evidence was updated at 6.10 pm on the same day. The evidence does not establish which parts of the article were in the original version and which parts were updated later. The article included:

> Retail shareholders of ANZ have certainly paid a hefty price so Mike Smith can sleep at night.
>
> Smith didn't want to be held hostage to the sharemarket over the next few months as other banks potentially respond to the Australian Prudential Regulation Authority's new capital rules, so he pulled the trigger on ANZ's $3 billion capital raising to get his money straight away.
>
> Talk on trading desks on Friday hinted that a disappointing first-half profit report from Standard Chartered this week and concerns Commonwealth Bank will announce a raising next week were reasons that the ANZ were so keen to do this deal.
>
> On Thursday Smith said ANZ was acting now because the banking regulator was moving faster than expected.
>
> When asked if small shareholders were getting a rough deal, Smith pointed to its comparative size.
>
> "This is a small issue. If it was a bigger issue we probably would have done it through a rights issue, which is always a little bit more fair, I think," he said
>
> ANZ's share register is also skewed to institutional investors and "the easy thing to have done would have been to do the whole thing as an insto placement but we felt we had to give some to retail".
>
> Shares in ANZ closed at $30.14, below the offer price to institutions of $30.95 in the $2.5 billion institutional component of the raising.
>
> Deutsche Bank, Citi and JP Morgan now have to convince retail investors it's a good deal to get the remaining $500 million and what they end up paying will depend on how ANZ stock trades in the last five days of the offer.
>
> The bank's CEO went head-first into the capital raising, delivering a profit result that failed to meet expectations and signalled the bad debt cycle in Australia is turning.
>
> **Local fund managers appeared to side-step the share purchase plan and pointed to the skinny 5 per cent discount the shares were offered at, given the earnings report and how diluted they might be as a result of the deal.**
>
> **It all meant Deutsche Bank, Citi and JPMorgan had to turn to offshore investors to get the deal away, which raised concerns about whether they are long-term players or not.**

> The deal has also sent a strong message to hedge funds around the world that short-selling local bank stocks is a low-risk trade.
>
> Sell now and buy back in when they raise the money.
>
> (Emphasis added.)

174 At 9.27 am on 7 August 2015, Richard Moscati (ANZ) sent an email to Michael Ormaechea (Deutsche), Geoffrey Tarrant (Deutsche), Robert Priestley (JPM), Stephen Roberts (Citi) and John McLean (Citi):

> Gents,
>
> I would like a call at 10.00am. I will send dial in details shortly.
>
> I understand that you may want one or two others from your team to join, but please advise and keep tight.

175 At 9.32 am on 7 August 2015, Mr Ormaechea replied to that email (reply all):

> May I ask that in the interim we instruct our respective desks NOT be trade ANZ today, or as a min until we speak.
>
> Pls confirm on the call no trading until this is agreed.

176 At 10.00 am on 7 August 2015, the market opened and trading in ANZ shares resumed. It appears from the expert evidence that ANZ shares opened at $29.99.

The conference call at 10.00 am on 7 August

177 At the same time (10.00 am on 7 August 2015), a conference call took place between the Underwriters and ANZ. The participants from the Underwriters were Stephen Roberts (Citi), Itay Tuchman (Citi), Michael Ormaechea (Deutsche), Geoff Tarrant (Deutsche), Michael Richardson (Deutsche), Richard Newton (JPM), Richard Galvin (JPM) and Jeffrey Herbert-Smith (JPM). The participants from ANZ were Richard Moscati and John Needham. Mr Needham took notes of the call in his notebook (from half-way down the page ending .0014 to the end of the page ending .0016). Mr Needham's notes (apart from the list of participants) are:

> – Open $29.86
>
> – RM. Want to ensure best outcome for all stakeholders + shareholders alike
> – Want undertaking that no trading against the position.
> – We assist wherever humanly + legally possible. Can discuss how over weekend/week.

– Omo – Will not do anything today
  – Will have facilitation. Must allow
  – expect – 5 – 6
  – will be tested for liq.
    need agreement
  – not use this for creating
    synthic shorts. Need trust
  – Ensure no dimish of the mkt
    price support.
  – How work in a compliance
    position
  – Compliance – Everything business
    as usual. Not impacted by any holding.

– J.H.S. – Put on macro hedges, not
    in the banking. Will convert into
    Aust market hedges
  – Will
  – Agree with OMO.
  – No hedging in the sector

– Omo – Will not trade single names

SR
– Citi – Agree to this
  – Details – How execute
  – Not allow bottom feeding

– Omo – Do everything to facilitate
  – Nothing in sector. Maybe
    in the indexes

– RM → will facilitate BAU. Not to
    manage long
  → No other transactions today

  → You as syndicate talk, then
    you talk to us. Will
    check in with you.

– Omo – Also consider discretionary
    incentive fee
– RM – Already giving it thought
    in accordance with what's
    legally possible.
  – Look for other ideas around
    SPP
  – Policing – How?
– Omo – Compliance depts can sign off
    between the banks
  – Share bids from US
  – Will convey – position is unchanged.
– Position $794 – $25

178 During his Section 19 Examination (in passages relied on by the parties), Mr Needham gave evidence about this conference call, with reference to these notes. Mr Needham stated that one of the Joint Lead Managers called out the open price, that is, that ANZ shares opened at $29.86. (It appears from the expert evidence that the opening price was in fact $29.99, but nothing turns on this difference.) In reference to the note of the statement by Omo (Mr Ormaechea) "Will not do anything today", Mr Needham was asked whether there was an undertaking to stay out of the market. Mr Needham answered No. He referred to the next line ("Will have facilitation. Must allow") and said that what he (Mr Ormaechea) was saying was that, if there were any customers who wanted to buy or sell stock, then they (the Joint Lead Managers) would facilitate that; they would ensure the ongoing operation of the market, but the position that they were sitting on would not be sold that day. Mr Needham was asked whether, by "facilitation", this meant that the Joint Lead Managers would sell to clients and then acquire that position back in the market, so that they were not selling down their position. Mr Needham agreed. In relation to the note "Ensure no dimish of the mkt price support", Mr Needham said that they (the Joint Lead Managers) were looking to have the market set the price for the normal supply and demand for shares; they wanted to ensure that they were not adding to an unnecessary supply of stock and that the market would find its own price. Mr Needham said the reference to "J.H.S." was to Jeff Herbert-Smith and that the note "Agree with OMO" meant that they would not be selling down his position that day. In relation to the note "Agree to this" (after SR, Citi), Mr Needham said that this meant that they would not be selling down their position. In relation to "Will facilitate B.A.U." and "No other transactions today", Mr Needham said these looked like things the Joint Lead Managers, rather than Rick Moscati, would say (despite the initials "RM" appearing before these notes). He said that "B.A.U." stood for business as usual. Mr Needham was asked whether, following this call, his understanding was that the Joint Lead Managers would stay out of the market for the rest of the day. He answered that his understanding was that they would not be selling their position, but they would be in the market by way of facilitating the market. I accept the evidence of Mr Needham as set out in this paragraph.

179 During cross-examination, Mr Needham gave the following evidence about the conversations with the Underwriters on the morning of Friday, 7 August 2015:

> … In these calls the underwriters made various statements to you about how they intended to trade their position in ANZ shares thereafter, didn't they?---**Not on that Friday. I think they were still considering how they would proceed.** I think they were making statements that they weren't going to do anything on Friday.

So on the Friday, so far as you were concerned, it remained uncertain what trading conduct they would actually engage in in the course of the next few days?---It – it was – **I think there was an undertaking for them to think about how they were going to do it. We were getting reassurance from,** I guess, the – **the chief executives** of – of those – **of those banks that they would – I think somebody used the terms "the right thing". And that is trade at a – on a – on a longer term basis**.

But in terms of the concern that you had when you entered into these calls on the morning of Friday 7 August, at the end of those calls that concern wasn't entirely alleviated, was it?---I think it was substantially alleviated. When you've got the senior people from each of those banks saying that they're – you know, and the notes are there – that – that they saw value in the shares and that they were going to consider how they were going to manage their positions.

…

Well, you couldn't control what they did, could you?---We – we couldn't control that.

They were their shares?---Yes.

The shares were their risk, so to speak?---Yes.

And so in terms of alleviating the concern that you took into the call, you could only rely upon what they told you they would do or not do?---Yes.

And what I want to suggest to you is that your concern was not sufficiently alleviated because you spoke to them again the next day on the Saturday morning?---That – that is the continuation of that, yes.

Yes?---That Saturday morning.

Yes, and it was a continuation because, as of Friday, you were still trying to ascertain what they would do with their trading on the Monday and thereafter?---**They were – had undertaken on that Friday to go away and think about how they were going to do that.**

Yes. **So on the Friday you had no indication from them as to what they would do on the Monday and thereafter?---Other than the – the general statements that they would do the right thing**.

But the purpose of the further call on the Saturday was to ascertain whether they were able to tell you more about what they planned to do in relation to Monday and subsequently?---That's right.

(Emphasis added.)

I accept the evidence of Mr Needham set out in the above passage. It accords with his notes of the conversations on the morning of 7 August and is consistent with the extracts set out below from the transcript of the conference call between the Underwriters and ANZ on Saturday, 8 August.

180 During his Section 19 Examination (in passages relied on by the parties), Richard Moscati said, in relation to the conversations on the morning of 7 August 2015, that the "last thing we wanted to see was panic and irrational behaviour, and that was our point. … we obviously played the

relationship card pretty heavily, you know, 'This is a long-standing relationship and, you know, we expect you all to do the right thing'. Which, by the way, was everything they'd led us to believe would happen prior to that point." Mr Moscati said that the Underwriters "[p]retty much told us that they would manage it – they – I can't remember the words exactly, but they weren't worried; they'd manage it appropriately". Mr Moscati said during the examination that the Underwriters told them that nobody would do anything on the day (that is, the Friday) until they had worked through all their issues. I accept this evidence.

181 On the basis of the evidence set out above, I find that, on the morning of 7 August 2015 (up to and including the 10.00 am conference call), the Underwriters communicated to ANZ that:

(a) they would "do the right thing" in the sense that they would manage the situation appropriately and would not sell down their positions in ANZ shares quickly or in a way that would create a disorderly market;

(b) they would not sell down their positions that day; and

(c) they would give further consideration as to how to manage the situation and come back to ANZ with more detail the next day.

After 10.20 am on 7 August

182 At 10.20 am on 7 August 2015, a telephone conversation took place between Sean Larcombe (Citi), Adam Lavis (Citi) and Ravi Bains. A transcript of the conversation is in evidence (FSCB tab 20). It contains a passage highlighted in green (relied on by ASIC); the balance of the transcript is subject to a limited use ruling. During the call, the following exchange took place (being the passage relied on by ASIC):

MR LAVIS:	Segantii's? Well, they – they – they – well, that doesn't surprise me, because they increased their bid size from 20 – they've taken 75 bucks. They were at 25.
MR LARCOMBE:	Yeah.
MR LAVIS:	So they're – they're – they've been lent on.
MR LARCOMBE:	Yeah.
MR LAVIS:	Sorry, they were at 50 and they've gone to 75.

183 At 12.59 pm on 7 August 2015, Itay Tuchman (Citi) sent an email to Andrew Milburn (Citi), copied to Richard Heyes (Citi), Adam Lavis and James Walker (all at Citi):

Hi Andrew,

As you know **we have a shortfall position in ANZ** as a result of yesterday's capital raising. **We are very cautious about leakage and are treating the information as highly confidential** and segregated from the broader equity sales and trading staff. I am a bit concerned that we send out risk reports to a wide array of Citi people and I want to make sure that this position is not included in those reports. Clearly we need to report to management all the risks in real time so is there a way that we can still ensure we do that while protecting the information barrier about the shortfall position?

(Emphasis added.)

184 At 1.10 pm on 7 August 2015, John Needham had a telephone conversation with John McLean (Citi). Mr Needham made notes of the conversation in his notebook (the page ending .0018).

185 At 2.13 pm on 7 August 2015, a telephone conversation took place between Itay Tuchman (Citi) and Richard Heyes (Citi). A transcript of the conversation is in evidence (FSCB tab 21) (and not subject to any limited use ruling). The conversation included:

MR TUCHMAN:	The other bit around the syndicate process is that the degree of attention to detail around the orders was appalling.
MR HEYES:	Talk to me about that, in terms of - -
MR TUCHMAN:	I'll give you an example. We walk in there. Indus, right?
MR HEYES:	Yeah.
MR TUCHMAN:	Yeah. He's in the book for $30 million.
MR HEYES:	Yeah.
MR TUCHMAN:	Rob Jahrling, yeah, I spoke to the trader there, they're – they're fine with 30. You know, I spoke to the trader, the same guy at JP Morgan. **I spoke to the (indistinct) there, and he only wants two. Why the hell is he in the book for 30?** Right, I mean, and this was multiple, multiple clients where we could not get straight what their real order was.
MR HEYES:	(Indistinct) Right.
MR TUCHMAN:	Right. And it was just – everything was done on the back of a napkin.
…	
MR HEYES:	No, but a good - a good person will know – will understand the dynamic around that and be able to adjust it as they understand the momentum within the transaction.
MR TUCHMAN:	You know, and adjust it in the book. Right, like you know, **you have Segantii in there for $250 million** - -
MR HEYES:	Yeah.
MR TUCHMAN:	**- - when he's ordered you that not a single penny over**

$50 million, right?

MR HEYES: Yeah.

MR TUCHMAN: **It shouldn't sit in the book at 250 as it closes**.

MR HEYES: Yeah.

MR TUCHMAN: So, anyway, there was a bit of a – there was a bit of – I don't know, I thought it was very amateurish, right? And- and Rob not being there was part of it.

MR HEYES: Yeah.

MR TUCHMAN: Rob is a much more detail person.

…

MR TUCHMAN: So, anyway, that's processed. And now, you know, **we're probably going to have a call with the syndicate at 4.30**.

MR HEYES: Yeah.

MR TUCHMAN: **To talk about what we're going to do starting Monday**, right?

MR HEYES: Mmm-hmm.

MR TUCHMAN: But for today, nobody's touched the stock, right? It's all sitting in the syndicate's books, in our book. **We need to have some kind of strategy around risk, you know, unloading this thing, right?**

MR HEYES: Correct.

MR TUCHMAN: We have some challenges. I don't know if Adam has told you. Challenge one is regulatory.

MR HEYES: Yeah.

MR TUCHMAN: **Which is apparently if you cross the stock from a shortfall you have to disclose.**

MR HEYES: Yeah.

MR TUCHMAN: **We don't want to do that, obviously**. **So we're trying to figure out if we can figure out a regulatory way to avoid doing that.**

MR HEYES: Yeah, you just want to maybe putting it to the loans and offering it back or something along those lines.

MR TUCHMAN: Something like that, right. That's one. Two is to what extent can we from a compliance perspective agree with the JLMs some type of boundaries around managing risk.

MR HEYES: Yeah.

MR TUCHMAN: Um, **my view is that we should all agree that starting Monday we minimise market impact** but then- and begin to dribble out stock.

MR HEYES:	Yeah.
MR TUCHMAN:	What do you think?
MR HEYES:	No, I agree with that. …
…	
MR TUCHMAN:	So I think that the message to the syndicate is starting Monday – for me is probably starting Monday no crossings, no disclosed crossing from the syndicate book, but we – well, with minimal market impac – impact we start to allow dribbling out of the stock.
MR HEYES:	Yeah
MR TUCHMAN:	And – and we just see how we go, right?
MR HEYES:	Yeah.

(Emphasis added.)

Saturday, 8 August

186 At 10.38 am on 8 August 2015, a conference call took place between the Underwriters. The participants were Jeffrey Herbert-Smith (JPM), Mark Dewar (JPM), Oliver Bainbridge (JPM), Richard Galvin (JPM), James Walker (Citi), John McLean (Citi), Itay Tuchman (Citi), Mersina Mouhtaris (Citi), Michael Richardson (Deutsche), Lee Newton (Deutsche), Geoffrey Tarrant (Deutsche) and Michael Ormaechea (Deutsche). A transcript of the conference call is in evidence (FSCB tab 22, previously CB tab 353), marked to identify the passages relied on by ASIC and ANZ. The passages relied on by ASIC are subject to a limited use ruling, namely the use set out in MFI-1, item 3, response column. The balance of the transcript is subject to a limited use ruling as referred to at [32] above. It is apparent from the transcript that the conference call was taking place in anticipation of a conference call with ANZ, which was to take place later that morning. I will set out, below, the parts of the conference call relied on by one party or the other.

187 At the beginning of the conference call, John McLean referred to a call the day before that had touched on protocols. He said there was a need to revisit the protocols and then discuss how they would deal with Rick (a reference, it may be inferred, to Richard Moscati). In this context, the following were said:

MR TUCHMAN:	... I think we have to do two things, right, so first we need to be very clear and up front with Rick that all of our objectives are aligned. Both the syndicate members and ANZ, which is to minimise market impact, right? And - and... **to make sure that... to make sure that... it does not get out that the syndicate has a position or its size**, right?

…

MR DEWAR: Ok guys, let me jump in, it is Mark from JP Morgan, now I think what we discussed yesterday is a pretty good ... is a pretty good sort of agreement around ... all our interests are aligned, we don't want, you know, we don't want to put undue pressure on the stock, but I think if we looked at each trading a maximum of 5% of average daily volume of our positions, no more, …

…

MR DEWAR: … I kind of like the idea of a maximum of 5% each of average – average daily turnover in the market and that will – that will not result in any undue pressure, we don't even need to be sellers if we don't want, we can each manage our positions separately to a maximum of 5% …

…

MR ORMAECHEA: That's my view, right. We could ... I think you've gotta be ... in my view, you should be straight forward, right, the combined effect of us as a group should be 15% of ADV. Anything much more than 15% of ADV is, by our lack of absence in buying it back and the discretion people have on where you might want to make switch stocks between banks in terms of pairs trades ...

LEE NEWTON: Yeah, Lee here from Deutsche. If you were to do that it might alleviate any existing concerns about having to disclose because you are talking about different positions and trading different positions.

…

MR TUCHMAN: So are we making basically the 5% cap, a hard cap, including facil? Is that the way we are policing that? …

…

MR ORMAECHEA: … don't mind saying it is 5% intention and if you have natural flow up to say 7, do you know what I mean? But you have to be realistic, much more than 20% in aggregates …

MR TUCHMAN: Ok so I am in agreement with that. I am in agreement with 5% if you have natural flow, max, max 7, absolutely hard max. Anything else has to be bought back into the market place.

…

MR HERBERT-SMITH: It's kind of what we agreed yesterday unless for some reason there is a mammoth turn around, then clearly people are going to have a different view, aren't we? And then we can chat.

…

MR HERBERT-SMITH: Are you fine with that outcome, that sort of 5 to 7 ... if it's natural?

MR DEWAR: … Yeah look I think that is reasonable, so 5% max to ADV …

MR HERBERT-SMITH: Ok, ok, we should move on because we are all in agreement there.

(Emphasis added.)

188 There was then discussion about whether the Underwriters would stay out of the market on Monday. This part of the conversation included:

MR TUCHMAN: The only reason to stay out of the market on Monday is to obscure the fact that we have stock, that would be the only logical reason, …

189 The discussion then moved to the question of disclosure of the shortfall. This part of the conversation included:

MR HERBERT-SMITH: … The other question we had on was the disclosure of shortfall. Can we just talk about that? Where everyone's at? **I mean clearly we don't want to do anything that does that**.

…

MR TUCHMAN: **Well this is way I looked at it, every bank agrees that there will be no disclosure of the shortfall**, everybody has to manage their own compliance department and what they can do and can't do subject to that constraint. Right? I don't need to manage y'alls compliance departments.

MR BAINBRIDGE: Ok and look, sorry it's Oliver Bainbridge from JP Morgan compliance. I mean, to that point, I mean I think the – the market integrity rule is not particularly clear on a couple of fronts and I think if we're ... different banks are taking a different view based on where – which entity is ...

…

MR ORMAECHEA: ... So guys ... so it's Mike, I am going to jump ... I'm going to interrupt a bit but **I think the most important thing is if we are going to disclose, we all need to know, right**? … **I personally don't understand how you have to disclose** because the book was covered, and in managing the book we've pulled the stock back, that's right. But that's ... we can take that offline, but that is my personal view. …

MR HERBERT-SMITH: That's my opinion as well.

…

MR RICHARDSON: Ok, well then in that case the other argument is a practical

> one, we have a covered book and we took a commercial decision to take the stock for the market. … So I think it boils down to the fact that we had a covered book and it was our decision to take this on as a commercial- as a commercial undertaking to protect the market and our clients.
>
> MR TUCHMAN: So let compliance folks offline discuss that, **but it is our intention, at this point, that nobody is going to disclose stock**, right, and let's try to work around that.

190 At 11.01 am on 8 August 2015, a conference call took place between the Underwriters and ANZ. The participants were Jeffrey Herbert-Smith (JPM), Richard Galvin (JPM), Robert Priestley (JPM), Michael Ormaechea (Deutsche), Michael Richardson (Deutsche), Geoffrey Tarrant (Deutsche), Itay Tuchman (Citi), John McLean (Citi), Richard Moscati (ANZ) and John Needham (ANZ). Mr Needham made notes of the conference call in his notebook (at the pages ending .0019 to .0021). A transcript of the conference call is in evidence (FSCB tab 23, previously CB tab 356), marked to identify the passages relied on by ASIC. There is a limited use ruling for these passages, namely the use set out in MFI-1, item 4, response column. The balance of the transcript is subject to a limited use ruling as described at [32] above. I will set out, below, the parts of the transcript relied on by ASIC.

191 At the beginning of the call, John McLean said he would start and then others could join in. The following was said:

> MR MCLEAN: … I guess there's sort of two areas for us to cover off on this call depending upon, you know, whether there are other things that you've thought about or agenda items you wanted to add. …
>
> MR TUCHMAN: … so I think obviously there's broad agreement between all the JLMs as to the objectives that we have here, right, and – and – and there are really two objectives. One objective is obviously to minimise any market impact of unwinding of the individual positions that the JLMs hold. **The second objective is clearly to avoid any disclosure to the market of the shortfall position**. …
>
> …
>
> MR MCLEAN: … I think where we got to was we felt we had an understanding that no individual bank would sell more than 5% of the average daily volume on any given day such that the total JLM activity wouldn't be any greater than 15% of daily activity. …
>
> (Emphasis added.)

192 The conversation during the conference call then moved to the question of disclosure. The following was said:

> MR MCLEAN: Yeah, I think the – Yeah [I] mean I think the second point, Rick, that Itay raises around disclosure, and yeah maybe this is little less than a grey area, but there is a requirement that banks that have underwriting rump positions to the extent they are technically shortfall and those positions or part of them are sold, in a line to an investor, that that investor needs to be informed that they're shortfall shares. **And clearly that's not in anyone's interests from the JLM's perspective to be making that disclosure**, …
>
> We are continuing to work through our compliance teams on, you know, the sort of the best and clearest interpretation of that disclosure obligation – it's not – not 100% clear, but for – for the moment at least, you know, **we're designing our trading protocols in such a way as to completely ensure that there is no requirement to disclose** … And of course we are very alert to clients who may be sort of asking each of us to try and fish for information around a shortfall. We're certain that will happen so we don't want to, sort of, yield to that by crossing stock into those guys and as I said, rather just act through selling into the screen.
>
> MR ORMAECHEA: … Should anybody believe that they have a certain action that will trigger an obligation – they will consult the underwriting group and by definition yourself, Rick, prior to engaging in that activity. **So right now our default position is nothing new. No disclosure.** But we'll consult amongst ourselves and you if we think there's something that could trigger that. We should just work on that as our assumption.
>
> MR MOSCATI: Okay. That's alright. I mean just to pause I mean look, you know, this first thing. Obviously I'll take – take this back – I'll just have a chat with Shayne pretty quickly and come back with any comments. I mean at face value, kind of what you're suggesting sounds pretty – pretty sensible off the bat but what – what – what other alternatives have – had you discussed in the sort of last 24 hours? Is there anything worth talking about here, or – or if that's just a diversion – I'm happy to – to stay away from it, but ...

193 Later in the conversation, the following was said:

> MR MOSCATI: Okay, look I appreciate it. I don't think I've got any other further questions. I don't think what you're proposing is totally unreasonable. I'll speak to Shayne and look, if there are any issues, I'll come back to you. Just in terms of activity on Monday, per se – where did you – where did – where did you get to on that?
>
> MR MCLEAN: So on balance Rick, we felt we should, we should be active on Monday. [MR MOSCATI: Right] Obviously, we'll look

> at things – obviously we'll look at things, and, ah look at the environment on Monday depending on what happens over the weekend but I think as a syndicate we felt, it would be good to have the flexibility to be active on Monday.
>
> MR MOSCATI: Yep …
>
> …
>
> MR MOSCATI: Yep. Okay, no, I understand. Alright, look thanks guys, I appreciate your time. I'll – I'll have a chat to Shayne Elliot and, look, if – if there's anything that – I'll – I'll – I'll be in touch, right? We'll have a call tomorrow or –. Very good, thanks very much.

