FEDERAL COURT OF AUSTRALIA

Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited

[2025] FCAFC 63

Appeal from:	*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 (No 6)* [2024] FCA 1097
File numbers:	VID 572 of 2024 NSD 815 of 2024
Judgment of:	**MURPHY, MOSHINSKY AND BUTTON JJ**
Date of judgment:	7 May 2025
Catchwords:	**CORPORATIONS** - continuous disclosure – whether the respondent (the Bank) breached its continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) and rule 3.1 of the ASX Listing Rules – where, over a period of about three years (from November 2012 to September 2015), the Bank failed to provide approximately 53,000 threshold transaction reports (TTRs) to AUSTRAC as required by law – where the Bank subsequently lodged the TTRs in September 2015 – where the Bank did not disclose that failure to the market at any time up to 3 August 2017 – where, on 3 August 2017, AUSTRAC commenced a proceeding against the Bank about several matters including that failure – where the Bank's share price then dropped substantially – where the primary judge decided that the Bank did not have awareness of certain aspects of the pleaded information at the times alleged – where the primary judge decided that the pleaded information was not complete and accurate – where the primary judge concluded that the pleaded information, if considered with contextual matters, was not material – where the primary judge decided that the applicants had not established causation or loss – whether the primary judge erred in reaching those conclusions
Legislation:	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), ss 5, 6, 43, 81, 82, 83, 85, 162, 175, 184, 191, 197 *Banking Act 1959* (Cth) *Corporations Act 2001* (Cth), ss 674, 677, 111AE, 111AC, 111AL

Federal Court of Australia Act 1976 (Cth)

Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (Cth)

Federal Court Rules 2011, r 16.08

Cases cited:

Allen v The Queen [2014] VSCA 180

Armory v Delamirie (1722) 1 Stra 505; 93 ER 664

Australian Energy Regulator v AGL Retail Energy Ltd [2024] FCA 969

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

Australian Securities and Investments Commission v Big Star Energy Limited (No 3) [2020] FCA 1442; 389 ALR 17

Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586; 264 ALR 201

Australian Securities and Investments Commission v Vocation Limited (in liq) [2019] FCA 807; 136 ACSR 339

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

Baden v Société Générale pour Favoriser le Développement du Commerce et de l'lndustrie en France SA [1993] 1 WLR 509; [1992] 4 All ER 161

Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd [1990] HCA 11; 169 CLR 279

Berry v CCL Secure Pty Ltd [2020] HCA 27; 271 CLR 151

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; 117 FCR 424

CCL Secure Pty Ltd v Berry [2019] FCAFC 81

Cessnock City Council v 123 259 932 Pty Ltd [2024] HCA 17; 418 ALR 304

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited [2018] FCA 930

Commonwealth v Amann Aviation Pty Limited [1991] HCA 54; 174 CLR 64

Coulton v Holcombe [1986] HCA 33; 162 CLR 1

Crowley v Worley Limited [2022] FCAFC 33; 293 FCR 438

Crowley v Worley Ltd (No 2) [2023] FCA 1613; 171 ACSR 410

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

Cubillo v Commonwealth (No 2) [2000] FCA 1084; 103

	FCR 1 *Fink v Fink* [1946] HCA 54; 74 CLR 127 *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; 247 CLR 486 *Gould v Mount Oxide Mines Ltd* [1916] HCA 81; 22 CLR 490 *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149; 322 ALR 723 *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; 245 FCR 402 *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; 274 ALR 85 *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 *Jubilee Mines NL v Riley* [2009] WASCA 62; 40 WAR 299 *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136 *Kismet International Pty Ltd v Guano Fertilizer Sales Pty Ltd* [2013] FCA 375 *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128 *MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd* [2019] VSCA 46 *Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (in liq)* [2019] FCA 1720 *Metwally v University of Wollongong* [1985] HCA 28; 60 ALR 68 *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; 265 FLR 247 *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; 196 ALR 257 *R v Myer* [2023] QCA 144 *Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482; 335 ALR 320 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237 *TPT Patrol Pty Ltd v Myer Holdings Limited* [2019] FCA 1747; 293 FCR 29
Division:	General Division
Registry:	Victoria
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Date of hearing:	18 – 21 November 2024
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Solicitor for the Respondent:	Herbert Smith Freehills

ORDERS

VID 572 of 2024

BETWEEN:	**ZONIA HOLDINGS PTY LTD** Appellant
AND:	**COMMONWEALTH BANK OF AUSTRALIA LIMITED** Respondent

ORDER MADE BY:	**MURPHY, MOSHINSKY AND BUTTON JJ**
DATE OF ORDER:	**7 MAY 2025**

THE COURT ORDERS THAT:

1. Within 14 days, the parties provide any agreed minute of proposed orders to give effect to the Full Court's reasons and in relation to costs.

2. If the parties cannot agree, then:

   (a) within 21 days, each party file and serve its minute of proposed orders and a written submission (of no more than five pages) in support of those orders;

   (b) within a further seven days, each party file and serve any responding written submission (of no more than two pages); and

   (c) the issues of the form of orders and costs be determined on the papers.

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

ORDERS

NSD 815 of 2024

BETWEEN:	**PHILIP ANTHONY BARON** First Appellant
	JOANNE BARON Second Appellant
AND:	**COMMONWEALTH BANK OF AUSTRALIA LIMITED** Respondent

ORDER MADE BY:	**MURPHY, MOSHINSKY AND BUTTON JJ**
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REASONS FOR JUDGMENT

THE COURT:

1 INTRODUCTION

1 These appeals relate to two representative proceedings that were commenced by shareholders of the Commonwealth Bank of Australia Limited (the **Bank**) against the Bank. In each proceeding, the applicants alleged that the Bank contravened its continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) and rule 3.1 of the Australian Securities Exchange (**ASX**) Listing Rules (the **Listing Rules**), by not disclosing to the market operated by the ASX (on which the Bank's shares (**CBA shares**) were traded) information that was said to be material.

2 The information that it was alleged the Bank should have disclosed comprised (in summary) information that:

(a) from around November 2012 to 8 September 2015, the Bank had failed to give threshold transaction reports (**TTRs**) on time for approximately 53,506 cash transactions of $10,000 or more processed through Intelligent Deposit Machines (**IDMs**);

(b) from at least October 2012 to 8 September 2015, the Bank had failed to conduct account level monitoring with respect to 778,370 accounts;

(c) in the period prior to the roll-out of the Bank's IDMs in May 2012, and subsequently, the Bank had failed to carry out any assessment of money laundering/terrorism financing (**ML/TF**) risk in relation to the IDMs; and

(d) the Bank was potentially exposed to enforcement action by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) in respect of allegations of serious and systemic non-compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**), which might result in the Bank being ordered to pay a substantial civil penalty.

3 The Bank did not disclose the pleaded information in the period up to 3 August 2017.

4 On 3 August 2017, the Chief Executive Officer (**CEO**) of AUSTRAC commenced a proceeding against the Bank seeking civil penalties and other relief (the **Civil Penalty Proceeding**) in relation to the failures identified in (a), (b) and (c) above and two other matters.

The CEO also published a Tweet, with a link to a media statement about the commencement of the proceeding, which media statement had a link to AUSTRAC's concise statement as filed in this Court on 3 August 2017 (the **Concise Statement**). In the immediate aftermath of the commencement of the proceeding, the Bank's share price dropped substantially. Subsequently, in the Civil Penalty Proceeding, the parties jointly proposed, and the Court made orders for the Bank to pay, a pecuniary penalty of $700 million for the contraventions of the AML/CTF Act.

5 The applicant in one of the proceedings at first instance was Zonia Holdings Pty Ltd (**Zonia**) (the **Zonia proceeding**). The applicants in the other proceeding at first instance were Philip Baron and Joanne Baron (the **Barons**) (the **Baron proceeding**). Zonia and the Barons purchased CBA shares during the "relevant period" in the proceedings (see below).

6 The subject matter of the two proceedings overlapped and they were case managed together. The proceedings were not consolidated, but the pleadings were harmonised, such that the allegations in the two proceedings were substantially the same. The proceedings were heard together by the primary judge, and his Honour delivered a single judgment dealing with both proceedings: *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 5)* [2024] FCA 477 (the **Reasons**), delivered on 10 May 2024. The primary judge decided that the applicants' case against the Bank failed at a number of levels. In summary, the primary judge found that:

(a) the Bank was not "aware" of many of the forms of the pleaded information as at the relevantly pleaded dates, but found that the Bank *was* aware of some of the forms of the pleaded information on some of the relevantly pleaded dates: Reasons, [561], [565];

(b) all forms of the pleaded information were incomplete and, in some respects, misleading. Therefore, his Honour was not satisfied that Listing Rule 3.1 required the Bank to disclose that information in that form to the ASX: Reasons, [631]. The applicants' case therefore failed before one even considered the "materiality" of the pleaded information;

(c) the exception to rule 3.1 contained in rule 3.1A of the Listing Rules did not apply: Reasons, [639];

(d) although the conclusion in (b) meant that the applicants' case failed, the primary judge went on to consider the applicants' case on materiality. The primary judge was not satisfied that the pleaded information, in any of its forms, was information that, if disclosed at the relevantly pleaded times, would (or would be likely to) influence

persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. Further, his Honour was not satisfied that the pleaded information, in any of its pleaded forms, was information that a reasonable person would expect, if the information were generally available at the relevantly pleaded times, to have a material effect on the price or value of CBA shares: Reasons, [1030];

(e) even if the applicants had succeeded in their case on contravention, he would not have found that their case on causation was established: Reasons, [1245]; and

(f) leaving to one side the fact that the applicants' case had failed at a number of levels (so that one never gets to the assessment of damages), he concluded that their case on the assessment of damages also failed: Reasons, [1246].

7 The primary judge made orders in each proceeding to give effect to those reasons on 28 May 2024. The orders included that the proceeding be dismissed and that the common questions be answered as set out in the orders.

8 Zonia and the Barons (the **appellants**) appeal to this Court from the judgment and orders of the primary judge. The two appeals were heard together over a period of four days. The same lawyers represented Zonia and the Barons in both appeals. The same lawyers represented the Bank in both appeals. The issues raised by the two appeals are essentially the same, and the parties' submissions generally did not differentiate between the two appeals. Consistently with this, we will deal with the two appeals together and generally will not differentiate between them.

9 The appellants' case on appeal is in some respects narrower than their case at first instance. The period of time relied upon is shorter. At first instance, the "relevant period" for the purposes of the applicants' case was from 16 June 2014 to 1.00 pm on 3 August 2017, but on appeal the appellants rely on the period from 8 September 2015 to 1.00 pm on 3 August 2017. Relatedly, some aspects of the pleaded information relied upon by Zonia and the Barons at first instance are no longer relied upon. When we refer to the "pleaded information" in the following summary of the issues on appeal, we are referring only to the aspects of the pleaded information that are relied upon on appeal. In light of the narrowing of the appellants' case, the appellants accept that Zonia's personal claim should be dismissed irrespective of the outcome of the appeal.

10 The Bank has cross-appealed from one of the orders made by the primary judge in each proceeding, namely the order in which his Honour ordered that one of the common questions,

relating to the exception in rule 3.1A of the Listing Rules, be answered in a particular way. The Bank contends that the primary judge erred in concluding that the exception in rule 3.1A of the Listing Rules did not apply.

11 The issues raised by the appeals and cross-appeals may be summarised as follows:

(a) whether the primary judge erred in his findings relating to whether the Bank was *aware*, for the purposes of Listing Rule 3.1 and s 674(2) of the *Corporations Act*, of the pleaded information (the **Awareness issue**);

(b) whether the primary judge erred in dealing with the completeness and accuracy of the pleaded information as a threshold issue (rather than as part of the materiality analysis) and in concluding that the pleaded information was incomplete and, in some respects, misleading and therefore the Bank was not obliged to notify the ASX of that information (the **Completeness and Accuracy issue**);

(c) whether the primary judge erred in concluding that the exception in rule 3.1A of the Listing Rules did not apply to the pleaded information (the **Rule 3.1A issue**);

(d) whether the primary judge erred in finding that the pleaded information was not *material* for the purposes of Listing Rule 3.1 and ss 674(2) and 677 of the *Corporations Act* (the **Materiality issue**); and

(e) whether the primary judge erred in concluding that Zonia and the Barons had not established causation or loss (the **Causation and Loss issue**).

12 For the reasons that follow, we have concluded in summary that:

(a) No error is shown in the primary judge's findings relating to the Bank's awareness of the pleaded information.

(b) The primary judge erred in deciding *as a threshold issue* the question as to whether the pleaded information was complete and accurate.

(c) No error is shown in the primary judge's conclusion that the exception in rule 3.1A did not apply.

(d) The primary judge erred in concluding that certain forms of the pleaded information were not material.

(e) No error is shown in the primary judge's conclusion in relation to quantification of loss.

13 It follows from the above that the appeals are to be allowed in part (insofar as the answers to some of the common questions need to be changed to reflect the above conclusions), but the primary judge's orders dismissing the proceedings at first instance remain undisturbed. Further, it follows that the cross-appeals are to be dismissed.

2 BACKGROUND FACTS

14 The facts are set out in detail in the Reasons at [49]-[351]. The following is a summary, drawn from the Reasons, of the key facts relevant to the issues raised by the appeals.

2.1 General matters

15 The Bank is, and was at all relevant times, Australia's largest bank. For the years ended 30 June 2014 to 30 June 2017, the Bank's total annual income was between $22 billion and $26 billion; its profit was between $8.6 billion and $9.9 billion. It employed approximately 52,000 staff members. The Bank operates (and, at all relevant times, operated) in a highly regulated market and processes a large volume of domestic and cross-border transactions.

16 The Bank is required to monitor certain transactions under AML/CTF legislation. As at May 2015, the Bank was monitoring approximately 7 million transactions per day with a value of $219 billion. At that time, peak volumes stood at 16 million transactions per day with a value of $570 billion. As at June 2016, the Bank was monitoring over 8 million transactions per day with a value of $300 billion. As at April 2017, the Bank was reporting approximately 3.1 million International Funds Transfer Instructions, 800,000 TTRs, and almost 9,000 Suspicious Matter Reports (**SMRs**) to AUSTRAC each year.

17 The Bank is, and was at all relevant times, licensed to carry on banking business in Australia and authorised to take deposits from customers as an Authorised Deposit-Taking Institution (**ADI**) under the *Banking Act 1959* (Cth). It was subject to the AML/CTF Act and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (Cth) (the **AML/CTF Rules**).

18 The AML/CTF Act imposes obligations on ADIs that provide "designated services". Those services are defined in s 6 of the AML/CTF Act. A "designated service" includes opening an account or allowing a transaction to be conducted in relation to an account. A person who provides a "designated service" is a "reporting entity": s 5.

19 Part 3 of the AML/CTF Act contains reporting obligations for reporting entities. Relevantly to this proceeding, one obligation is to report a "threshold transaction" (as defined in s 5) to the AUSTRAC CEO: ss 43(2)-(3). A "threshold transaction" includes, for example, a transaction involving the transfer of physical currency, where the total amount of physical currency transferred is not less than $10,000. Section 43(2) is a civil penalty provision: s 43(4).

20 Section 81(1) of the AML/CTF Act provides that a reporting entity must not commence to provide a designated service to a customer if the reporting entity has not adopted and maintained an anti-money laundering and counter-terrorism financing program that applies to the reporting entity. Section 81(1) is a civil penalty provision: s 81(2). The program can be a standard AML/CTF program, a joint AML/CTF program, or a special AML/CTF program: s 83(1). The Bank adopted and maintained a joint anti-money laundering and counter-terrorism program. Such a program is divided into two parts—Part A (general) and Part B (customer identification): s 85(1).

21 The primary purpose of Part A (which is the Part of relevance for present purposes) is to identify, manage, and mitigate the risk that a reporting entity may reasonably face that the provision of designated services at or through its Australian operations might involve or facilitate money laundering or the financing of terrorism: s 85(2)(a). Section 82(1) provides that a reporting entity must comply with Part A of the program. Section 82(1) is a civil penalty provision: s 82(2).

22 As detailed in the Reasons at [73]-[79], there are a number of avenues open to the AUSTRAC CEO where AUSTRAC considers that there has been non-compliance with the AML/CTF Act, the Regulations, or the AML/CTF Rules. In summary:

(a) First, no formal action need be taken.

(b) Secondly, if there are reasonable grounds to think that there has been a contravention of an "infringement notice provision" (defined in s 184(1A)), an authorised officer can issue an infringement notice under s 184(1) requiring payment of a penalty.

(c) Thirdly, the AUSTRAC CEO can give a remedial direction under s 191(2) of the AML/CTF Act if satisfied that a reporting entity has contravened, or is contravening, a civil penalty provision.

(d) Fourthly, the AUSTRAC CEO can accept enforceable undertakings under s 197 of the AML/CTF Act.

(e) Fifthly, if the AUSTRAC CEO has reasonable grounds to suspect that a reporting entity has contravened, is contravening, or is proposing to contravene the AML/CTF Act, Regulations, or AML/CTF Rules, a written notice can be given under s 162 of the AML/CTF Act requiring the reporting entity to appoint an external auditor to carry out an audit of, and report on, the reporting entity's compliance with the AML/CTF Act, Regulations, or AML/CTF Rules.

(f) Sixthly, the AUSTRAC CEO can commence proceedings under s 175 of the AML/CTF Act seeking a civil penalty order for the contravention of a civil penalty provision.

23 In its published Enforcement Strategy 2012 – 2014, AUSTRAC stated that it generally chooses to use a supervisory approach to secure reporting entity compliance before proceeding to "more formal enforcement activities".

24 Before 3 August 2017, AUSTRAC had taken 33 enforcement actions. Only one was for a civil penalty order, namely the Tabcorp proceeding (see below).

2.2 Events in 2012

2.2.1 The roll-out of IDMs (May 2012)

25 In about May 2012, the Bank began rolling out its fleet of IDMs, being a type of automated teller machine (**ATM**), with additional functionality, which are part of the Bank's NetBank platform. IDMs allow customers to deposit cash or cheques into their accounts without the need to enter the branch itself. Cash deposits are automatically counted and credited instantly to the nominated recipient account. This means that these funds are then immediately available for transfer to other domestic or international accounts.

26 During the relevant period, the Bank's IDMs could accept up to 200 notes per deposit (i.e., up to $20,000 per cash transaction). The Bank did not limit the number of IDM transactions a customer could make each day. A card was required to activate and make a deposit through an IDM. The card could be issued by any financial institution, but the funds could only be deposited to one of the Bank's account holders.

27 The IDM channel favours anonymity and there is no mechanism to identify the person who activates the machine and performs the transaction. IDMs can also be used to structure transactions in which large cash amounts can be deposited in smaller quantities. The primary judge found (and there is no issue about this on appeal) that IDMs present a high inherent ML/TF risk.

28 At the commencement of the relevant period for the proceedings at first instance (16 June 2014), the Bank had 245 active IDMs and 3,147 active ATMs. At the end of the relevant period (3 August 2017), the Bank had 904 active IDMs and 2,522 active ATMs.

29 Before rolling out the IDMs in May 2012, the Bank did not conduct a formal risk assessment in relation to the designated services provided through this channel. Instead, the Bank relied on the risk assessment conducted for ATMs generally. At first instance, the Bank accepted that it had not carried out a formal risk assessment in relation to the designated services provided through the IDM channel, and also that such an assessment was not made before July 2015. The Bank accepted that, by not conducting the required risk assessment before rolling out the IDMs, it failed to comply with its AML/CTF Program. The primary judge referred to this as the **IDM ML/TF risk assessment non-compliance issue**.

30 This is not to say, however, that the Bank did not have regard to AML/CTF risks in respect of IDMs at the time they were rolled out. In a business requirements document, the Bank considered the need to report threshold transactions to the AUSTRAC CEO and the means by which this would be done through IDMs. TTR reporting and transaction monitoring were considered to be mandatory requirements as part of the IDM roll out project, and TTR reporting functionality was built and linked to IDMs. IDM deposits were also linked to automated transaction monitoring rules that targeted certain practices.

31 The primary judge found that the failure of the Bank to carry out a risk assessment in relation to the IDMs before they were rolled out, or in the period before July 2015, had no direct consequences. On appeal, the appellants contest that finding.

2.2.2 The introduction of code 5000 (November 2012)

32 When the IDMs were introduced, the Bank's processes relied on two transaction codes to generate TTRs (codes 5022 and 4013). Then, in November 2012, the Bank introduced an additional transaction code (code 5000) for a sub-set of IDM transactions to clarify a deposit message that was visible to customers via the NetBank platform. The new transaction code fixed the message problem, but it was not factored into the downstream process by which threshold transactions were identified for reporting. In short, a "flag" in the system for TTR reporting was missing.

33 This problem was not discovered, and its implications brought home to officers of the Bank, until much later (August-September 2015). In 2013, a potential problem, with an association

with code 5000, was identified by the Bank's staff, but unfortunately it was not fully investigated and rectified: see the Reasons at [118]-[139]. The primary judge found (and there is no issue about this on appeal) that as at 24 October 2013, no-one in the Bank had identified that transactions which should have been flowing through to TTR reporting were not flowing through and being reported to AUSTRAC.

2.2.3 Project Juno

34 The Bank's Financial Crimes Platform (**FCP**) contained data about the Bank's customers, accounts and transactions, which were sourced from different upstream systems. The platform was used by the Bank to undertake various functions, including:

(a) certain kinds of fraud detection, in particular internal fraud by the Bank's employees, cheque fraud, and application fraud;

(b) automated politically exposed person and sanctions screening of customers; and

(c) automated transaction monitoring for AML/CTF purposes.

35 In 2012, the Bank commenced an internal project known as Project Juno. This project related to enhancing the Bank's ability to monitor and detect potential instances of internal fraud. It was not focused on the Bank's AML/CTF systems, but it did impact on the FCP, which was used for both fraud monitoring and automated transaction monitoring.

36 One aspect of Project Juno involved integrating a new process called the "Associate Web" into the FCP. The Associate Web sourced data from the Group Data Warehouse (**GDW**) and the FCP to identify potential linkages between the Bank's staff and their customer profiles, the accounts they held, and any accounts that were related to them. For example, the Associate Web identified accounts that were registered with the same address or telephone number as a Bank staff member, or where an account was shared by a Bank staff member. This data was then used to populate a field in the FCP which flagged whether an account was "employee-related" or not. The rules in the FCP could then automatically run internal fraud monitoring rules to identify instances where Bank employees had initiated transactions involving accounts that had been identified as "related" to them.

37 In the course of updating account profiles in the FCP with data from the Associate Web, an error arose. In that process, the ACCOUNT_TYPE_DESC field for some accounts was populated with a null value (i.e., it was left blank). Over time, this caused the ACCOUNT_TYPE_DESC field in the FCP to be left blank, for a period, for certain "employee

related" account profiles (i.e., accounts that were intended to be flagged as accounts belonging to a Bank employee or related to a Bank employee). This occurred even though the process of integrating data from the Associate Web with the FCP was not intended to make any changes to the ACCOUNT_TYPE_DESC field. The consequence was that the automated transaction monitoring rules that depended on this field being populated did not operate for so long as the field was not populated. In short, some account monitoring did not occur in respect of some "employee related" accounts. The primary judge referred to this as the **account monitoring failure issue**.

38 Not all "employee-related" accounts were affected and the accounts that were affected were still monitored for financial crime screening (they were monitored against sanctions, politically exposed persons, and terrorists lists). Further, only some of the affected accounts were not subject to customer level transaction monitoring in the FCP.

2.3 Events in 2014

39 In mid-June 2014, the account monitoring problem was identified by a Bank employee, Mr Dhankhar (who was engaged in Financial Crime Analytics), in the course of developing rules for the FCP. On 17 June 2014, Mr Dhankhar circulated an email in which he identified seven issues with FCP data, one of which concerned the ACCOUNT_TYPE_DESC field. This was given the incident number IM0809261. By late August 2014, this issue (amongst other issues) was recorded in the Bank's risk management platform, RiskInSite, as "Medium Impact".

2.4 Rectification of the account monitoring issue (2014-2016)

40 On about 18 September 2014, the FCP was updated with a change that resolved the error so that, on updating the account profile, the ACCOUNT_TYPE_DESC field was updated with the relevant data as part of a "self-correct" process, and not left blank. Implementation of the Bank's usual data updating processes resulted in approximately 75% of the affected accounts (being active accounts) self-correcting by 30 November 2015. A manual update of the ACCOUNT_TYPE_DESC field in respect of inactive affected accounts (approximately 25% of the affected accounts) was completed by 27 September 2016.

41 In total, 778,370 accounts were affected in the period 20 October 2012 to 30 November 2015. The accounts were affected over varying time periods. For example, some accounts (54,357 accounts) were affected for a period of less than one month (for example, the period could have

been one day); some accounts (73,716 accounts) were affected for a period of between 25 to 36 months. However, a significant percentage of accounts (representing, in number, 195,000 accounts) were not active accounts.

2.5 Events in 2015

2.5.1 Tabcorp proceeding (July 2015)

42 On 22 July 2015, AUSTRAC announced that it had commenced proceedings against Tab Limited, Tabcorp Holdings Limited, and Tabcorp Wagering (Vic) Pty Ltd (collectively, **Tabcorp**) (the **Tabcorp proceeding**) for "extensive, significant and systemic non-compliance with Australia's anti-money laundering and counter-terrorism financing legislation".

2.5.2 AUSTRAC raises concerns (July 2015)

43 On 30 July 2015, the Bank met with AUSTRAC to provide a "general monthly update". It seems that, beforehand, AUSTRAC and the Australian Prudential Regulation Authority (**APRA**) had met and discussed an audit report of May 2015. That audit report was one of APRA's requirements notified in an APRA report of 5 September 2014. The report was prepared by Group Audit (at the Bank) and focused on the completeness of data captured in the Bank's systems used for centralised AML/CTF screening and the processes it used for the maintenance of "AML/CTF rules".

44 At the meeting with the Bank, AUSTRAC said that it had "serious concerns around" the audit. AUSTRAC made the overarching comment that, on the face of it, the 2015 audit report was "very concerning" and was "raising questions internally within AUSTRAC" and that, potentially, AUSTRAC "would … consider if enforcement action would be necessary".

2.5.3 Identification of the TTR problem (August–September 2015)

45 On 11 August 2015, AUSTRAC asked the Bank to locate TTRs relating to "two ATM deposits". The Bank could not locate these reports and it realised that they had not been made. On investigation, it was found that the deposits were processed under code 5000, but that code 5000 had not been linked to TTR reporting, as it should have been. It was then found that this resulted in the non-reporting of 51,637 threshold transactions from November 2012 to 18 August 2015. The number of affected transactions represented approximately 2.3% of the overall volume of TTRs provided by the Bank over the same period.

46 By the morning of 4 September 2015, the late TTR issue had been escalated to Mr Narev (the Managing Director and CEO of the Bank), who had asked for a "short briefing paper". By the afternoon, Mr Byrne (the Bank's Head of Group Financial Crime Compliance, Regulatory Liaison & Complex Matters) had prepared a briefing paper. The briefing paper said that it had been discovered that the two deposits (which had been referred to the Bank by AUSTRAC) had not been reported "because of a system coding error dating back to November 2012" and that, at that stage, "the investigation has identified that 51,637 TTRs were not reported to AUSTRAC" which represented "approximately 2.5% of the total reportable transactions for the same period (November 2012 to 18 August 2015)". A prefatory section of the report noted that failure to comply with the obligation to lodge TTRs "can result in reputational damage and regulatory enforcement including fines and remedial action".

47 On 6 September 2015, an email exchange took place between Mr Narev and Mr Comyn (the Group Executive for Retail Banking Services). In that exchange, Mr Comyn said that "the full extent of the issue is [being] investigated". In response, Mr Narev said that he had spoken to Mr Alden Toevs (Group Executive – Risk Management) that day. He continued:

> It goes without saying that we need to take this extremely seriously. I have let Alden know that he should personally be in touch with Austrac about this, and offer up a discussion with me. We need to adopt a similarly senior posture with AFP, though I suspect David Cohen (also copied) may be the better contact with them given that there are current legal proceedings.
>
> Whilst this is as a result of unintentional coding related errors, the circumstances warrant very senior oversight.
>
> We need also to make sure that:
>
> - we are going through all relevant transactions to check for other problems
>
> - we have fixed the problem, and
>
> - no-one within the Group had knowledge of/concern about this issue. I understand we have no cause for concern about this, but I want to know that there was no avoidance of the issue/reluctance to escalate.

48 Mr Comyn replied on 7 September 2015 that the matter was being taken "very seriously" but that he had "zero concerns about the reluctance to escalate".

2.5.4 Rectification of the TTR problem (September 2015)

49 By 8 September 2015, the error that had caused the TTR problem had been rectified.

50 On 8 September 2015, Mr Toevs sent a letter to AUSTRAC notifying it that 51,637 TTRs had not been lodged for the period November 2012 to 18 August 2015. The letter advised

AUSTRAC of the root cause of the problem and informed it of the "extensive remediation program" that the Bank would implement in response. This included the Bank retrospectively submitting "all of the reportable TTRs that resulted from the missing transaction code".

51 The primary judge accepted Mr Narev's evidence to the effect that, in early September 2015, he thought that the TTR issue posed a risk of AUSTRAC taking regulatory action: Reasons, [260].

52 By 24 September 2015, the outstanding TTRs had been lodged with AUSTRAC. There were 53,506 TTRs so lodged. The primary judge referred to this as the **late TTR issue**.

53 The reason why the number of TTRs lodged (53,506) is higher than the figure referred to in the Bank's letter to AUSTRAC dated 8 September 2015 (51,637) is that the 53,506 figure relates to a slightly longer period: Reasons, [462]. The higher figure was included in a spreadsheet prepared by the Bank on 22 September 2015: Reasons, [463]

2.5.5 October 2015

54 On 12 October 2015, Mr Toevs, Mr Dingley (the Chief Operational Risk Officer) and Ms Williams (the Chief Compliance Officer) prepared a report for the Bank's Risk Committee which, after noting the outcome of the 2015 audit report, included the following:

> 3.4.2. Group Operational Risk and Compliance (GORC) has accepted the outcomes of the Internal Audit reviews and is driving a series of initiatives to deliver effective end-to-end governance over the control environment.
>
> 3.4.3. An example of the outcomes of these control issues and their ongoing rectification is that, following a recent investigation undertaken by the Bank into two unreported threshold transaction reports (TTRs) to AUSTRAC, it was identified that between November 2012 and August 2015, 51,637 cash deposits of over $10,000 conducted through intelligent deposit machines (IDMs) were unreported to AUSTRAC. This arose because of a coding error.
>
> 3.4.4 While there is no formal breach reporting requirement under the AML/CTF Act, the breach has been reported to AUSTRAC and the non-compliance remediated. We have also taken steps to ensure better assurance processes are in place to detect these types of failures going forward. By taking steps to rectify the reporting failure and improving our control environment we reduce the risk of any regulatory action being taken by AUSTRAC.

55 The report noted that, in Australia, regulatory action had been taken against Barclays Bank, Mega Bank and Tabcorp for AML/CTF breaches, resulting in enforceable undertakings being given and (in the case of Tabcorp) "Federal Court action".

56 The Bank's Board was informed of the late TTR issue at its meeting on 12 and 13 October 2015.

57 On 12 October 2015, AUSTRAC responded to the Bank's communications of 8 and 24 September 2015. In a letter to Mr Toevs, AUSTRAC expressed its "serious concerns" about the scale of the Bank's non-compliance with s 43 of the AML/CTF Act and the period over which those contraventions had occurred.

58 AUSTRAC sought further details from the Bank in the form of information and documents. Among the documents sought was "any ML/TF risk assessment the CBA conducted on the IDMs before rolling out these machines in May 2012". AUSTRAC sought a response by 26 October 2015.

59 The Bank provided that response by letter on 26 October 2015. In relation to the request for documents of any ML/TF risk assessment before rolling out IDMs, the Bank said:

> CBA considers that IDMs were an enhancement of the existing ATM functionality as a channel to provide designated services. As a result, CBA has relied upon the ML/TF risk assessments conducted on ATMs as a channel for providing designated services.

60 The Bank also said:

> No changes have been made to IDMs since 2012 to warrant any further risk assessment.
>
> There were no additional high rated ML/TF risks raised in relation to the roll out of IDMs that required escalation to the Board or senior management. IDMs were intended to provide deposit functionality (similar to that of Branches) and the existing AML transaction monitoring controls and TTR reporting were applied to deposits via IDMs.

2.6 Events in 2016

2.6.1 Board meeting with AUSTRAC on 14 June 2016

61 On 14 June 2016, a lunch meeting took place attended by the Bank's Board, several members of the Bank's management, Mr Jevtovic (the AUSTRAC CEO) and Mr Clark (the Deputy CEO).

2.6.2 The statutory notices

62 On 22 June 2016, AUSTRAC gave a notice to the Bank under s 167(2) of the AML/CTF Act seeking the production of information and documents (the **first statutory notice**). The notice was circulated to Mr Comyn and others by an email dated 23 June 2016. The content of the notice (and the background to it) was described by Mr Keaney (General Manager, Group

Financial Crime Services) in a further email dated 13 July 2016 that was sent to various people, including Mr Comyn:

> On 22 June 2016, a statutory notice was received from AUSTRAC for the production of information and documents. Information collected under this notice could be used by AUSTRAC in civil penalty proceedings against the Group, although at this stage AUSTRAC is silent on its intentions. The notice is wide ranging but primarily relates to CBA's compliance with AUSTRAC's customer on-boarding and ongoing customer due diligence requirements. There is a particular focus on on-line account opening procedures, including electronic verification of customer identities, and the monitoring of transactions through Intelligent Deposit Machines. The notice also seeks detailed information in relation to 59 customers and 120 accounts, and asks for AML-related audit reports (over multiple years) as well as minutes of Board meetings where those reports were considered.
>
> This incident is related to the non-reporting of Threshold Transaction Reports for transactions undertaken through Intelligent Deposit Machines which was detected and self-reported to AUSTRAC in August 2015. Issues relating to that incident are largely closed out. The root cause for regulatory interest in relation to our customer on-boarding and ongoing customer due diligence processes more generally is not yet known. Further information on the root cause may be determined over the course of responding to the notice.
>
> Should AUSTRAC launch Federal Court proceedings against the Group (as in the case of Tabcorp) there will be reputational impacts. In addition, the Group would incur costs in defending such action. The maximum penalty that could potentially be applied by a court is $18 million per breach. Based on the CEO of AUSTRAC's description to the CBA Board just weeks ago that he has no concerns about the CBA's intention to be fully compliant with AML legislation, and his belief that the Group is a diligent manager of AML Risk (against a backdrop of significant business and technology complexity) it is hard to believe that AUSTRAC intends to impose significant penalties on the Group – especially given that the CEO Mr Jevtovic would have known about this imminent notice at the time he met with our Board and yet didn't raise it to offset his praise of the Group in relation to the management of financial crime.

63 Mr Keaney's email was forwarded to Mr Narev on the same day.

64 At the request of the Bank's Legal Services team, a project team was formed to assist in maintaining confidentiality and legal privilege in respect of responses to the first statutory notice. This was part of a project called **Project Concord** (the project being the Bank's response to AUSTRAC's investigation as reflected in the first statutory notice).

65 On 2 September 2016, AUSTRAC gave a second notice to the Bank under s 167(2).

66 On 14 October 2016, AUSTRAC gave a third notice to the Bank under s 167(2) (the **third statutory notice**).

67 On 17 October 2016, a report was prepared by an Executive Committee of the Bank seeking endorsement of a proposal to execute a program of work that would "establish the fundamentals

for the Group to manage its financial crime risk effectively and efficiently over the next three years". The report commenced by noting:

> 1.1. The Executive Committee is aware of the Group's exposure to financial crime risk, including money-laundering, sanctions-violations and bribery and corruption, and of consequences of non-compliance, including fines by onshore and offshore regulators.
>
> 1.2. Notwithstanding the Group's investment in financial crime compliance in recent years, there is still a way to go, as recently confirmed by Group Audit.
>
> 1.3. The potential for fines or other regulatory action seem elevated in light of AUSTRAC recently issuing the Group with an Enforcement Notice, stemming from breaches in Threshold Transaction Reporting from branch-based Intelligent Deposit Machines.
>
> 1.4. Group Security is taking a leadership role in improving the Group's management of financial crime and is now returning to ExCo to provide an update and plan for the way forward.

68 The primary judge accepted Mr Narev's evidence to the effect that, by October/November 2016, he thought that there was a serious risk of AUSTRAC taking regulatory action in relation to the late TTR issue, but he did not consider it likely that AUSTRAC would commence civil penalty proceedings: Reasons, [282].

2.6.3 The Bank's internal audit report 2016

69 In the meantime, on 28 September 2016, Group Audit delivered a report on a further internal audit in relation to the Bank's AML/CTF framework (the **2016 audit report**). The 2016 audit report gave an overall "red" rating based on an "unsatisfactory" rating for "Control Environment" and a "marginal" rating for "Management Awareness & Actions".

70 In its Audit Conclusion, Group Audit noted (amongst other things) that:

> A large number of AML/CTF issues continue to exist across the Group, with weaknesses identified across Business Unit's (sic) … and Group-wide AML/CTF processes. A number of repeat issues were identified due to inadequate implementation of action plans. Many of the prior issues remain open, with projects currently underway or due to commence to revisit the AML/CTF operating model and completeness of AML/CTF data flows.

71 Group Audit also said:

> As part of this Audit, Internal Audit conducted an independent review of the Group's Part A AML/CTF Program as required by the AML/CTF Rules … Whilst we found that the Bank's AML/CTF framework covered all of the key requirements of an effective AML/CTF framework, we noted a number of gaps in the development of the program (for example, mapping of compliance obligations), and the implementation and operationalisation of the program …

72 Group Audit noted that the Group had been "slow to address many of the previously identified issues and associated root causes" and that a "number of significant issues from our Audits in 2013 and 2015 remain unaddressed and are either still being remediated … have been reopened due to inadequate remediation … or are yet to be addressed …".

2.7 Events in 2017

2.7.1 Meeting with the AUSTRAC CEO on 30 January 2017

73 On 30 January 2017, Ms Livingstone (the Chair of the Bank's Board) had a meeting with Mr Jevtovic. Ms Livingstone did not give evidence in the proceeding at first instance, but her handwritten note of the meeting was in evidence. The note records, amongst other things, the following matters.

74 First, the note records Mr Jevtovic's view that the Bank's relationship with AUSTRAC was professional "outside of IDMs". The apparent concern in that regard appears to have been the Bank's failure to lodge TTRs, as discussed above. However, the note records that, while that matter "warrants close scrutiny", the Bank did respond to "the systems issue".

75 Secondly, the note records that AUSTRAC was concerned about whether the Bank had done sufficient work on understanding AML/CTF risk, refers to the 2015 internal audit, and appears to question the Bank's "risk culture" (noting the Bank's "poor performance" as against other banks).

76 Thirdly, the note records that AUSTRAC was concerned about the Bank's lack of reporting, its poor risk assessment, its slow response to risk assessment, and the fact that its IDMs had been compromised by organised crime.

77 Fourthly, the note refers to the issue of the three statutory notices, but records AUSTRAC's view that the Bank had responded adequately to the notices.

78 Fifthly, the note records that AUSTRAC had made no decision on what action "it may or may not take". The note appears to indicate that AUSTRAC would make a decision in that regard within two weeks, and that there were "options".

79 On 31 January 2017, Mr Narev (who, at this time, was concerned that the late TTR issue had been "dragging on" with AUSTRAC and that AUSTRAC might be considering taking action, such as an enforceable undertaking, which he wanted to avoid) sent Ms Livingstone an email in which he said:

> I am keen to get your instincts on how, if at all, you believe we can engage with [AUSTRAC] in advance of the final determination to influence it.

2.7.2 The development of Project Concord

80 The further action, if any, that AUSTRAC might take as a consequence of the late TTR issue remained a matter of abiding concern for the Bank. The Bank continued to consider the causes and impacts of that issue.

81 By 7 February 2017, Project Concord had expanded to include "an internal and external communications plan to be used in the event of public dialogue from AUSTRAC on the TTR matter". The concern appears to have been that, through various means, the fact that AUSTRAC was investigating the Bank in relation to the late TTR issue might or would become public knowledge. The Bank was concerned about bad publicity. One of the aims of the management of this issue was to seek to influence, to the extent possible, how the Bank's customers and investors would react upon becoming aware of the investigation of the late TTR issue. However, at that time, the plan did not envisage that AUSTRAC would commence proceedings against the Bank.

82 On 14 February 2017, Ms Watson (the Executive General Manager, Group Security and Advisory) sent an email to Mr Craig (the Bank's Chief Financial Officer), stating (amongst other things):

> - No new information from AUSTRAC
> - AUSTRAC have knocked back multiple requests for clarity
> - Paul Jevtovic has declined two invitations to meet with the CBA Board this week (invited May and June – no to both)
> - Latest update is Catherine Livingstone's where Paul said "I will let you know soon…"
> - Action could include:
>   - Civil penalties following court proceedings
>   - Enforceable undertaking style action
>   - External review/audit of our financial crime arrangements.
>
> There would likely be a media overlay to any of these actions.

2.7.3 Tabcorp civil penalty (February-March 2017)

83 On 16 February 2017, *The Australian* newspaper reported that Tabcorp had revealed the terms of a settlement with the AUSTRAC CEO in which it had agreed to pay a pecuniary penalty of

$45 million. A copy of the article was sent, by internal email, to Mr Cohen (the Bank's Chief Risk Officer). Mr Cohen's response was:

> Yes saw that today – this will potentially embolden AUSTRAC in its issue with us.

84 Ms Watson sent an email to Mr Comyn and others attaching a media release and articles explaining the settlement. Mr Comyn's response was:

> Jeez, that's a lot of money. Can you please remind me of the nature of their breach. I hope it's much more severe than us?

85 On 16 March 2017, in the Tabcorp proceeding, this Court ordered Tabcorp to pay a civil penalty of $45 million.

2.7.4 Meeting with AUSTRAC on 7 March 2017

86 On 7 March 2017, Ms Watson and Mr Keaney met with AUSTRAC. Ms Watson summarised the meeting in an email to Mr Craig on 8 March 2017, as follows:

> Matt Keaney and I met with AUSTRAC yesterday. They described their view of the TTR and associated matters as "serious, significant and systemic". They also said our failure to immediately and proactively tell them about these and other problems (here they were talking about control weaknesses over multiple years, etc) is a show of bad faith which leads them to wonder what else is broken across CBA's financial crime landscape.
>
> They said they have not made a determination but it isn't far off. And in either a slip or a deliberate signal they said "we will tell you before we go public or to media."
>
> Legal is helping draft a defence outline so we can work out what we do under a civil penalty scenario in particular. I didn't get any sense of them being interested in us putting an EU to them - they told me that the ball is in their court and they're going to make a decision then either advise or consult with us.

87 A copy of the email found its way to Mr Narev. Mr Narev forwarded Ms Watson's email to Ms Livingstone, saying:

> Obviously not good news here, though also not surprising.
>
> The judgment call we need to make from here is whether at the Chair/CEO level we ought to reach out again before a final determination?

88 Ms Livingstone responded:

> Agree – not good news. Paul didn't say anything on Monday and in fact could not have been more friendly.
>
> It might be a good idea if you and I together seek a meeting with Paul. If they speculate publicly about 'what else is broken' it will play into the very convenient culture rhetoric. We must make sure that we are dealing with facts and not supposition.

89 The primary judge stated that he understood the reference to "Paul" in Ms Livingstone's email to be to Mr Jevtovic.

2.7.5 Meeting with AUSTRAC on 21 March 2017

90 On 21 March 2017, Mr Narev and Ms Livingstone met with Mr Jevtovic and Mr Clark.

91 Mr Narev gave evidence of the discussion at the meeting. After recounting statements made by Mr Jevtovic and Mr Clark about the general nature of the engagement between the Bank and AUSTRAC, Mr Narev gave this evidence of the discussion:

> Mr Jevtovic: We have been looking into the information which CBA had been providing to us, and we have found some other things beyond the non-reporting of the TTRs. As recently as January, something happened that concerned us. We are looking into possible failures to lodge reports, submit reports linked to investigations, do some ongoing customer due diligence, and undertake adequate risk assessment of the IDMs.
>
> We think this is serious because of the scale of the IDMs, which should have prompted an earlier risk assessment than what was undertaken in mid-2016. Internal advice had highlighted the risk of IDMs.
>
> I wonder whether CBA's investment has necessarily been in the right place. We think accounts have remained open without follow-up. We also think that CBA's SMR policy may contradict the Act. There is a written policy which suggests that once SMRs had been submitted, further SMRs did not need to be.
>
> In terms of next steps, AUSTRAC is going to take an evidence-based approach. The options for us are an external auditor, a remedial direction, seeking an Enforceable Undertaking, or instituting civil penalty proceedings.
>
> We think it will take approximately one more month until we decide which path we want to follow.
>
> As we consider our options, CBA's leadership approach will be critical. This is the first time that a Chair and CEO have ever come personally to AUSTRAC, and that makes a difference. We are also very encouraged by Philippa's leadership and her relationship with Peter.
>
> Ms Livingstone: I have met with Paul prior to this meeting, on matters unrelated to these issues.
>
> We acknowledge that the issues you are now raising are serious, and that CBA needs to do better.
>
> We do think it is important that the path forward be constructive. Beyond the regulatory issues, there are potential reputational issues that are important to CBA, and it is key to us that it is not portrayed that CBA has a cavalier and disrespectful approach.

> It is clear that this is about systems, policy and capability, not bad intent. Our priority is to make sure this process sticks to the facts.
>
> Mr Jevtovic: We are not interested in adding to "bank bashing", and in fact all the major banks have been important and constructive partners for us.
>
> We will give you advance notice once we have decided what path to go down. We will definitely not do anything without telling CBA first, and we'll allow CBA time to consider what AUSTRAC is going to do.
>
> The work that CBA has done in recent times will be instrumental in shaping AUSTRAC's thinking about which path it will take.
>
> Ms Livingstone: We will have Philippa Watson articulate CBA's vision today and walk that over.

92 The primary judge stated that Mr Narev's evidence in this regard was not challenged substantively in cross-examination. The primary judge noted that AUSTRAC was still referring to "options", which not only included civil penalty proceedings, but other regulatory action which was available to it. In cross-examination, Mr Narev accepted that it was fair to say (apparently based on his understanding of the matter) that AUSTRAC was seriously considering all options, including civil penalty proceedings. Even so, Mr Jevtovic had made it clear that AUSTRAC had not made a decision about "the path we want to follow". He had also made it clear that AUSTRAC would give the Bank "advance notice once we have decided what path to go down" and provide the Bank with an opportunity to consider what AUSTRAC was going to do.

93 Mr Narev accepted during cross-examination that, at that time, his thinking was that it was "highly likely", but not inevitable, that AUSTRAC would be seeking a "fine" from the Bank.

2.7.6 March to August 2017

94 In the period from the 21 March 2017 meeting to 3 August 2017, there were no substantive updates from AUSTRAC.

95 On 13 April 2017, the Bank responded to a request from AUSTRAC (made on 1 March 2017) for further information in relation to two matters arising from the Bank's responses to the first and third statutory notices in respect of the account monitoring failure issue. In its request dated 1 March 2017, AUSTRAC requested:

> Please confirm the exact number of CBA profiles that were not picked up by FCP/Pegasus and the dates between which these profiles were not being picked up by FCP/Pegasus.

96 In response to that request, the Bank provided a table in its letter of 13 April 2017, which recorded that, in total, 778,370 accounts were affected:

Period account affected	Number of Affected Accounts not subject to relevant TM by maximum time impacted*
<1 month	54,357
1-3 months	164,920
4-6 months	75,685
7 to 12 months	140,143
13 to 24 months	269,549
25 to 36 months	73,716
TOTAL	**778,370**

Notes

*Maximum time an account was an Affected Account, calculated from the first time the account was impacted to the last time the account was impacted. The account may not have been impacted for the entire period (as an Affected Account profile may have self-corrected (ie the 'account description' field may have updated and not have been blank during the period)), and may have been impacted more than once.

