Federal Court of Australia
District Registry: Victoria
Division: General

Australian Securities and Investments Commission
Plaintiff

Australia and New Zealand Banking Group Limited (ACN 005 357 522)
Defendant

ANZ'S OUTLINE OF OPENING SUBMISSIONS

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A. INTRODUCTION AND SUMMARY

1 In July 2015, the Australian Prudential and Regulatory Authority (**APRA**) announced additional capital requirements directed at building capital strength in the Australian financial system following the global financial crisis.

2 In response to the APRA announcement, the defendant (**ANZ**) conducted an Institutional Share Placement on 6 August 2015 (**Placement**), which was to be followed by a Share Purchase Plan (**SPP**) for retail investors.

3 The Placement was conducted by Citigroup Global Markets Australia Pty Ltd (**Citi**), Deutsche Bank AG, Sydney Branch (**DB**) and J.P Morgan Australia Ltd (**JPM**) (together, the **JLMs** or **Underwriters**). The JLMs agreed to underwrite the Placement, such that they would subscribe for any amount of the shares not allocated to investors, in the proportion of 40% for Citi and 30% for each of JPM and DB of any shares in the Placement (**Placement Shares**) not allocated to investors.[1]

4 ANZ was placed in a trading halt at 8:38am on 6 August 2015. At 8:44am ANZ announced the Placement and the SPP (**Placement Announcement**). The Placement was to be conducted by way of an accelerated bookbuild, with investors able to bid into the book until 3pm on 6 August 2015 (for domestic investors, being Australia and New Zealand) and 6pm for international investors. Allocations were then to be advised to investors before market open on 7 August 2015. The settlement of shares issued under the Placement was then to occur on 12 August 2015.

5 At 8:35pm on 6 August 2015 the JLMs sent to ANZ a bookbuild update and draft allocation list (**Draft Allocation List**) which recorded demand (bids) from investors for 103% of the shares on offer at the share price of $30.95 (i.e. that the book was covered).[2] By that Draft Allocation List, and on a call shortly after it was sent, the JLMs recommended to ANZ that shares worth $1,745,030,819 be allocated to the investors who had bid into the book, with the remaining shares to the value of $754,969,181 to be allocated to the JLMs.[3] ANZ accepted the JLMs' recommendation.[4]

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[1] CB 124 – Underwriting Agreement at cl 3(c) and 3(e) (ZIH.003.001.0086); CB 117 – Placement Announcement (ZIG.1039.0001.0238).
[2] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
[3] ASIC alleges (CB 3 – Further Amended Statement of Claim dated 4 June 2019 (**FASC**) at [14]) that ultimately the JLMs subscribed for approximately 24,653,710 shares (with a value of approximately $763 million).
[4] CB 4 – Defence dated 27 June 2022 (**Defence**) at [9A(d)], relevantly admitted in the Reply dated 20 February 2023 (**Reply**) at [4(a)].

6 The shares to be allocated to the JLMs represented:[5]

(a) only approximately 0.9% of the issued share capital in ANZ, being around 0.27% of ANZ's issued share capital for JPM and DB, and around 0.37% for Citi;

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

(c) for each JLM, only about one day of trading volume based on the ADTV.

7 In accordance with the recommendation of the JLMs, accepted by ANZ, the JLMs advised investors of their allocations by around 12:30am on 7 August 2015.

8 At 7:30am on 7 August 2015, ANZ announced to the ASX that ANZ had completed its $2.5 billion Placement (**Completion Announcement**).[6]

9 ASIC commenced this proceeding on 14 September 2018 alleging (in broad terms) that ANZ contravened its continuous disclosure obligation in s 674(2) of the *Corporations Act 2001* (Cth) (***Corporations Act***) by failing to notify the ASX of the fact that Placement Shares were to be acquired by the JLMs.

10 More specifically, ASIC alleges that the information which ANZ held and which should have been disclosed was:[7]

(a) that shares with a value between approximately $754 million and $790 million were to be acquired by the JLMs (**Underwriter Acquisition Information**); or

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

with these two forms of information being referred to together in these submissions as "the **Information**".

[5] CB 4 – Defence at [9A(i)], admitted in CB 5 – Reply at [8].
[6] CB 299 (ANZ.505.001.3241).
[7] CB 3 – FASC at [16].

11 ASIC alleges that the Information should have been disclosed:[8]

(a) by around 8:35pm on 6 August 2015, that is as soon as the JLMs made their recommendation to ANZ and while the Placement was still being conducted and prior to investors being notified of the shares allocated to them; alternatively

(b) prior to the commencement of trading on 7 August 2015 (being 10am).

12 A fundamental premise underlying ASIC's case is that the Information was "material" (within the meaning of s 674(2)(c)(ii) of the *Corporations Act*) because investors would have expected that the JLMs would promptly dispose of the Placement Shares which they were to acquire and thereby place downward pressure upon the ANZ share price, and that as a result investors would have refrained from purchasing shares or engaged in trading activities such as shorting ANZ shares.[9]

13 ANZ disputes that the JLMs were in fact likely to be short-term sellers of any shares to be issued to them on 12 August 2015, or that the Information would induce that expectation in persons who commonly invest in securities. Further, the information which ANZ had in relation to the JLMs' intentions, and ANZ's belief, was to the contrary. As such, ASIC's case is based on a requirement for ANZ to disclose information on the premise that it will induce in investors an expectation which was contrary to what ANZ had been told by the JLMs and what ANZ considered to be the case.

14 ASIC's case is flawed and fails for numerous reasons. In summary, these reasons include:

(a) the Information which ASIC identifies was not material within the meaning of s 674(2)(c)(ii). In this regard:

(i) the Information was not of a kind that a "reasonable person" would expect to have a material effect on the price or value of ANZ shares, or which a "reasonable person" would expect to be information that would be likely to influence "persons who commonly invest in securities" in deciding whether to acquire or dispose of securities. It was <u>not</u> information about the fundamentals of ANZ's business, or ANZ's future cash flows or their risks. These are the matters of interest to "persons who commonly invest".[10]

[8] ASIC's Opening Submissions dated 31 March 2023 (**ASIC's Submissions**) at [2].
[9] CB 3 – FASC at [23(c)]; ASIC's Submissions at [106].
[10] *ASIC v Vocation Ltd* (2019) 371 ALR 155 (***Vocation***) at [552]–[553]; *Grant-Taylor v Babcock & Brown Ltd* (2016) 245 FCR 402 (***Grant-Taylor (Appeal)***) at [132]–[133].

Here, the information was about the identity of ANZ shareholders – and in respect of less than 1% of its shares;

(ii) ASIC's claim of materiality is based on an asserted expectation by investors that the JLMs would be short-term sellers of their holdings so as to place downward pressure on the ANZ share price. The factual premise that the JLMs would be short-term sellers so as to place downward pressure on the ANZ share price is wrong. So too is the contention that market participants would have expected the JLMs to be such short-term sellers. In fact, the commercial and reputational incentives of the JLMs meant that they would avoid being, or even appearing to be, aggressive sellers, and market participants would be aware of this. Even if this were not the case, the information cannot be "material" by virtue only of a false understanding on the part of investors;

(iii) the "information" that ASIC identifies as the relevant information for disclosure and by reference to which materiality must be assessed is the wrong information, or at least is incomplete. The conclusion that the information that ANZ had was not material is reinforced once regard is had to the information actually known by ANZ and the totality of information that would need to have been disclosed if a disclosure was in fact made – or, put differently, the totality of the context relevant to assessing materiality. This includes other information that the JLMs conveyed to ANZ in connection with the JLMs providing the recommendation that they be allocated ~$754 million of the Placement Shares. That additional information included the facts that:

(A) the allocation to the JLMs was in lieu of allocation to investors (hedge funds) who were likely to be short-term sellers;

(B) consistently with the so-called "aggravating circumstances"[11] pleaded by ASIC, prior to market opening on 7 August 2015 the JLMs had clearly indicated to ANZ their intention to promote an orderly after-market in ANZ shares, consistently with their commercial and reputational incentives, and their market integrity obligations;

(b) in addition to the fact that the Information was not material, the allegedly disclosable Information was not relevantly information "concerning ANZ" (as required by ASX Listing Rule 3.1). It is information about the identity of ANZ's shareholders (essentially, the JLMs as opposed to hedge funds), and perhaps about the presumed

[11] CB 3 – FASC at [29(b)].

intention of the JLMs as shareholders. It is not information concerning ANZ in the relevant sense;

(c) at least the Significant Proportion Information was already generally available to the market. ANZ's expert (John Holzwarth) refers to several matters of observation apparent to numerous market participants. The inference was drawn – and published – that the offer did not attract the level of interest anticipated, and that there was at least a prospect of the JLMs acquiring a portion of the shares. ASIC must negative the existence of relevant deductions or inferences. ASIC will not discharge that onus;

(d) consistently with an *ex ante* consideration of the relevant Information and its potential effect, an *ex post* analysis of ANZ's share price following the Placement demonstrates that: (i) by the resumption of trading on 7 August 2015 the Significant Proportion Information was widely known amongst market participants; and/or (ii) the relevant Information was not material to the price of ANZ shares in any event.

B. RELEVANT FACTUAL MATTERS AND EVIDENCE

B.1 Introduction

15 ASIC's Submissions introduce some, but not all, of the relevant factual background. Further, in certain respects ASIC's Submissions provide a partial account of relevant factual matters which does not accurately reflect the true or full position. In particular, ASIC relies on individual lines or comments from section 19 examination transcripts, or individual emails or comments in emails, and presents those matters out of context or without regard to other more relevant or probative material.

16 Set out below is a more complete and balanced account of the evidence in relation to key factual matters. Rather than recounting the history of events and a chronology concerning the Placement, these submissions focus on matters that were omitted or not fully or properly addressed in ASIC's recitation of the relevant facts. In doing so, these submissions focus on key matters that are relevant in considering the substantive claims made in this proceeding.

B.2 JLM communications to ANZ about the bookbuild and book coverage

17 ANZ submits that there is ample evidence demonstrating that ANZ was told by the JLMs, and understood, that:[12]

(a) the book was covered (that is, at the close of the book at 6:00pm there were current applications at the price of $30.95 per share from eligible investors for more than the full amount of the Placement Shares);[13]

(b) in that context, the JLMs would take up a portion of the Placement Shares by scaling-back the allocations to certain investors; and

(c) a substantial reason for the JLMs recommending that course of action was that investors such as hedge funds, if not scaled-back, might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares.

18 ANZ was provided with various updates as to the bookbuild during the course of 6 August 2015. Most relevantly, at 8:35pm on 6 August 2015 (after the close of the bookbuild) the JLMs emailed to Rick Moscati and John Needham of ANZ the **Draft Allocation List**.[14] The covering email noted that "*the team will call you shortly to discuss*". Mr Moscati and Mr Needham discussed this document with the JLMs shortly after this. The Draft Allocation List indicated that the book was covered, and it was understood by ANZ to indicate this.

19 The Draft Allocation List included the following near the top of the page:

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

20 On any reasonable reading of this document it was indicating that the coverage of the book at the price of $30.95 per share was "103%", with the demand (that is, applications or bids) being for 83,291,006 shares in the context of a "deal size" of 80,775,444 shares. It can be

[12] CB 4 – Defence at [9A(b)], [9A(c)], [9A(f)].
[13] Notably, ASIC does not advance a positive case that ANZ was not informed that the book was covered, or that ANZ was informed that the book was not covered; rather, ASIC simply puts ANZ to its proof: CB 5 – Reply at [1] (general joinder of issues, ASIC not otherwise responding to Defence at [9A(b)]).
[14] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).

noted that ASIC concedes (as it must) that the document indicates "*103% demand coverage of the Placement at $30.95*".[15]

21 Further, for each investor in the Draft Allocation List there were:

(a) two columns headed "**m shares**" and "**$m**"; and

(b) separate columns headed "**Allocation**", "**Value**" and "**% Fill**".

22 The only reasonable reading of this information for each investor is that:

(a) the columns headed "**m shares**" and "**$m**" set out the application/bid made by that investor; and

(b) the columns headed "**Allocation**", "**Value**" and "**% Fill**" set out the amount proposed to be allocated to that investor (in number of shares and on a dollar basis) and the percentage "fill" of that investor's bid (i.e. how much of the bid was to be allocated).

23 So, for example, for the first investor on the list (Regal Funds Management), the information recorded in the Draft Allocation List was relevantly as follows:

Investor Name	**m share**	**$m**	**Allocation**	**Value**	**% Fill**
Regal Funds Management	8,077,544	$250,000,000	4,846,527	$150,000,000	60%

24 This clearly conveyed that Regal Funds Management had made a bid for $250 million of shares at $30.95, and that the JLMs' proposal was to allocate it 60% of its bid being an amount of $150 million.

25 As to the Draft Allocation List:

(a) Mr Moscati, during his section 19 examination, gave evidence that he knew of no information in relation to each investor other than what was in the Draft Allocation

[15] ASIC's Submissions at [32]. A subsequent version of the allocation list provided at 2:26am on 7 August 2015 again indicated that the book was covered: CB 274 (ANZ.505.001.3253) and CB 275 (ANZ.505.001.3254).

List, and the JLMs never said that there had been any material change from what was presented in this document;[16]

(b) Mr Needham's evidence is that in his experience bids entered into a book-building system would be cross-checked to ensure accuracy, and would represent binding bids.[17] The obvious understanding from these documents is that the book was covered, and this was Mr Needham's understanding.[18]

26 More generally, Mr Moscati's evidence is that he understood that "*from where we sat, they [the JLMs] could have allocated the stock to those hedge funds*".[19] In relation to this, and the decision to scale-back hedge funds, Mr Moscati then said:[20]

> Q. But you were aware, in the end – at the end of the day you were aware that the joint lead managers were taking on circa 700 million dollars as on their own account?
>
> A. Privilege. Yes. And from our perspective, you know, did we think about – well, you know, "Is that a better outcome than allocating another 700 million bucks to some hedge funds?" Yeah, I thought about that, and I thought that was a better outcome.
>
> Q. And why would you think that would be a better outcome?
>
> A. Hedge funds aren't known to be particularly loyal and sticky investors and, goodness knows, you know, they come into the book to make a quick fire profit. You know, so to the – you know, whereas we knew that the investment banks were – obviously we had a relationship with the investment banks. They were in no hurry for us to sell the stock. I – you know, it'd be foolhardy for me to speculate as to, kind of, what a hedge fund was going to do with the stock. But I don't – I think we can probably extrapolate what —
>
> Q. And that would be? What? they may sell the shares?
>
> A. Well – well, in – you know, they're going to love – they're going to love you if it's all going well, and they're going to hate you if it's not going well. So it's quite possible that if a stock didn't trade up that they would be looking to exit their position relatively quickly.
>
> And so from our perspective, you know, did we push? And why didn't we push to allocate more to hedge funds? Was, you know, it certainly didn't cross my mind that'd

[16] CB 96 (ZIG.0005.0043.0002) – Transcript of s 19 examination for Rick Moscati dated 30 August 2016 at T32:18-33:13. In these submissions this transcript is referred to as "**Moscati T(2)**".
[17] CB 23 – Affidavit of John Needham dated 28 November 2022 (**Needham Affidavit**) at [19]–[21].
[18] CB 23 – Needham Affidavit at [60].
[19] CB 87 (ZIG.0005.0021.0002) – Transcript of s 19 examination for Richard Moscati dated 23 March 2016 at T72:14-18. In these submissions this transcript is referred to as "**Moscati T(1)**".
[20] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)73:20-76:4. See also CB 96 (ZIG.0005.0043.0002) – Moscati T(2)24:12-25:2.

be a better outcome for anybody. That that probably, and most – almost certainly would have been a more negative outcome for everybody. …

Q. Prior to that sort of final allocation I think you said that's where you took their recommendations –

A. Yeah.

Q. Was it apparent to you that there was a shortfall, even prior to that final allocation?

A. We were – we were told – privilege – we were told the book was fully covered. But we were also knowledgeable in terms of the composition of the book and the lack of long – long only funds. And that – that was kind of it. Right. So –

MR LUXFORD: Q. When they said "fully covered" did you mean "fully covered" by–

A. Bids.

Q. -- independent institutional type bids or covered including underwriting agreements?

A. In total. Just in terms of total bids received that they were fully covered. And then throughout, you know, throughout the course of the day that they didn't think it was appropriate to allocate – fully allocate those hedge funds.

27 Mr Needham's evidence is as follows:

(a) ANZ was reliant on the JLMs to provide it with updates as to the level of bids and coverage of the book;[21]

(b) "late afternoon" (on 6 August 2015) he had a call with representatives of the JLMs. Mr Needham's handwritten notes for that call state: "*Books close to 100%.*"[22] Mr Needham's evidence is that at this stage "*what the JLMs are telling us is that the books, basically, have got applications for all bids for 100 per cent of the book*".[23] In relation to the next entry in his notes which said "*Allocate $1.5 - $1.8 bn*", Mr Needham's evidence is that what the JLMs said was that "*they wouldn't recommend allocating all that stock to*

[21] CB 90 (ZIG.0005.0023.0001) – Transcript of s 19 examination for John Needham dated 26 April 2016 at T45:12-45:22. In these submissions this transcript is referred to as "**Needham T**".
[22] CB 355 (ANZ.002.001.0001) at .0009.
[23] CB 90 (ZIG.0005.0023.0001) – Needham T56:2-4.

those investors" notwithstanding that the bids "*are commitments to … take the stock*".[24] Consistently with this, Mr Needham's evidence in his affidavit is that:[25]

> My recollection is that around this time (and potentially on this call) the JLMs informed us that the book was close to being fully covered. I also generally recall that it was around this time that the JLMs (although I cannot now recall who) were recommending that notwithstanding that the book was close to fully covered that they would recommend only allocating shares to the value of $1.5 to $1.8 billion to those who had bid into the book. My recollection is that the JLMs said that they made this recommendation because of the number and size of the hedge fund bids in the book, and because there was a risk that over-allocating to hedge funds may cause an unorderly aftermarket in ANZ shares following the Placement because of the risk of many of those hedge funds being short-term holders of the shares. I also thought that the JLMs may have been concerned about the ability of some hedge funds to settle on their bids, although I do not recall any comments to this effect being made.