194 During his Section 19 Examination (in passages relied on by the parties), Mr Needham gave evidence about this conference call, with reference to his notes (which are not set out in these reasons). Mr Needham was asked about his understanding of what was agreed in relation to trading by the Joint Lead Managers going forward after this conversation. He said that they would be managing the position in the way that they saw fit, and that they would try not to sell more than the relevant amount of the daily average volume, so that they were not affecting the market; and that they would do that at a time and place that they determined. I accept this evidence.

195 During cross-examination, Mr Needham was taken to the transcript of this conference call and specifically to certain statements made by Mr Tuchman set out above. Mr Needham accepted that, when he participated in this call, he understood any references to the "shortfall position" to be a reference to the fact that the Underwriters had been allocated and were going to acquire, roughly, $790 million of shares from the Placement. The following exchange then took place:

> So if I could ask you to assume that, when they use shortfall position, that's what they're referring to. Do you understand?---Yes.
>
> **Yes. Now, when that was said to you on this call, you understood, didn't you, that, by that statement, the speaker at least was expressing his belief that the market did not know that the underwriters had acquired the so-called shortfall position?---Yes.**
>
> **And you, at the time, also held that belief that the market did not know that the underwriters had acquired those shares?---Yes.**
>
> ANZ certainly hadn't informed the market expressly of that fact, had it, by this time?---It had not.
>
> (Emphasis added.)

I accept the evidence of Mr Needham set out in the above passage.

196 Mr Needham was taken during cross-examination to three statements made by Mr McLean and Mr Ormaechea during the above call. Mr Needham gave the following evidence:

> Now, in respect of those three statements when made to you in the call on that day, you understood, Mr Needham, didn't you, that they were telling you and Mr Moscati that they would try to avoid engaging in any conduct that would involve making disclosure of what they've called the shortfall position?---Yes.
>
> **And you understood that what that meant was that they did not wish to engage in conduct that disclosed the shortfall position to the market?---Conduct that would require them to disclose that. Yes.**
>
> Yes. And you shared that objective?---That is their objective.
>
> Yes. The objective that they had of not engaging in conduct that would disclose the shortfall position to the market was an objective that you shared and supported?---That is something that they have made us aware of, and it's – it's their objective.
>
> Yes, but you equally did not wish them to engage in conduct that would disclose the shortfall position to the market at this point in time?---This is their position, and they're trading their shares, and it's that conduct that would cause that – that obligation. So we didn't have a – a desire to – to affect their position.
>
> No. What I'm suggesting to you, Mr Needham, is that to the extent that they stated that objective of seeking to avoid engaging in conduct that would disclose their shortfall position to the market, you shared the desired result that there not be such disclosure of the shortfall position to the market?---We shared that to the extent that they were – were selling the shares and – and yes.
>
> (Emphasis added.)

I accept the evidence of Mr Needham set out in the above passage.

197 On the basis of the above, I find that, as at the morning of 8 August 2015, senior representatives of the Underwriters and John Needham of ANZ were of the view that the existence of the shortfall (that is, the fact that the Underwriters were to take up approximately $790 million of the shares in the Placement) was not generally known in the market. Further, Mr Needham's evidence set out above establishes that the Underwriters did not want to engage in conduct that would require them to disclose the shortfall to the market.

Tuesday, 11 August

198 On Tuesday, 11 August 2015, Maxwell Davies (Citi) sent an email to Harry Florin (JPM), Joanne Ma (JPM), Jessica Lin (Deutsche) and Kyra Hannaford (Deutsche) attached a revised allocation list. The email stated:

> Hi All
> Please find updated book which now includes the Macquarie HK order
> Please let me know your final share count so that we can agree and then draw up an allocation letter

199 It appears from the documents that, on or about 11 August 2015, the Underwriters (or, at least, Deutsche) completed application forms for shares in the Placement, and they were sent Confirmation Letters.

Wednesday, 12 August

200 At 2.29 pm on Wednesday, 12 August 2015, Clime, an investment manager, posted on its website a report headed "Who was clever in the ANZ Capital Raising" (**Clime Article**). It appears that the website was accessible by members of the public. The article is referred to in the expert evidence (discussed later in these reasons). The article included:

> The [ANZ] raising was underwritten for $2.5 billion by three investment banks – Deutsche Bank, Citi and JPMorgan. Basically, if investors didn't buy all the shares on offer, those three banks would be left holding what was left over.
>
> Interestingly the floor that was agreed of $30.95 was below the lowest closing market price for ANZ over the previous six months of $31.09. Arguably that should have mitigated the risk of an underwriting shortfall.
>
> *Left holding the can*
>
> However that is not how it turned out and the investment banks still took a risk with the timing and the pricing. In a rushed book build, they chose not to lure shareholders with a discounted rights issue but rather chose a placement without much of a discount to the existing ANZ price.
>
> Big institutional investors were offered the stock at $30.95 a share – that was a 5 per cent discount to the closing price last Wednesday. (Retail investors could buy ANZ shares in the raising as part of a share purchase plan.)
>
> That 5 per cent discount was extremely slim. NAB's discount on its raising was a much more attractive 15 per cent.
>
> What happened?
>
> *A clear lesson*
>
> **The investment banks clearly didn't get the full raising away and they have been left holding the can to some extent.**
>
> ANZ's share price has now fallen below the capital raising price of $30.95.
>
> The investment banks, arguably, after mispricing the capital raising have egg on their face.
>
> As an aside, the ANZ Board now looks smart: they grabbed the money when they could and sold shares at what has turned out to be an attractive price. Further small shareholders will now be offered shares at a discount to the big boys through a SPP that is priced at VWAP??.
>
> The lesson is clear: Investment in equities is a long term endeavour and a focus on the short term actually creates more pricing risk and not less. Indeed short term pricing actually gives no indication of value.

> That should be clear to the investment banks who constructed a 12 hour window to raise capital that could have been raised over say a month with all shareholders being treated fairly and equally (as NAB did).
>
> Indeed by rushing a capital raising at a thin discount – through an "accelerated book build" – they increased their underwriting risk. They simply ignored the observable risk that bank equities would be under constant pressure due to the expectation that capital raisings were coming across the four large banks.
>
> (Bold emphasis added.)

201 This report (in the sentence emphasised above) contains a clear statement that the Underwriters took up a portion of the Placement shares.

Thursday, 13 August and later

202 At 10.42 am on Thursday, 13 August 2015, Niccolo Manno (JPM) sent an email to others at JPM (CB tab 398). The email was sent in response to a JPM email with the subject line, "anz ecm/syndicate issue + soros - can i please get a detailed update - thank you". Mr Manno's email stated:

> Mike Germino at Soros called on Monday [i.e. 10 August] **complaining that he didn't know we held a position in ANZ**.
>
> I told him that we don't advertise our positions to clients and subsequently checked with US syndicate who speak to Mike if they followed the same procedure, which indeed they do.
>
> I had called him on Thursday night prior to finalizing allocations [i.e. the evening of 6 August] **to discuss his allocation size preference** and he got reduced from c.usd70m to c.usd50m following that process.
>
> (Emphasis added.)

203 The evidence includes the transcript of a conversation on 24 August 2015 between Itay Tuchman (Citi) and Richard Heyes (Citi), which includes a passage relied on by ASIC in these reasons. I do not consider it necessary to set out this passage.

The six investors in ASIC's reply

204 I will now set out some additional facts, and make findings, in relation to the six investors referred to in ASIC's reply. Specifically, I am addressing whether these investors amended their applications and whether they made clear that they did not want to be allocated more than a certain amount.

Segantii

205 On the morning of 6 August 2015, Segantii made an application for $250 million of shares at $31.50 per share and $100 million of shares at $31.60 per share (CB tabs 57, 239, 308). This

was recorded as demand for $250 million of shares at $30.95 in a number of spreadsheets prepared during the book-build, including the first book-build update and the second book-build update (CB tabs 152, 183).

206 In the Draft Allocation List of 8.35 pm on 6 August 2015, the proposed allocation to Segantii was $65 million of shares, shaded in brown. The shading suggests that there needed to be further discussion about the amount of the proposed allocation.

207 I find that, before 9.23 pm on 6 August 2015, Segantii communicated to the Joint Lead Managers that it did not want more than $51 million of shares. This finding is supported by the telephone conversation at 9.23 pm on 6 August 2015 (see [139] above). During that conversation, Mr Richardson said: "Segantii's saying around number, make it 51 million – ie, around number in shares. I think he's already been yelling at Rob". (The reference to Rob is apparently to Rob Jahrling.) There was also subsequent discussion about whether Segantii was a real order, with Mr McLean stating that it *was* a real order. During cross-examination, Mr Jahrling gave evidence, which I accept, that he did not know whether Segantii amended its bid, and that he did not recall a conversation in which Segantii yelled at him that they did not want to take more than $50 million.

208 At 9.51 pm on 6 August 2015, JPM sent an internal email and spreadsheet (CB tabs 246, 247) that proposed allocating approximately $51 million of shares to Segantii.

209 In the spreadsheet of 10.57 pm on 6 August 2015, the proposed allocation to Segantii was $75 million of shares, with the row highlighted in blue.

210 In the Final Allocation List of 2.26 am on 7 August 2015, the proposed allocation to Segantii was $50 million of shares.

211 At 6.27 am on 7 August 2015, Michael Richardson (Deutsche) sent an email to others at Deutsche:

> FYI - some colourful discussions with Segantii (Arjuna Rajasingham) overnight on ANZ allocations. **Bid $250m, would only take $50m**.
>
> Mostly Rob Jahrling (Citi) and Niko Mannolo (JPM) discussions.
>
> (Emphasis added.)

212 It appears that Segantii subsequently agreed to take $75 million of shares. At 9.44 am on 7 August 2015, Niccolo Manno (JPM) sent an email to others at JPM with the subject line

"Segantii will take aud75m instead of aud50m in the end to help-out". The body of the email stated: "Just spoke to Arjuna who will reflect this to citi and db too."

213 At 9.50 am on 7 August 2015, Niccolo Manno (JPM) sent an email to Segantii:

> Thanks Simon and Arjuna,
> Your allocation is now aud75m, exact nbr of shares to come from Citi.
> Very much appreciate the help.
> Niccolo

214 At 10.02 am on 7 August 2015, Niccolo Manno (JPM) sent an email to Richard Galvin (JPM), Mr Newton (JPM), Aditi Varghese (JPM) and Mr Florin (JPM), copied to others at JPM. The email was sent in response to an email from Richard Galvin regarding Segantii. Mr Manno's email stated:

> Richard,
>
> Citi started this all by trying to push more stock down investors throat without checking first, so clever investors know what's going on and that was exactly what I wanted to avoid, hence all the discussions last night to try to stop them doing so.
>
> Segantii called to pro-actively help in taking more stock, ie aud75m.
>
> Niccolo

215 During the telephone conversation at 10.20 am on 7 August 2015 (see [182] above), Mr Lavis (Citi) said Segantii had been "lent on" and "they were at 50 and they've gone to 75".

216 During the conversation at 2.13 pm on 7 August 2015 (see [185] above), Mr Tuchman was critical of the process and noted that Segantii had been in the book for $250 million "when he's ordered you that not a single penny over $50 million". He said that "It shouldn't sit in the book at 250 as it closes". During his second Section 19 Examination, Mr Tuchman was questioned about this transcript (in a passage relied on by ANZ). He said that someone said something like this, but he could not recall when this occurred. Although the statements made by Mr Tuchman during the telephone conversation suggest that the communication from Segantii was received before the book-build closed (at 6.00 pm on 6 August 2015), there are indications that the communication from Segantii may have been received later in the evening. The Draft Allocation List of 8.25 pm on 6 August has the proposed allocation at $65 million (shaded in brown). This perhaps suggests that the communication had not yet been received. I am not satisfied that the communication from Segantii (that it only wanted $50 million or $51 million) was received before 6.00 pm on 6 August. However, I am satisfied that it was received before 9.23 pm on 6 August.

217 Segantii was ultimately allocated $75 million of shares (CB tab 382).

218 During his Section 19 Examination (in passages relied on by ANZ), Mr Jahrling gave evidence in relation to the allocation to Segantii. He said that he could not recall if Segantii amended their bid from the initial bid of $250 million; if they did, it would be reflected in the final order book. He also said that he would not have been concerned about a risk of default if the full $250 million of shares had been allocated to Segantii.

219 Having regard to the evidence set out above, on balance, I am not satisfied that Segantii *amended* its application from $250 million of shares to a lower figure. The application remained recorded as $250 million of shares through each iteration of the allocation spreadsheet. There does not appear to be any clear written communication from Segantii to the effect that it amended its application. Some of the evidence described above suggests that Segantii was merely communicating the maximum amount that it wanted to be allocated rather than amending its bid.

220 Further, I find that Segantii made clear, before 9.23 pm on 6 August 2015, that it did not want to be allocated more than $51 million of shares. (This subsequently changed to $75 million.)

Soros

221 Soros's initial application was for US$100 million of shares (approximately $136 million of shares).

222 During the evening of 6 August 2015, Soros's global head of trading told Niccolo Manno (JPM) that Soros wanted no more than US$50 million of shares. This is supported by an email sent by Aditi Varghese (JPM) (CB tab 262). The time of the email is not clear. It was "cut and pasted" into an email sent by Richard Newton (JPM) at 1.06 am on 7 August. I infer that Aditi Varghese's email was sent either late on 6 August or very early on 7 August. The email stated:

> Please note that the global head of trading at Soros had told Niccolo earlier today they want no more than USD50mm – please bear that in mind unless they provide an updated view overnight.

The reference to "earlier today" is to earlier on 6 August. I infer that the conversation between Soros and Niccolo Manno took place *during the evening* of 6 August, having regard to the email set out at [202] above (CB tab 398).

223 In the Draft Allocation List of 8.25 pm on 6 August 2015, the proposed allocation to Soros was $85 million of shares.

224 In the 9.51 pm (6 August 2015) JPM spreadsheet, the proposed allocation to Soros was approximately US$51 million ($69 million). This is (broadly) consistent with the instruction referred to above that Soros wanted no more than US$50 million of shares.

225 In the 10.57 pm (6 August 2015) spreadsheet, the proposed allocation to Soros was $85 million.

226 As noted above, at 12.04 am on 7 August 2015, Anthony Hanna (Citi) sent an email to a long list of recipients at the Underwriters attaching a revised version of the allocation list. The email stated that all letters except for Soros would be sent shortly. This suggests that there was uncertainty as regards the allocation to be made to Soros.

227 At 12.12 am on 7 August 2015, Richard Newton (JPM) sent an email to Niccolo Manno (JPM) and Harry Florin (JPM) (CB tab 310):

> Here is the final book except for Soros and ex anything we get from the USA. ....I have told them clearly that at the moment **Soros demand is at 2.25m shares** regards spider
>
> (Emphasis added.)

I note that 2.25 million shares equates to approximately US$51 million of shares or $69 million of shares.

228 At 1.06 am on 7 August 2015, Richard Newton (JPM) sent an email to John McLean (Citi) and Robert Jahrling (Citi) (CB tab 262) that set out the email from Aditi Varghese set out at [222] above. Mr Newton's email stated: "See below ... this where we are with Soros ….".

229 As noted above, at 2.08 am on 7 August 2015, Kristopher Salinger (Citi) sent an email to a long list of recipients at the Underwriters attaching a revised (final) version of the allocation list. The covering email included: "Soros now 2.25mm shares (previously $85mmm)".

230 In the Final Allocation List of 2.26 am on 7 August 2015, the allocation to Soros was approximately $69 million of shares (equating to approximately US$51 million of shares). This is (broadly) consistent with the communication from Soros that it wanted no more than US$50 million of shares.

231 As set out above, at 10.42 am on Thursday, 13 August 2015, Niccolo Manno (JPM) sent an email to others at JPM. The email included: "I had called him [Mike Germino] on Thursday night prior to finalizing allocations [i.e. the evening of 6 August] to discuss his allocation size preference and he got reduced from c.usd70m to c.usd50m following that process."

232 Having regard to the above, I am not satisfied that Soros amended its application. The amount of the application ($136 million of shares) remained the same through each iteration of the spreadsheet. There does not appear to be any clear communication to the effect that Soros amended its application. The email of 13 August 2015 supports the proposition that Soros was expressing an "allocation size preference" rather than altering its bid.

233 Further, I find that, during the evening of 6 August 2015, Soros made clear that it did not want to receive more than US$50 million (approximately $69 million) of shares.

DE Shaw

234 DE Shaw's initial application was for US$75 million of shares (approximately $102 million of shares). The evidence includes a copy of a spreadsheet from the records of JPM (CB tab 57) (the **DealAxis Spreadsheet**) that includes various details of applications, including the time at which the application was received. DE Shaw's initial application (US$75 million of shares) is recorded at row 163 (JPM, 3.19 pm), row 166 (Citi, 3.27 pm) and row 185 (Deutsche, 3.27 pm). In each case, the contact at DE Shaw was recorded as Rob Black (or Robert Black).

235 The DealAxis Spreadsheet also includes a later application by DE Shaw for a lower amount, namely US$40 million of shares (approximately $55 million of shares). This is recorded at row 501 and as having been received by JPM at 6.55 pm (on 6 August 2015). The contact at DE Shaw was Rob Black. This appears to record a communication from DE Shaw amending (or seeking to amend) its application (albeit that there is no similar entry in the DealAxis spreadsheets maintained by Citi and Deutsche).

236 In the Draft Allocation List of 8.35 pm on 6 August 2015, DE Shaw's application was recorded as $102 million of shares, and the proposed allocation to DE Shaw was $70 million of shares.

237 During the 9.23 pm (6 August 2015) telephone conversation reference was made to DE Shaw (see [135] and [139] above). This included a statement by Angus Richardson (Citi) that Spider (that is, Richard Newton of JPM) "reckons DE Shaw amended their order". Mr Tuchamn then said: "Why is it not amended in the book?". Mr McLean answered: "I know." Angus Richardson then said that DE Shaw were saying "55 Aussie", that is $55 million of shares. This conversation is consistent with DE Shaw's application having been amended.

238 In the JPM spreadsheet of 9.51 pm (6 August 2015) (CB tab 247), for DE Shaw, the demand was shown as US$40 million. This is consistent with DE Shaw having amended its application.

239 In the 10.57 pm (6 August 2015) spreadsheet, DE Shaw's application was listed as $102 million, and the proposed allocation to DE Shaw was $75 million of shares.

240 In the Final Allocation List of 2.26 am on 7 August 2015, DE Shaw's application was recorded as $102 million and the allocation to DE Shaw was $55 million of shares.

241 Having regard to the above, I am satisfied that DE Shaw sought to amend its application to US$40 million (approximately $55 million) of shares. However, in circumstances where the communication was received after the book-build closed (at 6.00 pm), I am not satisfied that the amendment was effective.

242 Further, I find that DE Shaw made clear that it did not want to receive more than US$40 million (approximately $55 million) of shares.

Myriad

243 Myriad's initial application was for $100 million of shares.

244 At 3.31 pm on 6 August 2015, John Hedigan (Myriad) sent a Bloomberg message to Joe Cruz (Deutsche) that stated: "keep me in for A$100 mm usd (sic) at low but my real max demand is A$35mm fill to be clear". Mr Cruz responded shortly afterwards: "understood". At 5.21 pm, Mr Cruz sent two messages that stated: "books covered"; and "have kept you in there for US$100m". The reference to US$100 million is confusing given that the initial application was for $100 million of shares in Australian dollars.

245 The DealAxis Spreadsheet records Myriad's initial application for $100 million of shares. It also includes a later application by Myriad for a lower amount, namely $35 million of shares. This is recorded at row 327 and as having been entered by JPM at 4.31 pm (on 6 August 2015). The contact at Myriad was John Hedigan (the same contact as for the initial application). This may suggest that Myriad amended its application. However, having regard to the timing (only one hour after the Bloomberg message of 3.31 pm), I consider it more likely that the entry in the DealAxis Spreadsheet represented JPM's interpretation of a communication from Mr Hedigan in the same or similar terms as the 3.31 pm Bloomberg message to Deutsche referred to above. The emails referred to below indicate that Mr Hedigan communicated his position regarding $35 million to all three Joint Lead Managers.

246 In the Draft Allocation List of 8.35 pm on 6 August 2015, Myriad's application was listed as $100 million of shares and the proposed allocation was $50 million of shares.

247 In the JPM spreadsheet of 9.51 pm (6 August 2015) (CB tab 247), for Myriad, the proposed allocation was 1.2 million shares (approximately $37 million of shares). The covering email (see [141] above) suggested a reduction of 100,000 shares. This would take the allocation to approximately $35 million of shares.

248 In the spreadsheet of 10.57 pm on 6 August 2015, Myriad's application was listed as $100 million of shares and the proposed allocation was $70 million of shares.

249 At 12.42 am on 7 August 2015 (that is, shortly after Confirmation Letters were sent to investors), John Hedigan of Myriad sent as email to Jarrod Bakker (Citi) in response to having received an email Confirmation Letter. Mr Hedigan wrote:

> Hi. I have been allocated A$70 mm ? ?
> I was very clear to all 3 runners that **my max allocation was to be A$35 mm**.
> Did Carl amend demand directly with Jahrling ?otherwise this is an issue.
> Thanks
> John
>
> (Emphasis added.)

250 As noted above, at 2.08 am on 7 August 2015, Kristopher Salinger (Citi) sent an email to a long list of recipients at the Underwriters attaching a revised (final) version of the allocation list. The covering email stated that, after much discussion, they had agreed to certain adjustments. One of these was "Myriad now A$40mm (previously A$70mm)".

251 In the Final Allocation List of 2.26 am on 7 August 2015, Myriad's application was listed as $100 million of shares and the allocation was $40 million of shares.

252 At 6.53 am on 7 August 2015, Jarrod Bakker (Citi) sent an email to John McLean (Citi), Robert Jahrling (Citi), Angus Richardson (Citi) and Adam Lavis (Citi) forwarding the email from Mr Hedigan of 12.42 am.

253 At 8.58 am on 7 August 2015, Jarrod Bakker (Citi) sent a further email to the same people stating:

> Why am I now seeing $40m in dialogic for Myriad.
> Someone needs to communicate with me on this so that we look coordinated.

254 At 9.14 am on 7 August 2015, Mr Bakker (Citi) sent a further email to the same people stating:

> Myriad
> First they got email saying they got 70bucks
> Then they get email saying 40bucks
> **Real demand was only 35bucks ..**

> The dealer is all over me ..
> Has anyone had another conversation with Carl overnight that is different to the instructions that I received before going to bed?
> Jarrod
>
> (Emphasis added.)

255 At 10.22 am on 7 August 2015, Mr Bakker sent a further email to the same people stating:

> Myriad COO now all over the dealer on this.
> They know $35m .. we are telling them $40m
> Sounds like we have a problem

256 Mr McLean replied to this email (reply all) stating that he would come down shortly.

257 Ultimately, Myriad was allocated $35 million of shares.

258 During his Section 19 Examination (in passages relied on by ANZ), Mr Jahrling was taken to the emails relating to Myriad referred to above. He said that he had conversations with the chief investment officer (**CIO**) of Myriad during the book-build; early in the book-build process, the CIO indicated to Mr Jahrling demand of $100 million; Mr Jahrling could not recall receiving an amended demand from the CIO; Mr Jahrling was not party to any conversation with John Hedigan (the head trader at Myriad) about amending the application. I accept this evidence.

259 Having regard to the above, I am not satisfied that Myriad amended its application from $100 million to $35 million of shares. In the Bloomberg message of 3.31 pm on 6 August 2015, Mr Hedigan stated: "keep me in for A$100 mm usd (sic) at low but my real max demand is A$35mm fill to be clear". This does not represent a clear amendment to the application (as distinct from an allocation preference). The words "keep me in for A$100 mm" suggest that he wanted to (or was prepared to) maintain an application for $100 million of shares. I consider this Bloomberg message to be a better indication of Myriad's position than the 4.31 pm entry in the DealAxis Spreadsheet, which may well have represented JPM's interpretation of a similar communication.