97 In relation to that information, the primary judge made the following findings (at [499]):

> … the number of the accounts affected by the account monitoring issue varied over time. The numbers are given in the analysis undertaken in March/April 2017 and reported to AUSTRAC at that time. In its letter to AUSTRAC dated 13 April 2017, the Bank pointed out that, in respect of the affected accounts, the account monitoring failure was intermittent for periods that varied between one day and 36 months; not all employee-related accounts were affected by the issue; and approximately 25% of the affected accounts were inactive. The applicants do not challenge these facts.

98 On 23 June 2017, Mr Narev had a meeting with the Minister for Justice and Minister Assisting the Prime Minister on Counter Terrorism, the Honourable Michael Keenan. Mr Narev wanted to meet Mr Keenan prior to any further developments with AUSTRAC. In an email (which included Mr Craig and Ms Watson as recipients), Mr Narev described the meeting as "very valuable" and reported:

> … Key points are as follows:
>
> - The Minister is aware of Austrac's investigations
> - This is very much Austrac's process, ie he does not expect to have significant involvement
> - He has heard directly that Austrac considers us to have a partnership approach. He noted specifically that he was made aware that Catherine and I had made the effort to go and visit
> - In that sense it was considered a different type of issue than Tabcorp
> - Although of course there is currently a leadership change, he believes these views are shared by the level below Paul as well, ie the key acting leaders.
>
> Whilst of course this does not alter the seriousness with which we should take all this, nor remove the risk, it does show that the approach we are taking in our interactions is unquestionably the right one.

99 By 22 March 2017, Project Concord had reached the stage of formulating a communications strategy should AUSTRAC commence proceedings against the Bank, described as a "worst case scenario". The strategy was based on the events attending the Tabcorp proceeding. It also focused on AUSTRAC's investigation of the late TTR issue.

2.7.7 AUSTRAC commences proceedings against the Bank (3 August 2017)

100 At about 10.18 am on 3 August 2017, Mr Narev received a message that Mr Clark (at this time, the Acting CEO of AUSTRAC) needed to speak to him "quite urgently". Shortly after receiving the message, Mr Narev telephoned Mr Clark, who, according to Mr Narev, said:

> AUSTRAC is issuing civil proceedings against CBA in around 15 minutes. We will arrange service of the relevant court documents and this will be followed shortly after by a media release from AUSTRAC.

101 Mr Narev's response to Mr Clark was:

> This is exactly what you said you wouldn't do.

102 Mr Clark replied:

> I hope this doesn't harm the relationship AUSTRAC has with CBA.

103 The primary judge found that Mr Clark's message took Mr Narev (and the Bank) by surprise, in that AUSTRAC had informed the Bank on a number of occasions that it would give advance notice of any action it decided to take to enable the Bank to consider its position. No doubt, from the Bank's perspective, adequate notice would have provided it with the opportunity to make further representations to AUSTRAC.

104 At 12.26 pm on 3 August 2017, AUSTRAC posted a Tweet stating that it had "initiated civil penalty proceedings against CBA for serious non-compliance with AML/CTF Act". The Tweet linked to the following media release posted on AUSTRAC's website (**AUSTRAC's media statement**):

> **AUSTRAC seeks civil penalty orders against CBA**
>
> 3 August 2017
>
> Australia's financial intelligence and regulatory agency, AUSTRAC, today initiated civil penalty proceedings in the Federal Court against the Commonwealth Bank of Australia (CBA) for serious and systemic non-compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).
>
> AUSTRAC acting CEO Peter Clark said that this action follows an investigation by AUSTRAC into CBA's compliance, particularly regarding its use of intelligent deposit machines (IDMs).

> AUSTRAC's action alleges over 53,700 contraventions of the AML/CTF Act. In summary:
>
> - CBA did not comply with its own AML/CTF program, because it did not carry out any assessment of the money laundering and terrorism financing (ML/TF) risk of IDMs before their rollout in 2012. CBA took no steps to assess the ML/TF risk until mid-2015 - three years after they were introduced.
> - For a period of three years, CBA did not comply with the requirements of its AML/CTF program relating to monitoring transactions on 778,370 accounts.
> - CBA failed to give 53,506 threshold transaction reports (TTRs) to AUSTRAC on time for cash transactions of $10,000 or more through IDMs from November 2012 to September 2015.
> - These late TTRs represent approximately 95 per cent of the threshold transactions that occurred through the bank's IDMs from November 2012 to September 2015 and had a total value of around $624.7 million.
> - AUSTRAC alleges that the bank failed to report suspicious matters either on time or at all involving transactions totalling over $77 million.
> - Even after CBA became aware of suspected money laundering or structuring on CBA accounts, it did not monitor its customers to mitigate and manage ML/TF risk, including the ongoing ML/TF risks of doing business with those customers.
>
> Mr Clark said that today's action should send a clear message to all reporting entities about the importance of meeting their AML/CTF obligations.
>
> "By failing to have sound AML/CTF systems and controls in place, businesses are at risk of being misused for criminal purposes," Mr Clark said.
>
> "AUSTRAC's goal is to have a financial sector that is vigilant and capable of responding, including through innovation, to threats of criminal exploitation."
>
> "We believe this can be achieved by working collaboratively with and supporting industry. We will continue to work in this way with our industry partners who also share this aim and demonstrate a strong commitment to it."

As we have said, AUSTRAC's media statement included a link to the Concise Statement that AUSTRAC filed in this Court on that date.

105 The primary judge defined the cumulative information provided in AUSTRAC's Tweet, its media statement and the Concise Statement as the "**3 August 2017 announcement**". We refer to the combined package of AUSTRAC's 3 August 2017 Tweet, media statement and linked Concise Statement as the **3 August 2017 AUSTRAC announcement,** and will refer to **AUSTRAC's media statement** and the **Concise Statement** separately when discussing either part. The appeal proceeded on the basis that AUSTRAC's media statement was to be read with the Concise Statement.

106 It may be noted that AUSTRAC's media statement referred to five issues:

(a) the IDM ML/TF risk assessment non-compliance issue;

(b) the account monitoring failure issue;

(c) the late TTR issue (the third and fourth bullet points);

(d) the Bank's failure to report suspicious matters (either on time or at all) for transactions totalling over $77 million; and

(e) the Bank's failure to monitor customers even after becoming aware of suspected money laundering or structuring in respect of accounts held with the Bank.

107 While the first three issues formed part of Zonia and the Barons' case below, the fourth and fifth issues did not. As we go on to explain, the Concise Statement contained significant additional information, both in respect of the first three points, and the additional points. This is significant for the purposes of some of the issues on appeal, because it calls into question whether (as the appellants contend) the market's reaction to the commencement of the proceeding is representative of what would have happened if the Bank had disclosed the pleaded information.

108 The Concise Statement, which was set out in a Schedule to the Reasons, is relevant to some of the issues raised by the appeal. In particular, again, it calls into question whether the market's reaction to the commencement of the proceeding is representative of what would have happened if the Bank had disclosed the pleaded information.

109 The primary judge noted that, even though Mr Clark had told Mr Narev after 10.18 am on 3 August 2017 that AUSTRAC would be commencing proceedings, the Concise Statement had, in fact, been lodged with the Court for filing at 9.39 am on that day. In other words, AUSTRAC had taken steps to commence enforcement proceedings seeking pecuniary penalties against the Bank without prior warning or, indeed, the advance notice that AUSTRAC said that it would give to the Bank when it had arrived at a decision as to the action, if any, it intended to take. Contrary to the expectation that AUSTRAC had engendered, the Bank did not have an opportunity to consider its position in relation to AUSTRAC's decision. The primary judge stated that that consideration would have included whether steps could, or should, be taken by the Bank to attempt to dissuade AUSTRAC from taking its chosen course.

110 On 3 August 2017, the Bank issued the following media release:

> Commonwealth Bank today acknowledges that civil proceedings have been brought by the Australian Transaction Reports and Analysis Centre (AUSTRAC). The proceedings relate to deposits made through our Intelligent Deposit Machines from

2012.

> We have been in discussions with AUSTRAC for an extended period and have cooperated fully with their requests. Over the same period we have worked to continuously improve our compliance and have kept AUSTRAC abreast of those efforts, which will continue.
>
> We take our regulatory obligations extremely seriously and we are one of the largest reporters to AUSTRAC. On an annual basis we report over four million transactions to AUSTRAC in an effort to identify and combat any suspicious activity as quickly and efficiently as we can.
>
> We have invested more than $230 million in our anti-money laundering compliance and reporting processes and systems, and all of our people are required to complete mandatory training on the Anti-Money Laundering and Counter-Terrorism Financing Act.
>
> Money laundering undermines the integrity of our financial system and impacts the Australian community's safety and wellbeing. We will always work alongside law enforcement, intelligence agencies and government authorities to identify, disrupt and prevent this type of activity.
>
> We are reviewing the nature of the proceedings and will have more to say on the specific claims in due course.

The applicants' pleadings define the 3 August 2017 AUSTRAC tweet and media statement and the Bank's media release as the "**3 August Corrective Disclosure**". We adopt that definition.

111 The primary judge considered it noteworthy that the Bank's media release referred to AUSTRAC's action against it as relating to "deposits made through our Intelligent Deposit Machines from 2012". The primary judge observed that the proceeding commenced by AUSTRAC against the Bank concerned non-compliance that was far more extensive than the late TTR issue.

2.8 Zonia and the Barons' shareholdings

112 As at 3 August 2017, Zonia held 17,213 CBA shares. It had acquired 718 of those shares on 18 September 2015 under the Bank's dividend reinvestment plan (**DRP**). Notwithstanding the 3 August 2017 announcement, Zonia continued to hold its shares. On 16 August 2017, within two weeks of the announcement, it purchased 593 PERLS IX hybrid securities (subject to a mandatory exchange for CBA shares in 2024) for $60,248.80. Further, on 17 August 2017, Zonia elected to participate in the Bank's DRP under which it was allotted 522 CBA shares for a payment of $39,531.06. Zonia did sell some of its CBA shares on 29 September 2017, along with some of its PERLS IX hybrid securities on 11 October 2017. The reason for these disposals was not explained in the evidence below.

113 On 21 August 2014, 19 February 2015, and 20 August 2015, the Barons acquired shares under the Bank's DRP. On 18 September 2015, they acquired shares under the 2015 Entitlement Offer and, on 29 May 2017, they made an on-market acquisition of shares. As at 3 August 2017, their portfolio included 3,757 CBA shares. Notwithstanding the 3 August 2017 announcement, the Barons continued to hold those shares. It was not until 14 May 2019 that they made a relatively small divestment.

114 The primary judge stated that the evidence supported an inference that Zonia and the Barons were indifferent to the disclosures in the 3 August 2017 announcement and simply took no notice of it in relation to their holding and, in Zonia's case, further acquisition, of CBA shares. The primary judge considered that this supported an inference that Zonia and the Barons would also have been similarly indifferent to the disclosure of any of the pleaded forms of the information. The primary judge stated that, as Zonia elected not to call evidence from any officer of the company, and as the Barons elected not to give evidence, he could more safely draw, and did draw, those inferences: Reasons, [1229].

3 THE KEY RELEVANT PROVISIONS

115 The provisions of the *Corporations Act* are set out as at 3 August 2017 (based on the compilation prepared as at 1 July 2017).

116 It is uncontentious that at all relevant times the Bank:

(a) was included in the official list of the financial market operated by the ASX (i.e., listed on the ASX);

(b) had issued shares being "ED securities" (short for "enhanced disclosure securities") for the purposes of s 111AE of the *Corporations Act*, which shares were able to be acquired and disposed of by investors on the financial market operated by the ASX;

(c) was a "disclosing entity" within the meaning of s 111AC(1) and a "listed disclosing entity" within the meaning of s 111AL(1) of the *Corporations Act*.;

(d) was subject to and bound by the Listing Rules; and

(e) was by reason of the above matters and ss 111AP and/or 674(1) of the *Corporations Act*, an entity to which s 674(2) of the Act applied.

117 Section 674 of the *Corporations Act* relevantly provided:

674 Continuous disclosure—listed disclosing entity bound by a disclosure

requirement in market listing rules

Obligation to disclose in accordance with listing rules

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

118 Section 677 provided:

677 Sections 674 and 675—material effect on price or value

For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

119 The relevant provisions of the Listing Rules as set out in these reasons are from the compilation provided by the parties in the joint bundle of authorities. Rules 3.1 and 3.1A provided:

General rule

3.1 Once an entity is or becomes [+]aware of any [+]information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's [+]securities, the entity must immediately tell ASX that information.

Note: Section 677 of the Corporations Act defines material effect on price or value. As at 1 May 2013 it said for the purpose of sections 674 and 675 a reasonable person would be taken to expect information to have a material effect on the price or value of

securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the first mentioned securities.

…

Exception to rule 3.1

3.1A Listing rule 3.1 does not apply to particular [+]information while each of the following is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

- It would be a breach of a law to disclose the information;
- The information concerns an incomplete proposal or negotiation;
- The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
- The information is generated for the internal management purposes of the entity; or
- The information is a trade secret; and

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.

The plus sign appearing before certain expressions indicates that the expression is defined in chapter 19 of the Listing Rules.

120 Chapter 19 (Interpretation and definitions) included:

Definitions

19.12 The following expressions have the meanings set out below.

…

aware	an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

…

information	for the purposes of Listing Rules 3.1 3.1B, information includes: (a) matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market; and (b) matters relating to the intentions, or likely intentions, of a person.

121 These provisions were considered in *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; 274 ALR 85 (***James Hardie***); *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; 245 FCR 402 (***Grant-Taylor***); *Crowley v Worley Limited* [2022] FCAFC 33; 293 FCR 438 (***Crowley (FC)***); and *Australia and New Zealand Banking Group Limited v Australian Securities and Investments Commission* [2024] FCAFC 128 (***ANZ v ASIC***).

4 THE PROCEEDINGS AT FIRST INSTANCE

4.1 Overview

122 The two proceedings at first instance were commenced under Pt IVA of the *Federal Court of Australia Act 1976* (Cth). The Zonia proceeding was commenced as an "open" class action. The Baron proceeding was commenced as a "closed" class action (whose Group Members were those who had signed a funding agreement with Therium Australia Limited at the commencement of that proceeding).

123 In the proceedings at first instance, the applicants alleged that the Bank breached its obligations of continuous disclosure under s 674(2) of the *Corporations Act* because, in the period between 16 June 2014 and 1.00 pm on 3 August 2017 (the "relevant period" for the purposes of the proceedings at first instance), it had certain information which it did not disclose to the market operated by the ASX. The applicants alleged that the Bank was required by Listing Rule 3.1 to disclose that information. They alleged, further, that, had that information (or a combination of it) been disclosed, it would have had a material effect on the market price of CBA shares.

124 The applicants alleged that, because the Bank did not comply with its continuous disclosure obligations as it should have done, CBA shares traded on the ASX at an artificially inflated price (i.e., at a price above the price that a properly informed market would have set). They contended that they acquired CBA shares in that inflated market and, as a consequence, paid too much for them. They sought to recover, by way of damages, the amount of that inflation or an amount referable to that inflation.

125 Relatedly, the applicants alleged that, throughout the relevant period (for the purposes of the proceedings at first instance), the Bank engaged in misleading or deceptive conduct on a continuous basis by publishing, and failing to correct or modify, various representations. Those representations included representations to the effect that the Bank had in place effective policies, procedures, and systems to ensure its compliance with relevant regulatory

requirements, and with its continuous disclosure obligations. That aspect of the case is not pursued on appeal and can be put to one side for present purposes.

126 Further, the applicants alleged that, in connection with a pro-rata renounceable entitlement offer of new CBA shares that was made to shareholders in September and October 2015 to raise $5 billion in capital, the Bank issued a cleansing notice that was defective within the meaning of the applicable provision, and which was not corrected as required by the applicable provision, of the *Corporations Act*. That aspect of the case is not pursued on appeal and can also be put to one side.

4.2 The pleaded information

127 The applicants' case at first instance relied on four groups or items of pleaded information. The labels used in the applicants' pleadings were as follows:

(a) the Late TTR Information – the applicants pleaded three forms of this information:

  (i) the "June 2014 Late TTR Information";

  (ii) the "August 2015 Late TTR Information"; and

  (iii) the "September 2015 Late TTR Information";

(b) the Account Monitoring Failure Information – three forms of this information were pleaded:

  (i) the "June 2014 Account Monitoring Failure Information";

  (ii) the "August 2015 Account Monitoring Failure Information";

  (iii) the "September 2015 Account Monitoring Failure Information";

(c) the IDM ML/TF Risk Assessment Non-Compliance Information – two forms of this information were pleaded:

  (i) the "June 2014 IDM ML/TF Risk Assessment Non-Compliance Information"; and

  (ii) the "August 2015 IDM ML/TF Risk Assessment Non-Compliance Information"; and

(d) the "Potential Penalty Information" – this item of pleaded information had only one form.

128 It is unnecessary for present purposes to set out the June 2014 Late TTR Information and the August 2015 Late TTR Information (as these are not relied upon on appeal). The *September 2015 Late TTR Information*, as pleaded, was:

> From around November 2012 to 8 September 2015:
>
> (a) CBA had failed to give TTRs on time for approximately 53,506 cash transactions of $10,000 or more processed through IDMs following the introduction of IDMs (**September 2015 Late TTRs**);
>
> (b) the September 2015 Late TTRs represented between approximately 80% and 95% of threshold transactions that occurred through CBA's IDMs during the period from November 2012 to September 2015;
>
> (c) the September 2015 Late TTRs had a total value of approximately $624.7 million dollars;
>
> (d) the September 2015 Late TTRs had not been lodged, at least in part because of a systems error which occurred in or around November 2012.
>
> (the **September 2015 Late TTR Information**).

129 It is unnecessary for present purposes to set out the June 2014 Account Monitoring Failure Information and the August 2015 Account Monitoring Failure Information (as these are not relied upon on appeal). The *September 2015 Account Monitoring Failure Information*, as pleaded, was:

> From around 8 September 2015 or shortly thereafter, CBA was aware (within the meaning of ASX Listing Rule 19.12) that from at least 20 October 2012 to 8 September 2015, CBA failed to conduct account level monitoring with respect to 778,370 accounts (the **September 2015 Account Monitoring Failure Information**).

130 It is unnecessary for present purposes to set out the June 2014 IDM ML/TF Risk Assessment Non-Compliance Information (as this is not relied upon on appeal). The *August 2015 IDM ML/TF Risk Assessment Non-Compliance Information*, as pleaded, was:

> Further or alternatively, from 11 August 2015, or shortly thereafter, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the **August 2015 IDM ML/TF Risk Assessment Non-Compliance Information**; namely that CBA had failed:
>
> (a) in the period prior to the roll-out of CBA's IDMs in May 2012, and between May 2012 and July 2015, to carry out any assessment of ML/TF Risk in relation to or including the provision of designated services through CBA's IDMs, as required to comply with CBA's AML/CTF Program; further or alternatively,
>
> (b) in the period since July 2015, to carry out an assessment of ML/TF Risk in relation to or including the provision of designated services through CBA's IDMs that followed the procedures in, and/or complied with the requirements of, CBA's AML/CTF Program.

During the appeal hearing, we were told that only paragraph (a) was pressed during the hearing below.

131 The *Potential Penalty Information*, as pleaded, was:

> From around 16 June 2014 or shortly thereafter, or alternatively 11 August 2015 or shortly thereafter, or alternatively 8 September 2015 or shortly thereafter, or alternatively 24 April 2017 or shortly thereafter, CBA was potentially exposed to enforcement action by AUSTRAC in respect of allegations of serious and systemic non-compliance with the AML/CTF Act, which might result in CBA being ordered to pay a substantial civil penalty (**Potential Penalty Information**).

132 The primary judge referred to the pleaded information collectively as the **Information**.

133 In closing submissions at trial, the applicants made clear that they did not rely on the Account Monitoring Failure Information and the IDM ML/TF Risk Assessment Non-Compliance Information in isolation from the Late TTR Information: see the Reasons at [901]. Further, the applicants allied their case on the materiality of the Potential Penalty Information with their case on the Late TTR Information: Reasons, [923].

4.3 The trial and the evidence

134 The hearing at first instance was lengthy, occupying a significant part of the period from 7 November 2022 to 14 December 2022. Many lay and expert witnesses gave evidence.

135 The primary judge summarised the evidence, and discussed evidentiary issues, at [14]-[48] of the Reasons.

136 Of particular relevance for the issues raised by the appeals is the expert evidence. It is convenient to identify the expert witnesses called by each side.

137 The applicants called expert evidence from:

(a) Professor Raymond da Silva Rosa, who is a Professor of Finance at the University of Western Australia's Business School;

(b) Mr Rowan Johnston, who has expertise in arranging, managing, underwriting, and advising on share issues and engaging with market participants via a corporate advisory role;

(c) Professor Peter Easton, who is the Notre Dame Alumni Professor of Accountancy and Director of the Center of Accounting Research and Education at the Mendoza College of Business at the University of Notre Dame in the United States of America; and

(d) Mr Howard Elliot, who has expertise in the design and development of IT systems.

138 The Bank called expert evidence from:

(a) Dr Sanjay Unni, who is a former academic with more than 30 years' experience in economics and financial analysis;

(b) Mr Mozammel Ali, who is a former investment banker with more than 25 years' experience in the financial services industry;

(c) Mr David Singer, who is a former investment banker with more than 25 years' experience; and

(d) Mr Shane Bell, who is a partner of McGrathNicol, a technology and cybersecurity expert, and a certified computer examiner.

139 The primary judge found each expert to be a satisfactory witness whose analysis and opinions provided assistance in elucidating the issues before the Court that were within his field of expertise: Reasons, [48].

5 THE PRIMARY JUDGE'S REASONS

5.1 General matters

140 After making factual findings, the primary judge outlined the applicants' continuous disclosure case and outlined his approach to the applicants' pleadings. We set out this section of the Reasons in full, as it is relevant to some of the issues raised in the appeals. The primary judge stated:

> **The significance of the applicants' pleading**
>
> 382 A contravention of s 674(2) of the Corporations Act must be "finally and precisely" pleaded and the party making the allegations must "identify the case it seeks to make … clearly and distinctly": *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627 (***Cruickshank***) at [120]; see also *TPT Patrol Pty Ltd, as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747; 140 ACSR 38 (***TPT Patrol***) at [1121]. This is a matter that I emphasised when dealing with the Bank's objection to an earlier form of the statement of claim: *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2018] FCA 659 at [24].
>
> 383 The applicants' pleaded case proceeds on the basis that the pleaded forms of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information—which I will call, collectively, the **Information** (as did the expert witnesses)—set the metes and bounds of the information that the Bank was obliged to disclose, and should have disclosed, to the ASX.

384 The Bank specifically canvassed this matter in correspondence with the applicants, who confirmed that the precise form of the information they contend that the Bank should have disclosed to the ASX was the information defined by the terms of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information as pleaded in the statement of claim.

385 Therefore, in the case of each of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information, it can be taken that: **(a) all the integers pleaded by the applicants, for each form of the Information, are necessary to identify the information that the applicants say the Bank should have disclosed to the ASX and are an inseparable part of that information, and that (b) each pleaded form is a complete statement of the information that the applicants say should have been disclosed.**

386 In closing submissions, the applicants deviated from the course they had set by contending, in the context of submissions directed to the June 2014 Late TTR Information, that:

> … if the Court were to find … that components of the June 2014 Late TTR Information … did not exist, or … [were] for some reason not required or apt to be disclosed to the ASX, the resultant exercise for the Court would involve determining the effects and consequences of, and in particular the quantum of loss caused by, CBA's failure to disclose the components of the June 2014 Late TTR Information in the remaining sub-paragraphs, being those components of the June 2014 Late TTR Information that did exist or were apt to be disclosed.

387 They also submitted that if the disclosure of further, contextual information is necessary to make the pleaded information complete, it was not their task to supply that information as part of their case under s 674(2) of the Corporations Act, so long as the pleaded information was otherwise material: T 1198, line 13 – 1199, line 8.

388 I do not accept that it is the task of the Court, in a case such as the present, to refashion a plaintiff's pleaded case to define, to its own liking, the information that, arguably, should have been disclosed by a defendant. The task of the Court is to adjudicate upon a pleaded case, not to plead the case itself.

389 Nor do I accept that it is the task of a defendant to refashion a plaintiff's pleaded case. **The defendant may, in its defence, identify omissions from the pleaded information which go to the materiality of that information and whether the defendant is required to disclose the information in its pleaded form. It remains, nevertheless, the plaintiff's onus to plead, completely, the information which, it says, the market operator required to be disclosed**: see s 674(1) of the Corporations Act. In the present case, this means information conforming to the requirements of r 3.1 of the ASX Listing Rules. I discuss some of these requirements in a later section of these reasons at [568] – [572] below.

390 To adopt the approach advocated by the applicants would not only create the potential for procedural unfairness, but also the potential to create confusion and disorder in the conduct of the proceeding, particularly where the expert evidence has been prepared and adduced in a form which is directed to the

plaintiff's pleaded case.

> 391 In the present case, I do not accept, for example, that the Court should embark on its own course to select parts of the pleaded forms of the Information that it finds to be material to determine for itself, in the absence of appropriate evidence, the likely market effects and consequences of those parts or, in the absence of appropriate evidence, to determine for itself whether those parts were, in and of themselves, productive of actual loss. In any event, as I will later explain, the evidence in respect of the event study on which the applicants rely to establish the existence and quantum of their alleged loss makes clear that the task they now advocate cannot be performed on the basis of that study.

(Emphasis added.)

141 The primary judge then dealt with the issues raised by the proceedings under the following headings:

(a) Was the Bank "aware" of the relevant information? (at [392]-[567]);

(b) The completeness and accuracy of the pleaded information (at [568]-[631]);

(c) The Rule 3.1A exception (at [632]-[649]);

(d) Materiality (at [650]-[1031]);

(e) The case on misleading or deceptive conduct (at [1032]-[1097]);

(f) The 2015 cleansing notice (at [1098]-[1119]);

(g) The case on causation and loss (at [1120]-[1245]); and

(h) Damages (at [1246]-[1258]).

142 As already noted, the appellants do not pursue on appeal the parts of their case relating to misleading or deceptive conduct or the 2015 cleansing notice. The parts of the Reasons dealing with those issues can therefore be put to one side for present purposes. Further, the appellants do not press on appeal certain forms of the pleaded information. The parts of the Reasons dealing with those forms of the pleaded information can also be put to one side. In the following summary of the primary judge's findings, we will focus on those parts that are relevant for the purposes of the appeals.

5.2 Was the Bank "aware" of the relevant information?

5.2.1 Late TTR Information

143 The primary judge first dealt with the awareness issue in relation to the *Late TTR Information*. For present purposes, it is sufficient to focus on the part of the Reasons dealing with the *September 2015 Late TTR Information*, as the other forms of the Late TTR Information are not pressed on appeal.

144 The September 2015 Late TTR Information, as pleaded, has been set out above (at [128]). The applicants pleaded that the Bank was aware of that information as at 8 September 2015 (or shortly thereafter), alternatively as at 24 April 2017. As set out above, the primary judge approached the issue on the basis that it was necessary for the applicants to show that the Bank was aware of *all* the integers pleaded by the applicants, for each form of pleaded information: Reasons, [385].

145 The primary judge was satisfied that the Bank was aware of integers (a) and (d) as at 8 September 2015 (or shortly thereafter): Reasons, [465]-[466]. The primary judge appears to have been satisfied also in relation to integer (c): Reasons, [474]. However, he was not satisfied that the Bank was aware of integer (b) as at September 2015: Reasons, [476]. Integer (b) is as follows:

> (b) the September 2015 Late TTRs represented between approximately 80% and 95% of threshold transactions that occurred through CBA's IDMs during the period from November 2012 to September 2015;

146 The primary judge found that the Bank only became aware of that information on about 22 January 2016, when that information was ascertained internally in response to a request for information from AUSTRAC: Reasons, [474]-[476].

147 The primary judge found that the Bank was aware of the September 2015 Late TTR Information as at 24 April 2017: Reasons, [477].

5.2.2 Account Monitoring Failure Information

148 The primary judge next dealt with the Account Monitoring Failure Information. For present purposes, it is sufficient to focus on the primary judge's findings in relation to the *September 2015 Account Monitoring Failure Information*.

149 The primary judge was not satisfied that the Bank was "aware" of the September 2015 Account Monitoring Failure Information as at 8 September 2015 (or shortly thereafter): Reasons, [489], [493]. The pleaded information referred to a failure to conduct account level monitoring with respect to 778,370 accounts. The primary judge found (at [494]) that the figure of 778,370 accounts appeared to have been obtained from the Bank's letter to AUSTRAC on 13 April 2017, in response to a request from AUSTRAC for information. In that letter, the Bank provided a table that included the 778,370 figure: Reasons, [495]. The primary judge stated that there was no evidence that persuaded him that that figure was known to employees of the Bank earlier than somewhere between 1 March and 13 April 2017: Reasons, [496].

150 The primary judge found that the Bank was aware of the September 2015 Account Monitoring Failure Information as at 24 April 2017: Reasons, [501].

5.2.3 IDM ML/TF Risk Assessment Non-Compliance Information

151 For present purposes, it is sufficient to focus on the primary judge's findings in relation to the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information.

152 The primary judge found that, as at 26 October 2015 (which he was prepared to accept was "shortly after" 8 September 2015), the Bank was constructively aware of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information: Reasons, [531].

5.2.4 Potential Penalty Information

153 As noted above, there is only one form of this pleaded information. The primary judge approached the issue of the Bank's awareness of this information on the basis that the applicants had "firmly anchored" this aspect of their case on the Bank's awareness of the other pleaded forms of information, namely the Late TTR Information, the Account Monitoring Failure Information and the IDM ML/TF Risk Assessment Non-Compliance Information: Reasons, [557]. The primary judge stated at [558]:

> In other words, the Bank's "awareness" of the Potential Penalty Information depends, fundamentally, on the applicants establishing the Bank's "awareness" of the other pleaded categories of the Information. It is from this "awareness" that the applicants say that the Bank was also "aware" that it was "potentially" exposed to enforcement action by AUSTRAC which "might" result in the Bank being ordered to pay a substantial civil penalty (the "serious and systemic non-compliance with the AML/CTF Act" being evident with respect to each pleaded form of the Late TTR Information and each pleaded form of the Account Monitoring Failure Information, and the "serious non-compliance with the AML/CTF Act" also being evident with respect to each pleaded form of the IDM ML/TF Risk Assessment Non-Compliance Information).

154 It followed that, to the extent that the primary judge was not satisfied that the Bank was aware of the other forms of pleaded information at the pleaded dates, he was also not satisfied that the Bank was aware of the Potential Penalty Information: Reasons, [559]-[560]. The primary judge then went on to consider whether the Bank was aware of the Potential Penalty Information to the extent that it related to the forms of pleaded information in respect of which he had found awareness.

155 As noted above, the primary judge was satisfied that the Bank was constructively aware, shortly after 8 September 2015, of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information. However, the primary judge was not satisfied that the Bank was aware of the

Potential Penalty Information to the extent that it related to the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information. This was because the applicants had not alleged that the relevant failure (taken alone) was "systemic" non-compliance, as referred to in the definition of "Potential Penalty Information": Reasons, [561].

156 The primary judge was satisfied that, as at 24 April 2017, the Bank was "aware" of the Potential Penalty Information to the extent that it related to the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information: Reasons, [565]. To that extent, the applicants had established their case on "awareness" of the Potential Penalty Information.

5.2.5 Summary of "awareness" conclusions

157 In summary, the primary judge concluded that:

(a) as at 24 April 2017, the Bank was aware of the September 2015 Late TTR Information: Reasons, [477];

(b) as at 24 April 2017, the Bank was aware of the September 2015 Account Monitoring Failure Information: Reasons, [501];

(c) shortly after 8 September 2015, the Bank was constructively aware of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information: Reasons, [531];

(d) as at 24 April 2017, the Bank was aware of the Potential Penalty Information to the extent that it related to the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information: Reasons, [565].

5.3 The completeness and accuracy of the pleaded information

158 The primary judge considered, as a threshold issue, whether the pleaded information was complete and accurate. The primary judge explained his approach at [568]:

> Before proceeding to consider questions of materiality, particularly in relation to the information of which the Bank was "aware", **it is appropriate to consider whether the information** (which the applicants contend should have been disclosed) **was information that was appropriate to be disclosed in its pleaded form**. In this regard, I refer to my previous remarks concerning the applicants' onus to plead, completely, the information which, they say, the ASX required the Bank to disclose under r 3.1 of the ASX Listing Rules.
>
> (Emphasis added.)

The reference to the primary judge's previous remarks was evidently to the passage at [382]-[391] (which we have set out above (at [140]).

159 One of the important issues raised by the appeals is whether the primary judge erred in considering the question of completeness and accuracy as a threshold issue, rather than considering it as part of the materiality analysis.

160 The primary judge referred, at [569]-[570], to the ASX's Guidance Note 8, which emphasised that an announcement under Listing Rule 3.1 must be "accurate, complete and not misleading" and the need for the information to be looked at in context. His Honour also referred to *Jubilee Mines NL v Riley* [2009] WASCA 62; 40 WAR 299 (***Jubilee Mines***), at [87]-[88] per Martin CJ and at [161]-[162] per McLure JA.

161 The primary judge noted, at [574], the Bank's contention that the pleaded forms of the Information were incomplete or ambiguous in many respects. His Honour then considered the detail of the Bank's submissions regarding the completeness and accuracy of the pleaded forms of the Information.

5.3.1 Late TTR Information

162 In relation to the Late TTR Information, the primary judge found that the Late TTR Information, in all its pleaded forms, was incomplete in a number of important respects and omitted a number of important contextual matters: Reasons, [584]. The primary judge's core reasoning included:

> 584 Proceeding on the basis that investors must be put in a position that allows them the opportunity to assess the value of disclosed information for the purpose of making an investment decision, I am persuaded that the Late TTR Information, in all its pleaded forms, is incomplete in a number of important respects and omits a number of important contextual matters. **I am persuaded that had the Bank disclosed that information in its various pleaded forms to the ASX without more information, a misleading picture would have been presented to the market.** I am not persuaded, therefore, that the Bank was obliged to disclose, and should have disclosed, the Late TTR Information in any of its pleaded forms.
>
> 585 I accept that if the proportion of late TTRs in the pleaded periods (expressed as a percentage of all the threshold transactions that occurred through the Bank's IDMs in those periods) is relevant to making an investment decision, then **it is equally relevant, and important, for investors to know the relationship of this proportion to the total number of TTRs that the Bank did, in fact, lodge in that period**. Without this information, the Late TTR Information would likely lead ordinary and reasonable investors into thinking, mistakenly, that threshold transaction monitoring relates only to IDMs or that IDMs are the principal source for monitoring threshold transactions when, in fact, neither proposition is true. By way of example, an article published in The Australian newspaper on 3 August 2017 (see [875] – [876] below) erroneously reported that "(t)he total number of late reports accounted for 95 percent of all notifiable transactions between 2012, when the bank launched its new

"intelligent" ATMs, and September 2015, but were not reported to Austrac until that final month". As I have noted, in the relevant period, the Late TTRs represented only between 1.08% and 2.3% of the total TTRs lodged by the Bank: see para 40B(e) of the defence. Without such information, the scale of the problem presented by the late TTR issue cannot be seen in the context of the Bank's overall extensive threshold transaction monitoring activities.

586 The Bank submits:

> 360. It is from one perspective understandable why the Applicants have sought to focus on only the proportion of TTRs through IDMs that the late TTRs made up. By so doing, they artificially inflate the significance of the late TTRs to CBA's business operations, and to its compliance systems as a whole. But there is no principled basis that would support such an approach. It stands to reason that an investor would wish to place the late TTRs within the broad scope of CBA's business. It is, after all, a part of that broad business into which an investor was buying when they purchased CBA shares. Yet, on the Applicants' approach they would not only be denied such information, but instead pointed to other information that inflated the numerical significance of the late TTRs. This could only mislead as to the significance of that information.

587 I accept that submission.

588 I also accept that if it is relevant to making an investment decision that the cause of the late TTRs was a systems error, it is equally important for investors to know that the error was a single coding error, not multiple errors permeating the Bank's systems and affecting more generally its ability to monitor transactions: see paras 40, 40A, and 40B of the defence.

…

591 With respect to the September 2015 Late TTR Information, I also accept that **it would be misleading to omit any reference to: (a) the cause of the late TTRs having been rectified; and (b) the fact that the late TTRs had been lodged**. The omission of these facts is important. Without that information, investors would likely be left with the wholly false impression that the problem had not been rectified and was ongoing, with no apparent solution in sight for past and present TTR reporting in respect of deposits made through the Bank's IDMs.

592 The significance of this omission is highlighted by the applicants' own expert, Mr Johnston …

593 **Finally, I accept that a significant omission from the September 2015 Late TTR Information (as it applies to the Bank's "awareness" pleaded as at 24 April 2017) is any reference to AUSTRAC's then known position as to the Bank's failure and whether, and if so what, action it proposed to take on account of that failure**.

594 As at 24 April 2017, there had been discussions between the Bank and AUSTRAC. AUSTRAC had told the Bank that it had a number of options at its disposal should it decide to take enforcement action because of the Bank's AML/CTF non-compliance. AUSTRAC had told the Bank that it had not made a decision as to whether it would take enforcement action against the Bank or

> as to the form of any such action. Further, AUSTRAC had informed the Bank that it would provide it with notice before taking any such action. This was in the context of the Bank having informed AUSTRAC of the late TTR issue on 8 September 2015 (after being prompted by a request from AUSTRAC to locate TTRs relating to "two ATM deposits"), some 19 months earlier.
>
> 595 Armed with the September 2015 Late TTR Information, and nothing more, the reasonable investor would be prompted to ask: Why am I being told this? What is the significance, and what are the consequences for the Bank, of not lodging the Late TTRs on time? In this scenario, the regulator's then known attitude to the problem is highly significant information for investor decision-making. And, as to this, I do not think that the reasonable investor is concerned with mere theoretical possibilities. The reasonable investor wants meaningful information on the significance and consequences of what he or she is being told in order to make an informed and rational decision on whether to acquire or dispose of securities.
>
> (Emphasis added.)

163 It can be seen that the primary judge relied on five matters in concluding that the September 2015 Late TTR Information was incomplete and in some respects misleading:

(a) given the pleaded information included the proportion that the late TTRs represented out of the total number of threshold transactions occurring through the Bank's IDMs during the period November 2012 to September 2015 (between 80% and 95%), the omission of the proportion that the late TTRs represented out of the total number of TTRs that the Bank did in fact lodge in that period (between 1.08% and 2.3%);

(b) given the pleaded information referred to the cause being a "systems error", the omission of reference to the error being a single coding error;

(c) the pleaded information omitted reference to the fact that the cause of the late TTRs had been rectified;

(d) the pleaded information omitted reference to the fact that the TTRs had been lodged; and

(e) considering the matter as at 24 April 2017 (being the date when, the primary judge found, the Bank had awareness of the information), the pleaded information omitted any reference to AUSTRAC's then known position.

5.3.2 Account Monitoring Failure Information

164 The primary judge stated that he was not persuaded that the Bank was obliged to disclose, and should have disclosed, the Account Monitoring Failure Information in any of its pleaded forms: Reasons, [602]. The primary judge reasoned:

603 I am satisfied that the Account Monitoring Failure Information, as pleaded, **conveys the misleading impression that, throughout the entirety of each pleaded period, the Bank failed to monitor the stipulated number of accounts**. **This is factually incorrect**, for the reason I have explained at [499] above: the account monitoring failure was intermittent for periods that varied between one day and 36 months.

…

605 These inaccuracies are reason enough to conclude that it would not have been appropriate for the Bank to disclose the Account Monitoring Failure Information as pleaded.

606 **I am also persuaded, however, that the Account Monitoring Failure Information is incomplete in a number of respects.** If the fact that the Bank failed to conduct account level monitoring in respect of a numerically large number of accounts is relevant to making an investment decision, then it is equally relevant, and important, for investors to know: (a) the context in which that occurred (it was a specific subset of accounts related to a single error); (b) the extent of the problem (a large number of the accounts were, in fact, inactive at the time and some were only affected for a short period of time); and (c) the implications that the problem had for the Bank's overall monitoring activities (it did not mean that there was a complete absence of monitoring transactions in respect of those accounts). **I accept that the absence of this information also means that the Account Monitoring Failure Information paints a misleading picture**.

(Emphasis added.)

5.3.3 IDM ML/TF Risk Assessment Non-Compliance Information

165 The primary judge stated that he was not persuaded that the Bank was obliged to disclose, and should have disclosed, the IDM ML/TF Risk Assessment Non-Compliance Information in any of its pleaded forms: Reasons, [614]. The primary judge reasoned:

614 I am not persuaded that the Bank was obliged to disclose, and should have disclosed, the IDM ML/TF Risk Assessment Non-Compliance Information in any of its pleaded forms. **I accept that the information that would be so conveyed is materially incomplete and, for that reason, misleading**. If the fact that the Bank's failure to carry out a formal and separate risk assessment in respect of its IDMs before their roll out in May 2012, or in the period May 2012 to July 2015, is relevant to making an investment decision, **then it is equally relevant, and important, for investors to know the consequences of that failure—namely, that there were no known consequences**.

615 The IDM ML/TF Risk Assessment Non-Compliance Information is conspicuously silent on this matter. In these proceedings, there is no evidence before me that the Bank's failure to carry out a formal and separate risk assessment of IDMs before July 2015 had any direct consequences. The applicants certainly do not point to any consequences, apart from the simple fact that the Bank had not complied with its AML/CTF Program.

616 The late TTR issue, for example, cannot be attributed to the failure to carry out a risk assessment. The late TTR issue was caused by a coding error, in circumstances where the Bank understood (as expressed through its business

requirements document for IDMs) that threshold transaction and other monitoring were mandatory requirements of the IDM roll out project and transaction monitoring rules were in place.

617 Without making clear that there were no known consequence of failing to carry out a formal and separate risk assessment on IDMs before their roll out in May 2012, or in the period May 2012 to July 2015, the IDM ML/TF Risk Assessment Non-Compliance Information is incomplete and liable to mislead investors as to the significance of that information for the purposes of their decision-making in relation to acquiring or disposing of CBA shares.

(Emphasis added.)

5.3.4 Potential Penalty Information

166 The primary judge was not persuaded that the Bank was obliged to disclose, and should have disclosed, the Potential Penalty Information: Reasons, [626]. After setting out the Bank's submissions, the primary judge reasoned:

627 Taken by itself, I accept that the Potential Penalty Information is vague and imprecise in the ways that the Bank contends. Because it is expressed in such high level, contingent, and inconclusive language, I accept that, if it were to be disclosed, the Potential Penalty Information would likely raise the kinds of questions that the Bank rehearses in its submissions.

628 Further, I accept that the Potential Penalty Information's deployment of the statement "allegations of serious and systemic non-compliance with the AML/CTF Act" begs the question: what non-compliance? This is another example of the vague and imprecise nature of the Potential Penalty Information.

629 **For these reasons, I consider that the Potential Penalty Information, taken by itself, would more likely confuse, rather than inform, investors.**

630 However, as I have noted, the applicants' "awareness" case in respect of the Potential Penalty Information is, as a matter of pleading, anchored on the Bank's alleged "awareness" of the various pleaded forms of the Late TTR Information and the Account Monitoring Failure Information (recognising that the IDM ML/TF Risk Assessment Non-Compliance Information is not alleged to have been "systemic" non-compliance). So understood, **the Potential Penalty Information suffers the inaccuracies and deficiencies of those pleaded forms of the Information**.

5.3.5 Conclusions on completeness

167 The primary judge therefore concluded, in relation to all four categories of pleaded information, that he was not satisfied that Listing Rule 3.1 required the Bank to disclose that information in that form to the ASX: Reasons, [631]. This meant that the applicants' case failed before one even considered the "materiality" of the pleaded information: Reasons, [650].

5.4 The Rule 3.1A exception

168 The primary judge was not satisfied that the rule 3.1A exception applied to any of the pleaded forms of information: Reasons, [639]. This was because the primary judge was not satisfied that any of the forms of the pleaded information were confidential within the meaning of rule 3.1A.2; absent satisfaction on that matter, rule 3.1A could not apply.

5.5 Materiality

5.5.1 General matters

169 As the primary judge explained at [650]-[651], the conclusion that he reached in relation to the completeness and accuracy of the information meant that the applicants' case failed before one even considered the "materiality" of that information. Nevertheless, the primary judge went on to consider that issue.

170 His Honour first considered the applicable principles, referring to *Grant-Taylor* at [96], [98]-[100], [115]-[116]; *Australian Securities and Investments Commission v Vocation Limited (in liq)* [2019] FCA 807; 136 ACSR 339 (***Vocation***) at [553]; *James Hardie* at [349], [454], [527]; *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; 265 FLR 247 (***Pathway***) at [87]-[88], [90]; *Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* [2020] FCA 1442; 389 ALR 17 at [240]; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; 264 ALR 201 (***ASIC v Fortescue***) at [477]. In relation to contextual material, the primary judge stated at [663]:

> In assessing materiality, it is not permissible to divorce the information from its context: *Jubilee Mines* at [88] and [161] – [162]. In *Cruickshank* at [124], the Full Court approved the following observation by Nicholas J in *Vocation* at [566] in relation to the approach to be taken in determining the materiality of given information:
>
> > 566 Properly understood, *Jubilee* is authority for the proposition that information that is alleged by a plaintiff to be material, may need to be considered in its broader context for the purpose of determining whether it satisfies the relevant statutory test of materiality. For that reason it will often be necessary to consider whether there is additional information beyond what is alleged not to have been disclosed and what impact it would have on the assessment of the information that the plaintiff alleges should have been disclosed. The judgment of the Court of Appeal in *James Hardie* … is authority for the same general proposition.

171 Commencing at [665], the primary judge considered the topic of investor decision-making referring to the expert evidence of Professor da Silva Rosa, Mr Johnston and Mr Singer.

5.5.2 Materiality: the submissions and evidence

172 The primary judge next outlined and discussed the parties' submissions and the evidence in relation to the materiality of each item of pleaded information, namely:

(a) the Late TTR Information (at [710]ff);

(b) the Account Monitoring Failure Information and the IDM ML/TF Risk Assessment Non-Compliance Information (considered together) (at [901]ff); and

(c) the Potential Penalty Information (at [923]ff).

173 The most detailed of those sections was that concerned with the Late TTR Information. Parts of that discussion are relevant for all forms of the pleaded information.

174 We note, in particular, the primary judge's summary of the positions of the experts as regards AUSTRAC's 3 August 2017 announcement. In summary: Professor da Silva Rosa considered that each form of the pleaded information was "economically equivalent" to the information in the 3 August 2017 announcement; the primary judge considered Mr Johnston's position to be generally similar; the other experts (Mr Ali, Mr Singer and Dr Unni) disagreed with the proposition that the 3 August 2017 announcement was economically equivalent to the pleaded information.

175 In relation to Professor da Silva Rosa's evidence, the primary judge stated at [736]-[737]:

> 736 It is important to emphasise two matters here. First, Professor da Silva Rosa considered that the 3 August 2017 announcement would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. Secondly, he reasoned that the elements of the announcement that would have that influence did not convey anything more material than the cumulative effect of the pleaded forms of the Information. In this regard, **he said that the material elements of the 3 August 2017 announcement, and the pleaded forms of the Information that the applicants say the Bank should have disclosed, were "economically equivalent"**. Professor da Silva Rosa said that two sets of information will be "economically equivalent" when the information conveys the same implications as to risk and expected cash flows.
>
> 737 It is important to understand that Professor da Silva Rosa considered each of the pleaded forms of the Information would lead investors to infer that the Bank had been substantially and systematically deficient in its compliance with its requirements under the AML/CTF Act and that this would then lead to investors making the assessment and estimations I have noted above. On this reasoning, **Professor da Silva Rosa considered that "each species of information was economically equivalent to each other species of information" and that "each species of information was economically equivalent to" the 3 August 2017 announcement**. As Professor da Silva Rosa also put it, each of these forms of information (including the

> 3 August 2017 announcement) "conveyed the same value-relevant implications to investors".
>
> (Emphasis added.)

