FEDERAL COURT OF AUSTRALIA

Australia and New Zealand Banking Group Limited v Australian Securities and Investments Commission [2024] FCAFC 128

Appeal from:	*Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 2)* [2023] FCA 1217
File number(s):	VID 1067 of 2023
Judgment of:	**MARKOVIC, LEE AND BUTTON JJ**
Date of judgment:	2 October 2024
Catchwords:	**CORPORATIONS** – breach of continuous disclosure obligations under s 674(2) of the *Corporations **Act** 2001* (Cth) – whether primary judge erred in finding the pleaded information fell within s 677 of the Act by failing to construe and apply correctly the words "persons who commonly invest in securities" – whether primary judge erred in finding the pleaded information was material within the meaning of s 677 of the Act by failing properly to consider additional context – whether primary judge had proper regard to what the appellant knew and understood when assessing materiality – whether the pleaded information fell within Rule 3.1 of the ASX Listing Rules, being the relevant listing rules of the listing market for the purposes of s 674 of the Act – appeal dismissed
Legislation:	*Corporations Act 2001* (Cth) ss 9, 674, 676, 677, 1317G *Corporations Law* (Cth) s 1001A
Cases cited:	*Australian Securities and Investments Commission (ASIC) v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; (2007) 160 FCR 35 *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; (2009) 264 ALR 201 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2023] FCA 1565 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19; (2011) 190 FCR 364 *Australian Securities and Investments Commission v*

GetSwift Limited (Liability Hearing) [2021] FCA 1384

Australian Securities and Investments Commission v Vocation (in liq) [2019] FCA 807; (2019) 371 ALR 155

Australian Securities and Investments Commission v Wilson (No 3) [2023] FCA 1009

Banque Commerciale SA, En Liquidation v Akhil Holdings Limited (1990) 169 CLR 279

Basic, Inc. v. Levinson, 485 U.S. 224 (1988)

Bert v Red 5 Limited [2016] QSC 302; (2016) 349 ALR 210

Crowley v Worley Ltd (2022) 293 FCR 438; [2022] FCAFC 33

Cruickshank v Australian Securities and Investments Commission [2022] FCAFC 128; (2022) 292 FCR 627

Forrest v Australian Securities and Investments Commission [2012] HCA 39; (2012) 247 CLR 486

Grant-Taylor v Babcock & Brown Limited (In Liquidation) [2015] FCA 149; (2015) 104 ACSR 195

Grant-Taylor v Babcock & Brown Ltd (in liq) [2016] FCAFC 60; (2016) 245 FCR 402

James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332; (2010) 274 ALR 85

Jubilee Mines NL v Riley [2009] WASCA 62; (2009) 40 WAR 299

Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (in liq) [2019] FCA 1720

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011)

McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd [2023] FCA 1628

National Australia Bank Limited v Pathway Investments Pty Ltd [2012] VSCA 168; (2012) 265 FLR 247

TPT Patrol Pty Ltd, as trustee for Amies Superannuation Fund v Myer Holdings Limited [2019] FCA 1747; (2019) 140 ACSR 38

Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 5) [2024] FCA 477

Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited [2018] FCA 659

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Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	219
Date of hearing:	23 – 24 May 2024
Counsel for the Appellant:	Mr J Sheahan KC, Mr P Liondas SC and Mr J Waller
Solicitor for the Appellant:	Allens
Counsel for the Respondent:	Mr C M Caleo KC, Ms P P Thiagarajan SC and Mr L Hogan
Solicitor for the Respondent:	Johnson Winter & Slattery

ORDERS

VID 1067 of 2023

BETWEEN:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY:	**MARKOVIC, LEE AND BUTTON JJ**
DATE OF ORDER:	**2 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant is to pay the respondent's costs.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1 I have had the considerable advantage of reading the draft reasons of each of Lee and Button JJ.

2 The appellant's, Australian and New Zealand Banking Group Ltd (**ANZ**), **Notice of Appeal** filed on 14 December 2023 raises four grounds:

(1) I agree that ground 1 should be dismissed for the reasons given by Lee J;

(2) as to grounds 2 and 3 which allege that the primary judge erred in finding that certain information was material for the purposes of s 677 of the *Corporations Act 2001* (Cth):

  (a) I agree with Button J that the information referred to at [2(d)(i) and (ii)] of the Notice of Appeal does not disclose any error in the primary judge's conclusion as to the materiality of the "pleaded information" (as defined in the reasons of Button J at [122] below);

  (b) I agree with Lee J that the balance of the further information relied on by ANZ at [2(d)(iii) and (iv)] of the Notice of Appeal also does not have any bearing on the primary judge's conclusion as to the materiality of the pleaded information;

  (c) it follows that those grounds should be dismissed; and

(3) I agree that ground 4 should be dismissed for the reasons given by Button J.

3 Accordingly, the appeal should be dismissed with costs.

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Markovic.

Associate: 

Dated: 2 October 2024

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION AND THE PROCEEDING BELOW

4 The procedural and factual background of this appeal are set out fully in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 2)* [2023] FCA 1217 (**primary judgment** or **J**) (at [19]–[288]) and for present purposes, it suffices to note the following.

5 On Thursday, 6 August 2015, the Australia and New Zealand Banking Group Limited (**ANZ**) undertook a fully underwritten institutional share placement to raise $2.5 billion. The placement was underwritten by three investment banks (**Underwriters**) being: Citigroup Global Markets Australia Pty Ltd; Deutsche Bank AG; and JP Morgan Australia Ltd.

6 ANZ's shares were placed in a trading halt at 8:38am. The placement was announced to the market at 8:44am. The Underwriters carried out a book-build process throughout the course of that day and kept ANZ informed of progress from time to time during the day.

7 At 8:35pm, the Underwriters emailed a draft allocation list to ANZ showing the book was "covered" to 103%, and proposed that approximately $754 million of the shares not be allocated to investors (and hence would need to be taken up by the Underwriters). ANZ approved the proposed allocation with the consequence that the amount to be taken up by the Underwriters was increased to approximately $790 million worth of the shares (which amounted to about 31% of the placement).

8 At 7:30am on the following day, 7 August 2015, ANZ announced that it had completed the placement and had raised new equity capital of $2.5 billion but did not disclose, in the announcement or at any time before the recommencement of trading in ANZ shares on the Australian Securities Exchange (**ASX**) at 10:00am, that the Underwriters were to take up a significant proportion of the placement shares, being a value between $754 million and $790 million.

9 The primary judge dealt with a contention of ASIC that ANZ breached its continuous disclosure obligations by not disclosing to the market (either on the night of 6 August or before the recommencement of trading in ANZ shares on 7 August), either: (a) that the Underwriters

were to acquire between approximately $754 million and $790 million worth of the shares; or (b) that the Underwriters were to acquire a significant proportion of the shares.

10 As we will see, under the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASX Listing Rules (**Listing Rules**), listed entities have an obligation to disclose immediately information concerning the listed entity that is not generally available and that a reasonable person would expect, if generally available, to have a material effect on the price or value of the entity's securities (subject to certain exceptions). A reasonable person is taken to expect information to have a material effect on the price or value of securities where the information would or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of those securities.

11 It follows ASIC's allegation brought with it the necessity to identify *information* of which ANZ was aware that was *not generally available*; and that this information was *material* within the meaning of the norms regulating the disclosure of material information to the market.

12 The primary judge accepted ASIC's case that the pleaded information was not generally available and was material, having:

(1) rejected an argument of ANZ that the information was generally available because, following a review of the evidence, his Honour held it could not 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 (at J [416]–[427]); and

(2) accepted the argument of ASIC that the information it identified was material because, if the 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 accordingly, place downward pressure on ANZ's share price (at J [436]–[447]); in doing so, his Honour did not accept an argument of ANZ that it was necessary to have regard to further or contextual information for the purposes of assessing materiality, because some of the so-called contextual material relied upon by ANZ did not fully nor accurately reflect the facts, and other material did not affect meaningfully the assessment of materiality (at J [455]–[463]).

13 The primary judge later made a declaration that ANZ contravened s 674(2) of the Corporations Act on 7 August 2015, prior to the recommencement of trading in ANZ shares, by failing to

notify the ASX either that shares in ANZ: (a) with a value of between approximately $754 million and $790 million; or (b) representing a significant proportion of the shares the subject of a $2.5 billion share placement, were to be acquired by underwriters of the share placement. His Honour also ordered ANZ pay to the Commonwealth a pecuniary penalty of $900,000, in respect of the contravention of s 674(2): *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2023] FCA 1565.

B THE APPEAL

14 The notice of appeal, in effect, raises four questions:

(1) Did the primary judge err in finding the pleaded information fell within s 677 of the Corporations Act by failing to construe and apply correctly the words "persons who commonly invest in securities"? (**Ground 1**)

(2) Did the primary judge err in finding the pleaded information was material within the (deemed) meaning of s 677 of the Corporations Act by failing properly to consider additional context which would render it immaterial? (**Ground 2**)

(3) Closely related to Ground 2, did the primary judge err in failing to have proper regard to what ANZ knew and understood, when assessing the materiality of the pleaded information? (**Ground 3**)

(4) Did the primary judge err in finding that the pleaded information was "information concerning it [the entity]" within the meaning of Listing Rule 3.1? (**Ground 4**)

15 There was no independent ground of appeal relating to penalty.

C STRUCTURE OF THESE REASONS

16 I have had the benefit of reading, in draft, the reasons of Button J as to Grounds 2 and 3. Although I agree with aspects of her Honour's analysis of those grounds, I respectfully come to a different conclusion as to one determinative aspect of those grounds.

17 I deal below with Ground 1 and my reasons for why I would reject the attempt, by Grounds 2 and 3, to impugn the primary judge's finding on materiality having regard to further contextual material, of which ANZ says it was aware.

18 I also agree with the conclusion of Button J that there is no substance in Ground 4. I deal with this ground briefly below.

D APPPLICABLE LEGAL PRINCIPLES AS TO DISCLOSURE

19 I will commence, however, by providing an overview of the regulatory scheme relating to disclosure. It is worth commencing in this way because this case is a good example of the necessity to avoid overcomplication and glosses in considering and explaining the requirements of the continuous disclosure regime.

20 In Section H of my reasons in *Australian Securities and Investments Commission v GetSwift Limited (Liability Hearing)* [2021] FCA 1384 (at [1065]–[1104]), I set out, in considerable detail, the relevant law relating to obligations of continuous disclosure. Some of what follows has been taken from part of that judgment.

D.1 Background and Rationale

21 The necessity for a company to take steps to prevent a false market from being created in relation to its shares has a long genesis. As long ago as the late nineteenth century, a company requesting admission to the official list of the Sydney Stock Exchange was required to agree to the condition that it must give prompt notification of all calls, dividends, alteration of capital or other material information. This established the principle and the contractual obligation that a listed company must release material information to the market on an ongoing basis and as such was a forerunner of the continuous disclosure requirement: see Coffey, J "Enforcement of Continuous Disclosure in the Australian Stock Market" (2007) 20 *Australian Journal of Corporations Law* 301; a more comprehensive historical survey of the continuous disclosure obligations is canvassed in Golding, G and Kalfus, N "The Continuous Evolution of Australia's Continuous Disclosure Laws" (2004) 22 *Company and Securities Law Journal* 385.

22 The listing rules were refined over time and an earlier version of Listing Rule 3.1, discussed below, required a listed entity immediately to notify any information that would be likely to affect materially the price of its securities or is necessary to avoid the establishment of a "false market".

23 In November 1991, the House of Representatives Standing Committee on Legal and Constitutional Affairs released a report in which the Attorney-General recommended that a regime of "continuous disclosure" by listed companies should be "introduced, implemented and enforced through the ASX Listing Rules": House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (Report, Commonwealth of Australia, 1991) (at 106–107).

24 The original statutory provision enforcing continuous disclosure by listed companies was introduced in 1994, being s 1001A of the *Corporations Law*. This provision mandated compliance with a revised Listing Rule 3.1 which had removed the "false market" test and imposed a rule in substantially the same form as is presently relevant.

25 The rationale of the continuous disclosure regime is apparent. It is usefully described in Part 8 of the Department of Treasury, *CLERP Paper No. 9: Proposals for Reform – Corporate Disclosure* (Report, Department of Treasury, 2002) (at [8.2]):

> 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.