260 Further, I find that Myriad made clear that it did not want to receive more than $35 million of shares.

Indus

261 Indus, a US-based investor, initially applied for US$30 million of shares (approximately $40.8 million of shares).

262 At 12.11 pm on 6 August 2015, Mike Conway of Indus sent an email to Richard Newton (JPM) that included: "If you do just a couple of bucks only is fine". I take the reference to "a couple of bucks" to mean US$2 million of shares (or perhaps $2 million of shares).

263 In the Draft Allocation List of 8.35 pm on 6 August 2015, the proposed allocation to Indus was $5 million of shares (shaded in brown).

264 During the 9.23 pm telephone conversation reference was made to Indus (see [138]). Angus Richardson (Citi) stated: "We still don't know where Indus is. Are they at 30 or are they at 2?" Michael Richardson (Deutsche) responded: "We've got them at 5." There is discussion of the bid having been changed, and there being a colour around the amount as they knew they had to check it.

265 In the spreadsheet of 10.57 pm on 6 August 2015, the proposed allocation to Indus was $5 million of shares (shaded in brown).

266 In the Final Allocation List of 2.26 am on 7 August 2015, the allocation to Indus was 161,551 shares, being $5 million of shares.

267 At 6.32 am on 7 August 2015, Richard Newton (JPM) sent an email to Kristopher Salinger (Citi) regarding allocations. Mr Newton also forwarded his email to Robert Jahrling (Citi), Angus Richardson (Citi) and John McLean (Citi). Mr Newton's email stated:

> Ok the only issue that I can see at the moment is Indus which needs to be 65/ shares at 30.95 which is 2 million dollars AUD as agreed. Regards richard

It is apparent from an email set out below that the reference to "65/ shares" means 65,000 shares.

268 At 6.59 am on 7 August 2015, Mr McLean responded to that email:

> OK we are hearing same from our US desk.
> We will make the change.

269 At 7.00 am on 7 August 2015, John McLean (Citi) sent an email to others at Citi (and copied to Robert Jahrling). The email followed on from other emails relating to Indus's application. In one of the earlier emails, it had been stated (somewhat confusingly): "please put Indus in for $5mm USD of ANZ, their real demand is for $2mm". Mr McLean's email stated:

> We have allocated them $5mm which looks like an error.
> RJ can you confirm and we will send amended paperwork.

270 At 7.20 am on 7 August 2015, Mr Jahrling responded:

> That was one of the orders we discussed this morning. I thought Spider [Richard Newton, JPM] had already agreed the allocation with Indus. Best I call him before we do anything. Will revert asap

271 In a subsequent email, at 7.22 am on 7 August 2015, Mr Jahrling stated:

> Spider confirmed that an allocation of 65,000 shares has already been agreed. KS. Please amend the paperwork and resend. Thank you.

272 During the telephone conversation at 2.13 pm on 7 August 2015 (see [185] above), the allocation process relating to Indus was discussed. Itay Tuchman (Citi) stated: "I spoke to the (indistinct) there, and he only wants two. Why the hell is he in the book for 30?"

273 Ultimately, Indus was allocated $2.01 million of shares.

274 Having regard to the above, I am not satisfied that Indus amended its application from US$30 million before the book-build closed. There is no clear communication from Indus of an amendment to its bid in that timeframe. The email of 12.11 pm on 6 August 2015 does not clearly convey this. To the extent that the emails discussed above indicate that an agreement was reached that Indus would only be allocated $2 million of shares, it is unclear when that occurred and whether it should be treated as an amendment to the application.

275 Further, I find that, at some time on 6 or 7 August 2015, Indus made clear that it did not want to receive more than $2 million of shares. This was not clear from the email of 12.11 pm on 6 August 2015. However, it appears from the other emails set out above that at some stage Indus made it clear that it did not want to receive more than $2 million of shares (and the Underwriters agreed to this).

Brevan Howard

276 Brevan Howard's initial application was for US$25 million of shares (approximately $34 million of shares).

277 At 5.04 pm on 6 August 2015, Johan Tellvik (Brevan Howard) sent a series of three Bloomberg messages to Deutsche as follows:

> Not sure how much I will get
>
> But goal is about USD7mln as that leaves me room to buy more tomorrow in case
>
> Don't want more...

I note that US$7 million was approximately $10 million.

278 In the Draft Allocation List of 8.35 pm on 6 August 2015, the proposed allocation to Brevan Howard was $10 million of shares.

279 In the spreadsheet of 10.57 pm on 6 August 2015, the proposed allocation to Brevan Howard was $20 million of shares.

280 At 12.32 am on 7 August 2015, Johan Tellvik (Brevan Howard) sent an email to Robert Jahrling (Citi) with the subject line "Rob – please call my work line [number redacted] URGENT". The text of the email stated:

> Re allocation in ANZ
> I told all banks I wanted USD5-7mln
> I did not want aud20mln

281 At 12.33 am on 7 August 2015, Kristopher Salinger (Citi) sent an email to Robert Jahrling (Citi), copied to John McLean (Citi), Anthony Hanna (Citi) and others at Citi with the subject line "*** URGENT: Johan @ Brevan Howard ***". The text of the email stated:

> Rob – Johan from Brevan Howard called re: ANZ allocation
> Noted he indicated for 25mm but only wanted USD5-7mm
> He wants to talk to you when you get a chance.
> Can you give him a call?
> Kris

282 At 12.40 am on 7 August 2015, Mr Jahrling replied (reply all) to the 12.33 am email. Mr Jahrling stated:

> He will not accept $20m. $10m max. Apparently DB confirmed with him last night.
> We don't have a choice here

283 In the Final Allocation List of 2.26 am on 7 August 2015, the allocation to Brevan Howard was $10 million of shares.

284 Ultimately, Brevan Howard was allocated $10 million of shares.

285 During his Section 19 Examination (in passages relied on by ANZ), Mr Jahrling was taken to the emails relating to Brevan Howard referred to in the preceding paragraphs. Mr Jahrling said that he could not recall the conversations that took place, and that he did not know the circumstances of what Deutsche said to Brevan Howard. I accept that evidence.

286 During cross-examination, Mr Jahrling was taken to the emails set out above. He gave evidence that this was an allocation discussion rather than an amendment to the bid. I accept that this reflects Mr Jahrling's view of the emails.

287 Having regard to the above, I am not satisfied that Brevan Howard amended its application from US$25 million. There was no clear communication to that effect. The statement in the email of 12.40 am on 7 August 2015 that "[w]e don't have a choice here" does not necessarily indicate that Brevan Howard had amended its bid; it may refer to not having a commercial choice.

288 Further, I find that Brevan Howard made clear that it did not want to receive more than US$7 million (approximately $10 million) of shares. In reaching this view, I have had regard to not only the Bloomberg message of 5.04 pm on 6 August 2015, but also the other emails set out above.

Conclusion

289 In relation to the six investors, I have concluded in summary that:

(a) In relation to Segantii, I am not satisfied that it amended its application (for $250 million of shares), but I am satisfied that it made clear that it did not want to receive more than $51 million of shares (later increased to $75 million of shares).

(b) In relation to Soros, I am not satisfied that it amended its application for US$100 million (approximately $136 million) of shares, but I am satisfied that it made clear that it did not want to receive more than US$50 million (approximately $69 million) of shares.

(c) In relation to DE Shaw, I am not satisfied that it amended its application from US$75 million (approximately $102 million) of shares to US$40 million (approximately $55 million) of shares. However, I am satisfied that it made clear that it did not want to receive more than US$40 million (approximately $55 million) of shares.

(d) In relation to Myriad, I am not satisfied that it amended its application from $100 million to $35 million of shares, but I am satisfied that it made clear that it did not want to receive more than $35 million of shares.

(e) In relation to Indus, I am not satisfied that it amended its application from US$30 million (approximately $40.8 million) of shares, but I am satisfied that, at some time on 6 or 7 August 2015, Indus made clear that it did not want to receive more than $2 million of shares.

(f) In relation to Brevan Howard, I am not satisfied that it amended its application from US$25 million (approximately $34 million) of shares, but I am satisfied that it made clear that it did not want more than US$7 million (approximately $10 million) of shares.

290 I therefore find that the book *was* fully covered, as set out in the Draft Allocation List and the Final Allocation List.

291 However, I also find that the six investors made clear that they did not want to be allocated the full amount of their applications. The total of the applications of the six investors was $662.8 million of shares. In total, the six investors made clear that they did not want more than $246 million of shares (adopting the figure of $75 million for Segantii). The difference between the two totals is $416.8 million of shares. Thus, the real demand for the Placement was (at least) $416.8 million of shares less than the total demand set out in the Draft Allocation List and the Final Allocation List.

Why the Underwriters made their recommendation

292 I now make findings as to why the Underwriters recommended that approximately $754 million of shares not be allocated to investors (and therefore be taken up by the Underwriters). This recommendation was made in the Draft Allocation List (of 8.35 pm on 6 August 2015) and during the conference call shortly afterwards. (The figure of $754 million was subsequently adjusted to approximately $790 of shares in the Final Allocation List of 2.26 am on 7 August 2015.)

293 During his Section 19 Examination (in passages relied on by ANZ) Robert Jahrling (Citi) gave evidence in relation to the Underwriters' allocation recommendation. He said that the ultimate allocation decision is a joint decision between all bookrunners taking a number of factors into account, including what an investor (in terms of percentage allocation) is accustomed to receiving. He drew a distinction between what is *allocable* and what the investor is *accustomed to receiving*. Mr Jahrling said that the Underwriters made a decision not only based on the order sizes that had been received from each investor, but also with reference to how the Underwriters thought they could give the transaction the best opportunity to trade well in the after-market.

294 During his first Section 19 Examination (in a passage relied on by ASIC), Itay Tuchman (Citi) gave evidence about the reasons why the Joint Lead Managers made the allocation recommendation that they did. He said one of the reasons was that there were a number of large hedge funds that bid for large amounts that they (the Joint Lead Managers) felt would cause significant after-market disruptions should they be given full allocations.

295 Having regard to the evidence as a whole, including in relation to the six specific investors, I find that the reasons why the Underwriters recommended the allocation that they did (that is, to not allocate, and to take up, approximately $754 million of the shares) included that: certain hedge funds had made it clear that they did not want to receive the full amount of their applications; certain hedge funds were accustomed to receiving only a certain percentage of their application; the Underwriters were concerned that certain hedge funds would not complete the transaction if allocated more than proposed; and the Underwriters were concerned that certain hedge funds would sell their shares quickly if allocated more than proposed, creating a disorderly after-market.

296 Further, I infer that the Underwriters considered that they had no choice (in practical terms) but to recommend the allocation that they did, having regard to these reasons. In other words, I infer that they felt that they had no choice but to take up approximately $754 million of the shares notwithstanding that applications had been received for (slightly) more than 100% of the book.

297 As to whether the above reasons were communicated to ANZ, I have made findings, above, in relation to what ANZ was told by the Underwriters during the course of 6 August 2015, in particular during the conference call that took place shortly after 8.35 pm on 6 August 2015 (at which the allocation recommendation was made). I have found (at [130]) that the Underwriters expressed the view that it was better for them to pick up a portion of the stock and not have an unorderly sale coming from the hedge funds.

The expert evidence

Overview

298 Mr Pratt and Mr Holzwarth gave expert evidence as to whether market participants were aware of the relevant information (namely, the Underwriter Acquisition Information and the Significant Proportion Information) by the commencement of trading on 7 August 2015, and whether the relevant information was material.

299 Mr Pratt prepared two reports:

(a) an initial report dated 19 September 2022 (**Pratt First Report**); and

(b) a supplemental report dated 20 December 2022 (**Pratt Second Report**).

300 Mr Holzwarth prepared three reports:

(a) an initial report dated 26 November 2022 (**Holzwarth First Report**);

(b) a reply report dated 26 November 2022 (**Holzwarth Reply Report**); and

(c) a supplemental report dated 28 April 2023 (**Holzwarth Supplemental Report**). This was prepared during the trial, following the pleading ruling referred to at [51] above.

301 In the Joint Expert Report, the experts largely summarised the opinions expressed in their earlier reports. There was little agreement between the experts on the issues dealt with in the Joint Expert Report.

302 The experts have different backgrounds and expertise. Broadly, Mr Pratt has extensive experience in advising investors in Australia in relation to sharemarket transactions, while Mr Holzwarth has deep expertise in economic and financial matters and has given evidence in many proceedings including shareholder class actions.

303 Mr Pratt's experience is set out in section 2 of the Pratt First Report and includes:

> 25 years in the stockbroking and funds management industries, encompassing a variety of roles and responsibilities, including advising private clients, sophisticated investors, institutional portfolio managers, research analysts and dealers, Finance Directors, and company Treasurers either in their capacity as managers of their own funds and/or on behalf of their clients/employers.
>
> Specifically, from 1986 to 1995, I advised retail and institutional investors on opportunities and risks involved in investing in the Australian Equity Options Market. This involved identifying and pricing, on a daily basis, combined stock and options strategies which matched the risk appetites and market views of the investors. To do so successfully involved the understanding of option pricing mechanics, research into the financial prospects of the underlying stock, and importantly, the appeal of those strategies to a particular investor.
>
> From 1996 to 2000, I was employed on the equity dealing desk AMP Capital and was responsible for the execution in the markets of all the various funds' equity derivative exposures, principally exchange traded share options, equity index futures and options over equity index futures in Australia. In addition, I was responsible for executing the equity orders for some of the fund management teams within AMP Capital, at the time the largest fund manager in Australia. In doing so, I had daily conversations with the Fund Managers providing execution advice on their equity orders. I also dealt into the Nikkei futures market on the Tokyo Stock Exchange and the New Zealand stock market on various occasions.
>
> Of relevance to this report, in order to perform the role effectively it was necessary to develop a range of skills including a nuanced understanding of the varying flows of transactions across the markets; the likely impact of orders to be executed on the price of securities in a market; remembering recent notable turnover in any particular security and which brokers had transacted it; who the "house brokers" to a given stock were; past or upcoming announcements expected in stocks and appreciating average

daily turnovers of stocks relative to the size of the order in hand, all of which had to be interpreted and balanced with the fund manager's reasons for trading the stock.

From 2001 to 2011, I was employed by ABN AMRO, (taken over by RBS in 2007) first as Head of Sales Trading and Trading (Aust/NZ). In this role I was responsible for a team of 30 employees who executed the share trading of clients and the firm on the ASX and NZ equity markets. I was also advising some institutions (AMP, BT, Perpetual) on the execution their equity orders in the Australian and New Zealand markets. This drew on my experiences from AMP detailed above and relied on a clear appreciation of the clients' needs and expectations regarding execution outcomes – the timeframe, price and volume of execution being all interrelated and often co-dependent.

From 2003 I was Head of Equities (Aust/NZ) and from 2010 Head of Global Markets (Aust).

As Head of Equities/Head of Global Markets, one of the reporting lines into me was the Head of Equity Capital Markets (ECM). ECM was the division of the firm that conducted capital market transactions such as IPO's, rights issues, and placements. As Head of Equities, I was a member of the local management committee which reviewed proposals from the ECM department, which considered all aspects of the transactions including the financial risk to the bank, reputational issues, likely market appetite for the deal and contemporaneous market conditions amongst other issues. If approved by the local committee the transaction was then referred on to the Global Committee for review at that level.

304 Mr Holzwarth summarised his qualifications in section 2 of the Holzwarth First Report as follows:

I am a Partner in OSKR, LLC, a consulting firm specialising in economic and financial analysis in litigation proceedings. I earned a B.A. in Economics cum laude from the University of Pennsylvania and an MBA from the Haas School of Business at the University of California at Berkeley. I am also a CFA® charterholder.

I began my career at LECG, LLC, a consulting firm specialising in economic and financial analysis in litigation proceedings. I was employed at LECG for approximately five years before attending Berkeley. I also worked at Charles Schwab & Co., a United States-based broker-dealer. I specialised in providing financial and statistical analysis to senior management regarding investments in the firm's infrastructure, products and marketing. In this role, I provided project valuation analysis and decision support to senior management. I left Charles Schwab & Co. to return to LECG. Upon returning to LECG, I was engaged as a consulting and testifying expert on matters related to valuation and damages analysis. I spent another five years at LECG before joining OSKR at its founding.

During this time, I have developed expertise in financial and damages analysis. I have made presentations to attorneys regarding the proper techniques to assess claims of disclosure contraventions. I have also served as a referee for a peer reviewed journal on research relying upon Event Study techniques. I have published on issues related to financial valuation. I have been retained as a testifying and consulting expert in matters regarding financial analysis and damages analysis using both traditional financial analysis techniques as well as applying Event Study analysis techniques. I have applied these analyses in various industries, including: telecommunications, semiconductors, avionics, real estate, waste management, agriculture, software, financial services, and resources. I am a co-author of a financial simulation model used in four US states in

the telecommunications industry.

I have acted as an Expert in several shareholder class actions in Australia. I have provided opinions regarding market efficiency, the appropriate methodologies for analysing materiality and inflation, such as the Event Study methodology, as well as fundamental value analysis and assessing the action of credit rating agencies.

(Footnotes omitted.)

305 Both experts gave evidence in a clear and helpful way. I am satisfied that they each expressed their honest opinions on the issues they addressed. Both experts were evidently conscious of their duty to assist the Court and made appropriate concessions.

306 The Joint Expert Report is arranged around five issues, and the concurrent evidence session was similarly structured. I will deal with the expert evidence under these five issues.

307 I note that the experts use the expressions "Underwriter Acquisition Information" and "Significant Proportion Information" in the same way as these expressions are used in these reasons (see [8] above).

Issue 1

308 Issue 1 is: to what extent were market participants aware by the commencement of trading on 7 August 2015 that the Joint Lead Managers were to acquire:

(a) a significant proportion of the Placement shares; or

(b) between approximately $754 million and $790 million of Placement shares,

and, if so, when and how would this awareness (if any) have arisen?

309 In broad outline, the positions of the experts were as follows:

(a) In Mr Pratt's view, market participants were not aware, to any meaningful extent, of either the Underwriter Acquisition Information or the Significant Proportion Information by the commencement of trading on 7 August 2015.

(b) Mr Holzwarth's opinions can be summarised as follows:

(i) The information available at the opening of trading on 7 August 2015 does not support a conclusion that the Underwriters had successfully placed all of the Placement shares with long-term existing domestic shareholders. Rather, the available information was that many large fund managers had shunned the capital raising due to the "skinny" discount and the poor ANZ Q3 trading update. Further information flow from the book-build or analyst reports would

reinforce this conclusion. As a consequence, market participants would be expected to have concluded that the Underwriters had either: (1) placed shares with offshore shareholders who may not be in for the long-term; or (2) retained a portion of the Placement shares. The known incentives of underwriters support a conclusion that market participants would have expected the Underwriters to retain a significant proportion of the Placement shares rather than place shares with investors not in for the long-term.

(ii) An "ex post analysis" or event study, based on the Clime Article (referred to by Mr Holzwarth as the Clime Disclosure), supports a conclusion that market participants did have sufficient time to "piece together" information as at the open of trading on 7 August 2015. Following the Clime Disclosure, the price of ANZ shares climbs slightly during the remaining hours of trading on 12 August and during the next trading day. The ex post analysis supports two compatible conclusions regarding the Significant Proportion Information: one, the Significant Proportion Information was already widely known prior to 12 August 2015; two, the Significant Proportion Information was not material to the price in any event.

310 I will now set out the expert evidence on this issue in more detail.

Mr Pratt's evidence

311 In his first report, Mr Pratt described the way in which information may be made known in the market. He expressed the opinions:

> Over time, an impression of the degree of uptake of a transaction by the institutional client base may thus be accumulated by third parties to the transaction who have no direct knowledge of its outcome. In the current situation, not only did some of Australia's largest fund managers request merely token allocations. Eg Ausbil, Antares, BT, Colonial First State, Paradise and Perennial, others took none eg. AMP, Vinva, Perpetual. In my experience, that lack of engagement by so many institutions of that size is extremely unusual given the magnitude of the placement and the large market capitalisation of the stock. In my experience it undoubtedly would have created a lot of discussion and enquiry across sales and dealing desks around the market and set in train the information gathering dynamic described above.
>
> Therefore, from my experience, I believe that across the market an appreciation that there had been a significant lack of demand for the placement and consequentially realisation the Underwriters had purchased some of the shares **would have slowly grown**.
>
> The development towards that understanding can be seen to emerge in a succession of media articles from the days of and following the placement. …

> In total, whilst this can be seen to be representative of the information circulating in the market, it is clearly an incomplete picture of the actual outcome. In my opinion, at some stage following the placement, the institutional market at least, would have become aware that the underwriters had been forced to acquire some of the placement shares due to insufficient demand from institutions.
>
> (Emphasis added.)

312 In his first report, Mr Pratt addressed the question whether the Underwriter Acquisition Information and/or the Significant Proportion Information were generally available (within the meaning of s 676 of the *Corporations Act*) at any time on 7 August 2015. Mr Pratt expressed the view that the *Underwriter Acquisition Information* was not generally available on 7 August 2015. His reasoning was as follows (p 10):

> To make the specific fact that shares with a value between $754m and $790m … were to be acquired by the underwriters generally available on 7 August 2015, would have required a notice from the ASX, ANZ and/or the Underwriters to have been released to the market. This was not done.
>
> The actual Notice issued by ANZ on 7 August 2015 … merely stated that "it had raised $2.5billion in new equity capital through the placement of approximately 80.8 million ordinary shares at the price on $30.95 per share."
>
> The market would have taken I believe, the pro forma wording of this notice at face value, including the implication that as per usual, the shares had been bought by investors and that there was no shortfall.

313 In relation to whether the *Significant Proportion Information* was generally available on 7 August 2015, Mr Pratt expressed the following opinion and provided the following reasons in his first report (pp 11-12):

> The more general fact that some of the shares, the subject of the placement, were to be acquired by the underwriters might possibly have been suspected by some sections of the market. However, being just one day after the transaction and given the wording of the aforementioned notice by ANZ, I believe those suspicions would as yet have been uncorroborated and unquantifiable.
>
> In my opinion, it is therefore extremely unlikely that the information that a "significant proportion of the shares the subject of the Placement were to be acquired by the Underwriters" was held by anyone other than ANZ or the Underwriters and thus it cannot be said that it was generally available on 7 August 2015.
>
> *Reason*
>
> First, it must be emphasised in my 30-year experience that only a very small percentage of placements are unsuccessful to the degree seen in this case and by companies of the magnitude of ANZ. The failed rights issue by Westpac in 1992 is the only similar sized failure I can recall by a bank.
>
> Whilst there are commonly shortfalls in rights issues due to logistical and or regulatory restrictions, these are usually smaller and either comfortably subsequently taken up by the underwriters and sub-underwriters themselves or sold off in a block trade by the managing broker if not underwritten.

> I believe all investors, regardless of their own appetite for placement stock, would therefore nevertheless have expected it to have been successfully placed. Thus, on 7th August it would have been unlikely market participants would have spent much time trying to determine whether a "significant proportion of the shares the subject of the Placement were to be acquired by the Underwriter" …
>
> Second, in my experience, the allocation process of matching demand for shares against supply in transactions such as this is a commercially sensitive one at the best of times. Competing interests can make it a fractious process requiring patient negotiations between, in this case, the Underwriters. At all times the final allocation list of which institution got how many shares, is withheld by the ECM department behind the Chinese Wall and not disclosed even to their own institutional sales desks.
>
> In this case, whilst the sales desks might have sensed the paucity of demand from the responses received from their inquiries seeking bids for shares from individual institutions on 6 August 2015, they would have had no vision of the overall demand nor of the final allocation list. In addition, from the only information they would have received, being the allocations for their own clients, the observation would have been that as per normal the larger bids only received partial fills, representative of a surfeit of demand. Thus, by 7 August 2015 I believe it likely that at best an opaque picture of the shortfall was held by the Underwriters sales desks (the most likely source of information leakage) and as such it is unlikely that information about a significant shortfall would have started to leak from those desks by then.
>
> Further, in my experience, the situation described in the Relevant Information would have created significant "shock waves" within both ANZ and the Underwriters' organizations. It was not a "good news story". In my experience the gravity of the situation, given the amount of money involved and high-profile nature of the transaction, would have been rapidly communicated up the various lines of command of the Underwriters' organizations (both domestic and offshore). In such circumstances where increasingly senior executives are involved, organisations tend to "go to ground" regarding outside communications until a coherent and coordinated position is agreed upon by all parties.
>
> For these reasons I believe it unlikely that there would have been sufficient information "leakage" from the parties involved in the transaction for the more general fact that a significant proportion of the shares the subject of the Placement had been acquired by the Underwriters was generally available on 7 August 2015, nor was there sufficient time for other market participants to piece together disparate pieces of information to come to that realisation.