176 In relation to Mr Johnston's evidence, the primary judge set out (at [743]) question 1 in Mr Johnston's report (which referred to the pleaded information and an additional item of information that was not pressed at trial) and then stated at [744]:

> In cross-examination, Mr Johnston volunteered that, in preparing his reports, **he assumed for the purpose of assessing materiality that *all* the information identified in this question was disclosed**, not just the Late TTR Information. He said that he was "hesitant to try and break out one of the five components in my head and give the court a considered opinion".
>
> (Bold emphasis added.)

177 After referring to other aspects of Mr Johnston's evidence, the primary judge also stated (at [754]):

> **From this evidence, I understand Mr Johnston to say that each pleaded form of the Late TTR Information was (to use Professor da Silva Rosa's expression) "economically equivalent" to the 3 August 2017 announcement.** Therefore, had each pleaded form of the Late TTR Information been disclosed at the time when the applicants say it should have been disclosed, the market's reaction to the disclosure would not have been materially different to the market's reaction to the 3 August 2017 announcement.
>
> (Emphasis added.)

178 At [768], the primary judge stated, in relation to Mr Ali's evidence:

> … Mr Ali did not consider that the fact that AUSTRAC had commenced proceedings was "economically equivalent" to the pleaded forms of the Information because **the fact that AUSTRAC had commenced proceedings** was not an integer of that information.
>
> (Emphasis added.)

179 In relation to Mr Singer's evidence, the primary judge stated:

> 789 From an investor's perspective, Mr Singer considered the "key components" of the 3 August 2017 announcement to be that:
>
> (a) AUSTRAC had commenced proceedings against the Bank (the most serious of the options available to AUSTRAC);
>
> (b) AUSTRAC would be seeking penalties for a range of contraventions for an unspecified amount (creating uncertainty around the magnitude of the penalties given the pecuniary penalty awarded against Tabcorp was the only market benchmark); and that
>
> (c) AUSTRAC had made the statement that the Bank had become aware of suspected money laundering or structuring on its accounts but did not monitor its customer to mitigate and manage ML/TF risk (an

"aggressive" statement by the regulator bearing upon the level of the penalties to be imposed).

790 Mr Singer remarked that these "key components" were not part of the pleaded information.

…

792 For these reasons, Mr Singer did not consider the 3 August 2017 announcement to be economically equivalent to the pleaded forms of the Information.

180 In relation to Dr Unni's evidence, the primary judge stated at [821]:

> As to the analysts' reports, Dr Unni noted that Professor da Silva Rosa's treatment of the reports was based on the proposition that each of the pleaded forms of the Information was economically equivalent to the 3 August 2017 announcement. Dr Unni disputed that proposition. He said that the 3 August 2017 announcement was not economically equivalent to the pleaded forms of the Information. Indeed, he expressed the opinion that the 3 August 2017 announcement differed in economically significant ways from the pleaded forms of the Information, at least in the following ways.
>
> (a) the 3 August 2017 announcement represented the realisation of the risk that AUSTRAC would seek a pecuniary penalty against the Bank;
>
> (b) the 3 August 2017 announcement signified the materialisation of litigation, which the research evidence indicates is associated with operational harm and a reduction in the value of a company;
>
> (c) the 3 August 2017 announcement revealed information in the context of regulatory litigation, as compared to news voluntarily disclosed by the Bank;
>
> (d) the 3 August 2017 announcement was accompanied by negative media publicity due to the adversarial nature of the proceeding which AUSTRAC had commenced;
>
> (e) the 3 August 2017 announcement involved the increased likelihood of the forced removal of its CEO, which the research evidence indicates is associated with a decline in the market value of a company; and
>
> (f) the circumstances of the 3 August 2017 announcement raised the prospect of a Royal Commission, with potentially broader ramifications for the business prospects of the Bank.
>
> (Emphasis added.)

181 The primary judge discussed Mr Ali's beta analysis at [889]-[900]. The nature of this analysis was explained at [889]-[891]:

> 889 It will be recalled that Professor da Silva Rosa was of the opinion that investors would consider, or would be likely to consider, the Late TTR Information to be value-relevant, such as to lead them to infer that the Bank had been substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act. According to Professor da Silva Rosa, this would then lead investors to (amongst other things) upwardly revise their estimates of the Bank's operational risk with economically significant adverse

consequences. Based on his view of investor decision-making, Professor da Silva Rosa opined that, if expected cash flows and risk aversion remained unchanged, an increase (decrease) in investor perception of risk would cause security prices to decrease (increase).

890 To test this proposition, Mr Ali undertook an empirical analysis of the "riskiness of CBA's share price" as measured by its historical "beta" (the **beta analysis**). The "beta" of a share is the measure of its price volatility relative to the market's volatility.

891 Mr Ali analysed the historical price volatility of CBA shares (and of ANZ, NAB, and Westpac shares) relative to the volatility of all shares comprising the All Ordinaries Index, for the 24 month periods immediately preceding and immediately following the 3 August 2017 announcement. …

182 The outcome of Mr Ali's beta analysis was summarised by the primary judge at [891]-[892]:

891 … This analysis showed that the market perception of the "riskiness" of CBA shares did not increase following the 3 August 2017 announcement. Rather, it decreased.

892 Specifically, Mr Ali observed that the Bank's historical beta for the 24 month period immediately following the 3 August 2017 announcement was 9.9% lower than the Bank's historical beta for the 24 month period immediately preceding the announcement. This reduction was broadly in line with the reduction in the corresponding 24 month historical betas for ANZ and Westpac. The reduction in NAB's corresponding 24 month historical beta was greater …

5.5.3 Materiality: analysis

183 In the next section of the Reasons (commencing at [942]), the primary judge conducted his *analysis* of whether the pleaded information was material in the relevant sense.

184 The primary judge commenced his analysis with a consideration of the significance of the market reaction to the 3 August 2017 announcement. His Honour rejected the proposition (expressed in Professor da Silva Rosa's evidence) that the pleaded information was "economically equivalent" to the 3 August 2017 announcement. His Honour's reasons were as follows:

942 There can be no doubt that, following the 3 August 2017 announcement, the market price of CBA shares on the ASX fell. For present purposes, I shall proceed on the assumption that this price movement was caused by, and resulted from, the 3 August 2017 announcement itself.

943 Although the applicants' case on materiality is not dependent on my acceptance of Professor da Silva Rosa's evidence and Mr Johnston's evidence on that question, the applicants nevertheless rely on the evidence of both experts to support their case in this regard. As the market reaction to the 3 August 2017 announcement is fundamental to both Professor da Silva Rosa's and Mr Johnston's opinions on materiality, it is convenient to commence my analysis of the question of materiality with their evidence and

the significance that the 3 August 2017 announcement has to their evidence and the applicants' case.

944 Professor da Silva Rosa expressed the opinion that each pleaded form of the Late TTR Information, each pleaded form of the Account Monitoring Failure Information, each pleaded form of the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information, was "economically equivalent" to the 3 August 2017 announcement. As I have noted, Professor da Silva Rosa regarded two sets of information to be "economically equivalent" when they convey the same "implications" as to risk and expected cash flows. For Professor da Silva Rosa, the implication as to risk and expected cash flows of each pleaded form of the Information and the 3 August 2017 announcement was that the Bank had been substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act.

945 Subject to one significant qualification which I discuss below, Mr Johnston's opinion was to the effect that, if any of the pleaded forms of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, or the Potential Penalty Information were to have been disclosed when the applicants say it should have been disclosed, the market's reaction to the disclosure would not have been materially different to the market's reaction to the 3 August 2017 announcement.

946 These opinions are substantially the same in effect. I do not accept them.

947 First, **I do not accept that any of the pleaded forms of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, or the Potential Penalty Information, is equivalent, in any sense, to the information disclosed in the 3 August 2017 announcement**. Indeed, I am satisfied that the information conveyed by the 3 August 2017 announcement is materially, and significantly, different to the information conveyed by each of the pleaded forms of the Information or any combination of those pleaded forms.

948 As I have previously recorded, **the 3 August 2017 announcement comprised the cumulative information provided by AUSTRAC's Tweet, media release, and the Concise Statement. I have previously summarised the features of that information. There are obvious and notable differences in the content of the 3 August 2017 announcement and the discrete information conveyed by the pleaded forms** of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information, although elements of those various pleaded forms of the Information are contained within the 3 August 2017 announcement.

…

950 **The Potential Penalty Information is completely at variance with the 3 August 2017 announcement** in that the Potential Penalty Information is characterised by high level, contingent, and inconclusive language about the possibility of enforcement action and the possibility that AUSTRAC might seek a pecuniary penalty, whereas the 3 August 2017 announcement is the clearest possible statement that enforcement action had been taken by AUSTRAC and that that enforcement action *was* the commencement of proceedings against the Bank for pecuniary penalties, amongst other relief.

951 Secondly, as I have also noted, the 3 August 2017 announcement included AUSTRAC's significant public censure of the Bank's failings and the message that AUSTRAC wanted its action to be taken as a warning to other reporting entities. This adds an important, explicitly adverse quality to the 3 August 2017 announcement that is not present in the pleaded forms of the Information.

952 Thirdly, having reached these views, I do not accept that the pleaded forms of the Information would convey the same "value-relevant implications to investors" (to use Professor da Silva Rosa's expression) as the 3 August 2017 announcement.

185 The balance of the primary judge's analysis of the materiality issue was structured around a consideration of the evidence of the various experts. The primary judge first considered, and made findings in relation to, Professor da Silva Rosa's evidence. Then, the primary judge considered Mr Johnston's evidence. His Honour then considered the other evidence (including the evidence of other experts). Lastly, his Honour focussed on the materiality of the information of which the Bank was "aware" (based on his earlier findings as to awareness).

186 The primary judge did not accept Professor da Silva Rosa's opinion that the IDM ML/TF Risk Assessment Non-Compliance Information would lead persons who commonly invest in securities to infer that the Bank had been substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act: Reasons, [953]-[956]. This was particularly so when the pleaded forms of that information were considered in their proper context: Reasons, [954]. The primary judge said much the same considerations applied to the Late TTR Information and the Account Monitoring Failure Information: Reasons, [956]. In relation to the Late TTR Information, the primary judge did not accept Professor da Silva Rosa's opinion that this information would lead persons who commonly invest in securities to infer that the Bank had been substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act: Reasons, [957]. Again, the primary judge emphasised the need to consider the pleaded information in its proper context.

187 This section of the Reasons is important for the purposes of the appeal; we therefore set it out in full:

The Late TTR Information

957 Turning to the Late TTR Information, I accept that, considered in the abstract, the number of threshold transactions, and the value of those transactions, are quantitatively large in all pleaded forms of that information, particularly in relation to the August 2015 Late TTR Information and the September 2015 late TTR Information. **However, when that information is considered in its proper context, I am not persuaded that persons who commonly invest in securities would infer that the Bank had been substantially and**

systematically deficient in its compliance with the requirements of the AML/CTF Act in the sense that the Bank had engaged in widespread non-compliance by reason of various deficiencies throughout its ML/TF monitoring processes.

958 This is because, although the Bank's failing involved a large number of threshold transactions of a correspondingly large dollar amount, **the proper context for assessing the materiality of the Late TTR Information includes the important facts that: (a) the failure to lodge these TTRs on time resulted from a single coding error; (b) this error had been rectified** (or notionally would have been rectified after discovery in relation to the June 2014 Late TTR Information or the August 2015 Late TTR Information, contrary to the pleaded facts); **and (c) the TTRs had been lodged, albeit later than they should have been lodged**.

959 In a sense, the late TTR issue, like the IDM ML/TF risk assessment non-compliance issue, concerned a single failure. This failure was a coding error. However, unlike the IDM ML/TF risk assessment non-compliance issue, there were consequences: a large number of TTRs were lodged late in circumstances where the lateness itself could not be rectified. This should not have happened. It was a significant failure in respect of an important regulatory obligation. However, that fact alone does not mean that the Late TTR Information was material in the relevant sense. **In this regard, there are other important contextual matters that must be taken into account in assessing the materiality of the late TTR Information**.

960 First, the Bank's monitoring of threshold transactions through IDMs was but one part of the Bank's overall monitoring of threshold transactions. Further, the monitoring of threshold transactions was but one part of the Bank's transaction monitoring for ML/TF purposes. Thus, the fact that the Late TTRs represented a large proportion of threshold transactions through IDMs in the relevant period must be seen in the context that **the Late TTRs represented between 1.08% and 2.3% of the total TTRs lodged by the Bank, and represented between 0.0002% and 0.0007% of the total transactions monitored by the Bank, in the relevant period**.

961 This puts the Late TTR Information in perspective. It makes clear that not only was the Bank's failing in relation to IDMs the result of a single coding error that had been rectified, but that the error affected, relatively speaking, a small part of the Bank's overall threshold transaction monitoring processes, and an even smaller part of the Bank's overall monitoring processes.

962 This is not to deny the large number of Late TTRs or the value of the transactions involved with this error, or the fact that the lateness itself could not be rectified. It does, however, inform the question whether persons who commonly invest in securities would infer that, by this failing, the Bank was substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act in the sense I have described. As I have said, I am not persuaded that such investors would draw that inference.

963 Secondly, while I accept that investors who commonly invest in securities would have an expectation that financial institutions will take sufficient measures and undertake sufficient investment to mitigate their operational risks, including those risks arising from their need to comply with the AML/CTF Act, **I also accept that such investors would understand that financial institutions are not free of risk in that regard**. Such investors

would factor that consideration into their decision-making with respect to, here, the acquisition or disposal of CBA shares. It means that the fact of non-compliance would not be reason alone to influence such investors in deciding to acquire or dispose of CBA shares.

964 Thirdly, and relatedly, like the IDM ML/TF Risk Assessment Non-Compliance Information, the Late TTR Information is completely silent on the significance, and consequences for the Bank, of not lodging the TTRs on time. The context in which the Late TTR Information must be assessed includes the fact that the Bank had been in discussions with, and supplying information to, AUSTRAC for nearly two years before AUSTRAC commenced proceedings, in circumstances where the Bank itself had reported the late TTR issue. In other words, **the Bank had been working cooperatively with AUSTRAC on that issue for an extended period of time, without any enforcement action being taken by the Bank**. **What is more, AUSTRAC had not made clear its intentions on whether it would take enforcement action in respect of that particular episode of non-compliance**. Throughout that time, AUSTRAC maintained the consistent position that: (a) it had not decided what, if any, action it would take; (b) if it were to take action, a range of options were available to it; and (c) once it had reached a decision in that regard, it would provide notice of that fact to the Bank to allow the Bank to consider its position in light of AUSTRAC's decision.

965 These facts also put the Late TTR Information into perspective, particularly when materiality is assessed as at 24 April 2017. It means that, although the Bank had failed to lodge a large number of TTRs on time in respect of transactions through its IDMs, it was far from clear that this failing would be likely to have had any operational or reputational consequences for the Bank that would or might affect the value of, or return on, CBA shares. The real potential for those consequences only became clear following the 3 August 2017 announcement that AUSTRAC had, in fact, commenced proceedings against the Bank seeking pecuniary penalties for alleged contraventions based on the range of conduct referred to in AUSTRAC's Concise Statement.

966 Fourthly, Mr Ali's beta analysis casts significant doubt on the application of Professor da Silva Rosa's analytical framework to the facts of the present case insofar as it concerns investor perceptions of the significance of operational risk. As I have noted, **Mr Ali's beta analysis shows, persuasively, that, even when informed of all the matters in the 3 August 2017 announcement, investors did not upwardly revise their estimates of the Bank's operational risk with economically significant adverse consequences**. Once again, Mr Ali's beta analysis is relevant, in this regard, to each of the other pleaded forms of the Information.

967 Taking all these considerations into account, as they should be taken into account, I am not satisfied that any heightened perception of investors with respect to the Bank's operational risk or reputational risk arising from the disclosure of the Late TTR Information, at any of the pleaded times, would be such as to influence, or be likely to influence, persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares.

968 It is convenient at this juncture for me to record that I do not accept the applicants' submission that the Late TTR Information is "intuitively" information that would, or would be likely, to influence persons who commonly invest in securities in deciding whether to acquire or dispose of

CBA shares.

969 First, while I accept that, from a regulatory perspective, the Late TTR Information is serious in nature, I do not accept, as I have already said, that that fact alone means that the Late TTR Information was material in the sense that it would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares.

970 Secondly, I do not accept that the Late TTR Information would have led investors to consider that the Bank's reputation was going to be damaged irretrievably, as the applicants' submissions suggest. While I accept the likelihood that investors would not approve of the Bank's failing, and be critical of the fact that the Bank had failed in that regard, those consequences must be considered in the context of all the circumstances I have described. When that is done, I am not persuaded that any damage to the Bank's reputation would be of such significance to investors who commonly invest in securities that it would influence, or be likely to influence, their decision to acquire or dispose of CBA shares.

971 Thirdly, even if the Late TTR Information would have suggested to investors that the Bank was at risk of regulatory action, including the risk of substantial pecuniary penalties being imposed, I am satisfied that, in the absence of more concrete information being provided as to AUSTRAC's intentions, the Late TTR Information would not influence, or be likely to influence, them in deciding to acquire or dispose of CBA shares. Concrete information of AUSTRAC's intentions was only revealed by the 3 August 2017 announcement.

972 Fourthly, I do not accept the applicants' submission that the Late TTR Information would have suggested to persons who commonly invest in securities that the Bank's AML/CTF systems might require remediation at a "higher than anticipated expenditure". There is no reason to think that investors would have any rationally held views on that matter. What is more, on the evidence before me, the late TTR issue was readily and promptly rectified once the problem was known. There is nothing to suggest that the cost of rectification involved "higher than anticipated expenditure". These facts form part of the context in which the materiality of the Late TTR Information must be assessed. The context does not suggest that rectification of the late TTR issue had any value-related implications for the Bank and I am not satisfied that investors who commonly invest in securities would have thought otherwise.

(Emphasis added.)

188 It can be seen from the above passage that the primary judge took into account the following contextual matters when assessing whether the Late TTR Information was material in the relevant sense:

(a) the failure to lodge the TTRs on time resulted from a single coding error;

(b) the error had been rectified;

(c) the TTRs had been lodged, albeit later than they should have been lodged;

(d) the late TTRs represented between 1.08% and 2.3% of the total TTRs lodged by the Bank, and represented between 0.0002% and 0.0007% of the total transactions monitored by the Bank, in the relevant period;

(e) investors who commonly invest in securities would understand that financial institutions are not free of operational risk, including risks arising from their need to comply with the AML/CTF Act; and

(f) (as at April 2017) the Bank had been working cooperatively with AUSTRAC on the late TTR issue for an extended period of time, without any enforcement action being taken by AUSTRAC; moreover, AUSTRAC had not made clear its intentions on whether it would take enforcement action in respect of that particular episode of non-compliance.

189 Further, the primary judge was of the view that Mr Ali's beta analysis showed, persuasively, that, even when informed of all the matters in the 3 August 2017 announcement, investors did not upwardly revise their estimates of the Bank's operational risk with economically significant adverse consequences.

190 The primary judge next considered Professor da Silva Rosa's evidence in relation to the Account Monitoring Failure Information, stating that a similar analysis applied: Reasons, [973]. The primary judge considered that the proper context for considering the materiality of the Account Monitoring Failure Information included the following facts (Reasons at [974]):

(a) the failure to monitor resulted from an error in updating account profiles in the Bank's FCP as part of a project directed to enhancing the Bank's ability to monitor and detect potential instances of internal fraud;

(b) the error was the population of a particular data field with a null value;

(c) the error affected only a subset of particular accounts (employee-related accounts);

(d) the error did not mean that there was a complete absence of monitoring in respect of these accounts;

(e) a large percentage of these accounts (25%) were inactive;

(f) the monitoring of the accounts was affected for varying periods of time (which included relatively short periods of time); and

(g) the error had been rectified.

191 The primary judge next considered the Potential Penalty Information. His Honour expressed the view that this information, as pleaded, was vague and imprecise. He considered that "the high level, contingent, and inconclusive language used to express the Potential Penalty Information would more likely confuse, rather than inform, investors": Reasons, [979]. This information needed to be considered in its proper context, which comprised the other forms of pleaded information. For the reasons given earlier, his Honour was not satisfied that those items of information were material. In that context, his Honour considered that the Potential Penalty Information added "little meaningful information for investors": Reasons, [983].

192 Commencing at [985], the primary judge considered Mr Johnston's evidence. The primary judge said that the findings he had made, and the reasons for those findings, applied equally to the question of materiality when considered with reference to Mr Johnston's evidence: Reasons, [985]. The primary judge made observations about certain matters that diminished the weight to be attached to Mr Johnston's evidence: Reasons, [986]-[991].

193 The primary judge considered (commencing at [992]) the other evidence, stating that it did not persuade him that the Late TTR Information, or the Account Monitoring Failure Information, or the IDM ML/TF Risk Assessment Non-Compliance Information, would, or would be likely to, influence persons who commonly invest in securities in deciding to acquire or dispose of CBA shares, had the Bank disclosed the information when the applicants say it should have been disclosed: Reasons, [992]. The primary judge considered four matters. The first related to the evidence given by Mr Ali, Mr Singer, and Dr Unni. The primary judge reasoned:

> 993 First, the evidence given by Mr Ali, Mr Singer, and Dr Unni is to the effect that the Late TTR Information, the Account Monitoring Failure Information, and the IDM ML/TF Risk Assessment Non-Compliance Information would not, or would not be likely to, have that influence in the absence of AUSTRAC commencing proceedings against the Bank for pecuniary penalties because of its non-compliance.
>
> 994 I do not think that investor knowledge that proceedings *had* been commenced is necessarily critical. **I am satisfied, however, that, as a minimum, an expression of AUSTRAC's resolve to take enforcement action against the Bank in the form of proceedings for a pecuniary penalty would be indispensable to a finding of materiality in the relevant sense**.
>
> 995 I say this having regard to the fact that, notwithstanding the Tabcorp proceeding, AUSTRAC's usual and preferred approach during the relevant period was to seek cooperative engagement with reporting entities, and only to consider enforcement action where that engagement did not result in improved compliance. As I have observed, even referral of a matter to its Enforcement Team did not mean that AUSTRAC would take enforcement action. And even if enforcement action were taken, this did not necessarily mean that

proceedings would be commenced for a civil penalty. Other forms of action were available.

996 The market circumstances before 3 August 2017 were that AUSTRAC had taken only 33 enforcement actions, and even then only one of those actions (the Tabcorp proceeding) was for a civil penalty. The rest of the enforcement actions involved remedial directions, the acceptance of enforceable undertakings, the issuance of infringement notices, or the appointment of an external auditor.

997 These are important market circumstances affecting the question of the materiality of the pleaded forms of the Information. **The fact that the Bank had not complied with its obligations under the AML/CTF Act did not, in and of itself, entail adverse financial consequences, or likely adverse financial consequences, for the holders of CBA shares in the form of a loss of share value or a loss of dividend income, even though non-compliance is a serious matter from a regulatory perspective. However, the commencement of proceedings for a civil penalty, or AUSTRAC's announced resolve to do so, would raise that prospect**. Whether that prospect would, in turn, lead to adverse financial consequences, or likely adverse financial consequences, for shareholders would depend on, amongst other things, the extent and seriousness of the non-compliance involved.

(Emphasis added.)

194 The second matter referred to by the primary judge in this section of the Reasons was that persons who commonly invest in securities would only be influenced, or be likely to be influenced, by information that conveyed some real likelihood (as opposed to a mere possibility) of financial consequences for them. The primary judge reasoned:

998 Secondly, I am not persuaded that persons who commonly invest in securities would readily be influenced in their decision-making regarding the acquisition or disposal of CBA shares. **I am satisfied that such persons would only be influenced, or be likely to be influenced, by information that conveys, expressly or implicitly, some real likelihood, as opposed to the mere possibility, that the information has financial consequences for them**. I am not persuaded that any of the pleaded forms of the Information provide sufficient certainty as to the likely financial consequences of that information for the holding of CBA shares, as to have the required influence or likely influence on investor decision-making.

999 **I say this bearing in mind Mr Singer's evidence about the significance of CBA shares (and the shares of the other four major Australian banks) to portfolio construction, and the role of such shares in wealth creation and management**. Mr Singer also said that a large portion of investors will be "less influenced by micro announcements than by ensuring that their overall portfolio is constructed so as to provide them with the appropriate diversification and income growth". He referred, in particular, to the Bank's large base of retail shareholders who are "stickier" in their decision-making in relation to the holding of CBA shares.

1000 I do not accept, therefore, the applicants' submission that much of the decision-making involved in buying and selling shares is heuristic in nature, insofar as that submission is directed to the holding of CBA shares. Certainly, this does

> not appear to have been the applicants' experience based on their own decision-making with respect to investing in CBA shares.

195 The primary judge referred to the decision-making by Zonia and the Barons – in both cases they continued to hold their CBA shares after the 3 August 2017 announcement: Reasons, [1004]-[1005]. The primary judge referred also to Mr Ali's beta analysis: Reasons, [1007]. His Honour also relied on a Westpac case study prepared by Dr Unni: Reasons, [1008]-[1009].

196 The third matter referred to by the primary judge was media and analysts' reports. His Honour was not persuaded that the media and analysts' reports provide any real support for the applicants' case on materiality: Reasons, [1017].

197 The fourth matter the primary judge considered was the Lieser paper. The paper had been referred to earlier in the Reasons (at [836]-[841]). In relation to this paper, the primary judge reasoned:

> 1019 Fourthly, I am not persuaded that the Lieser paper provides any real support for the applicants' case on materiality. I do not accept that the results reported in the paper are "compelling" in relation to the determination of the question of materiality in the present case.
>
> 1020 The Lieser paper's concern is with the shareholder wealth effect of the revelation of alleged wrongdoing, the commencement of class action proceedings in relation to the alleged wrongdoing, and the resolution of such proceedings. **I am not persuaded that the broad analogy that the applicants seek to draw between the class of cases discussed in the paper, and the present case, is of any real assistance**. The applicants assert that there is "no material difference between the circumstances of the cases analysed in the Lieser Paper and the circumstance that the applicants allege ought to have prevailed here". However, no attempt has been made to analyse the specific facts and circumstances of any of the cases analysed in the Lieser paper to see whether they bear any meaningful relationship with the specific facts and circumstances of the present case. I am not prepared to accept that the cases analysed in the Lieser paper can be used as a proxy for the present case.
>
> (Emphasis added.)

198 Commencing at [1021], the primary judge considered the materiality of the information of which the Bank was "aware" (based on his earlier findings of awareness). In this section of the Reasons, the primary judge considered whether certain items of pleaded information *taken together* would be material in the relevant sense. His Honour's reasoning included:

> 1023 Finally, I turn to consider whether, as at 24 April 2017, the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information, together with the Potential Penalty Information (to the extent that it is dependent on the Bank's awareness of the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information), was material in the requisite sense. In other words, even though

I am not satisfied that the September 2015 Late TTR Information, or the September 2015 Account Monitoring Failure, or the Potential Penalty Information (to the extent that it is dependent on either of the other two forms of information), would influence or be likely to influence investors who commonly invest in securities in deciding whether to acquire or dispose of CBA shares, would the combination of that information, if disclosed at 24 April 2017, lead to the contrary conclusion?

1024 **I am not persuaded that the combination of this information, if disclosed at 24 April 2017, does lead to the contrary conclusion**. The September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information stand as two discrete instances of non-compliance. While, as a general proposition, I accept the likelihood that investors would view the disclosure of two instances of non-compliance with the AML/CTF Act to be more serious than the disclosure of one instance of non-compliance, it does not follow that this combination of information was, at 24 April 2017, materially more influential on investor decision-making than each form of information considered alone.

1025 **This is because, at 24 April 2017, both forms of information concerned truly historical instances of non-compliance that had been rectified some time ago.** There was no continuing operational problem in relation to them, and there was nothing further the Bank was required to do, or could do. **AUSTRAC had made no decision as to what regulatory action, if any, it might take because of the Bank's known non-compliance with the AML/CTF Act**, and no-one was closer to knowing what its intentions were. AUSTRAC's declared position was that, if it did take enforcement action, it had a range of options open to it. **Absent the benefit of hindsight (and remembering that the assessment of materiality is an *ex ante* assessment), there is no reason to think that, at 24 April 2017, the commencement of proceedings for civil penalties was AUSTRAC's preferred position if it were to take enforcement action against the Bank**. Certainly no sound prediction to that effect could have been made.

1026 It is, of course, to be recalled that, on 7 March 2017, AUSTRAC had informed Ms Watson and Mr Keaney that it viewed "the TTR and associated matters" as "serious, significant and systemic". However, that statement immediately led to the Bank taking the initiative to engage in high level discussions between Ms Livingston and Mr Narev (on behalf of the Bank) and Mr Jevtovic and Mr Clark (on behalf of AUSTRAC) on 21 March 2017. Although Mr Narev's initial strategy was to seek to negotiate a relatively swift outcome with AUSTRAC that would involve, amongst other things, the payment of a negotiated "fine", this was not the strategy he deployed at this meeting and, as I have noted, the Bank had in mind the prospect of persuading AUSTRAC to the position of pursuing other forms of enforcement, if AUSTRAC's then undisclosed intention was, or was moving towards, enforcement through proceedings for pecuniary penalties.

1027 At the meeting on 21 March 2017, Mr Jevtovic said that, in terms of next steps, AUSTRAC was going to take an "evidence-based approach". He made clear that a decision had not been made as to the "path" that AUSTRAC would follow. He reiterated that there were a number of options open to AUSTRAC. Plainly, at that time, and armed with that information, no-one could arrive at a mature view as to what AUSTRAC would do. One could speculate what AUSTRAC *could* do, but such speculation was not appropriate information to put before the market.

> 1028 I do not think that, as at 24 April 2017, the stage to which Project Concord had developed betrays some more informed view by the Bank, or any prescience, about the path that AUSTRAC did in fact take on 3 August 2017. I regard the Bank's development of Project Concord as no more than proactive planning, in uncertain times, as to what the Bank's strategy should be, or could be, in the event that the "worst case scenario" (the commencement of proceedings against the Bank for civil penalties) eventuated.
>
> 1029 Nor do I think that Mr Narev's acceptance in evidence that, from October/November 2016, there was a serious risk that AUSTRAC would take regulatory action against the Bank which could involve the imposition of a significant "fine", advances matters. Mr Narev's acceptance was really no more than the acknowledgement of a possibility. And, as I have previously remarked, Mr Narev's assessment of risk also included the risk of AUSTRAC taking other forms of regulatory action.
>
> (Emphasis added.)

199 The primary judge's overall conclusion on materiality was set out in [1030]:

> 1030 For these reasons, I am not satisfied that the Information, in any of its pleaded forms, was information that, if disclosed at the relevantly pleaded times, would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. More generally, I am not satisfied that the Information, in any of its pleaded forms, was information that a reasonable person would expect, if the information were generally available at the relevantly pleaded times, to have a material effect on the price or value of CBA shares.

200 The conclusions (as well as other conclusions reached by the primary judge) meant that the applicants had not established that the Bank contravened s 674(2).

5.6 The case on causation and loss

201 In light of the conclusions referred to above, it was unnecessary for the primary judge to consider the applicants' case on causation and loss. However, the primary judge considered that there were some findings that he could and should make. After setting out the way the applicants put their case, the primary judge discussed (commencing at [1137]) "market-based causation", being the theory upon which the applicants' case was based. In this regard, the primary judge referred to the judgment of Beach J in *TPT Patrol Pty Ltd v Myer Holdings Limited* [2019] FCA 1747; 293 FCR 29 (***TPT***), the judgment of Brereton J in *Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482; 335 ALR 320 (***HIH***) and the judgment of Foster J in *Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (in liq)* [2019] FCA 1720 (***Masters***).

202 Commencing at [1165], the primary judge considered Professor Easton's event study, relied on by the applicants. The event study related to the 3 August 2017 announcement and concluded

that the announcement caused a statistically abnormal return of -$3.29 per CBA share: Reasons, [1128]. As set out in the Reasons at [1170], in discussing the "event" he analysed, Professor Easton said:

> In order for information to be conveyed to market participants, there must be a disclosure via a medium (e.g., a press release, a tweet, a conference call) and the disclosure must be analyzed. An event study determines the reaction of market participants as they understand and interpret the implications of the disclosure for their expectations of the amounts, timing, and uncertainty of future pay-offs from investing in shares of the firm. **The four elements of information (the message that was disclosed, the medium, the analysis, and the interpretation) are all part and parcel of the event analyzed and cannot and should not be separated**. …
>
> (Emphasis added.)

203 The primary judge's summary of Professor Easton's evidence included the following passage:

> 1173 In cross-examination, Professor Easton confirmed that **"everything that comes out on 3 August cannot be split into its constituent parts and separately analysed"**.
>
> 1174 It is important, at this point, to note the following matters about this evidence.
>
> 1175 First, as Professor Easton stressed, the "event" he analysed is not simply the "message" but the inseparable combination of the "message", the "medium", the "analysis", and the "interpretation" of the Alleged Corrective Disclosures. All these matters comprise the "event".
>
> 1176 Secondly, and obviously, this "event" does not correspond to the mere hypothetical disclosure, by the Bank, of any of the pleaded forms of the Late TTR Information, or of the Account Monitoring Failure Information, or of the IDM ML/TF Risk Assessment Non-Compliance Information; nor does the "event" correspond to the hypothetical disclosure, by the Bank, of the Potential Penalty Information.
>
> 1177 Thirdly, Professor Easton catalogued the ML/TF Risk Systems Deficiency as part of the "message", whereas this information is no longer part of the applicants' continuous disclosure case (and was not part of the applicants' continuous disclosure case when they opened their case).
>
> 1178 Fourthly, as I have previously discussed, **there is additional, significant, and damning, information contained in the 3 August 2017 announcement (and hence the Alleged Corrective Disclosures) that is not part of the applicants' continuous disclosure case**.
>
> 1179 Fifthly, it is not accurate to say that the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, "and/or" the Potential Penalty Information was the information, and thus the "message", disclosed in the Alleged Corrective Disclosures. The Late TTR Information, the Account Monitoring Failure Information, and the IDM ML/TF Risk Assessment Non-Compliance Information exist in differently pleaded forms with differently pleaded content that (on the applicants' case) should have been disclosed at different times. The variously pleaded forms of the Information were not disclosed by the 3 August 2017 announcement (and hence by the Alleged Corrective

Disclosures). Some information, in some of the pleaded forms, was disclosed.

1180 Similarly, the Potential Penalty Information is pleaded in alternatives. None of these alternatives was disclosed as part of the 3 August 2017 announcement (and hence as part of the Alleged Corrective Disclosures). **What was disclosed was the fact that proceedings for civil penalties had been commenced by AUSTRAC, not the fact that the Bank was "potentially exposed to enforcement action by AUSTRAC"**.

1181 I raise these matters because the evidence appears to glide over important differences between (a) what information the applicants allege the Bank should have disclosed and when the Bank should have disclosed it, and (b) what AUSTRAC in fact disclosed on 3 August 2017. However, it is the hypothetical market effect of the former, not the actual market effect of the latter, that is in issue and must be determined.

1182 I wish to make clear, however, that these observations are not a criticism of Professor Easton. Far from it. For the purposes of his task, Professor Easton was instructed to express his opinions on the basis of the following core assumption:

> A2 From the beginning of, and at any time during, the Relevant Period, CBA could have conveyed information materially equivalent to that contained in the 3 August Corrective Disclosure.

1183 In his Expert Report in Reply, Professor Easton explained the ramifications of making that assumption:

> Given the assumption I was provided … [Assumption A2] … the focus of my report is on the stock price reaction of CBA on 3 and 4 August 2017. **This assumption implies that the effect of the content of the disclosure** (although the disclosure differs across the Relevant Period), the medium by which the information became known to investors in CBA shares, and the analysis of the disclosure **would have a materially equivalent effect on the price of shares of CBA at the beginning and any time during the Relevant Period**; that is, at least $3.29 per share. …

…

1192 … It is to be borne in mind that, here, the inquiry is whether, in the relevant period, and if so when, the market price of CBA shares was artificially inflated because of the Bank's alleged non-disclosure of material information or its alleged misleading or deceptive conduct. **There are important differences in content between the different categories of Information, and the various pleaded forms of that Information, which the applicants allege the Bank should have disclosed to the market. It cannot be assumed that each category and form, if disclosed, would have had the same, or any, market impact**.

204 The primary judge then set out the various causation "pathways" relied on by the applicants.

205 Commencing at [1211], the primary judge analysed those pathways. Proceeding on the assumption that market-based causation was an available mechanism, the primary judge nevertheless considered there to be numerous difficulties in applying that analysis in the present

case: Reasons, [1211]. By way of example, the primary judge's reasoning in relation to the applicants' pathway 1A included:

> 1214 Proceeding from (a) the fact of an abnormal return, as established by Professor Easton's study, and (b) the assumption that materiality in the requisite sense has been established, the applicants then (c) call in aid the efficient market hypothesis to contend that they have established a prima facie case on loss sufficient to (d) cast an onus on the Bank to establish that "the whole of the price reaction which in fact occurred" following the 3 August 2017 announcement was attributable to something other than any part of the pleaded Information that was contained in that announcement. The applicants contend that, absent the Bank discharging that onus, (e) loss has been established for which the Bank is causally (and therefore legally) responsible.
>
> 1215 **I do not accept any of the steps in this reasoning**.
>
> 1216 First, **Professor Easton was at pains to stress that, in his event study, the "event" comprised four inseparable elements—the message, the medium, the analysis and the interpretation of the Alleged Corrective Disclosures made on 3 August 2017**. Professor Easton did not profess to have studied any other "event". Similarly, Professor Easton did not profess to have studied any "event window" other than the period 3 – 4 August 2017.
>
> 1217 The answer given by Professor Easton to the second question he was asked was driven by the core assumption he was instructed to make. **He did not substantively address the question whether the traded price of CBA shares on the ASX would have been affected if the Bank had disclosed the information in the Alleged Corrective Disclosures from the beginning of, and at any time during, the relevant period**.
>
> 1218 **More specifically, he was not asked to address, and did not address, whether the traded price of CBA shares on the ASX would have been affected if the Bank had disclosed any particular pleaded form** of the Late TTR Information, or of the Account Monitoring Failure Information, or of the IDM ML/TF Risk Assessment Non-Compliance Information, or if the Bank had disclosed the Potential Penalty Information, or some particular combination of the Information, at the particular time at which the applicants allege the Bank should have disclosed any of that information (i.e., at a particular time earlier than the "event window" actually studied by Professor Easton).
>
> 1219 Secondly, for the reasons I have previously given, **I do not accept that any of the pleaded forms of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, or the Potential Penalty Information, is equivalent, in any sense, to the information disclosed in the 3 August 2017 announcement** (and hence the Alleged Corrective Disclosures). I am satisfied that the information conveyed by the 3 August 2017 announcement (and hence the Alleged Corrective Disclosures) was materially, and significantly, different to the information conveyed by each of the pleaded forms, or any combination of the pleaded forms, of the Information.
>
> 1220 Thirdly, for the reasons I have previously given, **I do not accept that each category of the Information, or the various pleaded forms of that information, would have conveyed the same "value-relevant implications**

> **to investors" as the 3 August 2017 announcement** (and hence the Alleged Corrective Disclosures). In this regard, I have not accepted Professor da Silva Rosa's opinion or Mr Johnston's opinion that each of the categories of the Information, the various pleaded forms of that information, and the information in the 3 August 2017 announcement, are "economically equivalent".
>
> 1221 Fourthly, for the reasons I have previously given, I do not accept that each of the categories of the Information and the various pleaded forms of that information were "material" in the requisite sense.
>
> 1222 Fifthly, even if I had found that the Information (or some part of it) was "material" in the requisite sense, it does not necessarily follow from such finding that the Bank's failure to disclose the Information (or some part of it), in the relevant period, resulted in the market price of CBA shares being artificially inflated in that period. (Emphasis added.)

206 The primary judge rejected each of the causation pathways relied on by the applicants. His Honour concluded that, even if the applicants had succeeded in their case on contravention, he would not have found that their case on causation was established: Reasons, [1245].

5.7 Damages

207 The primary judge stated that, leaving to one side the fact that the applicants' case had failed at a number of levels (so that one never gets to the assessment of damages), he concluded that their case on the assessment of damages also failed: Reasons, [1246]. The primary judge stated that the applicants relied on two approaches. The first approach was to rely on the result of Professor Easton's event study. For the reasons he had already given, the primary judge rejected that approach: Reasons, [1248]. The second approach relied on Professor Easton's event study as a starting point and then contended that the Court should do the best that it could to quantify the damages. The primary judge also rejected that approach. His Honour's reasons included:

> 1249 The second approach also relies on the result of Professor Easton's event study. It is, therefore, flawed at the outset. Even so, in this approach the applicants contend that if the Court finds that some part of the price impact determined by Professor Easton was not causally related to the non-disclosure of the information the applicants say should have been disclosed, **the Court should adjust the artificial inflation derived from the event study to award, as best it can, compensation which "strips out" the impact of the disclosure of "unrelated matters"**.
>
> 1250 **The problem with this approach is that Professor Easton's own evidence establishes that his event study cannot be used for this purpose**, as I have previously explained. Therefore, this approach also cannot succeed.
>
> 1251 Apart from these matters, a further difficulty with the second approach is determining, rationally, what adjustment should be made in any event.

1252 In this regard, the applicants submit that data from the Lieser paper is available to guide the Court. Whilst that data might be of academic interest (which is the purpose for which the Lieser paper was written), I do not consider it to be useful for the purpose of assessing damages, and would not use it in the present case. The Lieser paper simply does not deal with the case that the applicants have presented, and says nothing about the value relevance of information in the market conducted in Australia by the ASX in the relevant period.

…

1254 These conclusions mean that the Court is left with no evidence of the valuation of the loss that the applicants claim. Nevertheless, the applicants urge the Court to assess compensation in a "robust manner". They rely on the settled rule that mere difficulty in estimating damages does not relieve a court from the responsibility of assessing damages as best it can: *The Commonwealth of Australia v Amann Aviation Pty Limited* [1991] HCA 54; 174 CLR 64 at 83 (Mason CJ and Dawson J) and 125 (Deane J).

1255 In closing submissions, the applicants drew attention to my decision in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237 at [1057] – [1058] as illustrating that rule …

…

1256 The present case is different. **First and foremost, there is no proven loss. Secondly, and in any event, once the limitations of Professor Easton's event study are recognised (as Professor Easton himself recognised), there is no rational starting point for the valuation of the inflation that the applicants allege**.

1257 As recognised by Brereton J in *HIH* at [78], the valuation question in a case such as the present is inextricably bound up with the problem of establishing loss in the first place. Just as Professor Easton's event study cannot be used to establish loss in the present case—and, in the absence of appropriate evidence, there is no reason to assume that there has been or would have been loss—so too his event study cannot be used to value the alleged loss.

1258 The present case is not one involving a paucity of evidence. It is a case involving the absence of proof of these two critical matters. Contrary to the applicants' submissions, this is not a problem of the Bank's making. The present case is not one where the principle in *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664 applies. The applicants cannot lay the blame for the deficiencies in their own proof at the feet of the Bank.

(Emphasis added.)

6 THE APPEALS AND CROSS-APPEALS

208 In each appeal proceeding there is an amended notice of appeal, each of which is in substantially the same form. Each notice of appeal contains grounds numbered from 1 to 22 (but omitting any grounds numbered 20 or 21), which may be grouped as follows:

(a) Grounds 1 to 4 relate to whether the primary judge erred in his findings relating to the Bank's awareness of the pleaded information (referred to in these reasons as the Awareness Issue);

(b) Ground 5 relates to whether the primary judge erred in dealing with the completeness and accuracy of the pleaded information as a threshold issue (rather than as part of the materiality analysis) and in concluding that the pleaded information was incomplete and, in some respects, misleading (referred to in these reasons as the Completeness and Accuracy issue);

(c) Grounds 6 to 17 relate to whether the primary judge erred in finding that the pleaded information was not material for the purposes of the relevant provisions (referred to in these reasons as the Materiality issue); and

(d) Grounds 18, 19 and 22 relate to whether the primary judge erred in concluding that Zonia and the Barons had not established causation or loss (referred to in these reasons as the Causation and Loss issue).

209 Each notice of appeal has an annexure that sets out the answers to the common questions sought by the appellants. The mark up in those annexures shows the amendments to the original notice of appeal. During the appeal hearing, the appellants provided the Court with a document that shows the amendments that the appellants seek to the answers given by the primary judge. As noted above, in light of the narrowing of the appellants' case, the appellants accept that Zonia's personal claim should be dismissed.

210 In each appeal proceeding, the Bank has filed a notice of cross-appeal, each of which is in substantially the same form. Each notice of cross-appeal contains a single ground, that raises the issue whether the primary judge erred in concluding that the exception in rule 3.1A of the Listing Rules did not apply (referred to in these reasons as the Rule 3.1A issue).

211 We will now consider each of the issues raised by the appeals and the cross-appeals.

7 AWARENESS ISSUE

212 The September 2015 Late TTR Information was the lynchpin of the appellants' case. They did not suggest that the other forms of pleaded information – the September 2015 Account Monitoring Failure Information, the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information and the Potential Penalty Information – required disclosure if the September 2015 Late TTR Information was not required to be disclosed. Accordingly, we first

address whether, as the appellants contend, the primary judge erred in rejecting their case on actual or constructive awareness of the September 2015 Late TTR Information.

7.1 Ground 1: Awareness of the September 2015 Late TTR Information

213 As set out above, the September 2015 Late TTR Information, as pleaded, comprised four elements, as follows:

> From around November 2012 to 8 September 2015:
>
> (a) CBA had failed to give TTRs on time for approximately 53,506 cash transactions of $10,000 or more processed through IDMs following the introduction of IDMs (**September 2015 Late TTRs**);
>
> (b) the September 2015 Late TTRs represented between approximately 80% and 95% of threshold transactions that occurred through CBA's IDMs during the period from November 2012 to September 2015;
>
> (c) the September 2015 Late TTRs had a total value of approximately $624.7 million dollars;
>
> (d) the September 2015 Late TTRs had not been lodged, at least in part because of a systems error which occurred in or around November 2012
>
> (the **September 2015 Late TTR Information**).

214 The information in (b) above, referred to as **integer (b)**, was recorded in an internal Bank email on January 2016. The primary judge found that the Bank was "aware" of each integer of the September 2015 Late TTR Information as at 8 September 2015, or shortly thereafter, other than integer (b).

215 The primary judge found that the Bank was not "aware" of integer (b) until January 2016 and rejected the applicants' case that the Bank was "aware" of the September 2015 Late TTR Information from around 8 September 2015 or shortly thereafter, as pleaded.

216 By Ground 1, the appellants contend that the primary judge erred in failing to find that the Bank was aware of integer (b) as at 8 September 2015, or shortly thereafter. That contention was advanced based on actual, and constructive, awareness.

7.1.1 The concept of awareness

217 Where an entity "has information" that provisions of the Listing Rules require the entity to notify to the market operator, and the information is not generally available, and is material, the entity is required to notify the market operator of "that information": *Corporations Act*, s 674(2). It is only information that the entity "has" that must be disclosed.