(c) in relation to the rationale for the JLMs not wanting to fully allocate to the hedge funds (and therefore scale-back their bids), Mr Needham's evidence in his section 19 examination included the following:

(i) at Needham T59:24-60:7:

> Q. Was there a concern about some of the investors' activities in the aftermarket at this stage?
>
> A. Privilege. No, I think that - I think that the nature of those investors, and, if they are entities that don't have, you know, a long position - sorry. If they're hedge funds, then you want to question whether - whether that volume of stock has gone to those parties as to whether, you know, those parties who are receiving more than they'd expected would lead to them, you know, wanting to - to sell in an un-orderly way.

(ii) at Needham T60:17-24:

> Q. So it would be preferable to give it to the banks – the underwriting rather than giving it to these hedge funds?
>
> A. Privilege.
>
> Q. Is that right?
>
> A. Privilege. I think that if you've got a party here who's not going to have an un-orderly sale, then that's a better outcome.

[24] CB 90 (ZIG.0005.0023.0001) – Needham T53:23-56:24, T57:26-58:12.
[25] CB 23 – Needham Affidavit at [47].

(iii) at Needham T63:5-14:

> Q. So you're deliberately deciding to scale back less than 100 per cent allocation. Why?
>
> A. Privilege. So, you know, we - you know, there's a concern that some parties aren't up to holding that allocation.
>
> Q. Whose concern?
>
> A. The - privilege. The JLMs.
>
> Q. Was ANZ concerned?
>
> A. Yes. Privilege. You know, if the JLMs are concerned, then we'll be concerned

(iv) at Needham T65:3-18:

> Q. Why is it preferable to give the stock then to the banks, the underwriters, than the people who have put their hands up to bid for the stock?
>
> A. Privilege. So that comes back to that - that point about, you know, whether there's going to be an un-orderly, you know, sale of those shares, and, from a relationship perspective, the JLMs, you know, would be, you know, expecting that they won't go and do it on an un-orderly basis.
>
> MR EVANS: Q. But this isn't a request from ANZ at this point, is it? This is something that the JLMs have approached you with as a solution, isn't it?
>
> A. Privilege. These are options that are available for us to consider, and it's the nature of that conversation.

(v) at Needham T79:20-80:10, in relation to the call at around 8:35pm on 6 August 2015 and his handwritten note "*No other choices*" (emphasis added):

> Q. The next one down is, "No other choices"; is that a reference to - well, can you tell me what that's a reference to?
>
> A. Privilege. So what they are saying is that they don't believe that they - you could allocate to that - that larger – the larger list, if this is the 8 o'clock one, where we've got the full - the full amount bid, that instead of doing that - so this is all part of the discussion about getting the agreement for allocating the list in the way that it was allocated, and, you know, so the question is whether you do fill, you know, those hedge funds, that's what's being talked about and, you know, the view is that that is not the way to go, that it is for the banks to pick up the stock, for them to sell the stock over – over some, you know, extended period in an orderly way and not have an unorderly sale coming from - from whichever of these hedge funds.

(vi) at Needham T87:25-88:5, Mr Needham gave evidence that it was undesirable to allocate too much to the hedge funds because there would potentially be a lot more selling pressure on the stock;

(vii) at Needham T99:15-22:

> A. Whilst the applications were there, we allocated on the basis that we discussed at - was that 1 point - 1.5 to 1.8 billion, 350 million less than 2 billion.
>
> Q. Sure. You scaled back the applications because you thought it was undesirable to allocate those shares?
>
> A. Privilege. Correct.

(d) consistently with this, Mr Needham's evidence in his affidavit is that:[26]

> My understanding, which was reinforced by the recommendation from the JLMs, was that it was preferable for the JLMs to hold stock rather than over-allocating to hedge funds. This was because the JLMs are large, well-capitalised financial institutions who were paid to take on risk under the Underwriting Agreement, and who based on my experience and in my understanding had the ability to manage that risk such that they did not need to promptly dispose of any stock allocated to them or to dispose of it in a way that may affect the share price. In particular, my understanding based on both my experience and what was said by the JLMs was that it was more desirable to have shares placed with the JLMs, who had enough capital to manage the sale of those shares over a longer period, so there was less selling pressure from the hedge funds and the market for the shares remained stable. …
>
> During this discussion of the Draft Allocation List we discussed with the JLMs whether all the shares should be allocated to the hedge funds who bid for them, such that all shares in the Placement would be allocated to the investors listed in the Draft Allocation List. The view that was expressed by the JLMs was that that was not the way to go, and that it was better for the JLMs to pick up a portion of the stock, for them to sell the stock over an extended period in an orderly way and not have an unorderly sale coming from the hedge funds. Although I cannot now recall which specific individuals made this recommendation, I am clear in my recollection that this was said by a number of representatives of the JLMs during this call. …
>
> Based on my experience the recommendation made sense, as both the JLMs and ANZ had a concern about how the hedge funds might trade if they were fully allocated. My recollection is that this concern was based on knowledge and experience that, if you over-allocate to hedge funds they may sell the stock quickly and in an unorderly way following the Placement. Hedge funds have a relatively small amount of capital to hold against a large stock position, and are highly geared. On the other hand, in my experience large investment banks such as the JLMs have large volumes of capital and are in the business of underwriting and managing this type of risk such that they will not have the same potential need to sell the stock quickly.

[26] CB 23 – Needham Affidavit at [50], [65], [67].

28 In addition to these direct communications to ANZ, the JLMs also communicated to all investors that the book was covered. For example, Jarrod Bakker of Citi sent an email to investors at 5:01pm on 6 August 2015.[27] The title of the email was "**ANZ AU BOOKS CLOSE IN 1 HR; BOOK IS COVERED & WILL PRICE @ 30.95**". Mr Moscati's evidence is that he recalls being aware that the JLMs had communicated to investors that the book was covered.[28] Nothing about the "agreed message" concerning the Placement (on which ASIC specifically relies[29]) suggests in any way that the book was not covered, or that ANZ was told this or held this view.

29 As to Shayne Elliott, and what he may have been told or considered to be the case, it can be noted that he was one step removed from the direct interactions with the JLMs (save for one call with one of the JLMs during the transaction), and it was Mr Moscati and Mr Needham who were directly involved in the Placement.

30 Mr Elliott's evidence (as given during his section 19 examination) was relevantly that:

(a) Mr Moscati had responsibility for execution of the Placement;[30]

(b) he recalls being involved in a call with Geoff Tarrant of DB later in the day (which also involved, at least, Mr Moscati), which discussion concerned the options available to ANZ including in relation to changing the price for the Placement, and in which Mr Tarrant agreed that that was not the right thing to do;[31]

(c) he recalls seeing at some point in the day a spreadsheet of a similar nature to the Draft Allocation List.[32] In relation to this spreadsheet, Mr Elliott's understanding was that the column entitled "m shares" and "$m" related to bids into the book, and the subsequent columns "Allocation" and "Value" related to the allocations made to particular investors after scale-backs. Mr Elliott does not recall specifically discussing the rationale for the scale-back with anyone, and that he left this up to Mr Moscati to run through with the JLMs;[33]

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[27] CB 210 (CIT.101.011.2656).
[28] CB 96 (ZIG.0005.0043.0002) – Moscati T(2)33:26-34:9.
[29] ASIC's Submissions at [47]; CB 293 (ANZ.509.001.1262).
[30] CB 91 (ZIG.0005.0014.0004) – Transcript of s 19 examination of Shayne Elliott dated 9 June 2016 at T25:18-26:6. In these submissions this transcript is referred to as "**Elliott T**".
[31] CB 91 (ZIG.0005.0014.0004) – Elliott T50:15-52:10.
[32] Mr Elliott was shown CIT.001.001.0124, which is relevantly the same as CB 275 (ANZ.505.001.3254, i.e. the final allocation list as sent to ANZ: see ASIC Submissions at [49]). Accordingly, the version of the Draft Allocation List by reference to which Mr Elliott gave this evidence was that emailed to ANZ at 2:26am on 7 August 2015.
[33] CB 91 (ZIG.0005.0014.0004) – Elliott T62:6-65:3.

(d) he recalls that in relation to this spreadsheet (Draft Allocation List) Mr Moscati said "*that technically the demand was higher than the deal size*".[34]

31 ASIC's Submissions largely ignore this evidence, and instead seek to highlight only some individual entries in Mr Needham's notes, and a statement made by Jill Campbell in her section 19 examination.[35]

32 As to these:

(a) ASIC contends that Mr Needham's evidence was that the reference in his notes to "*No other choice*" was a reference to not being able to allocate Placement Shares to the then stated demand amount of all investors.[36] This does not fairly summarise or reflect his evidence, which was in fact as follows:[37]

> So what they [the JLMs] are saying is that they don't believe that they - you could allocate to that - that larger – the larger list, if this is the 8 o'clock one, where we've got the full - the full amount bid, that instead of doing that - so this is all part of the discussion about getting the agreement for allocating the list in the way that it was allocated, and, you know, so the question is whether you do fill, you know, those hedge funds, that's what's being talked about and, you know, the view is that that is not the way to go, that it is for the banks to pick up the stock, for them to sell the stock over – over some, you know, extended period in an orderly way and not have an unorderly sale coming from - from whichever of these hedge funds.

(b) As to the statement from Ms Campbell on which ASIC relies, that statement was consistent with the fact that the JLMs were to be allocated some of the Placement Shares by reason of scaling-back investors. To the extent that ASIC seeks to read anything more into this statement, it is apparent from Ms Campbell's examination transcript relied on by ASIC that she had, when examined by ASIC eight months after the events in question, little recollection of the call in issue. Further still, Ms Campbell had no direct role in the conduct of the Placement, with it being handled by Mr Moscati and Mr Needham (whose evidence is clear that they were told that the book was covered).

(c) ASIC also focuses on the note in Mr Needham's written notes which said: "*Not plan to manage collectively. Whole trade 10 days only*".[38] It is unclear what inference ASIC says

[34] CB 91 (ZIG.0005.0014.0004) – Elliott T116:18-117:16.
[35] ASIC's Submissions at [33].
[36] ASIC's Submissions at [33(a)].
[37] CB 90 (ZIG.0005.0023.0001) – Needham T79:20-80:10.
[38] ASIC's Submissions at [33(c)].

should be drawn from this note. However, it can be noted that ASIC does not reference Mr Needham's explanation, including in his section 19 examination,[39] which makes it clear that what the JLMs said related to them being able to dispose of the shares over about 10 days of trading without affecting an orderly market for ANZ shares (but not that they would seek to dispose of the shares within a 10 day period).[40]

B.3 Evidence as to the JLMs' trading intentions, and ANZ's knowledge of those trading intentions

33 There is substantial evidence showing that prior to the commencement of trading in ANZ shares on 7 August 2015:[41]

(a) the JLMs had each indicated to ANZ their intention to promote an orderly after-market in ANZ shares and not to promptly dispose of any allocation of Placement Shares to them; and

(b) ANZ understood that the JLMs intended to promote an orderly after-market in ANZ shares and did not intend to promptly dispose of any allocation of Placement Shares to them.

34 Further, a number of matters reinforce what ANZ was told and understood as to the JLMs' trading intentions, and objectively support the fact that the JLMs would not be or be expected to be short-term sellers of their shares in a way that would place downward pressure on ANZ's share price.

B.3.1 Evidence of ANZ personnel

35 Mr Moscati's evidence is that the JLMs made numerous statements to him as to their selling intentions, and in particular that: the JLMs were in no hurry to dispose of any ANZ shares allocated to them in the Placement; they had no concerns about that allocation; and, they would manage appropriately any allocation to them. For example, Mr Moscati's evidence given during his section 19 examination included the following:

(a) at Moscati T(1)36:8-16:

[39] CB 90 (ZIG.0005.0023.0001) – Needham T77:17-24, T94:3-17, T103:8-22.
[40] See also CB 23 – Needham Affidavit at [63]–[64].
[41] CB 4 – Defence at [9A(g)].

Privilege. We had – we started to have a series of discussions with the JLMs on the Friday morning to understand exactly what their intention was with that stock.

We had already had some commentary that the leads were in no rush to exit their position. And we – I reinforced that we didn't want to see anyone panic and exit the position in a irrational manner.

(b) at Moscati T(1)44:27-45:28:

Q. Okay. You said earlier that you'd already had some commentary that the JLMs were in no rush to discussions regarding their intentions.

A. Yep.

Q. Yeah. What was the commentary, and from whom did you receive it?

A. Privilege. Obviously towards the later part of the Thursday it became clear that stock would be allocated to the JLMs. We obviously spoke to the JLMs about that. Again, something new for us, for me. Had not been in that position before.

So we saw them as our trusted adviser and partners. And I asked them, you know, what the process – you know "So what happens? So what happens here", you know. This is all– all new. …

I was told that this is not the first time this has happened and this stuff does happen. That's what underwriting – you know, that's what underwriting is about. And they would manage a position, and they weren't concerned about managing the position. Now, exactly who said what on what time on what phone call, I probably couldn't tell you.

(c) at Moscati T(1)46:23-48:11:

Q. Yeah, sure. Before you had those conversations with them in which they reassured you about their intention to manage things appropriately, were you concerned that they – that the joint lead managers may exit their positions quickly?

A. Privilege. Oh, look, generally I didn't know what was going to happen and – –

Q. Was that – was that one of the concerns that you held?

A. And that would have been one of, you know, one of the concerns possibly. But, you know, as soon as you sort of get to that point you say, "Well, what happens now?" Because you've got a whole bunch of concerns.

Q. Sure.

A. You've never been here before, so – –

> Q. Sure.
>
> A. And that was – that was put to bed, you know, very early.
>
> Q. Quite quickly.
>
> A. At no stage did anyone express a concern – quite the contrary, you know.
>
> Q. Yeah, yeah.
>
> A. And so then for us, realistically, the issue was on the following day, just to make sure that that was, you know, that they were going to walk the talk and that, you know, it wasn't all just, you know, investment banker BS. And so we jumped on the call. And there was consistency at all stages that this has happened before where – you know, "We'll manage it. We'll manage it properly".
>
> And, you know, after we said we weren't paying them a fee they didn't tell us to go away and, you know, they were about to sell all the stock tomorrow; quite the contrary. At no point in time did we have a concern – you know, a real concern that they were about to act in an irrational manner.
>
> Q. What was it that the JLMs said that gave you that level of comfort?
>
> A. Pretty much told us that they would manage it – they – I can't remember the words exactly, but they weren't worried; they'd manage it appropriately.

(d) that when it became apparent during the course of the afternoon that with scale-backs it was likely that the Underwriters would take up an amount of the Placement Shares, Geoff Tarrant of DB advised ANZ that this was the best option and that "*You know, we're – we're big and ugly enough to look after ourselves*" and "*We'll manage the position appropriately … No hurry to you know, to exit the position in any hurry*".[42] Similarly, Mr Moscati recalls statements from each of the JLMs on 6 August 2015 that "*no-one was in any rush to sell the stock*"[43] and that there were "*numerous representations … made to us by the JLMs about no panic, no big deal, it's not a large portion of the stock, it's a very liquid stock, i.e., there's no fundamental concern*",[44] and that:[45]

> [L]ate in the afternoon [of 6 August 2015] and, you know, when it was clear that there would be an allocation to the JLMs, there was never any concern raised. It was seen that as "No big deal. We've seen this before. This has happened before. You know, we will manage it responsibly", and that was interesting in contrast to the re-marketing option that was there. I mean, if anyone was worried about that position, I would

[42] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)66:15-67:4.
[43] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)79:19-21.
[44] CB 96 (ZIG.0005.0043.0002) – Moscati T(2)47:15-24.
[45] CB 96 (ZIG.0005.0043.0002) – Moscati T(2)41:14-42:2.

> have absolutely expected there to be some pressure to re-market the deal, and there wasn't.

(e) in relation to the calls that he and Mr Needham then had with senior representatives of each of the JLMs early on 7 August 2015, Mr Moscati's evidence was that:[46]

> [W]e were given a view, communicated a view on the Thursday, that this wasn't anything that they couldn't manage appropriately. There was no panic. No-one had a different view to that. No-one suggested that that wouldn't be the case. In fact, I don't know how many times that was reiterated to us over and over and over again. The purpose of the call on the Friday was to make sure that that was still indeed the case, and we didn't interrogate it further. I mean, we took that at face value, that that was true and correct, and that they would act - that they would indeed act reasonably. They were in no panic. They were in no hurry to sell the stock over the course of a short number of trading days. …
>
> Then we have the call on - we start the calls on - early in the morning on the Friday, largely to understand exactly what happens from here. Clearly we had, I said previously, an indication that the underwriters were in no rush. You know, we received those comments, you know, categorically from the CEOs of the three banks. So it wasn't like, you know, we're talking to a junior dealer on the fricken desk telling us that, you know, "Don't worry, mate, she'll all be right". We spoke to the CEOs. The CEOs were not worried. There's that and for - "We're not - we're not in any hurry. We're not going to panic out of this." You know, "We'll work through it." No - no concerns at all. …

(f) Moscati T(2)16:24-17:5:

> From our perspective, did we think that [that full allocations were not made to the hedge funds] was sensible? Yes. You know, to the extent that if the JLMs were advising other than a full allocation to a hedge fund, there was rationale in their thinking, I guess we were concerned in any case about the quality of the book, and that hedge funds aren't there for a long time, and so a smaller allocation to the hedge fund didn't seem unreasonable in the light of the composition of the book, and so that was the overwhelming issue we dealt with.