314 In Mr Pratt's second report, at pp 3-5, he discussed what types of investors would have been likely to review and/or receive the Clime Article. He stated that, although the Clime Article would have been open to the public on the Clime website, in his opinion, it would most likely to have been seen by those of Clime's clients who happened upon it or those of its existing clients who took an active interest in the day-to-day machinations of the equity market. He stated that the focus of Clime's business appeared to be on retail clients. He stated that, based on his experience over nearly 30 years both as a broker at three large investment houses and as a client at AMP, none of the large investment houses like the Joint Lead Managers, nor the large institutional investors such as those who acquired shares in the Placement, would have

been looking at the Clime website, nor have been in receipt of a copy of the Clime Article and, as a result, they would have been unaware of it. In oral evidence, Mr Pratt was taken to a folder of articles dealing with banks over the period from August 2014 to August 2016 in which Clime's views were reproduced or quoted. Mr Pratt accepted that Clime was able to get itself quoted alongside some of the best investment managers in the business.

315 In Mr Pratt's second report, at p 13, he set out a table showing the share price for ANZ and the other three major Australian banks, and the percentage changes in those share prices in the period from 5 August 2015 to 31 October 2015. He expressed the view in that report that the figures gave credence to his opinion that awareness of the relevant information "would have slowly grown". However, in oral evidence, Mr Pratt accepted that the significant movement in the ANZ share price (vis a vis the other banks) as at 31 October 2015 was a result of the ANZ financial year 2015 results (which were published on 29 October 2015) not a growing appreciation of the relevant information. In light of this questioning and Mr Pratt's responses, I place no weight on the share price analysis at p 13 of the Pratt Second Report.

316 In the Joint Expert Report, in relation to Issue 1, Mr Pratt set out his reasoning in some detail. This included:

> 7. In Pratt's opinion, there is no evidence to suggest that before trading on 7 August 2015 any market participant received any hard information other than their allocation and the announcement by the ANZ that the placement had been completed. Whilst Pratt accepts that it is relatively uncommon to receive a 100% allocation in a placement, as many institutions and private clients did, it is difficult to see how market participants could extrapolate from this solitary data point an awareness that the [Joint Lead Managers] were to either acquire a significant proportion of the placement shares or between approximately $754 million and $790 million of them. Indeed, Pratt has seen no evidence that information to that effect was made available to market participants by the [Joint Lead Managers] or ANZ.
>
> 8. A recipient of a 100% allocation might have made any number of conclusions at odds with the Underwriter Acquisition Information or the Significant Proportion Information. …
>
> 9. Further, it is highly unlikely those institutional investors who did receive an allocation of 100% of their bid knew how many other bidders received the same. Allocations are regarded as commercially sensitive information and would have remained confidential within the Equity Capital Markets (ECM) departments of the [Joint Lead Managers].
>
> …
>
> 18. Also, if market participants, many of whom were quoted in the media reports cited above, were aware of either the [Underwriter Acquisition Information] and/or the [Significant Proportion Information] at the start of trade on 7 August

> 2015, it is hard to conceive how comment on them would not have featured prominently in the multitudinous analyst and media reports subsequently published.
>
> 19. Particularly so, given the rarity of a shortfall of this extraordinary size occurring from a placement of such a prominent and well capitalised stock as ANZ. (Pratt Report p11).

317 In oral evidence, Mr Pratt was asked what he meant by a "failed capital raising", an expression used in his first report. He initially accepted the proposition that he meant that the underwriters were unable to find enforceable bids for all the stock that was available. However, he subsequently clarified this by reference to the Draft Allocation List. He said that the premise upon which he prepared the reports was that "there was $750 million worth of unfilled bids left to allocate" as indicated by the "left to allocate" figure in the spreadsheet. I take from this that Mr Pratt used the expression "failed capital raising" to encompass the Placement.

318 In oral evidence, Mr Pratt was taken to a Morgan Stanley report on ANZ dated 6 August 2015 (CB tab 969). Mr Pratt said that the report would have been written on 6 August and delivered to institutions on the morning of 7 August, before the opening of trading. The report was headed "ANZ Bank – Testing Time: Stay Underweight" and commenced:

> In our view, ANZ's trading update and equity raising highlight downside risk to consensus EPS estimates from revenue headwinds, higher loan losses and more onerous capital requirements. We also think the stock should de-rate and we retain our UW rating.
>
> **~4% to ~5% EPS downgrades**: The impact of an earlier-than-forecast capital raising and a ~2% reduction in cash profit sees us downgrade cash EPS by ~5% in FY16E and ~4% in FY17E. Our price target falls by ~4.5% to A$29.50.

319 Mr Pratt accepted that this indicates a 4 to 5 per cent EPS downgrade on account of the announcements that had been made by ANZ, and that led Morgan Stanley to a price target fall of the same order of magnitude. Mr Pratt accepted that there were similar negative reports by CLSA and Bank of America on 6 August 2015. He accepted that large institutional investors would have access to these sorts of reports as they are published.

320 In oral evidence, Mr Pratt was taken to a number of the media articles about the Placement that have been set out earlier in these reasons. It was put to Mr Pratt that, if one assumes that the book for the Placement was fully covered by nightfall on 6 August 2015, and that the Underwriters had to turn to offshore investors to get the deal away, this suggests a "pretty well-informed marketplace". Mr Pratt accepted this in relation to *those specific pieces of information*. However, that is, of course, quite different to accepting that the marketplace was

well-informed about either the Underwriter Acquisition Information or the Significant Proportion Information.

Mr Holzwarth's evidence

321 In Section 5 of his first report, Mr Holzwarth set out a number of background matters. In Section 5.3 he described event study methodology. Within this section, he referred to the concept of informational efficiency and the role played by informed investors. In Section 6 of that report, Mr Holzwarth set out his market model for ANZ shares. In Section 7, he dealt with market efficiency in relation to ANZ shares. In Section 8, Mr Holzwarth expressed the view that neither the Underwriter Acquisition Information nor the Significant Proportion Information was value-relevant information.

322 In Section 9 of his first report, Mr Holzwarth dealt with the *incentives of Underwriters of an SEO* (defined in the report as meaning a Seasoned Equity Offering, otherwise known as a Secondary Equity Offering, that is, an equity offering by an already publicly traded company). Mr Holzwarth's conclusion in relation to this topic included:

> 176. Taken together, the academic research contradicts an assertion [in ASIC's pleading] that market participants would have expected the Underwriters to "promptly" sell shares in a way that would "place downward pressure upon the ANZ share price." Rather, the incentives of the Underwriters in selling ANZ shares would have been to trade more slowly and wait for liquidity as opposed to buying liquidity by trading quickly. In addition, academic research documents the importance of reputation for underwriters in winning larger deals. Research has also shown that underwriters will act to "stabilize" the price of newly issued securities consistent with reputational effects influencing their decisions.

323 In Section 10 of his first report, Mr Holzwarth dealt with *book-build information flow*. At paragraphs 181 to 186, Mr Holzwarth analysed data from the book-build that had been provided to him as part of his instructions. First, he analysed the extent that existing ANZ shareholders participated in the capital raising. His analysis indicated that of the 100 largest shareholders prior to the capital raising, 60 shareholders did not choose to bid. Secondly, Mr Holzwarth assessed the extent that smaller shareholders received full allocations of shares requested (noting that, to the extent that they did receive a full allocation, this would signal to market participants that the capital raising had not successfully placed all of the Placement shares with long-term domestic shareholders). He stated that, of the 29 existing shareholders with less than 1 million shares prior to the capital raising, 23 received a full allocation. Thirdly, he identified 53 participants of the capital raising who were not existing shareholders prior to

the capital raising. He stated that, of these 53 shareholders, 41 received full allocations. Mr Holzwarth stated that, consistent with the prior discussion, new shareholders receiving a full allocation would have signalled to market participants that the capital raising had not successfully placed all of the Placement shares with long-term domestic shareholders. Fourthly, Mr Holzwarth identified 25 investors whose bids were reduced during the book-build. He stated that this is consistent with market participants initially asking for more than they wanted to receive. Fifthly, Mr Holzwarth stated that the process of soliciting non-shareholders to purchase allocations of shares would have provided information to non-participants of the capital raising that the book-build had not successfully placed all of the Placement shares with long-term domestic shareholders. Mr Holzwarth expressed the following opinions based on that analysis:

> 187. Overall, the Bookbuild provided several ways for market participants to become aware that the Bookbuild had not successfully placed all of the Placement Shares with long-term domestic shareholders. Market participants would have come to two likely conclusions based on this information:
>
> - One, the Underwriters had placed shares with market participants who were not considered long-term existing shareholders. These types of investors would have been more likely to attempt to flip shares in order to capture any short-term trading profit or to sell quickly if the price of ANZ shares was below the offer price; or
> - Two, the Underwriters had chosen to retain a portion of the shares rather than place the shares with shareholders who were not considered long-term holders.
>
> 188. Of these two potential outcomes, the more likely outcome, in my opinion, would be for the Underwriters to choose to retain shares rather than place them with perceived short-term shareholders based on my discussion of the incentives of underwriters generally in Section 9. The Underwriters would be in a better position to act to "stabilize" ANZ shares in the secondary market by choosing to retain shares rather than place the shares with potentially more volatile short-term shareholders.

324 In oral evidence, Mr Holzwarth accepted that the reference to "several ways" in the first sentence of paragraph 187 was a reference back to the matters set out in paragraphs 181-186. In relation to the analysis contained in paragraphs 181-186, Mr Holzwarth was taken to the Final Allocation List sent to ANZ at 2.26 am on 7 August 2015, a copy of which had been provided to him as part of his instructions. Mr Holzwarth confirmed that he also had regard to the spreadsheets that were sent to ANZ throughout the day and early evening of 6 August 2015 (referred to earlier in these reasons). Mr Holzwarth accepted that all of these documents were at the time highly confidential documents. Mr Holzwarth said that he did not have any reason to disagree with Mr Pratt's opinion that even within the investment banks those documents

were not shared at the time with sales desks. Mr Holzwarth said that he proceeded on that premise or assumption. Mr Holzwarth said that his analysis did not assume that market participants had access to those spreadsheets at any time on 6 August 2015 or before trade commenced on 7 August 2015. Mr Holzwarth said that his analysis proceeds under the assumption that the spreadsheets accurately reflect interactions between the Joint Lead Managers and their customers. Mr Holzwarth confirmed that the words "based on this information" in the second sentence of paragraph 187 referred to the information described in paragraphs 181-186 of his report. Mr Holzwarth was asked whether he meant that market participants would come to one or other of the two likely conclusions. He responded that it could be somewhat of a mix, depending on specifically how they perceived demand with the domestic long-term shareholders; they could have decided to place some off-shore and retain some. Mr Holzwarth said that, apart from the two likely conclusions set out in paragraph 187, he was not aware of any other possibilities.

325 In oral evidence, Mr Holzwarth clarified that by "long-term domestic shareholders" in the first sentence of paragraph 187 he meant long-term *existing* domestic shareholders (consistently with his evidence in the Joint Expert Report). Mr Holzwarth confirmed that he understood that the Placement was offered internationally, and that existing international shareholders of ANZ could bid into the Placement. Mr Holzwarth was taken to an analyst report that stated that, to a greater extent than the other three major Australian banks, ANZ was owned by international investors. He said that he did not have any reason to dispute that. It was put to Mr Holzwarth that his analysis at paragraph 187 left open the possibility that the unstated number of shares not placed with the long-term existing domestic shareholders were placed with long-term existing international shareholders. He said initially that this would be covered by his analysis in paragraph 182 and exhibit 9 (which related to existing shareholders). However, he appeared ultimately to accept that paragraph 187 does not have regard to the question whether existing international shareholders took shares in the Placement. It was also put to him that his analysis at paragraph 187 did not have regard to the question whether new domestic shareholders took shares in the Placement. Mr Holzwarth did not accept this; he said that he did have regard to that, and referred to the word "overall" at the beginning of the paragraph. These questions highlight a difficulty with the analysis in paragraphs 187 and 188 of Mr Holzwarth's first report. The proposition in the first sentence of paragraph 187 (as adjusted in oral evidence) is that "[o]verall, the Bookbuild provided several ways for market participants to become aware that the Bookbuild had not successfully placed all of the Placement Shares with long-term

[existing] domestic shareholders". However, this does not account for the possibility that shares may have been successfully placed with long-term existing international shareholders or long-term new (domestic or international) shareholders. This affects whether the conclusions set out in the dot points in paragraph 187 were likely to be drawn. Putting this another way, the conclusions set out in the two dot points do not cover the universe of realistic possibilities.

326 In Section 11 of his first report, Mr Holzwarth analysed the information disclosed around the time of the capital raising.

(a) In Section 11.1, he discussed the total set of information disclosed by ANZ on 6 August 2015 and the reaction of market participants reflected in analyst reports and media articles. In relation to the *analyst reports*, Mr Holzwarth described reports published on 6 or 7 August 2015 (and set out extracts from some of the reports) at paragraphs 202-210 of his report. Mr Holzwarth concluded (at paragraph 211) that, overall, his review of the analyst reports published after the ASX release published by ANZ on 6 August 2015, and the announced trading halt that day, indicated that market participants did not consider the terms of the capital raising to be positive; ANZ's trading update was viewed negatively and there were expectations of further capital raisings by ANZ and the other three major banks. In relation to *media reporting* of the capital raising, Mr Holzwarth described the media articles (including setting out key extracts at paragraphs 212-213 of the report). Many of these have been referred to earlier in these reasons. Mr Holzwarth concluded (at paragraph 214) that, overall, the media reporting made clear that domestic shareholders had "side-stepped" the capital raising with a view that it would be possible to buy ANZ shares "at cheaper levels down the track". He expressed the opinion that market participants would have been aware that the Underwriters faced a choice of either: (1) placing the shares with new investors who were not existing domestic shareholders; or (2) retaining a portion of the Placement shares. Mr Holzwarth expressed the opinion that, given the incentives of the Underwriters to protect their reputations, market participants would have expected the Underwriters to retain the shares in order to stabilise the price of ANZ shares.

(b) In Section 11.2, Mr Holzwarth discussed changes in the share price of ANZ and the other three major Australian banks (CBA, NAB and Westpac) in response to the information discussed above. Mr Holzwarth provided the following details of the share

prices and movements on 6 and 7 August 2015 (which are not contested and I accept). On 6 August 2015, during the trading halt of ANZ shares, the share prices of ANZ's peer banks (i.e., CBA, NAB and Westpac) declined. At the end of trading on 6 August 2015, the share prices of CBA, NAB and Westpac declined by 3.23%, 2.18%, and 3.04%, respectively. At market open on 7 August 2015, ANZ shares began trading at a price of $29.99, which was 7.49% lower than its prior closing price of $32.58 on 5 August 2015. ANZ shares closed at $30.14 that day (i.e. 7 August), an increase of 0.5% for the day, which was essentially flat relative to its opening price. Similarly, NAB and Westpac opened lower relative to their prior closing price, with NAB opening 1.6% lower and Westpac opening 2.8% lower and each closing essentially flat relative to their opening prices. However, CBA, while also opening lower than its prior day's close by 2.1%, fell a further 1.8% throughout the day to close at $81.30. Table 5 in the Holzwarth First Report shows the cumulative returns for each of those banks relative to their closing prices on 5 August 2015:

Table 5: Big 4 Banks' Cumulative Returns on 6 to 7 August 2015 Relative to Close on 5 August 2015

	Cumulative Returns (%)			
Date	**ANZ**	**CBA**	**NAB**	**WBC**
6 Aug. 2015	n/a	-3.23%	-2.18%	-3.04%
7 Aug. 2015	-7.49%	-6.95%	-4.43%	-6.20%

Mr Holzwarth stated (at paragraph 218) that, based solely on the share price movements of the other three large banks on 6 August 2015 (when trading of ANZ shares was halted), he has calculated that ANZ shares would have been expected to decline by 2.7% on 6 August 2015; this is based on his market model analysis in Section 6 of the report. He noted that, in addition, the price of ANZ shares also would have been expected to decline due to the dilution effects of the capital raising. Mr Holzwarth expressed the opinion (at paragraph 219) that the decline in the price of ANZ shares at the opening of trading on 7 August 2015 reflects the negative information flow associated with the ASX release published by ANZ on 6 August 2015 and the announced trading halt. He concluded:

> 220. Based on my review of available information, market participants were aware of the Significant Proportion Information based on the flow of information during the trading halt. That set of information was incorporated into the price of ANZ shares (to the extent, contrary to my view, that it was price sensitive information) at the opening of trading on 7 August 2015. In my opinion, there is not any incremental

> information described by the Underwriter Acquisition Information relative to the Significant Proportion Information from an economic perspective. The specific number of shares retained by the Underwriters would not have changed the interpretation of the information by market participants. …

327 In relation to *media reporting* of the capital raising, in the Joint Expert Report Mr Holzwarth referred to the article in the Chanticleer column of the *Australian Financial Review* (see [146]-[147] above) and specifically the sentence: "It would not surprise Chanticleer if there was short selling of the other banks by the underwriters of the ANZ issue to hedge their positions". Mr Holzwarth expressed the following opinions in the Joint Expert Report:

> The AFR discussion reflects two important points that are discussed further in Section 11.1.3 of the Holzwarth [First] Report. One, media discussion reflects market participants anticipating that the Underwriters would retain some portion of the Placement Shares. Otherwise, there would be no need to "hedge" the shares as investors would have purchased the shares at the $30.95 or greater price. In this way, there would be no position to "hedge". Two, market participants would have been aware that trading techniques of this type could be employed to reduce the equity exposure of the Retained Placement Shares rather than simply selling the shares.

328 In oral evidence, Mr Holzwarth was taken to the Chanticleer column (see [146]-[147] above). It was put to him that the sentences commencing "Small shareholders will have …" and "Small investors watched …" conveyed that there was significant participation in the Placement. Mr Holzwarth accepted that that was what the sentences were trying to convey, but he did not think it was a correct interpretation of what actually happened. He was asked whether he thought, in these sentences, the journalist had simply "got it wrong". He answered Yes. Mr Holzwarth was taken to the sentence commencing "It would not surprise Chanticleer …" and accepted that one could not tell whether this was an expression of supposition or expectation. It was put to Mr Holzwarth that one interpretation of that sentence is that the author is simply suggesting that the Underwriters who signed the Underwriting Agreement might put in place at the time that they signed it certain hedges. Mr Holzwarth did not accept this, given the contents of the media reporting generally. He said that his interpretation was based on looking at the total set of information. In my view, it is unclear whether the sentence "It would not surprise Chanticleer …" is to be interpreted in the way suggested by Mr Holzwarth or in the way put to him during questioning. In any event, other parts of the article suggested that there had been significant participation in the Placement, which tends to undercut Mr Holzwarth's overall interpretation of the media reporting.

329 In oral evidence, Mr Holzwarth was also taken to the article in the *Australian Financial Review* published on 7 August 2015 (see [151] above). He accepted that this stated that the deal was

covered. Mr Holzwarth accepted that that article makes no reference to the Underwriters acquiring any shares from the Placement. Mr Holzwarth was taken to the article headed "Smith puts anz in a bind" in *The Australian* (see [148] above). He accepted that the article stated that the book was covered by nightfall. He accepted that the article implied that demand, while sluggish, was sufficient to allow for the allocation of shares according to the demand that existed. In my view, these articles do not support, and indeed detract from, Mr Holzwarth's analysis of the media reporting. The statements in these articles that the *book was covered* tend to suggest that the Underwriters did not need to, and did not, take up a portion of the Placement shares.

330 In oral evidence, Mr Holzwarth was referred to an opinion he had expressed in the Joint Report, namely that the conclusion that the Underwriters had not successfully placed all of the Placement shares with long-term existing domestic shareholders could be reached based on information in *the media alone*. Mr Holzwarth clarified that in his opinion the conclusion could be reached based on *both media and analyst reports*.

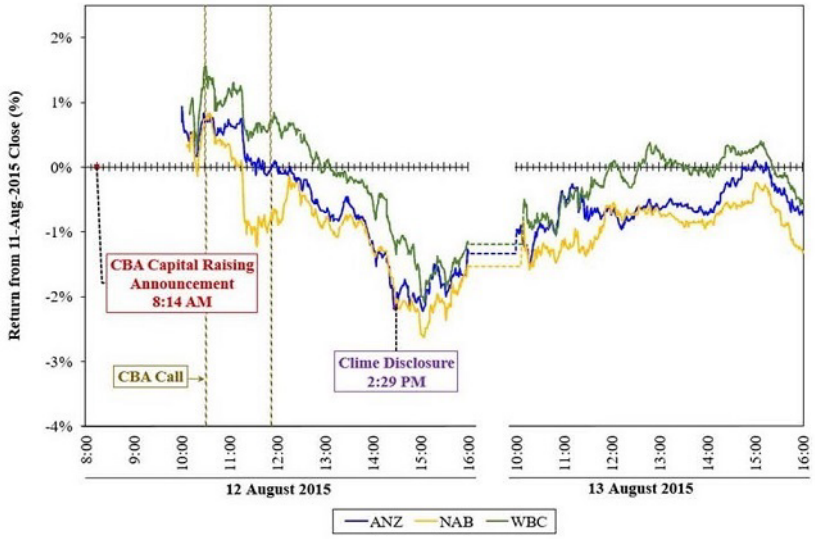
331 In Section 12 of his first report, Mr Holzwarth set out his *ex post analysis* (or event study) based on the Clime Disclosure, which was posted on 12 August 2015. In Section 12.1, Mr Holzwarth discussed a disclosure made by CBA prior to market open on 12 August 2015 (CBA disclosed its 2015 financial year results and its plan to raise $5 billion in capital through an entitlement offer). In Section 12.2, he discussed the Clime Disclosure. Mr Holzwarth expressed the following opinions:

> 232. In my opinion, the Clime Disclosure conveys information consistent with the Significant Proportion Information. Clime's statement that the Underwriters had been "clearly" "left holding the can to some extent" would indicate to market participants information consistent with the Significant Proportion Information. In my opinion, Clime's statement that it was "clearly" discernible that the Underwriters had not placed all of the Placement Shares with investors is consistent with an understanding that the Underwriters had acquired a "significant" portion of the Placement Shares rather than a small portion.

332 In Section 12.3, Mr Holzwarth considered the share price reactions. He explained that, as two events relevant to ANZ shares were disclosed on 12 August 2015, he had analysed ANZ shares' intraday price movements in response to both disclosures. He stated that Figure 10 in his report (set out below) plots the minute-to-minute price of ANZ shares (along with NAB and Westpac) across 12 and 13 August 2015 relative to the closing price of 11 August 2015. He stated that Figure 10 shows that the price of ANZ, NAB and Westpac initially rose at the start of trading but then declined during CBA's conference call from approximately 10.30 am to 11.30 am; the

price of ANZ, NAB and Westpac all continued to fall into the afternoon of 12 August 2015. Mr Holzwarth noted that the Clime Disclosure occurred at 2.29 pm. He stated that Figure 10 shows that the share price returns of ANZ shares increased over the next day, though the return was not material to the price of ANZ shares. Mr Holzwarth expressed the opinion that this analysis indicates that the Clime Disclosure did not change the mix of information for ANZ shares because there is not a significant excess return associated with the disclosure. Mr Holzwarth expressed the opinion that this analysis supports two compatible conclusions: (1) the Significant Proportion Information was widely known among market participants prior to this disclosure; and/or (2) the Significant Proportion Information was not material to the price of ANZ shares in any event. Figure 10 in the Holzwarth First Report is as follows:

Figure 10: ANZ, NAB and Westpac Price Returns on 12 and 13 August 2015
Intraday Returns from 11 August 2015 Close



333 In oral evidence, Mr Holzwarth was asked questions about the methodology of an event study. It was put to him that it was critical to that methodology that you identify what is called a corrective disclosure. He accepted that this was an important part of the process. He accepted that, when one uses the expression "corrective disclosure", what one is looking for, ideally, is the very information that it is alleged the company failed to disclose and which is made known in some form at a later date. He confirmed that, in his first report, he had used the Clime Article on 12 August as, effectively, the corrective disclosure (assuming that there was an omission). Mr Holzwarth was taken to the following sentence of the Clime Article:

> The investment banks clearly didn't get the full raising away and they have been left holding the can to some extent.

Mr Holzwarth was also taken to the following opinion he expressed (in paragraph 232 of the Holzwarth First Report):

> In my opinion, Clime's statement that it was "clearly" discernible that the Underwriters had not placed all of the Placement Shares with investors is consistent with an understanding that the Underwriters had acquired a "significant" portion of the Placement Shares rather than a small portion.