218 Rule 3.1 of the Listing Rules provides that an entity that "is or becomes aware of any information" concerning it that is material "must immediately tell ASX that information". The ambit of what constitutes "information" informs the approach to determining whether an entity is "aware" of the information. The notes to Listing Rule 3.1 specify that "'information' may include information necessary to prevent or correct a false market … [and] may also include 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".

219 The notes to Listing Rule 3.1 also contain a non-exhaustive list of information that may require disclosure. By and large, the examples are all pieces of information constituted by facts that do not involve any process of inference, or the formation of an opinion. For example, the list includes matters such as a material acquisition or disposal, giving or receiving a notice of intention to make a takeover, and the application of a rating by a ratings agency. The examples that involve the formation of opinions, or the making of inferences, are the entry into a transaction that will lead to a "significant change" in the nature or scale of the entity's activities, the commission of an event of default under a facility, and the fact that the entity's earnings will be "materially different from market expectations".

220 The term "aware" is of central importance in the application of the Listing Rules. The term "aware" is defined in Listing Rule 19.12. Although set out above, we set it out again for ease of reference:

> [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.

221 The ASX published Guidance Note 8 to assist listed entities to understand and comply with their obligations under the Listing Rules. Compliance with the Listing Rules is explained by the ASX to be "critical to the integrity and efficiency of the ASX market". Part 3 of Guidance Note 8 quotes the policy objective of Australia's continuous disclosure regime, as described by the New South Wales Court of Appeal in *James Hardie* at [355] per Spigelman CJ, Beazley and Giles JJA. There, the Court said:

> The continuous disclosure regime, contained in s 674 and the Listing Rules, is designed to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions.

222 The authorities are replete with similar expositions of the purpose and importance of the continuous disclosure regime: eg *Jubilee Mines* at [87] per Martin CJ (Le Miere AJA agreeing); *Pathway* at [61] per Bell AJA (Bongiorno JA and Harper JA agreeing); *Grant-Taylor* at [92] per Allsop CJ, Gilmour and Beach JJ; *Crowley (FC)* at [157]-[159] per Jagot and Murphy JJ (Perram J agreeing).

223 As may be seen, the concept of all market participants having equal access to material information lies at the heart of the continuous disclosure regime.

224 An entity may become "aware" of "information" through:

(a) the actual knowledge of an officer who comes to have "information" by some means; or

(b) the constructive knowledge of an officer by operation of the deeming aspect of the definition in Listing Rule 19.12 – "ought reasonably to have come into possession of".

225 An officer "ought reasonably to have come into possession of information" when, viewed objectively, in light of the officer's role and the surrounding circumstances (including the information to which they have access) the "information" is information that a reasonable person would expect the officer to have.

226 Guidance Note 8 expands on the concept of "awareness" and explains the function and intended operation of constructive awareness (or constructive knowledge, as the concept is sometimes referred to in the continuous disclosure context). Constructive knowledge is to be distinguished from the concept of constructive knowledge in other spheres of the law in which the "Baden scale" (named for *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'lndustrie en France SA* [1993] 1 WLR 509; [1992] 4 All ER 161) applies.

227 Part 4.4 of Guidance Note 8 explains that, without the inclusion of constructive awareness, the continuous disclosure regime could be undermined by information not being escalated to officers:

> The extension of an entity's awareness beyond the information its officers in fact know to information that its officers "ought reasonably have come into possession of" effectively deems an entity to be aware of information if it is known by anyone within the entity and it is of such significance that it ought reasonably to have been brought to the attention of an officer of the entity in the normal course of performing their duties as an officer. **Without this extension, an entity would be able to avoid or delay its continuous disclosure obligations by the simple expedient of not bringing market sensitive information to the attention of its officers in a timely manner**.

> In light of this extension, it is important that entities have in **place appropriate reporting and escalation processes** to ensure that information which is potentially market sensitive is promptly brought to the attention of its officers so that there are no gaps between the information they in fact know and the information they are deemed to know for the purposes of Listing Rule 3.1.
>
> (Emphasis added.)

228 Annexure B to Guidance Note 8 observes that it is likely an incident of being a director of a listed entity that directors ensure that the entity has appropriate information reporting systems in place so that they are kept apprised of material developments affecting the entity in a timely manner, lest their failure to do so put them in breach of their statutory duties of care and diligence. Annexure C provides further guidance on the development of compliance policies, one aim of which is to ensure that information that may be market sensitive is brought to the attention of its officers in a timely manner.

229 The leading authority on constructive awareness in the continuous disclosure regime is the Full Court's decision in *Crowley (FC)*. That case, and its limits, are addressed below in considering the constructive awareness case on integer (b) of the September 2015 Late TTR Information.

7.1.2 Actual awareness of integer (b)

230 The appellants' case on actual awareness of integer (b) rests on the evidence given in cross-examination by the Bank's then CEO, Ian Narev. That evidence was set out by the primary judge as follows:

> 468 In his evidence in chief, Mr Narev said that at the time that he first became aware of the late TTR issue on (around) 4 September 2015, "the exact number of affected transactions had not yet been finalised". Nevertheless, Mr Narev said that, at that time, he understood the number to be above 50,000. He said that he was told that the "affected transactions" were around 2.5% of the Bank's total threshold transactions over the "affected period". Mr Narev also said that he did not recall "being expressly informed of the proportion of affected transaction through IDMs specifically, or the dollar value of those transactions, at any stage prior to AUSTRAC commencing proceedings".
>
> 469 Mr Narev was cross-examined on the two last-mentioned matters. The following exchange took place:
>
> > Now, both of those two items of information, that is, information about the proportion of affected transactions through IDMs and the dollar value, is part of the context of the late TTR issue. Do you accept that?---The number and the dollar value, part of the context – sorry, in what sense?
> >
> > Well, just perhaps put it this way: you were briefed extensively on the late TTR issue,
> >
> > I take it?---At around that time, yes.

> Yes. And I take it the purpose of the briefings was to give you a full understanding of the late TTR issues?---Yes, it would have been.
>
> And as far as you were concerned, you did receive or obtain a full understanding of the late TTR issues through and by, or as a result of those briefings?---Well, a sufficient understanding, yes.
>
> And you say in this paragraph:
>
> *I don't recall being expressly informed of those two matters.*
>
> That's in the fourth line. Do you see that?---Yes.
>
> But you accept that, I take it, that even if you can't expressly remember it, it's likely as at 8 September 2015, or shortly thereafter in the course of the briefings you received information concerning a proportion of affected - - -?---Look, in fairness, I can't recall, but it wouldn't surprise me if I had heard that. I'm saying here I didn't recall it, but it wouldn't surprise me if I had heard the dollar value.
>
> Well, heard the dollar value and also heard the proportion of - - -?---And the – yes.
>
> - - - of affected transactions through IDMs?---Yes.
>
> That was all. I wasn't meaning anything else when I was putting to you - - -?---No, no.
>
> That's fine.
>
> - - - that it's part of the context?---I understand.
>
> I just mean it is likely that in those briefings you received both of those two items of information; correct?---I'm happy to say yes.

231 The primary judge explained why he was not prepared to find that the Bank had actual knowledge of integer (b) as at 8 September 2015 or shortly thereafter, notwithstanding Mr Narev's evidence, as follows:

> 470 Although Mr Narev was prepared to make the concession recorded above, his evidence, given in the way it was, does not fill me with confidence. I am not persuaded, on the balance of probabilities, that, before 8 September 2015, he was informed of the proportion of "affected transactions" through IDMs specifically, or the dollar value of those transactions, as recorded in the September 2015 Late TTR Information.
>
> 471 In that regard, the applicants have not drawn my attention to any contemporaneous documents that record that information at that time. The briefing note that was prepared for Mr Narev on 4 September 2015 contains no such information.
>
> 472 Further, the cross-examination did not elicit that Mr Narev was told, or that it was likely that Mr Narev was told, the content of integers (b) and (c) (i.e., the actual proportion and dollar value of the late TTRs); nor could it be said that Mr Narev was in a position to form an opinion or draw an inference to the effect of integers (b) and (c) based on the information he did have.

> 473 Moreover, there is no evidence that any other officer of the Bank had that information, or could form an opinion or draw an inference to the effect of integers (b) and (c) as at 8 September 2015.

232 The appellants' submissions on the appeal did not explain why the primary judge's rejection of Mr Narev's concession involved error. Their written submissions in chief did no more than refer to Mr Narev's concession and the primary judge's rejection of the proposition that Mr Narev was informed of the facts comprising integer (b) at that time. In responding to the Bank's submissions by way of reply, the appellants slightly augmented their argument, expanding on the evidence given by Mr Narev and submitted:

> It is patently clear from the transcript that the cross-examination elicited that it was likely that Mr Narev was told integer (b). Moreover, in circumstances where Mr Narev agreed that it was likely that he was verbally told integer (b), whether that information was also recorded in contemporaneous documents or known by others is forensically irrelevant (c.f. J[471] and [472]).

233 The appellants' oral submissions on the appeal did not go beyond identifying Mr Narev's evidence, the fact that he was briefed orally (as well as in writing) and contending that his evidence was "sufficient to find actual knowledge in Mr Narev of the information".

234 A trial judge is not obliged to accept the evidence of a witness, even if not controverted. In *Cubillo v Commonwealth (No 2)* [2000] FCA 1084; 103 FCR 1 (***Cubillo***), O'Loughlin J observed (at [118]) under the heading "Accepting only part of the evidence of a witness" as follows, before going on to address relevant authorities:

> Before commencing a detailed analysis of the evidence in this case, I desire, in the first instance, to make clear the approach that I have taken to the evidence of a witness where I have found some, but not all, aspects of the evidence of that witness to be unreliable. Simply because I find against a party or a witness on one issue and reject some part of the evidence of that person, it does not mean that what remains is tainted, or otherwise lacks probative force, with the consequence that I should dismiss all the evidence of that person. **The principles enunciated in the cases indicate that the trial judge is entitled to believe part of the evidence given by a witness and to reject the rest**. After making an assessment of the evidence, after utilising the advantage of having seen and heard all the witnesses, and after forming an impression of each, the confidence that the judge reposes in a particular witness is assessed accordingly. **Where evidence has a logical probative value, a judge will rely on it; where it contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force, the judge will, in all probability reject it or, at least, not rely on it**. I mention some authorities that support those propositions.
>
> (Emphasis added.)

235 These observations have been widely cited with approval, including in the following cases: *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 (***CCL Secure***) at [94] per McKerracher, Robertson and Lee JJ (although an appeal from *CCL Secure* was allowed by the High Court in

Berry v CCL Secure Pty Ltd [2020] HCA 27; 271 CLR 151 (***Berry v CCL***), the Court did not criticise the Full Court's statements of principle in [94]); *R v Myer* [2023] QCA 144 at [108] per Bond JA (McMurdo JA and Dalton JA agreeing), referring to *CCL Secure* at [94]; and *Allen v The Queen* [2014] VSCA 180 at [65] per Maxwell P, Neave and Kyrou JJA.

236 As is apparent from *Cubillo*, the capacity of a judge to reject, or not rely on, part of a witness's evidence is not confined to the circumstance where the judge considers that that part of the witness's evidence was knowingly false: eg *Cubillo* at [125]. An examination of documents and surrounding circumstances may lead a judge to have no confidence in some parts of a witness's evidence, even if there is no suggestion that evidence was knowingly false.

237 In considering whether the primary judge erred in not proceeding on the basis that Mr Narev's concession in cross-examination was sufficient to establish actual awareness of integer (b), it is important to consider both the nature of his evidence, and the factual context. As is apparent from the extracts set out in the primary judge's reasons, Mr Narev's evidence was that he could not recall being informed of the percentage figure that constitutes integer (b). He then said it would not surprise him if he had heard the dollar value (which was integer (c)). Mr Narev finally said he was "happy to say yes" when the cross-examiner suggested that it was "likely" that in the briefings he was given, he had "received both of those two items of information" (being integers (b) and (c)).

238 The primary judge observed Mr Narev's evidence, which included cross-examination over three days. With the benefit of hearing Mr Narev's evidence over an extended period, the primary judge said his evidence making the concession "does not fill me with confidence", and he was not persuaded on the balance of probabilities that Mr Narev was informed of the percentage of the "affected transactions" that went through IDMs (i.e. the percentage figure specified in integer (b)).

239 But that was not the only matter to which the primary judge referred in rejecting the case on actual awareness of integer (b) as at 8 September 2015 or shortly thereafter. The primary judge also referred to the fact that the applicants had not identified any contemporaneous documents recording that information at that time, and there was no evidence any other officer of the Bank had that information, or could form an opinion or draw an inference to the effect of integer (b).

240 These points are of some importance and are not "forensically irrelevant", as the appellants contended. The integer (b) figure was not referred to in any *written* briefing provided to

Mr Narev in this period. However, Mr Narev was, as the appellants highlighted on appeal, also briefed *orally*. Counsel for the appellants identified an email sent by Mr Narev on 6 September 2015 in which he said "I spoke with Alden … about this today" as the evidence that Mr Narev was briefed orally. The appellants also referred to an email chain dated 7 September 2015 between Mr Toevs, Gary Dingley (Chief Operational Risk Officer) and Fiona Larnach (Chief Risk Officer – Retail Banking Services), but nothing in that email suggests anyone involved had the information constituting integer (b). It is objectively most unlikely (if not impossible) that Mr Toevs briefed Mr Narev with a figure he did not himself have, and there was no evidence before the primary judge that anyone in the Bank had that figure (or the raw data from which to calculate it) prior to January 2016.

241 It must be recalled that the percentage figure set out in integer (b) is the mathematical result of calculating the proportion of all threshold transactions processed through IDMs that were processed with the faulty code 5000. This required someone to find out not just how many threshold transactions had been processed, but not reported, using the faulty 5000 code, but how many threshold transactions had been processed through IDMs through the two other codes, which were not faulty.

242 The 95% figure in integer (b) was recorded in an internal email in the Bank on 22 January 2016. The email chain refers to the Bank having advised AUSTRAC on 8 September 2015 that the non-reporting of threshold transactions through the IDMs amounted to only 2.3% of the Bank's "overall TTRs" between November 2012 and August 2015, and to AUSTRAC having sent a letter dated 15 December 2015 posing various questions, which had to be answered by 31 January 2016. One question was how many TTRs were lodged for each of codes 4013 and 5022 during the stipulated period. Those two codes were IDM codes unaffected by the error that lead to IDM transactions with the 5000 code not being captured for threshold transaction reporting.

243 The email of 22 January 2016 stated:

> Question 8 asks us to provide details of how many TTRs were reported during that period relating to the other 2 IDM codes in operation. This shows that only a very small number of TTRs were lodged in respect of the other two codes meaning that the 53,529 unreported TTRs is 95 per cent of all TTRs that should have been relating to IDMs during the period.

The Bank's response to AUSTRAC reported that 616 TTRs were lodged for the 4013 code, and 2216 were lodged for the 5022 code.

244 It is clear from the email chain just referred to that the information for the response was being collated and a draft responsive letter was being prepared for Mr Toevs to review. There was, as the primary judge observed, no evidence that the information necessary to calculate the 95% figure, or the figure itself, had been ascertained by anyone in the Bank before the response to AUSTRAC's 15 December 2015 letter was prepared.

245 For these reasons, we do not consider that the primary judge erred in rejecting the applicants' contention that the Bank had actual awareness of integer (b) as at 8 September 2015 or shortly thereafter.

7.1.3 Constructive awareness of integer (b)

7.1.3.1 The primary judge's reasons

246 The primary judge rejected the applicants' contention that the Bank had constructive awareness of integer (b) as at 8 September 2015 or shortly thereafter. The primary judge observed that, while the Bank admitted that, from around November 2012 to September 2015, the late TTRs represented approximately 95% of threshold transactions that occurred through the Bank's IDMs, the Bank put in issue the question of its "awareness" of that information at that time.

247 The primary judge addressed the actual knowledge case (which was advanced on the basis of Mr Narev's concessions in cross-examination) and then observed that "there is no evidence that any other officer of the Bank had that information, or could form an opinion or draw an inference to the effect of integers (b) and (c) as at 8 September 2015". That observation is to be understood in the context of the primary judge's earlier discussion of the legal principles, and the way in which the primary judge addressed the applicants' case as to constructive awareness when addressing it more fully in connection with the June 2014 Late TTR Information. (The primary judge's fuller treatment of constructive awareness in addressing the June 2014 case reflects that the case below was run on the basis that, subject to modifications and additions, the submissions advanced regarding the late TTRs at June 2014 applied to the September 2015 case as well.)

248 The appellants' case on constructive awareness focused, both below and on appeal, on the Full Court's decision in *Crowley (FC)*. The primary judge said as follows in explaining what his Honour understood to have been determined by that Full Court:

> 395 The notion of constructive awareness was explained by Jagot and Murphy JJ in *Crowley v Worley Limited* [2022] FCAFC 33; 293 FCR 438 (***Crowley (FC)***). After stating (at [176]) that the word "information", as used in the definition

of "aware", embraces "facts", "circumstances", and "opinions", their Honours said (at [178]):

> 178 If the evidence shows that: (a) the information in fact existed, (b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer; and (c) acting reasonably the company officer ought to have discerned the significance of the information, then s 674 and the Listing Rules deem the company to have had the information. …
>
> ...
>
> 397 It is important to understand that the focus of their Honours' concern was a case in which it had been argued that r 3.1 was not engaged where officers did not realise, even though they should have realised, the implications of information of which they were actually aware. Their Honours did not accept that r 3.1 was not engaged in those circumstances. They accepted the submission that the information that a corporation ought reasonably to "have" includes opinions that an officer ought to have held by reason of *known* facts. At [182] their Honours said:
>
> > 182 Given the statutory provisions, to confine the inquiry to the question whether an officer or employee under a duty to inform an officer in fact formed an opinion or drew an inference consistent with [the pleaded information] would be in error. The required inquiry extends to the question whether an officer or employee under a duty to inform an officer knew facts from which they reasonably ought to have formed an opinion or drawn an inference consistent with [the pleaded information]. …
>
> 398 This aspect of their Honours' reasoning has importance for the present case. The Bank submits, and I accept, that *Crowley (FC)* does not extend the notion of "awareness" to an awareness of unknown facts that are merely capable of discovery through a process of further investigation to ascertain their existence. I would add that, even more so, *Crowley (FC)* does not extend "awareness" to facts that are capable of discovery with the benefit of hindsight.

249 Ground 4 of the appellants' notice of appeal focuses squarely on the correctness of the primary judge's approach, as set out in the passages just quoted.

250 Turning to the appellants' case on constructive awareness in relation to the June 2014 Late TTR Information, the primary judge found that the applicants' argument misapplied what Jagot and Murphy JJ said in *Crowley (FC)*. His Honour considered that the applicants' approach – which treated the first element of Jagot and Murphy JJ's statement (that the information in fact existed) as an abstract enquiry that could be informed by ex post facto investigation, divorced from whether a relevant person actually knew the fact at the relevant time or ought to have formed an opinion or drawn an inference to the effect of the fact from other known facts – was incorrect.

251 The primary judge considered that the applicants' case as to knowledge of integers (a) to (c) of the June 2014 Late TTR Information was that those facts were only said by the applicants to exist by reference to facts ascertained well after the relevant period, making the first step in the applicants' analysis one affected by hindsight. In this regard, it should be recalled that integer (b) in each form of the Late TTR Information included the same 80-95% range, while varying the period of time specified. Bringing those matters back to the constructive awareness contention, the primary judge said that, as at 16 June 2014, no relevant person (being an officer or someone with a duty to report to an officer) knew that, in the relevant period, the late TTRs represented between approximately 80 to 95% of the threshold transactions processed through the IDMs. Focusing on the information known as at the date in question (June 2014 in this part of his Honour's analysis), his Honour concluded: "Nor on the facts known as at 16 June 2014, could any relevant person deduce the content of the June 2014 Late TTR Information in this regard."

252 With that background to the primary judge's consideration of the effect of *Crowley (FC)* and the application of that approach to the June 2014 Late TTR Information, we return to his Honour's finding, in addressing the September 2015 Late TTR Information, that there was no evidence any officer had the information in integer (b), or could form an opinion or draw an inference to the effect of integer (b) at the relevant time. What that holding conveys is that no officer had the information from which that person could form an opinion, or draw an inference, that the late TTRs constituted between 80 to 95% of the threshold transactions occurring through the Bank's IDMs between November 2012 and September 2015.

253 The question, on appeal, is whether the primary judge erred in rejecting the constructive awareness case regarding integer (b) of the September 2015 Late TTR Information.

7.1.3.2 The parties' submissions on the appeal

254 The appellants' written submissions on the appeal put their position succinctly:

> Integer (b), which is simply one measure of the relative scale of the contraventions, is not of such a character that to ascertain it would have required CBA to undertake a further investigation beyond facts that were already obvious to it. The proportion of total TTRs represented by the Missing TTRs was a simple mathematical calculation. One input required for the calculation, the number of Missing TTRs in the period November 2012 to 8 September 2015, was found by the primary judge to have been known by CBA on or shortly after 8 September 2015: J[463]-[465]. The second input – the total TTRs for IDMs reportable to AUSTRAC in the period November 2012 to 8 September 2015 – could readily have been ascertained by CBA on or shortly after 8 September 2015 from data held within the GDW. Since CBA was under an obligation under s 43 of the AML/CTF Act to make such reports, interrogation of the

> GDW at any given time would have revealed the number of reports that had been made. Once extracted from the GDW, reasonable management procedures ought to have brought integer (b) to the attention of officers of CBA. The reason the document recording this data was brought into existence in early 2016, without the slightest difficulty, was to enable Mr Toevs to respond to AUSTRAC's request for that very information. It was an obvious thing to ask for, and could be worked out very rapidly, at any time after the problem was escalated in September 2015.

255 The key propositions advanced by the appellants were:

(a) the Bank was obliged, by s 43 of the AML/CTF Act, to report threshold transactions to AUSTRAC and so could interrogate the GDW to find out how many threshold transactions through IDMs had been reported over the period in question;

(b) it would not have been hard for someone to interrogate the GDW to obtain this data; and

(c) once extracted from the GDW, this information about total threshold transactions should have been brought to the attention of officers of the Bank, where it could have been combined with the number of TTRs known to have been missed due to the coding error, such that the percentages in integer (b) could have been worked out.

256 In oral submissions, the appellants observed that the Bank had been able to advise AUSTRAC on 8 September 2015 that the TTRs that had not been lodged in respect of the IDMs under code 5000 constituted approximately 2.3% of the overall volume of TTRs reported by the Bank over the same period, thereby demonstrating that it was able to obtain the kind of data necessary to work out percentages by "asking a question of the system". The appellants submitted that it was "obviously possible on that date [8 September 2015] to ask the more pertinent question, what percentage are the late TTRs of all TTRs through IDMs?" The contention was advanced that the enquiry necessary to obtain the number of TTRs for the "innocent" codes was simple, obvious and "should have been done".

257 A further submission advanced orally (but not in the appellants' written submissions on this issue) was that the Bank was obliged to maintain, and comply with, Part A of its anti-money laundering and counter-terrorism financing program (**AML/CTF Program**). The Bank's AML/CTF Program contained a series of provisions requiring, amongst other things, that business units must "identify compliance incidents; assess them to determine if they are reportable or notifiable; record and report them" and must "advise and escalate compliance incidents to the relevant person who has got authority to make decisions over them". The

Program also contained a requirement to conduct an "impact assessment" of each compliance incident. The submission, then, was that:

> So to conduct an impact assessment of the late TTRs, an essential part would be to record how widespread this problem is across the IDM system. Is the whole network threatened with denying AUSTRAC the information it has required or has it only been an isolated breach?

The next step in this argument was that the risk escalation protocols then required that matters including the late TTRs be escalated to someone of the seniority of Matthew Comyn (Group Executive – Retail Banking Services), Mr Toevs or Mr Narev.

258 Bringing the threads together, the submission (said also to be supported by the expert evidence of Mr Elliott as to the simplicity of ascertaining the relevant information from the Bank's system) was that:

> [E]ven if integer (b) was not known, it ought to have been known as part of the process of escalating this extraordinarily serious problem to the highest levels of the bank, and it's information that was capable of being obtained without difficulty.

259 The Bank submitted that the appellants had not contended before the primary judge that the Bank was constructively aware of integer (b). The Bank also contended that the appellants had not explained, in their submissions, why the information in integer (b) was so significant that someone within the Bank *should* have interrogated its systems, performed the calculation and escalated it to the officer level.

260 The Bank's oral submissions on constructive awareness of integer (b) focused on *Crowley (FC)*. They contended that, on the appellants' case, the Bank was obliged to disclose information based on a calculation using data stored in a database when the data in question was not a "known fact" because there was no evidence anyone in the Bank had drawn the data regarding the two "innocent" codes before that information was extracted, at AUSTRAC's request. The Bank submitted that this approach went beyond *Crowley (FC)*, and the reasons of Jagot and Murphy JJ in that case did not extend beyond inferences or opinions from "known facts". The Bank submitted that the continuous disclosure regime does not oblige listed entities to disclose information that is not known to anyone in the entity, and is not an inference that may be drawn from known facts.

261 The Bank's oral submissions also took issue with the appellants' contention that it would have been a quick and easy task for personnel in the Bank to extract the data regarding the "innocent" IDM codes. The Bank contended that not only did the Bank process over seven million

transactions a day, the appellants' submissions overlooked the complexity of the Bank's systems, which was a matter that the primary judge addressed in his reasons.

7.1.3.3 Consideration

262 An initial point can be readily addressed: contrary to the submissions of the Bank, the appellants did advance a case on constructive awareness of the September 2015 Late TTR Information (including integer (b)) below.

263 It is salutary to recall that the appellants' case on constructive awareness necessarily contends that an officer of the Bank ought reasonably to have come into possession of the information constituting integer (b). In other words, an officer of the Bank should reasonably have come into possession of information that "the September 2015 Late TTRs represented between approximately 80% and 95% of the threshold transactions that occurred through Bank's IDMs during the period from November 2012 to September 2015".

264 As the Bank highlighted, integer (b) is information about the specific proportion of all IDM threshold transactions constituted by the late TTRs. The appellants' contention regarding constructive awareness of integer (b) was not that an officer ought to have become aware of the late TTR problem itself, the cause of the problem, whether the problem had been rectified, or the number of TTRs that were late, but that an officer should have become aware of the pleaded percentage figures. The immediate question is: why? Why, when the Bank knew (at least approximately) how many TTRs were late, knew what the cause was – the coding error – knew that the problem had been fixed, and had reported what occurred to AUSTRAC, would it be necessary, or even sensible, for an officer to be told (or calculate) the percentages in question? We will return to this, but first address the contention that *Crowley (FC)* supports the appellants' case.

265 The issue in *Crowley (FC)* was whether an entity can be obliged to disclose to the market an opinion that no officer had actually formed, even if that opinion ought to have been formed. That question arose because the respondent company had published earnings guidance to the ASX and it was alleged that the company contravened its continuous disclosure obligations by failing to disclose that the company did not have a reasonable basis for that earnings guidance. That allegation was met by the defence that neither the respondent's officers nor the Board had, in fact, formed the opinion that the company did not have a reasonable basis for its earnings guidance, and therefore the respondent was not "aware" of the alleged "information" that it

was alleged the respondent was required to immediately tell the ASX pursuant to Listing Rule 3.1.

266 In the course of their reasons, Jagot and Murphy JJ addressed the circumstance where a board (or other directing minds) of a corporation "have not focused on the relevant issue based on the then known facts but reasonably ought to have done so and formed a particular opinion or drawn a particular inference": *Crowley (FC)* at [171]. Their Honours considered that there was no reason that such an opinion or inference "not in fact held by the board or any other person, but which on the *known facts* ought to have been held" should not be treated as "information" required to be disclosed: *Crowley (FC)* at [171] (emphasis added). Following on from that, the plurality stated that Listing Rule 3.1 can be engaged where the directors or officers of a company should have, but did not, "realise the implications of information *of which they were aware*": *Crowley (FC)* at [173] (emphasis added).

267 The passage of the reasons of Jagot and Murphy JJ on which the appellants particularly rely is [178], where their Honours said:

> If the evidence shows that: (a) the information in fact existed, **(b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer, and (c) acting reasonably the company officer ought to have discerned the significance of the information**, then s 674 and the Listing Rules deem the company to have had the information. … WOR's approach would effectively reward a publicly listed company for having such poor information systems and management procedures that the company does not come into possession of important, market-sensitive information and does not form an opinion based on known facts, which it reasonably should have formed. It would also reward a company for its officers holding back from the board an opinion they had formed about such matters.
>
> (Emphasis added.)

268 Writing separately, Perram J agreed with Jagot and Murphy JJ, but also explained why his Honour had come to the view that what he had said in *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149; 322 ALR 723 at [157] – that the continuous disclosure regime did not apply to require disclosure of opinions not actually formed – was wrong. In stating his revised view, Perram J accepted that an entity to which Listing Rule 19.12 applies will be "aware" of an opinion which it "ought reasonably to have formed on the facts known to it regardless of whether it did or did not in fact form that opinion": *Crowley (FC)* at [5].

269 Having regard to Perram J's agreement with Jagot and Murphy JJ, and his Honour's observations just referred to, it follows that all three members of the Full Court in *Crowley*

(FC) considered that the continuous disclosure regime applies to opinions or inferences that ought to have been formed from *known facts*.

270 In the present case, while it is plain that the percentage figures in integer (b) could be calculated from information held on the Bank's GDW, those percentage figures are the result of a calculation based on information that *no person* within the Bank knew.

271 Is it, however, sufficient that the facts from which the calculation was performed were stored on, or could be extracted from, the GDW? On the facts of this case, we think not.

272 First, the situation where the information comprises a deduction or calculation from data points not known to any individual is not a situation that was addressed by the Full Court in *Crowley (FC)*.

273 The observations of Jagot and Murphy JJ in *Crowley (FC)* at [178] (referred to at [267] above) were made in, and apply to, the circumstances before the Court in that case. Their Honours' reference to "reasonable information systems or management procedures" was not at large. Their Honours were not setting out any principle of general application that a fact *capable of discovery* by interrogating a database and then performing calculations constitutes information of which an entity is aware just because it would be "reasonable" for those enquiries to be made. If that proposition is to be embraced, it must be on the basis that s 674 of the *Corporations Act* and the Listing Rules require disclosure in those circumstances; not because *Crowley (FC)* applies to construe s 674 and the Listing Rules as requiring disclosure in that circumstance.

274 Secondly, neither the terms of, nor the policy objectives pursued by, the continuous disclosure regime require disclosure of information constituted by a calculation based on data simply because that data *could* be extracted from a database. As set out above, the continuous disclosure regime is concerned with timely disclosure of material information, so as to enhance the fairness and efficiency of stock markets, and to avoid (or at least minimise) the opportunities for some market participants to have access to material information that is not available to others.

275 The continuous disclosure regime does not impose a wide-ranging obligation on listed entities to scrutinise their data just because if they did so, and drew out certain data, someone *could* then derive a market-sensitive piece of information from that data. In many circumstances such an obligation would be all but impossible to fulfil (including having regard to the

obligation to disclose market sensitive information "immediately"). It would also tend to support the imposition of continuous disclosure obligations by retrospective, post hoc analysis because the potential to extract data and then make calculations or draw inferences from it would often only be apparent with hindsight, once a particular issue has emerged.

276 In this regard, it should be recalled that s 674 of the *Corporations Act* refers to whether the *entity* has information, but that issue is, in the case of entities listed on the ASX, practically to be determined by the Listing Rules. Rule 3.1 refers to an *entity* being "aware" of the information, but awareness is to be determined by reference to an identified group of people: *officers* of the entity. More than that, the awareness of an entity through the constructive awareness of an *officer* is further confined to information that they ought reasonably to have come into possession of "in the course of the performance of their duties as an officer of that entity".

277 In their written submissions, the appellants relied on *Australian Energy Regulator v AGL Retail Energy Ltd* [2024] FCA 969 (***AGL***). In that case, Downes J held that AGL Retail Energy Ltd (**AGL**) was "aware" of information for the purposes of the relevant rules under consideration where the information existed within its SAP computer system and could be readily identified, and could not avoid having awareness by designing and implementing a system such that no person ever had knowledge of the information capable of being extracted from it: *AGL* at [152] and [159]-[160].

278 AGL was a business that received energy bill payments from social security recipients directly by a facility operated by Services Australia, known as "Centrepay". The Australian Energy Regulator alleged that AGL had overcharged some customers whose bills were paid via Centrepay. Rule 31(1) of the National Energy Retail Rules required the retailer to inform a "small customer" within 10 business days of becoming "aware" of the overcharging. The issue in *AGL* was whether AGL had become "aware" that a group of Centrepay customers had been overcharged when the billing was wholly automated and records existed in AGL's SAP system.

279 It was common ground in *AGL* that "aware" in r 31(1) meant actually aware. The result in *AGL* was driven by Downes J's conclusion that the purpose of r 31(1) would be defeated if: it were construed to require (for example) actual knowledge of the directors or other officers of the corporate retailer, or any other particular person or group of persons; or if actual knowledge of a human being in the corporate retailer was required, thereby incentivising systems to ensure no person ever gained knowledge of instances of overcharging: *AGL* at [151]-[152]. *AGL* was

not about constructive awareness at all. It concerned the operation, in relation to social security recipients, of a specific rule in the National Energy Retail Rules with particular policy objectives. The case is not of assistance in the very different legislative and policy framework of the continuous disclosure regime for listed entities, which fixes on the actual or deemed awareness of officers. We also note that an appeal has been filed, but — at the time of publication of these reasons — has not yet been heard.

280 Thirdly, the appellants' case on appeal fails on the facts. It takes the statement of Jagot and Murphy JJ regarding "reasonable information systems or management procedures" and hitches it to the Bank's AML/CTF Program. There are a number of problems with this approach. It takes Jagot and Murphy JJ's reference to "reasonable information systems or management procedures" out of context and seeks to apply it beyond the ambit of the matters addressed by *Crowley (FC)*.

281 Fundamentally, the appellants' argument fails on the facts because it confuses escalation of an *issue* – the fact large numbers of TTRs for IDM transactions were not lodged due to a coding error – with the extraction and escalation of data that would allow a calculation of the percentage of threshold transactions through IDMs that had been missed. As counsel for the appellants said in oral submissions, that was the "problem" that needed to be escalated to senior levels in the Bank. However, that problem *was* escalated, and it was fixed without anyone needing to find out the information constituting integer (b). Nothing in the appellants' submissions exposed just why it was said that the percentage information that constitutes integer (b) was important for an officer to know, or to deduce once informed of the data points for the two "innocent" IDM codes, and so to come into possession of that information "in the course of the performance of their duties as an officer of [the Bank]".

282 Rather, the appellants' contention seems to be that the problem was serious, and adherence to the Bank's AML/CTF Program would have seen those data points extracted and escalated to senior management, or the percentage figures being calculated by staff and then escalated. That contention fails at the factual level. Part A of the Bank's AML/CTF Program required the Bank to identify and assess compliance incidents and conduct an impact assessment. None of the tasks required that the data points regarding the number of TTRs lodged in respect of the "innocent" IDM codes be extracted and escalated to an officer. Nor did the Bank's AML/CTF Program require that someone (whether or not an officer) take those data points and calculate

the percentage of all IDM threshold transactions that were represented by those transactions in respect of which TTRs were not lodged due to the coding error in relation to the 5000 code.

283 The obligation of the Bank, pursuant to s 43 of the AML/CTF Act, to report threshold transactions, also does not assist the appellants' case. The existence of the obligation explains the development of processes and data warehouses to enable the Bank to fulfil such obligations, but it does not say anything about why the relevant data points concerning the "innocent" codes would be extracted and escalated, or why anyone would be concerned to know the percentage of the overall IDM threshold transactions constituted by the late TTRs associated with the faulty 5000 code.

284 Fourthly, to the extent that the appellants' case on this issue rested on the proposition that it would have been easy and quick to extract the two data points, that is not borne out by the evidence. While the Bank suggested that the time taken to reply to AUSTRAC's 15 December 2015 letter shows the process was complex, that proposition cannot be accepted as AUSTRAC asked a number of questions, and there was no evidence about how long it took, or the process pursued, to extract the data points for the "innocent" codes, when AUSTRAC asked for that data. Nevertheless, as the Bank observed, the primary judge set out in his reasons features of the Bank's TTR processes and data systems, which expose considerable complexity. Those findings were not challenged on appeal. The primary judge also considered Mr Elliott's evidence not to be of importance and to suffer from a number of deficiencies. Those conclusions were not directly challenged on the appeal.

285 It follows from the foregoing that the primary judge did not err when he concluded that *Crowley (FC)* does not extend the notion of "awareness" to an awareness of unknown facts that are merely capable of discovery through a process of further investigation into their existence, still less to facts that are capable of discovery with the benefit of hindsight.

286 Ground 1 must be rejected.

287 Our rejection of the appellants' case on Ground 1 should not, however, be misunderstood as suggesting that an entity can never breach its continuous disclosure obligations where the material information is constituted by, or may be drawn from, information on a company's databases. A decision as to whether "information" exists "will, invariably, be assisted by analysis against specific factual circumstances" (*Grant-Taylor* at [94]) and the same can be

said of a decision as to whether an officer, acting reasonably, should have scrutinised company data, and drawn out certain data, in an effort to derive potentially material "information".

288 The definition of "aware" in Listing Rule 19.12 extends an entity's awareness beyond the information its officers in fact know to information that its officers "ought reasonably have come into possession of". The extended meaning given to awareness and the statutory purpose behind s 674 indicate the importance of ensuring that an entity cannot avoid its continuous disclosure obligations by the simple expedient of not asking company officers to draw information out of a company database, and thereby not deriving "information" which is notifiable to the ASX under Listing Rule 3.1. Nor should an entity be rewarded for its officers holding back from drawing information from the company's databases, and making calculations, when they reasonably ought to have made those enquiries. There may be cases where the nature of the issue, or the nature of the information on a database, or other parts of the factual context, would bring such a case within the terms of s 674 of the *Corporations Act* and the Listing Rules; but this is not such a case.

289 Similarly, while the Bank's AML/CTF Program did not, on the facts in this case, support the appellants' case, an entity's internal policies and procedures may be relevant in other cases, not just in relation to escalation of known facts, but in relation to whether an entity ought to have been aware of facts that are not known by any individual in the entity. That said, the continuous disclosure regime operates having regard to the characteristics of the information concerned (its materiality), not by imposing differential obligations on listed entities depending on the content of their internal policies.

290 Were the application of the continuous disclosure provisions driven by the content of an entity's internal policies so as to operate in this differential way, it would operate as an incentive to have more limited internal policies. That would be inimical to the objects of the continuous disclosure regime. The Listing Rules and Guidance Note 8 make it plain that listed entities should have policies and procedures that are effective to ensure that information known by personnel in the entity that *should* be escalated to officers *is* so escalated. Absent such policies and procedures, a listed entity may find itself in breach of its continuous disclosure obligations in respect of information known in the entity, but which is not escalated to an officer, due to inadequate policies and procedures.

7.2 Grounds 2 and 3: Awareness of other pleaded information

291 Grounds 2 and 3 concern the Bank's awareness of the September 2015 Account Monitoring Failure Information and the Potential Penalty Information at the same point in time. However, as we have rejected the appeal concerning the Bank's awareness of the September 2015 Late TTR Information as at 8 September 2015 or shortly thereafter, it is not necessary to address grounds 2 and 3.

292 That is because the appellants did not contend that the latter forms of information were required to be disclosed as at 8 September 2015 or shortly thereafter if the September 2015 Late TTR Information was not required to be disclosed at that time.

7.3 Ground 4: Legal approach to awareness

293 By Ground 4, the appellants contended that, contrary to [398] of the Reasons:

> [T]he primary judge ought to have found that a corporation cannot shield itself from awareness within the meaning of ASX Listing Rule 19.12, and further or alternatively, for the purposes of having information under s 674 of the Corporations Act 2001 (Cth) (**Corporations Act**), by reason of its failure:
>
> a. to put in place, or observe, adequate systems for bringing knowledge of material facts to officers of the corporation; and further or alternatively,
>
> b. to make obvious enquiries arising from facts known to it.

294 Contrary to the premise of this ground of appeal, the primary judge did not find that an entity can shield itself from awareness by either of the means stated in Ground 4. It also follows, from our discussion of Ground 1, that the enquiries necessary to discern the information constituted by integer (b) were not the product of a failure to put in place, or observe, adequate systems for the escalation of knowledge to officers, or to make obvious enquiries from known facts.

295 Ground 4 must also be rejected.

8 COMPLETENESS AND ACCURACY ISSUE

296 This issue is raised by Ground 5 of each notice of appeal. In summary, by this ground, the appellants contend that the primary judge erred in dismissing their disclosure case on the *threshold basis* that if the Bank could identify any piece of "contextual information" (i.e. information outside the information pleaded by the appellants) that would be required or permitted to be disclosed as part of an accurate and complete disclosure of the pleaded

information, the disclosure case must fail entirely (referring to the Reasons at [382]-[391] and [568]-[631]). Specifically, the appellants contend that:

(a) the primary judge wrongly reasoned that s 674(2) of the *Corporations Act* and Listing Rule 3.1 contained within them a threshold criterion, namely, that information said to have been wrongly withheld from the market must be "appropriate to be disclosed in its pleaded form" (Reasons, [568]) in the sense of being a "complete statement" of information that would be required or permitted to be disclosed as part of an accurate and complete disclosure of the pleaded information (Reasons, [385], [387]-[388], [570]-[575]);

(b) the primary judge wrongly permitted the Bank to contend that the disclosure case should be dismissed on the threshold basis when that fell outside the Bank's defence; and

(c) having permitted the Bank to rely on the threshold basis outside its defence, the primary judge erred in:

(i) holding the appellants to their pleading and in not permitting the appellants to meet the Bank's new defence on its merits (Reasons, [386]-[391]);

(ii) allowing the Bank, in closing submissions, to expand its defence on the threshold basis beyond its case as articulated in its opening submissions;

(iii) finding that the pleaded information was incomplete and inaccurate in particular respects that had not been raised by the Bank or ventilated at trial; and

(iv) failing to make findings as to the full scope of disclosure that should have been made by the Bank and then carrying forward those findings to the materiality stage of the analysis.

297 This ground raises both an issue of principle (namely, whether the primary judge erred in dealing with the Bank's contentions regarding the completeness and accuracy of the pleaded information as a *threshold issue*) as well as issues relating to the way in which the case at first instance was pleaded and run. We will first describe the way in which the case was relevantly pleaded and run, before turning to consider the various aspects of Ground 5.

8.1 The way in which the case was relevantly pleaded and run

298 Although the focus for present purposes is the *Bank's* pleadings, it is necessary to start with the *applicants'* pleadings to provide context. It is sufficient to refer to the pleadings in the

Zonia proceeding, as the pleadings were substantially the same in both proceedings. Zonia's latest statement of claim was the third further amended statement of claim (the **Statement of Claim**). Zonia pleaded the information that it contended ought to have been disclosed at paras 40-40B (the Late TTR Information), 43 and 43A (the IDM ML/TF Risk Assessment Non-Compliance Information), 45-45AB (the Account Monitoring Failure Information) and 48 (the Potential Penalty Information). In other paragraphs, Zonia pleaded that: the Bank was "aware" of the pleaded information; the Bank did not at any time prior to 3 August 2017 disclose the information (para 50); the pleaded information was information that a reasonable person would expect to have a material effect on the price or value of CBA shares within the meaning of Listing Rule 3.1 and s 674(2)(c)(ii) of the *Corporations Act* (eg, para 69C); the Bank was obliged to tell, but did not, the ASX the pleaded information (eg, paras 70C, 71C); and the Bank thereby contravened Listing Rule 3.1 and s 674(2) of the *Corporations Act* (eg, para 72).

299 In its pleading in response (the defence to the Statement of Claim), the Bank pleaded a number of facts and matters related to the pleaded information, but *did not allege* that the pleaded information was incomplete and/or misleading and/or not in a form that would be appropriate for disclosure, or that these matters provided a reason why the Bank was not obliged to disclose the pleaded information. For example, in response to paras 40 and 40B (which pleaded, respectively, the June 2014 Late TTR Information and the September 2015 Late TTR Information), the Bank pleaded:

> 40. In answer to paragraph 40, CBA:
>
> a. says that, before CBA launched IDMs, it established an automated process to identify threshold transactions through IDMs and report those threshold transactions to AUSTRAC (the **TTR process**);
>
> b. says that the TTR process identifies transactions by transaction codes and automatically generates TTRs in respect of threshold transactions by reference to those transaction codes;
>
> c. says that, when IDMs were launched, two transaction codes were used to identify the types of deposits involving cash that could be made through IDMs;
>
> d. says that, in or around November 2012, to address an error message appearing on customer statements when cash deposits were made through IDMs, a third transaction code was introduced, being transaction code 5000;
>
> e. says that, from in or around November 2012 to in or around September 2015, as the result of an error which occurred where the TTR process was not configured to recognise transaction code 5000 for the purposes of TTR reporting, TTRs for cash deposits with transaction code 5000 did not automatically generate;

f. says further that as a result of the transaction coding error not being detected until mid to late August 2015, in total CBA did not give the Chief Executive Officer of AUSTRAC (**AUSTRAC CEO**) a TTR for 53,506 cash transactions of $10,000 or more processed between November 2012 and 1 September 2015 through IDMs within 10 business days after the day on which the transaction took place;

g. says that each of those TTRs were cash deposits which were identified by reference to transaction code 5000;

h. says that 2 of those TTRs were submitted to the AUSTRAC CEO on 24 August 2015 and the remaining 53,504 TTRs were submitted to the AUSTRAC CEO on 24 September 2015;

i. says that, from September 2015, the TTR process was reconfigured to automatically generate TTRs for cash deposits with transaction code 5000; and

[j had been deleted]

k. otherwise denies the allegations in paragraph 40 of the Claim

…

40B. In answer to paragraph 40B, CBA:

a. repeats paragraph 40 above;

b. in answer to the allegations in sub-paragraph 40B(a) of the Claim:

i. says that CBA failed to give TTRs on time for approximately 53,506 cash transactions of $10,000 or more processed through IDMs following the introduction of IDMs, which transactions occurred in the period from 5 November 2012 to 1 September 2015 (**CBA September 2015 Late TTRs**); and

ii. otherwise denies the allegations in sub-paragraph 40B(a);

c. says that the CBA September Late TTRs represented approximately 95% of threshold transactions that occurred through CBA's IDMs during the period from November 2012 to September 2015 and otherwise denies the allegations in subparagraph 40B(b);

d. says that the CBA September 2015 Late TTRs had a total value of approximately $624.7 million and otherwise denies the allegation in sub-paragraph 40B(c);

e. says that the CBA September 2015 Late TTRs represented approximately 2.3% of all TTRs reported by CBA to AUSTRAC between 2012 and 2015;

f. says that 2 of the CBA September 2015 Late TTRs had been lodged on 24 August 2015; and

g. otherwise denies the allegations in paragraph 40B of the Claim.

300 It can be seen from these paragraphs that the Bank pleaded positively several of the facts and matters that formed part of the Late TTR Information as pleaded by Zonia (indicating that there

was no issue as to the accuracy of those matters). The definition of the September 2015 Late TTR Information has been set out at [128] above. Paragraphs 40B(b)(i), (c) and (d) appear to be substantially the same as, or at least very similar to, paras (a), (b) and (c) of the September 2015 Late TTR Information. While para (d) of the September 2015 Late TTR Information (which uses the expression "systems error") is not reflected in the Bank's pleading, the underlying facts relating to the cause of the TTR problem are set out in para 40.

301 The Bank's pleadings in response to paras 43 and 43A of the Statement of Claim (relating to the IDM ML/TF Risk Assessment Non-Compliance Information) and paras 45-45AB (relating to the Account Monitoring Failure Information) were similar in character.

302 The Bank's pleadings in response to para 48 of the Statement of Claim (relating to the Potential Penalty Information) set out options available to AUSTRAC, details of the Tabcorp proceeding and the dealings between the Bank and AUSTRAC prior to 3 August 2017.