26 Put simply, as was noted in *National Australia Bank Limited v Pathway Investments Pty Ltd* [2012] VSCA 168; (2012) 265 FLR 247 (at 260 [61] per Bell AJA, with whom Bongiorno JA and Harper JA agreed), the purpose of the continuous disclosure provisions:

> … 'is to ensure an informed market in listed securities' and that 'all participants in [that] market ... have equal access to all the information which is relevant to, or more accurately, likely to, influence decisions to buy or sell those securities'.

D.2 The Relevant Provisions

27 At the times material to this case, s 674 of the Corporations Act was in the following terms:

> **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.

28 Listing Rule 3.1 relevantly provided as follows:

> 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.

29 It follows from the terms of Listing Rule 3.1, that to establish a contravention of s 674(2) of the Corporations Act, ASIC was required to demonstrate facts which make out what can be conveniently described as four elements or "requirements":

(1) there existed "information";

(2) the entity had that information and was aware of it;

(3) the information was not "generally available"; and

(4) a reasonable person would expect that information, if it were generally available, to have a "material effect" on the price or value of the entity's shares.

D.3 Information

30 The *first* requirement is that there must be something constituting "information".

31 Listing Rule 19.12 relevantly defines "information" as including "matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market" and "matters relating to the intentions, or likely intentions, of a person". The question of whether there is information can sometimes be a matter of some controversy, partly because the elucidation of its reach "will, invariably, be assisted by analysis against specific factual circumstances": *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; (2016) 245 FCR 402 (***Grant-Taylor (FC)***) (at 418–419 [94] per Allsop CJ, Gilmour and Beach JJ).

32 The ASX has published Guidance Note 8 to assist listed entities to understand and comply with their obligations under the Listing Rules and provides a flow chart of the continuous disclosure process (Guidance Note 8 (at 5 [2]), reproduced at [111] below). Guidance Note 8 does not have statutory force, but the ASX states in the note that it reflects the ASX's position as to how the law is intended to operate. In a note subjoined to Listing Rule 3.1, the ASX sets out examples of the types of information that it considers would require disclosure if that

information is material. As the ASX indicates in Guidance Note 8, this list of examples is not exhaustive and there are many other examples of information that potentially could be market sensitive.

33 Obviously enough, as will be discussed further below, given the nature of the obligation, when considering whether an entity has been compliant, it is necessary to identify the relevant information said to be the subject of the disclosure obligation with some precision (although having said this, the obligation is concerned with matters of substance over form).

D.4 Awareness of Information

34 The *second* requirement is that the entity *has* information: *Grant-Taylor (FC)* (at 418–419 [94]). It must also be established that the entity was "aware" of the information, in the sense that an officer of the 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: *Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (in liq)* [2019] FCA 1720 (at [273]–[274] per Foster J); citing *Grant-Taylor (FC)* (at 434 [185]).

35 Two defined terms used in Listing Rule 3.1 are important in understanding this requirement.

36 *First*, the definition of "aware" is defined by Listing Rule 19.12 in the following terms:

> [A]n entity becomes aware of information if, and as soon as, an officer of the 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.

37 *Secondly*, s 9 of the Corporations Act defines "officer" in the following terms (which applies to the Listing Rules pursuant to Listing Rule 19.3(a)):

> ***officer*** of a corporation means:
>
> (a) a director or secretary of the corporation; or
>
> (b) a person:
>
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
>
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act …

38 As can be seen, by reason of the definition of "aware", s 674(2) operates by reference to the material information of which an officer of the entity has, *or ought reasonably to have*, come

into possession. All such information amounts to information of which the entity *is aware*. It follows that the information of which an officer ought reasonably to have come into possession includes opinions the officer ought to have held by reason of facts known to the officer.

D.5 General Availability of Information

39 The *third* requirement is that the information must not be generally available. Sections 676(2) and (3) of the Corporations Act describe when information is taken to be generally available for the purposes of s 674:

> **676 When information is generally available**
>
> …
>
> (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).

40 The phrase "readily observable matter" is not defined in the Corporations Act. The requirement is a question of fact to be determined on an objective and hypothetical basis. Information, of course, may be readily observable even if no one has observed it. The test of whether material is readily observable is not whether the matter was observed but whether it "could have been observed readily, meaning easily or without difficulty": see *Grant-Taylor (FC)* (at 424 [119]). As Jacobson J noted in *Australian Securities and Investments Commission (ASIC) v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; (2007) 160 FCR 35 (at 106 [546]) "observability does not depend on proof that persons actually perceived the information; the test is objective and hypothetical".

D.6 Materiality

41 The *fourth* requirement, which is of decisive importance in this appeal, is provided for by s 674(2)(c)(ii) of the Corporations Act.

42 For the purposes of s 674, s 677 relevantly provides that a reasonable person will be taken to expect information to have a "material effect" on the price or value of securities if that information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of" the securities.

43 As was explained in *Australian Securities and Investments Commission v Vocation (in liq)* [2019] FCA 807; (2019) 371 ALR 155 (at 281–282 [516] per Nicholas J), s 677 is in the nature of a deeming provision, which describes a sufficient, but not a necessary foundation for establishing the materiality requirement under s 674(2)(c)(ii).

44 In *Grant-Taylor (FC)* (at 420 [96]), the Full Court said:

> 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.

45 It follows 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'": *Grant-Taylor (FC)* (at 423 [116]).

46 In *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149; (2015) 104 ACSR 195, Perram J noted (at 209 [64]):

> What s 677 poses is an objective test to be applied at the time it is alleged the disclosure should have occurred. This involves a survey of all of the available material including, because they are part of the factual matrix, the views of the company and individual investors while accepting, of course, that those views cannot by themselves be determinative [*citations follow*]. … Despite this *ex ante* approach, it is nevertheless

> permissible to examine how the market subsequently behaved when the information was disclosed **as a device for confirming the correctness of a conclusion already reached**.
>
> (Citations omitted, emphasis added)

47 The correctness of this observation was not questioned on appeal in *Grant-Taylor (FC)*. The Full Court turned to the interplay between Listing Rule 3.1 and ss 674(2) and 677, putting beyond doubt that: (a) materiality is a question which is looked at *ex-ante* and depends upon a balancing of both the indicated probability that a relevant event will occur and the anticipated magnitude of the event on the company's affairs; and (b) the class of "persons who commonly invest in securities" to whom the Court ought have regard in determining materiality (by assessing whether those persons would have been influenced in their investment decisions by the release of the alleged material information) includes not just sophisticated investors, but small, infrequent and unsophisticated investors: *Grant-Taylor (FC)* (at 419–420 [95]–[96], 426 [131]).

48 Hence although the considerations evaluated by a company and its reasons for withholding certain information from the market may be relevant, they are not determinative: *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; (2010) 274 ALR 85 (at 195 [527] per Spigelman CJ, Beazley and Giles JJA). Of course, given the test is objective, the fact officers of an entity may themselves reasonably believe that information would not be expected to have a material effect does not answer the question of whether the material was required to be disclosed: *Vocation* (at 281 [515]; citing *James Hardie* (at 195 [527], 199 [546])).

49 Further, s 677 differs in its focus from the treatment of materiality in accounting, in that the accounting treatment of materiality has less relevance where the information is not financial information of a type that is required to be disclosed in a company's accounts: *Vocation* (at 282 [518]); citing *Grant-Taylor (FC)* (at 420 [96]). I will return to this concept below.

50 To satisfy the "materiality" requirement imposed by s 674(2)(c)(ii), the information must be "non-trivial" and rise beyond information which "may" or "might" influence a decision by investors and it must be shown that the information "would" or "would be likely" to influence a decision: *Grant-Taylor (FC)* (at 420 [96]).

51 The relevant "influence" is that which bears upon common investors. This was explained in *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; (2009) 264 ALR 201 (at 309 [521] per Gilmour J):

> The relevant influence is that bearing upon common investors, relevantly, "deciding whether to acquire or dispose of" [the relevant securities]. **Influence which is productive of mere consideration but no decision either way is not the relevant statutory influence.** This is so because the primary question under s 674(2) is whether the information is such that a reasonable person would expect it to have a material effect on "the price or value" of [the relevant securities]. Information which would or would likely influence common investors merely to consider whether to buy or sell [the relevant securities] but not decide to buy or sell could never be expected to have a material effect on the price or value of those securities.
>
> (Emphasis added)

52 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 is a matter which can be addressed by expert evidence: *James Hardie* (at 139 [228]). Such evidence may aid the Court in determining the predictive exercise that the sections require. This is not to say that expert evidence will always be useful. After all, the assessment of materiality upon an *ex-ante* approach involves a matter of judgment, informed by commercial common sense: see Gilmour J in *Fortescue* (at 307 [511]).

53 Evidence of the actual effect of the information disclosed on the share price may be relevant in determining whether s 674(2) of the Corporations Act has been contravened. As was explained by Perram J in *Grant-Taylor* in the extract above (at [46]), such evidence may constitute what amounts to a cross or reality "check" as to the reasonableness of an *ex-ante* judgment about a different hypothetical disclosure: *Fortescue* (at 301 [477] per Gilmour J).

D.7 Specificity of Information and "Context"

54 As can be seen, fundamental to assessing compliance with any obligation to disclose is identification of the "news" said to constitute the relevant information. Given the importance of contextual information to the disposition of this appeal, it is important to understand the role of *contextual* facts and opinions and how they fit into a principled analysis of whether there has been a breach of the continuous disclosure obligations.

55 In this regard, it is important to remember that this is a regulatory proceeding and not a securities class action. It follows that we are presently concerned with the identification of contravening conduct – not issues of causation or loss that might flow from any proven contravention.

56 In *Vocation* (at 294–295 [566]), Nicholas J, in another regulatory proceeding, 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", citing *James Hardie* and *Jubilee Mines NL v Riley* [2009] WASCA 62; (2009) 40 WAR 299. It is trite that the materiality of information must have regard to all the relevant circumstances, including any matters of context bearing upon materiality.

57 It has been said, more than once, that a contravention of s 674(2) of the Corporations Act must be pleaded precisely and the moving party must "identify the case it seeks to make … clearly and distinctly": *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; (2022) 292 FCR 627 (at 659 [120] per Allsop CJ, Jackson and Anderson JJ); see also *TPT Patrol Pty Ltd, as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747; (2019) 140 ACSR 38 (at 229–230 [1121] per Beach J); *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2018] FCA 659 (at [24] per Yates J). These observations must be understood as directed to the function of a pleading, which is to state with sufficient clarity the case that must be met, hence serving to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against it and, incidentally, to define the issues for decision: *Banque Commerciale SA, En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 (at 286 per Mason CJ and Gaudron J).

58 However, it is important not to elide different stages of the relevant inquiry. The applicant is required to plead and hence identify the information that it alleges: (a) existed; (b) the entity "had", and of which, it was "aware"; (c) was not "generally available"; and (d) a reasonable person would expect, if it were generally available, to have a "material effect" on the price or value of the entity's shares. The pleaded information either had these cumulative characteristics or it did not. That is the end of the liability inquiry subject to any affirmative defences.

59 I am conscious that there are cases such as *Jubilee Mines* where observations have been made (at 322 [87]–[88] per Martin CJ, McLure JA and Le Miere AJA agreeing) that: (a) the "information" must also include all contextual matters of fact and opinion necessary in order to prevent the disclosing company making a misleading disclosure; and (b) to define the "information" narrowly by taking it outside of its broader factual and commercial/corporate

context, then gauge whether that information has the deemed material effect by reference to the common investor who assesses the information in the context of publicly available information, is inconsistent with the purpose of the disclosure regime, which is a fully informed market: see also *Grant-Taylor* (at 211–212 [73]–[74]); *Bert v Red 5 Limited* [2016] QSC 302; (2016) 349 ALR 210 (at 249 [205] per Applegarth J); and *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 5)* [2024] FCA 477 (at [568] per Yates J).

60 But such observations should not be decontextualised. Of course, in assessing *ex-ante*, whether information is market sensitive and requires disclosure, the information needs to be looked at in context, rather than in isolation, against the backdrop of: (a) the circumstances affecting the entity at the time; (b) any external information that is publicly available at the time; and (c) any previous information the entity has provided to the market. This is a point made in Guidance Note 8 (at 12–13 [4.3]).

61 Additionally, considering whether other contextual facts or news existed that would have been required to be disclosed contemporaneously with any disclosure of the pleaded information (to ensure disclosure of the pleaded information would not be misleading) may have some use as an analytical tool to test the relevance of those contextual facts and opinions to the materiality of the pleaded information. But it is for the party alleging the contravention to define the information said to have required disclosure.