36 Mr Needham's evidence is that during the call around 8:35pm on 6 August 2015, the view expressed (in relation to why hedge funds should be scaled-back) was that "*it is for the banks to pick up the stock, for them to sell the stock over – over some, you know, extended period in an orderly way and not have an unorderly sale coming from - from whichever of these hedge funds*".[47]

37 Mr Needham recalls that during the early morning calls on 7 August 2015, Steve Roberts (the Chairman of Citi in Australia) said various things, the substance of which is recorded in

[46] CB 96 (ZIG.0005.0043.0002) – Moscati T(2)55:21-56:8; CB 87 (ZIG.0005.0021.0002) – Moscati T(1)87:24-88:10. See also CB 87 (ZIG.0005.0021.0002) – Moscati T(1)93:19-20: "*on the Friday we were told that they were in no rush to sell*"; CB 96 (ZIG.0005.0043.0002) – Moscati T(2)64:8-65:4, T(2)65:25-66:5.
[47] CB 90 (ZIG.0005.0023.0001) – Needham T80:5-10.

his contemporaneous notes: "*Important for relationship … Happy to hold … disappointing but they can hold … Need to ensure no panic … we will do the right thing*".[48]. He also recalls representatives of the JLMs making statements to the effect that they were in no rush to sell any shares they acquired.[49]

38 In light of these statements, and having regard to various other matters, Mr Needham stated during his section 19 examination what he ultimately understood about the JLMs' selling intentions:[50]

> Q. All right. What did you understand or what were you told during the course of this day, or subsequently, about what the three JLMs intended to do with this position? Were they going to hold it?
>
> A. So - privileged - they had all indicated that they weren't going to sell in the first day, that, you know, there's - they had a - you know, an ability to be able to trade out of that position over the course of around about 10 days. They indicated that they'd hedge their positions, so that - that's the next day, that they'd hedge their positions. So, you know, I took from that that, you know, they're all well-capitalised large - you know, large institutions that didn't need to sell, they had theirs - that had a relationship with us where they didn't want to see an unorderly sale, that we had some confidence that that's what would happen, that there wouldn't be an unorderly sale. …
>
> Q. But you were fairly confident that, you know, they wouldn't be forced into a fire sale or anything like that?
>
> A. Privilege. Correct. So we were comforted because, you know, we know the institutions. We know their capital strength. We know they had - had approvals to hold that stock. We know that they'd hedged their positions. So, you know, they gave us comfort that - that they - they weren't necessarily, you know, a seller in - in any particular time frame.

39 Further, Mr Moscati and Mr Needham were the two individuals at ANZ who dealt directly with the JLMs throughout the Placement and who had management responsibility with respect to the Placement. Given that Mr Elliott was one step removed from the detail of the transaction, and received his updates primarily from Mr Moscati, there is no proper basis to suggest that he could or would have received any different information as to the JLMs' intentions or that he would have formed any different understanding as to their intentions. Further, Mr Moscati's evidence is that he gave updates to Mr Elliott and that as a result of these "*he [Mr Elliott] was knowledgeable, or should have been knowledgeable that the JLMs weren't, you know, likewise in any hurry to sell the stock.*"[51]

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[48] CB 90 (ZIG.0005.0023.0001) – Needham T121:3-16; CB 23 – Needham Affidavit at [83].
[49] CB 23 – Needham Affidavit at [70].
[50] CB 90 (ZIG.0005.0023.0001) – Needham T93:26-94:17, T95:28-96:10.
[51] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)122:18-23.

40 ASIC's Submissions seek to downplay what ANZ was told by the JLMs by: (a) not setting out that evidence; and (b) then contending that all that was provided by the JLMs was a "*general indicat[ion] to ANZ, without detail, that they [the JLMs] would 'manage their position' in the Placement Shares*", that ANZ was "*concerned*" about what that meant,[52] and that any assurances from the JLMs might just be "*investment banker BS*".[53]

41 ASIC's Submissions in this regard do not properly have regard to the full evidence given as to these matters, as set out in paragraphs 35 to 39 above. In this regard, the evidence (when read fairly and as a whole) shows that:

(a) at no time did ANZ have a real concern that the JLMs were going to act in an irrational manner so as to sell their shares in a way which might place downward pressure on ANZ's share price;

(b) the fact that the JLMs would manage their shareholding appropriately, and that they were not in a hurry to exit their position, was reiterated to ANZ "*over and over and over again*";[54]

(c) the reference by Mr Moscati to "*investment banker BS*" (which ASIC quotes twice in its submissions[55]), is taken out of context by ASIC. The statement by Mr Moscati in his section 19 examination referred merely to him wanting additional comfort as to the JLMs' position from their most senior representatives in Australia (to "*make sure*" that the statements that they would deal appropriately with shares allocated to them was the case);[56]

(d) importantly, this comfort was sought and received on calls on the morning of 7 August 2015 prior to ANZ shares resuming trading. In particular, Mr Moscati's evidence was that ANZ received this comfort "*categorically from the CEOs of the three banks*".[57]

[52] ASIC's Submissions at [35].
[53] ASIC's Submissions at [36].
[54] CB 96 (ZIG.0005.0043.0002) – Moscati T(2)55:21-56:8.
[55] ASIC's Submissions at [36], [140].
[56] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)46:23-48:11.
[57] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)87:24-88:10.

B.3.2 Other matters relevant to the JLMs' trading intentions

42 In addition to direct evidence given by ANZ personnel as to these matters, there is also a range of other matters which support or reinforce this being the JLMs' intention, the likelihood of this having been communicated to ANZ, and this reasonably being understood by ANZ as being the JLMs' intention.

B.3.2.1 The JLMs had hedges in place, and would be expected to have had hedges in place

43 Mr Needham and Mr Moscati were each told, and understood, that the JLMs would and had hedged their position.[58] This was consistent with what they expected based on their experience.[59]

44 That the JLMs informed ANZ that they had hedges in place, and would put them in place, is consistent with other contemporaneous documentary evidence. For example:

(a) an email between Citi personnel[60] evidences that prior to market open on 7 August 2015, Citi already had a hedge in place for $170 million ($125 million of SPI, and another $35 million of "*E-mini s&p future*"), and that the SPI futures hedge was likely to grow during the morning;

(b) an email between JPM personnel[61] shows that JPM had a macro hedge of US$50 million short SPX futures prior to the opening of trade, and that during the day on 7 August 2015 JPM entered into a short SPI futures position of US$30 million;

(c) a text message between DB personnel at 1:19am on 7 August 2015 which states that "*We have hedged with index about 125m*".[62]

B.3.2.2 JLMs' reputation and their relationship with ANZ

45 There is evidence in relation to the overlapping issues of the JLMs' reputation in the market place, and their relationship with ANZ. As developed below, these matters provide an additional reason why the JLMs would not be, and would not be perceived by those in the market to be, short-term sellers of stock that they had acquired in the Placement.

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[58] CB 90 (ZIG.0005.0023.0001) – Needham T94:3-17; CB 87 (ZIG.0005.0021.0002) – Moscati T(1)108:5-24.
[59] CB 23 – Needham Affidavit at [69]; CB 87 (ZIG.0005.0021.0002) – Moscati T(1)104:8-9.
[60] CB 302 (CIT.100.053.3387).
[61] CB 338 (ZIH.007.001.0576) at .0580, .0576.
[62] DBA.303.001.0016 (text message between Michael Ormaechea and Michael Richardson).

46 These matters were touched on by ANZ personnel during their section 19 examinations. For example:

(a) Mr Needham stated that "*from a relationship perspective*" he would not have expected the JLMs to sell their shares "*on an un-orderly basis*";[63]

(b) Mr Moscati stated that he raised, at the time of the Placement, the importance of the ANZ relationship with the JLMs.[64] Mr Moscati also referred to the relationship ANZ had with the investment banks in the context of why they would be in no hurry to sell the shares.[65]

47 At the time of the Placement, the JLMs also noted to ANZ the importance of the relationship in the context of statements to the effect that they were happy to hold the shares and would "*do the right thing*".[66] Internal JLM documents also recognised these relationships. For example, a DB internal memorandum in relation to consideration of its participation in the Placement, which notes that DB has strong personal relationships with the CEO and several members of the Board of Directors and executive management team of ANZ, that DB has regular dialogue with ANZ in relation in particular to "*Strategy/M&A*", and that DB had a number of notable recent engagements with ANZ.[67]

B.3.2.3 The JLMs' obligations under the ASX Market Rules

48 Each of the JLMs was obliged by s 798H of the *Corporations Act* to comply with the *ASIC Market Integrity Rules (ASX Market) 2010* (Cth) (**Market Integrity Rules**).[68]

49 Rule 5.9.1 of the Market Integrity Rules required each of the Underwriters not to do anything which results in the market for ANZ shares not being both fair and orderly, or fail to do anything where that failure has that effect. The expression "orderly" in that context

[63] CB 90 (ZIG.0005.0023.0001) – Needham T65:3-18. See also at Needham T94:3-17, T120:11-15.
[64] CB 87 (ZIG.0005.0021.0002) – Moscati T(1):42:5-18: "*we obviously played the relationship card pretty heavily, you know, 'This is a long–standing relationship and, you know, we expect you all to do the right thing'. Which, by the way, was everything they'd led us to believe would happen prior to that point*".
[65] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)74:7-11.
[66] CB 23 – Needham Affidavit at [81]–[83].
[67] CB 113 (DBA.401.001.0785) at .0787. CB 88 (ZIG.0005.0022.0002) – Transcript of s 19 examination for Michael Richardson on 30 March 2016 T52:7-22. In these submissions this transcript is referred to as "**Richardson T**". See also Transcript of s 19 examination of Itay Tuchman dated 22 March 2016 T(1)28:28-29:8 and Transcript of s 19 examination of John McLean dated 22 March 2016 T(1)40:27-41:7. In these submissions these transcripts are referred to as "**Tuchman T(1)**" and "**McLean T(1)**" respectively.
[68] CB 4 – Defence at [9(h)], admitted in CB 5 – Reply at [7].

encompasses reliable market operations displaying price continuity and depth and in which unreasonable price variations between sales are avoided.[69]

B.3.2.4 What ANZ was told as to whether the book was covered and rationale for the scale-backs

50 As noted above, ANZ was told and understood that:

(a) the book was covered; and

(b) the JLMs would take up a portion of the Placement Shares by scaling-back the allocations to certain investors, and that a substantial reason for the JLMs recommending that course of action was that investors such as hedge funds, if not scaled-back, might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares.

51 That ANZ was told and understood these matters reinforced and supported ANZ's understanding as to the JLMs' trading intentions in relation to Placement Shares allocated to them. In short, given that ANZ understood that the book was covered, and that a key reason for scaling-back allocations to certain hedge funds and allocating shares to the JLMs, was to avoid the shares being placed in the hands of short-term sellers, it would be inconsistent with this to then expect the JLMs to themselves be short-term sellers.

52 ASIC seeks to suggest that the reason that the allocations to certain hedge funds was below the demand recorded in the Draft Allocation List was that (in summary):[70]

(a) certain identified investors had amended their bids to a lower amount or had indicated to one of the JLMs that they did not want an allocation higher than the lower amount (then allocated to them);

(b) having regard to (a):

(i) the JLMs considered that the real demand of those identified investors was at or around the lower figure proposed to be allocated to them; and

(ii) there was a risk that those identified investors would not settle on a higher allocation of shares to them.

[69] See, albeit in the context of *Corporations Act* s 792A(a), *Transmarket Trading Pty Ltd v Sydney Futures Exchange Ltd* (2010) 188 FCR 1, 26 [95].
[70] CB 5 – Reply at [5(a)].

53 The specific investors identified by ASIC and on whose conduct it relies were Myriad, Segantii, Soros, DE Shaw, Brevan Howard and Indus (together, the **Six Investors**). ASIC has confirmed that it is not advancing a case that any investor other than the Six Investors amended their bids in any relevant way or had indicated to one of the JLMs that they did not want an allocation higher than the lower amount then allocated to them.

54 ASIC alleges in its Reply that ANZ was aware of these reasons for the scale-backs.[71] ASIC's Submissions do not identify any evidence in support of this allegation.

B.4 Evidence as to whether the book was in fact covered and the rationale for scale-backs

55 In ANZ's submission it is evident from the evidence of JLM personnel and relevant documentary evidence that the JLMs: (a) considered the book to be covered; (b) communicated to ANZ that the book was covered; (c) communicated to investors that the book was covered; and (d) scaled-back hedge funds in order to assist the after-market and advised ASIC that this was the rationale behind scaling-back investors.

56 This is evident from the material referred to above, but also from the following:

(a) Robert Jahrling, who was the Head of Equity Capital Markets Syndication at Citi,[72] gave the following evidence as to the decision to scale-back certain hedge funds:[73]

> A. The ultimate allocation decision is a joint decision between all book runners taking a number of factors into account, including, and, you know, not being a full, there may be others, but, you know, part of the consideration is what is a current, in terms of a percentage allocation, accustomed to receiving. Not what is allocable, i.e. there is a difference between the capacity of an investor to take, in this instance 100 million dollars and that investor being accustomed to receiving 100 or 100 per cent allocation. If I talk percentages and dollars – almost the same. And then, obviously from the book runners or jointly manager's perspective, there is also an analysis and a – call it an analysis – I guess we will form – try to form an opinion as to what may be the best outcome for the after-market to create an already [sic: orderly] after-market based on those allocations. …
>
> [W]hen all the facts had been collected or when all the orders had been aggregated and received and confirmed, that the underwriters at that point made a decision not only based on the order sizes for each investors that had been received but also with a reference to how we think or thought we could best manage or – and you can never ensure but how we could be – what's the right word – well, give the transaction the best opportunity to trade well in the aftermarket. So we obviously take that as a – as one of

[71] CB 5 – Reply at [6].
[72] CB 93 (ZIG.0005.0039.0001) – Transcript of s 19 examination of Robert Jahrling dated 12 August 2016 at T9:25-12:16. In these submissions this transcript is referred to as "**Jahrling T**".
[73] CB 93 (ZIG.0005.0039.0001) – Jahrling T52:1-20, T84:4-85:1

> the reference points as par– of an allocation policy – once all information has been received.

(b) Mr Jahrling also gave evidence that the reason for scaling-back investors such as Segantii was because the JLMs determined that it was in the best interest of the transaction, with reference to the after-market, that this scaling take place,[74] and that he was "*absolutely not*" concerned that Segantii may default if it was allocated $250 million.[75] Mr Jahrling was the liaison point with Segantii insofar as Citi was concerned.[76]

(c) Itay Tuchman of Citi, who was involved in the allocation meeting and in discussions with ANZ (although he did not speak to investors) stated the following in relation to whether the book was covered and the rationale for scaling-back certain investors:[77]

> Q. Well, could you just give me some examples of what you do know? Maybe not a particular person or company, but why the decision was made to allocate nothing or an amount less than they had bid?
>
> A. Privilege. From recollection, there's a number of reasons that I believe were discussed; one of which was that there were a number of large hedge funds that bid for large amounts that we felt would cause significant aftermarket disruptions should they be given full allocations. …
>
> Q. You referred to it as generically, a class; so I'm asking you in relation to your answer, do you know why that class of investor [hedge funds] was scaled down in particular?
>
> A. Privilege. I know that there were a number factors discussed as to why individual clients in that class were scaled, and those discussions were around, as I said earlier, the belief that potentially those clients would provide disorderly aftermarket trading. Some consideration for both Citi's and the general - each JLM's individual institutional relationships with those hedge funds, and the strength and nature of them. And in the case of long only investors, by contrast, the feeling that they wanted to hold the stock - they generally hold the stock and they don't trade the stock, as a general, as a class, and, therefore, in generic terms, some of the long only's were fully allocated. …
>
> Q. Okay. So when you - it appears you had two beliefs at this time. You believed that the book was covered on one hand. You also believed that there was a

[74] CB 93 (ZIG.0005.0039.0001) – Jahrling T70:10-19.
[75] CB 93 (ZIG.0005.0039.0001) – Jahrling T73:16-74:9.
[76] CB 93 (ZIG.0005.0039.0001) – Jahrling T68:4-13.
[77] CB 86 (ZIG.0005.0011.0004) – Tuchman T(1)28:17-29:8; CB 95 (ZIG.0005.0041.0001) – Transcript of s 19 examination of Itay Tuchman dated 19 August 2016 at T(2)12:23-14:4, T(2)23:23-24:24, T(2)136:3-23. In these submissions this transcript is referred to as "**Tuchman T(2)**".

possibility of a rump position. So can you just explain to us how those two positions can coexist?

A. Privileged. At some point, I believed that we might make a decision to scale back some clients, which would leave the underwriters taking stock.

Q. And what was it about, I guess, the nature of the bids from certain investors that made you think that they were going to get scaled back?

A. Privileged. I believe at the time, I was told there were some bids from hedge funds that we thought maybe from a commercial perspective we wouldn't want to fully allocate, and part of that would have been our belief around how they might have traded that in the aftermarket.

Q. Okay. And when you indicated - and I think we covered some of this in the previous examination but just to clarify, when you say the way that they might have traded in the aftermarket, are you talking about the likelihood of them disposing of it fairly aggressively?