303 The Bank's responses to the other relevant paragraphs of the Statement of Claim referred to above contained specific defences or answers to the allegations (eg, reliance on the exception in rule 3.1A of the Listing Rules), but did not allege that the pleaded information was misleading and/or incomplete and/or not in a form that would be appropriate for disclosure. For example, in response to para 69C of Zonia's pleading (in which Zonia alleged that, as at 24 April 2017 or shortly thereafter, the September 2015 Late TTR Information was information that a reasonable person would expect to have a material effect on the price or value of CBA shares within the meaning of Listing Rule 3.1 and s 674(2)(c)(ii) of the *Corporations Act*), the Bank pleaded:

> 69C. In answer to paragraph 69C, CBA:
>
> a. repeats paragraphs 40B, 41C and 48 above;
>
> b. says that to the extent that the Applicant relies on matters or information which it is alleged CBA or officers of CBA ought to have been (but were not) aware, such matters or information was not information required to be disclosed under section 674(2) of the Corporations Act by reason of the fact that the alleged information was in the nature of an opinion and no relevant person had formed that opinion;
>
> c. says that if the September 2015 Late TTR Information existed (which is denied) and CBA was aware of the September 2015 Late TTR Information from 24 April 2017 or shortly thereafter (which is denied), it denies that such September 2015 Late TTR Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares as pleaded;

d. says that even if the September 2015 Late TTR Information existed (which is denied) and CBA was aware of such September 2015 Late TTR Information from 24 April 2017 or shortly thereafter (which is denied) and the September 2015 Late TTR Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares (which is denied), then the September 2015 Late TTR Information was within an exception to ASX Listing Rule 3.1 provided by ASX Listing Rule 3.1A because:

i. the information as pleaded:

1. comprises matters of supposition or is insufficiently definite to warrant disclosure; and/or

2. was generated for the internal management purposes of CBA;

ii. the information was confidential and the ASX had not formed the view that the information had ceased to be confidential; and

iii. a reasonable person would not have expected CBA to disclose that information;

and accordingly, by virtue of ASX Listing Rule 3.1A, ASX Listing Rule 3.1 did not apply to that information; and

e. otherwise denies the allegations in paragraph 69C of the Claim.

304 This form of pleading was also adopted in other paragraphs in the defence, in relation to the other forms of pleaded information.

305 In response to the paragraphs of Zonia's pleading alleging that the pleaded information should have been disclosed and that the Bank thereby contravened Listing Rule 3.1 and s 674(2) (eg, paras 70C, 71C and 72), the Bank repeated earlier paragraphs of the defence and otherwise denied the allegations.

306 On the basis of this review of the pleadings, it can be seen that the Bank's defence did not raise, as an issue, that the pleaded information was incomplete and/or misleading and/or in a form that would not be appropriate for disclosure, and that, on these bases, the Bank was not required to disclose the pleaded information. (Although not directly relevant for the purposes of this section of our reasons, we note that the Bank's defence also did not contain any allegation to the effect that the pleaded information needed to be considered together with other relevant information and, when so considered, the pleaded information was not material in the relevant sense.)

307 However, the Bank did squarely raise a contention that the pleaded information was incomplete and/or misleading and/or in a form that would not be appropriate for disclosure in its outline

of opening submissions dated 2 November 2022 (being five days before the commencement of the trial). Section B of the Bank's outline of opening submissions was headed "The Applicants' alleged information and whether it could be disclosed". This section, comprising paras 101-124, was located immediately *before* a section of the outline dealing with the "awareness" issue, indicating that it was raised as a threshold point. This section of the Bank's outline commenced with the following overview:

> 101. To make good their continuous disclosure claim, the Applicants must prove first that the information they have pleaded is accurate, coherent, and properly contextualised and second that it was material. **The Applicants' case will fail at the first of these hurdles**. The second hurdle is also fatal and is dealt with further below. The authorities are clear that information disclosed under the continuous disclosure regime must not be misleading or deceptive, or otherwise incomplete, having regard to matters of context. Yet the information that the Applicants allege CBA should have disclosed is of precisely this character. When viewed this way, disclosure of the information alleged by the Applicants would undermine the continuous disclosure regime, rather than promoting it.
>
> (Emphasis added.)

308 The second sentence in the above paragraph indicated that the Bank was raising this as a threshold point (a first hurdle). In other words, the Bank contended that if the applicants failed to show that the pleaded information was "accurate, coherent, and properly contextualised" then the applicants' claim would fail before one even considered whether the information was material in the relevant sense.

309 At paras 102-104, the Bank set out legal principles that it said supported its (first hurdle) contention, relying on *Jubilee Mines* and the ASX's Guidance Note 8. The Bank submitted:

> 102. The authorities establish that a company cannot be required by the continuous disclosure regime to disclose to the ASX information that would be misleading or deceptive or would otherwise give rise to a false market. Instead, disclosure if required, must be of complete information. To this effect in *Jubilee Mines NL v Riley* at [161], McClure JA observed:
>
> > The information [to be disclosed] must also include all matters of fact, opinion and intention that are necessary in order to prevent the disclosing company otherwise engaging in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> 103. To similar effect, Martin CJ observed in *Jubilee* at [87] that it would be contrary to the purpose of the continuous disclosure regime "to construe either the listing rule or the statutory provisions as countenancing disclosure of incomplete or misleading information". So too, in "Guidance Note 8" published by the ASX (**Guidance Note 8**), the ASX observes that "[a]n announcement under Listing Rule 3.1 must be accurate, complete and not misleading".

(Footnotes omitted.)

310 As discussed below, the judgment of Martin CJ (with whom Le Miere AJA agreed) in *Jubilee Mines* provides no support for the "first hurdle" or threshold approach for which the Bank was contending. In fact, Martin CJ considered the relevant additional information (relied on by the defendant at first instance) in the context of considering the *materiality* of the pleaded information.

311 The Bank's outline of submissions, at paras 105-117, set out reasons why it was contended that the pleaded information was incomplete and/or misleading and/or not in a form that was appropriate for disclosure.

312 The Bank referred (at para 106 of its outline) to correspondence between the parties in which the applicants' legal representatives had confirmed that the pleaded form of information was the "precise form of information that [they allege] should have been disclosed [by CBA] to the ASX". That correspondence is before this Court on appeal (AB Pt C, tabs C2.170, C2.171). The Bank submitted (in its outline at first instance) that, as such, there was no room for doubt as to the precise nature of the disclosure that the applicants contended should have been made.

313 The Bank made submissions about each group of pleaded information, starting with the Potential Penalty Information. The Bank submitted that the Potential Penalty Information was vague and imprecise and therefore was not in a form that would be appropriate for disclosure. The Bank also submitted that the Potential Penalty Information was "misleading or incomplete" because it did not include certain matters, namely that: AUSTRAC had consistently maintained that it had not made any decision about whether to take enforcement action against the Bank or what form any action would take; and AUSTRAC had also indicated to the Bank that it would provide it with notice before taking any such action (para 110).

314 In relation to the Late TTR Information, the Bank made the following submissions:

> 112. <u>*Secondly*</u>, and similarly, the disclosure of the alleged Late TTR Information could not have been required by the continuous disclosure regime where it would have involved the disclosure of **misleading or incomplete information**.
>
> 113. The constituent elements of the Late TTR Information are: (1) certain TTRs were not lodged on time; (2) those TTRs represented a certain percentage of threshold transactions through IDMs; (3) those TTRs related to transactions of a particular dollar amount; (4) the TTRs were not lodged because of a "systems" error; and (5) as at June 2014 and August 2015, the cause of the failure to lodge the TTRs on-time had not been rectified. But an announcement of this kind would have been misleading or deceptive. Such an announcement

would paint an entirely inaccurate and incomplete picture of the state of affairs.

114. Again, by way of example, the Applicants contend that CBA should have disclosed to the ASX that the late TTRs constituted 80%-95% of the total TTRs to be lodged in respect of transactions through IDMs. However, this leaves out of account the fact that the late TTRs represented only between 1.08% and 2.3% of the total TTRs lodged by CBA during the Relevant Period. Moreover, it also leaves out of account the fact that the late TTRs represented only between .0002% and .0007% of total transactions undertaken by CBA in the Relevant Period.

115. Similarly, the Applicants contend also that any disclosure of information should have disclosed that the error had occurred by reason of a "systems" error. However, this would be misleading. It would fail to reveal that the late lodgement of the TTRs was the result of a single error caused by the creation of an additional transaction code. As such, it would omit information key to understanding why the error had occurred. Furthermore, the Applicants contend that any disclosure in June 2014 or August 2015 should have stated that the problem had not been rectified, and any disclosure in September 2015 should not state that the problem had been rectified. This again misrepresents the situation. As noted above, once detected, the cause of the late lodgement of the TTRs was rectified in a matter of weeks. By including a statement that the problem had not been rectified (or failing to state that it had been rectified) would create a quite misleading impression that the problem was ongoing and difficult to resolve. That is distant from the truth.

116. Perhaps most significantly, the Late TTR Information must be viewed in light of AUSTRAC's attitude towards it. For this reason, any disclosure would necessarily also require disclosure of the course of dealings between AUSTRAC and CBA in relation to this issue. A failure to do so would be both incomplete and misleading.

117. In these circumstances, consistently with the principles identified above, there cannot have been an obligation to disclose the alleged Late TTR Information to the ASX.

(Footnotes omitted; bold emphasis added.)

315 As para 112 makes clear, the Bank's contention was that the pleaded information was "misleading *or* incomplete" (emphasis added). In other words, the Bank was relying on these points in the alternative. Nevertheless, insofar as the Bank submitted that the pleaded information was *misleading*, it seems that this was primarily put on the basis that it would have been misleading to disclose the pleaded information without also disclosing the additional information (as distinct from contending that the pleaded information was factually incorrect).

316 The Bank's outline dealt in a broadly similar way with the IDM ML/TF Risk Assessment Non-Compliance Information (paras 118-119) and the Account Monitoring Failure Information (paras 120-122) (although the additional information relied on was different).

317 This section of the Bank's outline of opening submissions concluded:

> 123. **These are just some of the matters** that would need to be included in any contemplated disclosure and the absence of which would make a disclosure of the kind promulgated by the Applicants misleading or deceptive.
>
> 124. Ultimately, what is clear is that in constructing the "information" the Applicants have sought to artificially inflate its significance by leaving out context and cherry-picking particular aspects of the underlying conduct. This both renders their case unmaintainable and exposes the fact that the information when properly understood is not material (which is explored further below).
>
> (Emphasis added.)

318 As is apparent from para 123, the Bank's outline did not purport to be comprehensive as to the additional matters the Bank relied upon; the Bank sought to leave open the possibility that it might rely on additional matters that were not identified in the outline.

319 The Bank opened these contentions in its oral opening submissions. For example, senior counsel for the Bank submitted (T139):

> We submit that the third framing issue is that any disclosure that is made to the market **must be accurate and complete**. So much, we think, is common ground. If a disclosure is made, it is only if it is a true and full story that the market will be appropriately informed rather than misinformed. This is important because **we submit that each of the applicants' proposed disclosures involve elements of misinformation insofar as each would incorrectly state the true position at relevant times or would leave out evidence – key elements of relevant information**. And that is not overcome by the process, as it were, of mixing and matching, which my learned friend adverted to yesterday afternoon. …
>
> (Emphasis added.)

320 A little later, senior counsel for the Bank made clear that the Bank was raising this contention as a threshold point (or first hurdle), that is, a matter to be considered before one gets to considering materiality. Senior counsel submitted (T141):

> … we say that … this case … fails at every hurdle, including, **firstly, inherent problems with the precise disclosures which the applicants plead should have been made** …; secondly, some obvious flaws in the awareness case being propounded; thirdly, … assuming that our learned friends have overcome (a), the first matter, that is, the disclosures are appropriate disclosures, the question of materiality arises because materiality has been debated by the experts solely by reference to the proposed disclosures.
>
> (Emphasis added.)

321 It does not appear that the applicants objected to the Bank's contentions regarding the first hurdle (on the basis that they were not pleaded) in the applicants' oral opening submissions or immediately after the completion of the Bank's oral opening submissions. We were not taken

to any passage of the transcript of the oral opening submissions in which such an objection was taken.

322 However, in the applicants' closing submissions (both written and oral) they *did* make the point that the Bank's contentions relating to additional information and its contentions regarding the pleaded information being misleading if disclosed without the additional information, had not been pleaded. In the applicants' written closing submissions (Part I), they submitted (in a section headed "The Issues raised by CBA's defence"):

> 599. This section of the submissions briefly addresses the matters raised by CBA in its defence to the applicants' continuous disclosure and misleading and deceptive conduct cases on liability.
>
> 600. It is important to emphasise, however, that the applicants are not in a position at this stage to address these matters comprehensively. Many of the points made by CBA in its written and oral openings, and through cross-examination, are at a high level of generality **and, in addition or in the alternative, are not pleaded, nor supported by evidence, and are thereby outside the case**.
>
> 601. **For example, CBA's allegations to the effect that any disclosure of the pleaded information to the ASX would have been "misleading" are in this category:** CBA has not pleaded, nor proved, that on some counterfactual it would have made a disclosure to the ASX, still less what the content of that hypothetical disclosure could or might have been. Likewise, CBA's allegations to the effect that certain components of the pleaded information would be "an invitation to the criminals of the world" are not pleaded and it is unclear how CBA contends that they are somehow included in the case. Likewise any submissions, and the cross-examination, to the effect that the 3 August 2017 disclosure contained confounding information are not pleaded either. All these suggestions are rhetorical flourishes. They should be disregarded.
>
> (Footnote omitted; emphasis added.)

323 In oral closing submissions, senior counsel for the applicants (not the same senior counsel as appearing for the appellants in the appeal) dealt (at T1099-1107) with the Bank's contentions that the pleaded information was misleading. In relation to the Late TTR Information, senior counsel asked rhetorically: "how could disclosing … something that is true, not generally available and known to CBA either actually or constructively, be information that misleads the market?" (T1099). Senior counsel noted that there is, of course, a statutory prohibition on engaging in misleading or deceptive conduct, but separately from that there is nothing in s 674 that refers to misleading conduct. He noted that it is adverted to in the ASX Guidance Note. He submitted that the legislature had proceeded on the basis that if something is true and known and not generally available, disclosure of that thing cannot be misleading.

324 Senior counsel then addressed *Jubilee Mines*, which had been relied on by the Bank, in some detail. He submitted that the passages relied on by the Bank needed to be understood in the context of the case. After quoting [123] of the judgment of Martin CJ (in which his Honour dealt with the additional information point in the context of materiality), senior counsel for the applicants submitted that "[t]hat was really the gravamen of the Chief Justice's decision". Senior counsel submitted that the judgment of McLure JA was to similar effect. Senior counsel emphasised that in *Jubilee Mines* the additional information "exploded or negated" the materiality of the pleaded information. He then submitted that none of that was present in this case. He submitted that CBA breached the law on 53,000 occasions; there was no other information that negated that or made it misleading to disclose that fact.

325 Senior counsel for the applicants then submitted (T1102-1104):

> Now, CBA doesn't point to any information that it disclosed [that] will have nullified – would have nullified the market impact of the pleaded information. Now, the highest they get to with the late TTRs is to say at 359 of their submissions that the late TTRs represented a small percentage of the total TTRs lodged by CBA during the relevant period. But even if that be accepted, there's no evidence that that information, that additional information will have nullified the market impact of the late TTR information in its pleaded form.
>
> **There's no case being put forward to that effect; it's not pleaded**, it's not proved. It's a proposition that's really just come from the bar table that – I mean, it may well be that the late TTRs represented – the figures seem to be – I just can't track it down, but 108 per cent [sic] to 3.2 per cent of the late TTRs, so that step may be correct – I will assume it's correct for the time being, but what hasn't been demonstrated is what the impact of that additional information would have been. We would respectfully submit it would have no impact whatsoever, and there's certainly zero evidence to suggest that it would have had the effect of entirely negating the materiality of the late TTR information in the sense contemplated in Jubilee.
>
> **And really the same point lies in respect of CBAs contention that the late TTR information was, and I quote "incomplete or misleading"** or without, it is said, disclosure of the course of dealings between AUSTRAC and CBA. Again, yes, there was some dealings between AUSTRAC and CBA, but **there's no evidence and no pleading and no proof, that evidence of that kind would have negated the market impact of the late TTR information**. It just simply doesn't have the negating effect that the information in Jubilee had.
>
> …
>
> But in a sense, if there is additional information, one then needs to ask, well, what are the qualities of that additional information. It may be, if that information is material, then it separately needs to be disclosed. We would respectfully submit that the fact that there are more than one items of material information does not have any consequence for the first item of information. Putting that around the other way, pleaded information doesn't become immaterial simply because there's additional items of information that may be material, and the only circumstance in which later information or additional information could deprive an earlier category of information of materiality is if the

> additional or later information entirely negates the first category. If there are elements even of the first category that were left to be material, then it would be incumbent upon the entity to disclose immediately those categories or those remaining elements.
>
> (Emphasis added.)

326 While the oral closing submissions made the point that the Bank's contention that the pleaded information was incomplete or misleading had not been pleaded, it did not squarely take issue with the Bank's contention that the completeness or accuracy of the pleaded information should be dealt with as a threshold point (beyond observing, correctly, that *Jubilee Mines* does not support that approach). Rather, consistently with the earlier oral submissions summarised above, the applicants' main point was that the Bank had not pleaded, and there was no evidence, that the additional information negated the materiality of the pleaded information.

327 In the passage immediately after that quoted above, senior counsel for the appellants made further submissions to the effect that the additional information relied on by the Bank did not negate the materiality of the pleaded information, and referred to the judgment of the Full Court in *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627 (***Cruickshank***) at [124], in which the Full Court quoted with approval a passage from the judgment of Nicholas J in *Vocation* at [566]. In that paragraph, Nicholas J stated:

> 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. The judgment of the Court of Appeal in *James Hardie* … is authority for the same general proposition.

328 The thrust of the applicants' oral submissions (as summarised above) was that the pleaded information was factually accurate and material, and the additional information relied on by the Bank did not negate that materiality. Implicit in those submissions was the proposition that the Bank's contentions regarding additional information were to be considered at that materiality stage of analysis rather than as a threshold point.

329 The applicants' senior counsel returned to these matters in the closing oral submission *in reply*. Senior counsel submitted (at T1198-1199):

> The position, in our respectful submission is very simple: for the purposes of pleading, and for the purposes of 674, the applicants are required to identify the information which they contend is required to be disclosed to the market operator pursuant to section 674. Now, a respondent can then either admit or deny that allegation, but what **we say is absolutely plain is that if a respondent such as CBA wants to go further**

> **and assert positively by way of its defence that some item of further information would have been required either to complete it or by way of context**, but, for the present purposes, required so as – because the absence of that further information would render the pleaded information material, **then it is up to the respondent – in this case, CBA – to identify that, and, as part of its defence, plead it**.
>
> Now, this is not just, as it were, an arid pleading point, your Honour, it is – because neither the applicants nor, with respect, the court should be in the position of dealing with a multitude of different items of information which are now said to be required in some way to make the pleaded items information not misleading. To give some examples, we're told from the bar table that the role of regulator was important; we were told that the pleaded information in some way misrepresented AUSTRACs position; we were told that there was a need to specify the number of transactions overall or the proportion of the number of contraventions to the number of transactions overall. All these matters were put at various times as further items of information which were needed in some way in order to ensure that the pleaded items of information were not material.
>
> **So [CBA's] position appears, with respect, to be that the applicants are bound strictly to their pleading, but its case is entirely at large**. It was able to come up with any item of information in the course of argument or in written submissions which was said to somehow render the pleaded items of information misleading, and we say, with respect, it doesn't work that way. **CBA has said repeatedly that it is proceeding on the basis of the pleading and the pleading alone. So be it. This should have been pleaded**, and your Honour should disregard this point entirely. Your Honour should not allow our friends to, as it were, come up with different items of information willy-nilly and say that those items of information somehow render the pleaded items of information misleading. And, of course, allied to that point is the point I made, as it were, pre-emptively on Monday, namely, that *Jubilee Mines* doesn't stand for the wide-ranging proposition for which our friends contend, but I will come back to that.
>
> (Emphasis added.)

330 In this passage, the applicants squarely made the point that, if the Bank wanted to contend that the pleaded information was incomplete because some further item of information was required, this needed to be pleaded.

8.2 Consideration

331 The primary judge did not deal directly with the applicants' submission (made in closing submissions) that, if the Bank wanted to allege that the pleaded information was incomplete because some further item of information was required, this needed to be pleaded. However, the primary judge did discuss pleadings issues in some detail in the section of the Reasons at [382]-[391] (set out at [140] above). It appears, based on that section of the Reasons, the primary judge considered that it was incumbent on the applicants to plead a *complete statement* of the information that they contended should have been disclosed, and that the Bank did not need to plead the additional information that it said made the pleaded information incomplete.

332 In particular, the primary judge stated at [383] that the applicants' pleaded case proceeded on the basis that the pleaded forms of information "set the metes and bounds" of the information that the Bank was obliged to disclose to the ASX. The primary judge stated at [384] that the Bank specifically canvassed this matter in correspondence with the applicants, "who confirmed that the precise form of the information they contend that the Bank should have disclosed to the ASX was the [pleaded information]". The primary judge stated at [385] that it could be taken that "each pleaded form [of the pleaded information] is a complete statement of the information that the applicants say should have been disclosed". Further, the primary judge stated at [389]:

> The defendant may, in its defence, identify omissions from the pleaded information which go to the materiality of that information and whether the defendant is required to disclose the information in its pleaded form. **It remains, nevertheless, the plaintiff's onus to plead, completely, the information which, it says, the market operator required to be disclosed** …
>
> (Emphasis added.)

333 Contrary to the approach taken by the primary judge, in our view, if the Bank wanted to contend that the pleaded information was incomplete and/or misleading and/or not in a form that was appropriate for disclosure, it was incumbent on the Bank to plead these contentions, including pleading the additional information without which the pleaded information was said to be incomplete and/or misleading.

334 As stated by Mason CJ and Gaudron J in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279 (***Banque Commerciale***) at 286, "[t]he function of pleadings is to state with sufficient clarity the case that must be met … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision". That passage was quoted with approval by Gageler and Edelman JJ in *Berry v CCL* at [72]. Further, r 16.08 of the *Federal Court Rules 2011* provides that, in a pleading subsequent to a statement of claim, a party must expressly plead a matter of fact or point of law that:

> (a) raises an issue not arising out of the earlier pleading; or
>
> (b) if not expressly pleaded, might take another party by surprise if later pleaded; or
>
> (c) the party alleges makes another party's claim or defence not maintainable.

335 In the present case, the contention that the pleaded information was incomplete and/or misleading without the inclusion of certain additional information, and therefore did not need to be disclosed, was a point of law that the Bank alleged made the applicants' case not maintainable. Further, it was a point of law that, if not expressly pleaded, might take the applicants by surprise. Equally, the additional information relied on by the Bank to advance that contention, if not expressly pleaded, comprised matters of fact that might take the applicants by surprise. This was information which, of its nature, was in the awareness of the Bank. On the other hand, the applicants were not necessarily aware of that information. These circumstances reinforce that, if the Bank wanted to rely on additional information to contend that the pleaded information was incomplete and/or misleading, the Bank should have pleaded that additional information.

336 Contrary to the view of the primary judge, we do not read the applicants' pleading as asserting that the pleaded information was a *complete statement* of all that needed to be disclosed. Rather, it was a statement of what the applicants contended needed to be disclosed. That does not exclude the possibility that certain additional matters (of which the applicants may have been unaware) might also need to be disclosed, whether to avoid engaging in misleading or deceptive conduct or for any other reason, or that certain other contextual matters might also need to be considered.

337 We accept that, as referred to by the primary judge, correspondence had passed between the parties in relation to the form of the pleaded information. In that correspondence (which is included in the Appeal Book at tabs C2.170 and 2.171), the solicitors for the Bank stated that their understanding was that the *precise form* of information that the applicants contended should have been disclosed was the pleaded information, and the applicants' solicitors confirmed that that understanding was correct. However, that correspondence did not go so far as to say that the pleaded information was a *complete statement* of all the information that needed to be disclosed.

338 Our view that the Bank's contentions should have been pleaded is reinforced by the difficulty we have had in pinning down what the Bank was contending:

(a) First, it is unclear whether the Bank was contending that the pleaded information was incomplete *and therefore misleading*, or that it was misleading irrespective of completeness, or both. Our impression is that the thrust of the Bank's argument was that the information was incomplete *and therefore misleading* (because the factual

matters forming part of the pleaded information were largely unchallenged, if not adopted in the Bank's own pleading, with some exceptions which we discuss later in these reasons), but the Bank's outline of opening submissions included the submission that the pleaded information was "misleading or incomplete", suggesting that the Bank might have been saying that the pleaded information was misleading irrespective of completeness. There is therefore a lack of clarity about this matter.

(b) Secondly, and in any event, to the extent that the Bank contended that the pleaded information was misleading, it is unclear whether that contention was based on a particular construction of s 674/rule 3.1, or other provisions of the Act/Listing Rules (and, if so, which provisions?), or both.

(c) Thirdly, it is unclear whether the allegation that the pleaded information was *not in an appropriate form for disclosure* was intended to refer only to the contention that the pleaded information was vague and imprecise, or whether it was a broader proposition intended to encompass the points that the pleaded information was incomplete and misleading.

(d) Fourthly, the outline of opening submissions was not comprehensive as to the additional information relied on by the Bank.

These points reinforce why the Bank's contentions should have been pleaded: a pleading would likely have clarified what the Bank was contending.

339 It is true that the Bank did raise its contentions about the first hurdle in its outline of opening submissions and relied on these contentions in its oral opening. It is also true that it does not appear that the applicants objected to these contentions being raised, either during the applicants' oral opening or immediately after the Bank's oral opening. In these circumstances, it may have been open to the primary judge to deal with the Bank's contentions on the basis that this was the way in which the case was run: see *Gould v Mount Oxide Mines Ltd* [1916] HCA 81; 22 CLR 490 at 517-518 per Isaacs and Rich JJ; *Banque Commerciale* at 286-287.

340 However, his Honour does not appear to have approached the matter in this way. Rather, in the section of the Reasons dealing with pleadings (at [382]-[391]), the primary judge emphasised the primacy of the pleadings. If and to the extent that the Bank contends on appeal that it ran its case on a certain basis that was outside the pleadings and the applicants acquiesced in the case being run on that basis, we were not taken to sufficient material to be satisfied that that is what occurred. The Bank referred in its written and oral submissions to the assumptions

that it provided to its experts, and that the primary judge indicated that those assumptions would be taken to be established unless challenged (which they were not). The Bank submitted that those assumptions contained the facts which the Bank relied on by way of additional information. However, while the assumptions document may have brought those facts to the applicants' attention, the document did not draw those facts together into a contention that the pleaded information did not need to be disclosed on a particular basis.

341 For these reasons, we consider that his Honour erred in (implicitly) holding that it was unnecessary for the Bank to plead its contention that the pleaded information was incomplete and/or misleading and/or not in a form that was appropriate for disclosure and therefore that the Bank was not obliged to disclose that information. Having made clear that he was holding the parties to their pleadings, the primary judge should not have entertained the Bank's threshold point, which was not pleaded. With respect, there does appear to be some inconsistency in, on the one hand, holding the applicants strictly to their pleadings while, on the other, permitting the Bank to run a defence that was not pleaded.

342 We will now consider whether, in any event, the primary judge erred in considering as a *threshold issue* the completeness and accuracy of the pleaded information (rather than considering asserted additional information at the materiality stage of analysis).

343 We start with the statutory purposes of the continuous disclosure regime. In *Grant-Taylor*, the Full Court of this Court (Allsop CJ, Gilmour and Beach JJ) stated at [92]-[93]:

> 92 The statutory purposes for the continuous disclosure regime were foreshadowed in the 1991 Australian Companies and Securities Advisory Committee Report and in a Second Reading Speech to the *Corporate Law Reform Bill 1992* (Cth) (although the 1992 Bill was superseded by the 1993 Bill). **The main purpose is to achieve a well-informed market leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information** (see *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [353]-[355]; *Re Chemeq Ltd* (2006) 234 ALR 511 at [42]-[46] per French J (as he then was)). Further, one of the justifications for introducing the continuous disclosure regime, as referred to by that Committee, was to "minimize the opportunities for perpetrating insider trading" thereby providing an explicit link between the purposes of the continuous disclosure regime and the insider trading regime.
>
> 93 It is also to be noted that ss 674 to 677 are remedial or protective legislation. They should be construed beneficially to the investing public and in a manner which gives the "fullest relief" which the fair meaning of their language allows (*James Hardie v ASIC* at [356]).

(Emphasis added.)

344 These statements were approved in *Crowley (FC)* at [157]-[159] per Jagot and Murphy JJ (Perram J agreeing at [1]). See also *Cruickshank* at [83] per Allsop CJ, Jackson and Anderson JJ; *ANZ v ASIC* at [21]-[26] per Lee J.

345 We set out s 674 of the *Corporations Act* and Listing Rule 3.1, as they appeared at the relevant times, earlier in these reasons. As observed by Lee J in *ANZ v ASIC* at [29], it follows from the terms of Listing Rule 3.1 that to establish a contravention of s 674(2), a claimant is required to demonstrate facts that make out five elements or "requirements":

(a) first, that there is in existence "information" concerning the entity;

(b) secondly, that the entity *had* that information, in the sense that it was "aware" of it within the meaning of the definition in Listing Rule 19.12;

(c) thirdly, that the information was not "generally available";

(d) fourthly, that 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; and

(e) fifthly, that the entity failed to "immediately tell" that information to the ASX.

346 These requirements have been considered in a number of cases.

347 In the present case, the primary judge dealt with the Bank's contention that the pleaded information was incomplete and/or misleading and/or not in a form appropriate for disclosure after dealing with the first two requirements. On the basis of that consideration, his Honour determined that the applicants' case should be dismissed, without it being necessary to consider the materiality of the pleaded information (whether alone or together with the asserted additional information).

348 The issue to be determined may be stated as: where a respondent to a proceeding alleging breach of the continuous disclosure provisions contends that the pleaded information is incomplete and/or misleading and/or not in a form appropriate for disclosure, is it open to the Court to deal with such a contention as a threshold issue (and divorced from the analysis of materiality), or should it be dealt with as part of the analysis of materiality?

349 In advocating for a threshold approach, the Bank relied (both at first instance and on appeal) on *Jubilee Mines.* However, in our view, *Jubilee Mines* does not provide any clear support for taking a threshold approach.

350 The facts of the case can be briefly stated as follows. At the relevant times, Jubilee Mines NL (**Jubilee**) was a small mining company with a focus on exploration for gold. Day-to-day management of the company was vested in Mr Crossley, the managing director, and Mr Cooke, a geologist. In August and September 1994, Jubilee received information from a neighbouring tenement holder (**WMC**) about the results of drilling that WMC had mistakenly carried out on one of Jubilee's tenements. The data received from WMC related to the presence of nickel. Mr Cooke's evidence was that although he was of the view that the data did suggest future exploration for nickel on the tenement may be appropriate, given Jubilee's financial position and its focus on gold, it was his view it would not be appropriate for Jubilee to undertake exploration of the tenement at that time (see [11]). Mr Cooke discussed the matter with Mr Crossley and advised Mr Crossley of his views. Mr Crossley decided that the information relating to the nickel was not of any interest or significance to Jubilee (see [12]). Jubilee did not disclose the information relating to the presence of nickel to the ASX at that time. (It subsequently disclosed the information in June 1996.) Mr Riley, a past shareholder in Jubilee, brought a claim against the company contending that it had breached its continuous disclosure obligations by failing to disclose the information relating to the presence of nickel. We note that the provisions of the continuous disclosure regime under consideration in *Jubilee Mines* were different in some respects from the current provisions, but not in a way that is relevant to the issue under present consideration.

351 At first instance, the Master held that Jubilee had breached its continuous disclosure obligations and awarded substantial damages to Mr Riley. On appeal to the Court of Appeal of the Supreme Court of Western Australia, all members of the Court (Martin CJ, McLure JA and Le Miere AJA) considered that the appeal should be allowed. Le Miere AJA delivered a concurring judgment in which he agreed with the judgment of Martin CJ. Of relevance for present purposes are grounds 2 and 3 of the notice of appeal. These grounds were summarised by Martin CJ in the following passage:

> 85 These grounds [i.e. Grounds 2 and 3] are conveniently considered together, as they involve essentially the same issue. Ground 2 alleges that if Jubilee had notified the ASX of the data received from WMC in September or October 1994, it would also have been obliged to notify the ASX that:
>
> (a) in the opinion of its geologist, the intersected mineralisation, which was found in only one hole of six drilled, was too deep, too low a grade and too small to be of any interest; and
>
> (b) Jubilee had no current intention of carrying out any exploratory drilling on the tenement in the foreseeable future

because of:

(i) the view of its geologist and managing director as to the lack of significance in the drilling results;

(ii) its preoccupation with gold exploration; and

(iii) its lack of funds.

86 Ground 3 asserts that when regard is paid to the additional material which Jubilee would have disclosed together with the WMC drilling data, the information as a whole was not information which was likely to have influenced persons who commonly invest in securities in deciding whether or not to buy or sell shares in Jubilee, with the result that the master erred in concluding that Jubilee had contravened either the listing rule or the statute.

352 The judgment of Martin CJ contains a number of statements to the effect that the continuous disclosure regime does not require the disclosure of misleading information. In particular, Martin CJ stated:

87 There are a number of preliminary observations appropriately made in relation to these grounds. The first is that the evident purpose of each of the listing rule and the relevant statutory provisions is to ensure an informed market in listed securities. Put another way, the legislative objective is to ensure that all participants in the market for listed securities have equal access to all information which is relevant to, or more accurately, likely to, influence decisions to buy or sell those securities. **It would be entirely contrary to that evident purpose to construe either the listing rule or the statutory provisions as countenancing the disclosure of incomplete or misleading information**.

88 The next relevant general observation is that the ultimate determination of the ambit of the information appropriately disclosed, on the proper construction of the listing rule and the statutory provisions, was essentially a determination for the master drawing upon the facts established by the evidence. **If the proper conclusion from the facts established by the evidence is that disclosure of the information gained from WMC without disclosure of the surrounding circumstances would have been incomplete or misleading, it would be wrong to award damages on the basis that Jubilee had failed to comply with its obligations in that way**.

(Emphasis added.)

353 However, Martin CJ did not consider whether the pleaded information (the data received from WMC in September or October 1994) was incomplete or misleading as a threshold issue. Rather, his Honour considered whether the pleaded information, taken together with the relevant additional information, met the test of materiality in the continuous disclosure obligations. This is apparent from the following passage:

90 Jubilee can only have been obliged to disclose information which it had or ought to have had. The latter expression cannot be construed as extending to information arising from business decisions which Jubilee had not made —

> such as the decision to undertake exploratory drilling. Jubilee's obligations of disclosure must be assessed having regard to the totality of relevant information. **It follows that if, for whatever reason (including flawed reasons), Jubilee had no current intention of undertaking exploratory drilling on the tenement, and that intention was relevant to the assessment of the extent to which provision of the drill hole data provided by WMC would be likely to influence those who commonly invest in securities in deciding whether or not to buy or sell Jubilee's shares, Jubilee's obligations of disclosure must be assessed in that light**.
>
> (Emphasis added.)

354 After considering the evidence and the Master's findings, Martin CJ concluded, at [113],

> As the master emphasised at many points in his reasons, the significance of the drill hole data provided by WMC lay in its revelation of the exploration potential of the tenement. As Mr Le Page conceded, obviously announcement of that data in isolation would give rise to an expectation, on the part of those who commonly invest in securities, that Jubilee would utilise that potential by undertaking further drilling work (ts 642). **If, as was the fact, Jubilee had no current intention of undertaking such work, it would have been obliged to accompany the drill hole data with an announcement to that effect, in order to avoid misleading the market**. That conclusion flows, with respect, as a matter of logic from the facts unequivocally established by the evidence, and cannot be avoided by reference to business decisions Jubilee might or should have made if it had taken a different view of the data, or to the customary practices of junior explorers in presenting only positive announcements to the market.
>
> (Emphasis added.)

355 It followed that ground 2 was upheld. Martin CJ went on to consider materiality in the context of ground 3. His Honour stated at [115]:

> Ground 3 raises the question of whether Jubilee was obliged to disclose anything prior to its announcement in June 1996, given its lack of intention to undertake exploratory drilling work up to that time (and its financial incapacity to undertake such work for at least part of that time). The answer to that question turns upon the question of whether disclosure of all relevant information would have influenced, or was likely to influence, persons who commonly invest in securities in deciding whether or not to buy or sell Jubilee's shares. Because of the view taken by the master, he did not address that question. It is therefore necessary for this Court to do so by reference to the evidence.

356 His Honour's conclusion on the materiality of the pleaded information together with the relevant additional information was as follows:

> 123 Looking at this issue from the perspective of such a trader, as the master found, the relevance of the WMC drill hole information lay in its revelation of the prospectivity of the tenement. Following the announcement of such data, the prospect of gain for such a trader would lie in the possibility that further exploratory work would prove up the preliminary data, resulting in an increase in the price of the shares, which could then be sold at a profit. On that hypothetical scenario, if the announcement of the drill hole data was accompanied by a statement to the effect that the company had no current

intention of undertaking exploratory work, and lacked the financial capacity or the inclination to do so, the hypothetical scenario of gain would appear, to such a trader, to be most unlikely or improbable, at least in the foreseeable future. **Accordingly, doing the best one can to stand in the shoes of the hypothetical investor nominated by s 1001D, and taking into account the evidence of Mr Le Page, Dr Rudenno and Mr Riley, I conclude that an announcement by Jubilee of all relevant information pertaining to the WMC drill hole data would not, or would not have been likely to, influence persons who commonly invest in securities in deciding whether or not to buy or sell its shares**. It follows that s 1001D did not operate to require Jubilee to disclose any information relating to the data provided by WMC until June 1996, when it made such disclosure.

124 As I have observed (at [58]), s 1001D is not, theoretically at least, the only means by which it can be concluded that a reasonable person would expect the information, if made available, to have a material effect on the price or value of Jubilee's shares. However, in the circumstances of the present case, once it is concluded that disclosure of all relevant information would not have influenced persons who commonly invest in securities in deciding whether to buy Jubilee's shares, it is impossible to see any other basis upon which it could be concluded that a reasonable person would expect disclosure of that information to have a material effect on the price of Jubilee's shares.

125 It follows that ground 3 should be upheld. The master should have concluded that, when all relevant information was taken into account, Jubilee was under no obligation to make disclosure following receipt of the information from WMC, at least and until it altered its position and decided to undertake exploratory drilling work, at which time disclosure was in fact made.

(Emphasis added.)

357 McLure JA delivered separate reasons for judgment. Her Honour also stated that the continuous disclosure regime did not require disclosure of information that was misleading or incomplete: at [161]-[162]. In those paragraphs, her Honour indicated that it was wrong to consider the materiality of the pleaded information in isolation from necessary contextual information. Her Honour stated:

161 The "information" must also include all matters of fact, opinion and intention that are necessary in order to prevent the disclosing company otherwise engaging in conduct that is misleading or deceptive or is likely to mislead or deceive which was prohibited by s 995(2) of the *Corporations Law*.

162 The respondent [i.e. Mr Riley] would narrowly confine the "information" **by taking it out of its broader factual and commercial/corporate context then gauge whether that information has the deemed material effect on the price of the company's securities** by reference to the common investor who assesses the information in the context of publicly available information. That in my view is inconsistent with the purpose of the disclosure regime which is a fully informed market. Where share price sensitivity depends upon the company having an expert assessment of core information and business decisions are made based on that expert assessment, the disclosure of only the core information (conveying an imputation that it is, in the company's assessment, likely to have a material effect on the share price) may be

> misleading. The disclosure regime does not countenance disclosure of incomplete information just because that information alone would influence persons who commonly invest to buy or sell shares.

(Emphasis added.)

358 Her Honour considered grounds 2 and 3 together at [179]-[191]. Her Honour's core reasoning was at [191]:

> I accept that the evidence established that at no material time in 1994 or 1995 did the appellant have any intention of conducting further exploratory drilling on the tenement. It was also open on the evidence to conclude that an announcement of the type contemplated by the master (one which was silent on the issue of further drilling) would impliedly convey the imputation that the appellant regarded the WMC information as significant and warranted further exploration drilling. In circumstances where the appellant had a positive intention not to drill, such an announcement would be misleading. **Prima facie, its drilling intentions would be part of the mix of relevant information on which to assess whether it was share price sensitive**. **It was also open on the evidence to conclude that an intention not to undertake further exploration drilling would deprive the information of any price sensitive effect**. However, it does not follow that there was no obligation to disclose the WMC information. It is not correct as a matter of principle to rely on a decision not to undertake further exploratory drilling which is caused or materially contributed to by the appellant's failure to take into account a matter of which it has constructive notice under r 3A. That is, the appellant cannot rely on its intention in relation to drilling which is based on a deficiency in its required knowledge base to prevent the disclosure obligation from arising. However, it may be relevant when considering whether the loss and damage suffered by the respondent was caused by the contravention.
>
> (Emphasis added.)

359 In the above passage, McLure JA stated that, prima facie, the additional information "would be part of the mix of relevant information" on which to assess materiality. We do not consider her Honour's judgment to provide any clear support for a threshold approach.

360 In *Vocation* at [566] (a passage set out at [327] above), Nicholas J stated that "[p]roperly 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." This is consistent with our analysis of *Jubilee Mines* and supports an approach of considering additional material at the materiality stage of the analysis.

361 Although the analytical framework in which contextual information is to be considered was not in dispute in *ANZ v ASIC* (see [14] per Lee J, and [120] per Button J), both the appellants and the Bank referred to the observations of Lee J in that case. We need not set out all of the paragraphs relied on by the appellants (which ran from [54]-[67]) but it is appropriate to set out the following paragraphs, noting that the Bank referred in particular to [64]:

> 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])).
>
> (Emphasis added.)

362 The Bank contends that, properly understood, the passage at [64] is not inconsistent with its submissions. But if the passage is interpreted otherwise, the Bank submits that the comments were obiter and should not be followed.

363 It should be noted that, although Button J dissented in the result, both Lee J and Button J (dissenting on the result on some sub-grounds of the appeal) addressed the contextual information in the context of the materiality analysis, as the primary judge had done (Markovic J agreed with Lee J on the sub-grounds of appeal on which Button J dissented, and both Lee J and Markovic J agreed with Button J on some the other aspects of the ground of appeal in question: at [2] and [98]).

364 In our opinion, for the reasons we go on to develop, and consistently with the passage from Lee J's judgment in *ANZ v ASIC* set out above, contextual information will usually be considered as part of the materiality analysis.

365 The resolution to the issue under present consideration turns on an appreciation of the elements of s 674(1) and (2) and Listing Rule 3.1. As we said earlier, the effect of those provisions is that there are essentially five requirements that need to be satisfied by an applicant to establish a contravention of s 674(2), namely that:

(a) there existed "information" concerning the entity;

(b) the entity *had* that information in the sense that it was "aware" of it;

(c) the information was not "generally available";

(d) 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; and

(e) the entity failed to "immediately tell" that information to the ASX.

366 Having regard to the elements of the provisions, where a respondent contends that the pleaded information is incomplete *and therefore misleading*, we consider that the impact of the contextual information on the information said to require disclosure will usually be considered as part of the analysis of materiality, and not as a threshold issue. One problem with considering such a contention as a threshold point is that, if it is concluded that the pleaded information is incomplete and therefore misleading, the applicant's case fails at this point, without even considering the materiality of the pleaded information (together with the asserted additional information, if considered relevant). This may produce the result that the applicant's case fails even though, if the pleaded information were considered together with the asserted additional information, it would be considered material and required to be disclosed. This would be contrary to the text of the provisions insofar as they mandate disclosure where the elements identified above are satisfied in respect of an item of information. It would not further, and indeed would frustrate, the purposes of the continuous disclosure regime. The approach we favour – namely considering the asserted additional information at the materiality stage of analysis – is consistent with the approach taken in *Jubilee Mines*.

367 The uncontroversial requirement for the pleaded information to be precisely and specifically identified (to which the primary judge referred at [382] of the Reasons, and to which the Bank refers on appeal) does not support the primary judge's treatment of the threshold point. That requirement (as explained in, eg, *Cruickshank* at [120]-[122]) is fulfilled by pleading the items of information that the applicant says satisfy the elements of s 674 and must, on that basis, be disclosed; there is no broader requirement for the applicant to plead the complete content of an "appropriate" disclosure.

368 The position may be different where a respondent contends that the pleaded information is factually incorrect or that the pleaded information is so vague and imprecise that it is not required to be disclosed. In such cases, the respondent may in substance be contending that, regardless of any additional information, the pleaded information is not required to be notified

to the market operator under the Listing Rules: see s 674(1) and (2). Such a contention *may* be appropriately considered at the outset, because:

(a) information that is not correct does not "arise" or constitute "information" for the purposes of s 674(1); and

(b) information that "comprises matters of supposition or is insufficiently definite to warrant disclosure" may not be information to which rule 3.1 (and, therefore, s 674(1)) applies (see rule 3.1A.1).

In such cases, there is a clear textual foundation for considering a contention that the information is incorrect or insufficiently precise otherwise than as part of the analysis of materiality.

369 The Bank submits that analysis of the text, context and purpose of s 674 confirms that there was no error in the primary judge's approach. It contends that the appellants' approach to construing s 674 poses a five-stage analysis which is an unwarranted gloss on the statute. It argues that, moreover, the appellants' analysis (focussing on s 674(2)) takes the wrong starting point; that the correct starting point is s 674(1), and that the word "information" in s 674 means materially complete information.

370 In our view, these submissions should not be accepted. The Bank's threshold approach is not consistent with the terms of s 674(1) or 674(2) and is not supported by the context or purpose of the provisions. To the contrary, as we have said, the effect of the threshold approach may be to conclude that the pleaded information is not required to be disclosed in circumstances where, if the pleaded information were considered together with the asserted additional information, it would be material and otherwise satisfy the elements of s 674(2), a result that is contrary to the text of the provisions.

371 It may be accepted that, as the Bank submitted orally, the continuous disclosure regime does not contemplate the disclosure of information that is misleading or materially incomplete. However, the approach that we prefer would not produce this result. First, on this approach, pleaded information that is misleading because it is factually incorrect need not be disclosed at all. Secondly, where a respondent contends that the pleaded information is incomplete and therefore misleading, the asserted additional information would be considered as part of the analysis of materiality. If considered relevant (for example, because it is necessary to ensure that the pleaded information is not misleading), the additional information would be taken into

account, together with the pleaded information, when assessing materiality. If the additional information is relevant in this way, it may follow that the additional information is itself material and must be disclosed, assuming it otherwise satisfies the elements of rule 3.1 and s 674. Further, the entity may (had it disclosed the pleaded information) also have been obliged to disclose the additional information to avoid breaching the statutory prohibitions on misleading or deceptive conduct. In this way, s 674 and rule 3.1 can operate according to their terms without any disharmony with the prohibition on misleading or deceptive conduct.

372 The flaw in the Bank's approach is illustrated by the possibility that if an applicant's pleaded information omits an item of information that, upon analysis, is necessary to ensure that the pleaded information is complete and not misleading, the applicant's case fails, even though the additional information may go only to the *extent* of materiality rather than *negative* materiality. As we have said, this would not further, and would frustrate, the purposes of the continuous disclosure regime.