62 As the primary judge recognised, when it comes to any contextual material, such material is directly relevant to the assessment of *materiality* of the pleaded information. That is, it may be other facts are present (such as those identified by ANZ in this case) which necessitate the conclusion that the pleaded information, found to exist, was not material. The contextual material does not directly bear upon the anterior question as to whether the pleaded information existed.

63 When it comes to questions of causation and loss (not relevant in this regulatory proceeding but necessary for recovery of loss in a securities class action), attention is directed to the "but for" world. It is at this step, logically subsequent to the establishment of contravening conduct, that attention must be directed to the *mode* by which the pleaded information would, in the counterfactual world, have been disclosed – including the assessment of any confounding information or other contextual material that may have been disclosed to the market but for the contravening conduct.

64 At the risk of repetition, any notion it is necessary to consider whether the pleaded information was information that was "appropriate" to be disclosed in its pleaded form is incorrect to the extent that such consideration goes beyond an assessment as to whether the pleaded information was, or was not, material (cf *Zonia Holdings (No 5)* (at [568])).

65 A further point should be made about context or the possibility of further information.

66 Once an entity is aware of material information, it must announce the extent of that information immediately. An entity cannot adopt a "wait and see" approach in the hope of obtaining some greater qualitative or quantitative specificity. The obligation to disclose material information cannot be deferred while an entity awaits further detail or additional matters, which might be said to be in some way "contextual", if this additional material would not change the *substance* of the material information known (that is, the reason why the information was objectively material in the first place). This is also a point also made in Guidance Note 8, which correctly notes that the "question is each case is whether the entity is going about this process [of disclosure] as quickly as it can in the circumstances and not deferring, postponing or putting it off to a later time" (at 14–15 [4.5]).

67 Commonly, a company may be required to undertake an investigation or take additional steps to identify the entirety of the news it may need, or wish, to announce. But there is a logical and often practical difference in ascertaining whether information is material and assessing the *extent* of materiality. Once an entity's officers are aware of material information that is otherwise disclosable, the obligation is extant – even if a supplemental disclosure may be required when investigations or other steps are completed, and which may assist in ascertaining a more precise impact of the fact or opinion disclosed on the price or value of the company's shares.

E GROUND 1

E.1 ANZ's Argument

68 As noted above, the primary judge found that the pleaded information fell within s 677 of the Corporations Act. The ANZ contends this was in error because the "persons who commonly invest in securities" within the meaning of that provision are persons who are influenced in deciding whether to acquire or dispose of securities based on company fundamentals, and the pleaded information in this case was not relevant to the value of ANZ's shares.

69 At trial, ASIC did not prove the pleaded information was relevant to the value of ANZ's securities. Although ASIC had initially sought to prove that disclosure of the pleaded information would have had a price effect (apparently directed to the elements of s 1317G on the issue of relief) the evidence admitted at trial did not establish a quantifiable impact on ANZ shares (at J [370]–[372]).

70 ANZ asserts that by finding that persons who commonly invest in securities would decide whether to acquire or dispose of ANZ shares on the basis of information which was "irrelevant to value (and which had no established price effect)", the primary judge failed to grapple with, and did not follow, the judgment in *Vocation* (at 291 [552]–[553]) and misconstrued the statutory test.

71 In *Vocation*, Nicholas J considered the meaning of the statutory concept by observing that 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. His Honour dismissed the relevance of "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" (at 291 [553]). ANZ further submits this reasoning was approved by Anderson J in *McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd* [2023] FCA 1628 (at [147(13)]).

72 Consistently with this approach, Guidance Note 8 states that the ASX interprets the reference to persons who commonly "invest in" securities in s 677 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" and as not including persons "who trade into and out of securities without reference to their inherent value" (Guidance Note 8 (at 9–10 [4.2])).

73 It is further supported by the distinction in language, in s 677 itself, between investing (on the one hand) and acquiring or disposing (on the other). The section, it is submitted, would have a quite different meaning if it referred to "persons who commonly *buy or sell* securities in deciding whether to buy or sell". Persons who "invest in" securities describes persons who are buying, not selling. It connotes a purpose which is different from a goal of trying to exploit short term price fluctuations (which entails "buying and selling").

74 The use of the word "whether", rather than "when", in the phrase "whether to acquire or dispose of the ED securities" is said to be a further indication that the statutory test is concerned with the making of investment decisions rather than the mere timing of decisions as to purchases and sales with a view to short-term price fluctuations.

75 This position is contended to be consistent with the objectives of the law. The continuous disclosure provisions seek to ensure that the prices of securities reflect their underlying economic value and, it is to the extent that a disclosure would occasion a difference between market price from true value, that it would involve a result that is contrary to the law's object and intended operation.

76 Put another way, ANZ argues the primary judge appeared to hold that "persons who commonly invest in securities" should be taken to include persons who would trade on information that was irrelevant to value (and which had no demonstrable effect upon price) (at J [443]–[447]). ANZ submits that having regard to the statutory text, the object of the law, and the authorities, the primary judge ought to have concluded that the class of persons the subject of the statutory test would not trade on information of that nature. ANZ notes that the only persons that ASIC identified as investing based upon non-value relevant information were index funds, speculators and chartists (at J [338]).

77 ANZ further submits that to the extent the primary judge did rely upon the inclusion of the words "price or value" in s 677 (at J [444]) to support his Honour's conclusion, this is said to be misconceived. Section 677 does not purport to derive any meaning from the words "price or value"; rather its purpose is to provide for when "a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities". The concept of "price or value" thus forms part of what is being deemed, not the elements that give rise to the deeming. To allow the meaning of "price or value" to affect the test would amount to circular reasoning.

E.2 Consideration

78 ANZ's argument overcomplicates the statutory regime and does not withstand close analysis. The contention the materiality test *requires* the information to have an established economic value effect is a gloss. Relatedly, there no necessity to *prove* that a change in the price of securities occurred to establish liability.

79 As can be seen from the above (at [29]), s 674(2) relevantly conditions the obligation for a listed disclosing entity bound by a disclosure requirement in market listing rules to disclose if it is aware of the relevant information and it: (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 ED securities of the entity.

80 Section 677 then provides that the expression "to have a material effect on the price or value" of the entity's securities, be given an expansive meaning. Specifically, s 677 states that a reasonable person would be taken to expect information to have a material effect on the price or value of the 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 [entity's securities].

81 Both the purpose and the effect of this provision is evident: the "deeming" provision applies to satisfy the requirements of Listing Rule 3.1: *Grant-Taylor (FC)* (at 419–420 [95]); *Jubilee Mines* (at 309 [34], 315–317 [54]–[62]). Provided other requirements of disclosure are present, it is relevantly sufficient (and necessary) if the information would be likely to influence the investment decisions of potential investors. There is no other relevant requirement, but the notion of "influence" reflects the fact that the obligation is conditioned upon materiality, as the relevant information must be of a particular character, that is, it would, or be likely to, influence persons who commonly invest in securities to decide to acquire or dispose of an entity's securities (and not merely be an immaterial factor in making such a decision).

82 As explained above, those responsible for disclosure are required to engage in a predictive and hypothetical analysis. There is a need for an entity's officers to put themselves into the shoes of persons who commonly invest in securities and form a hypothetical view as to whether the information would have influenced their decision to acquire or dispose of the entity's securities.

83 This will be easy in some circumstances – where the information, if disclosed, is likely to be plainly price and value positive or negative because it squarely goes to the present value of future cash flows – but at the margins, the *ex-ante* assessment may be more difficult.

84 Any inquiry into compliance with the obligation involves a question of fact: and its focus is on the time at which it is alleged that the disclosure should have occurred and involves a survey of all the relevant material. As I have explained above, evidence as to *ex-post* price effect of disclosure of the information in the real world may be of assistance to test the cogency of the *ex-ante* analysis, but it is only a tool to the extent the circumstances are such that a subsequent

event, in the circumstances of the case, can rationally (directly or indirectly) bear upon the *ex-ante* assessment.

85 As the Full Court observed in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19; (2011) 190 FCR 364 (***Fortescue (FC)***) (at 424–425 [188] per Keane CJ, Emmett and Finkelstein JJ agreeing), the test of "likely to influence" in s 677(1) "is not a high threshold" (an observation not disapproved on appeal in *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486).

86 In the end, as noted above, the resolution of the question of materiality is a matter of judgment, informed by commercial commonsense and it demands appreciation of any relevant broader context, investor experience and intuitive realism: *GetSwift* (at [1101], [1165], [1240] and [1259]). To erect some test based on fundamental value is as erroneous as adopting a rigid numerical formula based upon a percentage of price movement in the share price upon any corrective disclosure. Notably, in applying a statutory test which does not include an expansive provision such as s 677, Courts in the United States have nonetheless also rejected "bright line" approaches. As reaffirmed by Sotomayor J (on behalf of a unanimous Supreme Court) in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011), materiality is satisfied when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (see also *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (at 231–232 per Blackmun J, Brennan, Marshall, Stevens, White and O'Connor JJ agreeing). Like in the United States, "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality must necessarily be overinclusive or underinclusive": *Basic, Inc. v. Levinson* (at 236).

87 At the risk of repetition, ASIC's allegation of contravention did not require it to establish, or the Court to find, an actual effect on the price or value of ANZ's shares by reason of the failure to disclose the pleaded information and, in particular, the terms of s 677 do not mandate an inquiry as to whether any change in the price of securities has occurred: see *Fortescue (FC)* (at 424–425 [188]).

88 This approach makes sense when one has regard to ANZ's argument that ASIC was required to prove the pleaded information was relevant to the fundamental value of ANZ's shares. Although an objective of the disclosure regime is to align the price of securities with their

underlying fundamental value, a moment's thought reveals that this alignment is not always present.

89 As ASIC correctly submits, the primary purpose of continuous disclosure is to ensure the existence of an informed market for financial products. Disclosing entities are required to disclose materially price sensitive information on a continuous basis to all categories of investors. The continuous disclosure regime does not give companies a right to withhold information because the company's officers form the opinion that disclosure might cause a misalignment between price and what those officers perceive, at any one time, to be the value of the company's securities.

90 Any notion that s 677 only has an operation whereby the relevant information could only have a relevant impact upon fundamental value is not only acontextual (giving insufficient attention to the alternative concept of "price") but, when one has regards to purpose, makes little practical sense when one considers the way the market operates in the real world and the forensic realities in sometimes proving changes in the fundamental value of a share.

91 It is unnecessary to get into the weeds of economic theory, but the fundamental value of a security is the expected risk-adjusted present value of all free cash flows. But, as was noted during oral argument, one cannot ignore the evidence that a market can misprice securities and there are well-known empirical limitations that demonstrate some limitation in the efficient market hypothesis (at least in its strong or semi-strong form). Indeed, it is trite that a perceived discrepancy between market price and estimated intrinsic or fundamental value of a share is the measure of opportunity for those engaged in making investment decisions based upon fundamental analysis.

92 A further complication, evident in this case, is where an alleged contravener never makes what is said to be a "corrective disclosure". The conduct of an event study seeking to determine any departure of a share price from "true" value – including for use as a cross-check as to materiality – may have utility in some cases but it will be unnecessary in others. Notably, in the present case, the primary judge concluded that the absence of any corrective disclosure was one factor relevant to his Honour's determination that the expert evidence of Mr Holzwarth, called by ANZ, was not to be accorded significant weight (at J [309], [321] and [331]–[333]).

93 There is no circularity of reasoning in recognising, as the primary judge did (at J [445]), that prices can sometimes diverge from value. Moreover, as the primary judge noted (at J [444]),

the words "price *or* value" not only appear in each of s 674(2)(c)(ii) and s 677, but also in Listing Rule 3.1 and, as his Honour noted (at J [381] and [444]), they appear in the Introduction to the Listing Rules, as part of the statement of the principles upon which the Listing Rules are based, and the "natural way to read [price or value] is as alternatives".

94 On proper examination, nothing said by Nicholas J in *Vocation* is inconsistent with the above. His Honour (at [552] and [553]) was dealing with an argument that the evidence of ASIC's expert, given in relation to the investing behaviour of institutional investors, was incapable of providing a sufficient basis from which to draw a conclusion in relation to the behaviour of the broader class of "persons who commonly invest in securities". Nicholas J rejected that submission. But his Honour was not addressing the matters upon which ANZ relies. Further, as ASIC submits, in circumstances where Nicholas J – like the primary judge here – noted and purported to apply the statements of the Full Court in *Grant-Taylor (FC)* as to the meaning of the expression "persons who commonly invest in securities", it would be wrong to construe his Honour's observations in such a way that one effectively excludes from the class those persons for whom price is a relevant consideration.