A. Privileged. I would use the terminology "in a disorderly way". That would be my terminology.

Q. Okay. And when you say, "disorderly", can you just expand on that?

A. Privileged. Some of these clients, they're not long-term investors in things. They participate in processes like these sometimes for very short profits and one of the considerations, not the exclusive consideration, that at least at the time I thought about would have been that we wanted to ensure that the people who got stock would tend to either dispose of it in an orderly fashion or be long-term holders of the stock. …

SMITH: Q. Is there any kind of landmark event that stands out in your mind that underlines that belief? So you say you believe the book was covered at five. Is that because something happened around that time that makes you believe that?

A. Privileged. It's based on two things. One is that I recall being told I believe by Mr McLean but it may have been others and I think consistent with what I've reviewed around the calls that I was making to update senior management that my belief was that the book was covered; and second relies on when I walked into the bookbuild room I don't think maybe an hour after this event that the first number that I saw on the top of the screen indicated that according to the definition I provided that the book was covered. …

Q. Okay, well, you used the term, "disorderly market". I'm just interested to know what you meant by a "disorderly market".

A. Privileged. I think what I meant was hypothetically, if we were to have tried to allocate 100 per cent to all of those hedge funds, that the next day's market activity might have been disorderly --

Q. In what way?

A. -- over the next few days.

Q. In what way?

A. Privileged. It really depends on each one of those hedge fund's activity --

Q. Sure, but --

A. -- but in a way, that a hedge fund, for example, that might have bid a lot because they thought they would get substantively scaled back wouldn't have the risk avoidance or the capital, or there would be some trigger which would require them to market on the open, sell it in a disorderly way. That's the crux of it, yeah.

(d) John McLean, who was the Head of Capital Markets at Citi, and responsible for the overall execution of the Placement from Citi's perspective, also gave similar evidence in relation to whether the book was covered and the rationale for scaling-back certain investors:[78]

A. Privilege. We exercised our judgement, our best judgment in respect to our obligations to our clients on how best to allocate that book.

Q. I'm not saying there's anything wrong, I'm not critical, I'm just trying to understand.

A. Yes.

Q. So factually, there was decisions made to allocate a less than bid for amount and that had the effect of making the shortfall larger than it otherwise could have been?

A. Privilege. Yes.

Q. And that was a jointly made decision amongst the three underwriters?

A. Privilege. That was a recommendation that was provided by the underwriters to the client.

Q. Right. But that recommendation was arrived at as the basis of a joint agreement .

A. Privilege. Yes.

[78] CB 85 (ZIG.0005.0013.0004) – McLean T(1)40:9-41:7; CB 94 (ZIG.0005.0031.0003) – Transcript of s 19 examination of John McLean dated 18 August 2016 at T(2)36:16-37:23, T(2)40:1-40:7. In these submissions this transcript is referred to as "**McLean T(2)**".

MR EVANS : Q. You said that you have obligations to your client, what did you mean by that?

A: Privilege. To provide advice on what we call register construction, being the quality of the register, to pay heed to the aftermarket and to look after the - I should say to pay heed to the interests of, as I've described earlier, shareholders who participated in the transaction. …

MR LUXFORD: Q. John, when you use the word shortfall, can you tell me what you actually are talking about in respect to this placement?

THE EXAMINEE: Privilege. The shortfall was the amount of securities that the underwriters were required to take up or subscribe for under the underwriting agreement.

Q. And how is it - what circumstances arose that it was necessary for them to do that?

A. Privilege. Based on a reasonable allocation, excising our professional judgement, there were less securities allocable than were underwritten by the underwriters.

Q. In perhaps, I am not really an equities guy, so in plain speak, there were insufficient bids for there to be a full allocation of the value of shares for ANZ to place?

A. Privilege. There was sufficient bids and - privilege - as we discussed last time when we explored the concept of the allocation process, in the collective judgement of the JLMs there was insufficient allocable demand and that created the shortfall in the allocations.

Q. If, sorry - so there were more bids than stock offered at the point of where the placement time was closed off?

A. Privilege. Effectively, yes.

Q. Well, according to your knowledge there was or there was not?

A. Privilege. According to my knowledge, there was.

Q. okay. So those bids, why weren't they allocable if they were above the level of stock to be placed? What made them un-allocable?

A. Privilege. There were firm orders for those securities so - privilege - technically they were allocable. …

Q: There was decisions taken by the JLMs jointly that they would allocate less than, or not at all, to some bids?

A. Privilege. In some cases.

Q. And that brought about the shortfall?

A. Privilege. The shortfall was a result of the allocation process.

(e) Michael Richardson, who was the Head of ECM at DB and had responsibility for leading the ECM team at DB in executing the Placement,[79] gave similar evidence in his section 19 examination, as follows:

(i) when the books were closed at 6pm, "*we were covered*", albeit that "*we weren't overwhelmed*" and the transaction "*limp[ed] over the line*";[80]

(ii) in this context his evidence was that:[81]

> We, as three JLMs, assessed and had due regard for our client, the ANZ, our clients, the institutions, and the aftermarket, and taking into account those considerations, we came to the conclusion that we should be scaling back some of those hedge funds considerably. Mainly because if we had allocated them in full, we suspect the aftermarket and the reaction would have been pretty negative and reflected poorly on us reputationally and, again, would have resulted in a pretty soggy aftermarket, which wasn't our desire. …
>
> So our assessment as three JLMs was that we should scale back some of those big hedge funds quite considerably, because we were concerned about what they might do in the aftermarket if they got allocated in full. …
>
> Again, our thoughts on what the aftermarket would do was that we thought – we thought this would be reasonably positive because it was ANZ, having raised equity, had answered the market's concerns about their capital position. The whole Australian market and the global market was expecting the Aussie banks to raise. So our base case was that this should be positive for the stock. But over-allocating or filling substantial orders from hedge funds in that way we think would have probably been – again, it's an assumption, and using our experience we were concerned about what might happen in the aftermarket. …
>
> Q. Why did you not allocate more shares to the hedge funds, then, and then you wouldn't have had any financial exposure?
>
> A. Privilege. Because, again, we made the – we collectively came to a conclusion that that would be a less desirable outcome than ourselves taking it and trading it in a more responsible manner over a period of time.
>
> As I said, the banks and ANZ had an equity monkey on their back, so our hope was that this would trade positively over the medium term and we thought we were – we would be better managers of that risk than potentially

[79] CB 88 (ZIG.0005.0022.0002) – Richardson T9:1-12:15.
[80] CB 88 (ZIG.0005.0022.0002) – Richardson T51:5-52:6.
[81] CB 88 (ZIG.0005.0022.0002) – Richardson T:52:7-22, T53:16-20, T96:28-97:15.

> those hedge funds that might be overallocated. Again, these are highly subjective assessments that are made on the fly.

57 Mr McLean was also asked specifically about the email sent by Mr Bakker of Citi to investors at 5:01pm on 6 August 2015, the title of which was "**ANZ AU BOOKS CLOSE IN 1 HR; BOOK IS COVERED & WILL PRICE @ 30.95**".[82] In relation to this, the following exchange occurred:[83]

> Q. In circumstances where it appears as if there's going to have to be some scaling and that it appears as if there'd be a shortfall, is it potentially misleading to release this kind of information?
>
> A. Oh - privilege - no, I don't believe so, the book is --
>
> Q. And why is that?
>
> A. -- the book was covered. If the book is covered the market understands there is an excess of demand for the securities that are on offer.
>
> Q. But you've indicated that you're aware, and certainly Mr Tuchman is - appears to be aware, that the demand is possibly not particularly genuine and that some investors may have overbid?
>
> A. Privilege. As I said earlier, any order in the book is capable of being allocated in full. The syndicate's job is to make value judgments around the appropriateness of an individual allocation

58 Further, all spreadsheets sent internally among the JLMs after 6pm on 6 August 2015 showed that the book was covered. This includes: an allocation list sent by Kristopher Salinger of Citi at 8:41pm on 6 August 2015;[84] an allocation list sent by Anthony Hanna of Citi at 10:57pm on 6 August 2015;[85] an allocation list sent by Anthony Hanna of Citi at 12:04am on 7 August 2015;[86] and an allocation list sent by Kristopher Salinger of Citi at 2:08am on 7 August 2015.[87]

59 ASIC's pleaded case that the book was not in fact covered because the Six Investors had amended their bids prior to the close of the book (as largely set out in Annexure C to ASIC's Submissions) is dealt with in **Annexure A** to these submissions. ANZ submits that when

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[82] CB 210 (CIT.101.011.2656).
[83] CB 94 (ZIG.0005.0031.0003) – McLean T(2)133:6-24.
[84] CB 235 (CIT.100.005.4100) and CB 236 (CIT.100.005.4102).
[85] CB 249 (CIT.100.005.4112) and CB250 (CIT.100.005.4113).
[86] CIT.100.005.4117 [CB 252] and CIT.100.005.4119 [CB 253].
[87] CIT.100.005.4124 [CB 270] and CIT.100.005.4126 [CB 271].

the evidence is looked at as a whole and all relevant matters are objectively considered, there is no evidence that warrants a conclusion that any of the bids were amended.

B.5 Calls after the Placement was complete

60 ASIC relies on calls which took place after the resumption of trading on 7 August 2015, and on the morning of 8 August 2015.[88] ASIC seeks to focus on certain comments which (it apprehends) assist its case, while at the same time ignoring other comments in the calls that are inconsistent with its case.

61 As an example, during the call between senior representatives of the JLMs (but not ANZ) at 10:38am on 8 August 2015, the JLMs discussed the issue of whether there was a need for the JLMs to make a disclosure by reason of "*the market integrity rule*".[89] By reason of s 798H of the *Corporations Act*, each of the JLMs was required to comply with the Market Integrity Rules. It is apparent that:

(a) the market integrity rule under consideration by the JLMs was rule 5.10.5 which provides (underlining added):

> Disclosure of shortfall—Must disclose to Client
>
> A Market Participant, an Employee or a director of a Market Participant or a company which is a partner of a Market Participant who or which will be required to acquire Cash Market Products as underwriter or sub-underwriter must not offer such Cash Market Products to clients unless:
>
> (a) they first inform the clients concerned of the closing date of the issue or offering of the Cash Market Products and the reasons for the acquisition; or
>
> (b) the offer to the client is made more than 90 days from the closing date.
>
> Maximum penalty: $100,000

(b) the point under consideration by the JLMs was whether they had been required to acquire the Placement Shares as underwriter, such that this was a "shortfall" within the meaning of the Market Integrity Rules which they had to disclose to clients.

[88] ASIC's Submissions at [55]–[59]; CB 3 – FASC at [29(b)].
[89] CB 357 (ZIH.002.001.0542, audio); CB 356 (ZIH.002.001.0830, transcript). See transcript at p 7, statements made by Oliver Bainbridge of JPM. See also CB 362 (DBA.401.001.0812) which confirms the focus of the JLMs on rule 5.10.5 of the *ASIC Market Integrity Rules*.

62 In this context:[90]

(a) Michael Ormaechea of DB said: "*I personally don't understand how you have to disclose because the book was covered, and in managing the book we've pulled the stock back*". Mr Ormaechea was at the time the Head of Global Markets for Asia-Pacific for DB and the most senior DB capital markets person in Australia, and Michael Richardson reported to him;[91]

(b) Jeff Herbert-Smith of JPM said in response: "*That's my opinion as well*". Mr Herbert-Smith was at the time Head of Markets at JPM.

(c) Michael Richardson of DB then said: "*we have a covered book and we took a commercial decision to take the stock for the market ... So I think it boils down to the fact that we had a covered book and it was our decision to take this on as a commercial undertaking to protect the market and our clients*".[92] The evidence shows that Mr Richardson was closely involved in the bookbuild and allocation process. At the time he led the equity capital markets (**ECM**) team at DB and oversaw the execution of ECM transactions in which DB was involved.[93] More specifically, he was responsible for leading the ECM team in the execution of the ANZ share placement.[94]

63 These statements are significant. The call involves senior representatives of each of the JLMs. In response to these clear statements that the book was covered, no-one said anything to suggest that what was being stated was not accurate. ASIC places specific emphasis on this call, yet fails to refer to these statements.

64 Further, there were contemporaneous written communications in which the commonly understood view that the book was covered was stated. For example, in an email sent by Lee Newton of JPM to Michael Ormaechea and Michael Richardson of DB on 9 August 2015, which discussed the ongoing consideration of the issue concerning rule 5.10.5 of the *ASIC Market Integrity Rules*, in which Mr Newton said (emphasis added).[95]

> I pointed out that this is all irrelevant until Thursday because even assuming the rule does apply despite the facts of a covered book, scale back and election rather than a requirement to take shares, the rule only refers to the securities received from the offer, rather than

[90] CB 356 (ZIH.002.001.0830, transcript) at p 8.
[91] CB 88 (ZIG.0005.0022.0002) – Richardson T11:25-12:15; CB 23 – Needham Affidavit at [74].
[92] See also CB 88 (ZIG.0005.0022.0002) – Richardson T92:14-94:9.
[93] CB 88 (ZIG.0005.0022.0002) – Richardson T11:7-24.
[94] CB 88 (ZIG.0005.0022.0002) – Richardson T13:16-19.
[95] DBA.401.001.0812.

ANZ shares generally. These shares aren't received until Thursday so any selling of ANZ during the first three days of this week will need to be other covered ANZ shares.

C. STATUTORY SCHEME AND GENERAL PRINCIPLES

C.1 Relevant statutory provisions

65 The continuous disclosure obligations applicable to a listed entity are set out in ss 674 to 677 of the *Corporations Act*. Those provisions relevantly provide:

> **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.
>
> …
>
> **676 Sections 674 and 675 — when information is generally available**
>
> (1) This section has effect for the purposes of sections 674 and 675.
>
> (2) Information is generally available if:
>
> (a) it consists of readily observable matter; or
>
> (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
>
> (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph (2)(a);

(b) information made known as mentioned in subparagraph (2)(b)(i).

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.

C.2 ASX Listing Rules

66 At all material times:

(a) ASX Listing Rule 3.1 provided as follows:

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.

(b) the definition of "aware" in ASX Listing Rule 19.12 was as follows:

an 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.

(c) the definition of "information" in Listing Rule 19.12 was as follows:

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.

C.3 Establishing a contravention of s 674(2) of the *Corporations Act*

67 Having regard to the regulatory regime set out above, in order to succeed in its claim of a contravention of s 674(2) of the *Corporations Act*, ASIC will need to establish that:

(a) "information" existed within the meaning of ASX Listing Rule 3.1 and s 674(2)(b);

(b) ANZ had that information (s 674(2)(b)) and was aware of it (ASX Listing Rule 3.1);

(c) the information was "information concerning [ANZ]" within the meaning of ASX Listing Rule 3.1;

(d) the information was not generally available (s 674(2)(c)(i)); and

(e) a reasonable person would have expected that information to have had a material effect on the price or value of the ANZ's shares, if it had been generally available (s 674(2)(c)(ii), ASX Listing Rule 3.1, including by reference to s 677).

C.4 Relevant general principles of statutory construction

68 The appropriate approach to statutory construction is well established, in that the task must have regard to the context, including the statutory purpose, of the legislation being construed.

69 Section 15A of the *Acts Interpretation Act 1901* (Cth) provides that:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

70 In *SZTAL v Minister for Immigration and Border Protection*, Kiefel CJ, Nettle and Gordon JJ explained that:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[96]

71 In that same case, Gageler J elaborated on the proper approach to statutory interpretation, stating that:

> Mason J said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*:
>
> > "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation,

[96] (2017) 262 CLR 362 at [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–382, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 45–47 and *CIC Insurance v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

> divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."[97]

Drawing on that statement, and its antecedents, Brennan CJ, Dawson, Toohey and Gummow JJ said in *CIC Insurance Ltd v Bankstown Football Club Ltd*:

> "[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."[98]

Both of these paragraphs have been cited too often to be doubted. Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text…

The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies".

Integral to making such a choice is discernment of statutory purpose.[99]

72 Accordingly, it is appropriate and necessary to interpret the relevant statutory provisions in the *Corporations Act*, and the ASX Listing Rules, in accordance with the evident purpose of the ASX Listing Rules and the continuous disclosure regime in the *Corporations Act*. This is reinforced by ASX Listing Rule 19.12 which provides that the rules must be interpreted in accordance with their spirit, intention and purpose, and in a way that best promotes the principles on which the ASX Listing Rules are based.

C.5 Context and purpose of market regulation and continuous disclosure

73 In light of the relevant principles of statutory interpretation, it is necessary to ascertain the context and purpose of the continuous disclosure regime.