373 In the present case, as discussed above, there is a lack of clarity in what the Bank was contending. In relation to the Late TTR Information and the IDM ML/TF Risk Assessment Non-Compliance Information, it seems that the substance of the Bank's contentions was that the pleaded information was incomplete *and therefore misleading* (rather than that the pleaded information was factually incorrect). Assuming that the Bank was contending that those forms of the pleaded information were incomplete and therefore misleading, the appropriate stage to have considered the Bank's contention was in analysing materiality. Thus, the appropriate pathway of analysis would have been to consider: (a) whether the pleaded information constituted "information" concerning the Bank; (b) whether the Bank was aware of that information; (c) whether that information was generally available; (d) whether the pleaded information (together with the asserted additional information, if considered relevant) was material; and (e) whether the entity failed to notify the pleaded information to the ASX. The asserted additional information would be *relevant* if, for example, it was information without which the pleaded information would be incomplete and therefore misleading.

374 For example, in relation to the Late TTR Information, as set out above, the primary judge relied on the following five matters:

(a) given the pleaded information included the proportion that the late TTRs represented out of the total number of threshold transactions occurring through the Bank's IDMs during the period November 2012 to September 2015 (between 80% and 95%), the

omission of the proportion that the late TTRs represented out of the total number of TTRs that the Bank did in fact lodge in that period (between 1.08% and 2.3%);

(b) given the pleaded information referred to the cause being a "systems error", the omission of reference to the error being a single coding error;

(c) the pleaded information omitted reference to the fact that the cause of the late TTRs had been rectified;

(d) the pleaded information omitted reference to the fact that the TTRs had been lodged; and

(e) considering the matter as at 24 April 2017 (being the date when, the primary judge found, the Bank had awareness of the information), the pleaded information omitted any reference to AUSTRAC's then known position.

375 Each of the above involves the *omission* of additional information, rather than a finding that an element of the pleaded information was incorrect. We consider that it would have been appropriate for his Honour to have considered each of the above items of asserted additional information at the materiality stage of the analysis. If the asserted additional information was considered relevant (for example, because it was necessary to ensure that the pleaded information did not convey a misleading impression), then the question of materiality would be considered by reference to both the pleaded information and the additional information.

376 The position in relation to the Account Monitoring Failure Information and the Potential Penalty Information requires separate consideration.

377 In relation to the Account Monitoring Failure Information, the primary judge stated that the information, as pleaded, "conveys the misleading impression that, throughout the entirety of each pleaded period, the Bank failed to monitor the stipulated number of accounts". The primary judge said that this impression was "factually incorrect" because the account monitoring failure was intermittent for periods that varied between one day and 36 months, referring to his earlier reasons at [499]. That is different from finding that the pleaded information was itself factually incorrect. We consider it to be similar to a finding that the pleaded information was incomplete and therefore misleading. The primary judge also found that the information was incomplete and therefore misleading in other respects. We consider that these are matters that should have been considered in addressing materiality, and not as a threshold point.

378 In relation to the Potential Penalty Information, the Bank contended that the formulation of that information was vague and imprecise, and this was accepted by the primary judge. It may be that this contention was appropriately dealt with as a threshold issue. As discussed later in these reasons, in the section dealing with materiality, we do not see any error in the primary judge's conclusion that this form of the pleaded information added little additional information to the other forms of pleaded information, and therefore was not material. In light of that conclusion, it is unnecessary for us to consider whether the primary judge erred in concluding that this form of the pleaded information was vague and imprecise and therefore not required to be disclosed.

379 For the reasons set out above, we conclude that the primary judge erred in dealing with the Bank's contentions in relation to the September 2015 Late TTR Information, the September 2015 Account Monitoring Failure Information and the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information as a threshold point (or immediately after the first two requirements) rather than as part of the materiality analysis.

380 We therefore uphold Ground 5.

9 RULE 3.1A ISSUE

381 Given our conclusions concerning the Bank's awareness of integer (b), our conclusions in relation to the preliminary issues discussed at [397]-[428] below, and the appellants' position that none of the other forms of pleaded information required disclosure ahead of the disclosure of the September 2015 Late TTR Information, it follows that the application of Listing Rule 3.1A falls to be considered as at 24 April 2017.

382 By its cross-appeals, the Bank contends that the primary judge erred by finding that none of the forms of the pleaded information were confidential (at Reasons, [639] and [646]). The Bank contends on the appeal that the primary judge should have found that rule 3.1A of the Listing Rules applied such that Listing Rule 3.1 did not apply to require disclosure.

383 As the appellants' case on appeal is confined to the September 2015 Late TTR Information, the September 2015 Account Monitoring Failure Information, the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information and the Potential Penalty Information, it is not necessary to address the other forms of information litigated below.

384 Although Listing Rule 3.1A has been set out above, we set it out again for ease of reference:

> 3.1A Listing rule 3.1 does not apply to **particular information** while each of the following is satisfied in relation to the information:
>
> 3.1A.1 One or more of the following 5 situations applies:
>
> - It would be a breach of a law to disclose the information;
> - The information concerns an incomplete proposal or negotiation;
> - The information **comprises matters of supposition or is insufficiently definite to warrant disclosure**;
> - The information is generated for the internal management purposes of the entity; or
> - The information is a trade secret; and
>
> 3.1A.2 The information is **confidential** and ASX has not formed the view that the information has ceased to be confidential; and
>
> 3.1A.3 A **reasonable person would not expect the information to be disclosed**.
>
> (Emphasis added.)

385 The primary judge rejected the Bank's contention that the Listing Rule 3.1A exception applies to the pleaded forms of information. Noting that each of the matters specified in Listing Rules 3.1A.1 to 3.1A.3 are cumulative, his Honour's conclusion that none of the pleaded information was confidential was enough to dispose of the argument that Listing Rule 3.1A applied to exempt the Bank from its disclosure obligations. However, his Honour went on to consider whether the pleaded information was "insufficiently definite to warrant disclose", as the Bank contended was the case for each form of the pleaded information. His Honour concluded that, while that was the case in respect of the Potential Penalty Information, it was not the case for the Late TTR Information, the Account Monitoring Failure Information, or the IDM ML/TF Risk Assessment Non-Compliance Information.

386 The primary judge rejected the Bank's argument that the pleaded forms of information were "confidential" because they were not generally available and concerned matters internal to the Bank, or was information generated for internal management purposes. The primary judge pointed out that neither an entity's desire not to disclose information, nor the undesirability of disclosure in certain circumstances (eg where it would expose gaps that might be exploited by money launderers) established confidentiality.

387 The primary judge rejected the Bank's argument that if the Potential Penalty Information attracted the operation of Listing Rule 3.1A, that meant that all the other forms of pleaded information did not require disclosure. That argument had been advanced on the basis that,

absent the Potential Penalty Information, the other categories of pleaded information had "no stand-alone financial effect on CBA".

388 In its defence, the Bank pleaded that the September 2015 Late TTR Information fell within the Listing Rule 3.1A exception on the basis that "the information as pleaded" comprises matters of supposition or was insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of the Bank, was confidential and was information a reasonable person would not have expected the Bank to disclose. Pleas at the same unparticularised level of generality were advanced in respect of the other categories of pleaded information.

389 In our view, the primary judge did not err in rejecting the Listing Rule 3.1A case advanced by the Bank. As the appellants highlighted in their submissions on the appeal, the Bank's pleading of the basis on which Listing Rule 3.1A was attracted was scant and unparticularised, and the evidence relied on, such as it was (eg the marking of a letter "without prejudice" and marking some documents "confidential"), did not establish the confidentiality of any of the categories of pleaded information in issue on the appeal. Nor was the disclosure of the pleaded information (other than the Potential Penalty Information) dependent on the Potential Penalty Information falling outside Listing Rule 3.1A. The primary judge was correct to reject that argument. We note that there was no challenge, on the appeal, to the primary judge's finding that the Potential Penalty Information was insufficiently definite for the purposes of Listing Rule 3.1A.1.

390 We agree with the primary judge's observations that the Bank's case on the application of Listing Rule 3.1A mistook a desire not to disclose information as establishing its confidentiality. The satisfaction of Listing Rule 3.1A.2 has not been established for any of the categories of pleaded information.

391 We also do not accept that the September 2015 Late TTR Information involved matters of supposition or was insufficiently definite to warrant disclosure. On the contrary, the information was pleaded in very specific terms, specifying exact numbers of late TTRs, the percentage of overall TTRs represented by the late TTRs, the approximate dollar value of the late TTRs and the fact that the late TTRs had not been lodged on time at least in part because of a systems error. The information did not lack specificity in terms of how it was pleaded. The September 2015 Account Monitoring Failure Information and the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information were also pleaded in specific terms.

392 Further, even if, at a factual (cf pleading) level, there were some supposition involved, or some insufficiency in how definite the pleaded information (other than the Potential Penalty Information) was at earlier times, by 24 April 2017, those categories of information did not continue to involve supposition or insufficiency in how definite the information was. It follows that the exception in Listing Rule 3.1A.1 has not been made out for the September 2015 Late TTR Information, the September 2015 Account Monitoring Failure Information, and the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information.

393 Whether or not each category of pleaded information was of a kind that a reasonable person would not expect would be disclosed, was not a matter on which the primary judge made findings. Nor were submissions advanced on the appeal regarding that matter, beyond the appellants asserting that the Bank had not established that Listing Rule 3.1A.3 applied to the categories of pleaded information and the Bank submitting that it is only in exceptional cases that information that fulfills the criteria in Listing Rule 3.1A.1 and 3.1A.2 will fail to fulfil Listing Rule 3.1A.3. It is not necessary for us to address Listing Rule 3.1A.3.

394 The cross-appeals must be rejected.

10 MATERIALITY ISSUE

10.1 Overview of grounds

395 The grounds relating to materiality are lengthy and overlap to a considerable extent. By way of overview:

(a) Ground 6, 7 and 8 appear under the heading "Legal errors in approaching materiality" and contend that the primary judge erred in his approach to materiality. In particular, by these grounds the appellants contend that the primary judge erred in his approach to the tests in ss 674 and 677 of the *Corporations Act*, in his application of the expression "persons who commonly invest in securities", and in his approach to contextual information.

(b) Grounds 9 to 15 appear under the heading "Materiality of items of information (8 September 2015)" and include specific grounds (9, 10, 11 and 12) relating to the four forms of pleaded information relied on in the appeal. These grounds take issue, in particular, with the way in which the primary judge dealt with contextual information. They are premised on the relevant date for the purposes of assessing materiality being 8 September 2015 (or shortly thereafter). Grounds 13, 14 and 15 then focus on specific

aspects of the way in which the primary judge dealt with materiality. Ground 13 contends that the primary judge erred in conducting an incomplete and erroneous ex post facto inquiry. Ground 14 contends that the primary judge erred in his approach to expert evidence. Ground 15 contends that the primary judge erred in his approach to the lay evidence on materiality.

(c) Grounds 16 and 17 appear under the heading "Materiality of information at times after 8 September 2015 (including 24 April 2017)". Ground 16 seeks to rely on the appellants' contentions regarding awareness that we have rejected above. It also seeks to rely on a continuum between 8 September 2015 and 24 April 2017. Ground 17 contends that the primary judge erred in failing to find that the pleaded information was material, adopting 24 April 2017 as the date for the purposes of considering materiality. This ground also takes issue with the primary judge's approach to contextual information.

396 Although these appeal grounds deal with each of the four forms of pleaded information relied on in the appeal, as stated above the September 2015 Late TTR Information was the lynchpin of the appellants' case.

10.2 Two preliminary issues

397 Two related issues need to be addressed, before turning to the substantive issues concerning materiality.

398 First, can one element (referred to as an "integer") of the pleaded September 2015 Late TTR Information be disregarded? That is relevant because the appellants have failed on their contention that the primary judge erred in rejecting awareness of that integer in September 2015. If that integer can be disregarded, the appellants will still have a materiality case that requires assessment of the September 2015 Late TTR Information, minus that integer.

399 The second issue is whether the appellants can advance a case that materiality needs to be assessed as at January 2016 (as that is the date that the primary judge found all integers of the September 2015 Late TTR Information were known to the Bank), and not just at 24 April 2017, which is the date on which the primary judge addressed materiality, given his Honour's conclusion that the applicants had failed to make out awareness of all integers of the September 2015 Late TTR Information at 8 September 2015 or shortly thereafter.

10.2.1 Whether awareness of the September 2015 Late TTR Information can be assessed without one integer (integer (b))

400 On the appeal, the appellants contended that it was not essential to their case to establish the Bank's awareness of integer (b) of the September 2015 Late TTR Information on or shortly after 8 September 2015. They contended that if we were against them on the Bank having actual or constructive awareness of that information from 8 September 2015 or shortly thereafter, integer (b) could be disregarded and the materiality of the balance of the September 2015 Late TTR Information could, and should, be assessed.

401 The Bank contended that integer (b) cannot simply be disregarded, as the appellants urged. It submitted that the "information" as pleaded comprised *all* the integers, the experts had addressed the "package" of information that included all integers and the primary judge was correct to observe that the court's task is to adjudicate on the pleaded case and not to, in effect, devise a new case from elements of the pleaded case (Reasons, [382]-[391]).

402 For the reasons set out below, we have concluded that integer (b) cannot be excised, given the way in which the case was run below.

403 The appellants' written opening submissions below were put on the basis that the evidence would establish awareness of the September 2015 Late TTR Information. That information was referred to in terms reflecting a singular concept; the submissions did not suggest that the applicants were running a case based on only some of the pleaded integers of the September 2015 Late TTR Information being established.

404 The appellants' written opening submissions below did not descend to detail their case on how awareness would be established, beyond saying that they would rely on what they termed the "*Worley* approach" (referring to *Crowley (FC)*). The Full Court's decision in *Crowley (FC)* is addressed in further detail above in considering the appellants' constructive awareness case. For present purposes, it suffices to note that the Full Court rejected the proposition that an entity cannot have, and therefore be obliged to disclose, information comprising an opinion where no person within the entity has actually formed that opinion.

405 Unsurprisingly, the Bank's written opening submissions below also addressed the September 2015 Late TTR Information as a singular concept, and did not address the individual integers of the September 2015 Late TTR Information.

406 The parties' oral opening submissions below referred to assessing the pleaded items of information alone or in combination, but referred to the pleaded information in terms reflecting that each pleaded composite constituted a single piece of information. The oral opening submissions did not refer to any case being advanced on the basis of only some of the integers of each pleaded item of information being established.

407 For the most part, the appellants' written closing submissions below also addressed each version of the pleaded Late TTR Information as a singular concept, referring, for example, to the June 2014 Late TTR Information as "this item [of information]". However, the applicants' closing submissions below also asserted that:

> [I]f the Court were to find (contrary to the above, and which is denied) that the components of the June 2014 Late TTR Information in one or more of sub-paragraphs (a) – (e) did not exist, or for that matter was for some reason not required or apt to be disclosed to the ASX, **the resultant exercise for the Court would involve determining the effects and consequences of, and in particular the quantum of loss caused by, CBA's failure to disclose the components of the June 2014 Late TTR Information in the remaining sub-paragraphs**, being those components of the June 2014 Late TTR Information that did exist or were apt to be disclosed.
>
> (Emphasis added.)

408 The appellants cross-referred to their submissions on the June 2014 Late TTR Information in addressing the September 2015 Late TTR Information (and the August 2015 Late TTR Information). Their submissions on integer (a) also suggested that, "on a worst case scenario", this integer was known, and not disclosed, by 24 September 2015.

409 The Bank responded forcefully in its written closing submissions below. It said as follows:

> One matter bears particular mention in relation to the construction of the information the Applicants' allege ought to have been disclosed. The Applicants make the somewhat startling submission that if the Court finds that any element of one of the categories that they contend should have been disclosed either did not exist, or is inapt for disclosure, then the Court must proceed to determine the case on the basis of those items of information that remain.
>
> **The Applicants' submission is both legally wrong and places the Court in an unfair position. The Applicants have pleaded each of their items as composite pieces of information. There is no suggestion in their pleading, or in the way in which the case has been run to date, that those pieces of information should be atomised to their constituent parts such that each element could be treated as a separate piece of information.** That does not reflect the way in which the information has been approached by the experts, nor the way in which the Applicants conducted their case. It is an approach that cannot now be adopted in closing submissions.
>
> The Applicants' submission also places the Court in an entirely unfair position. **If accepted, the Applicants' submission would mean that the Court would in effect be required to mix and match every constituent element of the Applicants' case**

> **and determine whether there might be a contravention in respect of every possible combination.** This is done all without any assistance from the Applicants as to the true nature of the case that they seek to bring. In circumstances where there are four major categories of information, nine sub-categories of that information (for example, June 2014 Late TTR Information, August 2015 Late TTR Information, September 2015 Late TTR Information), and, on the most conservative estimate, 21 elements of that information, the possible combinations would literally number in the millions. It cannot sensibly be contended that the Court should be left to sift through those combinations to determine the Applicants' case.
>
> (Emphasis added.)

410 The parties maintained their positions in their oral closing submissions below.

411 The question whether integer (b) can be excised also directs attention to the basis upon which the experts prepared their reports on materiality. The appellants' materiality experts below, Mr Johnston and Professor da Silva Rosa, were not asked to assess the materiality of integer (b) separately from the other integers; the appellants' materiality experts were asked to assess the September 2015 Late TTR Information (and other iterations of the Late TTR Information) as a whole. Their individual treatment of integer (b) was limited.

412 Mr Johnston prepared two expert reports, dated 14 April 2022 and 30 September 2022. In his first expert report, Mr Johnston identified integer (b) as one of five factors indicating that the pleaded Late TTR Information would have been qualitatively material to investors, but otherwise gave no separate consideration to this integer in his analysis. Mr Johnston's expert reply report largely responded to matters raised in the Bank's expert reports on materiality, and did not specifically address integer (b).

413 Professor da Silva Rosa also prepared two expert reports, dated 12 April 2022 and 29 September 2022. In his first expert report, Professor da Silva Rosa identified integer (b) as one of the three "key elements" of each version of the pleaded Late TTR Information which "would lead investors to infer that [the Bank] had been substantially and systematically deficient in its compliance with requirements under the AML/CTF Act". However, he also opined that particular numerical values would not be critical once the scale was such that it is evident that the Bank's non-compliance was systematic and "large in scale". Professor da Silva Rosa's reply report was in similar terms.

414 The Bank's materiality experts below were Dr Unni, Mr Ali and Mr Singer. Each of the Bank's experts concluded that no version of the pleaded Late TTR Information was material. When questioned on appeal as to whether embracing the appellants' submission that integer (b) could be disregarded would mean that the materiality of the September 2015 Late TTR Information

would need to be addressed without the assistance of the expert evidence below, the Bank submitted that "what we say in relation to our experts is because they reach a view that there is no materiality, taking out something which is said to be material isn't going to affect their opinion".

415 In *Metwally v University of Wollongong* [1985] HCA 28; 60 ALR 68 at 71, the High Court confirmed the long-standing principle that a party is bound by the conduct of his or her case at trial. Only rarely can new issues be raised on appeal, and close attention will be paid to whether the new point raised is one for which, had the issue been raised below, "evidence could have been given which by any possibility could have prevented the point from succeeding": *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ.

416 Although the contention that an integer of an item of pleaded information could be excised was raised below, it was not pleaded and was only raised in closing submissions. The Bank objected strenuously to the appellants' attempt to recast their case in this way in closing submissions, and the primary judge did not accede to the attempt, recognising it as an attempt by the appellants to deviate from the course they had set. While the relevant portion of the primary judge's reasoning also addressed issues concerning contextual information, his Honour's observations were also extended to, and are apposite to, the present issue.

417 The primary judge observed that the authorities emphasise the need for parties alleging contraventions of the continuous disclosure regime to plead their case "finally and precisely" (also "clearly and distinctly"), citing *Cruickshank* at [120], and that to accede to the applicants' approach would create the potential for procedural unfairness, and sow confusion and disorder in the conduct of the proceeding, particularly where the expert evidence was prepared and adduced in a manner directed to the pleaded case. His Honour further stated that it was not for the Court to embark on its own course, selecting parts of the pleaded forms of the information and, in the absence of appropriate evidence, seeking to establish the likely market effects and consequences of a sub-set of parts of the pleaded information. These observations of the primary judge are all well-made.

418 No ground of appeal directly contended that the primary judge fell into error in declining to accede to the appellants' suggestion, raised in closing submissions, that integers of the pleaded information could be disregarded. While the appellants took issue, as part of Ground 5, with the Bank being permitted (as they saw it) by the primary judge to depart from its pleadings whereas the primary judge held them to their pleaded case, our conclusion that Ground 5 is

made out means that there is no unfairness in holding the appellants to their pleadings in relation to this aspect of the case.

419 The suggestion, pursued on appeal, that integer (b) may be disregarded is simply too significant a departure from the pleaded case and the case run at trial (prior to closing submissions). The suggestion cannot be acceded to. It falls into the category of new points that have obvious implications for the conduct of a trial and the evidence to be adduced. While counsel for the Bank said, on the appeal, that its expert evidence on materiality did address the separate integers of the September 2015 Late TTR Information, that does not eliminate the prejudice that would be occasioned by acceding to the appellants relying on the excision of integer (b) on the appeal. A party's experts addressing the pleaded information integer by integer is only one aspect of the preparation for, and conduct of, a trial.

420 These observations should not be misconstrued as an invitation for pleaders to revive the deplorable practice of pleading seemingly never-ending variations and alternatives. While the proper pleading of facts and their characterisation – so as to clearly put the case to be answered – can involve pleadings in the alternative, proper pleading does not extend to "planting a forest of forensic contingencies": *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; 247 CLR 486 at [27] per French CJ, Gummow, Hayne and Kiefel JJ. Equally, our observations ought not be misconstrued as advancing a general proposition that all integers of pleaded information must always be established. Any such general proposition would be inimical to the objects of the continuous disclosure regime. Here, the excision of integer (b) on appeal was precluded by the way in which the appellants pleaded and ran their case below.

10.2.2 Whether the appellants can advance a case based on awareness of all integers of the September 2015 Late TTR Information in January 2016

421 The primary judge found that the Bank was aware of integer (b) of the September 2015 Late TTR Information in January 2016. On that basis, the primary judge was not satisfied that the Bank was "aware" of the September 2015 Late TTR Information from around 8 September 2015, or shortly thereafter. Having rejected the awareness case at that date, the primary judge found that "as at 24 April 2017 (the date referred to in para 41C of the Statement of Claim), the Bank was 'aware' of the September 2015 Late TTR Information".

422 On the appeal, the appellants contended (pursuant to an aspect of Ground 16) that the primary judge should have, but did not, assess their materiality case based on awareness of the totality of the September 2015 Late TTR Information in January 2016. This matter was only the

subject of any real attention in the appellants' oral submissions (albeit there were some, mostly oblique, references in their written submissions). Counsel for the Bank objected to the introduction of a new, "continuum" case on the appeal, submitting that the case was not run on that basis below, was not pleaded, and was not addressed in the evidence on that basis.

423 In the case of the September 2015 Late TTR Information, the appellants pleaded – further or alternatively to earlier iterations of the Late TTR Information – that the Bank was aware of that information "from around 8 September 2015 or shortly thereafter" (paragraph 41B of the Statement of Claim). The appellants then pleaded – again "further or alternatively" – that the Bank was aware of the September 2015 Late TTR Information "as at 24 April 2017" (paragraph 41C of the Statement of Claim). Similar language was used by the appellants in pleading the alleged contraventions. Paragraph 69B of the Statement of Claim pleaded that "as at, and from 8 September 2015 or shortly thereafter, the September 2015 Late TTR Information was information that a reasonable person would expect to have a material effect on the price or value of CBA Shares" and paragraph 69C pleaded the same matters "further or alternatively, as at, and from 24 April 2017".

424 If the appellants were, by their pleadings below, advancing a case on the "continuum" basis they contended for on appeal, the words "or shortly thereafter" would be otiose (because any day after 8 September 2015 and before 24 April 2017 would be covered by "from 8 September 2015"). But those words were deployed in fixing the time at which they alleged awareness, materiality and a breach of the continuous disclosure obligations. January 2016 is not "shortly" after 8 September 2015.

425 Even if it is accepted that there is some ambiguity in the appellants' pleading, it is apparent from the parties' submissions below, and from the terms of the primary judge's reasons, that everyone (including the primary judge) approached the applicants' case on the basis that they were advancing a case that the Bank was aware of specific pleaded items of information at and from points in time that were pleaded in the alternative, and that each pleaded point in time was a fixed starting point, as distinct from running a case that awareness (and materiality) was to be assessed at any intermediate point between the fixed pleaded dates.

426 The primary judge observed that the applicants pleaded awareness of the September 2015 Late TTR Information "as at both 8 September 2015 (or shortly thereafter) and 24 April 2017". The appellants did not submit to the primary judge that he should assess materiality at any intermediate point between the pleaded dates, if his Honour found awareness at a date between

8 September 2015 (or shortly thereafter), and 24 April 2017. As noted above, consistently with this, the primary judge proceeded on the basis that each pleaded starting date was a fixed point (as distinct from the appellants having advanced an awareness (and materiality) case at any intermediate point in time between the pleaded fixed points). We do not accept that a rhetorical flourish in the Bank's closing submissions below – stating that the applicants had to prove the Bank's awareness "of each piece of information at every point throughout the relevant period" – changes the basis upon which the parties engaged at trial to one encompassing any intermediate point in time between the two pleaded dates (8 September 2015 or shortly thereafter, and 24 April 2017).

427 In addition, and as noted above, the appellants' written submissions on the appeal were (save for some oblique references) silent on the point. If the case below had truly been run on the basis that there was an alternative case run for any intermediate date when awareness was established, it defies explanation for it not to be mentioned squarely in the appellants' written submissions (for which an extended page limit of 50 pages was allowed). The fact that it was not reinforces our view that the case below was not run on that basis. It would be unfair to the Bank, and contrary to authority (referred to above), to allow a new case of that kind, and which was not addressed in the written submissions on the appeal, to be advanced in the running of the appeal.

10.2.3 The basis upon which materiality is to be addressed

428 It follows from the foregoing that the materiality of the September 2015 Late TTR Information is to be addressed *with integer (b)* and *as at 24 April 2017*.

10.3 Grounds 9 and 17 (September 2015 Late TTR Information)

429 Ground 9 challenges the primary judge's finding that the September 2015 Late TTR Information was not material, with a focus on the primary judge's treatment of contextual information. While Ground 9 deals with this issue as at 8 September 2015 (or shortly thereafter), a date we have rejected for this purpose, Ground 9 is picked up by Ground 17 as at 24 April 2017, which we consider to be the relevant date. In addition, Ground 17 contains some additional points that relate to the primary judge's treatment of contextual information. At this stage, we consider Ground 17 insofar as it relates to the September 2015 Late TTR Information.

430 The definition of the September 2015 Late TTR Information has been set out above, but we set it out again for ease of reference:

> From around November 2012 to 8 September 2015:
>
> (a) CBA had failed to give TTRs on time for approximately 53,506 cash transactions of $10,000 or more processed through IDMs following the introduction of IDMs (September 2015 Late TTRs);
>
> (b) the September 2015 Late TTRs represented between approximately 80% and 95% of threshold transactions that occurred through CBA's IDMs during the period from November 2012 to September 2015;
>
> (c) the September 2015 Late TTRs had a total value of approximately $624.7 million dollars;
>
> (d) the September 2015 Late TTRs had not been lodged, at least in part because of a systems error which occurred in or around November 2012
>
> (the **September 2015 Late TTR Information**).

431 The core reasoning of the primary judge that is the subject of Grounds 9 and 17 is at [957]-[972] and [1023]-[1029], which we have set out above.

432 The issue to be determined is whether the primary judge erred in concluding that, as at 24 April 2017, the September 2015 Late TTR Information was not material within the meaning of ss 674 and 677. Those provisions have been set out at [117]-[118] above. Section 674(2)(c)(ii) refers to information that "a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity". Section 677 relevantly provides that, for the purposes of s 674, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities".

433 The appellants submit that the September 2015 Late TTR Information in substance conveyed that the Bank had failed to give TTRs on time on over 53,000 occasions, representing the vast majority of transactions occurring through its IDM network over a 2 and 1/2 year period from November 2012, involving a very large dollar value, because of a systems error. The appellants submit that:

(a) the materiality of the September 2015 Late TTR Information was obvious and intuitive (an acceptable mode of reasoning: *ASIC v Fortescue* at [307] per Gilmour J; *ANZ v ASIC* at [86]), as the applicants had submitted below (Reasons, [710]) because of: (i) its objectively serious nature; (ii) the fact that it would damage the Bank's reputation; and

(iii) the fact that it would suggest to investors that the Bank was at risk of regulatory action, including significant penalties;

(b) the primary judge made numerous findings consistent with the materiality of the September 2015 Late TTR Information, several of which are summarised at Ground 9(a);

(c) his Honour correctly found that the late TTR issue was a significant failure in respect of an important regulatory obligation (at [959]), which he had earlier found carried a maximum penalty of $18 million per breach, and that the Bank was aware that any possible penalty that might be ordered against it would be "substantial" (Reasons, [563]);

(d) his Honour correctly also found that: (i) investors would have an expectation that financial institutions would take sufficient measures and undertake sufficient investment to mitigate their operational risks, including those risks arising from the need to comply with the AML/CTF Act (Reasons, [963]); and (ii) would not approve of the Bank's failing and would be critical of it (Reasons, [970]).

434 The appellants further submit that:

(a) so far as the Late TTRs were concerned, the applicable offence was one of strict liability; the Bank had not identified any viable defence to the multiple contraventions; and any reductions in penalties below the statutory maximum in accordance with the "course of conduct" and "totality" principles are discretionary and subject to "inherent synthesis", which is not a mathematical exercise;

(b) the Bank could have had no confidence how far the total penalty might be reduced below the total maximum, other than that a court would strive not to impose a penalty that would bankrupt it;

(c) moreover, the High Court has emphasised that the primary if not sole purpose of civil penalty regimes is deterrence, thus: (i) the penalty must be sufficiently high that it cannot be regarded as an "acceptable cost of doing business"; (ii) having regard to the size and profitability of the Bank's business, and other businesses like it, the objects of the civil penalty regime in the AML/CTF Act would only have been achieved by the imposition of a significant penalty; (iii) "significant" here means in the tens, if not hundreds, of millions of dollars; and (iv) the fact that a total penalty of that scale had

not been previously imposed for like conduct reflects only that no financial institution had previously been found to have engaged in such large scale contraventions.

435 The appellants submit that the primary judge was erroneously influenced in his decision by a faulty approach to "contextual" information or matters. Taking each piece of contextual information relied on by the primary judge separately, the appellants submit:

(a) The *first* piece of contextual information was that the failure to lodge the TTRs on time arose from what he described as a "single coding error" or "single failure" (Reasons, [958], [959]). That is said to involve error because the primary judge did not explain why the cause of the about 53,000 breaches of the Bank's AML/CTF obligations deprived the September 2015 Late TTR Information of materiality, or why this so-called piece of context was not already bound-up in sub-para (d) of the September 2015 Late TTR Information (referring to the late lodgement being caused by a "systems error").

(b) The *second and third* pieces of contextual information were that the error had been rectified (Reasons, [958]), and the TTRs had been lodged as required, albeit late (Reasons, [958]). That is said to involve error because the primary judge acknowledged that the lateness itself could not be rectified (Reasons, [959]), and it is mysterious why his Honour felt that this piece of contextual information impacted the materiality of the September 2015 Late TTR Information. Moreover, regardless of whether the Bank said anything at all about whether the cause of the issue had been rectified, investors would obviously expect the Bank to do what it could to rectify an identified non-compliance, and to do so very rapidly (see the cross-examination of Mr Singer), while understanding that lateness itself could not be rectified.

(c) The *fourth* piece of contextual information was that that the monitoring of threshold transactions through IDMs was but one part of transaction monitoring for AML/CTF purposes and the late-lodged TTRs represented a small percentage of the total TTRs lodged by the Bank and a lower percentage of total transactions monitored (Reasons, [960]-[961]). That is said to involve error because the fact that much had gone right did not detract from the materiality of how much had gone wrong.

(d) The *fifth* piece of context was that investors did not understand financial institutions to be "wholly free from risk" (Reasons, [963]). That is said to involve error because it is unclear why this is described as a "contextual matter", and that the case was never about

absence of risk as distinct from perceived increases in risk (or indeed, that the extant perception of a risk of contraventions to which all financial institutions were exposed, had crystallised 50,000 times at the Bank over several years).

(e) The *sixth* piece of context was the fact that the September 2015 Late TTR Information was silent on the significance and consequences for the Bank of not lodging the TTRs on time, and did not include "more concrete information" as to AUSTRAC's intentions (Reasons, [964], [971]).

436 The appellants submit that the first five contextual matters identified by the primary judge could not rationally have deprived the September 2015 Late TTR Information of materiality, and the sixth contextual matter is in the same category and is also infected by the faulty legal approach which is the subject of Ground 6(c) (namely, that the primary judge imposed a test that information was not material unless it could be shown that the information included concrete information on its significance and potential consequence for the Bank). The appellants submit that none of the contextual matters really intersected at all with the facts that mattered to materiality, namely investors' concerns with the fact the Bank had not complied for a long period with its objectively serious AML/CTF obligations so as to expose it to reputational damage and the risk of regulatory action including large fines.

437 Although the appellants' submissions on materiality include a reference to the additional matters not having been "properly pleaded" by the Bank, this point is not raised in the appellants' appeal grounds on materiality. For similar reasons to those set out above in connection with the Completeness and Accuracy issue, in our view the Bank should have pleaded the additional information it sought to rely on in connection with materiality. However, in relation to the materiality issue, it appears that the case was run by both parties on the basis that the Bank relied on certain additional information (namely, that set out in its opening submissions and that briefed to the experts) to contend that the pleaded information lacked materiality. In these circumstances, we will not discuss this issue any further.

438 In response to the appellants' submissions summarised above, the Bank submits that the appellants are seeking to largely rerun the case they advanced at trial, which was rejected. The Bank contends that: (a) it is necessary to understand the basis on which the primary judge rejected the materiality of this alleged information; (b) the appellants pay scant regard to the primary judge's findings; (c) the analysis was detailed and multi-faceted, and considered carefully the evidence and the case that was put; and (d) the primary judge's advantage in

having sat through a long trial, involving complex lengthy evidence, and having been in a position to synthesise that evidence should not be overlooked.

439 The Bank also argues that the primary judge accurately recorded the appellants' contention that the Late TTR Information was material because (a) it was "serious in nature" and concerned a large number of contraventions over a period of years, and a large transaction value (Reasons, [712]); (b) investors would consider that there would be reputational damage ([720]); (c) investors would have believed that the Bank was at risk of regulatory action, including the risk of substantial penalties being imposed ([725]); and (d) the Late TTR Information would have suggested higher remediation costs ([727]). It submits that five experts gave evidence as to the materiality of the Late TTR Information: Professor da Silva Rosa and Mr Johnston for the appellants, while the Bank called Dr Unni, Mr Ali and Mr Singer. The Bank submits that the primary judge painstakingly summarised their respective evidence at [728]-[835]; in so doing, his Honour made numerous observations as to the characterisation of the evidence given by those witnesses (and its effect) based on his observations of them giving evidence.

440 In response to the appellants' submission that the materiality of the Late TTR Information was "obvious and intuitive", the Bank submits that this does little more than seek to establish materiality through assertion; it does not engage with the careful analysis of the primary judge.

441 The Bank contends that the appellants' submissions proceed on the assumption that it was pre-ordained that a substantial regulatory civil penalty would be imposed on the Bank; however, no such penalty was pre-ordained and, as the primary judge observed: (a) AUSTRAC's usual approach was not to take enforcement action as a first course, and where it was taken, in nearly all cases it did not involve the imposition of a civil penalty; (b) moreover, the primary judge's (unchallenged) finding was that once the Bank reported the issue, AUSTRAC's consistently communicated position was that it had not decided whether it would take any enforcement action or, if it did, what action it might take (Reasons, [43]); (c) at no stage did AUSTRAC say to the Bank that civil penalty proceedings were likely or anything more than one option amongst a range of other options (Reasons, [43]); (d) these matters are significant because they demonstrate that the appellants' submissions view matters through the lens of hindsight; (e) there was never a certainty (or even a probability) of a penalty being imposed. Rather, there was no more than the possibility of that occurring; as the primary judge rightly found, that was a matter that tended against a finding of materiality (at [936], [938], [955]-[956], [971], [998]).

442 In response to the appellants' submissions regarding the contextual information, the Bank submits that there are three matters that demonstrate why this attack should be rejected. The Bank argues:

(a) First, that the matters identified by the appellants in fact represent only a small cross-section of the matters on which the primary judge in fact relied. As such, the appellants' attack is partial at best.

(b) Secondly, that the appellants apparently assert that it is necessary to show that these matters "detract from" or "negate" the materiality of their pleaded information. This is a methodologically unsound approach, which assumes materiality and then asks whether any other matter would be sufficient to contradict that materiality. That assumes the answer to the question. The correct approach is that adopted by the primary judge; namely to ask whether the information in its proper context is material. When that question is asked, the answer is the one reached by the primary judge: "no".

(c) Thirdly, when regard is had to the matters relied on by the appellants, they have no substance.

443 The Bank makes the following submissions in response to the appellants' submissions about contextual information:

(a) The appellants' *first* attack is on the fact that the late TTRs arose from a single coding error. The appellants assert that the primary judge did not explain why this "deprived" the information of its materiality. But the primary judge explained the relevance of this matter to materiality. His Honour referred to the evidence that the coding error did not involve fraud or misconduct, and that non-fraud related operational risk events are perceived to be less significant by investors: Reasons, [758]. His Honour also explained that the contraventions were put in their proper context when it was appreciated that they arose from a single error and as such did not indicate a general problem with the Bank's systems: Reasons, [588], [958]-[959], [961]-[962]. Similarly, the appellants assert that the primary judge did not explain why these aspects were not already captured by their reference to a "systems error". Again, his Honour did so at the judgment references identified above, in particular at [588], where he explained that it was relevant for investors to understand "the error was a single coding error, not multiple errors permeating the Bank's systems and affecting more generally its ability to monitor transactions".

(b) The *second* and *third* attacks are made on the fact that the error giving rise to the late TTRs had been rectified and all the TTRs had been lodged. The appellants assert that it is "mysterious" why the primary judge regarded this as relevant. However, again, his Honour's reasoning is clear. His Honour explained that in the absence of any explanation that the issue had been rectified, a false impression that the issue was ongoing would be created: Reasons, [591]. This was consistent with Mr Johnston's evidence that in the absence of a statement as to rectification, the market would infer that the contraventions were continuing. Furthermore, his Honour also referred to the evidence that a statement that the problem had been swiftly rectified would indicate that the problem was not complex or costly to resolve: Reasons, [758], [972]. Again, his Honour noted that these were matters relevant to an investor assessing whether the problems affected the entirety of the Bank's systems, or were localised, and the remediation costs associated with them: Reasons, [962]. The same point may be made in relation to the fact that all of the Late TTRs were lodged promptly once the problem was identified.

(c) The *fourth* attack is made on the fact that the Late TTRs represented a minute fraction of the total TTRs lodged and transactions monitored by the Bank. This was addressed at Reasons, [585], [762]-[763], [778]-[781], [960]-[962]. As his Honour explained, this put the issue in perspective, and made clear that the error affected a small part of the Bank's overall TTR processes, and an even smaller part of the Bank's overall monitoring processes: Reasons, [961]. As the primary judge accepted (at [587]) investors were purchasing an interest in the Bank's business as a whole, and therefore would wish to understand the broad scope of that business. This is not to focus on only what had gone right, but rather to engage with what would affect investors' decision-making.

(d) The *fifth* attack is made on the truism that investors understand that financial institutions are not free from risk. The primary judge's observations are set out at Reasons, [761], [914], [963], [1085]. His Honour noted that investors understood that financial institutions are not free from risk, and would factor that understanding into their decision-making. The effect of this was that non-compliance alone would not influence investors: Reasons, [963]. Such reasoning is plainly correct, and no error has been demonstrated in it.

(e) The *sixth* attack is made on the fact that the Late TTR Information did not deal with the significance or consequences of the contraventions. This was addressed at Reasons, [971]. The point made by his Honour was that in the absence of being provided with some firmer indication as to AUSTRAC's intentions (as occurred in the later cases of Westpac and NAB), investors were less likely to regard the information as material. There is no error in this reasoning. It is no more than the unexceptional observation that investors were unlikely to attribute substantial weight to a proposition of this kind when it was a mere possibility, rather than something more reliable.

444 The Bank submits that, contrary to the appellants' submissions, these are matters that were rationally related to the assessment of materiality.

445 It is well established that, in considering whether or not information is material in the sense described in ss 674 and 677 of the *Corporations Act*, it is necessary to consider the information in its broader context: *Jubilee Mines* at [87]-[88], [90], [115], [123]-[125] per Martin CJ (Le Miere AJA agreeing), [161]-[162], [191] per McLure JA; *Vocation* at [566] per Nicholas J (quoted with apparent approval by the Full Court in *Cruickshank* at [124]); *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 2)* [2023] FCA 1217 at [455] per Moshinsky J, upheld on appeal in *ANZ v ASIC*, in which all members of the Full Court accepted that it was appropriate to consider relevant contextual information for the purposes of determining materiality.

446 The question raised by these grounds is whether the primary judge adopted an incorrect approach in his treatment of contextual information. In our opinion, for the reasons that follow, the primary judge did err in his treatment of contextual information. We are conscious of the advantages enjoyed by the primary judge in what was a lengthy and complex trial, including "the opportunity over the course of the hearing and adjournments for reflection and mature contemporaneous consideration and assessment": see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 at [24] per Allsop J. Notwithstanding those advantages, for the reasons that follow, we consider that his Honour erred.

447 We will now address each of the contextual matters relied on by the primary judge at [957]-[972].

448 The *first* matter was the fact that the failure to lodge the TTRs on time resulted from a single coding error: Reasons, [958]-[959]. There is no dispute that the cause of the late TTR problem

was a single coding error. It may also be accepted that this was relevant contextual information (although views might differ on this). However, we question whether this additional information makes much, if any, difference to an assessment of the materiality of the pleaded information. The fact is that the single coding error led to an extraordinary number of failures by the Bank to lodge TTRs on time (over 53,000), each failure constituting a contravention of the Bank's obligations under the AML/CTF Act. The number of contraventions was so large and the nature of the contraventions was so serious that we consider that the fact that they arose from a single coding error made little, if any, difference to the materiality of the information. It may also be observed that, while the late TTR problem was caused by a single coding error, the Bank's systems failed to detect that the late TTR problem was occurring over a long period of time. In our opinion, even if it be accepted that the first matter constituted relevant context, it made little, if any, difference to the materiality or otherwise of the information within the meaning of ss 674 and 677.

449 The *second* and *third* matters relied on by the primary judge were (a) that the error had been rectified and (b) that the TTRs had been lodged, albeit later than they should have been lodged: Reasons, [958]. Earlier in the Reasons, at [591] (in the section dealing with the Completeness and Accuracy of the pleaded information), the primary judge found that, with respect to the September 2015 Late TTR Information, it would be misleading to omit any reference to (a) the cause of the late TTRs having been rectified; and (b) the fact that the late TTRs had been lodged. The primary judge stated that the omission of those facts was important, and that without that information investors would likely be left with the wholly false impression that the problem had not been rectified and was ongoing, with no apparent solution in sight.

450 We have difficulties with these conclusions:

(a) First, the September 2015 Late TTR Information (set out above) commences with the words "[f]rom around November 2012 to 8 September 2015". In our opinion, those words indicate that the failure by the Bank to give TTRs on time occurred during a defined period of time and was not ongoing. This would clearly be the case if the disclosure were to have occurred on 24 April 2017. Had the September 2015 Late TTR Information been disclosed on 24 April 2017, it would have been evident from the terms of the information that the error had been rectified.

(b) Secondly, the definition of the September 2015 Late TTR Information states that the Bank failed to give the TTRs "on time" and then defines the TTRs as "late TTRs". The

label used for this form of the pleaded information uses the description "Late TTR". The implication from this is that the TTRs were eventually lodged; just not on time. Had the September 2015 Late TTR Information been disclosed on 24 April 2017, it would have been evident that the TTRs had been lodged. A reasonable investor, faced with this disclosure, would expect that if the TTRs were not lodged *at all*, such that the contravention was ongoing, the Bank would say so. To describe such an ongoing failure as merely a failure to lodge TTRs "on time" would be misleading.

451 Accordingly, in our view, the second and third matters did not constitute additional information, or relevant context, that needed to be considered to assess the materiality or otherwise of the September 2015 Late TTR Information, or that otherwise affected the analysis of the materiality of that information. Those matters did not add to, qualify, or usefully clarify, relevant aspects of the September 2015 Late TTR Information.

452 The *fourth* matter relied on by the primary judge was that the late TTRs represented between 1.08% and 2.3% of the total TTRs lodged by the Bank, and represented between 0.0002% and 0.0007% of the total transactions monitored by the Bank, in the relevant period: Reasons, [960]-[962]. We accept that these matters constitute relevant context for the purposes of assessing the materiality or otherwise of the September 2015 Late TTR Information. However, it remains necessary to consider whether the pleaded information considered in the context of this additional information is material in the sense described in ss 674 and 677. The primary judge stated that this additional information put the Late TTR Information in perspective, and made clear that the error affected, relatively speaking, a small part of the Bank's overall threshold transaction monitoring processes, and an even smaller part of the Bank's overall monitoring processes: Reasons, [961].

453 That can be accepted, but it remains the case that the number of failures to provide TTRs on time was extremely large (over 53,000) and each failure constituted a contravention of the AML/CTF Act. The scale of the contraventions remains a matter that would be of concern to investors, notwithstanding that these additional pieces of information put the objectively high number of contraventions (over 53,000) in the context of the Bank's vast operations. Appreciating that context does not alter the fact that a single error resulted in over 53,000 contraventions. We consider that the focus needed to be and remain on those matters. Those matters were highly relevant in considering the materiality or otherwise of the information (albeit in the context of the additional information).

454 The *fifth* matter relied on by the primary judge was that investors who commonly invest in securities would understand that financial institutions are not free of operational risk, including risks arising from their need to comply with the AML/CTF Act: Reasons, [963]. While this may be accepted as correct, we have difficulty in seeing how it assists in assessing the materiality or otherwise of the September 2015 Late TTR information. There is an important difference between: (a) the existence of an operational risk; and (b) the operational risk materialising. It may be accepted that financial institutions, such as the Bank, are not free of operational risk. The appellants' case is not concerned with disclosure of that risk. The question here is whether, in circumstances where there was a failure to give TTRs on time in a large number of cases over an extended period of time, information about that failure or those failures was material. The fact that financial institutions are subject to operational risk is a given, but does not really assist the analysis. Having regard to the magnitude of the failures in this case, it is unlikely that persons who commonly invest in securities would discount them as insignificant on the basis of their understanding that financial institutions are not free of operational risk.

455 The *sixth* matter relied on by the primary judge can be summarised as that the Bank had been working cooperatively with AUSTRAC on the late TTR issue for an extended period of time, without any enforcement action being taken by AUSTRAC; moreover, AUSTRAC had not made clear its intentions on whether it would take enforcement action in respect of that particular episode of non-compliance: Reasons, [964]. The primary judge stated that these facts put the Late TTR Information into perspective, particularly when materiality is assessed as at 24 April 2017: Reasons, [965]. His Honour also said that these matters meant that it was far from clear that the Bank's failing would be likely to have any operational or reputational consequences for the Bank that would or might affect the value of, or return on, CBA shares. In our view, contrary to a submission made by the Bank at the appeal hearing, when materiality is assessed as at April 2017, the time that had elapsed since the date when the Bank informed AUSTRAC of the problem (in September 2015) *helps* rather than *harms* the appellants' case.