95 There is a danger in putting a gloss on the phrase "persons who commonly invest in securities" in s 677. Although the use of the word "invest" rather than "purchase" or "acquire" suggests that the hypothetical reasonable person excludes "irrational" purchasers, this reflects that persons who commonly invest in securities are likely to act rationally, and is consistent with the notion that inconsequential information, irrelevant to a company's financial position, is unlikely to change investors' collective valuation and is not information that a reasonable person would expect to have a material effect.

E.3 Conclusion on Ground 1

96 The approach of the primary judge to the construction and application of s 677 was in accordance with authority. In particular, his Honour did not fall into error in the way he applied the principles explained by the Full Court in *Grant-Taylor (FC)*.

F GROUNDS 2 AND 3

97 As has been explained by Button J, Grounds 2 and 3 attack the primary judge's finding on materiality having regard to what are said to be four pieces of "further information", of which ANZ says it was aware.

98 These specifics of the further information and the relevant evidence is helpfully set out, in detail, in Button J's reasons. As to the information referred to in paragraphs 2(d)(i) and (ii) of the notice of appeal, I agree with Button J that there was no error in his Honour's conclusion that these matters had any bearing on the materiality of the pleaded information.

99 I will describe the balance of the further information relied upon by ANZ as the **contextual material**.

100 It is sufficient for present purposes to note that the primary judge accurately captured the contextual material (at J [453(e)–(f)]) as follows:

> 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:
>
> ...
>
> (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.

101 Button J explains the pleaded information was found to be material based on the prompt seller inference, that is, that receipt of that information would lead those who commonly invest in securities to expect that the Underwriters would promptly dispose of the shares and, in so doing, put downward pressure on the share price. More specifically, the primary judge found "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" (at J [436]). In reaching this conclusion, his Honour placed some significance on Mr Pratt's testimony that "market participants would expect the Underwriters to sell down their positions in the short to medium term" (at J [438]).

102 However, ANZ's contention is that when viewed in the light of the contextual material, the "prompt seller inference" would not arise, as the Underwriters would *not* sell the issued shares promptly and disclosure of the pleaded information would have been misleading.

103 The primary judge then explained that although the way in which ANZ captured the Underwriters' intentions was broadly correct, their positions as to selling were "expressed in

very general terms and were still the subject of further consideration" (at J [459]). His Honour explained this conclusion by noting (at J [459]–[461]):

> (a) … 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.
>
> (Emphasis added)

104 It followed, according to the primary judge, that the contextual information did not affect the materiality of the pleaded information.

105 I respectfully agree with Button J that the general assurances given by senior personnel in the Underwriters were subjectively credible to those to whom they were conveyed but, in my respectful view, this is insufficient to demonstrate error in his Honour's conclusion that those assurances, expressed in "very general terms" and which were "subject of further consideration", meant that the pleaded information was not material.

106 As I have explained, the test is a wholly objective one. Although the subjective views of ANZ are not to the point, it is worth remarking that the mere fact that assurances were sought by senior officers of ANZ demonstrates that there was a real and abiding concern for reassurance. Irrespective of the views held within ANZ following the general and preliminary assurances made, it was open for his Honour to conclude, on the evidence, 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. No doubt that when disclosing the pleaded information further material going to the opinion of ANZ officers as to risk could have been accurately conveyed to the market – one can also assume that these opinions could (or even would) have affected the *extent* of the market reaction to the disclosure of the pleaded information, but this is not to the point when one is assessing whether the failure to disclose

the pleaded information amounted to contravening conduct. Put another way, there was no error in his Honour concluding the disclosure of the pleaded information would have been viewed by the hypothetical investor as having altered the total mix of information available in such a way as would be expected to have a "material effect" on the price or value of ANZ shares.

107 His Honour's findings provided a sufficient basis for establishing materiality. I do not consider there is any substance in Grounds 2 and 3.

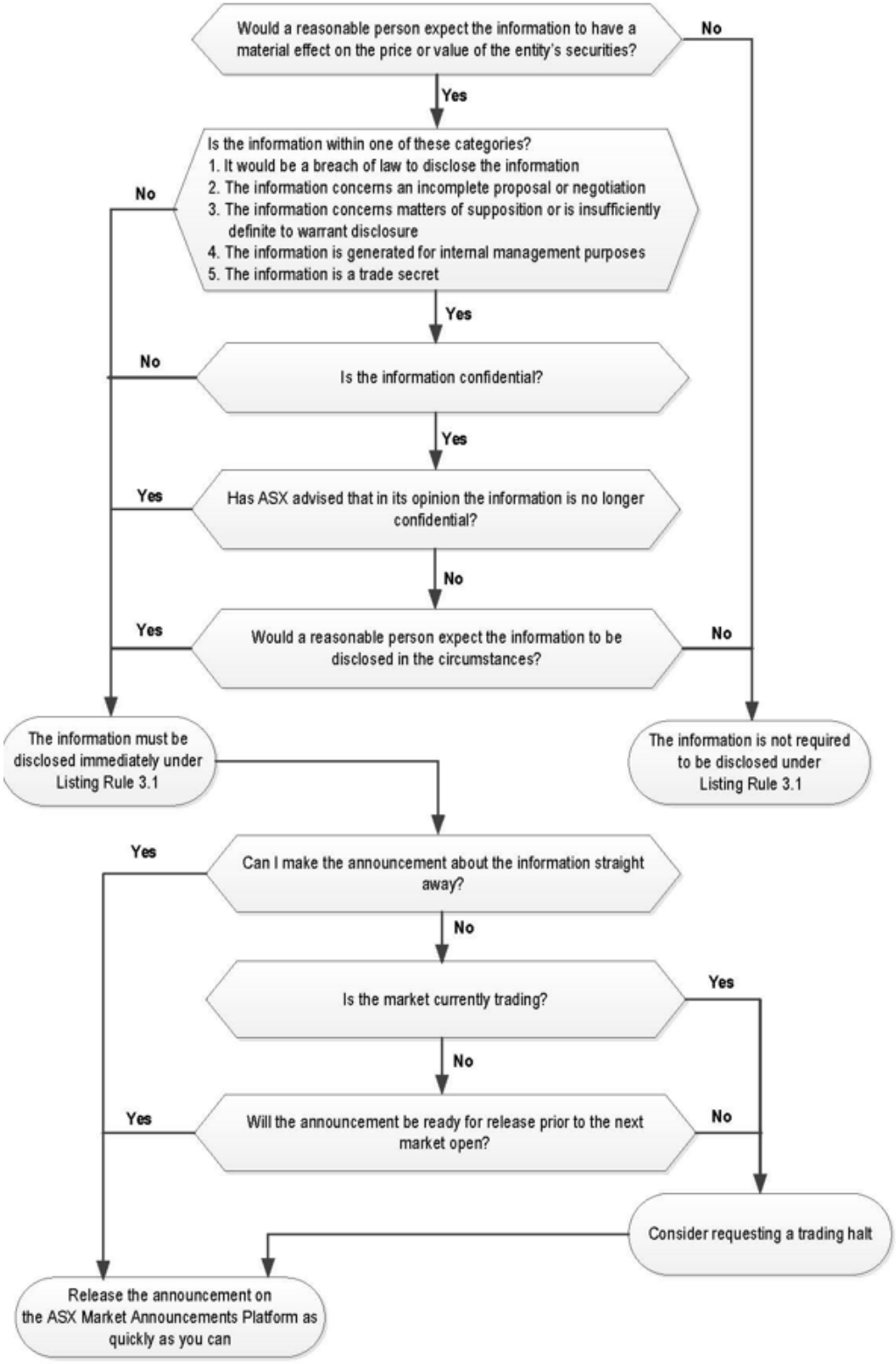
G GROUND 4

108 As noted above, I agree with Button J's rejection of Ground 4. Her Honour has explained the ground and set out ANZ's submissions.

109 The approach of the primary judge was entirely orthodox. His Honour concluded the words "concerning it" have their ordinary (and broad) natural meaning, and that this unsurprising approach to the text was likely to further the object of the continuous disclosure regime (and was also consistent with the examples provided by the ASX illustrating the operation of Listing Rule 3.1).

110 ANZ's contention that his Honour's construction of what was meant by "concerning it" would lead to listed entities being routinely required to disclose the trading intentions of shareholders is not only belied by the everyday experience of the operation of the continuous disclosure regime but does not bear analysis. The only reason why disclosure was required to the ASX was because Listing Rule 3.1 was engaged and the exceptions to Listing Rule 3.1A were not.

111 As Button J notes, the continuous disclosure regime is carefully drafted and calibrated. The operation of the regime (leaving aside Listing Rule 3.1B) is well set out by the overview provided in Guidance Note 8 (at [2]):



112 When taken together, Listing Rules 3.1, 3.1A and 3.1B constitute an integrated whole which reflects an intention to strike what the market operator regards as "an appropriate balance between the interests of the market in receiving information that will affect the price or value of, or which is needed to correct or prevent a false market in, an entity's securities at the earliest

reasonable time, and the interests of the entity in not having to disclose information prematurely or where it would clearly be inappropriate to do so": see Guidance Note 8 (at [3]).

113 ANZ's attempt to introduce a gloss to achieve a "balance" by creating an artificial demarcation between information that may concern the subjective intentions of shareholders with information concerning the entity, is misconceived.

H CONCLUSION AND ORDERS

114 It follows that all the questions I identified above (at [14]) should be answered in the negative and no error has been established.

115 The appeal ought to be dismissed with costs.

I certify that the preceding one hundred and twelve (112) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: M. Punch

Dated: 2 October 2024

BUTTON J:

116 The background is set out in the reasons of Lee J and in the primary judge's reasons on liability (**LJ**). It need not be rehearsed here.

GROUND 1

117 I have had the benefit of a draft of Lee J's reasons. I agree that there is no merit in ground 1, for the reasons his Honour gives.

GROUNDS 2 AND 3

118 Grounds 2 and 3 impugn the primary judge's finding on materiality having regard to four pieces of "further information", of which ANZ says it was aware. ANZ contended that, once the pleaded information is viewed in light of those pieces of further information, the pleaded information is shown not to be material and is also shown to itself be misleading, as disclosure of the pleaded information alone would convey a false or misleading impression.

119 The four pieces of further information raised by the Notice of Appeal (in paragraph 2(d)) are as follows:

(i) the book was fully covered (LJ [290]), which ANZ understood to be the case (LJ [128]);

(ii) at least one reason, communicated to ANZ, for the Underwriters recommending that they allocate approximately $754 million of the shares to themselves was to avoid a situation in which the shares were allocated to certain hedge funds who might sell their allocated shares quickly and thereby create a disorderly market (LJ [295]);

(iii) the Underwriters had communicated to ANZ that they would not sell down their position quickly or in a way that would create a disorderly after-market (LJ [181], [101]) and were in no rush to sell any shares they acquired (LJ [131]); and

(iv) ANZ's understanding 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 and that they had the capacity to achieve this (LJ [101], [165], [441(a)]).

120 The primary judge structured his reasons by first addressing the materiality of the pleaded information, and then considering whether any of the contextual information relied on by ANZ — the key elements of which constitute the further information relied on in the appeal — revealed the pleaded information not to be material, either individually or in combination with

one another. The primary judge identified that his reasons took that staged approach, and said the approach was consistent with the structure of ANZ's submissions (LJ [430]). While ANZ was somewhat critical of the staged approach on appeal, it did not refute that the approach taken by the primary judge accorded with the way it presented its case in submissions. I need say nothing more about that particular matter save to say that I see no error in his Honour's approach.

121 The information that ASIC contended ought to have been disclosed was put in two alternate ways. These were set out by the primary judge as follows (LJ [8]):

> (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**).

122 The primary judge used the term "the **pleaded information**" to refer to the Underwriter Acquisition Information and the Significant Proportion Information together (LJ [396]).

123 The primary judge accepted ASIC's contention on materiality as follows (LJ [436]):

> 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.

124 Two things should be observed. First, it is clear from the terms in which the primary judge expressed this finding, that materiality was established by reference to s 677 (rather than directly under s 674(2)(c)(ii)). Secondly, the pleaded information was found to be material on the basis that receipt of that information would lead those who commonly invest in securities to expect that the Underwriters would promptly dispose of the shares and, in so doing, put downward pressure on the share price. This inference was referred to in argument as the **prompt seller inference**.