Mr Holzwarth was asked whether he was suggesting that the statement that the investment banks "clearly didn't get the full raising away" was not consistent with the Underwriters acquiring a *small portion*. He said that was correct. He was asked whether he had interpreted the words "to some extent" as being inconsistent with the Underwriters acquiring a small portion of the Placement shares. He said it was not just that; it was also the word "clearly". He said that his interpretation was based on the combination of the sentence and what was already known in the analyst and media reports. It was put to Mr Holzwarth that the sentence in the Clime Article is framed as a speculative opinion and not as a reporting of fact. Mr Holzwarth did not accept this. He was asked whether, looking at the text alone, it reveals to readers any indication of the extent of the shortfall. Mr Holzwarth said that he thought his interpretation was sound, given the context of the available information. I have some difficulty with Mr Holzwarth's interpretation of the Clime Article. In my opinion, read as a whole, including the words relied on by Mr Holzwarth, and in context, it does not convey that the Underwriters had acquired a *significant portion* of the Placement shares; it merely conveys that they had acquired them "to some extent". As Mr Holzwarth's ex post analysis is premised on his interpretation of the Clime Article, which I do not accept, I attach little weight to that analysis.

334 In oral evidence, Mr Holzwarth was taken to Mr Pratt's reference in the Joint Expert Report to "the rarity of a shortfall of this extraordinary size occurring from a placement of such a prominent and well capitalised stock as ANZ". Mr Holzwarth agreed that it was unusual. Mr Holzwarth was referred to Mr Pratt's statement in his first report that in 30 years he can only recall a very small percentage of placements that have resulted in any shortfall of a significant size. Mr Holzwarth accepted that he had not pointed to any particular number of placements that had met a similar fate in Australia.

Issue 2

335 Issue 2 is: was either the Underwriter Acquisition Information or the Significant Proportion Information information that on 7 August 2015 would, or would be likely to, influence persons

who commonly invest in securities in deciding whether or not to acquire or dispose of ANZ shares?

336 In broad outline, the positions of the experts are as follows:

(a) In Mr Pratt's view, both the Underwriter Acquisition Information and the Significant Proportion Information were information that would have had a significant impact on the minds and action of persons who commonly invested in ANZ securities and would have directly influenced them in deciding whether to acquire or dispose of ANZ shares on 7 August 2015.

(b) In Mr Holzwarth's opinion, the Significant Proportion Information was not information that on 7 August 2015 would be likely to influence persons who commonly invest in securities in deciding whether or not to acquire or dispose of ANZ shares.

Mr Pratt's evidence

337 In the Joint Expert Report, Mr Pratt set out his opinion and reasoning on Issue 2 as follows:

> *Summary of response*
>
> 1. Yes, in Pratt's opinion both the [Underwriter Acquisition Information] and the [Significant Proportion Information] was information that would undoubtedly have had a significant impact on the minds and actions of any person who commonly invested in ANZ securities and would have directly influenced them as whether to acquire or dispose of ANZ shares on 7 August 2015 (see Pratt Report p12).
>
> *Reasoning*
>
> 2. A person who commonly invests in shares would normally and reasonably expect that when any placement is conducted, the [Joint Lead Managers] to the transaction will find sufficient buyers in the market to successfully place all the shares.
>
> 3. The Pratt Report p13, explains how Investment Banks, when engaging in underwritten placements, whilst accepting the risk of being left with a shortfall, do not actually expect to encounter a shortfall.
>
> 4. Thus, as stated above, nor do persons who commonly invest in shares expect [Joint Lead Managers] to encounter a shortfall.
>
> 5. Persons who commonly invest in shares hearing either the [Underwriter Acquisition Information] or the [Significant Proportion Information], would therefore perceive the [Joint Lead Managers] as "weak" or not natural holders of the large parcel of shares they had been obliged to purchase.
>
> 6. Further, a successfully completed placement demonstrates to the market that, at that price, there were sufficient buyers prepared to purchase at least that number of placement shares or, usually, many more.

7. If a person who commonly invests in shares had heard on 7th August 2015 either the [Underwriter Acquisition Information] or the [Significant Proportion Information], it would have revealed to them the [Joint Lead Managers] could not source sufficient buyers from the marketplace for that number of shares, at that price.

8. The Pratt report pp12-13, describes how a "failed" underwritten capital raising creates what is perceived as an overhang of unsold shares in the market. Similarly, as described by John Durie, in The Australian 6 August 2015:

> "…in reality no one wants a truckload of stock left with the underwriters because it leaves a stain on the stock".

9. Nor, in the absence of a statement by the [Joint Lead Managers], would a person who commonly invests in shares have had any clear indication of the [Joint Lead Managers'] intentions regarding the shares they had been obliged to purchase.

10. Nor would a person who commonly invests in shares have had any information as to what lower price would induce sufficient buyers from the market to purchase that number of shares.

11. Nor would a person who commonly invests in shares have had any insight as to what other market participants were thinking regarding the news of the [Underwriter Acquisition Information] or the [Significant Proportion Information].

12. That uncertainty, or information vacuum, had the [Underwriter Acquisition Information] or [Significant Proportion Information] information been released, would thus undoubtedly have influenced persons who commonly invest in securities in deciding whether or not to acquire or dispose of ANZ shares on 7 August 2015.

13. The Pratt Report p12, details specific examples of how participants would likely have initially reacted by varying any existing orders for ANZ shares in the market had they received information regarding either the [Underwriter Acquisition Information] or the [Significant Proportion Information], demonstrating the influence on the minds of investors either would have had.

14. Reactions which would have been even more likely in this case, given the rarity of a shortfall of this extraordinary size occurring in the placement of such a prominent, well capitalised and liquid stock as ANZ (see Pratt Report p11).

15. Further, the demonstrated dearth of buyers, as portrayed by the [Underwriter Acquisition Information] and the [Significant Proportion Information], would also have induced all persons who commonly invest in shares to review the other information released on the day by ANZ, re-examine their conclusions from it and determine if the new scenario represented an opportunity (e.g. to buy at lower prices) or threat (e.g. if already holding ANZ shares), depending on their circumstances.

16. Also, invariably, some purchasers of placement shares had only bought them as a short-term trading opportunity. Upon hearing either the [Underwriter Acquisition Information] or the [Significant Proportion Information], a natural conclusion for a person who commonly invests in securities to make would be that there was a dearth of buyers at the placement price. The possibility of any trading profit having thus evaporated, it would thus induce those who had

taken an allocation purely as an opportunity for a trading profit to sell immediately, as close to the placement price as possible to minimise their loss.

17. On the other hand, in Pratt's experience it is difficult to imagine how the [Underwriter Acquisition Information] and the [Significant Proportion Information] would induce persons who commonly invest in securities to acquire any shares unless accompanied by a material downward share price movement.

Conclusion

18. In Pratt's opinion:

i) given the reasonable expectations of persons who commonly invest in securities that, in the absence of any contrary information, the [Joint Lead Managers] had successfully sourced adequate demand to complete the placement,

ii) that the common perception is that failed underwritings create an "overhang" of unsold shares,

iii) given the extremely large size of the shortfall purchased by the [Joint Lead Managers] ie between $750m – $794m,

iv) that the failure of a placement in a top 20 stock such as ANZ was an extraordinary occurrence, and

v) in the absence of any clarifying statement by the [Joint Lead Managers] as to their intentions,

both the [Underwriter Acquisition Information] and the [Significant Proportion Information] were information that would be likely to influence persons who commonly invest in shares in deciding whether or not to acquire ANZ shares on 7 August 2015.

(Footnote omitted.)

338 In oral evidence, Mr Pratt qualified a sentence at the bottom of p 16 of his first report. In that sentence, he had stated that "[t]wo of the basic factors which all investors invariably look to when considering investing in shares, are the current share price and the earnings outlook or news of changes to either". In oral evidence, he qualified the word "all". He said that the persons who do not invest having regard to earnings would be index funds that operate on a more or less automatic basis, and speculators or chartists.

339 In oral evidence, Mr Pratt confirmed that his evidence was that the relevant information (that is, the Underwriter Acquisition Information and the Significant Proportion Information), if disclosed, would create *uncertainty* in the minds of persons who commonly invest. The following exchange occurred:

[SENIOR COUNSEL FOR ANZ]: Now, that uncertainty, I think, you say, might have been manifested – or resulted in some reduced buying, you agree, of ANZ shares?

MR PRATT: Assuming the relevant information is released.

[SENIOR COUNSEL FOR ANZ]: Is released, yes.

MR PRATT: Yes.

[SENIOR COUNSEL FOR ANZ]: So as I understand your theory, the information is released. Its release causes uncertainty.

MR PRATT: Correct.

[SENIOR COUNSEL FOR ANZ]: All right. And that uncertainty then produces reduced buying.

MR PRATT: Yes.

[SENIOR COUNSEL FOR ANZ]: Some additional selling.

MR PRATT: Possibly, yes.

…

[SENIOR COUNSEL FOR ANZ]: And possibly some additional buying.

MR PRATT: Well, less likely.

[SENIOR COUNSEL FOR ANZ]: Okay.

MR PRATT: There might be more bids, but not in the market, put it that way.

[SENIOR COUNSEL FOR ANZ]: Okay. … so that, in a sense, covers the gamut. You might have more buying or less buying, and more selling or less selling. All of those are potential possibilities of this new uncertain environment.

MR PRATT: Right. And overlaid with the caveat of price.

340 In oral evidence, Mr Pratt was referred to his reference to there being an "information vacuum" if the Underwriter Acquisition Information or Significant Proportion Information had been released. It was put to him that the additional information that people would primarily have been interested in would be information relevant to the *true value* of ANZ shares. He answered: "Not necessarily. Well, not solely." He said that primarily people would be interested in the intentions of the Joint Lead Managers, if the relevant information had been released. Mr Pratt accepted that, in his first report at paragraph 6 on p 14, he spoke about uncertainty in the minds of potential buyers of the true value of ANZ shares. It was put to him that the information that buyers confronted with uncertainty about true value would be interested to obtain would be information pertinent to the true value. Mr Pratt accepted this. It was put to him that the information would be the information referred to at the bottom of p 16 of his first report, namely current share price and earnings outlook. He accepted this. Mr Pratt then sought to clarify his reference to the "true value" of ANZ shares in paragraph 6 on p 14 of his first report. He said that, when he said the true value of ANZ shares, he did not mean an evaluation by a discounted

cash flow model as referred to in Mr Holzwarth's evidence, but rather the fair price of the shares. He accepted that fair price can have some connection to value. The following exchange then took place (still dealing with a scenario where the Underwriter Acquisition Information or the Significant Underwriter Information had been released):

> [SENIOR COUNSEL FOR ANZ]: Your hypothetical common investor, confronted with news about the outcome of the placement, I think your view is that they would think, "Well, obviously, a lot of the people who would normally participate in this placement – institutions and so on – decided not to." That would be your starting point in thinking.
>
> MR PRATT: Correct.
>
> [SENIOR COUNSEL FOR ANZ]: And so your – and your next step would be they must have thought the floor price was too much to pay for ANZ shares.
>
> MR PRATT: Correct.
>
> [SENIOR COUNSEL FOR ANZ]: All right. And your next step would be, "Well, I don't know how much they thought it was – that the true value or the fair price was below the floor price." You agree?
>
> MR PRATT: Correct.
>
> [SENIOR COUNSEL FOR ANZ]: So they would want to get information as much as possible or like the information the institutional people had that caused them not to bid – to try and get as much information as they could, relevant to the fair price for ANZ shares so as to make a judgment about their buying and selling.
>
> MR PRATT: Correct.

341 It was then put to Mr Pratt that, if there were no other information (in other words, after all their inquiries and investigations, they came up with nothing), that would imply that, if the share price had fallen on news of the outcome of the Placement, it would quickly recover. Mr Pratt answered "Possibly". Mr Pratt was referred to his view (in his first report) that if the results of the Placement had been disclosed, ANZ shares would have dropped another 2 to 4% on 7 August 2015 (see further below, under Issue 5). It was put to Mr Pratt that, if the share price had dropped 2 to 4%, and there was no additional information about the fair value of ANZ shares, then you would expect the share price to recover. He said it "might recover", but the point about the share price falling was that "people would be pulling their bids … refraining from buying in the hope of getting some of those placement shares from the [Joint Lead Managers]".

Mr Holzwarth's evidence

342 Mr Holzwarth addressed this issue by reference to both an "ex ante analysis" and an "ex post analysis". To the extent that he relied on an ex post analysis, this was the same ex post analysis as discussed above in connection with Issue 1.

343 In relation to his ex ante analysis, the key aspects of the First Holzwarth Report are:

(a) Section 5.3.2 (paragraphs 54-68), dealing with valuing an asset;

(b) Section 5.3.6 (paragraphs 100-107), relating to materiality; and

(c) Section 8 (paragraphs 139-141), dealing with value-relevant information.

344 In relation to materiality, Mr Holzwarth stated:

> 100. Materiality is a term of art within finance and economics. In finance and economics, information is considered to be material if it causes a statistically significant movement in a company's share price, after controlling for broad movements in the market. In an efficient market, share prices are affected by information if and only if the information is: (a) new; (b) of a type that relates to expected future cash flows of the stock, the riskiness of those flows, or both; and (c) of a magnitude that would materially change the market's expected future cash flows or risks for the stock. It is my opinion that in order for any information to be material information, it must satisfy *all three* of these criteria.

345 Mr Holzwarth discussed the above description of materiality in more detail in paragraphs 101-106 of his first report. In paragraph 102, which related to paragraph (b) in the above quotation, Mr Holzwarth stated:

> 102. Second, the materiality of information is dependent upon the type of information: it must be related to the expected future cash flows of the stock, the riskiness of the cash flows, or both. Information that can affect an investor's assessment of expected future cash flows or riskiness can be quantitative (e.g., the company is losing market share to an existing competitor) or qualitative (e.g., a new, well-financed competitor has entered the market). **In an efficient market, information that affects neither expected future cash flows nor their riskiness would not be expected to affect the price of the stock**. An example of such immaterial information is an announcement that the company is making a one-time nominal contribution to a local charity.
>
> (Emphasis added.)

In oral evidence, Mr Holzwarth said that the concepts addressed in the sentence commencing "In an efficient market …" in the above quotation were strongly related to the other concept to which he had significant regard, namely value-relevant information.

346 Mr Holzwarth concluded the section on materiality with the following paragraph:

> 107. Throughout this report, my opinions are based upon a financial/economic definition of material information, as I am not offering legal opinions, but rather economic opinions. My opinions regarding the materiality of the alleged information are in reference to whether or not the alleged information has the characteristics described above.

In oral evidence, Mr Holzwarth confirmed that by "the characteristics described above" in the above paragraph, he was referring to the three characteristics identified in paragraph 100.

347 In relation to *value-relevant information*, Mr Holzwarth expressed the following opinions in Section 8 of his first report:

> 139. In my opinion, neither the Underwriter Acquisition Information nor the Significant Proportion Information are value-relevant information. In this section, I provide brief additional discussion about the typical inputs for a valuation analysis and describe why neither the Underwriter Acquisition Information nor the Significant Proportion Information are information describing these inputs.
>
> 140. In Section 5.3.2, I described the accepted proposition in finance that the value of an asset is its expected future cash flows. This is consistent with the definition of value described in corporate valuations texts. For instance, in *Corporate Valuation*, Holthausen and Zmijewski define the value of an asset in terms of its discounted cash flow. They state:
>
> > The value of an asset depends on the magnitude, timing, and risk of the cash flows (called free cash flows) the investor expects it to generate. The discounted cash flow (DCF) valuation model directly results from these valuation principles.
>
> 141. **The three valuation factors identified by Holthausen and Zmijewski, (1) magnitude, (2) timing, and (3) risk of cash flows associated with ANZ shares are all independent of the Underwriter Acquisition Information or the Significant Proportion Information.** A valuation analyst would not need to adjust any of these types of inputs in a valuation in order to complete the analysis. **As such, neither the Underwriter Acquisition Information nor the Significant Proportion Information are value-relevant information.** This is consistent with my ex-post analysis related to the Clime Disclosure discussed below in Section 12. In that Section, I show that there was not a significant excess return related to the Clime Disclosure. The lack of a significant negative excess return after this disclosure is consistent with the two compatible conclusions that either information consistent with the Underwriter Acquisition Information and/or the Significant Proportion Information: (a) were already incorporated into the price of ANZ shares; and/or (b) were not material to the price of ANZ shares in any event.

(Footnotes omitted; emphasis added.)

348 In his first report, Mr Holzwarth responded to the following questions, which formed part of his instructions: what type of information would be relevant to a decision to buy or sell shares in a company? Was the Underwriter Acquisition Information or the Significant Proportion

Information, information of this nature? He expressed the following opinions on these questions:

> 240. In an efficient market, the type of information relevant to a decision to buy or sell shares in a company is information that is: (a) new; (b) of a type that relates to expected future cash flows of the stock, the riskiness of those flows, or both; and (c) of a magnitude that would materially change the market's expected future cash flows or risks for the stock. In my opinion, all three of these criteria must be satisfied for any information to be relevant to a decision to buy or sell shares in a company. Based on this information, market participants can compare the value of shares to the market price to make a decision to buy or sell shares. In Sections 5.3.2 and 8, I provided further discussion of this issue.
>
> 241. In my opinion, neither the Underwriter Acquisition Information nor the Significant Proportion Information were information of this nature. In Section 8, I discussed why the inputs to a valuation analysis are all independent of the Underwriter Acquisition Information or the Significant Proportion Information. **Neither the Underwriter Acquisition Information or the Significant Proportion Information would change the magnitude, timing, or risk of future cash flows of ANZ shares.**
>
> (Emphasis added.)

349 In oral evidence, Mr Holzwarth confirmed that he concluded in paragraph 141 of his first report (set out at [347] above) that the elements that make up the concept of value-relevant information were not satisfied by either the Underwriter Acquisition Information or the Significant Proportion Information. Mr Holzwarth confirmed that it was for those reasons that his answer to Issue 2 was, in effect, No.

350 During oral evidence, Mr Holzwarth was asked questions about a hypothetical scenario in which the relevant information was that the Underwriters had taken 100% of the Placement shares. He was asked whether that information would be material, using the same concepts of materiality and value-relevant information as he had applied in his first report. Mr Holzwarth responded that he would need to know more information in order to answer this question. Mr Holzwarth said that his report did not preclude that the information could be material. He said that one needs to assess materiality within the scope of the available information, and that it depends on expectations. He said that part of the information context would be whether information to the same effect is already out there or whether it is new. The following exchange then occurred:

> [SENIOR COUNSEL FOR ASIC]: Let's make the assumption that the information I've asked you to assume that the underwriters have taken 100 per cent of the placement shares is new information. On that basis, would that information be material within the terms that you analyse that concept in your report?
>
> MR HOLZWARTH: Yes, it would be as it would reflect an outcome.

[SENIOR COUNSEL FOR ASIC]: … It would, in fact, also affect price, wouldn't it?

MR HOLZWARTH: One of the challenges I've had with your questions and … going back to what I said to your Honour to start with – is the retained placement shares, as I use that term here or your counterfactual where it's 100 per cent of the shares is an outcome, and so that outcome and the materiality of that outcome is, in part, a reflection of what's available information. So let's say ANZ, instead of offering a five per cent discount to price, offered no discount to market prices, and so no one took up the shares. Would it be surprising that something – the majority of shares were not taken up by investors? Would it be material? I don't know. It's possible but given the – you – the problem I'm having is you haven't set up a complete counterfactual world for me to analyse and offer opinions about.

[SENIOR COUNSEL FOR ASIC]: So beyond me positing a particular percentage of placement shares taken by the underwriters on this placement, is it your answer that you would need to know some other information in order to reach a firm conclusion about materiality?

MR HOLZWARTH: Yes.

[SENIOR COUNSEL FOR ASIC]: But you agree, do you, that if it was 100 per cent of the placement shares that it's likely to be material?

MR HOLZWARTH: Part of the challenge I'm having is it's context. Why is it 100 per cent taken up? Is that specific information that the shares were taken by the underwriters at a 100 per cent level versus existing expectations, material? It depends. It depends on what's the context.

351 In oral evidence, Mr Holzwarth was taken to the third sentence in paragraph 100 of his first report (set out at [344] above) and asked whether, on that analysis, information cannot affect price unless it also affects value. Mr Holzwarth answered: "In an efficient market, yes." Mr Holzwarth accepted that, each and every day, price and value can and do diverge on the market. In a subsequent answer, Mr Holzwarth stated that share prices can move and diverge from value.

Issue 3

352 Issue 3 is: in or around August 2015:

(a) what would have been the incentives of the Joint Lead Managers in connection with their dealings with the ANZ Placement shares which they acquired from the Placement;

(b) what (if anything) would persons who commonly invested in securities have expected Joint Lead Managers holding ANZ Placement shares, in the amount referred to in the Underwriter Acquisition Information or the Significant Proportion Information, to do with them, why and over what timeframe?

In what way (if any) would persons who commonly invested in securities expect Joint Lead Managers to act differently from institutional investors (for example, hedge fund investors or long-term holders)?

353 In the Joint Expert Report, Mr Pratt and Mr Holzwarth agreed that:

(a) the Joint Lead Managers would have had incentives to:

(i) minimise the "price impact" of selling the Retained Placement Shares (defined in the Holzwarth First Report as the shares described in the Underwriter Acquisition Information and/or the Significant Proportion Information) by relying on computer algorithm trading procedures; and

(ii) reduce their financial exposure to the movement in the ANZ share price; this could have been achieved through a variety of ways, including selling ANZ shares, employing hedging strategies, or both.

(b) an example of a hedging strategy would be short selling other stocks with a high correlation to the ANZ share price;

(c) persons who commonly invest in securities would expect the Joint Lead Managers to take active steps to hedge their financial risk and attempt to minimise the "impact" of selling ANZ shares.

Mr Pratt's evidence

354 Mr Pratt's additional opinions on this issue are set out in the Joint Expert Report. The following is his summary of those opinions:

> 1. Regarding 3. a) In Pratt's opinion the main incentive of the [Joint Lead Managers] in connection with their dealings with the ANZ placement shares would be to limit their financial risk by reducing their exposure to the ANZ share price either by i) selling the placement shares as soon as practicable, balancing the speed of sale against any negative share price movement incurred, or ii) by selling other correlated securities as a hedging strategy or both.
>
> 2. Regarding 3. b) In Pratt's opinion, persons who commonly invested in securities would have expected the [Joint Lead Managers] holding ANZ placement shares, in the amount referred to in the [Underwriter Acquisition Information] or the [Significant Proportion Information], to be sellers of those shares to reduce their financial exposure in the short term to medium term, depending on the types and success of any hedging strategies employed.
>
> 3. In Pratt's opinion persons who commonly invest in securities would have expected the [Joint Lead Managers] to be relatively short-term holders of the placement shares compared to most other institutional investors and as such

act more like hedge funds in dealing with the placement shares than long term holders.

355 Mr Pratt's detailed reasoning was as follows:

Reasoning [Issue 3(a)]

4. Regarding 3. a) The Pratt Report p13, details, based on Pratt's experiences of nearly 30 years in the market, why [joint lead managers] when engaging in underwriting transactions, accept the risk of being left with a shortfall but do not on any given trade actually expect to encounter a shortfall.

5. In compensation for taking on this risk they are paid an underwriting fee which, given the preponderance of successful transactions, constitutes a profitable business activity over time.

6. In this case, as ever, the [Joint Lead Managers] would not have expected, when entering into the underwriting agreement, to purchase between $750m and $794m in ANZ shares.

7. In Pratt's experience of managing teams of 10 or more traders, holdings of this size are well beyond single stock trading limits at investment banks in Australia. Whilst the balance sheets of the [Joint Lead Managers] (being large international banks) were able to accommodate such a purchase, the ANZ share price, like all share prices, is subject to unpredictable, external market forces which would have exposed the [Joint Lead Managers] to considerable potential financial loss. The holding thus represented a material, unplanned, and unwanted financial risk to the [Joint Lead Managers].

8. Thus, due to this unexpected, outsized purchase, the main incentive of the [Joint Lead Managers] in or around August 2015 would have been to reduce their financial exposure to the movement in the ANZ share price i.e. to minimise their financial risk.

9. The most straightforward way would be to sell the ANZ shares as quickly as practicably possible without forcing down the share price and thereby incurring financial loss, a process at odds with itself given the extremely large holding.

10. However, various trading strategies could have been employed to minimise the price impact eg VWAP, where computers use algorithms to sell small amounts of shares constantly over the day, matching the average volume weighted price achieved in the market.