456 As the chronology earlier set out demonstrates, to the knowledge of the Bank's officers, the prospect that AUSTRAC would take regulatory action increased over time. In June 2016, AUSTRAC gave the first statutory notice to the Bank. In September 2016, AUSTRAC gave a second statutory notice. In October 2016, AUSTRAC gave a third statutory notice. On 17 October 2016, an Executive Committee report was prepared. This included the statement: "The potential for fines or other regulatory action seem elevated in light of AUSTRAC recently

issuing the Group with an Enforcement Notice, stemming from breaches in [TTR] Reporting from branch-based [IDMs]". The primary judge accepted Mr Narev's evidence to the effect that, by October/November 2016, he thought that there was a serious risk of AUSTRAC taking regulatory action in relation to the late TTR issue (albeit he did not consider it likely that AUSTRAC would commence civil penalty proceedings). In February 2017, it was revealed publicly that Tabcorp had agreed to pay a pecuniary penalty of $45 million in the Tabcorp proceeding brought by AUSTRAC. On 7 March 2017, Mr Keaney and Ms Watson of the Bank met with AUSTRAC. In an email the next day, Ms Watson reported to Mr Craig that AUSTRAC described the TTR and associated matters as "serious, significant and systemic". Ms Watson's email also reported that AUSTRAC said that the Bank's "failure to immediately and proactively tell them about these and other problems (here they were talking about control weaknesses over multiple years, etc) is a show of bad faith which leads them to wonder what else is broken across CBA's financial crime landscape". Ms Watson also reported that AUSTRAC said that it had not yet made a determination, but it was not far off. A copy of the email found its way to Mr Narev (the CEO), who forwarded it to Ms Livingstone (the Chair of the Board). On 16 March 2017, this Court made an order in the Tabcorp proceeding that Tabcorp pay a pecuniary penalty of $45 million. On 21 March 2017, Mr Narev and Ms Livingston met with AUSTRAC. In cross-examination, Mr Narev accepted that it was fair to say (apparently based on his understanding of the matter) that AUSTRAC was seriously considering all options, including civil penalty proceedings. Mr Narev accepted during cross-examination that, at that time, his thinking was that it was "highly likely" (but not inevitable) that AUSTRAC would be seeking a "fine" from the Bank.

457 In light of these matters, we consider that the sixth matter significantly understates the Bank's knowledge of the risk that AUSTRAC would bring civil penalty proceedings against the Bank. If the September 2015 Late TTR Information is considered in the context of the chronology set out above (rather than the sixth matter), it enhances, rather than detracts from, the appellants' case as to the materiality of the information.

458 We will now consider the primary judge's reasons at [1023]-[1029], which considered the materiality of the pleaded information as at 24 April 2017. The primary judge said that he was not persuaded that the combination of the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information, if disclosed at 24 April 2017, did lead to the contrary conclusion as to materiality: Reasons, [1024]. The primary judge's reasons on this point included that, at 24 April 2017, both forms of information "concerned truly

historical instances of non-compliance that had been rectified some time ago". His Honour also stated that AUSTRAC had made no decision as to what regulatory action, if any, it might take because of the Bank's known non-compliance with the AML/CTF Act, and no-one was closer to knowing what its intentions were. His Honour's reliance on these contextual matters is the subject of challenge in Ground 17.

459 The difficulty with these aspects of the primary judge's reasoning is that, for the reasons given above, the prospect of AUSTRAC taking regulatory action against the Bank increased rather than diminished over time. Thus, assessing the matter as at April 2017 (rather than September 2015), assists, rather than detracts from, the appellants' case. Contrary to the primary judge's view, we consider the Bank's contraventions were not "truly historical" instances of non-compliance, because there was the prospect of civil penalty proceedings being commenced in respect of the contraventions.

460 For these reasons, we consider that the primary judge erred in his treatment of contextual information relating to the September 2015 Late TTR Information. Ground 9 (as picked up by Ground 17) and Ground 17 (in relation to the September 2015 Late TTR Information) are made out.

10.4 Grounds 10 and 17 (September 2015 Account Monitoring Failure Information)

461 Ground 10 challenges the primary judge's finding that the September 2015 Account Monitoring Failure Information was not material, with a focus on the primary judge's treatment of contextual information. While Ground 10 deals with this issue as at 8 September 2015 (or shortly thereafter), a date we have rejected for this purpose, Ground 10 is picked up by Ground 17 as at 24 April 2017, which we consider to be the relevant date. We will also consider the additional points raised by Ground 17 insofar as they relate to the September 2015 Account Monitoring Failure Information.

462 The definition of September 2015 Account Monitoring Failure Information has been set out above, but for ease of reference we set it out again:

> From around 8 September 2015 or shortly thereafter, CBA was aware (within the meaning of ASX Listing Rule 19.12) that from at least 20 October 2012 to 8 September 2015, CBA failed to conduct account level monitoring with respect to 778,370 accounts (the **September 2015 Account Monitoring Failure Information**).

463 The primary judge's core reasoning in relation to the materiality of the September 2015 Account Monitoring Failure Information is at [973]-[978], which we have summarised earlier

in these reasons. That passage needed to be read together with the primary judge's earlier consideration (at [499] and [603]) of whether this form of the pleaded information was misleading.

464 As set out above, at [603], the primary judge stated that the information, as pleaded, "conveys the misleading impression that, throughout the entirety of each pleaded period, the Bank failed to monitor the stipulated number of accounts". The primary judge said that this impression was "factually incorrect" because the account monitoring failure was intermittent for periods that varied between one day and 36 months, referring to his earlier reasons at [499]. At [499], the primary judge stated:

> For the sake of completeness, I should record that it is not accurate to say that the Bank "failed to conduct account level monitoring" in the general terms in which the Account Monitoring Information is pleaded. As I have said, the number of the accounts affected by the account monitoring issue varied over time. The numbers are given in the analysis undertaken in March/April 2017 and reported to AUSTRAC at that time. In its letter to AUSTRAC dated 13 April 2017, the Bank pointed out that, in respect of the affected accounts, **the account monitoring failure was intermittent for periods that varied between one day and 36 months; not all employee-related accounts were affected by the issue; and approximately 25% of the affected accounts were inactive**. The applicants do not challenge these facts.
>
> (Emphasis added.)

465 As we have said, the primary judge's core reasoning in relation to the *materiality* of the September 2015 Account Monitoring Failure Information is at [973]-[978], which we have summarised earlier in these reasons. His Honour said that a similar analysis applied as for the September 2015 Late TTR Information. In relation to the September 2015 Account Monitoring Failure Information, the primary judge said that the proper context included the following important facts (at [974]):

(a) the failure to monitor resulted from an error in updating account profiles in the Bank's FCP as part of a project directed to enhancing the Bank's ability to monitor and detect potential instances of internal fraud;

(b) the error was the population of a particular data field with a null value;

(c) the error affected only a subset of particular accounts (employee-related accounts);

(d) the error did not mean that there was a complete absence of monitoring in respect of these accounts;

(e) a large percentage of these accounts (25%) were inactive;

(f) the monitoring of the accounts was affected for varying periods of time (which included relatively short periods of time); and

(g) the error had been rectified.

466 His Honour elaborated on some of these contextual matters at [975]-[978]. In [975], the primary judge said that the information "in a sense" concerned a single failure. In [976], the primary judge said that investors would understand that financial institutions are not free of risk in respect of regulatory compliance. In [977], the primary judge stated that, considering the matter as at 24 April 2017, the problem was truly historical. His Honour stated:

> In relation to the September 2015 Account Monitoring Failure Information (as it applies to the Bank's "awareness" pleaded as at 24 April 2017), a further matter militating against the materiality of that information (in the sense of whether the information would, or would be likely to, influence investors in deciding whether to acquire or dispose of CBA shares) **is the fact that, by that time, the account monitoring failure issue was truly historical**. It had been identified, and steps put in place to rectify it, some years beforehand in the period June to September 2014. There was no ongoing problem. I am not satisfied that, considered as at 24 April 2017, investors would regard such historical and rectified non-compliance as, itself, having any significant operational or reputational consequences for the Bank that would or might affect the value of, or return on, CBA shares.
>
> (Emphasis added.)

467 Ground 10 takes issue with a number of the contextual matters relied on by the primary judge.

468 In our opinion, some of the matters that his Honour took into account were relevant contextual information that it was appropriate to take into account. We consider that his Honour was correct to conclude that the information, as pleaded, gave a misleading impression. The statement that that "from at least 20 October 2012 to 8 September 2015, CBA failed to conduct account level monitoring with respect to 778,370 accounts" suggests that the Bank failed to monitor all of those accounts for that entire period. However, that was not the case, for the reasons given by the primary judge at [499]. In these circumstances, it was appropriate to take into account the following matters as they corrected the misleading impression: (a) the error did not mean that there was a complete absence of monitoring in respect of these accounts; (b) a large percentage of these accounts (25%) were inactive; (c) the monitoring of the accounts was affected for varying periods of time (which included relatively short periods of time); and (d) that the failure affected employee accounts.

469 However, for substantially the same reasons as set out above in relation to the September 2015 Late TTR Information, we consider that his Honour erred in taking into account certain other

matters, namely that the error had been rectified, and that investors would understand that financial institutions are not free of risk, so as to conclude that the relevant information was not material.

470 Insofar as the primary judge took into account that the account monitoring issue was, in a sense, a single failure, we consider that this matter made little, if any difference, to materiality, given the scale of the Bank's failure.

471 Further, we consider that it was an error for the primary judge to find that, as at 24 April 2017, the account monitoring failure was "truly historical". As at 24 April 2017, to the knowledge of the Bank, the issue remained the subject of active investigation by AUSTRAC. As set out above, on 1 March 2017, AUSTRAC sent a letter to the Bank seeking further information in relation to the account monitoring failure issue. The Bank responded by letter dated 13 April 2017. Indeed, the figure of 778,370 accounts that were affected by this issue appears to have been obtained from that letter (see the Reasons at [494]).

472 For these reasons, Ground 10 (as picked up by Ground 17) and Ground 17 (in relation to the September 2015 Account Monitoring Failure Information) are made out.

10.5 Grounds 11 and 17 (August 2015 IDM ML/TF Risk Assessment Non-Compliance Information)

473 Ground 11 challenges the primary judge's finding that the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information was not material, with a focus on the primary judge's treatment of contextual information. As with the previous grounds, Ground 11 deals with this issue as at 8 September 2015 (or shortly thereafter), a date we have rejected for this purpose. However, Ground 11 is picked up by Ground 17 as at 24 April 2017, which we consider to be the relevant date. Ground 17 does not appear to raise additional points relating to the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information.

474 The definition of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information has been set out above, but for ease of reference we set out para (a) of that definition again:

> Further or alternatively, from 11 August 2015, or shortly thereafter, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the **August 2015 IDM ML/TF Risk Assessment Non-Compliance Information**; namely that CBA had failed:
>
> (a) in the period prior to the roll-out of CBA's IDMs in May 2012, and between May 2012 and July 2015, to carry out any assessment of ML/TF Risk in relation to or including the provision of designated services through CBA's

IDMs, as required to comply with CBA's AML/CTF Program; …

475 The primary judge's core reasoning in relation to the materiality of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information is at [953]-[956]. In that section, his Honour was considering Professor da Silva Rosa's evidence in relation to this form of the pleaded information. In rejecting that evidence, the primary judge said at [954] that the information needed to be considered in its "proper context". The primary judge referred to the following contextual matters:

(a) when, in response to a query raised by AUSTRAC, the Bank informed AUSTRAC on 26 October 2015 that (in rolling out the IDMs) it had relied on the ML/TF risk assessment it had conducted on ATMs, AUSTRAC did not raise any issue about that fact at that time;

(b) there is no evidence that the failure to carry out a separate and formal risk assessment before the roll out of the IDMs in May 2012, or in the period May 2012 to July 2015, had any direct consequences; the late TTR issue was not the consequence of the Bank failing to carry out a risk assessment; it was a coding error.

476 Further, at [955], the primary judge said that, to the extent that such investors would regard the IDM ML/TF Risk Assessment Non-Compliance Information to be of concern, or even interest, his Honour was satisfied that they "would want concrete information on its significance and potential consequences for the Bank" before being influenced to either acquire or dispose of CBA shares. The primary judge said that such information was completely lacking from the pleaded information.

477 We also note that, at [1022] of the Reasons, the primary judge returned to this form of pleaded information, considering the matter as at 24 April 2017. His Honour stated that, apart from the matters he had discussed at [953]-[955], he was satisfied that, had this information been disclosed by the Bank at that date, persons who commonly invest in securities would more likely than not regard that information as "purely historical information having no significant bearing on the [Bank's] operational or reputational risk". His Honour stated that, although the Bank had not carried out a formal and separate assessment of ML/TF risk in respect of IDMs before they were rolled out in May 2012, such an assessment had been carried out in July 2015. The primary judge also repeated his earlier statement that there were no known consequences of the Bank not having carried out such an assessment earlier.

478 Ground 11 takes issue with a number of aspects of the primary judge's reasoning as summarised above.

479 Insofar as the primary judge took into account that there was no evidence that the failure to carry out the risk assessment had any direct consequences, we do not see any error in his Honour's reasoning. It was open to the primary judge to rely on that matter in considering the materiality or otherwise of the pleaded information. The absence of known consequences was relevant to the significance of this form of pleaded information.

480 We refer next to the primary judge's statement at [955] that, to the extent that investors would regard the IDM ML/TF Risk Assessment Non-Compliance Information to be of concern, or even interest, his Honour was satisfied that they "would want concrete information on its significance and potential consequences for the Bank" before being influenced to either acquire or dispose of CBA shares. This paragraph is also the subject of challenge by Ground 6(c). We would not treat this as his Honour imposing a test that, unless this could be shown, the information would not be material in the relevant sense. Rather, we would treat his Honour as in substance saying that the information, as pleaded, lacked significance for investors. So read, we see no error in his Honour's approach.

481 The appellants submitted that, in holding that the failure to carry out a separate risk assessment for IDMs had no direct consequences, the primary judge overlooked that the Bank's own Root Cause Analysis of the late TTR issue identified one of the root causes as "[r]eliance on the ML/TF risk assessments conducted on ATMs for the IDM channel, despite IDMs having different ML/TF risks" (AB tab C2.074). However, we are not satisfied that the primary judge erred in his factual finding that the failure to carry out the risk assessment had no direct consequences. This was a factual matter and the primary judge was immersed in the relevant evidence. It was open to the primary judge to find that the late TTR issue was caused by a coding error, and the failure to carry out the risk assessment was not causative, notwithstanding the statements in the Bank's Root Cause Analysis.

482 To the extent that the appellants submit that the primary judge should have considered the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information in the context of the September 2015 Late TTR Information, we do not accept that submission. Given the primary judge's finding (which we accept) that the failure to carry out the risk assessment did not cause the late TTR issue, it was not necessary to consider the IDM ML/TF Risk Assessment Non-Compliance Information in the context of the September 2015 Late TTR Information.

483 Insofar as the primary judge considered this information to be (as at 24 April 2017) "purely historical", this aspect of the reasoning is not directly challenged by Ground 11 or 17. In any event, we see no error in his Honour's approach. Unlike the two forms of pleaded information considered above, the chronology of events does not suggest that (to the knowledge of the Bank) AUSTRAC had any active interest in this failure.

484 For these reasons, Ground 11 (as picked up by Ground 17) is not made out.

10.6 Grounds 12 and 17 (Potential Penalty Information)

485 Ground 12 challenges the primary judge's finding that the Potential Penalty Information was not material, with a focus on the primary judge's treatment of contextual information. As with the previous grounds, Ground 12 deals with this issue as at 8 September 2015 (or shortly thereafter), a date we have rejected for this purpose, but Ground 12 is picked up by Ground 17 as at 24 April 2017, which we consider to be the relevant date. Ground 17 does not appear to raise additional points relating to this form of the pleaded information.

486 The definition of the Potential Penalty Information has been set out above, but for ease of reference we set out the relevant part again:

> From … 24 April 2017 or shortly thereafter, CBA was potentially exposed to enforcement action by AUSTRAC in respect of allegations of serious and systemic non-compliance with the AML/CTF Act, which might result in CBA being ordered to pay a substantial civil penalty (**Potential Penalty Information**).

487 The primary judge's core reasoning in relation to the materiality of the Potential Penalty Information is at [979]-[984] of the Reasons. As set out above, his Honour considered the information, as pleaded, to be vague and imprecise, and that "the high level, contingent, and inconclusive language used to express the Potential Penalty Information would more likely confuse, rather than inform, investors": Reasons, [979]. His Honour noted that the information, as pleaded, referred to "serious and systemic non-compliance with the AML/CTF Act". This needed to be understood in the context of the other forms of pleaded information, namely the Late TTR Information, the Account Monitoring Failure Information and the IDM ML/TF Risk Assessment Non-Compliance Information. His Honour then noted that the applicants had not pleaded that the IDM ML/TF Risk Assessment Non-Compliance Information was an example of "systemic" non-compliance, and in any event his Honour did not consider that to be an appropriate characterisation: Reasons, [981].

488 Further, the primary judge considered that to say that, by reason of either of the late TTR issue or the account monitoring failure issue, the Bank was potentially exposed to enforcement action that might result in it being ordered to pay a pecuniary penalty, added little meaningful information for investors: Reasons, [983]. This was particularly so when account was taken of "the fact that, even if AUSTRAC did decide to take enforcement action against the Bank, it had a number of other options available to it, not just the commencement of proceedings for civil penalties": Reasons, [983].

489 By Ground 12 the appellants challenge two of the primary judge's bases for concluding that the Potential Penalty Information was not material.

490 The first basis is the primary judge's finding that the fact that the Bank was potentially exposed to enforcement action that might result in it being ordered to pay a pecuniary penalty added "little meaningful information" beyond each of the other forms of pleaded information. Insofar as the primary judge held that the Potential Penalty Information added "little meaningful information" to the Late TTR Information and the Account Monitoring Failure Information, we see no error in his Honour's approach. The Potential Penalty Information was the obvious inference that persons who commonly invest in securities were likely to have drawn from the Late TTR Information and the Account Monitoring Failure Information. The primary judge was correct to conclude that it added little meaningful information.

491 The second basis is the primary judge's finding that even if enforcement action were taken against the Bank, AUSTRAC had a number of other options available to it, not just the commencement of proceedings for civil penalties. Insofar as the primary judge relied on that finding, we do not see any error in the primary judge's reasoning. This was factually correct. It was a particular reason why the pleaded information added little meaningful information to the Late TTR Information and the Account Monitoring Failure Information.

492 For these reasons, Ground 12 (as picked up by Ground 17) is not made out.

10.7 Grounds 6 to 8

493 Grounds 6 to 8 contend that the primary judge made a number of general errors in his consideration of the materiality of the pleaded information.

494 By Ground 6, the appellants contend that the primary judge "imposed tests" that information could not be material within the meaning of ss 674 and 677 of the *Corporations Act*, unless it could be shown that:

(a) persons would infer that the Bank had been substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act in the sense that it had engaged in widespread non-compliance by reason of various deficiencies throughout its ML/TF processes (Reasons, [957], [962]); or

(b) the information would affect the financial performance of a company or be financially significant (Reasons, [664]); or

(c) the information included concrete information on its significance and potential consequences for the Bank (Reasons, [955]).

495 We make the following points in relation to these grounds.

496 First, insofar as the primary judge referred to whether persons would infer that the Bank had been "substantially and systematically deficient in its compliance with the requirements of the AML/CTF Act" (eg, at [957] and [962]), his Honour was not substituting this as the test that had to be satisfied for materiality to be established; he was, rather, responding to Professor da Silva Rosa's evidence, which was couched in these terms. Ground 6(a) is therefore not made out.

497 Secondly, insofar as the primary judge referred to whether the information would affect the financial performance of a company or be financially significant (at [664]), his Honour said the test of materiality "focuses" on these matters, and accepted a submission by the Bank that while the seriousness of a contravention of the AML/CTF Act would "quite rightly be the focus of any regulatory inquiry", it does not automatically follow that the contravention is "financially significant". This paragraph of the primary judge's reasons formed part of his Honour's analysis of the legal principles (commencing at [652]).

498 Contrary to the primary judge's finding, information can be material even if it does not, of itself, reveal events or circumstances that will affect the financial performance *of* a company. Sections 674 and 677 refer to the "price or value" of securities, which may be affected by matters that do not find reflection in the financial performance *of* the company. See also the discussion in *ANZ v ASIC* at [215]-[216] per Button J (Markovic agreeing at [2(3)]).

499 The observations made by the primary judge at [664] reflect a narrower view of materiality. In the course of his analysis, the primary judge referred at numerous points to the late TTRs being significant from a regulatory perspective, but lacking financial consequences: eg Reasons, [965], [969], [972], [997], [998]. Although the language in which the primary judge drew that

contrast varied, and some such references tracked closer to the statutory language referring to the value of securities, the view of materiality outlined in [664] does appear to have informed his Honour's subsequent analysis. Accordingly, Ground 6(b) is made out.

500 Thirdly, insofar as the primary judge referred to investors wanting "concrete information on [the information's] significance and potential consequences for the Bank" (at [955]), as discussed above we would not treat his Honour as imposing a test that had to be satisfied. Rather, we would read that paragraph as saying, in substance, that the pleaded information there being discussed (the IDM ML/TF Risk Assessment Non-Compliance Information) lacked significance for investors. So read, we see no error in his Honour's approach in that paragraph.

501 However, in the appellants' written submissions in relation to Ground 6(c) they refer to other paragraphs of the Reasons, namely [964], [971], [994] and [1025]. It is sufficient to focus on [994]. In that paragraph, in the context of discussing expert evidence given by Mr Ali, Mr Singer and Dr Unni (to the effect that the pleaded information would not, or would not be likely to, have the requisite influence in the absence of AUSTRAC *commencing proceedings* against the Bank for pecuniary penalties), the primary judge stated:

> I do not think that investor knowledge that proceedings *had* been commenced is necessarily critical. **I am satisfied, however, that, as a minimum, an expression of AUSTRAC's resolve to take enforcement action against the Bank in the form of proceedings for a pecuniary penalty would be indispensable to a finding of materiality in the relevant sense.**
>
> (Emphasis added.)

502 We have difficulty with that statement. In our opinion, in the circumstances of this case, it erects too high a bar to establish materiality of the September 2015 Late TTR Information or the September 2015 Account Monitoring Failure Information. In some cases, of which the present is one, it is necessary to consider both the probability of an event occurring and the magnitude of the consequences should the event occur. This point was made by the Full Court *Grant-Taylor* in the following passage (at [96]):

> What is meant by "material effect" in s 674(2)(c)(ii)? As stated earlier, s 677 illuminates this concept and also identifies the genus of the class of "persons who commonly invest in securities". It refers to the concept of whether "the information would, or would be likely to, influence [such] persons … in deciding whether to acquire or dispose of" the relevant shares. The concept of "materiality" in terms of its capacity to influence a person whether to acquire or dispose of shares must refer to information which is non-trivial at least. It is insufficient that the information "may" or "might" influence a decision: it is "would" or "would be likely" that is required to be shown: *TSC Industries Inc v Northway Inc* 426 US 438 (1976). **Materiality may also then depend upon a balancing of both the indicated probability that the event**

> **will occur and the anticipated magnitude of the event on the company's affairs** (*Basic Inc v Levinson* 485 US 224 (1988) at 238 and 239; see also *TSC v Northway*). Finally, the accounting treatment of "materiality" may not be irrelevant if the information is of a financial nature that ought to be disclosed in the company's accounts. But accounting materiality does have a different, albeit not completely unrelated, focus.
>
> (Emphasis added.)

503 Having regard to that reasoning, we consider that it was open to conclude that the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information were material even if there was uncertainty as to whether AUSTRAC would take enforcement action by way of pecuniary penalty proceedings. It was necessary to balance the probability of the event occurring and the magnitude of the event for the company's affairs. The primary judge erred by insisting that the pleaded information could be material only if AUSTRAC had resolved to take enforcement action by way of pecuniary penalty proceedings. To that extent, Ground 6(c) is made out.

504 By Ground 7, the appellants contend that the primary judge erred in law in finding that, under s 677 of the *Corporations Act*, the Court should consider only the influence or effect of information on ordinary and reasonable members of the class of persons who commonly invest in securities, being a hypothetical class (Reasons, [657]); and failing to find that under s 677 the Court may find that a reasonable person is taken to expect information to have a material effect on the price or value of securities, if it is satisfied the information would, or would be likely to, influence some or a substantial number of persons among the cross-section of non-irrational investors who comprise "persons who commonly invest in securities".

505 Having considered the paragraphs of the Reasons relied on in this ground, and the other paragraphs referred to in the appellants' written submissions on this Ground (namely, [997]-[999], [1000] and [1007]), we are not persuaded that his Honour erred. At [655] of the Reasons, the primary judge quoted the key relevant passage from the judgment of the Full Court in *Grant-Taylor* (namely [115]-[116] from that judgment). No error is shown in his Honour's statement of the applicable principles at [657]. Further, we are not persuaded that, in his application of those principles, his Honour erred. We do not consider that he adopted the construct of a hypothetical reasonable member of the class of persons who commonly invest in securities. In the paragraphs that are criticised by the appellants, his Honour's language reflects the evidence that he was considering, rather than the adoption of an incorrect approach. Ground 7 is therefore not made out.

506 Ground 8 relates to the primary judge's treatment of contextual information. We have considered the primary judge's approach to contextual information in relation to the four forms of pleaded information in the course of considering Grounds 9, 10, 11, 12 and 17. In light of that discussion, it is unnecessary to consider Ground 8.

10.8 Grounds 13 to 15

507 By Ground 13, the appellants contend the primary judge erred in conducting an incomplete and erroneous ex post facto inquiry as part of his approach to assessing the materiality of the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information (and not conducting such an inquiry at all in respect of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information). In light of our conclusions, above, that Grounds 9 and 10 are made out, it is unnecessary to consider this ground insofar as it relates to the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information.

508 By Ground 14, the appellants contend that the primary judge erred in his approach to the expert evidence on materiality as follows:

(a) when conducting the erroneous exercise of postulating a hypothetical reasonable member of the class of persons who commonly invest in securities (Ground 7 above), proceeding on the basis that it was necessary for him to accept or reject one or other of the views or various experts, without ever finding that the views of the applicants' experts (Professor da Silva Rosa and Mr Johnston) were irrational (Reasons, [656]-[657]), such that the primary judge should have found that they represented the likely views of a substantial number of persons among the cross-section of non-irrational investors who comprise persons who commonly invest in securities, for the purposes of satisfying the s 674/677 materiality inquiries;

(b) so far as the Bank's experts expressed views in their reports that the information was not material, the primary judge failed to take into account and accept the substantial qualifications to that evidence in cross-examination; for example, the evidence of Mr Ali (Reasons, [771]-[773]) and Mr Singer ([793]-[794], [805]-[811]) as to how an investor would react if informed of the fact of non-compliance absent any disclosure as to the fact of prosecution for non-compliance;

(c) so far as the Bank's experts maintained their views that the information was not material, the primary judge erred in failing to find that such evidence was premised on

a concept of materiality, and an approach to materiality, that was erroneous in law for the reasons given in Grounds 6(b)-(c), 7 and 8, or was premised on other erroneous distinctions such as that referred to in paragraphs (b) above (Reasons, [756]-[768], [777]-[792] and [813]-[825]).

509 To the extent that this ground is bound up with Ground 7, we have rejected that ground above. While we have held that the primary judge erred in his approach to the materiality of the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information, we are not satisfied that the primary judge erred in his consideration of the expert evidence on materiality in the ways identified in Ground 14 or as elaborated in the appellants' written and oral submissions. His Honour discussed the expert evidence in detail and made findings as to that evidence. We do not accept the proposition that his Honour was obliged to find that the views of the applicants' experts were irrational before he could reject that evidence. We are not satisfied that his Honour failed to take into account the qualifications expressed by the Bank's experts during cross-examination. Given the detailed discussion of the evidence, we are satisfied that the primary judge had regard to such qualifications, even if not expressly mentioned in the Reasons. Further, we do not accept that the primary judge was obliged to determine whether the experts' opinions were based on an incorrect understanding of the legal test. Ultimately, the materiality question was one for the primary judge to determine himself, and while the expert evidence may have been of some assistance, his Honour was not obliged to accept the evidence of one expert or another. For these reasons, Ground 14 is not made out.

510 By Ground 15, the appellants contend that the primary judge erred in his approach to the lay evidence on materiality that consisted in the Bank's witnesses (Mr Narev and Mr Cohen) and the Bank's documents. They contend that:

(a) the primary judge ought to have accorded primary weight to the contemporaneous reaction of Mr Narev and senior bank officers to the discovery in September 2015 of the late TTR issue as something to be taken "extremely seriously", and as one which "can result in reputational damage and regulatory enforcement including fines and remedial action", (Reasons, [255]-[260]);

(b) the primary judge ought to have accorded significant weight to Mr Narev's belief that investors would be influenced by the TTR issue;

(c) the primary judge ought to have accorded significant weight to AUSTRAC's 12 October 2015 response to the Bank's communications of 8 and 24 September 2015 indicating that AUSTRAC held "serious concerns" about the scale of the Bank's non-compliance with s 43 of the AML/CTF Act (Reasons, [266]);

(d) insofar as Mr Narev deposed that it was not until October/November 2016 that he first thought that the known risk of AUSTRAC taking regulatory action had become a "serious" one that could involve the imposition of a significant fine (Reasons, [260], [282]), [1029]), that even then he considered it "unlikely" that AUSTRAC would commence a civil penalty proceeding (Reasons, [282]), and that it was only in March 2017 that he considered that AUSTRAC was seriously considering all options including civil penalty proceedings (Reasons, [314]-[322]), the primary judge erred in failing to find that, even if Mr Narev held such views, which was hardly credible, the more important point for materiality was that investors were being deprived of information critical to their assessment of the price and value of CBA securities.

511 We are not persuaded that the primary judge erred in the ways contended. The primary judge dealt with the lay and documentary evidence in considerable detail. This ground largely takes issue with the weight that his Honour accorded to particular pieces of evidence. We are not satisfied that any of these points rises to the level of an appealable error. Further, we are not satisfied that his Honour should have rejected Mr Narev's evidence or that his Honour failed to have regard to the "more important point" for materiality. In any event, as Mr Narev's evidence was that, at least by the time of the Bank's meeting with AUSTRAC on 21 March 2017, he was aware AUSTRAC was seriously considering all options, including civil penalty proceedings (Reasons, [320]). As we are addressing the materiality of the pleaded information in April 2017, it is not material whether Mr Narev's evidence regarding his state of mind earlier in 2016 is accepted or rejected. For these reasons, Ground 15 is not made out.

10.9 Ground 16

512 As noted above, Ground 16 seeks to rely on the appellants' contentions regarding awareness that we have rejected above; it also seeks to rely on a continuum between 8 September 2015 and 24 April 2017. In light of our earlier reasons, Ground 16 is not made out.

10.10 Reconsideration of materiality

513 In light of our conclusions in relation to Grounds 9, 10 and 17, it is necessary for us to reconsider the issue of the materiality of the September 2015 Late TTR Information and the

September 2015 Account Monitoring Failure Information. At the hearing of the appeal, both parties submitted that, should we form the view that the primary judge erred in his assessment of materiality of any of the forms of pleaded information, this Court should redetermine the matter (rather than remitting it to a single judge). The relevant date for the purposes of reconsidering materiality is 24 April 2017, for the reasons given above.

514 It is unnecessary to reconsider the issue of the materiality of the two other forms of pleaded information (the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information and the Potential Penalty Information), as the grounds relating to those forms of information have not been made out. Although Grounds 6(b) and 6(c) have been made out, we do not consider the success of those grounds to affect the primary judge's conclusions in relation to those two forms of pleaded information. In any event, for the reasons we have given above in the course of dealing with Ground 11 and 12, we are satisfied that the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information and the Potential Penalty Information were not material in the relevant sense.

10.10.1 September 2015 Late TTR Information

515 The issue to be determined is whether, as at 24 April 2017, the September 2015 Late TTR Information was material in the sense described in ss 674 and 677. In particular, the question is whether the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. For the reasons that follow, we are satisfied that the information was material.

516 The September 2015 Late TTR Information conveyed that, during a 2 and 1/2 year period, the Bank had failed to give TTRs to AUSTRAC as required by the AML/CTF Act on over 53,000 occasions, relating to threshold transactions with a total value of over $620 million. Each of those failures constituted a contravention of the Act. The relevant provisions were strict liability provisions and there was no apparent defence. This represented a serious failure by the Bank to comply with its legal obligations under legislation that was (and is) central to the conduct of banking operations, which failure went undetected over a lengthy period of time. The maximum penalty for each contravention was $18 million. The potential penalty (if civil penalty proceedings were brought by AUSTRAC against the Bank) was therefore very large.

517 The failure affected a high proportion of the threshold transactions that occurred through the Bank's IDMs, albeit only a small percentage of the total TTRs lodged by the Bank and a lower percentage of the total transactions monitored. A reasonable investor would infer that the

failure deprived Australian law enforcement, including AUSTRAC, of significant amounts of intelligence, and that AUSTRAC was likely to take this seriously.

518 If AUSTRAC commenced a civil penalty proceeding against the Bank, the financial consequences (in terms of any penalty imposed) and the reputational consequences could be significant. Although AUSTRAC had a history of adopting enforcement mechanisms other than civil penalty proceedings, it had commenced a civil penalty proceeding against Tabcorp and (as at April 2017) that proceeding had recently been resolved by the imposition of an agreed penalty of $45 million, indicating that AUSTRAC was prepared to commence civil penalty proceedings and that the penalties could be substantial. Further, the interactions between AUSTRAC and the Bank indicated that AUSTRAC viewed the matter as serious and its investigation was ongoing. While there was uncertainty as to whether AUSTRAC would commence a civil penalty proceeding, the seriousness and number of the contraventions meant that any financial penalty could be expected to be substantial.

519 It is noteworthy that, within a short time of the discovery of the late TTR issue (in September 2015), the problem was elevated to the CEO of the Bank, Mr Narev. The late TTR issue was subsequently dealt with by both the CEO and the Chair of the Board. As a matter of common sense, the fact that the CEO and Chair of a company the size of the Bank directed their personal attention to the late TTR issue suggested that the Bank considered that issue to be important. These matters reinforce the seriousness and significance of the issue.

520 Our opinion that the September 2015 Late TTR Information was material in the relevant sense does not involve any acceptance of the proposition that the pleaded information was "economically equivalent" to AUSTRAC's announcement of 3 August 2017. It follows that we do not consider it necessary to consider Mr Ali's beta analysis, which was directed to showing that, even when informed of all the matters in the 3 August 2017 announcement, investors did not upwardly revise their estimates of the Bank's operational risk with economically significant adverse consequences (see the Reasons, [966]). We accept that, as the primary judge found, there were difficulties with aspects of the expert evidence led by the applicants. However, notwithstanding those difficulties, we are satisfied that the information was material.

521 We have had regard to the fact that the cause of the late TTR issue was a single coding error. However, it is also the case that the Bank's systems did not pick up the issue for a long period of time.

522 The brokers' reports published after AUSTRAC's 3 August 2017 announcement provide a form of ex post confirmation of the materiality of the September 2015 Late TTR Information (even if one takes into account that there are differences between AUSTRAC's announcement and the pleaded information). For example, a report by Shaw and Partners dated 4 August 2017 (AB tab C2.157) included:

- **Media reporting 53,506 breaches each with maximum fine $18m** - $960bn. Apparently the Federal Court fined Tabcorp $45m or $416,666 per contravention, this would mean $22bn for CBA on that basis. Also press articles saying fine could be several hundred million.
- **CBA has 1.73bn shares** – so every $100m fine is worth 4 cents to stock price, i.e. a $500m fine is worth 20 cents to share price. So unlikely to be material.
- **CBA saying will defend case** – will take years to work out. Biggest fine globally for anti-money laundering $A11.9bn.
- **Reputational issue** – could impact brand and lead to management changes.

523 By way of further example, the report of UBS dated 4 August 2017 (AB tab C2.158) included:

> **Commonwealth Bank of Australia**
> **53,700 AML breaches. 4 critical questions**
>
> **CBA alleged to have breached AML requirements by AUSTRAC**
> AUSTRAC has initiated court proceedings against CBA alleging it failed to act on suspected Money Laundering activities via its intelligent Deposit Machines (smart ATMs). It is alleged CBA breached AML requirements on 53,700 occasions since 2012 by not reporting cash deposits above the $10,000 threshold. It is also alleged 1,640 of these breaches were connected to money laundering syndicates.
>
> **Four key questions that need to be considered**
> While CBA could potentially face substantial fines if it is found to have breached the AML requirements, we believe that these allegations highlight four critical questions: (1) Given CBA has seen a number of operating risk failures in recent times (life insurance, financial planning, AML) will this lead to lasting damage to CBA's reputation and what will be the implications of this? (2) Will CBA need to materially increase Operating RWA given such oversights (currently $33.8bn)? (3) Is this adding further fuel to the fire for a Royal Commission into the Banks? (4) Is the root of the problem the outdated high denomination cash notes? Should Australia move to phase out cash given its role in the black economy (including: proceeds of crime, money laundering, tax avoidance, welfare fraud)?
>
> …
>
> **Q: What will be the implications of the AML allegations against CBA?**
> It is difficult to estimate the impact of the AML allegations. If CBA faces a fine from alleged AML breaches then recent share price movements are likely to reflect this charge. However, if CBA sees lasting reputational damage and potentially higher operating risk weights or Prudential Capital Requirement then the impact on its valuation could potentially be much more significant.

524 See also the report of Morgan Stanley dated 4 August 2017 (AB tab C2.156). It may be inferred that, had the Bank disclosed the September 2015 Late TTR Information in April 2017, this type of analysis would have been undertaken. This tends to confirm the proposition that the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares.

525 Having regard to these matters, we are satisfied that the September 2015 Late TTR Information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares.

526 There is no issue that the September 2015 Late TTR Information was not generally available as at 24 April 2017. It follows that the Bank contravened Listing Rule 3.1 and s 674 of the *Corporations Act* by failing to disclose, on or about 24 April 2017, the September 2015 Late TTR Information.

10.10.2 September 2015 Account Monitoring Failure Information

527 We turn now to the September 2015 Account Monitoring Failure Information. The issue is whether, as at 24 April 2017, the information was material in the sense described in ss 674 and 677. In particular, the question is whether the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. Although the position is not as clear as with the September 2015 Late TTR Information, on balance we are satisfied that the September 2015 Account Monitoring Failure Information was material.

528 The September 2015 Account Monitoring Failure Information conveyed that, during a period of about three years, the Bank had failed to conduct account level monitoring with respect to over 770,000 accounts. This constitutes a contravention of the Bank's obligations under the AML/CTF Act. In assessing the materiality of this information, we take into account that the error did not mean that there was a complete absence of monitoring in respect of these accounts, 25% of these accounts were inactive, and the monitoring of the accounts was affected for varying periods of time (including relatively short periods of time). Nevertheless, it remains the case that the Bank's failure related to a large number of accounts over a long period. It is common ground that, by reason of this failure, the Bank contravened the AML/CTF Act. (In the judgment in the civil penalty proceeding against the Bank – *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited* [2018] FCA 930 – it was stated at [20] that the number of unmonitored transactions

could not be known; and that the precise number of contraventions could not be ascertained, but was, potentially, a very significant number.) As with the previously considered information, this represented a serious failure by the Bank to comply with its legal obligations under legislation that was (and is) central to the conduct of banking operations. This was the case even though the failure was in a sense a single failure and the affected accounts were employee accounts.

529 As with the previously considered information, if AUSTRAC commenced a civil penalty proceeding against the Bank, the financial consequences (in terms of any penalty imposed) and the reputational consequences could be significant. The points made above in relation to the potential for AUSTRAC to commence civil penalty proceedings, and for a substantial penalty to be imposed, apply also to this form of pleaded information. Further, as with the late TTR issue, the interactions between AUSTRAC and the Bank in relation to the account monitoring failure issue indicated that AUSTRAC's viewed the matter as serious and its investigation was ongoing.

530 When the September 2015 Account Monitoring Failure Information is considered in the context of the September 2015 Late TTR Information (as the appellants submit, and we accept, it should be) this supports the proposition that the September 2015 Account Monitoring Failure Information was material. That is because it indicates that the error was not just a single failure, but potentially part of a broader compliance problem.

531 Our opinion that the September 2015 Account Monitoring Failure Information was material in the relevant sense does not involve any acceptance of the proposition that the pleaded information was "economically equivalent" to AUSTRAC's announcement of 3 August 2017.

532 Having regard to these matters, we are satisfied that the September 2015 Account Monitoring Failure Information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares.

533 There is no issue that the September 2015 Account Monitoring Failure Information was not generally available as at 24 April 2017. It follows that the Bank contravened Listing Rule 3.1 and s 674 of the *Corporations Act* by failing to disclose, on or about 24 April 2017, the September 2015 Account Monitoring Failure Information.

11 CAUSATION AND LOSS ISSUE

11.1 The grounds of appeal

534 Issues of causation are raised by Grounds 18 and 19, and issues of quantification of loss are raised by Ground 22. (There are no Grounds 20 and 21.)

535 By Ground 18, the appellants contend that the primary judge erred in his assessment of causation by proceeding on the basis of his erroneous findings as to materiality (relying on Grounds 6 to 17), and failing to find that from 8 September 2015 or shortly thereafter, the Bank's non-disclosure of each or any, or all combinations of the pleaded information (that is, the pleaded information relied on for the appeal) caused the share price of the Bank to be inflated (Reasons, [1227]).

536 By Ground 19, the appellants contend that the primary judge erred in his approach to the applicants' market-based causation case. The appellants refer to three matters. The third of these was that the primary judge misconstrued and misapplied Professor Easton's event study.

537 By Ground 22, the appellants contend that the primary judge erred in:

(a) failing to value the quantum of inflation in the CBA share price from 8 September 2015 to 2 August 2017 by reference to the evidence tendered by the applicants, and rejecting the evidence of Professor Easton as either a basis for undertaking that valuation exercise, or the first step in that valuation exercise against which other discounting adjustments could be applied so as to avoid over-compensation (Reasons, [1248]-[1251], [1256]);

(b) finding that there was no evidence of the valuation of loss that the applicants claimed (Reasons, [1254]-[1258]), when there was such evidence;

(c) failing to have regard to, and to apply, the facilitation principle (*Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17; 418 ALR 304 (***Cessnock***)) in the assessment of loss, and failing to take into account (at [1258]) that it was the Bank's contravening conduct in not disclosing information to the ASX at a time when it was obliged to do so, but instead allowing the market to trade on an uninformed basis for the period between 8 September 2015 and 3 August 2017 by delaying the disclosure of that information until it was disclosed in combination with other information as to the fact of commencement of proceedings by AUSTRAC that has made it difficult for the applicants to quantify loss;

(d) failing to find that, in the circumstances, the inflation quantified by Professor Easton by reference to the statistically significant abnormal return on 3 August 2017, alternatively the inflation quantified by Professor Easton reduced by an appropriate amount such as 20% (by reference to the Lieser paper), was the best and an appropriate measure of the per share damage suffered by the Baron applicants.

11.2 The appellants' case on causation and loss, and the primary judge's reasons for rejecting it

538 The primary judge gave reasons on causation and loss although those issues did not arise for determination, given his Honour's anterior findings on contravention.

539 By the time of the appeal, it was not in dispute that causation and loss could, as a matter of theory, be established by reliance on an event study (cf any argument that an event study was not a suitable technique to deploy). It was common ground below that the abnormal return over a two day "event window", starting when AUSTRAC published its 3 August 2017 release, was $3.29. The availability of market based causation as a means for the quantification of group members' loss was not an issue on the appeal.

540 The primary judge rejected the appellants' case on causation and loss. At trial, the appellants advanced four causation pathways. Only what was referred to as "pathway 1A" was relevant to the issues on the appeal. Pathway 1A posited that the Bank's contraventions of s 674 of the *Corporations Act* caused group members to acquire shares at an inflated price on the market. At trial, that causation pathway was said by the appellants to be satisfied one of three ways:

(a) Shares in the Bank traded on an efficient market, and the price would be expected to react quickly to new information. Because (on the hypothesis that materiality was established) the information that was not disclosed was new information that was material, it follows that some loss was caused by the Bank's failure to make the necessary disclosures. While the appellants allowed that that conclusion would be displaced were the Bank to establish that the whole of the price reaction following AUSTRAC's 3 August 2017 announcement was attributable to matters other than the pleaded information, the Bank had not established that.

(b) Professor Peter Easton's event study established causation on the basis that the event study showed an abnormal return of $3.29 over the two day event window after AUSTRAC released its 3 August 2017 statement. Given that (on the appellants' case) that disclosure revealed the three sets of pleaded information (and the Potential Penalty

Information could be inferred), at least some of the price drop must have been referable to the revelation of the pleaded information.

(c) The evidence of Mr Ali (an expert called by the Bank) to the effect that the substantial majority of the market reaction on 3 August 2017 was a consequence of AUSTRAC having commenced proceedings against the Bank. It follows, the appellants said, that *some* of the market reaction was referable to revelation of the underlying information (including the late TTRs), thereby establishing that *some* loss was caused by the failure to disclose the pleaded information.

541 On the appeal, the appellants maintained forms of the first two bases for causation (albeit with some additional points and changes of emphasis), but did not maintain that causation was established by Mr Ali's evidence as a standalone method of establishing causation. They contended that the primary judge erred in rejecting their case on causation.

542 At trial, the applicants advanced two distinct methods by which they submitted the Court should award statutory compensation:

(a) The Court should adopt the full $3.29 figure calculated by Professor Easton's event study as the artificial inflation caused by the Bank's contraventions of s 674 of the *Corporations Act*. This approach was based on there being economic equivalence between what was announced to the market via AUSTRAC's 3 August 2017 announcement (which included a link to its filed Concise Statement) and the pleaded information. To the extent that AUSTRAC's media statement and Concise Statement went beyond the pleaded information, the appellants contended that that other information could not be stripped out and, further, the difficulties in quantification were to be attributed to the Bank's own contraventions in failing to make disclosures earlier. The appellants here called in aid principles from *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664 (***Armory***) (discussed further below).

(b) If the Court were to conclude that some part of the price impact following AUSTRAC's 3 August 2017 announcement was not causally related to the pleaded information, the Court should adjust the artificial inflation and do the best it can and adopt a "robust approach" to assess compensation. The appellants suggested that the "Lieser paper" (explained below) provided a principled basis on which a reduction of 20% could be applied to the $3.29 figure.

543 These arguments were maintained on the appeal, and the appellants contended that the primary judge erred in rejecting their case on quantification of loss.

544 In addressing causation and loss, the primary judge explored an issue concerning whether or not claimants who were indifferent to whether the market price of shares accurately reflected all price-sensitive information would be entitled to compensation based on inflation in the share price. His Honour noted that the applicants had not given evidence on such matters. While this aspect of the primary judge's reasoning initially arose for consideration on the appeal, in light of the Bank's submissions stating it was only an issue in relation to Zonia's individual claim, the appellants confirmed by their reply submissions that it was not a matter that we needed to address on the appeal. Accordingly, we say no more about it.

545 The primary judge next considered Professor Easton's event study. His Honour set out the questions that Professor Easton was engaged to address, which were:

> Q1 Did the release of the 3 August Corrective Disclosure have an effect on the price of CBA Shares, and if so, what was the magnitude of that effect?
>
> Q2 Would the price at which CBA Shares traded on the ASX have been affected, and if so by what magnitude, if CBA had disclosed the information contained in the 3 August Corrective Disclosure from the beginning of, and at any time during, the Relevant Period?

546 The primary judge drew out that it was Professor Easton's view that the four elements of information – the message disclosed, the medium through which the information was disclosed, the analysis of it and the interpretation of it – are part of the "event" being analysed, which cannot, and should not, be separated. In cross-examination, Professor Easton confirmed his view that "everything that comes out on 3 August cannot be split into its constituent parts and separately analysed". The primary judge then made a series of observations, leading to his conclusion that the pleaded information, being the information the applicants contended the Bank should have disclosed, was different from the information AUSTRAC in fact disclosed on 3 August 2017.