125 On the appeal, ANZ did not challenge the primary judge's finding that, taken alone, disclosure of the pleaded information would give rise to the prompt seller inference and would be material on that basis. Rather, the burden of ANZ's argument on grounds 2 and 3 was that, when the pleaded information is viewed in the context of the further information — being information that ANZ had — the prompt seller inference would not arise, as the further information reveals that the Underwriters did *not* intend to dispose of the placement shares promptly. More than

that, ANZ contended that, as the further information reveals that the Underwriters would *not* sell the placement shares promptly, disclosure of the pleaded information alone would be misleading or materially incomplete.

126 The primary judge summarised ANZ's submissions on the "information" ANZ submitted it had (in the sense of being aware of it) in the reasons (LJ [453]). On appeal, ANZ accepted that the primary judge had accurately captured its submissions in the following paragraphs of the judgment (LJ [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.

127 In addressing the significance of the further information, the primary judge first confirmed the applicable principles. His Honour accepted (LJ [455]) that the applicable principles were as stated by Nicholas J in *Australian Securities and Investments Commission v Vocation Ltd* (2019) 371 ALR 155; [2019] FCA 807 (***Vocation***) at [566], being a passage quoted earlier in his Honour's reasons. In the paragraph of *Vocation* adopted by the primary judge, Nicholas J said (*Vocation* at [566], quoted LJ [448]):

> 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.

128 The primary judge also referred (LJ [448]) to the importance of considering the totality of relevant information as having been established and discussed in a number of cases: citing *Jubilee Mines NL v Riley* (2009) 40 WAR 299; [2009] WASCA 62 at [87]–[90] (Martin CJ, Le Miere AJA agreeing at [199]), [161]–[162] (McLure JA); *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2015) 322 ALR 723; [2015] FCA 149 at [96]–[101] (Perram J); *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402; [2016] FCAFC 60 (***Grant-Taylor***) at [149] (Allsop CJ, Gilmour and Beach JJ); *Bert v Red 5 Ltd* (2016) 349 ALR 210; [2016] QSC 302 at [19], [117], [210]–[211] (Applegarth J). See also *Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 at [1102] (Lee J); *Australian Securities and Investments Commission v Wilson (No 3)* [2023] FCA 1009 at [148] (Jackson J).

129 As the primary judge observed, the principles concerning contextual, or further, information have been established in a number of cases. They are not controversial. What is controversial is the application of those principles to the facts as found.

130 The primary judge addressed, separately, each item of further information referred to in LJ [453(b)–(f)], albeit not in the same order as the items of further information are raised in the Notice of Appeal.

131 I will address the items of information in the following order: first the Underwriters' intentions and ANZ's knowledge of those intentions, which constituted the focus on appeal; next, the book coverage; and finally, the reasons for the Underwriters' intentions.

The Underwriters' intentions

132 The third and fourth pieces of information that are the subject of grounds 2 and 3 of the Notice of Appeal concern the Underwriters' intentions, and ANZ's knowledge of those intentions. Those two items of information, as set out in the Notice of Appeal, are as follows:

> (iii) the JLMs had communicated to ANZ that they would not sell down their position quickly or in a way that would create a disorderly after-market (LJ[181], [101]) and were in no rush to sell any shares they acquired (LJ[131]); and

(iv) ANZ's understanding was that the JLMs 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 to achieve this (LJ[101], [165], [441(a)]).

133 These items of information were also raised before the primary judge, although cast in slightly different terms (LJ [453(e)–(f)]):

(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.

134 Given that the contraventions alleged and found relate to the failure to disclose the pleaded information before the market opened, it is the intentions of the Underwriters and communications regarding those intentions before the market opened that are relevant to this ground. That is important given that communications between ANZ and the Underwriters included a conference call at about 10.00am on 7 August 2015. Counsel for ANZ was clear that it was interactions prior to the market opening that were relied on as founding the contextual information comprising the Underwriters' intentions and ANZ's knowledge of those intentions. The exclusion of events at and after 10.00am is important because, as will be explained, some of the primary judge's findings were stated in terms that *include* the call at about 10.00am, but others do not.

The factual narrative concerning the Underwriters' intentions and communications with ANZ

135 To properly understand the primary judge's findings regarding the Underwriters' intentions and ANZ's knowledge of those intentions — which findings were not challenged on the appeal — it is necessary to say something about the course of events in respect of which those findings were made.

136 ANZ's shares entered a trading halt at 8.38am on 6 August 2015. At 8.44am that morning, ANZ issued a media release in relation to the placement. The media release noted that ANZ was announcing a fully underwritten institutional share placement to raise $2.5 billion, It identified the underwriters as Citigroup Global Markets Australia Pty Ltd (**Citi**), Deutsche Bank AG, Sydney Branch (**Deutsche**) and JP Morgan Australia Ltd (**JPM**). The book build commenced soon after the media release was issued at 8.44am.

137 The progress of the book build, the recommendation that placement shares be issued to the Underwriters, and interactions between ANZ and the Underwriters were covered in detail by the primary judge in his reasons.

138 The events included the following:

(1) Shortly after 2.34pm on 6 August 2015 there was a conference call between the Underwriters and ANZ at which ANZ was told, in substance, that the demand from long term investors was limited. This was reflected in a note Mr Needham (ANZ's Head of Capital and Structured Funding) made during the call: "Long only funds not there". This was negative news from ANZ's point of view (LJ [92]–[94]).

(2) There was a further conference call with the Underwriters later during the afternoon of 6 August 2015. ANZ's CFO, Shayne Elliot, Mr Needham and Mr Moscati (ANZ's Group Treasurer) participated in the call (LJ [95]). Again, it was clear that the book build was not going well. The options identified were to reprice the share issue, or for only $1.5 to $1.8 billion of stock being issued to those on the book and for the Underwriters to "own it", meaning to take the balance of the stock (LJ [98]). The Underwriters told ANZ that they were making that recommendation due to the number and size of the hedge fund bids in the book, and because there was a risk that over-allocating to the hedge funds could cause an unorderly after-market due to the risk of many of those hedge funds being short-term holders of the shares (LJ [100], [130]).

(3) The primary judge accepted Mr Needham's evidence that it was his understanding that it was preferable for the Underwriters to hold stock rather than over-allocating to hedge funds because the Underwriters 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**" (LJ [101], emphasis added).

(4) Around 4.47pm on 6 August 2015, ANZ's draft post-completion announcement was amended to remove a reference to the placement being significantly oversubscribed and well-supported by institutional investors (LJ [104]–[105]).

(5) There were a number of calls between the Underwriters as the book closure time of 6.00pm approached. To summarise, those calls included references to orders being placed in excess of true demand because bidders expected to be scaled back. Those

involved in the calls drew a distinction between what was the formally allocable amount, and what could be allocated, in the sense of the amount that hedge funds and others were accustomed to receiving. Concerns were expressed that if the hedge funds were allocated stock in excess of their underlying demand, they may create a disorderly aftermarket (LJ [106]–[109]).

(6) The book-build closed at 6.00pm on 6 August 2015 (LJ [110]).

(7) At 8.35pm on 6 August 2015, Citi sent ANZ (copying representatives of JPM and Deutsche) a Draft Allocation List. That document set out that there was 103% coverage of the $2.5 billion to be raised, but also included a "Total Allocated" figure of $1,745,030,819 and a "Left to Allocate" figure of $754,969,181, being the dollar value of the placement shares that would be taken up by the Underwriters (LJ [111]–[116]).

(8) There was a conference call between the Underwriters and ANZ shortly after 8.35pm on 6 August 2015. Mr Needham took notes of the meeting. During the call, ANZ was told that interest from some segments of the market had gone backwards since the last update. One note made by Mr Needham was "Whole trade 10 days only". Mr Needham's recollection was that this was a comment made by the Underwriters to the effect that, in their view, if the sale of any shares allocated to them was undertaken over about 10 trading days, "it would not affect an otherwise orderly market for ANZ shares" (LJ [123]). ANZ was also told that long-only funds were largely still not coming in (LJ [124]).

(9) The primary judge summarised Mr Needham's evidence about the call, including the following (LJ [125(c) and (e)]):

> 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.
>
> …
>
> 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.

(10) After that call, Mr Elloitt's approval was obtained to agree to the Underwriters' recommendation, which approval was referred to on a call between the Underwriters that commenced at 9.23pm (LJ [126]).

(11) The primary judge rejected Mr Needham's evidence that there was a discussion during the 8.35pm call whether all shares should be allocated to the hedge funds that bid for them and observed (LJ [129]) that the evidence generally suggested that allocating to hedge funds the full amount of their applications was not a viable option from the perspective of the Underwriters, as to which his Honour noted that Mr Needham's notes of the call included "No other choices". The primary judge did, however, accept Mr Needham's evidence 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 (LJ [130]).

(12) The primary judge also accepted Mr Needham's evidence that the Underwriters made statements to the effect that they had hedged their positions and that they were in "no rush to sell any shares they acquired" (LJ [131]).

(13) There was a call between the Underwriters at 9.23pm on 6 August 2015. ANZ was not on the call. Amongst the matters discussed was whether hedge funds might renege on their applications and fail to complete (LJ [134]–[135]).

(14) Omitting other interactions between the Underwriters, the next point of note is the final allocation list that was sent to ANZ at 2.26am on 7 August 2015 (LJ [155]). That list stated, for "Total Allocated" $1,709,128,319 and "Left to Allocate" (being the shares to be taken up by the Underwriters) $790,871,681 (LJ [157]–[158]).

(15) ANZ published a media release at 7.30am on 7 August 2015. The release stated that ANZ had raised $2.5 billion in new equity capital through the placement. It did not mention shares having been taken up by the Underwriters. The primary judge found (LJ [164]) that, at the time the media release was issued, ANZ was aware that approximately $754 million in placement shares were not going to be allocated to investors, but would be taken up by the Underwriters.

(16) Also in the morning of 7 August 2015, before the market opened, Mr Moscati and Mr Needham had short separate calls with each of the Underwriters. The primary judge

stated as follows in relation to Mr Needham and Mr Moscati (LJ [165], emphasis added):

> 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".**

(17) The primary judge then referred to Mr Needham's evidence in cross-examination (LJ [166], emphasis in original):

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

(18) The primary judge then addressed each of the calls on the morning of 7 August. Senior representatives of the Underwriters participated in each call: Mr Ormaechea, the most

senior Deutsche capital markets person in Australia was on the call with ANZ at 9.00am; the CEO of JPM in Australia spoke with Mr Needham and Mr Moscati at 9.10am, and the Chairman of Citi spoke with them at 9.15am.

(19) Mr Needham's notes of the call with Deutsche were as follows (LJ [167]):

> – 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

(20) The primary judge accepted Mr Needham's evidence that, during the call, the Deutsche representatives raised ideas as to how the securities might be managed, and an additional fee for coordinating or managing the shares they were allocated, but ANZ did not agree to the additional fee (LJ [168]).

(21) The next call that morning was with the CEO of JPM in Australia, Robert Priestley. Again, Mr Needham took notes. His notes were as follows (LJ [169]):

> 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

(22) In relation to this conversation, the primary judge accepted Mr Needham's evidence that: the note "ANZ concerned over aftermark[et]" reflected the substance of a comment made by Mr Moscati, and that Mr Needham understood Mr Moscati to have

made comments of that nature "in order to seek to elicit responses that would confirm Mr Moscati's and Mr Needham's understanding of the Joint Lead Managers' intentions" (LJ [170]). The primary judge also accepted Mr Needham's evidence that Mr Priestley "did not make any comments that suggested that JPM was in any rush to sell its ANZ shares".

(23) The next call, which was at 9.15am, was with the Chairman of Citi in Australia, Stephen Roberts. Mr Needham's notes of the call recorded as follows (primary judge's emphasis):

> 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**

(24) The primary judge accepted Mr Needham's evidence that the note about concern regarding the size of the shortfall was a comment of Mr Moscati, made 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 that the note "we will do the right thing" was referring to "ensuring no panic and an orderly after-market" (LJ [172]).

(25) ANZ then arranged a call for 10.00am, being the same time that the market opened. In an email at 9.32am, responding to all in reply to Mr Moscati's email about setting up a call for 10.00am, Mr Ormaechea from Deutsche said "May I ask that in the interim we instruct our respective desks NOT be trade ANZ today, or as a min until we speak." (LJ [175]).