11. It would also have been an incentive of the [Joint Lead Managers] to keep persons who commonly invest in securities as uninformed as possible about the [Underwriter Acquisition Information] or the [Significant Proportion Information] to assist the [Joint Lead Managers to] achieve their goal of selling as many of the placement shares as quickly as possible without unduly impacting the price.

12. The [Joint Lead Managers] would also have had their underwriting fee (in Pratt's experience 1-2% of the total amount raised in the placement, in this case $25-50m) as a buffer against any loss on sale of the placement shares.

13. The knowledge of the [Underwriter Acquisition Information] or the [Significant Proportion Information], as explained in the response to Issue 2

above, would have caused persons who commonly invest in securities to amend any orders they had in the market at the time to reflect the uncertainty created by new circumstances thereby resulting in downward pressure on the ANZ share price.

14. In addition, there would also be a strong incentive for the [Joint Lead Managers] to conduct their selling in a coordinated fashion to avoid competing against each other in the market.

15. Pratt cannot concur with the conclusion in Holzwarth Report p60 that the main incentive for the [Joint Lead Managers] would be to "protect their reputation" by "stabilising the share price". The implication that the [Joint Lead Managers] were incentivised to buy additional ANZ shares having just purchased $750m-$794m of them is, in Pratt's experience, an extremely unlikely proposition.

Conclusion

16. In Pratt's opinion, the main incentive for the [Joint Lead Managers] in or around August 2015 would have been to reduce their financial exposure to the movement in the ANZ share price i.e., to minimise their financial risk, by selling the placement shares or by employing hedging strategies, or both.

17. Consequently it would also have been an incentive for the [Joint Lead Managers] to keep the [Underwriter Acquisition Information] and the [Significant Proportion Information] from becoming public knowledge, and

18. Incidentally, it would have been an incentive for the [Joint Lead Managers] to act in a coordinated fashion if/when selling ANZ shares.

[Reasoning - Issue 3(b)]

19. Regarding 3. b) As outlined earlier, a person who commonly invests in shares would normally and reasonably expect that when any placement is conducted, the [Joint Lead Managers] to the transaction will find sufficient buyers in the market to buy all the placement shares.

20. The [Underwriter Acquisition Information] and or the [Significant Proportion Information] would have revealed to persons who commonly invest in shares that in this case the [Joint Lead Managers] could not source sufficient buyers from the marketplace to purchase that number of shares, at that price.

21. Persons who commonly invest in shares hearing either the [Underwriter Acquisition Information] or the [Significant Proportion Information], would therefore perceive the [Joint Lead Managers] to be uncomfortable with the large financial risk they had assumed with the ANZ share purchase, at a price which insufficient numbers of other participants in the market were prepared to pay.

22. Persons who commonly invest in securities would therefore have expected the [Joint Lead Managers], in the very short term, to be taking active steps to reduce their financial exposure to the ANZ share price.

23. Persons who commonly invest in securities would expect them to mitigate that risk by either:

    i) selling the ANZ placement shares below the placement price particularly if sufficient demand could be found to materially reduce the size of the [Joint Lead Managers'] holding and/or

ii) by employing hedging strategies, such as short selling other stocks with a high correlation to the ANZ share price, or short selling the [Significant Proportion Information] futures or combinations thereof.

24. Persons who commonly invest in securities would be aware that if hedging strategies had been employed, the financial risk for the [Joint Lead Managers] would have been reduced but not eliminated, and therefore at some stage the [Joint Lead Managers] would still have to sell the ANZ placement shares and unwind the hedges in the short to medium term.

Conclusion

25. Thus persons who commonly invest in securities would expect the [Joint Lead Managers] to be sellers of the ANZ shares, in the amount referred to in the [Underwriter Acquisition Information] or the [Significant Proportion Information], either in the short or medium term at a price ultimately dictated by the interplay of the forces of supply and demand and the [Joint Lead Managers'] tolerance for the risk of financial loss.

[Reasoning – further issue]

26. Finally, in assessing how persons who commonly invest in securities would expect the [Joint Lead Managers] to act differently from institutional investors, it should be noted this nomenclature for an "investor" is a broad and indistinct one, covering a multitude of different organisations which might vary in many material characteristics.

27. For example, "institutional investors" vary by size of funds under management, by investment styles, geographic location, mandate restrictions, trading patterns and by size of teams amongst many other idiosyncrasies.

28. An appreciation of any or all these dissimilarities by persons who commonly invest in securities may affect their expectations regarding how the [Joint Lead Managers] might act differently to any given "institutional investor".

29. However, in Pratt's experience a fundamental characteristic common to all "institutional investors" in this context is that their mandates are centred on owning a portfolio of shares, in the expectation of a commercial return being achieved on the funds deployed i.e. they are essentially fund managers.

30. Within that category of institutional investors, hedge funds are perceived by persons who commonly invest in securities to be more short term focused in investment style and more of a trader of shares compared to a long term investor who may be described as having a buy and hold mentality.

31. On the other hand, Investment Banks, such as the [Joint Lead Managers], are not at their core fund managers, but stockbrokers. The fundamental heart of their business is to induce their clients to buy and sell shares, either on the stock market or, as in this case, from primary issuances such as placements. Whilst within their operations they may, as an ancillary operation, purchase and hold shares on their own account, this is subject to strict exposure limits and secondary to the principal business of seeking orders to execute on behalf of their clients.

32. In Pratt's experience, this distinction is well known and understood by persons who commonly invest in securities.

33. As such, persons who commonly invest in securities would expect [Joint Lead

> Managers] to act differently to some institutional investors and similarly to others, having purchased, against their expectations, $750m-$794m of ANZ shares.
>
> 34. Whilst it is difficult to say exactly how any particular institutional investor, be they hedge fund or long-term investors, would act in any given scenario, persons who commonly invest in securities would perceive hedge funds to be quicker to respond to commercial stimuli from changing circumstances than long term holders.
>
> *Conclusion*
>
> 33. In this situation, it is Pratt's opinion that persons who commonly invest in securities would expect the [Joint Lead Managers] to act more like hedge funds than long-term holders, in that they would expect the [Joint Lead Managers] to take, in the short term, active steps to hedge their financial risk by either selling the placement shares or by employing hedging strategies as described in paragraph 20 above, as distinct from long term holders who would be slower to react.

356 In oral evidence, Mr Pratt accepted that the Joint Lead Managers had a number of techniques and skills available to them to mitigate their risk. He accepted that this included algorithmic trading of the kind that both he and Mr Holzwarth referred to in the reports. He said that this technique would minimise the impact, and minimise the disclosure, of any large orders, but nonetheless, by putting on sell orders through that device, you would still be a new seller in the market, so it would not be without cost to the seller.

357 In oral evidence, Mr Pratt said that the Joint Lead Managers' primary incentive was to reduce their financial risk to the exposure of ANZ share price. He accepted that they did have other incentives as well. He accepted that, when someone has two incentives that pull in slightly different directions, they try and accommodate them both as best they can. In response to a question whether the underwriters would be well-equipped to accommodate both, Mr Pratt responded, "They would be. Sometimes there's not a perfect answer."

Mr Holzwarth's evidence

358 In Mr Holzwarth's first report, he dealt with the incentives of underwriters of an SEO in Section 9. That section commenced:

> 142. I have considered the assertions in ¶23(c)(ii) of the FASoC regarding the alleged "expectation of both sophisticated and unsophisticated investors" that the Underwriters would "promptly dispose" of shares and "place downward pressure upon the ANZ share price" (despite this information not being value relevant). In my opinion, this assertion is contradicted by an analysis of the motivations of traders, generally, and the incentives of the underwriters of a SEO, generally.
>
> (Footnote omitted.)

359 Mr Holzwarth expressed the opinion that, overall, the expected behaviour of the Underwriters would have been to act to stabilise the price of ANZ shares, both to minimise the price impact of any trading of ANZ shares and to protect their reputation (paragraph 145 of his first report).

360 In Section 9.1 of his report (paragraphs 146-165), Mr Holzwarth discussed the "motivation" of a trade and its implications for analysing the expected actions of the Underwriters. He discussed the three general motivations for a trade: (1) value; (2) information; and (3) cash-flow. He described why the motivation of the Underwriters would have been consistent with a trader seeking cash-flow to decrease equity exposure, independent or even ignorant of the prospects of the investment. In these circumstances, in Mr Holzwarth's view, the Underwriters would not have been expected to pay for liquidity to profit from an informational advantage. Rather, they would have been expected to sell as liquidity was available.

361 In Section 9.2 (paragraphs 166-175), Mr Holzwarth discussed how academic research has shown that underwriters will intervene in secondary markets after an issuance based on an analysis of proprietary data to support the price. He stated that, while several theories have been posited for the decision by underwriters to buy shares after an issuance, academic research is consistent with a view that underwriters act in part to support their reputations. In this way, in his view, the academic evidence is consistent with underwriters having incentives to protect their reputation.

362 Mr Holzwarth's conclusions were set out in paragraph 176 of his first report, part of which has been extracted at [322] above.

363 In the Joint Expert Report, as part of Mr Holzwarth's response to Issue 3, he stated (at p 24):

> As described in Section 9.1 of the Holzwarth [First] Report, market participants would expect that the Underwriters would follow a strategy to wait "for natural liquidity to appear at an acceptable price" in order to "minimize direct price impact". This is done by following "the best strategy for filling routine trades in a liquid name" by using an "algorithm that divides the block into small pieces, feeding them out in a controlled sequence to avoiding upsetting supply/demand balance." In this way, the expected actions of the Underwriters would be to trade in a manner "avoiding upsetting supply/demand balance" rather than place "downward pressure" on the price of ANZ shares. To the extent that the Underwriters' preference was to reduce their equity risk exposure related to the Retained Placement Shares, cross hedges could have been employed. In this way, the Underwriters could both slowly reduce their position in the Retained Placement Shares and also reduce their equity risk exposure more quickly without placing downward pressure on the price of ANZ shares.
>
> (Footnote omitted.)

364 In oral evidence, Mr Holzwarth said that the Underwriters' incentives were to reduce their risk and to protect their reputation, by stabilising the price of ANZ shares. Mr Holzwarth accepted that the articles that he referred to in paragraphs 166-171 of his report related only to IPOs. It was put to him that, because they relate only to IPOs, they contain no analysis in relation to SEOs. Mr Holzwarth said that they were not the transactions the reports were analysing. Mr Holzwarth was asked questions and gave evidence about the role of underwriters in an IPO. It was put to him that, because of the role that they play over an extended period of time, any underwriters become strongly associated with the success or failure of the IPO. Mr Holzwarth accepted that they are measured in this way, but maintained that the transaction presently in issue, which was a $2.5 billion transaction, raised similar reputational considerations. In my view, as these questions highlight, there are relevant differences between an IPO and the present Placement. This causes me to doubt whether these articles provide a reliable basis for forming a view as to the expected behaviour of the Underwriters.

365 In oral evidence, it was put to Mr Holzwarth that in the case of this Placement, where the Underwriters were bearing the risk of, in total, over $750 million in shortfall shares, the prospect that they would act to stabilise the share price by purchasing more shares was very, very unlikely. Mr Holzwarth did not agree, referring to the academic research. He accepted that the academic research to which he referred in his first report, referable to this proposed conduct, related to IPOs only. He said that he had seen other academic research that is consistent with it, but it is not referred to in his reports. It was put to Mr Holzwarth that in the case of a placement of this kind, where the underwriters were already bearing the risk of over $750 million in shortfall shares, the notion that they would act to stabilise the share price by purchasing more shares would simply operate to increase their risk. Mr Holzwarth responded: "If you buy more assets, you expose yourself more to the equity volatility or equity risk." Having regard to the evidence as a whole, it strikes me as distinctly unlikely that the Underwriters would act to stabilise the ANZ share price by purchasing more shares.

Issue 4

366 Issue 4 is: if the Underwriter Acquisition Information or the Significant Proportion Information had been disclosed by ANZ to the market on 7 August 2015 (prior to the resumption of trading), to what extent would that information have differed from the then prevailing market expectations?

367 There is some overlap between this issue and the previous issues.

368 Mr Pratt's opinions, as summarised in the Joint Expert Report, were as follows:

> 1. As explained and detailed in the response to Issue 1 above, Pratt's opinion is that prior to the resumption of trading on 7 August 2015 market participants were not aware of the [Underwriter Acquisition Information] or the [Significant Proportion Information].
>
> 2. Market expectations would have been primarily determined by the pro forma announcement by ANZ at 730am on 7 August 2015 stating the placement had been successfully completed and coincident media reports describing the bookbuild as "covered" and that the [Joint Lead Managers] had managed to "get the deal away", both being colloquial terms referring to the successful completion of the bookbuild.
>
> 3. As such, the prevailing market expectations would have been that the [Joint Lead Managers] had successfully placed the shares to institutions.
>
> 4. Had the [Underwriter Acquisition Information] and the [Significant Proportion Information] been disclosed by ANZ to the market on 7 Aug 2015 prior to the resumption of trading, market expectations would have altered dramatically as market participants realised that a very different scenario was unfolding.

369 Mr Holzwarth's opinions, as set out in the Joint Expert Report, included:

> • Based on Holzwarth's review of available information, market participants were aware of the Significant Proportion Information based on the flow of information during the trading halt. That set of information was incorporated into the price of ANZ shares (to the extent, contrary to my view, that it was price sensitive information) at the opening of trading on 7 August 2015. In Holzwarth's opinion, there is not any incremental information described by the Underwriter Acquisition Information relative to the Significant Proportion Information from an economic perspective. The specific number of shares retained by the Underwriters would not have changed the interpretation of the information by market participants. …

Issue 5

370 Issue 5 is: if the Underwriter Acquisition Information or the Significant Proportion Information had been disclosed by ANZ to the market on 7 August 2015 (prior to the resumption of trading), what would have been the likely effect on ANZ's share price?

371 Mr Pratt's opinion, as set out in his first report and the Joint Expert Report, was that, had the Underwriter Acquisition Information or the Significant Proportion Information been disclosed by ANZ to the market on 7 August 2015 (prior to the resumption of trading), Mr Pratt's estimation is that the likely impact on the share price of ANZ would have been a further fall of 2-4%.

372 In oral evidence in relation to Issue 1, Mr Pratt was questioned about his 2-4% estimate. He accepted that it was not supported by any *quantitative* reasoning. It was put to him that there

was no *qualitative* reasoning in his first report in support of the estimate. He responded that the qualitative reasoning he used was an assessment of the size of the Underwriter Acquisition Information relative to matters such as the average day's turnover, how much the stock had already fallen and the information that had been disclosed already. It was put to him that his 2-4% estimate was not much better than a guess. He responded that it was an "educated guess". In light of the lack of quantitative or detailed qualitative reasoning to support the 2-4% estimate, I place little weight on that estimate.

373 In oral evidence, Mr Pratt was taken to paragraph 4 on p 14 of his first report, where he had referred to the size of the shortfall being nearly 4x the average daily turnover of ANZ shares. Mr Pratt was referred to the Holzwarth Reply Report, which reduced this figure by 50% based on the average daily turnover having increased in the period after 6 August 2015. Mr Pratt accepted that the expectation is that after a placement of this kind and size there would normally be an increase in the average daily turnover. Mr Pratt said that he did not disagree with Mr Holzwarth's figures.

374 Mr Holzwarth's opinion, as set out in the Joint Expert Report, was that the economic evidence indicates that a counterfactual disclosure of the Underwriter Acquisition Information and/or the Significant Proportion Information would not have caused a material change in the price of ANZ shares at the commencement of trading on 7 August 2015. Mr Holzwarth relies primarily on the ex post analysis contained in Section 12 of his first report, which has been discussed under Issue 1. Mr Holzwarth disagreed with Mr Pratt's 2-4% estimate, for reasons set out in Section 5.4 of the Holzwarth Reply Report and the Joint Expert Report. Mr Holzwarth also carried out an analysis of share price movements from 7 August 2015 to 31 October 2015, with the results set out in "Holzwarth Exhibit 1", attached to the Joint Expert Report. This plots the daily return of ANZ from the close on 7 August 2015 relative to the daily return of an equal-weighted portfolio of the other three big banks.

Applicable provisions and principles

Corporations Act

375 I will refer to the *Corporations Act* provisions as in force in August 2015 (by reference to the version compiled on 1 July 2015).

376 Chapter 6CA dealt with continuous disclosure. Section 674 relevantly provided:

674 Continuous disclosure—listed disclosing entity bound by a disclosure

requirement in market listing rules

Obligation to disclose in accordance with listing rules

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:
(a) this subsection applies to a listed disclosing entity; and
(b) the entity has information that those provisions require the entity to notify to the market operator; and
(c) that information:
(i) is not generally available; and
(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;
the entity must notify the market operator of that information in accordance with those provisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

377 It is apparent that s 674 operates in conjunction with the ASX Listing Rules in the sense that, for s 674(2) to apply, it is necessary that the applicable listing rules (here, the ASX Listing Rules) require the listed disclosing entity to notify the market operator of information.

378 Section 676 dealt with when information is "generally available". It provided:

676 Sections 674 and 675—when information is generally available

(1) This section has effect for the purposes of sections 674 and 675.

(2) Information is generally available if:
(a) it consists of readily observable matter; or
(b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
(a) information referred to in paragraph (2)(a);
(b) information made known as mentioned in subparagraph (2)(b)(i).

379 Section 677 dealt with the expression "material effect on price or value". It provided:

> **677 Sections 674 and 675—material effect on price or value**
>
> For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

ASX Listing Rules

380 I will refer to the ASX Listing Rules as in place in August 2015 (by reference to the version compiled by LexisNexis including amendments up to and including 1 July 2015). In setting out the relevant listing rules, I will omit the plus signs indicating defined expressions, and will omit some of the notes and cross-references appearing under the rules.

381 The Introduction to the ASX Listing Rules included:

> **The principles on which the Listing Rules are based**
>
> The Listing Rules serve the interests of listed entities and investors, both of whom have a vital interest in maintaining the reputation of the market in ASX listed securities and ensuring that it is internationally competitive and facilitates efficient capital raising.
>
> The principles which underpin the obligations imposed on listed entities by the Listing Rules include:
>
> - An entity should satisfy appropriate minimum standards of quality, size and operations and disclose sufficient information about itself before it is admitted to the official list.
> - Sufficient investor interest in an entity's securities should be demonstrated before those securities are quoted.
> - Securities should be issued in circumstances which are fair to new and existing security holders.
> - Securities should have rights and obligations attaching to them that are fair to new and existing security holders.
> - Timely disclosure should be made of information which may have a material effect on the price or value of an entity's securities.
> - Information should be produced to high standards and, where appropriate, enable ready comparison with similar information.
> - Information should be disclosed to enable investors to assess an entity's corporate governance practices.
> - The practices adopted in relation to meetings and other communications with security holders should facilitate constructive engagement with security holders.
> - Certain significant transactions should require security holder approval.

382 Chapter 3 of the ASX Listing Rules dealt with continuous disclosure. Rules 3.1, 3.1A and 3.1B provided as follows:

> **Immediate notice of material information**
>
> **General rule**
>
> 3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.
>
> …
>
> Note: Section 677 of the Corporations Act defines material effect on price or value. …
>
> …
>
> Examples: The following are non-exhaustive examples of the type of information that, depending on the circumstances, could require disclosure by an entity under this rule:
>
> - a transaction that will lead to a significant change in the nature or scale of the entity's activities (see also Listing Rule 11.1 and Guidance Note 12 *Significant Changes to Activities*);
> - a material mineral or hydro-carbon discovery;
> - a material acquisition or disposal;
> - the granting or withdrawal of a material licence;
> - the entry into, variation or termination of a material agreement;
> - becoming a plaintiff or defendant in a material law suit;
> - the fact that the entity's earnings will be materially different from market expectations;
> - the appointment of a liquidator, administrator or receiver;
> - the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
> - under subscriptions or over subscriptions to an issue of securities (a proposed issue of securities is separately notifiable to ASX under listing rule 3.10.3);
> - giving or receiving a notice of intention to make a takeover; and
> - any rating applied by a rating agency to an entity or its securities and any change to such a rating.
>
> **Exception to rule 3.1**
>
> 3.1A Listing rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:
>
> 3.1A.1 One or more of the following 5 situations applies:
>
> - It would be a breach of a law to disclose the information;
> - The information concerns an incomplete proposal or negotiation;

- The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
- The information is generated for the internal management purposes of the entity; or
- The information is a trade secret; and

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.

False market

3.1B If ASX considers that there is or is likely to be a false market in an entity's securities and asks the entity to give it information to correct or prevent a false market, the entity must immediately give ASX that information.

383 Chapter 19 dealt with interpretation and definitions and relevantly included:

Principles on which the listing rules are based

19.1 The listing rules are based on the principles set out in the Introduction.

Entity must comply with spirit, intention and purpose etc of rules

19.2 An entity must comply with the listing rules as interpreted:

- in accordance with their spirit, intention and purpose;
- by looking beyond form to substance; and
- in a way that best promotes the principles on which the listing rules are based.

…

Expressions used in the Corporations Act

19.3 Expressions that are not specifically defined in the listing rules, but are given a particular meaning in the Corporations Act, have the same meaning in the listing rules.

…

Definitions

19.12 The following expressions have the meanings set out below.

Expressions	**meanings**
…	
aware	an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.
…	
information	for the purposes of Listing Rules 3.1 3.1B, information includes: (a) matters of supposition and other matters that are

insufficiently definite to warrant disclosure to the market; and

(b) matters relating to the intentions, or likely intentions, of a person.

Case law

384 The continuous disclosure obligation in s 674(2) has been considered in two recent Full Court decisions: *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; 245 FCR 402 (***Grant-Taylor***) (Allsop CJ, Gilmour and Beach JJ); and *Crowley v Worley Ltd* [2022] FCAFC 33; 293 FCR 438 (***Crowley***) (Perram, Jagot and Murphy JJ).

385 In *Grant-Taylor*, the Full Court discussed the background to and purpose of the continuous disclosure provisions at [92]-[93]:

> 92 The statutory purposes for the continuous disclosure regime were foreshadowed in the 1991 Australian Companies and Securities Advisory Committee Report and in a Second Reading Speech to the *Corporate Law Reform Bill 1992* (Cth) (although the 1992 Bill was superseded by the 1993 Bill). The 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** (see *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [353]-[355]; *Re Chemeq Ltd* (2006) 234 ALR 511 at [42]-[46] per French J (as he then was)). Further, one of the justifications for introducing the continuous disclosure regime, as referred to by that Committee, was to "minimize the opportunities for perpetrating insider trading" thereby providing an explicit link between the purposes of the continuous disclosure regime and the insider trading regime.
>
> 93 It is also to be noted that ss 674 to 677 are remedial or protective legislation. They should be construed beneficially to the investing public and in a manner which gives the "fullest relief" which the fair meaning of their language allows (*James Hardie v ASIC* at [356]).
>
> (Emphasis added.)

386 To like effect, in *Crowley*, Jagot and Murphy JJ stated at [157]-[159]:

> 157 The purpose of s 674 and the continuous disclosure regime is clear. In Treasury Paper, *CLERP Paper No 9, Proposals for Reform – Corporate Disclosure* (Part 8 at 8.4) it was described in the following terms:
>
> > The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets … Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity's performance and prospects and this information can be more rapidly factored into the price of the entity's

securities.

158 In *Grant-Taylor FFC* at [92] the Full Court said, and we agree, that the main purpose of the regime 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

159 It is necessary to keep in mind that s 674 of the *Corporations Act* is a remedial or protective provision which should be construed beneficially to the investing public and in a manner which gives the fullest relief which the fair meaning of the language allows: *Grant-Taylor FFC* at [93]; *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [356].

387 Section 674(2), set out above, has three elements.

388 The first element (in s 674(2)(a)) is that the sub-section applies to the listed disclosing entity.

389 The second element (in s 674(2)(b)) is that the entity has information that those provisions (relevantly here, Listing Rule 3.1) require the entity to notify to the market operator. Apart from the issues that overlap with the other elements of s 674(2), there is an issue whether the Underwriter Acquisition Information and the Significant Proportion Information were information "concerning it", that is, concerning ANZ. I will discuss the meaning of "concerning it" later in these reasons.

390 The third element (in s 674(2)(c)) has two cumulative requirements:

(a) first, that the information is not "generally available"; and

(b) secondly, that the information is material in the relevant sense.