547 The primary judge then turned to the assumptions given to Professor Easton. As our reasons go on to discuss, assumption A2 is critical to understanding Professor Easton's event study. Assumption A2 was in the following terms:

> A2 From the beginning of, and at any time during, the Relevant Period, CBA could have conveyed information materially equivalent to that contained in the 3 August Corrective Disclosure.

548 Having addressed question 1 by conducting the analysis to show the $3.29 abnormal return, the primary judge observed that Professor Easton's answer to the second question "followed ineluctably from his answer to the first question, without separate or further analysis". That was because assumption A2 required Professor Easton to assume that the disclosures that the Bank should have made were equivalent to the information in fact contained in AUSTRAC's 3 August 2017 disclosure.

549 The primary judge was critical of the applicants' contention that there was no need to differentiate between the different forms of the pleaded information and how they changed at different points in time. However, as the case on appeal was confined to disclosure on 8 September 2015 (or shortly thereafter) or 24 April 2017, it is not necessary to delve into this aspect of the primary judge's reasoning.

550 In rejecting the appellants' case on causation pathway 1A, the primary judge made a number of points:

(a) Professor Easton's answer to question 2 was wholly driven by assumption A2.

(b) Professor Easton was not asked to, and did not, address whether the traded price of Bank shares would have been affected if the Bank had disclosed any particular form of the pleaded information or some combination at the particular time which the applicants allege the Bank was required to make disclosure.

(c) The pleaded forms of information are not equivalent to the information in fact disclosed in the 3 August 2017 announcement. On this point, the primary judge found that "the information conveyed by the 3 August 2017 announcement (and hence the Alleged Corrective Disclosures) was materially, and significantly, different to the information conveyed by each of the pleaded forms, or any combination of the pleaded forms, of the Information." The primary judge did not accept Professor da Silva Rosa's opinion, or the opinion of Mr Johnston (both experts called by the appellants) that the pleaded forms of the information would have conveyed the same "value-relevant implications to investors" as the 3 August 2017 announcement. His Honour rejected the contention that the pleaded forms of information and the information in AUSTRAC's announcement were "economically equivalent".

(d) The fourth matter raised by the primary judge was his earlier determination that the categories of information pleaded were not "material" in the requisite sense. However, the primary judge then immediately went on to state, as the fifth matter, that even if he

had found that some of the information was material in the requisite sense, "it does not necessarily follow from such finding that the Bank's failure to disclose the Information (or some part of it), in the relevant period, resulted in the market price of CBA shares being artificially inflated in that period".

(e) The applicants have the onus of proving the existence of loss, and the Bank did not "bear an onus of negativing the existence of loss".

(f) The correct approach to establishing loss is to start with the information the applicants allege should have been disclosed at the time in question. However, the primary judge considered that the applicants had not presented a case that addressed that "simple, uncomplicated inquiry", but had instead invited the Court to start with Professor Easton's analysis of the "event", which was not the same as any of the pleaded forms of information.

551 Having concluded that the applicants had failed to establish their case on causation, the primary judge addressed, albeit relatively briefly, the question of quantum. The primary judge set out the applicants' first argument, and rejected it, referring to his earlier rejection of the thesis of economic equivalence that underpinned Professor Easton's event study.

552 The primary judge then referred to the applicants' second approach – namely that Professor Easton's event study should be taken as the starting point, and the Court should make adjustments to "strip out" unrelated matters – and said that this approach was not available as Professor Easton's own evidence was that his event study could not be used in that way. The primary judge then explained what he regarded as a further difficulty with the applicants' second approach, namely that there was no basis for the rational determination of what adjustment should be made. In that regard, the primary judge rejected the Lieser paper and the market reaction to disclosures by National Australia Bank (**NAB**) as bases on which to adjust from the $3.29 starting point presented by Professor Easton's event study.

553 The primary judge concluded that "the Court is left with no evidence of the valuation of the loss that the applicants claim" and explained why the quantification could not proceed by the Court being invited to assess compensation in a "robust manner", or on the basis that mere difficulty in estimating damages does not relieve a court from the responsibility of assessing damages as best it can: *Commonwealth v Amann Aviation Pty Limited* [1991] HCA 54; 174 CLR 64 (***Amann Aviation***) at 83 per Mason CJ and Dawson J and 125 per Deane J.

554 In addressing why his Honour was not prepared to adopt the same approach as his Honour had in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237 at [1057]-[1058], the primary judge explained that in that case he was satisfied that there was a way in which loss could be quantified by making reasonable estimates on the available evidence. In the case at hand, however, his Honour concluded that there was no proven loss, and there was no "rational starting point for the valuation of the inflation". The primary judge finally stated (Reasons, [1258]) that the principle in *Armory* did not assist as:

> The present case is not one involving a paucity of evidence. It is a case involving the absence of proof of these two critical matters. Contrary to the applicants' submissions, this is not a problem of the Bank's making. The present case is not one where the principle in *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664 applies. The applicants cannot lay the blame for the deficiencies in their own proof at the feet of the Bank.

11.3 Consideration

555 One aspect of Ground 18 may be disposed of quickly. By Ground 18, the appellants contend in part that the primary judge erred because he considered whether the appellants had established causation on the basis of his "erroneous findings as to materiality". The contention was that, rather than approaching causation on the assumed basis that, contrary to his Honour's conclusions, the appellants *had* established materiality, the primary judge conducted the analysis of causation on the wrong basis by including and relying on his adverse findings on materiality.

556 As set out above, while the primary judge referred, in his fourth point, to his adverse conclusion on materiality, he immediately went on to consider the position if the pleaded information had been material. A review of the balance of the primary judge's reasons (summarised above) show that his Honour's adverse conclusion on causation did not rest on the fourth stated reason referring back to his Honour's view on materiality.

557 Turning to the more substantial points raised by Grounds 18, 19 and 22, it is clear that Professor Easton's event study was the fulcrum of the appellants' case on quantification and one of the two means by which causation pathway 1A was said on appeal to be satisfied. It is convenient, then, to first address Professor Easton's event study and whether the primary judge erred in rejecting it.

558 As referred to above, Professor Easton was instructed on the basis of assumption A2. That assumption meant that Professor Easton's event study proceeded on the basis that, at any point during the relevant period "CBA could have conveyed information materially equivalent to

that contained in the 3 August Corrective Disclosure". As the primary judge detailed, that assumption drove the answer to the second question posed for Professor Easton's attention. It should be recalled that the second question was: "Would the price at which CBA Shares traded on the ASX have been affected, and if so by what magnitude, if CBA had disclosed the **information contained in the 3 August Corrective Disclosure** from the beginning of, and at any time during, the Relevant Period?" (emphasis added).

559 The appellants' primary case was that the entirety of the $3.29 abnormal return should be adopted as the inflation referable to the contraventions of the Bank's continuous disclosure obligations. That starting point rests on the appellants' contention that the information contained in the 3 August 2017 AUSTRAC announcement was "economically equivalent" to the pleaded information.

560 In the earlier section of our reasons dealing with materiality, we concluded that the primary judge erred in his conclusions as to the materiality of the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information, and that his Honour did not err in his conclusions as to the materiality of the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information and the Potential Penalty Information. However, for the purposes of this section of our reasons, dealing with causation and loss, we will assume that all four forms of pleaded information that are relied on for the appeal are material in the relevant sense. Of course, on the appeal, we are not concerned with earlier pleaded versions of the information (eg the June 2014 Late TTR Information, or the August 2015 Late TTR Information). It also follows from our conclusions on awareness, that we are concerned with the disclosure case as at 24 April 2017 (and not as at 8 September 2015 or shortly thereafter).

561 The tighter focus of the case on appeal, and the further narrowing of the focus to 24 April 2017 consequent upon our findings, means that some of the issues that the primary judge identified recede accordingly (eg as concerns variations between the pleaded information over time, and the failure of Professor Easton to address disclosure at specific earlier points in time). But the principal issue of the economic equivalence between the pleaded information in issue and the information conveyed by the 3 August 2017 AUSTRAC announcement remains.

562 The pleaded information still in issue must then be compared with the information conveyed by the 3 August 2017 AUSTRAC announcement.

563 As outlined above, the September 2015 Late TTR Information was pleaded in the following terms:

> From around November 2012 to 8 September 2015:
>
> (a) CBA had failed to give TTRs on time for approximately 53,506 cash transactions of $10,000 or more processed through IDMs following the introduction of IDMs (**September 2015 Late TTRs**);
>
> (b) the September 2015 Late TTRs represented between approximately 80% and 95% of threshold transactions that occurred through CBA's IDMs during the period from November 2012 to September 2015;
>
> (c) the September 2015 Late TTRs had a total value of approximately $624.7 million dollars;
>
> (d) the September 2015 Late TTRs had not been lodged, at least in part because of a systems error which occurred in or around November 2012

564 The September 2015 Account Monitoring Failure Information was pleaded in the following terms:

> From around 8 September 2015 or shortly thereafter, CBA was aware (within the meaning of ASX Listing Rule 19.12) that from at least 20 October 2012 to 8 September 2015, CBA failed to conduct account level monitoring with respect to 778,370 accounts (the **September 2015 Account Monitoring Failure Information**).

565 The August 2015 IDM/ML Risk Assessment Non-Compliance Information was relevantly pleaded in the following terms:

> Further or alternatively, from 11 August 2015, or shortly thereafter, CBA was aware (within the meaning of ASX Listing Rule 19.12) of the **August 2015 IDM ML/TF Risk Assessment Non-Compliance Information**; namely that CBA had failed:
>
> (a) in the period prior to the roll-out of CBA's IDMs in May 2012, and between May 2012 and July 2015, to carry out any assessment of ML/TF Risk in relation to or including the provision of designated services through CBA's IDMs, as required to comply with CBA's AML/CTF Program; …

566 The Potential Penalty Information was relevantly pleaded in the following terms:

> From around … 24 April 2017 or shortly thereafter, CBA was potentially exposed to enforcement action by AUSTRAC in respect of allegations of serious and systemic non-compliance with the AML/CTF Act, which might result in CBA being ordered to pay a substantial civil penalty (**Potential Penalty Information**).

567 The terms of the relevant pleaded information are to be contrasted with the information conveyed by the 3 August 2017 AUSTRAC announcement.

568 On the appeal, the appellants focused their submissions on identifying, in AUSTRAC's media statement (as distinct from the Concise Statement), the correspondence between the pleaded information and the information conveyed by the first four bullet points in the media statement:

- CBA did not comply with its own AML/CTF program, because it did not carry out any assessment of the money laundering and terrorism financing (ML/TF) risk of IDMs before their rollout in 2012. CBA took no steps to assess the ML/TF risk until mid-2015 - three years after they were introduced.
- For a period of three years, CBA did not comply with the requirements of its AML/CTF program relating to monitoring transactions on 778,370 accounts.
- CBA failed to give 53,506 threshold transaction reports (TTRs) to AUSTRAC on time for cash transactions of $10,000 or more through IDMs from November 2012 to September 2015.
- These late TTRs represent approximately 95 per cent of the threshold transactions that occurred through the bank's IDMs from November 2012 to September 2015 and had a total value of around $624.7 million.

569 While it may be observed that these bullet points omit a number of matters referred to in the relevant pleaded information set out above – the systems error in relation to the late TTRs, the 80% lower end of the range of TTRs stated as being late, and the Potential Penalty Information – the focus on appeal was the fact that the 3 August 2017 AUSTRAC announcement was made by the regulator announcing that legal proceedings *had* been launched and contained additional, much more damning, information.

570 AUSTRAC's media statement referred, in the fifth and sixth bullet points, to additional failings by the Bank that are not the subject of this proceeding:

- AUSTRAC alleges that the bank failed to report suspicious matters either on time or at all involving transactions totalling over $77 million.
- Even after CBA became aware of suspected money laundering or structuring on CBA accounts, it did not monitor its customers to mitigate and manage ML/TF risk, including the ongoing ML/TF risks of doing business with those customers.

571 It is the Concise Statement, however, that reveals more fully the gravity of the additional matters raised by AUSTRAC. The following matters should be noted:

(a) The Concise Statement did not just stipulate the number of late TTRs, and that those TTRs represented 95% of threshold transactions through IDMs in that period, with a total value of $624.7 million. It also drew attention to the fact that some of the transactions that should have been reported were connected with money laundering syndicates being investigated by the authorities, and that some related to customers that the Bank itself had assessed as posing a risk of terrorism or terrorism financing:

> 1,640 of the Late TTRs (totalling about $17.3 million) related to transactions connected with money laundering syndicates being investigated and prosecuted by the Australian Federal Police (**AFP**) or accounts connected with those investigations.

> A further 6 of the Late TTRs related to 5 customers who had been assessed by CommBank as posing a potential risk of terrorism or terrorism financing. ...

(b) The next section of the Concise Statement was headed "Failure to file SMRs [suspicious matter reports] and to carry out ongoing due diligence". This section detailed AUSTRAC's allegations that suspected money laundering was being conducted through the Bank's IDMs with international and domestic transfers being effected soon after deposits were made, and many of the cash deposits being "structured" (meaning that repeated cash deposits, just under the $10,000 threshold for making a TTR, were made) where structuring itself is an offence.

(c) The Concise Statement then detailed the Bank's failure to comply with its obligations to give SMRs despite having identified that the pattern of activity on these accounts was suspicious and indicative of money laundering. The reasons for this included that the Bank ignored notifications by law enforcement of unlawful activity. The Concise Statement further alleged that the Bank had not complied with its obligation to undertake "enhanced customer due diligence" (contrary to its statutory obligation) once suspected money laundering or structuring on Bank accounts had been brought to its attention. The Concise Statement also raised that, where the Bank did move to close suspicious accounts, it gave the holders of those accounts 30 days' notice and allowed transactions to continue on some accounts during the notice period.

(d) The Concise Statement then set out a series of allegations concerning four separate money laundering syndicates, and a "cuckoo smurfing" syndicate (cuckoo smurfing being a form of money laundering).

(e) The allegations concerning the money laundering syndicates were as follows:

> **Money laundering Syndicate No 1**
>
> 15. From late 2014 to August 2015, **approximately $20.59 million was deposited, mostly in structured cash deposits, through CommBank IDMs** into 30 CommBank accounts, 29 of which were in fake names. Shortly after each deposit, the money was transferred internationally. Approximately **$20.56 million was transferred offshore**. Two individuals have been convicted of dealing with proceeds of crime and structuring offences in relation to this activity.
>
> 16. By April 2015, **CommBank had identified repeated, suspicious and connected patterns** of structured cash deposits followed by international money transfers on 16 of these accounts (15 of which were in fake names). **Notwithstanding this suspicion**, between April and 1 July 2015, CommBank **permitted approximately $9.1 million to be transferred** from these accounts to Hong Kong.
>
> 17. The AFP requested CommBank prevent withdrawals and transfers on

these accounts on 1 July 2015. **By that time, CommBank had identified a particular methodology** for these accounts - they were opened by certain foreign nationals on holiday visas and deposits through IDMs were made involving blatant structuring, followed by transfers offshore almost immediately thereafter.

18. Between 1 July 2015 and 24 August 2015, the **same syndicate laundered approximately $4.78 million using 11 further accounts** opened in fake names. Those accounts used the **same methodology** previously identified by CommBank and yet were **not appropriately monitored** having regard to the ML/TF risks and were not always the subject of SMRs that complied with s 41.

19. **60 of the Late TTRs** recorded transactions of this syndicate, with a value of $629,200. On **92 occasions CommBank failed to report suspicions** relating to this syndicate, either at all or on time as required by s 41, involving transactions totalling approximately **$22.7 million**.

Money laundering Syndicate No 2

20. Between June 2014 and January 2015, 3 individuals deposited $2,272,435 in cash into 3 respective CommBank accounts (largely through IDMs). Almost immediately after each deposit, the money was transferred domestically, including to money remitters. **By July 2014, CommBank was aware of unusual patterns of transactions** on 1 of these accounts and had identified a number of deposits which were structured. By October 2014, **CommBank was aware of suspicious transactions** on the second of these accounts, and by November 2014, CommBank was aware of suspicious transactions on the third account. **However, CommBank continued to allow these individuals to transact on these accounts until they were each arrested on 19 January 2015**. These 3 individuals have been charged with dealing in proceeds of crime, in connection with a drug importation syndicate, with 1 of these individuals already having been convicted.

21. Between March 2014 and November 2015, a **further $4.053 million was deposited, in cash,** into 9 other CommBank accounts, followed by domestic transfers to accounts which had previously received funds from the three individuals. **Even after CommBank identified structuring on the deposits, and identified some of these accounts as belonging to suspicious money remitters or being part of a sophisticated money laundering syndicate, CommBank allowed transactions to continue.**

22. **178 of the Late TTRs** recorded transactions involving this syndicate or related third party accounts, with **a value of $1,780,030.** On 18 occasions CommBank failed to report suspicions relating to this syndicate or related third party accounts, either at all or on time as required by s 41, involving transactions totalling approximately **$5.73 million.**

Money laundering Syndicate No 3

23. From November 2014 to August 2015, **cash deposits totalling $27.2 million** were made to one CommBank account. Almost immediately after each deposit, the money was transferred

internationally. $26.47 million was transferred to offshore accounts. **The deposits were the proceeds of a drug manufacture and importation syndicate.** Three individuals have been charged with dealing in proceeds of crime, with 1 of these Individuals already having been convicted.

24. **Despite cash deposits under $10,000 being made into this account, no transaction monitoring alerts for structuring were ever raised**. Very large **cash deposits, up to $532,500**, were also regularly being made at branches. Some alerts were raised for these large deposits, but were not reviewed in a timely manner, having regard to the ML/TF risks. By no later than 28 April 2015, **CommBank considered the account to be high risk and suspicious**. By this time, **$14.7 million had already been sent offshore. However, CommBank did not monitor this customer** having regard to the ML/TF risks and **permitted the highly suspicious activity to continue**, with $12.2 million in cash deposits received and $11.8 million remitted overseas after 28 April 2015. **Although the pattern of structured deposits, large cash deposits and international transfers occurred almost daily, an SMR was only lodged around every 3 months or so for this account.**

25. **514 of the Late TTRs** recorded transactions into this CommBank account or into the account of related persons, with a value **of $5,435,860**. On 3 occasions **CommBank failed to report suspicions** relating to this syndicate, either at all or on time as required by s 41, Involving transactions totalling approximately **$10.1 million**.

Money laundering Syndicate No 4

26. Between February 2015 and May 2016, **over $21 million** was deposited in cash into 11 CommBank accounts. These deposits were the illicit proceeds of a **drug importation and distribution syndicate**. More than half of the deposits occurred through IDMs. Shortly after each deposit, the money was transferred to other domestic accounts. Transfers were made across a number of these accounts to the same recipients, some of which were known as early as May 2015 to CommBank to be suspicious entities, including accounts connected to Syndicate No 2.

27. **A number of transactions on these accounts were not the subject of any transaction monitoring alerts**, in spite of large and structured cash deposits being made. However, by mid-2015, **CommBank was aware of unusual patterns of transactions and suspected structuring** of cash deposits on 4 of the accounts. CommBank became aware of unusual and suspicious transactions on the remaining accounts later in 2015. **CommBank also identified a connection between suspicious activity on a number of these accounts. Despite these matters, CommBank did not monitor these customers** having regard to the ML/TF risks, and **permitted transactions to continue** on these accounts.

28. The **AFP advised CommBank** in late 2015 that a number of these accounts were connected with an investigation into serious criminal offences including ‘drug importation and unlawful processing of money’. **CommBank permitted several of the accounts to remain**

open even after this time and further transactions occurred. Eight individuals have been charged with dealing in proceeds of crime, with 6 of these individuals already having been convicted.

29. **888 of the Late TTRs** record transactions on these accounts and a related party's account, with a **value of $9,462,095**. On 27 occasions CommBank **failed to report suspicions** relating to this syndicate, either at all or on time as required by s 41, involving transactions totalling **approximately $34.3 million**.

(Emphasis added.)

(f) As may be seen, the allegations raised by AUSTRAC concerning these money laundering syndicates included allegations that substantial sums were involved, and the transactions included many that were the subject of the late TTRs. Perhaps most damningly, AUSTRAC alleged that the Bank failed to act on its own knowledge or suspicions, and information provided to it by the Australian Federal Police in respect of the activities of these syndicates. The allegations also included the failure to lodge SMRs in respect of transactions totalling many millions of dollars.

(g) The allegations in relation to the cuckoo smurfing syndicate were in a similar vein:

Cuckoo smurfing syndicate - Strike Force A

30. CommBank accounts were used for "cuckoo smurfing", a form of money laundering which involves transfers of money between associates within separate countries in such a way that obviates the need for money to cross international borders.

31. In May 2015, 2 individuals were arrested and charged with money laundering and structuring offences, which were allegedly committed by structured cash deposits made into a number of CommBank accounts, as part of a "cuckoo smurfing" syndicate. NSW Police alleged that some $1.784 million was laundered through 99 CommBank accounts between 7 October 2014 and 21 May 2015 (Strike Force Al). NSW Police first advised CommBank that it was investigating money laundering and structuring on these accounts on 26 May 2015.

32. Between 24 October 2011 and 18 June 2016, 902 **cash deposits** under $10,000, totalling **$7.2 million**, were deposited into 12 CommBank accounts —10 of these accounts being Strike Force Al accounts and a further two accounts related to Strike Force Al accounts. **On 20 occasions, CommBank failed to report $2,311,902 in cash deposits to 11 of these 12 accounts that it suspected were structured**, contrary to s 41. **CommBank failed to monitor** these customers with a view to identifying, mitigating and managing ML/TF risk.

33. In January 2015, another individual was arrested and charged with money laundering and structuring offences, which were allegedly committed by structured cash deposits made into a number of CommBank accounts, as part of a cuckoo smurfing syndicate. NSW Police alleged that some $273,432 was laundered through 39

CommBank accounts between 10 October 2014 and 19 January 2015 (Strike Force A2). NSW Police advised CommBank that it was investigating money laundering and structuring on these accounts on 20 March 2015.

34. Between 31 January 2012 and 18 April 2016, 276 **cash deposits** under $10,000 **totalling $1.7 million**, were deposited into 6 of the Strike Force A2 accounts. On 20 March 2015 NSW Police advised CommBank that it believed these 6 accounts had been specifically generated for the purposes of money laundering. On 11 occasions, **CommBank failed to report $1,250,534 in cash deposits to 5 of these accounts that it suspected were structured**, contrary to s 41. CommBank **failed to monitor these customers** with a view to identifying, mitigating and managing ML/TF risk.

(Emphasis added.)

(h) The final set of allegations in the Concise Statement concerned the Bank failing to report its suspicions with respect to a customer who was suspected of running an unregistered remittance service, the Bank having previously failed to report suspicions in relation to sizeable cash deposits, and failing to monitor this customer. AUSTRAC also alleged that the Bank failed to submit an SMR in respect of its suspicions involving a particular account in January 2017.

(i) The Concise Statement set out the "Alleged Harm Suffered", alleging that the failure to file TTRs and SMRs on time or at all meant that AUSTRAC and other law enforcement agencies had been deprived of information that the AML/CTF Act intended be provided to them. It stated that: "Non-reporting and late reporting both delays and hinders law enforcement efforts. Delays in this case have resulted in lost intelligence and evidence (including CCTV footage), further money laundering and lost proceeds of crime." AUSTRAC also highlighted the Bank's role in undermining the integrity of the Australian financial system in relation to deterring money laundering. It alleged that: "The effect of CommBank's conduct in this matter has exposed the Australian community to serious and ongoing financial crime."

572 The information disclosed by the 3 August 2017 AUSTRAC announcement was much more extensive, and much more damning, than the information the subject of the relevant pleaded information. It was also information delivered by a different entity, and in a different manner; and it was different from the information the Bank would have disclosed on the counterfactual.

573 Had the Bank disclosed to the market any or all of the September 2015 Late TTR Information, the September 2015 Account Monitoring Failure Information, the August 2015 IDM/ML Risk Assessment Non-Compliance Information and the Potential Penalty Information in April 2017,

it would have been disclosing that certain events had occurred and that it was "potentially exposed to enforcement action by AUSTRAC" which "might result in CBA being ordered to pay a substantial civil penalty".

574 That is a far cry from the 3 August 2017 AUSTRAC announcement, which: (i) was made by the regulator; (ii) was made by the regulator in announcing that it *had* commenced legal proceedings (such proceedings were no longer something that the Bank "might" face); and (iii) detailed allegations that went far beyond, and were much more damning than, the content of the September 2015 Late TTR Information, the September 2015 Account Monitoring Failure Information, and the August 2015 IDM/ML Risk Assessment Non-Compliance Information.

575 Even if one were to put to one side that the Potential Penalty Information could not logically form part of the actual 3 August 2017 AUSTRAC announcement, the nature of the wrongdoing disclosed, and the characteristics of much of the alleged wrongdoing, went far beyond the three substantive pieces of pleaded information. That conclusion is not gainsaid by the evidence of Professor da Silva Rosa (relied on by the appellants principally in relation to materiality).

576 Professor da Silva Rosa recognised that the 3 August 2017 AUSTRAC announcement differed from the pleaded information as it referred to the commencement of proceedings, but maintained the contention of economic equivalence on the basis that the elements disclosed in the 3 August 2017 AUSTRAC announcement conveyed the same "value-relevant" information as the pleaded information, such that both would cause investors to lower their assessment of the Bank's competence in complying with the AML/CTF Act and upwardly revise their assessments of the Bank's operational and reputational risk.

577 The appellants also relied on Mr Johnston's evidence, in support of their thesis of economic equivalence. While Mr Johnston acknowledged that there were differences between the pleaded information and the 3 August 2017 AUSTRAC announcement, he supported the thesis of economic equivalence on the basis that the "fundamental factors" that he considered drove the market reaction to the 3 August 2017 AUSTRAC announcement were also to be observed in the pleaded information. Mr Johnston's opinion was that the differences between the pleaded information and the information disclosed by the 3 August 2017 AUSTRAC announcement did not disturb a conclusion of economic equivalence on the basis that "given the baseline disclosure of the Late TTR information", the incremental effect of those differences would "be parabolic and decreasing rather than linear, so that they made *no*

material difference to the market's overall reaction" (emphasis added). For example, Mr Johnston considered that disclosure of the September 2015 Late TTR Information would cause investors to assume that the risk of penalty proceedings was "so high that it could be regarded as certain", such that the later notification of the commencement of proceedings would not have had a material effect. In the course of cross-examination on the differences and details of some of the allegations in the Concise Statement, Mr Johnston characterised them as merely adding "colour" or "emotion".

578 In oral reply submissions on the appeal, the appellants contended that the difference between the pleaded information and the contents of the 3 August 2017 AUSTRAC announcement lay in the difference in their wording, but the inference was "conceptually the same". Both that submission, and the approaches of Professor da Silva Rosa and Mr Johnston, advanced the proposition of economic equivalence on a basis that lacks common sense and was put at altogether too high a level of abstraction. While both the pleaded information and at least some of the contents of the 3 August 2017 AUSTRAC announcement may indeed raise concerns of the same kind in the minds of investors (concerning systematic data failures, competence, exposure to penalty and the like), that kind of directional observation does not establish equivalence of the kind necessary to make good assumption A2, upon which the answer to question 2 of Professor Easton's event study relied.

579 In our view, the 3 August 2017 AUSTRAC announcement was not materially the same as, nor was it the economic equivalent of, the relevant pleaded information. This is not to focus on differences in wording, but on the substance of what was conveyed. Rejection of the equivalence proposition also does not involve finding differences that arise only through strictly adhering to Professor Easton's view that the "event" constitutes an inseparable whole comprising the message, the medium, the interpretation and the analysis. Even just focusing on the "message", there are very significant differences. The differences in what was conveyed, and the contents of the Concise Statement (which included allegations that the Bank had ignored warnings), cannot be dismissed as merely adding further "colour" or "emotion". The differences are so far-reaching that the conclusion that the two are not equivalent, or materially the same, is obvious and is not a conclusion that rests on expert evidence. Nonetheless, we note that Dr Unni gave cogent evidence concerning the lack of equivalence.

580 While our reasons for arriving at that conclusion are not on all fours with the reasons of the primary judge, his Honour's conclusion was correct.

581 It follows that assumption A2 given to Professor Easton was not made good. His event study did not present a reasonable assessment of what would have happened to the price of shares in the Bank had it made, in April 2017, the disclosures the appellants contend it should have.

582 But that conclusion does not dispose of the matter. It remains to address whether the appellants' case on causation and loss is made good even though there is a lack of equivalence between the 3 August 2017 AUSTRAC announcement and the forms of pleaded information relied on for the appeal. We will next address issues concerning quantification of loss because, if the appellants fail to make out their case of quantification of loss, the outcome on causation will not matter.

583 The appellants' primary position on loss was that the Court should adopt the full $3.29 abnormal return figure calculated by Professor Easton as the artificial inflation caused by the Bank's contraventions of s 674 of the *Corporations Act*. Having regard to the foregoing analysis, this contention must be rejected insofar as it is based on there being economic equivalence between what was announced by AUSTRAC on 3 August 2017 and the pleaded information.

584 The appellants' alternative position in seeking the adoption of the full $3.29 figure was that to the extent that the 3 August 2017 AUSTRAC announcement went beyond the pleaded information, the other information *cannot* be "stripped out", and the consequences of that should rest with the Bank because the difficulties the appellants faced in quantification were to be attributed to the Bank's own wrongdoing, calling in aid principles from *Armory* and *Cessnock*.

585 It was a basic premise of the appellants' argument that it was impossible to seek to apportion the abnormal return of $3.29 so as to fix on a portion of that figure which reflects the market reaction to the disclosure of information that was equivalent to the pleaded information, and its reaction to the other matters that were the subject of the 3 August 2017 AUSTRAC announcement, but went beyond the pleaded information. That was what Professor Easton said, firmly and repeatedly. But Dr Unni did not agree.

586 On Dr Unni's evidence, differences between the information disclosed, and the circumstances in which it was disclosed (as against the counterfactual) need to be assessed and addressed. As we are just concerned with disclosure as at 24 April 2017, and it was not suggested that market

conditions or other relevant aspects of the stock price differed materially between late April and early August 2017, the temporal point can be put to one side.

587 The fact that an event study can only be taken as a reliable estimate of the effect on the share price where no other company-specific information has been disclosed at the same, or a similar, time has been referred to and confirmed by judges of this Court in determining cases relying on market-based causation and assessment of loss: see, eg *TPT* at [664] per Beach J.

588 Professor Easton recognised that "confounding information" needs to be identified to see if it causes any part of the share price decline. He said:

> I also investigated whether news unrelated to the Alleged Corrective Disclosures could have caused any portion of the decline in CBA's share price on 3-4 August 2018 [sic]. Accordingly, I reviewed news articles and analyst reports issued on 3-4 August 2017. My review did not reveal any confounding information.

589 Of course, it is important to note that, because of assumption A2, Professor Easton was not approaching his analysis of confounding information on the basis that information outside the pleaded information would be confounding information. Because of assumption A2, on Professor Easton's approach, all of the information in the 3 August 2017 AUSTRAC announcement was not confounding information even if it was not pleaded information.

590 In a footnote to his statement that his review did not reveal any confounding information, Professor Easton said:

> I found only one report published between 3 August 2017 and the close of trading on 4 August 2017 that did not discuss the AUSTRAC lawsuit. That was a Deutsche Bank report published at 10:57 PM on 3 August 2017. In that report, the analyst said he expected CBA to report 2H17 results on 9 August 2017 that were "relatively subdued." See Deutsche Bank Markets Research, "Commonwealth Bank: 2H17 result preview," 3 August 2017. By contrast to the negative commentary related to the AUSTRAC lawsuit, none of the news articles and analyst reports on 3-4 August 2017 discussed this Deutsche Bank report.

591 What is notable about this aspect of Professor Easton's report is that it points to precisely the sort of analysis that can, and should, be carried out when a corrective disclosure that forms the basis of an event study differs in material respects from the hypothetical counterfactual disclosure that should have been made. His report acknowledged that it is necessary to consider whether "any portion of the decline in CBA's share price" could have been caused by other news. Professor Easton's approach here looked for confounding information, identified a single piece of confounding information (being a Deutsche Bank report), and then analysed the

content of that additional piece of information, and whether it was picked up in other news articles or analyst reports which provided negative commentary on the AUSTRAC lawsuit.

592 Dr Unni's analysis was different, as he was looking at confounding information on the basis that information outside the pleaded information was confounding information.

593 It is one thing to say, as Professor Easton did, that an "event" which is the subject of an event study, cannot be split into disparate parts, but the critical question is what that event study reveals about the extent to which the price of an entity's shares is inflated by reason of the wrongdoing established. We do not consider that treating an "event" as indivisible absolves a party from taking steps to attempt to arrive at a principled basis upon which a price decline that is plainly referable to a raft of "bad news" going well beyond the pleaded information, can be attributed to the alleged contraventions.

594 Nor are such steps impossible, as the appellants contended. In *TPT*, Beach J observed (at [727]) that "[w]here two or more items of information are released to the market on the same day, it may be difficult to separate their respective effects on a share price", and "other techniques" must be employed to "*estimate* the likely separate price effect of each item of news" (emphasis added).

595 Contrary to the appellants' claims that it was simply impossible to try and discern the contributions to the price drop referable to the information that was substantively the same as the pleaded information, Professor Easton's own approach to confounding information points to one option, namely looking to qualitative market reactions and commentary in the form of broker and analyst reports, and news articles. That is one of the methods identified by Beach J in *TPT*. In cross-examination, Professor Easton accepted that analyst reports would be one resource that an economist would look at if instructed to determine the proportion of a share price decline that was referable to each of two different pieces of information posited by the hypothetical put to him or her. We also note that, in *TPT*, there was expert evidence that deployed analyst reports in seeking to allocate the identified abnormal return to different pieces of information. In *Crowley v Worley Ltd (No 2)* [2023] FCA 1613; 171 ACSR 410 (***Worley No 2***), Jackman J also discussed (at [260]) the avenues available to an applicant in seeking to adduce event study evidence despite a lack of economic equivalence between a counterfactual disclosure and the actual disclosure.

596 In his report, Dr Unni explained the need to go beyond the statistical analysis in order to evaluate the economic impact of disclosure of multiple pieces of information. He said:

> The statistical analysis in an event study may indicate that the abnormal return on a certain date was likely to have been generated by firm-specific news (at a 95% confidence level). However, statistical analysis alone cannot identify the particular elements of news that may have caused this return. Therefore, **it is necessary to examine the record of news releases, analyst reports or other sources of information regarding the firm released on that day and to evaluate the economic implications of information they disclosed regarding the firm. Such an attribution analysis is particularly important if more than one item of information was disclosed to the market on the date when we observe an abnormal return**.
>
> (Emphasis added.)

597 Dr Unni was not cross-examined on the suggestion that a second stage of analysis, of the kind he outlined, is necessary where there are differences of the kind to which he referred. As we have noted, it is the kind of analysis that was referred to in both *TPT* and *Worley No 2*.

598 Another resource, that may be analysed in attempting to work out just how much of an observed abnormal return is to be attributed to the non-disclosure of specific information, is the observed market reactions to disclosure of qualitatively similar information by other companies. Dr Unni identified market reactions to NAB and Westpac (two of the other "big four" banks in Australia) when they disclosed AML violations. The point for present purposes is not whether the market reactions following NAB and Westpac's disclosures may be transferred and applied seamlessly to the case of the Bank, but that such resources are available and may be analysed when seeking to work out the extent to which an observed price reaction to publicised "bad news" can sensibly be attributed to the wrongdoing in question.

599 Our observations should not be misunderstood as suggesting that this kind of analysis will necessarily yield mathematically rigorous exactitudes. The point is, rather, that in order to establish quantum, an attempt at estimation must be made. It is not enough for the appellants to put up Professor Easton's event study and then throw their hands up, say it was impossible to seek to allocate the observed price effect between the information that was substantively the same as the pleaded information and the other "bad news" disclosed on 3 August 2017, and then rely on principles in *Armory* and *Cessnock* to claim the whole of the $3.29 figure when that plainly is a figure that reflects the market's reaction to much, much more than the pleaded information.

600 Nor do we accept that, in the absence of any real attempt at estimating the contribution of the pleaded versus non-pleaded information to the price drop, the onus was cast on the Bank to

establish that not all of the $3.29 price drop was referable to the pleaded information. As we go on to detail, this is not a case where the "fair wind" principle discussed in *Cessnock* applies such that the Court should accede to a calculation of loss that is manifestly wrong, and where there were steps available to the appellants to more accurately estimate the true measure of loss.

601 The steps that may be taken will vary from case to case. It may be, for example, that conducting a discounted cashflow valuation of the Bank's business would not have been practical (although there was no evidence that, despite an enterprise valuation having been pleaded by the appellants, attempts had been made to approach loss on that basis but proved impractical). As the steps that may, and ought, be taken in attempting to prove loss will, as we have said, vary from case to case, it follows that the extent of the steps that will be expected of applicants in large class actions with potential damages calculated in the multiple, if not hundreds, of millions of dollars, will be more extensive than the steps required of an applicant in proceedings of a different character.

602 We should explain why the principles in *Armory* and *Cessnock* do not mean that, on the facts of this case, loss should be calculated adopting the whole $3.29 figure.

603 The appellants' grounds of appeal only relied on *Cessnock* in relation to the quantification of loss. It was not relied on in the ground concerning causation. Their written submissions on the appeal were consistent with this position. While oral submissions made by the appellants on the appeal sought to harness *Cessnock* on causation, we confine our discussion of that case to quantification. Accordingly, it is not necessary to determine the extent to which *Cessnock* has the effect that principles, previously understood to apply only in relation to quantification, and to operate only when causation was established, can be called in aid in establishing causation.

604 The point of principle at issue in *Cessnock* was whether the Court of Appeal of New South Wales erred in concluding that: a presumption arose that the respondent would at least have recouped its wasted expenditure if the contract had been performed; and that the presumption was not rebutted. The contract in question was an agreement to lease a lot in a proposed subdivision at an airport owned by the local council. The High Court dismissed the appeal.

605 The plurality (Edelman, Steward, Gleeson and Beech-Jones JJ) said (at [61]) that, while the legal onus to prove loss arising from a breach of contract case rests with the plaintiff, where a

breach of contract has resulted in uncertainty about the position the plaintiff would have been in if the contract had been performed:

> …then the discharge of the plaintiff's legal burden of proof will be facilitated by assuming (or inferring) in their favour that, had the contract been performed, then the plaintiff would have recovered the expenditure they reasonably incurred in anticipation of, or reliance on, the performance of the contract.

Their Honours went on to observe that:

> The strength of this assumption or inference, and thus the weight of the burden placed on the party in breach to adduce evidence to rebut the inference in whole or in part, will depend on the extent of the uncertainty that results from the breach. Expressed in this way, this facilitation principle is tied to its rationale, namely the uncertainty in proof of loss occasioned to the plaintiff by the defendant's breach.

606 In expanding upon the "principle of facilitation", the plurality explained (at [127]) that, in some circumstances, the common law "facilitates" the discharge of the plaintiff's onus. This facilitation was said to find expression in the burden imposed on a defendant to establish a failure to mitigate loss. Their Honours also identified (at [127]) the operation of the principle in the law of torts, where "a plaintiff is assisted in proof by **reasonable inferences** where a defendant's breach has resulted in difficulties or impossibilities of proof of loss or damage" (emphasis added). The plurality explored the different terminology and descriptions deployed in describing the principle, but returned to confirm (at [129]) that: "Whatever the description of the principle, its essence is that it **facilitates the discharge of the plaintiff's legal onus** of proof of loss in circumstances where **the defendant's wrongdoing has resulted in uncertainty** regarding the quantum of loss" (emphasis added).

607 The facilitation principle allows for assumptions favourable to a plaintiff to be made, for example that the jury should award the plaintiff the market value of the best jewel that would fit in the setting where the defendant refused to produce the jewel actually retained for valuation, as occurred in *Armory* itself. However, and as the plurality summarised the position in *Cessnock*, a plaintiff is given a "'fair wind' but not a 'free ride'" and the "strength of the wind" varies depending on the extent of the uncertainty resulting from the defendant's breach: *Cessnock* at [139]. In *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 (***JLW***), Brooking J surveyed the authorities (at 241-246). What Brooking J's analysis exposes is that, as we have already observed, the evidence required of a plaintiff (in this Court, an applicant) is responsive to the circumstances concerning the evidence that could be adduced, and the impact of the defendant's wrongdoing on the capacity of the plaintiff to establish quantum. In *JLW*, Brooking J also referred to the need to have regard to whether the damages sought are of a kind

that is left to the opinion of the Court, acting at large (eg in the assessment of damages for pain and suffering in personal injuries cases) or are of a kind that are capable of quantification, such as property valuation or, one might add, inflation to a share price.

608 As we have explained, we do not accept that the Bank's breach of its continuous disclosure obligations on and from 24 April 2017 meant that the appellants were practically unable to do more, in establishing quantum, than to point to the entire abnormal return of $3.29. As the primary judge found, the appellants had not established any "rational starting point for the valuation of the inflation", and the principle in *Armory* (and, we would add, *Cessnock*) does not assist as the deficiencies in proof are not a problem of the Bank's making.

609 The appellants' fallback was that the $3.29 figure should be adopted as a starting point, and a downward adjustment made – 20% was suggested – based on the "Lieser paper". The "Lieser paper" was first referred to by Dr Unni in addressing the significance of the commencement of litigation for entities in terms of the drop suffered to their market valuations. That was of relevance given that the 3 August 2017 AUSTRAC announcement disclosed, not only underlying events, but that litigation *had* been commenced. Dr Unni quoted the Lieser paper – Lieser, P, & Kolaric, S (2016) "Securities class action litigation, defendant stock price revaluation, and industry spillover effects", working paper – which identified an average abnormal return of -3.25% during the three day event window surrounding the filing date of the action. The Lieser paper itself situated that figure in the context of the larger negative reaction of -20% during the three days surrounding the "revelation date of potential misconduct". The appellants contended that the Lieser paper found that the average additional abnormal decline attributable to the act of commencing proceedings was 14%, but a discount of 20% could be applied as a more conservative figure. The Bank pointed out that the 14% figure was not a figure found in the Lieser paper (the authors of which were not called), but was a calculation made by the appellants using some of the figures from the Lieser paper.

610 It is important to note, however, that the Leiser paper addressed the impact on the share price of entities following the filing date of a securities class action, and concerned large numbers of United States cases. In their case on quantification of loss, the appellants sought to rely on the differential impact from the revelation of misconduct and the commencement of proceedings, to suggest a discount of 20% to the $3.29 abnormal return following the 3 August 2017 AUSTRAC announcement would be an appropriate discount to take account of the fact that the announcement included information beyond the pleaded information.

611 There are a number of reasons why this suggestion must be rejected. First, the Lieser paper is only relevant (at best) to one of the points of difference between the 3 August 2017 AUSTRAC announcement and the pleaded information: viz, that litigation had commenced, and it was not merely the underlying events that were being disclosed. It has nothing to do with the other points of difference that we have addressed in detail above, concerning the wider, greater and more damning AML/CTF breaches that were the subject of the 3 August 2017 AUSTRAC announcement.

612 Secondly, the circumstances being studied in the Lieser paper are too remote from the facts of this case for the statistical analysis to have any sensible application. The Lieser paper analysed the differential price impacts from revelation of misconduct, which was said to generate a large reaction including because the market anticipated that class action litigation would follow, and the smaller reaction associated with the actual filing of proceedings which, on the authors' thesis, had already been priced in. The authors' analysis has no logical application to a circumstance where the allegation is that the Bank should have disclosed certain facts about the late TTRs, its account monitoring failure, its failure to conduct a risk assessment in relation to the IDMs, and the potential for *regulatory* action (and penalties).

613 Having regard to the extensive differences between the pleaded information and the 3 August 2017 AUSTRAC announcement, it would be entirely illogical to apply a discount founded on a United States study of the more muted impact when class action litigation that was already anticipated is filed, as compared with the reaction when the misconduct (or underlying events) was disclosed, and the market had already priced in that class action litigation would likely follow.

614 The "fair wind" principle does not invite resort to irrational bases for making adjustments. Nor does the principle that, once satisfied of causation, the Court is to adopt a "robust" approach to assessing loss and should not deprive a plaintiff of a monetary award due to the difficulty of assessing loss: *Fink v Fink* [1946] HCA 54; 74 CLR 127 at 143 per Dixon and McTiernan JJ; *Amann Aviation* at 83 per Mason CJ and Dawson J and 125 per Deane J. In this regard, the observations of Hayne J (with whom Gleeson CJ, McHugh and Kirby JJ agreed) in *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; 196 ALR 257 (***Placer***) at [38] remain apposite:

> It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff *cannot* adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff *has not* adduced such

> evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind.
>
> (Footnotes omitted; emphasis in original.)

Placer was not referred to by the High Court in *Cessnock*.

615 Similar observations were made by the Victorian Court of Appeal (Maxwell ACJ, Niall JA and Macaulay AJA) in *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136. In that case, the Court referred (at [70]) to the "distinction to be drawn between a situation that does not *permit* damages to be assessed with certainty, and one in which the plaintiff has simply *failed* to produce evidence that was otherwise reasonably available" (emphasis in original). Their Honours elaborated on the role of the court in the two situations described (at [70]): "The plaintiff is entitled to have the court do the best it can in the former case, but not in the latter. Where a party is able to produce evidence about loss and damage, they must do so with as much certainty and particularity as is reasonable in the circumstances."

616 Having referred to cases including *Placer*, the Victorian Court of Appeal referred (at [75]) to the summary of Chernov JA (with whom Buchanan JA agreed) in *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128 at [33], which also emphasised that plaintiffs are to prove the fact of loss and the amount of loss and to establish both matters with "as much certainty and particularity as is reasonable in the circumstances". The Court of Appeal also noted that Chernov JA's statement had been cited with approval in *MA & J Tripodi Pty Ltd v Swan Hill Chemicals Pty Ltd* [2019] VSCA 46 at [73] (Kyrou, Kaye and Emerton JJA). See also the observations of Murphy J in *Kismet International Pty Ltd v Guano Fertilizer Sales Pty Ltd* [2013] FCA 375 at [20]-[24].

617 It follows that the appellants' fallback approach, based on the Lieser paper, must also be rejected. For completeness, we note that the appellants did not rely on case studies of Westpac and NAB (concerning AML/CTF issues) in relation to quantification. The appellants submitted that the facts of those cases were so different that they provide no guide to valuing loss in the present case.

618 The appellants committed their case to a proposition they ultimately failed to make good: the economic equivalence of the information contained in the 3 August 2017 AUSTRAC announcement and the pleaded information. The appellants made a late attempt to derive, from

the Lieser paper, a basis for adjusting a flawed starting point. That attempt failed. As we have explained, the "fair wind", or "facilitation" principle does not absolve the appellants from their burden in proving loss. Nor can the deficiencies in their case be laid at the Bank's feet.

619 While our analysis above has focused on quantification, it follows from our criticisms of the event study by Professor Easton that it did not, by itself, make good the appellants' case on causation. That said, and while proof of materiality does not, ipso facto, establish causation, our foregoing analysis does not address whether the appellants' causation case should be accepted on the basis that the Bank's failure to disclose the pleaded information (and, in particular, the September 2015 Late TTR Information) is enough to establish causation on a "common sense" basis. However, in view of our conclusion that the appellants have not made good their case on quantification, there would be no real utility in taking the analysis of causation further so as to determine whether the appeal should also be refused on the additional basis that causation has not been established.

620 For these reasons, Grounds 18 and 19 (to the extent we consider it necessary to consider them) are not made out, and Ground 22 is not made out.

12 CONCLUSION

621 For these reasons, we have reached the conclusions summarised at [12] above. We will at this stage make orders for the parties to prepare proposed orders to give effect to these reasons, and in relation to costs.

I certify that the preceding six hundred and twenty-one (621) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Murphy, Moshinsky and Button.

Associate:

Dated: 7 May 2025