(26) There was then a conference call at 10.00am. ANZ and the Underwriters were on the call. Mr Needham took lengthy notes. The primary judge's findings about this call include findings regarding statements from the Underwriters that they would not trade in the market *that day*, other than by facilitating the market (meaning to sell to clients and then acquire that position back in the market, so that they were not selling down

their position) (LJ [178]). The primary judge also set out (LJ [179]) a passage of Mr Needham's cross-examination, which also confirmed that the Underwriters conveyed that they would not trade *that day* (ie the Friday) but they were still working out how they would proceed beyond the Friday.

(27) The cross-examination of Mr Needham included evidence, which the primary judge accepted, that: on the Friday, the state of affairs was that ANZ had assurances from senior personnel in the Underwriters that they would "do the right thing" and trade "on a longer term basis" (LJ [179]). The primary judge also accepted Mr Needham's evidence that, following the calls on the morning of Friday, 7 August 2015, the concerns that he had when he entered those calls had been "substantially alleviated" (LJ [179]). Mr Needham accepted that, other than the general statements that they would "do the right thing", ANZ did not have an indication of what the Underwriters would do on the following Monday and thereafter. He accepted that the purpose of a further call that was held on the Saturday was to ascertain what the Underwriters could tell ANZ about what they planned to do in relation to the Monday and subsequent to that.

(28) The primary judge also referred to, and accepted, evidence of Mr Moscati in the following terms (LJ [180], emphasis added):

> 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.

(29) There was a further call between the Underwriters and ANZ at 11.01am on Saturday, 8 August 2015 (LJ [190]). The primary judge set out a number of excerpts from a transcript of that call. In addition to there being discussion about a desire to avoid disclosing the shortfall position to the market, there was reference to one objective being to "minimise any market impact of unwinding of the individual positions that the JLMs hold". There was also discussion of the average daily volumes that each bank could sell each day and that the Underwriters felt they should be active in the market on the Monday (LJ [191]–[193]).

139 It was after setting out the evidence concerning the calls on the morning of 7 August 2015 (including the 10.00am call) that the primary judge set out the following findings (LJ [181], emphasis added):

> 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.

140 It is important to recall the basis upon which the primary judge found that the pleaded information (assessed without the contextual information relied on by ANZ) was material. His Honour accepted 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" (LJ [436], emphasis added).

141 In making that finding, the primary judge did not specify any precise timeframe as constituting the "prompt" disposal of shares. Nor did his Honour make any findings as to the volume of shares that would need to be traded over a given timeframe to put "downward pressure" on the share price. That is not a criticism of the primary judge as the case below was not run on the basis of such specifics.

142 It is, however, apparent from other parts of the primary judge's reasons that the concerns that the primary judge found ANZ personnel had were essentially the same concerns that ASIC contended persons who commonly invest in securities would have had (LJ [442]). That is of significance because the primary judge's discussion of that evidence in his Honour's discussion of the materiality of the pleaded information repeatedly refers to the prospect of the sale of the Underwriters' substantial shareholdings over only a "few" trading days.

143 However, in explaining his Honour's conclusions regarding materiality, the primary judge identified Mr Pratt's evidence on issue 3 as the "most directly relevant evidence" and quoted from the Joint Expert Report. The evidence of Mr Pratt was not cast in terms of a "few trading days". Rather, Mr Pratt's view was expressed in terms of expectations that the Underwriters would be sellers to reduce their financial exposure "in the **short term to medium term**",

depending on the hedging strategies employed. Mr Pratt's evidence, which the primary judge relied on in his findings on materiality, was also to the effect that persons who commonly invest in securities would have expected the Underwriters 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" (LJ [437], emphasis added).

144 The primary judge also referred, again, to Mr Pratt's opinion that "market participants would expect the Underwriters to sell down their positions in the **short to medium term**" (LJ [438], emphasis added).

145 The primary judge further considered that ASIC's central contention — namely 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" — was supported by the concerns held by, and the actions taken by, key ANZ personnel on 7 and 8 August 2015. As to those matters, the primary judge noted, inter alia, that (LJ [441], emphasis added):

(1) Based on conversations with the Underwriters on 6 August 2015, Mr Moscati's and Mr Needham's understanding going in to those 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", but 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".

(2) "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)."

(3) Mr Needham "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**". He wanted "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**."

The primary judge's reasoning on contextual information concerning the Underwriters' intentions

146 As noted above, ANZ accepted that the primary judge accurately stated the contextual information of which it was aware when his Honour stated (relevantly, at LJ [453(e)–(f)]):

> 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:
>
> ...
>
> (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.

147 In addressing the significance of the information at sub-paragraph (e), the primary judge characterised the way in which ANZ captured the Underwriters' intentions as "broadly correct factually", but said the "fundamental difficulty" with ANZ's contention, based on that information, was 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**" (LJ [459], emphasis added). The primary judge continued (LJ [459]–[461], emphasis added):

> 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.
>
> 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.

> 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.

148 As may be seen, it was the generality of, and lack of detail in, the information that ANZ held about the Underwriters' intentions, which caused the primary judge to reject the information as necessary contextual information.

Consideration

149 The information of which ANZ was "aware", and which the primary judge found to be material, concerned the acquisition of placement shares by the Underwriters. That information was found to be material on the basis 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" (LJ [436]).

150 The critical components of what market participants would have expected, had the pleaded information been disclosed, concerned the timeframe over which the Underwriters would sell their shares — "promptly" — and the effect on the market of the sale of shares by the Underwriters on the share price — viz, it would be subject to "downward pressure".

151 However, the pleaded information was not the only information of which ANZ was aware. It was also aware, through its interactions with the Underwriters, of certain matters concerning the intentions of the Underwriters in relation to the sale of the placement shares issued to them.

152 There is no dispute that knowledge of the Underwriters' intentions constituted knowledge of "information" for the purposes of Listing Rule 3.1. Listing Rule 19.12 defines "information" relevantly as including "matters relating to the intentions, or likely intentions, of a person" as well as "matters of supposition".

153 Counsel for ANZ accepted that, in assessing whether ANZ breached its continuous disclosure obligations, the materiality of the pleaded information is to be assessed having regard to the other information, as it existed *before* the market opened at 10.00am. Accordingly, and as counsel for ANZ accepted, ANZ's awareness of the Underwriters' intentions is to be assessed on the basis of interactions *before*, and not including, the conference call between ANZ and the Underwriters at 10.00am. Interactions after that time are only relevant to the materiality issue

to the extent that they bear on the correct characterisation of the information of which ANZ was aware prior to 10.00am.

154 The primary judge accepted, as "broadly correct factually", that the Underwriters' intentions in the aftermarket were not to be short-term sellers (LJ [459]). The primary judge also accepted that one of the purposes of the calls with the Underwriters individually in the morning of 7 August 2015 was for Mr Moscati to "confirm" that the Underwriters would not quickly dispose of their shares in a way that might affect an otherwise orderly after-market in ANZ shares (LJ [165] and [459(a)]). That one of the purposes of the calls in the morning of 7 August 2015 was to "confirm" the Underwriters' intentions, does not gainsay that ANZ already had information regarding those intentions from the interactions that occurred on 6 August 2015. As the primary judge accepted (LJ [101]), Mr Needham's experience and interactions with the Underwriters led him to understand that the Underwriters "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 dispose of it in a way that could affect the share price".

155 That was reinforced by the call shortly after 8.35pm on 6 August 2015. During that call, there was discussion of the sale of the shares over 10 trading days not affecting an otherwise orderly market for ANZ shares (LJ [123]). Mr Needham's evidence was that the discussion of the draft allocation list involved the Underwriters expressing the view that it was better for them to pick up a portion of the stock and for them to sell it "over an extended period in an orderly way", rather than having an unorderly sale coming from the hedge funds (LJ [125(c)]). The primary judge accepted Mr Needham's affidavit evidence that the Underwriters said words to the effect that it was better for the Underwriters to pick up a portion of the stock and not have an unorderly sale coming from the hedge funds, noting that he maintained his position during cross-examination (LJ [130]). His Honour also accepted (LJ [131]) that representatives of the Underwriters made statements to the effect that they had hedged their positions and that they were in no rush to sell.

156 In summarising the state of ANZ's understanding prior to the calls on 7 August 2015, the primary judge found that, based on the conversations the previous day, Mr Moscati and Mr Needham's understanding going in to the calls was that the Underwriters would not "quickly" dispose of their shares in a way that might affect an otherwise orderly after-market (LJ [441(a)]). His Honour also characterised a purpose of the calls as being to obtain assurances

that the Underwriters were not going to dispose of their shareholdings "over the course of only a few trading days", in the context of there being a concern that disposing of the shares in "only a few trading days" would place downward pressure on the share price (LJ [441(b)–(c)]).

157 Similarly, the primary judge accepted (LJ [165]) Mr Needham's evidence that, going in to the calls in the morning of 7 August 2015, "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".

158 The primary judge found that, by the calls in the morning on 7 August 2015, the Underwriters communicated to ANZ 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" (LJ [181(a)]). However, as that finding was made in relation to communications up to and including the 10.00am call, it cannot be relied on as a clear finding of ANZ's awareness prior to the market opening, even though the basis for the finding appears to rest on pre-10.00am events. However, later in his Honour's reasons, the primary judge found as follows regarding the position *prior to* the 10.00am call (LJ [459(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.

159 It is correct to say that the primary judge's findings as to assurances given by the Underwriters as to their intentions show that the assurances were conveyed in general terms and did not descend into the specifics of the volumes of placement shares issued that they would sell and when. The primary judge's conclusions (LJ [460]) that the information held by ANZ was of a "general nature" and lacked "detail" cannot be impugned (despite ANZ's contention on the appeal that the primary judge mischaracterised the assurances given).

160 Nevertheless, the critical point is that, while conveyed in general terms and lacking in detail, the assurances given meant that ANZ had information that the Underwriters did not intend to behave in precisely the way that the chain of reasoning underpinning the materiality findings depended on. In other words, the materiality finding depended on the prompt seller inference, but the assurances given were directly contrary to the prompt seller inference. That remains the

position even though, as the primary judge found, the information held by ANZ was of a "general nature" and lacked "detail".

161 It is important to observe that the information ANZ had concerning the Underwriters' intentions was an objective fact. What was communicated by the Underwriters about their intentions is relevant on that basis, and not on the basis that it affected ANZ's subjective assessment of the magnitude of the risk that the Underwriters would be prompt sellers, or left ANZ personnel concerned to some degree. Just as information can be material even if personnel in the entity concerned do not appreciate its significance in the market (see *Crowley v Worley Ltd* (2022) 293 FCR 438; [2022] FCAFC 33 at [173] (Jagot and Murphy JJ, Perram J agreeing at [1])) contextual facts may be such that a particular piece of information is *not* material even if those within the entity did not subjectively appreciate the significance of the contextual facts.

162 Although some of the primary judge's factual findings, set out above, referred to the "understanding" of ANZ personnel (particularly Mr Needham), the primary judge had regard to what ANZ personnel "understood" on the basis that their understanding supported the inferential analysis generating the prompt seller inference, and as part of the factual narrative. The contextual information referred to in paragraph 2(d)(iii) of the Notice of Appeal concerns what was communicated to ANZ; that aspect of grounds 2 and 3 of the Notice of Appeal does not concern ANZ's "understanding" of what the Underwriters would, or would not, do. As the primary judge found (LJ [459(b)]), what was communicated to ANZ was that the Underwriters "would not sell down their positions in ANZ shares quickly or in a way that would create a disorderly market". That conclusion does not refer to, or depend on, the understanding of ANZ personnel regarding what the Underwriters told them.

163 While the assurances were given in general terms, their import was clear: the Underwriters would "do the right thing" and would not sell down quickly. Moreover, the assurances were, as ANZ stressed, given by senior personnel in the Underwriters and were credible given the seniority of those involved, but also in light of the status of the Underwriters as well-resourced entities that had the capacity to hold the stock and not sell down quickly and those that had also hedged their exposure (which the primary judge accepted was factually correct (LJ [461])). The fact that the details regarding how and when the Underwriters would unwind their position had not been determined does not gainsay or undermine the information that ANZ had that, contrary to the prompt seller inference, the Underwriters did not intend to be prompt sellers.