391 In relation to the first requirement, the expression "generally available" is elaborated upon in s 676(2) and (3), which are described in *Grant-Taylor* at [117]. I note the following:

(a) In relation to s 676(2)(a), the Full Court in *Grant-Taylor* stated at [118]-[119]:

> 118 The first limb of the test in s 676(2)(a) stands as an independent basis upon which information may be found to be "generally available". It does not involve a consideration of whether the market has had a reasonable time to absorb the information.
>
> 119 The term "readily observable matter" is not defined in the Act. Extrinsic material relating to the enactment of the analogous provisions proscribing insider trading explained the expression "readily observable matter" as "facts directly observable in the public arena" (Explanatory Memorandum to the *Corporations Legislation Amendment Bill* at [328]: see *R v Firns* (2001) 51 NSWLR 548 at

> [56]). Whether information is "readily observable matter" is a question of fact to be determined objectively and hypothetically. It does not matter how many people actually observe the relevant information; information may be readily observable even if no one has observed it (*ASIC v Citigroup* at [546] and [551] per Jacobson J and *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at [167] per Judd J (affirmed on appeal but with no additional discussion on relevant aspects (*Woodcroft-Brown v Timbercorp Securities Ltd* (2013) 96 ACSR 307))). The test of whether material is readily observable is not whether the particular matter was actually observed but whether it could have been observed readily, meaning easily or without difficulty.

(b) In relation to s 676(2)(b), the Full Court in *Grant-Taylor* stated at [122]:

> Extrinsic material relating to the comparable provisions proscribing insider trading explained this element of the second limb of the test as requiring that the information:
>
> > be made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information. This provision is intended to define the term "generally available" in terms appropriate to closely held and unlisted companies as well as listed companies with dispersed shareholdings. It would not be sufficient for information to be released to a small sector of the investors who commonly invest in the securities. The information must be made known to a cross section of the investors who commonly invest in the securities; …
>
> (Explanatory Memorandum to the *Corporations Legislation Amendment Bill* at [328])

(c) In relation to s 676(3), the Full Court in *Grant-Taylor* stated at [124]:

> The third (but secondary) means by which information may become "generally available" is if the information consists of "deductions, conclusions or inferences" based upon information that is either readily observable or publicly disseminated. A party seeking to prove the lack of general availability of information must negative the existence of relevant deductions, conclusions or inferences (*R v Rivkin* (2004) 59 NSWLR 284 at [178]). Extrinsic material relating to the provisions proscribing insider trading noted that it was not intended that the provisions would regard, as "inside" information, such things as deductions and conclusions which investors, brokers or other market participants may make based upon independent research of generally available information (Explanatory Memorandum to the *Corporations Legislation Amendment Bill* at [327]: see *Woodcroft-Brown v Timbercorp Securities Ltd* at [176]; *R v Firns* at [56]).

392 The *second requirement* – set out in s 674(2)(c)(ii) – is that the information is "information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity". I note that the provision refers to the "price or value" of the securities. This is relevant to some of the submissions that are considered later in these reasons.

393 The test of materiality in s 674(2)(c)(ii) is the subject of elaboration in s 677, which provides that that test will be satisfied "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 ED securities". In *Grant-Taylor*, the Full Court stated at [96]:

> What is meant by "material effect" in s 674(2)(c)(ii)? As stated earlier, s 677 illuminates this concept and also identifies the genus of the class of "persons who commonly invest in securities". It refers to the concept of whether "the information would, or would be likely to, influence [such] persons … in deciding whether to acquire or dispose of" the relevant shares. The concept of "materiality" in terms of its capacity to influence a person whether to acquire or dispose of shares must refer to information which is non-trivial at least. It is insufficient that the information "may" or "might" influence a decision: it is "would" or "would be likely" that is required to be shown: *TSC Industries Inc v Northway Inc* 426 US 438 (1976). Materiality may also then depend upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event on the company's affairs (*Basic Inc v Levinson* 485 US 224 (1988) at 238 and 239; see also *TSC v Northway*). Finally, the accounting treatment of "materiality" may not be irrelevant if the information is of a financial nature that ought to be disclosed in the company's accounts. But accounting materiality does have a different, albeit not completely unrelated, focus. …

394 The expression "persons who commonly invest in securities", which is used in s 677, is not defined in the *Corporations Act*. In *Grant-Taylor*, the Full Court stated at [115]-[116]:

> 115 We are of the view that the expression "persons who commonly invest in securities" is a *class* description. First, the plural "persons" is used in contradistinction to the singular "a reasonable person" in s 677. Secondly, to treat this as a class description avoids distinctions dealing with large or small, frequent or infrequent, sophisticated or unsophisticated *individual* investors. Such idiosyncratic distinctions are made irrelevant if one is looking at a class of investors. There is no reason to confine "likely to influence persons" to the sophisticated. The unsophisticated also need protection. Likewise the small investor and likewise the infrequent investor. But not the irrational investor. Thirdly, in the context of s 676, the question is whether the information has been made known to the relevant class, albeit that the class may be narrower than for s 677. We accept that the phrase does not use the express language of "class", but in using the plural "persons", the legislature appears to be generalising to a group description.
>
> 116 The word "commonly" in s 677 has been employed to underline that the objective question of materiality posed by ss 674 and 675 by reference to the hypothetical reasonable person in turn has regard to what information would or would be likely to influence a *hypothetical* class of persons namely "persons who commonly invest in securities".

395 In *Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384, in the context of considering the test of materiality, Lee J made the following observations:

> 1100 In determining whether information (had it been generally available) would be expected by a reasonable person to have a material effect on the price or value

> of a company's securities, the Court held, in *James Hardie*, that this is a matter which can be appropriately addressed by expert evidence: (at 139 [228]). Such evidence may aid the Court in determining the predictive exercise that the sections require; although it is not determinative.
>
> 1101 With respect to the predictive exercise to be undertaken, Gilmour J noted in *Fortescue* (at 307 [511]) that "the resolution of the question upon an ex ante approach involves a matter of judgment, informed by commercial common sense and, if necessary, by evidence from persons who have practical experience in buying and selling shares and in the workings of the stock market".
>
> 1102 In *Vocation*, Nicholas J explained that information may need to be considered in its "broader context" to determine whether it satisfies the statutory test of materiality, including "whether there is additional information beyond what is alleged not to have been disclosed and what impact it would have on the assessment of the information that the plaintiff alleges should have been disclosed": (at 294–295 [566]), citing *Jubilee Mines NL v Riley* [2009] WASCA 62; (2009) 253 ALR 673 and *James Hardie*.
>
> 1103 Evidence of the actual effect of the information actually disclosed on share price may be relevant in determining whether s 674(2) of the *Corporations Act* has been contravened. It has been accepted that such evidence may constitute a relevant cross-check as to the reasonableness of an ex ante judgement about a different hypothetical disclosure: *Fortescue* (at 301 [477] per Gilmour J), cited with approval in *James Hardie* (at 197 [534]–[535]). …

Consideration

Overview

396 As set out in the Introduction, ASIC contends that ANZ breached its continuous disclosure obligation in s 674(2) of the *Corporations Act* (read with Listing Rule 3.1) by failing to notify the ASX (either on the night of 6 August 2015 or, alternatively, prior to the recommencement of trading in ANZ shares on 7 August 2015) of the Underwriter Acquisition Information or alternatively the Significant Proportion Information (together, the **pleaded information**).

397 The key contentions of the parties have been outlined in the Introduction of these reasons.

398 I will now consider each of the elements of s 674(2).

Section 674(2)(a)

399 There is no issue that the subsection (s 674(2)) applies to the listed disclosing entity (ANZ).

Section 674(2)(b)

400 There is no issue that the pleaded information is "information" for the purposes of s 674(2)(b). Further, there is no issue that ANZ *had* that information at the relevant times.

401 The next question is whether the provisions of the Listing Rules (specifically, Listing Rule 3.1) required the entity to notify the information to the market operator. This first part of Listing Rule 3.1 states: "[o]nce an entity is or becomes aware of any information …". There is no issue that the pleaded information is "information" for the purposes of the Listing Rules. Further, there is no issue that ANZ was "aware" of the information within the meaning in Rule 19.12 of the Listing Rules at the relevant times.

402 Listing Rule 3.1 refers to the information being information "concerning it", that is, ANZ. There is an issue whether the Underwriter Acquisition Information and the Significant Proportion Information satisfy this aspect of the Listing Rule.

403 ASIC submits that the ordinary meaning of "concerning" is a practical connection, referring to definition 1 of "concerning" in the *Macquarie Dictionary* (7th ed, 2017), namely "relating to; regarding; about". ASIC submits that the array of non-exhaustive examples of possible types of information requiring disclosure within Listing Rule 3.1 indicates a broad approach to the types of information that "concern" a listed entity; the same indication can be drawn from Listing Rule 19.12 and the purposive approach to interpreting remedial or protective provisions. ASIC submits that the fact that the Underwriters were to acquire between $754 million and $790 million of shares (or over 31% of the Placement shares) or, alternatively, were to acquire a significant proportion of the Placement shares, is information concerning the conduct and outcome of the capital raising undertaken by ANZ; it is therefore information "concerning" ANZ within the meaning of Listing Rule 3.1.

404 ANZ submits, in summary, that:

(a) The requirement that the information concern the entity are necessarily words of limitation and narrow the types of information which may require disclosure.

(b) ASX Guidance Note 8 (version dated 1 July 2015) (at p 8) provides limited commentary regarding this aspect of the Listing Rule. It relevantly states that:

> … the qualification that the information must "concern" the entity is an important one. Generally speaking, an entity would not be expected under Listing Rule 3.1 to disclose publicly available information about external events or circumstances that affect all entities in the market, or in a particular sector, in the same way. All other things being equal, that is not information concerning it.

(c) The decision of Nicholas J in *Australian Securities and Investments Commission v Vocation Ltd* [2019] FCA 807; 371 ALR 155 (***Vocation***) is instructive. Nicholas J

reasoned that the use of the word "invest" rather than purchase or acquire in s 677 suggested that the hypothetical person who commonly invests in securities would be someone who makes an assessment as to whether to buy or sell shares based on the "company's earnings or potential earnings and the potential return the investment offers after making an allowance for risk" (at [552]). Even though the statutory entry point for the reasoning in *Vocation* was not the phrase "information concerning it" in the Listing Rules, the reasoning of his Honour provides support for the underlying argument about the requirement that the information bears on fundamental value.

(d) This construction of the "information concerning it" limitation is supported by a purposive construction of the qualification, in light of the statutory objective of market efficiency.

(e) ANZ (as an entity) is conspicuously absent from ASIC's formulation of the pleaded information in the FASOC at [16(a)] and [16(b)]. The central subject of the pleaded information is the Joint Lead Managers and their acquisition of ANZ shares. ASIC alleges that ANZ had knowledge of facts about the Joint Lead Managers' shareholdings, but not that this information in any way concerned ANZ as an entity beyond mere knowledge of those facts.

(f) The pleaded information merely concerns the holding of shares by the Joint Lead Managers, and its significance is said to relate to their anticipated trading decisions. However, on no sensible view could ASIC contend (and ANZ does not understand it to contend) that every time ANZ becomes aware that a substantial shareholder intends to readjust their portfolio by selling a significant quantity of ANZ shares, ANZ would be obliged to disclose that information. Similarly, ANZ does not understand ASIC to contend that ANZ would have had a disclosure obligation if all of the shares acquired in the Placement by the Joint Lead Managers had instead been placed with hedge funds. The logical reason for this is that the information does not relevantly concern ANZ. The Underwriters were in no different position to other investors who took up shares.

405 In my view, both the Underwriter Acquisition Information and the Significant Proportion Information were information "concerning it", that is, concerning ANZ, for the purposes of Listing Rule 3.1. The words "concerning it" are not defined in the Listing Rules. I consider that they have their ordinary meaning, which in this context is relating to, regarding, and about. This construction is likely to further the object of the continuous disclosure regime, namely to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price

or market sensitive information: see *Grant-Taylor* at [92], set out above. Further, this construction is consistent with the examples given under Listing Rule 3.1. The examples include "under subscription or over subscriptions to an issue of securities". While not the same as the outcome of a capital raising, it relates to the securities of the entity rather than its business. In the present case, the Underwriter Acquisition Information and the Significant Proportion Information were information *concerning ANZ* because they represented the outcome of a large placement of ANZ shares. Further, they represented the outcome of a substantial transaction undertaken by ANZ.

406 The other parts of Listing Rule 3.1 raise issues that overlap with issues raised by s 674(2) that will be discussed below.

Section 674(2)(c)(i): not generally available

407 As noted above, s 674(2)(c)(i) requires that the information is not "generally available". The expression "generally available" is elaborated upon in s 676(2) and (3), which are set out above.

408 ANZ has admitted that the Underwriter Acquisition Information was not generally available.

409 In relation to the Significant Proportion Information, there is an issue between the parties as to whether this was not generally available at the relevant times. There are two relevant points in time for the purposes of ASIC's case: the night of 6 August 2015 and prior to the recommencement of trading in ANZ shares of 7 August 2015. ASIC contends that the information was not generally available at each of those points in time. In relation to the night of 6 August 2015, it does not appear that ANZ contends that the information was generally available at that time. However, ANZ does contend that the Significant Proportion Information was generally available before the recommencement of trading in ANZ shares on 7 August 2015. Trading in ANZ shares recommenced at 10.00 am that day. Accordingly, I will focus on the point in time shortly before 10.00 am on 7 August 2015.

410 ASIC submits that: ANZ did not disclose any part of the Significant Proportion Information to the ASX on 6 August or 7 August, and ANZ and the Underwriters were bound by confidentiality and announcement provisions of their Underwriting Agreement as to any such disclosure; the information was not "readily observable" information.

411 ASIC submits that no published analyst research, nor newspaper nor other publication contained the Significant Proportion Information on 6 August or 7 August (or thereafter); nor was there readily observable information in the market, or information made known to persons

who commonly invested in securities of a kind whose price or value might be affected by the information, that permitted deduction, conclusion or inference, on 6 August or 7 August, as to the existence of the Significant Proportion Information.

412 ASIC submits that not only is there an absence of evidence that the Significant Proportion Information was generally available, there is cogent evidence indicating that it was known by relevant participants that the Significant Proportion Information was *not* generally available, relying on the conference calls on 8 August 2015.

413 ANZ relies on the opinion of Mr Holzwarth that the Significant Proportion Information was widely known amongst market participants before the open of trading on 7 August 2015. ANZ relies in its submissions on Mr Holzwarth's opinions that:

(a) based on the flow of information in relation to the book-build, market participants would have been aware that the Joint Lead Managers had not successfully placed all of the Placement shares with long-term existing domestic shareholders of ANZ;

(b) as a consequence, market participants would have been aware that the Joint Lead Managers were confronted with a choice to: (i) place shares with shareholders perceived as likely to sell quickly; or (ii) purchase Placement shares themselves;

(c) given this information, and in light of the known incentives of Joint Lead Managers to stabilise the price of ANZ shares to protect their reputation, market participants would have become aware of the Significant Proportion Information prior to the resumption of trading on 7 August 2015.

414 ANZ submits that Mr Pratt reaches a similar view as to the information becoming widely known by market participants; the point of difference between them is in relation to the time by which this information would have been known. (Mr Pratt's opinion was that an appreciation that there had been a significant lack of demand for the Placement, and consequently that the Underwriters had purchased some of the shares, "would have slowly grown".)

415 ANZ submits that the evidence of Mr Holzwarth is to be preferred for the following reasons:

(a) information in relation to the book-build which would have informed this knowledge of market participants was all available prior to the resumption of trading on 7 August 2015. This information included that:

(i) of the largest 100 existing shareholders on the ANZ register, 60 did not participate in the Placement;

(ii) many smaller shareholders received full allocations of shares requested;

(iii) 53 participants who got allocations were not existing shareholders;

(iv) the Joint Lead Managers were soliciting bids from non-shareholders (which would have provided information to market participants that the Joint Lead Managers had not placed all of the Placement Shares with long-term domestic shareholders);

(b) these matters provided several ways for market participants to become aware that the book-build had not successfully placed all of the Placement shares with long-term existing domestic shareholders;

(c) an analysis of analyst reports and media articles at the time supports a conclusion that it was widely known that the Joint Lead Managers did not successfully place all of the Placement shares with long-term existing domestic shareholders;

(d) Mr Holzwarth's analysis of the share price reaction (or lack of it) during the period of 7 to 12 August 2015, and following the Clime Disclosure, supports two compatible conclusions, being: (i) that the Significant Proportion Information was widely known amongst market participants; and/or (ii) the Significant Proportion Information was not material to the price of ANZ shares in any event. This analysis also contradicts Mr Pratt's opinion that the Significant Proportion Information was material, but that an appreciation of it had only slowly grown;

(e) the fact that the book-build did not clear at greater than the underwritten floor price was included in ANZ's completion announcement and therefore known by 7:30 am on 7 August 2015;

(f) there is evidence of a number of market participants in fact drawing the inference or deducing that the Joint Lead Managers took up shares. Evidence in this regard includes:

(i) the Clime Disclosure, which shows that Clime was able to deduce and publicly disclose information consistent with the Significant Proportion Information;

(ii) the article in the Chanticleer column of the *Australian Financial Review* published on 6 August 2015, which stated that: "It would not surprise Chanticleer if there was short selling of the other banks by the underwriters of the ANZ issue to hedge their positions".

416 In my view, the Significant Proportion Information was not generally available shortly before (or at) the recommencement of trading in ANZ shares on 7 August 2015, whether the issue is analysed under s 676(2)(a), s 676(2)(b) or s 676(3).

417 If and to the extent that ANZ relies on s 676(2)(a), in my view the Significant Proportion Information was not *readily observable* shortly before (or at) the recommencement of trading in ANZ shares on 7 August 2015. The information was not disclosed by ANZ, the Underwriters or anyone else before that time.

418 If and to the extent that ANZ relies on s 676(2)(b), I note that this provision contains two cumulative requirements. The first of these is that the Information has been "made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities" of the kind there described. In my view, the Significant Proportion Information was not made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities before the recommencement of trading on 7 August 2015. None of the media articles published before 10.00 am on 7 August 2015 stated or otherwise conveyed that a significant proportion of the Placement shares were to be taken up by the Underwriters. A number of the articles stated that the *book was covered*, which tended to suggest that the Underwriters did not need to, and did not, take up a portion of the shares. The analyst reports referred to by Mr Holzwarth did not refer to the Underwriters having taken up a significant proportion of the Placement shares. In these circumstances, the first requirement in s 676(2)(b) is not satisfied. Accordingly, the Significant Proportion Information was not generally available on the basis of s 676(2)(b).

419 Section 676(3) provides that information is generally available if it consists of "deductions, conclusions or inferences" made or drawn from either or both of the following: (a) information referred to in paragraph s 676(2)(a) (that is, readily observable matter); or (b) information made known as mentioned in s 676(2)(b)(i) (that is, information made known in a manner that would, or would be likely to, bring it to the attention of person who commonly invest in securities of a kind whose price or value might be affected by the information). For the following reasons, in my view, the Significant Proportion Information was not generally available shortly before (or at) the recommencement of trading on 7 August 2015 on the basis of this provision.

420 First, I consider it doubtful that, on the basis of the information flow from the book-build, the analyst reports and/or the media articles, an inference could be drawn that the Underwriters had not successfully placed all of the Placement shares with long-term existing domestic

shareholders. In relation to the information flow from the book-build, the spreadsheets provided by the Underwriters to ANZ were confidential and were not available to market participants. While each investor would have been aware (by the early hours of 7 August 2015) of how their bid had been dealt with, they would not have known how other applications had fared. They would therefore have had only a very limited basis to draw any inferences as to the overall outcome of the Placement before 10.00 am on 7 August 2015. The analyst reports indicated that market participants did not consider the terms of the capital raising to be positive; ANZ's trading update was viewed negatively and there were expectations of further capital raisings by ANZ and the other three major banks. This did not take matters very far. While some of the media articles (set out at [145]-[151] and [173] above) suggested that the Joint Lead Managers were struggling to cover the book, they also indicated that, ultimately, the book was covered. This tended to suggest that the Underwriters would not be taking up shares, which undercuts Mr Holzwarth's overall analysis.

421 Secondly, even if one accepts that it could be inferred from the above sources that the Underwriters had not successfully placed all the Placement shares with long-term existing domestic shareholders, it is doubtful that market participants would have deduced, concluded or inferred (by 10.00 am on 7 August 2015) that a significant proportion of the Placement shares were to be taken up by the Underwriters. As discussed above, a difficulty with Mr Holzwarth's analysis is that it does not account for the possibility that shares may have been successfully placed with long-term existing international investors or long-term new (domestic or international) shareholders. This undermines the subsequent steps in Mr Holzwarth's analysis.

422 Thirdly, the factual evidence stands strongly against the proposition that, shortly before (or at) the recommencement of trading in ANZ shares on 7 August 2015, it could be deduced, concluded or inferred on the basis of information that was readily observable or publicly disseminated that the Underwriters were to take up a significant proportion of the Placement shares. It is clear from statements made during the two conference calls on the morning of Saturday, 8 August 2015 (the first, between the Underwriters; the second, between the Underwriters and ANZ), that senior representatives of the Underwriters believed that the existence of the shortfall was not generally known in the market. I note that:

(a) During the first conference call on 8 August 2015, Itay Tuchman (Citi) said that they (the Underwriters) had to do two things. One of these was "to make sure that … it does

not get out that the syndicate has a position or its size". Later in the call, he said that the only reason to stay out of the market on Monday would be "to obscure the fact that we have stock".

(b) In the discussion that followed, Jeffrey Herbert-Smith (JPM) referred to the question of disclosure of the shortfall. He said, "I mean clearly we don't want to do anything that does that".

(c) Michael Ormaechea (Deutsche) said, "I think the most important thing is if we are going to disclose, we all need to know, right? … I personally don't understand how you have to disclose because the book was covered, and in managing the book we've pulled the stock back".

(d) Mr Tuchman, apparently referring to all three Underwriters, said "it is our intention, at this point, that nobody is going to disclose stock".

(e) In the next conference call, Mr Tuchman referred to two objectives. He said: "The second objective is clearly to avoid any disclosure to the market of the shortfall position".

(f) Mr Ormaechea said, "So right now our default position is nothing new. No disclosure".

423 During cross-examination, it was put to Mr Needham that he understood that, by a statement on that call, the speaker was expressing his belief that the market did not know that the underwriters had acquired the so-called shortfall position. He answered Yes. Further, it was put to Mr Needham that, at the time, he held the belief that the market did not know that the underwriters had acquired those shares. He answered Yes.

424 It is very difficult to reconcile the above evidence with Mr Holzwarth's analysis. Clearly, those senior representatives of the Underwriters and Mr Needham (all of whom were involved in the Placement) believed that the market did not know about the shortfall. I consider that more weight should be given to that factual evidence than to Mr Holzwarth's analysis. I consider that it is more likely to represent the reality of the situation.

425 Fourthly, to the extent that ANZ relies on Mr Holzwarth's ex post analysis, I give this little weight for the reasons set out at [333] above.

426 Fifthly, to the extent that ANZ relies on the Chanticleer column published in the *Australian Financial Review* on 6 August 2015, I consider the sentence relied on by ANZ to be ambiguous, for the reasons given at [328] above.

427 I therefore conclude that both the Underwriter Acquisition Information and the Significant Proportion Information were not generally available at the relevant times (being the night of 6 August 2015 and prior to the recommencement of trading in ANZ shares on 7 August 2015).

Section 674(2)(c)(ii): materiality

428 Section 674(2)(c)(ii) requires that the information is "information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity". This is the subject of elaboration in s 677, which provides that that test will be satisfied "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 ED securities".

429 In outline, the parties' positions are as follows:

(a) ASIC contends that the Underwriter Acquisition Information and the Significant Proportion Information were material to the price of ANZ shares (so as to satisfy s 674(2)(c)(ii) directly), and would, or would have been likely to, have influenced persons who commonly invested in securities in deciding whether to acquire or dispose of ANZ shares (so as to satisfy s 674(2)(c)(ii) via the deemed materiality test in s 677). ASIC submits that, in this case, the same facts go to the satisfaction of both tests.

(b) ANZ contends that the pleaded information is not the correct information to assess, and that it is necessary to have regard to a broader suite of information. ANZ also contends that, even accepting for the sake of argument that the relevant information to assess is (and is only) the pleaded information, ASIC's case on materiality fails.

430 I will first consider the issue of materiality with respect to the pleaded information (as distinct from the broader suite of information relied on by ANZ). I will then consider ANZ's contention that it is necessary to have regard to a broader suite of information. This approach is consistent with the structure of ANZ's submissions.

Materiality of the pleaded information

431 ASIC contends that the materiality of the pleaded information is established because "persons who commonly invest in securities" would have held an expectation that the Underwriters would promptly dispose of allocated or acquired Placement shares, and in so doing place downward pressure on ANZ's share price.