74 Continuous disclosure obligations were first introduced into Commonwealth statute by the *Corporate Law Reform Act 1994* (Cth) which amended the *Corporations Act 1989* (Cth) (***1989 Act***). The 1989 Act was replaced by the *Corporations Act* in 2001, in which the current

[97] (1985) 157 CLR 309 at 315 (emphasis added).
[98] (1997) 187 CLR 384 at 408 (emphasis added).
[99] (2017) 262 CLR 362 at [35]–[39] (emphasis added) (citations omitted).

continuous disclosure regime is contained, following a number of reviews. These reviews included the final report of the Financial System Inquiry of 1997 (commonly known as the **Wallis Report**) and the review of the Corporate Law Economic Reform Program (**CLERP**). In 1997, the Commonwealth government published the **CLERP6** Proposal Paper,[100] which incorporated key recommendations of the Wallis Report.[101]

75 Both CLERP6 and the Wallis Report underscored as an aim of regulation the importance of market efficiency. For example, CLERP6 stated that "efficient stock markets facilitate the flow of capital into private enterprise",[102] and that "[i]nvestors will more readily participate in markets which are perceived to be efficient and fair".[103] The first listed objective of market regulation recognised in CLERP6 was to "enhance the efficiency and fairness of markets".[104] Likewise, the Wallis Report stated that "[t]he general case for regulation is founded in market failure, where efficient market outcomes are inhibited",[105] and concluded that "[m]arket integrity regulation aims to promote confidence in the efficiency and fairness of markets".[106] The report also noted that "[f]ree and competitive markets can produce an efficient allocation of resources and provide a strong foundation for economic growth and development".[107]

76 In a speech delivered at the Financial Services Council Annual Conference in 2010, Tony D'Aloisio, then Chairman of ASIC, correctly observed:

> Much of the economic underpinning to regulation in the last 20 to 30 years has come from the theories around the 'Efficient Markets Hypothesis'. In Australia this is seen in the work of the Wallis Inquiry, whose recommendations underpin much of the Corporations Act.[108]

77 A second Financial System Inquiry was conducted in 2014 (known as the **Murray Inquiry**). The Murray Inquiry concluded that:

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[100] Commonwealth of Australia, *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment,* Corporate Law Reform Program Proposals for Reform: Paper No 6 (1997) (**CLERP6**).
[101] For a general overview of the development of financial market regulation in Australia see Merav Bloch, James Weatherhead and Jon Webster, 'The Development and Enforcement of Australia's Continuous Disclosure Regime' (2011) 29 *Company and Securities Law Journal* 253; Matthew Peckham, 'From the Wallis Report to the Murray Report: A Critical Analysis of the Financial Services Regime between Two Financial System Inquiries' (2015) 33 *Company and Securities Law Journal* 478.
[102] CLERP6, 7.
[103] Ibid 21.
[104] Ibid 26.
[105] Wallis Report, 175.
[106] Ibid 188.
[107] Ibid 177.
[108] Tony D'Aloisio, 'Developments in the Global Regulatory System' (Speech delivered at the Financial Services Council Annual Conference, Melbourne, 12 August 2010) 8.

> An efficient financial system is fundamental to supporting Australia's growth and productivity. An efficient system allocates Australia's scarce financial and other resources for the greatest possible benefit to our economy, promoting a higher and more sustainable rate of productivity, and economic growth.[109]

78 The statutory purpose of the continuous disclosure obligations was considered by the New South Wales Court of Appeal in *James Hardie Industries NV v Australian Securities and Investments Commission*, in which Spigelman CJ, Beazley and Giles JJA 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.[110]

79 In *Grant-Taylor v Babcock & Brown Ltd (in liq)* (***Grant-Taylor (Appeal)***), Allsop CJ, Gilmour and Beach JJ said, referring to various extrinsic materials relevant to the introduction of the disclosure regime, that:

> 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.[111]

80 More recently, in *Crowley v Worley Ltd*, Jagot and Murphy JJ (Perram J agreeing) said:

> The purpose of s 674 and the continuous disclosure regime is clear. In Treasury Paper, *CLERP Paper No 9, Proposals for Reform — Corporate Disclosure* (Part 8 at 8.4) it was described in the following terms:
>
> > The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets … Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity's performance and prospects and this information can be more rapidly factored into the price of the entity's securities.[112]

81 Relatedly, s 1(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) provides that (emphasis added):

> In performing its functions and exercising its powers, ASIC must strive to:

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[109] Murray Inquiry, xv.
[110] (2010) 274 ALR 85 at [355] (emphasis added) (***James Hardie***).
[111] (2016) 245 FCR 402 at 418 [92] (emphasis added).
[112] (2022) 400 ALR 452 at 498 [157] (emphasis added) (***Crowley***).

(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and

(b) promote the confident and informed participation of investors and consumers in the financial system …

82 It emerges from the above authorities and contextual background that a primary purpose of market regulation, including of the continuous disclosure obligations, is to ensure that the market is efficient.[113] This was expressly recognised in the report published by the Parliamentary Joint Committee on Corporations and Financial Services in November 2009. The report, *Inquiry into Financial Products and Services in Australia,* included a submission from ASIC which noted that the:

> fundamental policy settings of the FSR regime … are based on 'efficient markets theory', a belief that markets drive efficiency and that regulatory intervention should be kept to a minimum to allow markets to achieve maximum efficiency. The 'efficient markets theory' has shaped both the FSR regime and ASIC's role and powers.[114]

83 As such, in order to properly appreciate the statutory purpose of the disclosure regime, it is necessary to elaborate on the meaning and theoretical underpinnings of market efficiency and its connection with a well-informed market.[115]

84 The efficient market hypothesis is an economic theory, generally attributed to Eugene Fama, which states that in efficient markets, security prices 'fully reflect' all available information.[116] This is because "professionally-informed traders quickly notice and take advantage of mispricing, thereby driving prices back to their proper level".[117] This, in turn, allows for allocative efficiency, namely, the efficient allocation of capital throughout the market.[118] As one commentator has said, continuous disclosure, among other things, "allows securities, or

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[113] See also: International Organization of Securities Commissions (**IOSCO**), *Objectives and Principles of Securities Regulation* (June 2010) 3, which states that the three objectives of securities regulation are protecting investors, ensuring that markets are fair, efficient and transparent, and reducing systemic risk; Robert Baxt, Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis, 2017) 11.

[114] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (Final Report, November 2009) 7 [2.2].

[115] John Holzwarth provides a general description of these matters in Section 5 of his Expert Report dated 26 November 2022 (**First Holzwarth Report**) (CB 26).

[116] Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383, 383.

[117] CB 1399 – Ronald J Gilson and Reinier Kraakman, 'The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias' [2003] (Summer) *Journal of Corporation Law* 715, 723.

[118] Gill North and Ross P Buckley, 'A Fundamental Re-Examination of Efficiency in Capital Markets in Light of the Global Financial Crisis' (2010) 33 *University of New South Wales Law Journal* 714, 721. Mr Fama argued that '[t]he primary role of the capital market is allocation of ownership of the economy's capital stock': Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383, 383.

more importantly their associated risk, to be priced accurately allowing for the appropriate distribution of capital throughout the economy".[119]

85 According to Mr Fama, "the ideal is a market in which prices provide accurate signals for resource allocation".[120] The efficient market theory has been described as being premised upon the following three assumptions:

> First, investors are assumed to be rational and hence to value securities rationally. Second, to the extent that some investors are not rational, their trades are random and therefore cancel each other out without affecting prices. Third, to the extent that investors are irrational in similar ways, they are met in the market by rational arbitrageurs who eliminate their influence on prices.[121]

86 In articulating the role of financial market regulation, the Murray Inquiry identified "three distinct, but interrelated, forms of efficiency" with which it was concerned; operational, allocative and dynamic efficiency.[122] For present purposes, the Murray Inquiry's description of allocative efficiency – which it defined as a state of affairs "where the financial system allocates financial resources to the most productive and valuable use"[123] – is most relevant. The Murray Inquiry found that:

> Central to achieving allocative efficiency is the ability of prices to adjust freely to give participants information about the value and risk of various financial products and services. Prices help allocate financial resources to productive uses. Prices also help allocate risks to those most willing and able to bear them, such as through insurance or derivative contracts. For prices to play this role, market participants require access to comprehensive information about the risks and expected returns of financial products. Allocative efficiency can be hampered by ineffective disclosure, government guarantees (explicit or implicit) and tax policies that distort price signals.[124]

D. THE RELEVANT INFORMATION WAS NOT MATERIAL

D.1 General

87 Section 674(2)(c)(ii) provides that information will only be disclosable if a reasonable person would expect such information, if it were generally available, to have a material effect on the price or value of the securities. Section 677 then stipulates that a reasonable person is taken

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[119] Rebecca Langley, 'Over Three Years On: Time for Reconsideration of the Corporate Cop's Power to Issue Infringement Notices for Breaches of Continuous Disclosure' (2007) 25 *Company and Securities Law Journal* 439, 440.
[120] Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383, 383.
[121] Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* (Oxford University Press, 2000) 2.
[122] Murray Inquiry, 4.
[123] Ibid.
[124] Ibid.

to expect information to have a material effect on the price or value of an entity's securities if the information "would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of" those securities. Section 677 is in the nature of a deeming provision which describes a sufficient, but not a necessary, foundation for establishing the materiality requirement under s 674(2)(c)(ii).[125]

88 The following general principles emerge from the authorities:

(a) the test is an objective one,[126] determined *ex ante* the relevant event which requires disclosure;[127]

(b) while the question is determined *ex ante*, an *ex post* analysis of what happened in the market, in terms of movements in share price, is a relevant cross-check that assists the Court in applying the "likely influence" test;[128]

(c) the fact that an entity with an obligation to disclose may itself reasonably believe that information would not be expected to have a material effect on the price or value of its securities does not answer the question whether the material was disclosable as required by s 674 of the *Corporations Act*;[129]

(d) the information must be "non-trivial" and rise beyond information that merely "might" influence a decision by investors.[130] Determining whether information is material may sometimes involve balancing the probability that a particular event will occur and the potential impact of the event on the company's business.[131]

D.2 Materiality of the narrow Information pleaded by ASIC

D.2.1 The premise underlying ASIC's case

89 The premise underlying ASIC's pleaded case as to materiality is that "*'persons who commonly invest in securities' would have held an expectation that the Underwriters would promptly dispose of allocated or acquired Placement Shares, and in so doing place downward pressure on ANZ's share price.*"[132]

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[125] *Vocation* at [516].
[126] *Vocation* at [515]; *James Hardie* at [527], [546].
[127] *James Hardie* [2010] NSWCA 332 [546], [454]; *Vocation* at [515]; *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2015) 322 ALR 723 (***Grant-Taylor (First Instance)***) at [64].
[128] *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [84(d)]; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 at [474]–[629]; *James Hardie* at [531]–[540].
[129] *Vocation* at [515]; *James Hardie* at [527], [546].
[130] *Grant-Taylor (Appeal)* at [96].
[131] *Vocation* at [519]; *Grant-Taylor (Appeal)* at [96]; *Grant-Taylor (First Instance)* at [278].
[132] ASIC's Submissions at [106]; CB 3 – FASC at [23(c)].

D.2.2 Would investors expect that the JLMs would promptly dispose of the shares?

90 ANZ has a number of fundamental points which it raises in response to ASIC's case on materiality, including that the pleaded information identified by ASIC is not the correct information to assess, and that ASIC's case relies on non-value relevant information which is not the type of information which a "reasonable person" would expect to have a material effect on price or value (within the meaning of ASX Listing Rule 3.1 and s 674(2)(b)) or which would influence "persons who commonly invest in securities" in deciding whether to acquire of dispose of securities (within the meaning of s 677).

91 Putting those points to one side for the moment and accepting for the sake of argument that the relevant information to assess is (and is only) the narrow sliver of information identified by ASIC, ASIC's case on materiality fails.

92 Fundamentally, this is because the factual premise on which ASIC's case is based – that persons who commonly invest in securities would, if the Information was disclosed, have expected the JLMs to promptly dispose of their shares so as to place downward pressure on the share price – is misplaced. The actual incentives of the JLMs regarding any shortfall shares would not be to be short-term sellers in a way that may place downward pressure on the share price, and this would not have been the expectation of market participants.

93 ANZ relies on the expert reports of John Holzwarth, as reinforced by numerous factual matters. Mr Holzwarth's opinion is that investors would not have held any such expectation, and that the actual incentives of the JLMs regarding any shortfall shares would not be to be short-term sellers in a way that may place downward pressure on the share price. In his opinion the premise of ASIC's case on materiality is contradicted by an analysis of the motivations of traders generally, as well as the incentives of underwriters of an equity offering such as the Placement.[133] There are several matters that he identifies in support of this opinion.

94 *First*, the JLMs were, and would be expected by market participants to be, "cash-flow" traders who would seek to reduce their exposure to a position profitably by waiting for liquidity rather than paying for liquidity.[134]

[133] CB 26 – First Holzwarth Report at Section 9.
[134] CB 26 – First Holzwarth Report at [14], [146]–[154].

95 Mr Holzwarth explains that there are three general motivations for a sale of shares: (1) information; (2) value; and (3) cash-flow.[135] In this regard:

(a) informational traders seek to profit from a view that price does not reflect all information at a given moment. Such traders are time sensitive and need to act on any informational advantage quickly in order to profit from their understanding that the price of a security does not reflect all information at a given moment. As such, informational traders are likely to face a "price impact cost" as their trading quickly to act on information may lead to a change in the price of the security (depending on the size of the trade). Accordingly, informational traders are prepared to get their trades done quickly, even if this means "paying for liquidity";

(b) value traders are traders motivated by the value of the shares. Such traders are more price sensitive than time sensitive, and would not be expected to pay for liquidity but to trade in a way that reduces the cost of trading;

(c) cash-flow traders are shareholders who are motivated to change their exposure to a position, and are not motivated by either information or value.

96 In Mr Holzwarth's opinion:[136]

(a) the motivations of the JLMs were not consistent with either informational traders or value traders. Rather, the JLMs would be expected to act in a manner consistent with cash-flow traders seeking to change their exposure to a security;

(b) market participants would not expect the JLMs to trade on information, but to act in a way that would minimise the cost of trading in reducing their exposure to the position.

97 *Secondly*, and reinforcing this first point, Mr Holzwarth identifies the fact that if the JLMs' preference was to reduce their equity risk exposure to ANZ shares for operational reasons, there were alternatives to selling the shares outright.[137] In this regard, the JLMs could, and would be expected, to use various trading strategies such as hedges. Two illustrative hedging methods that Mr Holzwarth identifies are: (a) shorting shares of the other three large banks; and (b) building short positions in ASX 200 futures contracts.[138] Mr Holzwarth provides an

[135] CB 26 – First Holzwarth Report at [148]–[151].
[136] CB 26 – First Holzwarth Report at [152]–[154].
[137] CB 26 – First Holzwarth Report at [155]–[158].
[138] CB 26 – First Holzwarth Report at [158].

analysis to show why such hedging strategies would have been available and effective.[139] Mr Holzwarth also notes a media article at the time in the *Australian Financial Review* (**AFR**) which identified the prospect that there may be "*short selling of the other banks by the underwriters of the ANZ issue to hedge their positions*".[140] This media discussion reflected the fact that market participants would have been aware that trading techniques of this type could be employed to reduce any equity exposure that the JLMs had in respect of any Placement Shares allocated to them.

98 In Mr Holzwarth's opinion the fact that the JLMs could, and would be expected to, use various trading strategies such as hedges, would mean that market participants would not have expected the JLMs to promptly sell their shares thereby placing downward pressure on the share price.[141]

99 By reference to these two points, Mr Holzwarth concludes:[142]

> For these reasons, market participants would expect that the Underwriters would follow a strategy to wait "for natural liquidity to appear at an acceptable price" in order to "minimize direct price impact". This is done by following "the best strategy for filling routine trades in a liquid name" by using an "algorithm that divides the block into small pieces, feeding them out in a controlled sequence to avoiding upsetting supply/demand balance" In this way, the expected actions of the Underwriters would be to trade in a manner "avoiding upsetting supply/demand balance" rather than place "downward pressure" on the price of ANZ shares. To the extent that the Underwriters' preference was to reduce their equity risk exposure related to the Retained Placement Shares, cross hedges could have been employed. In this way, the Underwriters could both slowly reduce their position in the Retained Placement Shares and also reduce their equity risk exposure more quickly without placing downward pressure on the price of ANZ shares.

100 *Thirdly*, and reinforcing the above points, Mr Holzwarth explains how academic research contradicts an assertion that market participants would have expected the JLMs to "promptly dispose" of shares.[143] This research shows that in fact underwriters typically act to stabilise the price of shares, including in some instances by purchasing additional shares. A key explanation identified in the literature for such conduct is the reputation of the underwriter.[144] In particular, these reputational incentives are important to an underwriter's position in the market and its ability to win future deals.[145] For these reasons, Mr Holzwarth's opinion is that market participants would have expected the JLMs to value their

[139] CB 26 – First Holzwarth Report at [161]–[164].
[140] CB 26 – First Holzwarth Report at [159].
[141] CB 26 – First Holzwarth Report at [160].
[142] CB 26 – First Holzwarth Report at [165] (citations omitted).
[143] CB 26 – First Holzwarth Report at [166].
[144] CB 26 – First Holzwarth Report at [168]–[171].
[145] CB 26 – First Holzwarth Report at [172]–[174].

reputation in making decisions about how to deal with the ANZ shares (and hence would not have expected the JLMs to promptly dispose of the shares with the effect of placing downward pressure on the share price).[146] Reputational issues had especial significance in the landscape then confronting the JLMs, in that it was expected that there would be more capital raisings by the four large Australian banks to comply with APRA's changes in capital requirements, making it particularly important for the JLMs to protect their reputation if they wanted to win future deals.[147] These matters were known to market participants.

101 It can be observed that the matters relied on by Mr Holzwarth are not merely theoretical points, but are in fact evident from or reinforced by other evidence.

102 *First*, the JLMs had each indicated to ANZ their intention to promote an orderly after-market in ANZ shares and not to promptly dispose of any allocation of Placement shares to them (see paragraphs 33 to 38 above).

103 *Secondly*, relevant personnel at ANZ held the view that the JLMs would not be short-term sellers of the ANZ shares (see paragraphs 33 to 38 above).

104 *Thirdly*, ASIC has not pleaded a case that the JLMs were in fact short-term sellers of shares in a way that would place downward pressure on the ANZ share price, nor that ANZ knew or expected that to be the case. Indeed, ASIC previously abandoned any such case (see paragraph 149 below).

105 *Fourthly*, the book was covered and the JLMs decided to take up a portion of the Placement Shares by scaling-back allocation to certain investors. A substantial reason for the JLMs recommending that course of action was that investors such as hedge funds, if not scaled-back, might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares. This decision by the JLMs reveals a preference to protect their reputation over "promptly disposing" of the shares. Mr Holzwarth notes that this supports his opinion, reached independently of this fact:[148]

> Given the Underwriters decision to purchase the Retained Placement Shares, the Underwriters would not be expected to place "downward pressure" on the price of ANZ shares by "promptly" disposing of the Retained Placement Shares. Rather, the Underwriters' decision to purchase the Retained Placement Shares would indicate to market participants

[146] CB 26 – First Holzwarth Report at [174].
[147] CB 26 – First Holzwarth Report at [175].
[148] CB 26 – First Holzwarth Report at [17].

an overriding incentive to "stabilize" the price of ANZ shares influenced by their incentive to protect their reputation.