164 The pleaded information was said to be material only because it would give rise to the "prompt seller" inference. But that inference was directly contradicted by the contextual information, which the primary judge found included information conveyed to ANZ by the Underwriters 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 primary judge accepted that ANZ had information that the Underwriters would not do the one and only thing that was said to render the information material in the first place (ie sell quickly).

165 For these reasons, I consider that the primary judge did err in rejecting the assurances given, and referred to in paragraph 2(d)(iii) of the Notice of Appeal, as relevant contextual information. In my view, those assurances did constitute relevant contextual information and, moreover, was information that directly undermined the prompt seller inference and so meant that the pleaded information was not material. Grounds 2 and 3 should be allowed to this extent. However, as the information referred to in paragraph 2(d)(iv) of the Notice of Appeal was constituted by "ANZ's understanding" of the Underwriters' intentions, I do not consider that the primary judge erred in not taking into account ANZ's understanding as necessary contextual information.

166 I do not consider that the primary judge erred in rejecting the information as to hedges as contextual information on a standalone basis (LJ [461]). Its relevance lies in fortifying the credibility of the assurances given as to the Underwriters' intentions.

167 It remains to address a few discrete points.

168 The first is ASIC's failure to reconcile the prompt seller inference with the assurances given by the Underwriters to ANZ. ASIC's submissions on this aspect of grounds 2 and 3 were limited. ASIC's submissions did not seek to explain how the primary judge's findings as to the assurances given to ANZ that the Underwriters would "do the right thing", and that they would not sell "quickly" or in a way that would create a disorderly market, could be reconciled with the prompt seller inference. (I interpose to note that whether or not Mr Needham and Mr Moscati appreciated the distinction between "downward pressure" and a "disorderly market" (as to which see Mr Pratt's evidence discussed at paragraphs 195 to 196 below), it is apparent that ANZ's concerns, as explained by Mr Needham, were not confined to a disorderly market but extended to the Underwriters selling shares over a time frame that would result in there being downward pressure on the share price (see especially LJ [166] and [170]). In this

regard, it is significant that the primary judge expressed his findings as to the assurances given by the Underwriters in terms of them not selling down their shares "quickly" *or* "in a way that would create a disorderly market".)

169 Rather, while not challenging the primary judge's findings of fact, set out above, ASIC sought to meet this aspect of grounds 2 and 3 by saying that the consequence of the primary judge's findings (LJ [441]–[442] and [459]) was that "a statement to the effect that the JLMs' intentions in the aftermarket were not to be short term sellers did not accurately reflect the understanding or belief of senior ANZ officers at those relevant times". A footnote (footnote 30) to that submission listed a number of documentary and transcript references.

170 At LJ [441]–[442], the primary judge referred to concerns held by, and actions taken by, ANZ personnel as supporting ASIC's contention regarding what persons who commonly invest in securities would have expected regarding the prompt disposal of shares by the Underwriters and the downward pressure prompt disposal would place on the share price. However, and contrary to ASIC's reliance on those paragraphs, the actions and concerns referred to by the primary judge explained why Mr Moscati and Mr Needham acted, as they did, to obtain assurances. The paragraphs in question did not suggest that the relevant ANZ personnel continued to believe that the Underwriters would be prompt sellers — which subjective beliefs would in any case not be determinative — or undermine in any way the state of affairs that was objectively communicated to ANZ concerning the Underwriters' intentions. The other paragraph relied on (LJ [459]) does not provide any support for ASIC's contention. On the contrary, and as I have set out above, the primary judge's findings in LJ [459(b)] directly support ANZ's case. I have also already addressed the significance of the fact that the detail of how the Underwriters would unwind their position had yet to be addressed and there were further interactions at and after 10.00am on 7 August 2015 regarding that matter.

171 As to the references in footnote 30, I accept that, for the reasons advanced by counsel for ANZ in oral submissions, those references do not support the contention for which ASIC cited them. Counsel for ASIC did not seek, in written or oral submissions, to explain how this raft of references supported the contention in question.

172 The parties also made submissions about a passage of evidence in which Mr Pratt was cross-examined. Mr Pratt confirmed that, if the pleaded information was disclosed along with certain contextual information, which included a statement to the effect that the Underwriters would not be promptly selling their shares, disclosure of the additional pieces of contextual

information put to him would be "highly material and likely to reduce any share price effect of the underwriter acquisition disclosure". Counsel for ANZ relied on this passage as supporting ANZ's contentions regarding the significance of the contextual information concerning the Underwriters' intentions. While counsel for ASIC submitted that the evidence was not significant because the question was framed on the basis of the *Underwriters* (not ANZ) disclosing certain things to the market, that contention misses the point, as the materiality of the contextual information being put to Mr Pratt, and its bearing on the prompt seller inference, did not depend on the Underwriters being the entity (or entities) making the disclosure to the market. That said, the question put to Mr Pratt did include a number of points of hypothetically disclosed contextual information, so the support ANZ obtains from Mr Pratt's evidence is limited. The success of the appeal on this aspect of grounds 2 and 3 does not rest on Mr Pratt's evidence.

Book coverage

173 The first item of further information identified in ground 2 of the Notice of Appeal was that the book was fully covered, and ANZ understood that to be the case. The primary judge addressed the significance of that information at LJ [458]. His Honour stated:

> 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.

174 Earlier parts of the primary judge's reasons set out extensively the evidence concerning the Underwriters' efforts to obtain orders and clearly convey that, while the book was "covered" in a technical sense, the Underwriters' assessment was that a number of funds had submitted orders well in excess of the number of shares they actually wanted, or expected, to be allocated. From that evidence, it is apparent that at least some funds placed orders expecting that they would be "scaled back". In discussing the reasons why the Underwriters recommended that they be allocated $754 million of the shares, his Honour identified that the reasons included the following (LJ [295]):

(a) certain hedge funds had made it clear that they did not want to receive the full amount of their applications;

(b) certain hedge funds were accustomed to receiving only a certain percentage of their application;

(c) the Underwriters were concerned that certain hedge funds would not complete the transaction if allocated more than proposed [by the Underwriters in the Draft Allocation List and the Final Allocation List]; and

(d) the Underwriters were concerned that certain hedge funds would sell their shares quickly if allocated more than proposed, creating a disorderly after-market.

175 In light of the matters to which the primary judge referred, I see no error in his Honour's conclusion that the fact that the book was "covered" did not have any bearing on the materiality of the pleaded information. The fact that the book was "covered" is not information that logically undermines the prompt seller inference. At most, it might convey that the Underwriters were not legally compelled to take the substantial issue that they took. But that does not touch on the point that the Underwriters were not being issued such a substantial amount of stock because they wanted to invest in ANZ. It is entirely consistent with them being issued shares in the placement and being prompt sellers of that unwanted stock. While there may, as ANZ submitted, be a difference between the legal compulsion to take stock that the Underwriters would have been under if the book had not been "covered" and the "practical compulsion" which was one of the reasons for their recommendation, I do not accept that the fact that the compulsion was practical and not legal renders the prompt seller inference unavailable.

176 In its submissions, ANZ contended that the primary judge's approach to the book being covered revealed two further errors. First, that if the pleaded information were disclosed alone, that would lead to an inference in the market that the book was not covered, and that would make the disclosure inaccurate and contrary to law. Secondly, the primary judge considered that disclosure of the book coverage point in isolation would be misleading, when ANZ's point was that disclosing the book coverage information with the pleaded information would not be apt to mislead.

177 ANZ's submission that disclosure of the pleaded information without information that the book was covered would be misleading misses the point. The primary judge concluded that the information about book coverage was not necessary contextual information for the purposes of assessing materiality of the pleaded information (LJ [458]). It was not, and his Honour did not find that it was, information that suggested the pleaded information was not in fact material.

178 While ASIC submitted that there was no evidence that disclosure of the pleaded information without the information about book coverage as context would have given the false impression that the book was *not* covered, that is not entirely correct. In the joint expert report, Mr Pratt summarised the reasons why, in his view, both forms of the pleaded information constituted information that would 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 to whether to acquire or dispose of ANZ securities on 7 August 2015. Mr Pratt's summary included, at point 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 JLMs could not source sufficient buyers from the marketplace for that number of shares, at that price.

179 However, it does not follow from that evidence that the pleaded information would, in substance, have been misleading. The substance of the position was that the Underwriters did not in fact source sufficient genuine buyers from the marketplace for the number of shares on issue, at that price. While the book was covered in a technical sense, it was clear from the evidence that, as the primary judge found, formal orders exceeded real demand.

180 ANZ did not explain how or why market participants inferring (if in fact they would have inferred) that the book was not covered would give them a wrong understanding about anything of substance, as compared with being told that the book was "covered" in circumstances where real demand was well below the level of formal applications.

Reasons for the Underwriters' recommendation

181 After considering, at length, evidence concerning the Underwriters and how they came to recommend to ANZ that a significant proportion of the stock be issued to them, the primary judge set out his findings in a section headed "Why the Underwriters made their recommendation" (LJ [292]ff).

182 Relevantly, his Honour found as follows (LJ [295]–[297], emphasis added):

> 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**.
>
> 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.
>
> 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**.

183 At LJ [130], to which the primary judge referred in the last of the extracted paragraphs above, his Honour found that words to the effect 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" were said by the Underwriters on a call attended by Mr Needham of ANZ.

184 As noted above, the primary judge set out (LJ [453]) the information that ANZ contended it was aware of, and which was said to reveal that the pleaded information was not material, or, if disclosed, would have been misleading. Two of those pieces of information were (LJ [453(b)–(c)]) that:

(a) the Underwriters recommended scaling back certain hedge fund investors and having the Underwriters take up a portion of the placement shares; and

(b) a substantial reason for the recommendation to scale back was that, if not scaled back, the hedge funds might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares.

185 The primary judge said as follows in relation to those two pieces of information (LJ [456]–[457]):

> 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.
>
> 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.

186 While I have set out above two pieces of related information that ANZ relied on before the primary judge (both of which were referred to by ANZ in its submissions), it should be noted that, in its Notice of Appeal, ANZ only relied on the second of these two pieces of information, being the finding (LJ [295]) as to the *reasons* for the Underwriters' recommendation, which was addressed by the primary judge at [457]. The second piece of information also assumed greater significance in the parties' submissions. Nevertheless, I deal with the first piece of information for completeness at paragraph 201 below.

187 The thrust of ANZ's submission on appeal was that the fact that one of the reasons why the Underwriters opted to allocate placement shares to themselves was precisely in order to avoid shares being allocated to short-term holders, and that this negatives the prompt seller inference. ANZ submitted that, contrary to the reasons of the primary judge in rejecting the reason known to ANZ as necessary contextual information, it did not matter that the Underwriters had additional reasons for making the recommendation that they made. ANZ submitted that that did not matter and, in any case, the other reasons as found by the primary judge were also apt to negative the prompt seller inference. Related to that, ANZ submitted that the Underwriters' lack of viable choices other than to allocate shares to themselves, only underscores that the Underwriters felt compelled to avoid an allocation to hedge funds, thus further evidencing their desire to avoid a disorderly after-market.

188 In relation to ground 3 specifically, ANZ submitted that, as the fourth reason identified by the primary judge (LJ [295]) (that the Underwriters were concerned that certain hedge funds would sell their shares quickly if allocated more than proposed, creating a disorderly after market) was in fact the only reason of which ANZ was aware, the primary judge should not have rejected the significance of that reason just because there were other reasons for the Underwriters' recommendation, in addition to that reason.

189 For its part, ASIC submitted that ANZ's submissions relied on a false binary opposition on the basis that it did not follow as a matter of logic that if investors knew of the Underwriters' concern about potential volatility of hedge fund purchasers and that this influenced the Underwriters' recommendation to ANZ, they would have been disabused of any expectation that the Underwriters' intention would be to dispose of their shares promptly. Rather, ASIC submitted, both hedge fund purchasers and the Underwriters may be regarded by investors as potential short-term holders, both of which were likely to act in a manner which could put downward pressure on ANZ's share price.

190 ASIC argued that ANZ's contentions about the effect of the additional information would have to be proved as a matter of fact, and not merely logic, and that the primary judge accepted the evidence led by ASIC as to investor expectations being that the Underwriters would be short-term holders.

191 ASIC further submitted that the general expression by the Underwriters of their intentions did not satisfy senior officers of ANZ, or alleviate their concerns, that the Underwriters would be prompt sellers and thereby put downward pressure on the share price. ANZ knew of the matters in question, yet still had a state of mind consistent with the prompt seller inference (LJ [441]–[442], [459]).