432 ASIC relies on the reports of Mr Pratt in connection with the materiality of the pleaded information. ASIC submits that, where they differ, the opinions of Mr Pratt ought to be preferred over those of Mr Holzwarth, referring to *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; 264 ALR 201, where Gilmour J stated at [511]:

> In my opinion the resolution of the question upon an ex ante approach involves a matter of judgment, informed by commercial common sense and, if necessary, by evidence from persons who have practical experience in buying and selling shares and in the workings of the stock market.

433 ASIC submits that Mr Pratt's opinions about materiality are consistent with ANZ's own behaviour. ASIC submits that the evidence shows that ANZ was concerned about the potential impact on its share price of the Underwriters' trading of their position in ANZ shares; between 6 and 8 August 2015, ANZ had both internal discussions and discussions with the Underwriters in which it expressed concerns about the Underwriters' trading of their position in ANZ shares on and from 7 August 2015.

434 ANZ submits that, fundamentally, ASIC's case fails because the factual premise on which it is based – that persons who commonly invest in securities would, if the pleaded information was disclosed, have expected the Joint Lead Managers to promptly dispose of their shares so as to place downward pressure on the share price – is misplaced. ANZ submits that the *actual* incentives of the Joint Lead Managers regarding any shortfall shares would *not* be to be short-term sellers in a way that may place downward pressure on the share price, and this would not have been the expectation of market participants. ANZ's submissions in support of those propositions can be summarised as follows:

(a) ANZ relies on the expert reports of Mr Holzwarth, as reinforced by numerous factual matters. Mr Holzwarth's opinion is that investors would not have held any such expectation, and that the actual incentives of the Joint Lead Managers regarding any shortfall shares would not be to be short-term sellers in a way that may place downward pressure on the share price. In his opinion, the premise of ASIC's case on materiality is contradicted by an analysis of the motivations of traders generally, as well as the incentives of underwriters of an equity offering such as the Placement. The opinions of Mr Holzwarth relied on by ANZ have been summarised earlier in these reasons (particularly under Issue 3).

(b) The matters relied on by Mr Holzwarth are not merely theoretical points, but are in fact evident from or reinforced by other evidence. First, the Joint Lead Managers had each indicated to ANZ their intention to promote an orderly aftermarket in ANZ shares and not to promptly dispose of any allocation of Placement shares to them.

(c) Secondly, relevant personnel at ANZ held the view that the Joint Lead Managers would not be short-term sellers of the ANZ shares.

(d) Thirdly, ASIC has not pleaded a case that the Joint Lead Managers were in fact short-term sellers of shares in a way that would place downward pressure on the ANZ share price, nor that ANZ knew or expected that to be the case. Indeed, ASIC previously abandoned any such case.

(e) Fourthly, the book was covered and the Joint Lead Managers decided to take up a portion of the Placement shares by scaling-back allocation to certain investors. A substantial reason for the Joint Lead Managers recommending that course of action was that investors such as hedge funds, if not scaled back, might deal with their shares in such a way as to create a disorderly, or volatile, aftermarket for ANZ shares. This decision by the Joint Lead Managers reveals a preference to protect their reputation over promptly disposing of the shares.

(f) Fifthly, as to hedges: the Joint Lead Managers in fact had hedges in place; and ANZ was told and understood that the Joint Lead Managers had hedged their position, this was consistent with what ANZ personnel expected based on their experience, and this was one of the reasons why ANZ did not consider that the Joint Lead Managers would be short-term sellers.

(g) Sixthly, contemporaneous evidence, as well as evidence given by personnel from ANZ and the Joint Lead Managers during Section 19 examinations, highlights the importance of the overlapping issues of the Joint Lead Managers' reputation in the market place, and their relationship with ANZ, and why those matters were consistent with an expectation that the Joint Lead Managers would be unlikely to engage in after-market activity that would place downward pressure on ANZ's share price.

(h) Seventhly, as a further basic matter of commercial common sense none of the Underwriters would have any commercial incentive to negatively impact the share price through the way it dealt with the allocated shares. In fact, the opposite would be the case. Had any of the Underwriters elected to quickly sell a material portion of their allocation, this may have allowed one of the Underwriters to secure a short-term

advantage, but it may have equally caused a negative price effect on their remaining shares, thereby causing harm to that Underwriter's broader holdings of ANZ shares and other shares in the banking sector, as well as harm to the other Underwriters and potentially to the market or sector generally. Each of the Underwriters would have been aware of the risk of this occurring had any of them engaged in this behaviour. With this knowledge, the rational approach to ensure that overall losses were averted was for each of the Underwriters to hold the shares and unwind from their positions gradually over time in a way that did not materially affect price.

(i) Eighthly, the Joint Lead Managers' obligations under the Market Integrity Rules also support the unlikelihood of the Joint Lead Managers selling their shares in a way that created a disorderly market and put pressure on the ANZ share price.

(j) Further, ANZ relies on the propositions agreed by the experts in relation to Issue 3 (see [353] above).

(k) Further still, the logical conclusion that can be drawn from that ex ante analysis is consistent with an ex post analysis. ANZ relies on the ex post analysis in the Holzwarth First Report (based on the Clime Disclosure) and the further analysis conducted by Mr Holzwarth of the share price movement over the period 7 August 2015 to 31 October 2015 in the Joint Expert Report.

435 ANZ also submits that the materiality test requires the information to be *value-relevant information*. ANZ's submissions can be summarised as follows:

(a) The "deeming provision" in s 677 (see *Vocation* at [516]) relates to what a reasonable person would expect to be the effect on "persons who commonly invest in securities". Accordingly, it is necessary to understand what is meant by "persons who commonly invest in securities".

(b) ASX Guidance Note 8, in applying the test in s 677 of the *Corporations Act*, states that the ASX interprets the reference to persons who commonly "invest in" securities as a reference to "persons who commonly buy and hold securities for a period of time, *based on their view of the inherent value of the security*" (emphasis added) (p 10). In the ASX's view, "it therefore does not include traders who seek to take advantage of very short term (usually intraday) price fluctuations and who trade in and out of securities without reference to their inherent value and without any intention to hold them for a

meaningful period of time" (p 10). The footnote which the ASX included in relation to these statements states (p 10, n 22):

> The exclusion of such traders from the class of "persons who commonly invest in securities" is an important one. These types of traders often make trading decisions on the basis of very small movements in market price and so their inclusion in that class could artificially reduce the level of price movement that might be regarded as "material" under Listing Rule 3.1 and section 674. Also, their trading decisions typically are made without any regard to the underlying fundamentals of the securities in which they trade. …

(c) In *Vocation*, Nicholas J considered the operation and meaning of s 677 of the *Corporations Act*, stating at [552]-[553]:

> 552 … the use of the word "invest" rather than purchase or acquire in s 677 suggests that the hypothetical reasonable person referred to in that section will be someone who makes an assessment as to whether to buy or sell securities on the basis of a company's earnings or potential earnings and the potential return the investment offers after making an allowance for risk.
>
> 553 I do not think a knowledge of the investing behaviour of speculators and day traders who seek to profit on the back of rumour or momentum rather than company fundamentals would be of any assistance in determining what information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of particular securities. That observation would also hold true for hedge funds at least in circumstances where they are not making their investment decisions based on company fundamentals.

(d) This is consistent with *Grant-Taylor*, where the Full Court held that the phrase "persons who commonly invest in securities" refers to a broad class of investors and does not distinguish between investors based on their level of sophistication, size or frequency of investment (none of which undermines the proposition that the focus of attention is on investors basing decisions on expected earnings adjusted for risk, or 'fundamentals'): see [115], [130]-[131]. At [115], the Full Court excluded the "irrational investor". In the context of a regime fundamentally premised on the efficient market hypothesis, the reference to an irrational investor in the Full Court's judgment is readily understood as a reference to an investor who invests other than by reference to the inherent value of the security.

(e) The ASX Guidance Note, *Vocation* and *Grant-Taylor* each support the proposition that information which may influence trading decisions of an irrational investor is not the subject of the continuous disclosure regime; or to put it another way, information which is not material to the value of the securities does not give rise to disclosure obligations. Such an approach is consistent with the statutory purpose of the continuous disclosure

regime; namely, to ensure an efficient market. An efficient market is achieved by the disclosure of information that goes to the fundamental value of a security and, conversely, is undermined by the disclosure of information which does not go to the fundamental value of securities and which may induce irrational trading behaviour (i.e. trading behaviour divorced from the fundamental value of the securities). Once it is understood that in an efficient market price reflects (or is) value, the fact that s 674(2) refers to "price or value" can be seen not as a true disjunctive but rather as a compendious reference to a single phenomenon.

436 For the reasons that follow, I accept ASIC's contention that, if the pleaded information had been disclosed, persons who commonly invest in securities would have held an expectation that the Underwriters would promptly dispose of allocated or acquired Placement shares, and in so doing place downward pressure on ANZ's share price.

437 First, ASIC's contention derives substantial support from the evidence of Mr Pratt, which is informed by his extensive "real world" experience in advising investors in the Australian sharemarket over many years. The most directly relevant evidence is Mr Pratt's opinions in relation to Issue 3. In essence, Mr Pratt's opinions, as expressed in the Joint Expert Report, are:

> 2. Regarding 3. b) In Pratt's opinion, persons who commonly invested in securities would have expected the [Joint Lead Managers] holding ANZ placement shares, in the amount referred to in the [Underwriter Acquisition Information] or the [Significant Proportion Information], to be sellers of those shares to reduce their financial exposure in the short term to medium term, depending on the types and success of any hedging strategies employed.
>
> 3. In Pratt's opinion persons who commonly invest in securities would have expected the [Joint Lead Managers] to be relatively short-term holders of the placement shares compared to most other institutional investors and as such act more like hedge funds in dealing with the placement shares than long term holders.

438 While Mr Pratt joined in some joint propositions in relation to Issue 3, I do not see them as qualifying in any way the opinions he expressed as set out above. Mr Pratt's reasons for forming these opinions have been set out earlier in these reasons. They are clear and logical. While Mr Pratt's opinion refers to an expectation that the Underwriters would adopt hedging strategies, he also expresses the opinion that market participants would expect the Underwriters to sell down their positions in the short to medium term.

439 Secondly, I am not persuaded that market participants would undertake the kind of analysis of the Underwriters' incentives that is set out in Mr Holzwarth's first report; accordingly, I am not persuaded that they would expect the Underwriters to act in the way outlined by Mr Holzwarth. As set out under Issue 3 above, Mr Holzwarth referred to paragraph 23(c)(ii) of ASIC's FASOC regarding the alleged "expectation of both sophisticated and unsophisticated investors" that the Underwriters would "promptly dispose" of shares and "place downward pressure upon the ANZ share price". Mr Holzwarth expressed the opinion that "this assertion is contradicted by an analysis of the motivations of traders, generally, and the incentives of the underwriters of a SEO, generally". In Section 9.1, Mr Holzwarth discussed the "motivation" of traders and its implications for analysing the expected actions of the Underwriters. In Section 9.2, Mr Holzwarth discussed how academic research has shown that underwriters will intervene in secondary markets after an issuance based on an analysis of proprietary data to support the price. Mr Holzwarth concluded:

> 176. Taken together, the academic research contradicts an assertion that market participants would have expected the Underwriters to "promptly" sell shares in a way that would "place downward pressure upon the ANZ share price." Rather, the incentives of the Underwriters in selling ANZ shares would have been to trade more slowly and wait for liquidity as opposed to buying liquidity by trading quickly. In addition, academic research documents the importance of reputation for underwriters in winning larger deals. Research has also shown that underwriters will act to "stabilize" the price of newly issued securities consistent with reputational effects influencing their decisions.

440 As set out earlier in these reasons, I have doubts about some aspects of Mr Holzwarth's reasoning in relation to Issue 3. Further, Mr Holzwarth conducts a sophisticated analysis of the Underwriters' incentives and uses this as the basis for forming a view as to the expectations of market participants. It seems unlikely to me that persons who commonly invest in securities (a broad class) would approach the matter in that way. It assumes a level of sophisticated analysis that may be justified in some cases, but is unlikely to be true generally.

441 Thirdly, ASIC's contention – that, if the pleaded information had been disclosed, persons who commonly invest in securities would have held an expectation that the Underwriters would promptly dispose of allocated or acquired Placement shares, and in so doing place downward pressure on ANZ's share price – is supported by concerns held by, and actions taken by, the key ANZ personnel involved in the Placement on 7 and 8 August 2015. I note the following:

(a) On the morning of 7 August 2015, before the market opened, Richard Moscati and John Needham had separate calls with senior representatives of each of the Underwriters to

obtain assurances with regard to their selling intentions. Based on conversations with the Underwriters on the previous day, Mr Moscati's and Mr Needham's understanding going in to these calls was that the Underwriters would not quickly dispose of their shares in a way that might affect an otherwise orderly after-market in ANZ shares. Nevertheless, one of the purposes of the calls on the morning of 7 August 2015 was for Mr Moscati to confirm this with the Underwriters; in other words, to seek further assurances from the Underwriters as to their selling intentions.

(b) During cross-examination, Mr Needham gave evidence that a purpose of the calls on the morning of 7 August 2015 was to give ANZ reassurance that the Underwriters were not going to dispose of their very large holdings in ANZ shares over the course of only a few trading days (see [166] above).

(c) It is apparent from Mr Needham's evidence during cross-examination (see [166] above) that he was concerned that, if the Underwriters did dispose of their shares in only a few trading days, this would place downward pressure on the share price. Accordingly, as he accepted during cross-examination, what he wanted to achieve in the calls was to alleviate that concern to the greatest extent that he could; he wanted to hear from the Underwriters that they would not dispose of their very large holdings over the course of only a few trading days.

(d) The importance of this issue from ANZ's perspective is highlighted by the fact that not only did they speak with each Underwriter separately on the morning of 7 August 2015, they also spoke with the Underwriters as a group on the morning of 7 August 2015 (the conference call at 10.00 am that morning) and then again on the morning of 8 August 2015. These conference calls were largely directed at obtaining assurances from the Underwriters as to their selling intentions.

442 It is apparent from the above that Mr Moscati and Mr Needham were concerned that the Underwriters would or might sell down quickly the shares that they were to take up, such that Mr Moscati and Mr Needham repeatedly sought assurances from the Underwriters that they would not do so. Moreover, the reason why Mr Needham was concerned about the Underwriters selling down quickly was that he believed that this would place downward pressure on the ANZ share price. ASIC's contention is essentially that that persons who commonly invest in securities would have held similar concerns and beliefs.

443 For these reasons, I accept ASIC's contention. In light of that, I conclude that the pleaded information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of ANZ shares. It follows that, subject to the issue considered next below, I am satisfied that the pleaded information falls within s 677 and therefore was material for the purposes of s 674(2)(c)(ii).

444 It remains to deal with ANZ's submission that the materiality test requires the information to be value-relevant information. I do not accept this submission. The text of s 674(2)(c)(ii) refers to information that a reasonable person would expect, if it were generally available, to have a material effect on the "price or value" of securities. The words "price or value" also appear in s 677 and in Listing Rule 3.1. The natural way to read these words is as alternatives.

445 Further, reading the words "price or value" as alternatives furthers the purpose of the continuous disclosure regime. As the Full Court stated in *Grant-Taylor* at [92], the object of the regime is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information. Mr Holzwarth accepted that, in practice, price and value can and do diverge. In these circumstances, construing the provision as applying to price-related information promotes the object of enhancing the integrity and efficiency of capital markets.

446 ANZ's submissions rely on the expression "persons who commonly invest in securities" (in particular, the word "invest") in s 677. It is open to question how much weight can be placed on the use of the word "invest" in that phrase in s 677 for the purpose of construing the words "price or value" in s 674(2)(c)(ii). The ASX Guidance Note is of only limited assistance in circumstances where the passage relied on by ANZ related to the phrase "persons who commonly invest in securities" not the construction of "price or value" in s 674(2)(c)(ii). The passage from the judgment of Nicholas J in *Vocation* on which ANZ relies related to the word "invest" in s 677 and was not directed to the issue presently under consideration. The passages from the judgment of the Full Court in *Grant-Taylor* on which ANZ relies did not deal with the present issue.

447 For these reasons, I conclude that the pleaded information was material for the purposes of s 674(2)(c)(ii).

ANZ's contention regarding a broader suite of information

448 ANZ submits that: in considering the information which a plaintiff alleges is material and should have been disclosed, it is important that the information be assessed in its full commercial context and by reference to the totality of relevant information; this would include, in the present case, matters that are relevant to an assessment of the specific reason why ASIC alleges the pleaded information was material (i.e. that the Underwriters would be prompt sellers whose activity might depress the ANZ share price); the importance of considering the totality of relevant information has been established and discussed in a number of cases: see *Jubilee Mines NL v Riley* [2009] WASCA 62; 40 WAR 299 at [87]-[90], [161]-[162]; *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149; 322 ALR 723 at [96]-[101]; *Grant-Taylor* at [149]; *Bert v Red 5 Ltd* [2016] QSC 302; 349 ALR 210 at [19], [117], [210]-[211]. ANZ relies on the following passage from the judgment of Nicholas J in *Vocation* at [566]:

> Properly understood, *Jubilee* is authority for the proposition that information that is alleged by a plaintiff to be material, may need to be considered in its broader context for the purpose of determining whether it satisfies the relevant statutory test of materiality. For that reason it will often be necessary to consider whether there is additional information beyond what is alleged not to have been disclosed and what impact it would have on the assessment of the information that the plaintiff alleges should have been disclosed.

449 ANZ submits that in *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627 at [124], the Full Federal Court quoted with approval the statement of Nicholas J in *Vocation* at [566]. (I note that it may be that the passage was quoted as part of the summary of a party's submissions.)

450 ANZ also relies on ASX Guidance Note 8, which stated at p 11:

> In assessing whether or not information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1, the information needs to be looked at in context, rather than in isolation, against the backdrop of:
>
> - the circumstances affecting the entity at the time;
> - any external information that is publicly available at the time; and
> - any previous information the entity has provided to the market …
>
> (Footnotes omitted.)

451 ANZ submits that when the relevant information which should have been disclosed is properly identified (or the broader context relevant to assessment of materiality is taken into account), the reasons why any relevant information which ANZ had is not material are amplified.

452 ANZ submits that: the disclosure regime is concerned with "information" of which an entity is "aware"; these terms are defined in the ASX Listing Rules (see [383] above); in broad terms, the regime is concerned with information that an entity has or ought reasonably to have, and includes matters of supposition and matters relating to the likely intentions of a person.

453 ANZ submits that the "information" (within the meaning of the ASX Listing Rules) that ANZ had (in the sense of being aware of it) was:

(a) that the Joint Lead Managers had recommended to ANZ, and it had accepted, that they should acquire a significant proportion of the Placement shares, and hence that the Joint Lead Managers were to acquire a significant proportion of the Placement Shares (which it was aware of because the Joint Lead Managers had told ANZ this). This is the pleaded information on which ASIC's claim is based;

(b) that the Joint Lead Managers were to acquire a significant proportion of the Placement shares because they recommended scaling-back certain hedge fund investors. ANZ was aware of this because the Joint Lead Managers had told ANZ this. Indeed, ANZ only had the information in paragraph (a) (and on which ASIC focuses) by reason of it being given the information in paragraph (b) and ANZ accepting the Joint Lead Managers' recommendation that they take up a portion of the Placement shares in the context of ANZ being informed of the other matters below;

(c) that a substantial reason for the Joint Lead Managers recommending scaling-back hedge funds was that if not scaled-back they might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares;

(d) that the book was covered, which ANZ was aware of because the Joint Lead Managers had told ANZ this;

(e) that the Joint Lead Managers' intentions in the aftermarket were not to be short-term sellers, which it was aware of because the Joint Lead Managers had told ANZ this; and

(f) that the Joint Lead Managers had entered into hedges to manage their risk from acquiring Placement shares, which it was aware of because the Joint Lead Managers had told ANZ this.

454 ANZ submits that: the case that ASIC advances asks the Court to have regard to one part of what ANZ was told (the information in paragraph (a) above), while seeking to exclude from consideration other matters that ANZ was told at or around the same time as the information

in paragraph (a) and in connection with the information in paragraph (a); each of the above matters is information of which ANZ was aware within the meaning of the ASX Listing Rules; further, each of the above matters directly bears upon a rational assessment of the premise of ASIC's case as to materiality, *a fortiori* if they are considered in combination.

455 I accept that the applicable principles are as stated by Nicholas J in *Vocation* at [566] (see [448] above). However, I do not accept ANZ's contention at a factual level. I will address each of the facts and matters relied on by ANZ (set out at [453] above) in turn.

456 In relation to paragraph (b) (that the Joint Lead Managers were to acquire a significant proportion of the Placement shares because they recommended scaling-back certain hedge fund investors), while this is broadly correct factually, the way in which it is expressed may suggest that the Underwriters were indicating that there was a choice as to whether to scale back certain hedge funds. However, as discussed at [129] above, the evidence generally suggests that allocating to hedge funds the full amount of their applications (as listed in the Draft Allocation List) was not a viable option from the perspective of the Joint Lead Managers. I have found that, in these circumstances, it is unlikely that they would have discussed this as an option. This conclusion is also supported by the words "No other choices" in Mr Needham's notes of the call. The way in which paragraph (b) is expressed does not capture this. I am not satisfied that the information in paragraph (b) (adjusted to better capture the facts) constitutes necessary contextual information. It does not meaningfully affect the assessment of the materiality of the pleaded information.

457 In relation to paragraph (c) (that a substantial reason for the Joint Lead Managers recommending scaling-back hedge funds was that if not scaled-back they might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares), this does not fully or accurately capture the reasons why the Joint Lead Managers made the allocation recommendation that they did. I have made findings, at [295]-[296] above, about the reasons why the Joint Lead Managers made their allocation recommendation. In light of those findings, paragraph (c) does not fully or accurately capture the relevant facts. I am therefore not satisfied that it constitutes necessary contextual information.

458 In relation to paragraph (d) (that the book was covered), while this is factually correct, I consider that the information expressed in this way is apt to mislead. While the book was covered, the six investors referred to in ASIC's reply had made clear that they did not want to receive more than certain amounts, which were substantially less than their applications. In

total, the difference between their applications and the maximum amounts they wanted to receive was $416.8 million of shares. Thus, while the book was covered, the real demand was substantially less than the amount of the Placement. I therefore do not accept that the information in paragraph (d) was necessary contextual information for the purposes of assessing materiality.

459 In relation to paragraph (e) (that the Joint Lead Managers' intentions in the aftermarket were not to be short-term sellers), while this is broadly correct factually, the fundamental difficulty with ANZ's contention based on this information is that, at the relevant times (the night of 6 August 2015 and before the commencement of trading in ANZ shares on the morning of 7 August 2015), the Joint Lead Managers' positions as to selling their shares were expressed in very general terms and were still the subject of further consideration. I note the following:

(a) As set out above, one of the purposes of the calls on the morning of 7 August 2015 was for Mr Moscati to confirm with the Joint Lead Managers that the Joint Lead Managers would not quickly dispose of their shares in a way that might affect an otherwise orderly after-market in ANZ shares.

(b) The general tenor of the separate calls with each of the Joint Lead Managers on the morning of 7 August 2015 (before 10.00 am) was that they would "do the right thing" in the sense that they would manage the situation appropriately and would not sell down their positions in ANZ shares quickly or in a way that would create a disorderly market. The Joint Lead Managers did not present any detail as to how and when they would sell down their shares.

(c) During the conference call that commenced at 10.00 am on 7 August 2015 (which took place *after* the relevant times) the Joint Lead Managers stated that they would not sell down their positions that day and that they would give further consideration as to how to manage the situation and come back to ANZ with more detail the next day.

460 In light of the above, I consider that the information held by ANZ at the relevant times was of such a general nature, and so lacking in detail, that it does not constitute necessary contextual information for the purposes of assessing materiality.

461 In relation to paragraph (f) (that the Joint Lead Managers had entered into hedges to manage their risk from acquiring Placement shares), while I accept that this is factually correct (see

[131] above), I am not satisfied that it constitutes necessary contextual information. It does not meaningfully affect the assessment of the materiality of the pleaded information.

462 While I have considered each of the above matters separately, I reach the same conclusion if the matters are considered together. In summary, some of the matters relied on by ANZ do not fully or accurately reflect the facts, and other matters do not meaningfully affect the assessment of materiality.

463 Accordingly, I reject ANZ's contention that materiality is to be assessed against a broader suite of information.

Conclusion

464 For these reasons, I conclude that ANZ breached its continuous disclosure obligation in s 674(2) of the *Corporations Act*.

465 The matter will be listed for a hearing on penalty on a date to be fixed.

I certify that the preceding four hundred and sixty-five (465) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 13 October 2023