106 *Fifthly*, as to hedges:[149]

(a) the JLMs in fact had hedges in place;

(b) ANZ was told and understood that the JLMs had hedged their position, this was consistent with what ANZ personnel expected based on their experience, and this was one of the reasons why ANZ did not consider that the JLMs would be short-term sellers.

107 *Sixthly*, contemporaneous evidence, as well as evidence given by ANZ and JLM personnel during section 19 examinations, highlights the importance of the overlapping issues of the JLMs' reputation in the market place, and their relationship with ANZ, and why those matters were consistent with an expectation that the JLMs would be unlikely to engage in after-market activity that would place downward pressure on ANZ's share price.[150] It accords with basic commercial common sense that the Underwriters would seek to maintain an ongoing relationship with ANZ and other potential issuers, particularly in light of the importance of ANZ as a company in the Australian market. To immediately sell significant numbers of ANZ shares in the period immediately following the Placement would be likely to undermine the relationship between ANZ and the Underwriters, and jeopardise further business opportunities for the JLMs. Further and relatedly, it also accords with basic commercial common sense that in a competitive market where investment banks compete for business, and where the JLMs would want to protect their relationships with their clients (the investors) who received shares in the Placement,[151] the JLMs would want to avoid a situation where the Placement resulted in damage to the share price caused by the Underwriters' subsequent trading of Placement Shares. This market dynamic would provide a strong disincentive on the Underwriters to undertake a large disposal of shares in a quick fashion.

108 *Seventhly*, as a further basic matter of commercial common sense none of the Underwriters would have any commercial incentive to negatively impact the share price through the way it dealt with the allocated shares. In fact, the opposite would be the case. Had any of the

[149] See Section B.3.2.1 above.
[150] See Section B.3.2.2 above.
[151] See, eg, CB 85 (ZIG.0005.0013.0004) – McLean T(1)41:3-7 (referring to the JLMs' paying heed to "*the interests of … shareholders who participated in the transaction*").

Underwriters elected to quickly sell a material portion of their allocation, this may have allowed one of the Underwriters to secure a short-term advantage, but it may have equally caused a negative price effect on their remaining shares, thereby causing harm to that Underwriter's broader holdings of ANZ shares and other shares in the banking sector, as well as harm to the other Underwriters and potentially to the market or sector generally. Each of the Underwriters would have been aware of the risk of this occurring had any of them engaged in this behaviour. With this knowledge, the rational approach to ensure that overall losses were averted was for each of the Underwriters to hold the shares and unwind from their positions gradually over time in a way that did not materially affect price.

109 *Eighthly*, the JLMs' obligations under the Market Integrity Rules also support the unlikelihood of the JLMs selling their shares in a way that created a disorderly market and put pressure on the ANZ share price.[152]

110 Further, and reinforcing many of these matters, the Joint Report prepared by Mr Pratt and Mr Holzwarth addressed some of these issues by stating as follows:[153]

> Pratt and Holzwarth agree that the JLM's would have had incentives to:
>
> - minimize the "price impact" of selling the Retained Placement Shares by relying on computer algorithm trading procedures.
>
> - reduce their financial exposure to the movement in the ANZ share price. This could have been achieved through a variety of ways, including selling ANZ shares, employing hedging strategies, or both.
>
> Pratt and Holzwarth agree that an example of a hedging strategy would be short selling other stocks with a high correlation to the ANZ share price, or short selling the SPI futures.
>
> Pratt and Holzwarth agree that persons who commonly invest in securities would expect the JLMs to take active steps to hedge their financial risk and attempt to minimize the "impact" of selling ANZ shares.

111 Further still, the logical conclusion that can be drawn from this *ex ante* analysis is consistent with an *ex post* analysis.[154] Mr Holzwarth has identified two relevant ways in which an *ex post* analysis supports these conclusions.

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[152] See Section B.3.2.3 above.
[153] CB 29 – Joint Report of Grahame Pratt and John Holzwarth (**Joint Report**) at p 18 (citations omitted).
[154] CB 26 – First Holzwarth Report at [17].

112 The first is through an analysis of a disclosure made by Clime on 12 August 2015 (**Clime Disclosure**).[155] On this date Clime published an article entitled "*Who was clever in the ANZ Capital Raising?*", in which it stated:

> The raising was underwritten for $2.5 billion by three investment banks – Deutsche Bank, Citi and JPMorgan. Basically, if investors didn't buy all the shares on offer, those three banks would be left holding what was left over.
>
> Interestingly the floor that was agreed of $30.95 was below the lowest closing market price for ANZ over the previous six months of $31.09. Arguably that should have mitigated the risk of an underwriting shortfall.
>
> **Left holding the can**
>
> However that is not how it turned out and the investment banks still took a risk with the timing and the pricing. In a rushed book build, they chose not to lure shareholders with a discounted rights issue but rather chose a placement without much of a discount to the existing ANZ price. …
>
> What happened?
>
> **A clear lesson**
>
> The investment banks clearly didn't get the full raising away and they have been left holding the can to some extent.
>
> ANZ's share price has now fallen below the capital raising price of $30.95.
>
> The investment banks, arguably, after mispricing the capital raising have egg on their face.
>
> Indeed by rushing a capital raising at a thin discount – through an "accelerated book build"- they increased their underwriting risk. They simply ignored the observable risk that bank equities would be under constant pressure due to the expectation that capital raisings were coming across the four large banks.

113 Mr Holzwarth conducts an analysis which demonstrates that there was not a significant negative excess return related to the Clime Disclosure (that is, the share price did not decline by reason of that disclosure).[156] The Clime Disclosure conveys information consistent with the Significant Proportion Information. Accordingly, the absence of any relevant share price reaction to the Clime Disclosure is consistent with the Information not being material (or,

[155] CB 1088 (ZIG.0003.0002.0001).
[156] CB 26 – First Holzwarth Report at [30]–[34], [39], [221]–[238].

with the compatible conclusion that the Information was already widely known prior to 12 August 2015).[157]

114 There is a second and related *ex post* analysis that is also instructive. Mr Pratt[158] and Mr Holzwarth[159] agree that there was, across the market, an appreciation that there had been a significant lack of demand for the Placement and consequentially realisation the Underwriters had purchased some of the shares. The experts disagree as to how quickly these matters would have been known in the market: Mr Pratt says that this knowledge would have "*slowly grown*"[160] such that by 12 August 2015 it had accumulated to inform the Clime Disclosure[161], while Mr Holzwarth is of the opinion that market participants would have deduced this information by the start of trading on 7 August 2015.[162] What is relevant to note for present purposes is that the experts agree that information equivalent to the Significant Proportion Information was widely available in the market.

115 Accordingly, if the Information was material (as ASIC alleges in this proceeding), one would expect an *ex post* analysis of share price movements to demonstrate this. However, Mr Holzwarth has conducted further analysis which relevantly shows that:

(a) from the opening of trading on 7 August 2015 through to 12 August 2015 (when the Clime Disclosure occurred), there was no relevant observable decline in ANZ's share price;[163]

(b) over the longer period of 7 August 2015 to 31 October 2015 Mr Holzwarth assessed relative price changes in ANZ's share price relative to the average of the three peer banks.[164] In his opinion the economic evidence indicated that to the extent that a realisation of the Underwriters' purchase of the Placement Shares had "*slowly grown*" (as opposed to having been known at the commencement of trading on 7 August 2015), it did not lead to a decline in the price of ANZ shares.[165]

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[157] CB 26 – First Holzwarth Report at [233]–[236].
[158] CB 24 – Expert Report of Grahame Pratt (**First Pratt Report**) at p 8–9. Note also Mr Pratt's opinion that: "*the institutional market at least, would have become aware that the Underwriters had been forced to acquire some of the Placement Shares due to insufficient demand from institutions*" (First Pratt Report at p 9).
[159] CB 27 – Expert Report of John Holzwarth, responding to the Expert Report of Grahame Pratt (**Second Holzwarth Report**) at [25].
[160] CB 24 – First Pratt Report at p 8.
[161] CB 24 – First Pratt Report at p 9.
[162] CB 24 – First Pratt Report at p 8; CB 27 – Second Holzwarth Report at [11], [25].
[163] CB 27 – Second Holzwarth Report at [14]–[15], [47].
[164] CB 29 – Joint Report at p 31–32.
[165] CB 29 – Joint Report at p 32.

D.2.3 Conclusions on the materiality of the narrowly identified Information

116 Accordingly, ASIC's case on materiality fails for the fundamental reason that ASIC will not demonstrate that investors would have held an expectation that the JLMs would promptly dispose of ANZ shares in a way that would place downward pressure on ANZ's share price.

117 ASIC's materiality case also fails for numerous additional reasons.

118 The "deeming provision" in s 677 relates to what a reasonable person would expect to be the effect on "persons who commonly invest in securities". Accordingly, it is necessary then to understand what is meant by "persons who commonly invest in securities".

119 ASX Guidance Note 8, in applying the test in s 677 of the *Corporations Act*, states that the ASX interprets the reference to "persons who commonly invest in securities" as a reference to "*persons who commonly buy and hold securities for a period of time, based on their view of the inherent value of the security*". In the ASX's view, "*it therefore does not include traders who seek to take advantage of very short term (usually intraday) price fluctuations and who trade in and out of securities without reference to their inherent value and without any intention to hold them for a meaningful period of time*".[166] The footnote which the ASX included in relation to these statements then goes on to say:[167]

> The exclusion of such traders from the class of "persons who commonly invest in securities" is an important one. These types of traders often make trading decisions on the basis of very small movements in market price and so their inclusion in that class could artificially reduce the level of price movement that might be regarded as "material" under Listing Rule 3.1 and section 674. Also, their trading decisions typically are made without any regard to the underlying fundamentals of the securities in which they trade.

120 In *ASIC v Vocation Ltd (in liq)* (**Vocation**), Nicholas J considered the operation and meaning of s 677 of the *Corporations Act*, stating :

> [T]he use of the word "invest" rather than purchase or acquire in s 677 suggests that the hypothetical reasonable person referred to in that section will be someone who makes an assessment as to whether to buy or sell securities on the basis of a company's earnings or potential earnings and the potential return the investment offers after making an allowance for risk.
>
> I do not think a knowledge of the investing behaviour of speculators and day traders who seek to profit on the back of rumour or momentum rather than company fundamentals would be of any assistance in determining what information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of particular securities. That observation would also hold true for hedge funds at

[166] Guidance Note 8, p 10 [4.2].
[167] ASX, ASX Listing Rules Guidance Note 8, p 10 n 22.

> least in circumstances where they are not making their investment decisions based on company fundamentals.[168]

121 This is consistent with *Grant-Taylor (Appeal)*. There, the Full Federal Court held that the phrase "*persons who commonly invest in securities*" refers to a broad class of investors and does not distinguish between investors based on their level of sophistication, size or frequency of investment (none of which undermines the proposition that the focus of attention is on investors basing decisions on expected earnings adjusted for risk, or "fundamentals").[169] The Court went on to say that:

> We are of the view that the expression "persons who commonly invest in securities" is a class description. First, the plural "persons" is used in contradistinction to the singular "a reasonable person" in s 677. Secondly, to treat this as a class description avoids distinctions dealing with large or small, frequent or infrequent, sophisticated or unsophisticated individual investors. Such idiosyncratic distinctions are made irrelevant if one is looking at a class of investors. There is no reason to confine "likely to influence persons ..." to the sophisticated. The unsophisticated also need protection. Likewise the small investor and likewise the infrequent investor. <u>But not the irrational investor</u>.[170]

122 In the context of a regime fundamentally premised on the efficient market hypothesis, the reference to an "irrational investor" in the Full Court's judgment is readily understood as a reference to an investor who invests other than by reference to the inherent value of the security.

123 The ASX Guidance Note, *Vocation* and *Grant-Taylor (Appeal)* each support the proposition that information which may influence trading decisions of an "irrational" investor is not the subject of the continuous disclosure regime; or to put it another way, information which is not material to the value of the securities does not give rise to disclosure obligations. Such an approach is consistent with the statutory purpose of the continuous disclosure regime; namely, to ensure an efficient market. An efficient market is achieved by the disclosure of information that goes to the fundamental value of a security, and conversely, is undermined by the disclosure of information which does not go to the fundamental value of securities and which may induce irrational trading behaviour (i.e. trading behaviour divorced from the fundamental value of the securities). And once it is understood that in an efficient market price reflects (or <u>is</u>) value, the fact that s 674(2)(b) refers to "price or value" can be seen not as a true disjunctive but rather as a compendious reference to a single phenomenon.

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[168] (2019) 371 ALR 155 at [552]–[553].
[169] *Grant-Taylor (Appeal)* at [115], [130]–[131](Allsop CJ, Gilmour and Beach JJ).
[170] *Grant-Taylor (Appeal)*, [115] (emphasis added).

124 In this regard, Mr Holzwarth's uncontradicted evidence is that:

(a) in an efficient market, the type of information relevant to a decision to buy or sell shares is information that is: (i) new; (ii) of a type that relates to expected future cash flows of the stock or the riskiness of those flows; and (iii) of a magnitude that would materially change the market's expected future cash flows or risks for the stock;[171]

(b) the Information on which ASIC's case is based is not value-relevant information.[172]

125 An effective continuous disclosure regime pursuant to which listed entities are obliged to inform the market of relevant information in a timely fashion is essential to optimising market efficiency; it ensures that prices reflect fundamental value and that capital is most efficiently allocated throughout the market. The essential question of what precisely constitutes relevant information cannot be divorced from the efficient market theory which underpins the disclosure regime.

126 These matters are recognised or reflected in academic commentary and other aspects of the regulatory regime. For example, in the text *Securities and Financial Services Law* it is recognised that what is required is specifically "*adequate disclosure to facilitate the making of informed judgments in that market*".[173] To similar effect, the ASX Listing Rules requiring the correction or prevention of a false market,[174] and the provisions in the *Corporations Act* directed to preventing a false or misleading appearance in the market,[175] are aimed at ensuring the quality and rational value of the information disclosed to the market.

127 The disclosure regime does not, and should not, promote or require disclosure of information which cannot add to the efficiency of markets, and moreover, which would affect market behaviour, if at all, only by virtue of considerations detached from the value of the securities. It is *a fortiori* if the information would affect market behaviour only by virtue of a mistaken appreciation of the facts (here, the incentives and likely behaviour of the JLMs). Information of that kind would tend to reduce the efficiency of the market. Such information may result in trading, and subsequent changes in share price, which are materially disconnected from the security's true or fundamental value. As such, if the statutory purpose of the disclosure regime is to ensure the efficiency of the market, it would

[171] CB 26 – First Holzwarth Report at [11], [100]–[106].
[172] CB 26 – First Holzwarth Report at [12], [139]–[141].
[173] Robert Baxt, Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis, 2017) 11 (emphasis added).
[174] ASX Listing Rule 3.1B.
[175] *Corporations Act* s 1041B.

be contrary to that purpose if the regime mandated the disclosure of the information in question in this case.

128 ASIC's case is premised on potential purchasers being influenced to refrain from purchasing or to engage in activities such as shorting[176] because of "uncertainty"[177] as to the short-term price of ANZ shares due to an expectation of "prompt" selling by the JLMs. ASIC does not expressly identify the persons who commonly invest in securities who it alleges would have been influenced by disclosure of the information. However, the allegation that investors would trade on the basis of a prospect of downward pressure being placed on the shares is not a trading decision referable to fundamental value. As such, the type of investors on whom ASIC's case is premised are persons (including "speculators" or "day traders"), whose trading decisions are not relevant to the question of materiality under s 677.

129 Further, and for essentially the same reasons, having regard to the purpose of the continuous disclosure provisions, the (non-value relevant) Information relied on by ASIC would not be information that a "reasonable person" would expect to have the requisite effect under s 674(2)(c)(ii).

D.2.4 An assessment of materiality when all relevant information is taken into account

D.2.4.1 The "information" which has to be disclosed

130 In considering the "information" which a plaintiff alleges is material and should have been disclosed, it is important that the information be assessed in its full commercial context and by reference to the totality of relevant information. This would include, in the present case, matters that are relevant to an assessment of the specific reason why ASIC alleges the Information was material (i.e. that the JLMs would be prompt sellers whose activity might depress the ANZ share price). The importance of considering the totality of relevant information has been established and discussed in a number of cases.

131 In *Jubilee Mines NL v Riley* (***Jubilee***), the Western Australian Court of Appeal emphasised that the allegedly disclosable information must be considered in conjunction with the "totality of relevant information" concerning the specific matter, and should not be assessed in isolation.[178] *Jubilee* considered whether the defendant mining company had breached its continuous disclosure obligations by failing to disclose a discovery of nickel on its tenement.

[176] CB 3 – FASC at [23(c)]; CB 2 – Concise Statement at [19].
[177] CB 24 – First Pratt Report at p 13 [3], p 17; CB 29 – Joint Expert Report at p 15 [12].
[178] (2009) 40 WAR 299 at [90].