192 The first point to note in addressing this aspect of the primary judge's reasons is that his Honour regarded the information, as it was characterised by ANZ, as not being a full or accurate statement of the reasons why the Underwriters made the recommendation in question. ANZ's characterisation below (as set out in LJ [453(c)]) was:

> 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.

193 There was no challenge on appeal to the primary judge's finding that this characterisation of the information did not fully or accurately capture the relevant facts.

194 When ANZ's characterisation of the information is contrasted with the findings of the primary judge (to which his Honour referred at [457]), it is evident that the primary judge did not accord an elevated status to any one of the multiple reasons he identified. The concern that, if not scaled back, the hedge funds may deal with their shares in such a way as to create a disorderly, or volatile, after-market was one of a number of reasons which, as the primary judge found,

led the Underwriters to consider that they had no practical alternative but to recommend the allocation of shares to themselves.

195 It should be noted that the reasoning of the Underwriters related to the hedge funds behaving in a way that would create a "disorderly market". In the course of cross-examination of ASIC's expert, Mr Pratt, senior counsel for ANZ put questions on the basis that a "disorderly" market was an "unduly volatile" market. In the course of oral submissions on the appeal, senior counsel for ANZ characterised a disorderly market as one that "has inadequate depth, or substantial price movements between trades, or undue volatility".

196 Mr Pratt's evidence was that a "disorderly market" is not the same thing as a market in which there are large downward movements in the share price of a stock, and that there can be a large downward price move without the market being a "disorderly market of itself". Obviously enough, the price of a stock on the stockmarket is a function of the interplay of supply and demand. Downward price movements are not, as Mr Pratt confirmed, the same thing as a disorderly market.

197 That distinction is important because, as noted, the Underwriters' concern, and one of the reasons they made the recommendation they did to ANZ, was a concern about the hedge funds creating a disorderly market. The basis upon which the primary judge found that the pleaded information was material was not that the market would expect the Underwriters to behave in a way that would create a disorderly market, but on the basis that they would promptly dispose of the shares and so place *downward pressure* on the share price (LJ [431], [436]). It was, as the primary judge found, the prospect that the Underwriters selling their stock over only a few trading days would put downward pressure on the share price, which was of concern to ANZ (LJ [441]–[442]).

198 Further, it should be noted that the primary judge made that finding on materiality on the basis of Mr Pratt's evidence. Mr Pratt's critical evidence was summarised by the primary judge (LJ [437]) with two passages extracted from the joint report (emphasis added):

> 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**.

199 As those extracts expose, the primary judge's materiality finding did not proceed on the basis that the market would expect that the Underwriters would sell in a way that would create a disorderly market. Rather, the expectation was that they would sell in the short to medium term (see also LJ [438]), and, on the continuum between hedge funds and long term investors, would behave "more like" hedge funds than long term holders.

200 Once these matters are appreciated, it can readily be seen that information that one of the reasons the Underwriters made the recommendation that they did was to avoid issuing stock to hedge funds who may create a disorderly market, does not logically undermine the basis upon which the primary judge found that the pleaded information was material. That was not, as set out above, by reason of any expectation that the Underwriters would create a disorderly market. It follows that the contextual information regarding one of the reasons why the Underwriters made the recommendation does not, as ANZ submitted, negative the prompt seller inference and the primary judge did not err as contended by ground 2 in this respect. So far as ground 3 fixes on the sole reason for the recommendation of which ANZ was aware, the fact that ANZ was not aware of the other reasons for the Underwriters' recommendation does not change or enhance the nature of this aspect of the contextual information relied on by ANZ. It remains information that does not negative the prompt seller inference.

201 I am likewise of the view that information that the Underwriters considered that they had no choice (in practical terms) but to recommend the allocation they did, having regard to the reasons identified in LJ [295], does not logically undermine the basis upon which the primary judge found that the pleaded information was material, and it does not, as ANZ contended, negative the prompt seller inference.

Conclusion on grounds 2 and 3

202 Grounds 2 and 3 should be allowed, other than in respect of the information referred to in paragraphs 2(d)(i), (ii) and (iv) of the Notice of Appeal.

GROUND 4

203 By ground 4, ANZ contends that:

> The primary judge erred in finding a contravention in circumstances where the pleaded information was not information relevantly concerning ANZ within the meaning of

> ASX Listing Rule 3.1, because the information as pleaded in substance concerned the identity and inferred intentions of ANZ shareholders and not the business or assets or revenues of ANZ.

204 Listing Rule 3.1 applies where an entity "is or becomes aware of any information concerning it" that meets the materiality criterion specified in the rule.

205 The primary judge concluded (LJ [405]) that both the Underwriter Acquisition Information and the Significant Proportion Information were information "concerning" ANZ for the purposes of Listing Rule 3.1. His Honour explained that conclusion as follows (LJ [405], bolded emphasis added):

> 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.**

The parties' submissions

206 On appeal, ANZ contended that the phrase "information concerning it" refers to the listed entity as a going concern and does not apply to information of a general nature affecting all entities in the market, or "information which is about an entity's securities or shareholders, as distinct from the entity itself". ANZ submitted that its preferred construction best supported the "overall purpose" of the continuous disclosure regime that the information be "relevant to company fundamentals", citing the observations of Nicholas J in *Vocation* at [553]. There, his Honour stated, in addressing s 677 of the *Corporations Act 2001 (Cth)* (the **Act**), that:

> 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.

207 On ANZ's argument, the fact that materiality inhered in the prompt seller inference, exposed that the pleaded information was about the expected trading behaviour of *shareholders* in ANZ, not the company itself. It contended that, in the course of reasoning set out above, the primary judge recharacterised the nature of the pleaded information so as to put ANZ (and not its

shareholders) at the centre. ANZ submitted that the rejection of its contention would have wide-ranging commercial implications, namely that listed entities would be required to disclose the identities or trading intentions of their shareholders. In oral submissions, counsel for ANZ accepted that the information did "in a sense" concern ANZ, but argued that "[t]he question is whether it relevantly does [concern ANZ]". It was also accepted that "in a sense" it was "information about the placement".

208 ASIC contended that the primary judge had not recharacterised the nature of the pleaded information, describing ANZ's argument on this point as an argument about form not substance. It also contended that ANZ's floodgates argument — to the effect that the primary judge's construction would see listed entities be required to disclose the identities or trading intentions of shareholders — wrongly characterised the primary judge's reasoning. That reasoning, ASIC submitted, was not about materiality at all; it solely concerned ANZ's submission that the information was not information "concerning it".

209 ASIC also drew attention to the reasoning of the primary judge which preceded the impugned conclusion, noting that there was no challenge on the appeal to his Honour's approach in giving the words "concerning it" their ordinary meaning, which, in the context, was "relating to, regarding, and about". In addition, ASIC submitted, all continuous disclosure cases turn on their facts, and the primary judge's approach does not lead to any blanket rule that listed entities must disclose the identities or trading intentions of their shareholders.

Consideration

210 As the Full Court observed in *Grant-Taylor* (at [92]), the "main purpose [of the continuous disclosure regime] is to achieve a well-informed market leading to greater investor confidence", the object being to "enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information". Consistently with the purpose and object so identified, ss 674 to 677 of the Act are "remedial or protective legislation" that 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" (*Grant-Taylor* at [93], citing *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 81 ACSR 1; [2010] NSWCA 332 at [356] (Spigelman CJ, Beazley and Giles JJA).

211 A conclusion that certain information is required to have been disclosed to the ASX involves a multifactorial analysis. In other words, the boundary circumscribing information that is required to be disclosed is not the product of only one integer in the analysis. Section 674(1)

states that subs (2) applies to a listed disclosing entity if the provisions of the listing rules require the entity to notify the market operator of "information about specified events or matters as they arise". This provision relevantly brings in Listing Rule 3.1, which not only requires that the information be information "concerning it", but also requires that the information be information that "a reasonable person would expect to have a material effect on the price or value of the entity's securities"; only a sub-set of information "concerning" a listed entity meets the requirements of Listing Rule 3.1. Listing Rule 3.1A then sets out a number of exceptions to Listing Rule 3.1.

212 Only once it has been determined that the information in question falls within Listing Rule 3.1, and does not fall within an exception in Listing Rule 3.1A, will the analysis then return to s 674(2). That provision then sets out a number of independent, and cumulative, requirements, all of which must be satisfied before an entity will be required to notify the market operator of the information in question: the entity must be a "listed disclosing entity"; the entity must be one that "has information" that the Listing Rules require it to notify to the market operator; the information must not be information that is "generally available"; and it must be 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 criterion that the information not be "generally available" is itself a criterion that necessitates examination of a number of matters — specified in s 676 — in order to arrive at the conclusion that the information was not information that was generally available.

213 The short point — which may be laboured by the foregoing analysis — is that parliament legislated in a manner that has carefully calibrated the bounds of the continuous disclosure regime and has done so by only imposing disclosure obligations where a number of criteria are satisfied. ANZ's arguments tended to lose sight of this, and to focus overmuch on the role of the requirement that information be information "concerning" the disclosing entity in ensuring that the continuous disclosure regime is not excessively wide. This was particularly apparent in its floodgates argument (to the effect that, unless "concerning it" is constrained as ANZ suggested it must be, all manner of information not typically thought to require disclosure would be caught by the regime).

214 In this context, and as the primary judge considered, the words "concerning it" are to be given their ordinary meaning, being "relating to, regarding, and about". ANZ's argument would seek to construe the expression narrowly and confine "concerning it" to "about it". As the primary

judge observed, the examples set out in Listing Rule 3.1 point to the expression "information concerning it" *not* being limited to information concerning what ANZ referred to as information that goes to "company fundamentals". Rather, those examples include information that a share issue has been under, or over, subscribed. They also include receipt of a notice of intention to make a takeover, also a piece of information that would commonly concern the intentions of a shareholder. In addition, the definition of "information" in Listing Rule 19.12, and in the notes to Listing Rule 3.1, refer to the intentions, or likely intentions, of "a person", necessarily a term that is not limited to the entity itself.

215 Nor does ANZ's argument suggesting its construction best serves the objects of the continuous disclosure regime in relating to information concerning "company fundamentals" assist. The expression "company fundamentals" was used by Nicholas J in *Vocation* (at [553]) in addressing the ambit of "persons who commonly invest in securities", as it appears in s 677 of the Act. In referring to "company fundamentals", Nicholas J was referring to the anticipated earnings, cashflows or returns on investment which his Honour considered (at [552]) persons considering investing in securities would assess. The issue that Nicholas J was addressing in the relevant part of his Honour's reasons in *Vocation* concerned a submission that the evidence of an expert as to the investing behaviour of institutional investors constituted an insufficient basis upon which to draw conclusions about the investing behaviour of "persons who commonly invest in securities". His Honour was not called on to, and did not purport to, confine the target of the continuous disclosure regime to information that is material because it concerns "company fundamentals" going to earnings, or the anticipated return on risk. As such, ANZ's submission proceeds from a misreading of Nicholas J's reasons in *Vocation*.

216 If indeed *Vocation* is to be read as ANZ suggested, there is a live question whether the proposition that the continuous disclosure regime is confined to information that is material because it concerns "company fundamentals" going to earnings, or the anticipated return on risk, is consistent with *Grant-Taylor*. In *Grant-Taylor*, the Full Court emphasised (at [115]) that s 677 adopts a class description, and thus "avoids distinctions dealing with large or small, frequent or infrequent, sophisticated or unsophisticated *individual* investors." As the Full Court confirmed, s 677 is not confined to sophisticated investors, but extends to small and infrequent — but not irrational — investors: *Grant-Taylor* at [115]. However, it is not necessary to address this matter further in the present appeal.

217 For the foregoing reasons, there was no error in the primary judge's conclusion that the Underwriter Acquisition Information and the Significant Proportion Information were pieces of information "concerning" ANZ because they represented the outcome of a large placement of ANZ shares (LJ [405]).

218 ANZ's argument to the contrary contended that the information was not information "concerning" ANZ because it concerned the likely disposal intentions of the Underwriters as shareholders. That argument involves substituting the enquiry about the nature of the information itself for the enquiry about what makes that information material (here, the prompt seller inference). As I have already stressed, assessing materiality involves a separate and distinct analysis from that concerning whether the information in question is information "concerning" the entity.

219 Ground 4 ought to be dismissed.

I certify that the preceding one hundred and three (104) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Button.

Associate: 

Dated: 2 October 2024