The Court stated that the question of whether the defendant mining company had breached its continuous disclosure obligations by failing to disclose the discovery must be considered in light of additional relevant facts, including that the company had no intention of pursuing the discovery by undertaking exploratory drilling, and lacked the financial capacity to do so. Martin CJ (with whom Le Miere AJA agreed) stated as follows:

> 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 … 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.[179]

132 McLure JA reached a similar conclusion in relation to the identification of the relevant "information" under the predecessor to s 674(2), stating:

> 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. The respondent 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.[180]

133 Similarly, in *Grant-Taylor v Babcock & Brown Ltd (in liq)* (***Grant-Taylor (First Instance)***), Perram J held that the disclosable information needed to be assessed together with all relevant contextual information in order to avoid misleading the market. The plaintiffs submitted that Babcock & Brown Ltd (**BBL**) had breached s 674(2) by failing to disclose that its final dividends for the financial years 2005, 2006 and 2007 had been unlawfully paid out of capital contrary to s 254T of the *Corporations Act*. Perram J held that if BBL had disclosed information in relation to its breach of s 254T, it would not have been acceptable for BBL to disclose merely the fact of the breach. To do so would have misled the market

[179] *Jubilee* [87]–[90] (emphasis added).
[180] *Jubilee* [161]–[162] (emphasis added).

by creating the false impression that the breach brought with it negative economic consequences for BBL.[181] His Honour stated:

> I do not accept that the capital reduction information consisted simply of the mere fact that for each year part of each final dividend had been paid out of capital … It would have been quite misleading to have disclosed that the dividend payment had resulted in an unauthorised reduction of capital (with the alarming connotation such words naturally engender) without also disclosing that this was without any economic consequence.[182]

134 Perram J concluded that if disclosure was required to be made, what was to be disclosed was the "whole situation", including that the contravention of s 254T was an accounting error that had no impact on the value of BBL shares.[183]

135 On appeal, the Full Federal Court (Allsop CJ, Gilmour and Beach JJ) endorsed Perram J's conclusion, stating that:

> [H]is Honour rightly found, persons who commonly invest in securities would not have been influenced, or likely to be influenced, by an announcement of the contraventions coupled with the ameliorative matters that his Honour identified.[184]

136 In *Bert v Red 5 Ltd* [2016] QSC 302 (***Bert***), the plaintiff submitted that the defendant mining company had breached its continuous disclosure obligations by failing to disclose that there were significant quantities of groundwater flowing into the pit of its mine, which prevented complete dewatering of the pit. Applegarth J rejected the plaintiff's formulation of the information required to be disclosed, finding that, to announce that there were significant quantities of groundwater flowing into the pit would not disclose anything that the market had not already been informed of by the company in previous reports and market announcements.[185] In identifying the relevant information to be disclosed, his Honour stated:

> Before considering what the market's reaction would have been if information had been disclosed, it is necessary to identify precisely what it was that it is alleged should have been disclosed. That must be considered in the context of the facts and the company's activities as a whole … For example, disclosure of only factual information or data may be misleading if taken out of the commercial context of the company's intention as to how it will deal with

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[181] *Grant-Taylor (First Instance)* at [96]–[101].
[182] *Grant-Taylor (First Instance)* at [101].
[183] *Grant-Taylor (First Instance)* at [101]. Including the following: the declaration of the dividend by BBL contravened s 254T because the retained profits for the 2005 financial year for BBL on a stand-alone basis were less than the proposed dividend; but the BBL group had sufficient retained earnings on a consolidated basis to pay the dividend and the issue only arose because any dividend declared by BBIPL for the 2005 year would only be received as income in the 2006 year; such that it was purely an accounting issue; and it had no impact on the value of shares in BBL.
[184] *Grant-Taylor (Appeal)* at [149] (emphasis added).
[185] *Bert v Red 5 Ltd* [2016] QSC 302 (***Bert***) at [19], [210].

> that factual information. Further, it does not follow simply that the information which a plaintiff alleges should have been disclosed is, in fact, the correct expression of the relevant information.[186]

137 Having regard to *Jubilee*, Applegarth J concluded that disclosing the operational problem which had been detected without disclosing the solution that was at hand and was being implemented, would be to give incomplete and therefore misleading information.[187]

138 In *Vocation* at [566], and again to similar effect, Nicholas J said:

> 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.

139 In *Cruickshank v ASIC* the Full Federal Court (Allsop CJ, Jackson and Anderson JJ) quoted with approval the statement of Nicholas J in *Vocation* at [566].[188]

140 The ASX also recognises the importance of context. In assessing whether information needs to be disclosed under ASX Listing Rule 3.1, *ASX Listing Rules Guidance Note 8* (**ASX Guidance Note 8**) at [4.3] (p 11) says:

> In assessing whether or not information is market sensitive and therefore needs to be disclosed under Listing Rule 3.1, the information needs to be looked at in context, rather than in isolation, against the backdrop of:
>
> - the circumstances affecting the entity at the time;
> - any external information that is publicly available at the time; and
> - any previous information the entity has provided to the market…

141 Relatedly, ASX Guidance Note 8 also says that any announcement must be "*accurate, complete and not misleading*".[189]

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[186] *Bert* at [117] (emphasis added).
[187] *Bert* at [211].
[188] (2022) 292 FCR 627 at [124].
[189] ASX Guidance Note 8 at [4.15] (p 26).

D.2.4.2 The "relevant information" in the present case

142 For reasons given earlier, ASIC's narrowly constructed case which focuses on one part of the information which ANZ had, fails.

143 However, when the relevant information which should have been disclosed is properly identified (or the broader context relevant to assessment materiality is taken into account), the reasons why any relevant information which ANZ had is not material are amplified.

144 The disclosure regime is concerned with "information" of which an entity is "aware". These terms are defined in the ASX Listing Rules, as set out in paragraph 66 above. In broad terms, the regime is concerned with information which an entity has or ought reasonably to have,[190] and includes matters of supposition and matters relating to the likely intentions of a person.

145 In the present case, the "information" (within the meaning of the ASX Listing Rules) which ANZ had (in the sense of being aware of it), was:

(a) that the JLMs had recommended to ANZ, and it had accepted, that they should acquire a significant proportion of the Placement Shares, and hence that the JLMs were to acquire a significant proportion of the Placement Shares (which it was aware of because the JLMs had told ANZ this).[191] This is the Information on which ASIC's claim is based;

(b) that the JLMs were to acquire a significant proportion of the Placement Shares because they recommended scaling-back certain hedge fund investors.[192] ANZ was aware of this because the JLMs had told ANZ this. Indeed, ANZ only had the Information in (a) (and on which ASIC focuses), by reason of it being given the information in (b), and ANZ accepting the JLMs' recommendation that they take up a portion of the Placement Shares in the context of ANZ being informed of the other matters below;

[190] See *Crowley*.
[191] See ASIC's Submissions at [80] and [82], identifying how ANZ became aware of the information. See also CB 5 – Reply at [3], admitting that the Underwriters recommended to ANZ that they take up a portion of the Placement Shares.
[192] CB 4 – Defence at [9A(c)].

(c) that a substantial reason for the JLMs recommending scaling-back hedge funds was that if not scaled-back they might deal with their shares in such a way as to create a disorderly, or volatile, after-market for ANZ shares;[193]

(d) that the book was covered, which ANZ was aware of because the JLMs had told ANZ this;[194]

(e) that the JLMs' intentions in the aftermarket were not to be short-term sellers, which it was aware of because the JLMs had told ANZ this;[195]

(f) that the JLMs had entered into hedges to manage their risk from acquiring Placement Shares, which it was aware of because the JLMs had told ANZ this.[196]

146 The case that ASIC advances asks the Court to have regard to one part of what ANZ was told (the information in sub-para (a)), while seeking to exclude from consideration other matters that ANZ was told at or around the same time as the information in sub-para (a) and in connection with the information in sub-para (a). The evidence establishing each of the matters in sub-paras (b) to (f) has been discussed in Section B above. Each of these matters is "information" of which ANZ was "aware" within the meaning of the ASX Listing Rules. Further, each of these matters directly bears upon a rational assessment of the premise of ASIC's case as to materiality, *a fortiori* if they are considered in combination.

147 As Mr Holzwarth notes, the information that the book was covered and that the JLMs decided to scale back certain bids, fortifies the conclusion that the information is not material, because it:[197]

> reveals a preference to protect their reputation over "promptly disposing" of the Placement Shares. By allocating all the Placement Shares to investors, the Underwriters could have avoided any risk associated with a position in ANZ shares (thus avoiding any purported need to "promptly dispose" of shares) and avoided having capital tied up in the Retained Placement Shares. The Underwriters' decision to retain shares is consistent with my opinion, reached independently of this instruction, that Underwriters' incentives to protect their reputation by stabilizing the price of ANZ shares outweighed other concerns.
>
> Given the Underwriters decision to purchase the Retained Placement Shares, the Underwriters would not be expected to place "downward pressure" on the price of ANZ shares by "promptly" disposing of the Retained Placement Shares. Rather, the Underwriters' decision to purchase the Retained Placement Shares would indicate to market participants

[193] CB 4 – Defence at [9A(e)-(f)].
[194] CB 4 – Defence at [9A(a)-(b)].
[195] CB 4 – Defence at [9A(g)].
[196] See Section B.3.2.1 above.
[197] CB 26 – First Holzwarth Report at [16], [245]–[246].

an overriding incentive to "stabilize" the price of ANZ shares influenced by their incentive to protect their reputation.

148 Further, and more directly, if investors had been made aware of the information in sub-para (d) (that the JLMs' intentions in the aftermarket were not to be short-term sellers), it is difficult to conceive how an argument could be made that the Information was nonetheless material because investors would have expected the JLMs to be short-term sellers.

149 It should be noted that ASIC has abandoned a case that the JLMs were in fact short-term sellers of ANZ shares, or that ANZ knew that to be the case. In [16] of the original SOC ASIC specifically alleged that one of the relevant matters known to ANZ was that the shares had been allocated to the JLMs "as short term holders of the shares". ASIC then withdrew that allegation when ANZ pressed for particulars of ANZ's alleged knowledge that the JLMs were short-term holders of the shares: see the letters at CB 6 – 9. ASIC no longer alleges that the JLMs were in fact short-term holders or that ANZ was told or knew that the JLMs would be short-term holders.

150 Unlike the information that ANZ has by reason of it being told those matters by the JLMs (as set out in sub-paragraphs 145(b)-(f) above, and where ANZ does not consider there can reasonably be any contest as to what ANZ was told), the question whether the book was in fact covered is in dispute between the parties. ASIC's Submissions at [123]–[126] and Annexure C address its contention, pleaded at [2(a)] of the Reply, that the book was not covered because the Six Investors had in fact amended their bids, prior to the close of the bookbuild, in amounts sufficient to mean that the book was not fully covered.

151 In ANZ's submission an objective assessment of the relevant evidence, in context, demonstrates that in fact the Six Investors identified by ASIC did not amend their bids before the close of the book and the book was in fact covered. ANZ's contentions, and the evidence in relation to these matters, is dealt with in detail in **Annexure A** to these submissions. In summary, ASIC's case that the book was not covered because one or more of the Six Investors amended their bids prior to the close of the book should be rejected. An analysis of the documents relied on by ASIC for each of the Six Investors, shows that:

(a) most of the communications relied on by ASIC were after the close of the book, and after investors had been informed of their allocation;

(b) these communications or discussions related to the allocation process, rather than investors' bids;

(c) where ASIC does rely on communications from during the bookbuild period, the communications are consistent with the investors expressing a preferred allocation rather than an amendment to their bid;

(d) it is common practice in capital raisings for investors to make a bid that reflects their expectation of being scaled-back to a lower allocation. This does not undermine the binding nature of their bid, given the clear distinction between bids and allocations.

152 In any case, the issue of actual book coverage (separately from what ANZ was informed and understood as to this) is ultimately of subsidiary importance. This is so for several reasons.

153 *First*, the primary relevance of whether the book was in fact covered is that if the book was covered (or not covered), it may inform an assessment as to what in fact ANZ was told about such matters. However, the evidence is clear as to what ANZ was told (as set out in Section B.2 above).

154 *Secondly*, even if the book was not fully covered, this is irrelevant or unimportant in assessing ANZ's disclosure obligations. The disclosure obligation under consideration is that of ANZ, and relates to an assessment of information which ANZ is or becomes aware of (given the definitions of information and aware in the ASX Listing Rules). ANZ was not aware that the book was not covered (if, contrary to the points that follow, that is in fact the case). In fact, ANZ was told and understood that the book was covered. In those circumstances, any assessment as to materiality can only have regard to the information of which ANZ was aware, being that the book was covered.

155 *Thirdly*, even if the book was not fully covered, this does not affect a rational and principled assessment of the JLMs' incentives in dealing with the Placement Shares. As set out above, irrespective of issues of book coverage, the incentives of the JLMs were not to be short-term sellers in a way that would put pressure on the ANZ share price. If the book was not fully covered it would not change those incentives.

156 *Fourthly*, if in fact the book was covered (as ANZ contends is the case), then it is yet another reason to reject ASIC's case. That is because ASIC's case would involve ANZ making a disclosure that may convey that the book was not covered, and thereby require ANZ to make a disclosure that was apt to mislead or which was materially incomplete.

157 *Fifthly*, taking ASIC's positive case that the bids of the Six Investors were amended before the close of the book at its highest, it is still the case that the majority of the shares allocated to the JLMs (at least $394 million of shares) did relate (even on ASIC's case) to shares for which there is no allegation that an investor's bid was anything other than what was recorded in the demand column of the Draft Allocation List. Those bids were scaled-back in order to protect the aftermarket, and hence any disclosure by ANZ only that the full amount of shares of ~$790 million was to be allocated to JLMs, by conveying that there was a shortfall in valid demand, would have been apt to mislead or incomplete.

D.2.4.3 ASIC's notional disclosure would be misleading or incomplete

158 ASIC's case is that disclosure of the Information on which it focuses would have conveyed to investors, or led investors to expect, that the JLMs were likely to be prompt sellers of ANZ shares so as to put downward pressure on ANZ's share price.

159 If one accepts the premise of ASIC's case, which is that such an expectation would have been induced by disclosure of the Information, it becomes readily apparent why the narrow disclosure for which ASIC contends would have been apt to mislead and/or incomplete. In short, that is because it would have induced an expectation in investors that was:

(a) contrary to the position conveyed to ANZ, and which ANZ understood to be the case; and

(b) contrary to the position in fact.

160 In substance, the disclosure which ASIC says should have been made would have created a false market in ANZ shares, because it would (on ASIC's case) have induced investors to trade on the basis of an expectation as to the JLMs' intentions which was contrary to the true position.

161 Other aspects in which the narrow disclosure contended for by ASIC would have been misleading or incomplete are identified in paragraphs 156 and 157 above.

E. THE INFORMATION WAS NOT RELEVANTLY INFORMATION CONCERNING ANZ

162 ASX Listing Rule 3.1 provides as follows (emphasis added):

> 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.

163 The requirement that the information "concern" the entity are necessarily words of limitation and narrow the types of information which may require disclosure.

164 ASX Guidance Note 8 provides limited commentary regarding this aspect of the ASX Listing Rule. It relevantly states that:

> [T]he qualification that the information must "concern" the entity is an important one. Generally speaking, an entity would not be expected under Listing Rule 3.1 to disclose publicly available information about external events or circumstances that affect all entities in the market, or in a particular sector, in the same way. All other things being equal, that is not information "concerning it".[198]

165 Despite the qualification being described as "an important one", as far as ANZ is aware there has been no direct further commentary, judicial or otherwise, as to its scope or content.

166 The decision of Nicholas J in *Vocation* is instructive. In that case his Honour made findings about the materiality of non-disclosed information on the basis of evidence about the likely trading of institutional investors and without having heard any evidence regarding other investors. As noted above, Nicholas J reasoned that the use of the word "invest" rather than "purchase" or "acquire" in s 677 suggested that the hypothetical person who "commonly invests in securities" would be someone who makes an assessment as to whether to buy or sell shares based on the "*company's earnings or potential earnings and the potential return the investment offers after making an allowance for risk*".[199] Moreover, his Honour held that "*knowledge of the investing behaviour of speculators and day trader who seek to profit on the back of rumour or momentum rather than company fundamentals*" would not be of any assistance "*in determining what information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of particular securities*".[200] This observation was extended to hedge funds, at least where investment decisions were not based on company fundamentals.[201]

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[198] ASX Guidance Note 8 at p 8.
[199] *Vocation* at [552].
[200] *Vocation* at [552].
[201] *Vocation* at [552].

Even though the statutory entry point for the reasoning in *Vocation* was not the phrase "*information concerning it*" in the ASX Listing Rules, the reasoning of his Honour provides support for the underlying argument about the requirement that the information bears on fundamental value.

167 Further, this construction of the "*information concerning it*" limitation and as to the scope of the continuous disclosure regime is consistent with other decisions.

168 *Grant-Taylor (First Instance)* provides a further instructive example of information that did not go to fundamental value. In that case, Perram J considered that the payment of dividends out of the capital, rather than the profits, of a company was not material as it amounted to a book entry error and was financially and economically insignificant.

169 On appeal, the Full Court took no issue with Perram J's conclusions that the information in question did not require disclosure because the "information had no economic significance… [and] no financial significance" and that the information was "economically irrelevant to the value of the traded BBL shares".[202]

170 This interpretation is also supported by a purposive construction of the qualification, in light of the statutory objective of market efficiency.

171 The following can then be noted in the present case.

172 *First*, ASIC has not alleged in its FASC that the Information was information concerning ANZ for the purposes of ASX Listing Rule 3.1.

173 *Secondly*, insofar as ASIC does seek to identify the information to which the continuous disclosure regime applies it misstates the position,[203] and tellingly describes its case as follows:

> Pursuant to s.677 of the Act, the information that a reasonable person would expect to have a relevant material effect includes information about the relevant entity's securities which would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of those securities.[204]

174 The continuous disclosure regime, neither in the ASX Listing Rules or the *Corporations Act*, describes the information as "information about the relevant entity's securities". Rather, the

[202] *Grant-Taylor (Appeal)* at 426 (emphasis in original).
[203] See, eg, CB 2 – Concise Statement at [17] (describing the requirement as relating to "*any information*").
[204] CB 2 – Concise Statement at [19] (emphasis added).

regime applies to information concerning the entity. ASIC's misstatement is revealing, as the alleged disclosure might be said to relate to information about ANZ's securities, but it does not relate to ANZ itself let alone to its value as a listed entity.

175 *Thirdly*, ANZ (as an entity) is conspicuously absent from ASIC's formulation of the Information in FASC [16(a) and (b)]. The central subject of this Information is the JLMs and their acquisition of ANZ shares. ASIC alleges that ANZ had knowledge of facts about the JLMs' shareholdings, but not that this information in any way concerned ANZ as an entity beyond mere knowledge of those facts.

176 *Fourthly*, the Information concerns merely the holding of shares by the JLMs, and its significance is said to relate to their anticipated trading decisions. However, on no sensible view could ASIC contend (and ANZ does not understand it to contend) that every time ANZ becomes aware that a substantial shareholder intends to readjust their portfolio by selling a significant quantity of ANZ shares, that ANZ would be obliged to disclose that information. Similarly, ANZ does not understand ASIC to contend that ANZ would have had a disclosure obligation if all of the shares acquired in the Placement by the JLMs had instead been placed with hedge funds. The logical reason for this is that the information does not relevantly concern ANZ. The Underwriters were in no different position to other investors who took up shares.

177 *Fifthly*, and relatedly, when regard is had to the nature of the Information it is apparent that it bore no rational connection to the fundamental value of ANZ shares. That such information is not caught by the continuous disclosure regime is consistent with the matters discussed above.

178 *Sixthly*, it can be observed that in ASIC's Submissions at [78] ASIC seeks to re-characterise the Information as "*information concerning the conduct and outcome of the capital raising undertaken by ANZ*". Two points can be noted:

(a) ASIC does not allege that the Information is material because it discloses something about the conduct or outcome of the Placement separately from the fact that the JLMs acquired shares. ASIC's attempt to broaden or re-frame the information to include other matters which may be deduced from the Information does not answer the fundamental points raised above;

(b) there is a tension between this submission by ASIC and its broader submission that information concerning the conduct and outcome of the capital raising (including matters such as whether the book was covered, the reasons for the scale-back of bids, and what ANZ was told about the JLMs' intentions) is not information that should have been disclosed alongside the narrow Information ASIC identifies.

F. THE RELEVANT INFORMATION WAS "GENERALLY AVAILABLE"

F.1 Principles

179 ASIC alleges, and has the onus of proving, that the Information "*was not generally available to the market at the time (including to participants in the market for ANZ shares)*".[205]

180 Section 676, set out in paragraph 65 above, specifies when information is generally available for the purposes of s 674, and includes:

(a) where the information consists of readily observable matter;

(b) where it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information, and a reasonable period has elapsed for it to be disseminated among such persons; or

(c) where it consists of deductions, conclusions or inferences made or drawn from either or both of the information in (a) and (b) above.

181 In *Grant-Taylor (Appeal)*,[206] the Full Court (Allsop CJ, Gilmour and Beach JJ) summarised the following principles concerning the term "readily observable matter":[207]

(a) extrinsic material relating to cognate provisions explained the expression "readily observable matter" to refer to "facts directly observable in the public arena";

(b) whether information is a "readily observable matter" is a question of fact to be determined objectively and hypothetically;

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[205] *Grant-Taylor (First Instance)* at [105]; *Grant-Taylor (Appeal)* at [117], [124]; *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240 at [177] (Judd J): "*A party seeking to prove the lack of general availability of information must negative the existence of relevant deductions, conclusions or inferences*".
[206] *Grant-Taylor (Appeal).*
[207] *Grant-Taylor (Appeal)* at [119]–[121].

(c) it does not matter how many people actually observe the relevant information, information may be readily observable even if no one has observed it;

(d) the test is whether the particular matter "could have been observed readily, meaning easily or without difficulty"; and

(e) generally, material notified to the ASX and material stated in a financial report released by the company are readily observable matter.

182 In *Grant-Taylor (Appeal)*, one of the issues on appeal was whether the primary judge erred in concluding that the contraventions of ss 254T and 256D and the breach of BBL's constitution was information that was "generally available". The Full Court's consideration of this ground of appeal was brief given that the primary judge's consideration and application of s 676 of the Corporations Act was *obiter dicta*.[208] Nevertheless, the Full Court agreed with Perram J's reasoning that the information was "generally available" within the meaning of s 676(2)(b)(i) together with s 676(3) of the *Corporations Act* because the financial reports disclosed to the market contained information that would permit it to be deduced that the dividends were paid from capital.[209]

F.2 Application

183 ANZ relies on the opinion of Mr Holzwarth that the Significant Proportion Information was widely known amongst market participants before the open of trading on 7 August 2015,[210] and that the Underwriter Acquisition Information is functionally equivalent to the Significant Proportion Information (in his words, that "*there is not any incremental information described by the Underwriter Acquisition Information relative to the Significant Proportion Information from an economic perspective*"[211] – that is, given the general availability of the Significant Proportion Information the Underwriter Acquisition Information was not material).

184 In relation to this, Mr Holzwarth's opinion is that:

(a) based on the flow of information in relation to the bookbuild, market participants would have been aware that the JLMs had been unable to place all of the Placement Shares with domestic long-term shareholders of ANZ;

[208] *Grant-Taylor (Appeal)* at [171].
[209] *Grant-Taylor (Appeal)* at [165]–[171].
[210] CB 26 – First Holzwarth Report at [22], [26]
[211] CB 26 – First Holzwarth Report at [192].

(b) as a consequence, market participants would have been aware that the JLMs were confronted with a choice to: (i) place shares with shareholders perceived as likely to sell quickly; or (ii) purchase Placement Shares themselves;[212]

(c) given this information, and in light of the known incentives of JLMs to stabilise the price of ANZ shares to protect their reputation, market participants would have become aware of the Significant Proportion Information prior to the resumption of trading on 7 August 2015.

185 ASIC's expert, Mr Pratt, reaches a similar view as to information becoming widely known by market participants. In particular, Mr Pratt's opinion is that:

(a) there would have been "*across the market an appreciation that there had been a significant lack of demand for the placement and consequentially a realisation the Underwriters had purchased some of the shares*";[213] and

(b) "*the institutional market at least, would have become aware that the Underwriters had been forced to acquire some of the placement shares due to insufficient demand from institutions*".[214]

186 The point where, in substance, the experts differ is in relation to the time by which this information would have been known: Mr Pratt says that this knowledge would have "*slowly grown*"[215] such that by 12 August 2015 it had accumulated to inform the Clime Disclosure[216], while Mr Holzwarth is of the opinion that market participants would have deduced this information by the start of trading on 7 August 2015.[217] On this point, the evidence of Mr Holzwarth should be preferred.[218] Among other things:

(a) information in relation to the bookbuild which would have informed this knowledge of market participants was all available prior to the resumption of trading on 7 August 2015. This information included that:

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[212] CB 26 – First Holzwarth Report at [24]–[25].
[213] CB 24 – First Pratt Report at p 8.
[214] CB 24 – First Pratt Report at p 9.
[215] CB 24 – First Pratt Report at p 8.
[216] CB 24 – First Pratt Report at p 9.
[217] CB 24 – First Pratt Report at p 8; CB 27 – Second Holzwarth Report at [11], [25].
[218] It can be observed that in *Bonham v Iluka Resources Ltd* (2022) 404 ALR 15, Jagot J noted at [715] (in *obiter*) that even if, contrary to her finding, Iluka failed to disclose the negative information of which it was aware, the very high level of short selling in Iluka shares tended "*to undermine the notion that the information … was not known to the market*". In this way, it is evident that her Honour was prepared to draw an inference from the trading of short sellers about what was known in the market generally. This approach of looking to (some subset of) sophisticated investors when determining whether the information was known to the market is consistent with Mr Holzwarth's opinions.

(i) of the largest 100 existing shareholders on the ANZ register, 60 did not participate in the Placement;[219]

(ii) many smaller shareholders received full allocations of shares requested;[220]

(iii) 53 participants who got allocations were not existing shareholders;[221]

(iv) the JLMs were soliciting bids from non-shareholders (which would have provided information to market participants that the JLMs had not placed all of the Placement Shares with long-term domestic shareholders);[222]

(b) these matters provided several ways for market participants to become aware that the bookbuild had not successfully placed all of the Placement Shares with long-term domestic shareholders;[223]

(c) an analysis of analyst reports and media articles at the time supports a conclusion that it was widely known that the JLMs did not successfully place all of the Placement Shares with long-term domestic shareholders;[224]

(d) Mr Holzwarth's analysis of the share price reaction (or lack of it) during the period of 7 to 12 August 2015, and following the Clime Disclosure, supports two compatible conclusions, being: (i) that the Significant Proportion Information was widely known amongst market participants; and/or (ii) the Significant Proportion Information was not material to the price of ANZ shares in any event.[225] This analysis also contradicts Mr Pratt's opinion that the Information was material, but that an appreciation of it had only "*slowly grown*";

(e) the fact that the bookbuild did not clear at greater than the underwritten floor price was included in the Completion Announcement and therefore known by 7:30am on 7 August 2015;[226]

(f) there is evidence of a number of market participants <u>in fact</u> drawing the inference or deducing that the JLMs took up shares. Evidence in this regard includes:

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[219] CB 24 – First Holzwarth Report at [182].
[220] CB 24 – First Holzwarth Report at [183].
[221] CB 24 – First Holzwarth Report at [184].
[222] CB 24 – First Holzwarth Report at [186].
[223] CB 24 – First Holzwarth Report at [187].
[224] CB 24 – First Holzwarth Report at Sections 11.1.2 and 11.1.3.
[225] CB 24 – First Holzwarth Report at [238].
[226] CB 299 (ANZ.505.001.3241).

(i) the Clime Disclosure, which shows that Clime was able to deduce and publicly disclose information consistent with the Significant Proportion Information;[227]

(ii) an article in the AFR on 6 August 2015[228] which stated that: "*It would not surprise Chanticleer if there was short selling of the other banks by the underwriters of the ANZ issue to hedge their positions*".

187 Accordingly, ASIC will not be able to discharge its onus of proving that the Significant Proportion Information was not generally available within the meaning of s 674(2)(a) of the *Corporations Act*. Because the Underwriter Acquisition Information is functionally equivalent to the Significant Proportion Information, this is fatal to ASIC's claim.

G. WITNESSES

188 ANZ will call Mr Holzwarth, as an expert witness, in respect of his reports and the joint expert report.

189 ANZ's final position on which other witnesses (if any) it will call will be made following the close of ASIC's case and is dependent on the evidence tendered by ASIC and the resolution of outstanding issues including objections that ANZ has made to parts of ASIC's evidence.

H. CONCLUSION

190 For the numerous reasons set out above, ANZ submits that ASIC's claim that ANZ contravened s 674(2) of the *Corporations Act* should be dismissed.

18 April 2023

JOHN SHEAHAN

PAUL LIONDAS

Counsel for ANZ

[227] CB 1088 (ZIG.0003.0002.0001).
[228] CB 995 (HOL.002.001.1047).

ANNEXURE A: EVIDENCE AS TO THE BOOK BUILD, ALLOCATION PROCESS AND RELATED MATTERS

A. GENERAL

1 There are a number of overarching or contextual points that are relevant in assessing the evidence relied on by ASIC in support of its contention that individual bids were amended by the Six Investors (Myriad, Segantii Capital, Soros, DE Shaw, Brevan Howard and Indus Capital) at or prior to the close of the bookbuild such that the book was not covered at the close of the bookbuild.[229]

A.1 Contractual terms, and industry understanding, in relation to bids and allocations

2 On the morning of Thursday 6 August 2015, the JLMs sent an announcement message to their clients via email (in the body of the email and/or as an attached pdf) or Bloomberg message to announce the Placement (**Investor Placement Announcement**).[230]

3 The Investor Placement Announcement included in bold text near the start of the message the statement that: "***By accepting this document, each recipient agrees to be bound by the terms of the Acknowledgements, Important Notice and Disclaimer at the end of this communication.***"

4 Under the heading "**ACKNOWLEDGMENTS, IMPORTANT NOTICE AND DISCLAIMER**", the Investor Placement Announcement then stated:

> By bidding into the bookbuild, you confirm, and will be deemed to have represented, warranted, acknowledged and agreed upon submitting your bid (whether in writing or verbally) … that:
>
> …
>
> (d) you are aware that your bid into the bookbuild is a binding and irrevocable offer to acquire the number of New Securities nominated by you (subject to final allocations in the discretion of the Joint Lead Managers) and is otherwise subject to the terms of the confirmation letter ("Confirmation") that will be provided to you by the Joint Lead Managers.

[229] CB 5 – Reply at [2(a)].

[230] Examples of the Placement Announcement are included in the Court Book: see, eg, CB 162 (CIT.100.005.0316); CB 225 (CIT.100.063.1200); CB 137 (CIT.100.013.4754); CB 119 (CIT.100.005.3582); CB 129 (CIT.100.005.3610); CB 127 (CIT.100.005.3644); CB 220 (CIT.100.014.0127); CB 150 (ZIH.007.004.0952); CB 121 (ZIH.007.004.1534); CB 122 (DBA.518.001.2137); CB 146 (DBA.504.003.7866).

…

(g) you are aware that the Master ECM Terms dated 5 March 2015 (available from the AFMA website) and which may be applied by, incorporated by reference into or amended or supplemented in the Confirmation which will be provided to you separately by the Joint Lead Managers govern your bid and your agreement to acquire the New Securities.

(h) acceptance of ANZ's offer to sell the New Securities does not mean that you will receive an allocation for all or any of the New Securities that you have bid for. Allocations are at the sole discretion of the [JLMs] (in consultation with ANZ).

…

By accepting delivery of this notice, you represent, warrant and agree to the foregoing information, statements, restrictions and acknowledgements.

5 The Investor Placement Announcement, and the terms governing the book build, therefore drew a distinction between the bids of investors (which all parties agreed and acknowledged to be binding and irrevocable at the close of the book), and the allocations to be made to investors (which were in the discretion of the JLMs).

6 These matters were reinforced by the Master ECM Terms, which were expressly applied by, and incorporated by reference into, the Investor Placement Announcement through sub-section (g) of the Acknowledgements, Important Notice and Disclaimer. At the time of the Placement the Master ECM Terms which applied were the version dated 5 March 2015.[231] The Master ECM Terms were developed by the Australian Financial Markets Association (**AFMA**) and are described by AFMA as providing "*industry developed standard terms to streamline the confirmation of institutional allocations on capital raisings in Australia*".[232]

7 Clause 3 of the Master ECM Terms was headed "Confirmations" and stated:

(a) At the close of the bookbuild, Your Bid is a binding and irrevocable offer by You to acquire such number of Securities nominated by You (subject to final allocations) at the Price and on and subject to these Terms, which is capable of immediate acceptance in full or in part by the Lead Manager. By making Your Bid you make the General Acknowledgments, General Warranties, General Undertakings and General Foreign Jurisdiction Representations and/ or as specified in the Bloomberg.

(b) Your offer will be accepted if You receive an allocation of Securities in relation to an Offer and You will be sent a Confirmation.

[231] CB 101 (ANZ.500.007.0191).
[232] Australian Financial Markets Association, 'Standard Documentation: Standard Documentation' <https://afma.com.au/standards/standard-documentation>. Additional evidence confirms that these are industry standard terms: CB 23 (Needham Affidavit at [27]).

…

(e) If You fail to return Your executed Confirmation of Allocation or completed CARD Form by the time for return specified in the Confirmation, the Lead Manager may in its discretion enforce Your obligation to pay the Price and settle the Securities in Your Allocation or treat Your Bid as terminated and not settle, in each case, without cost or liability to the Lead Manager or the Offeror.

8 Further, cl 2.1 of the Master ECM Terms separately defined "Allocation" and "Bids" relevantly as follows:

(a) "**Allocation** means the number of Securities specified in the Confirmation as Your allocation";

(b) "**Bid** means, in relation to an Offer, a bid to receive an allocation of Securities …".

9 There is no evidence to suggest that any investor did not understand or accept the terms set out in the Placement Announcement and the Master ECM Terms as forming the basis on which their bid, and involvement in the book build process, occurred.

10 Given their status as industry standard terms, it can be inferred that the Master ECM Terms reflected accepted practice across capital raisings in Australia, including a common understanding amongst professional investors and placement managers that bids made in a capital raising were binding and enforceable at the time that the book closed.

11 After the close of the book, an Allocation Confirmation Letter (in the form of Annexure B to the Underwriting Agreement) was then to be sent to each investor who had bid into the book to confirm the allocation of Placement Shares that they were to receive. Such confirmations were expressly addressed in the Master ECM Terms, which stated that confirmations would be issued in the form of Schedule 5 to the Master ECM Terms.[233]

12 ASIC contends that the bids made by investors were not binding, despite the express terms of the Investor Placement Announcement and the Master ECM Terms, such that investors' bids were revocable at all times prior to the act of allocation of securities to the investor.[234]

13 This unpleaded argument that the bids were not binding, including for want of consideration, is mistaken. The circumstances described above establish a process contract akin to that found in *Hughes Aircraft Systems International v Airservices Australia* 76 FCR 151

[233] CB 101 (ANZ.500.007.0191) at cl 3 and cl 2.1 (definitions of Confirmation, Confirmation of Allocation and CARD Form).
[234] ASIC's Submissions at [18].

(Finn J). The consideration is provided (at least) by the bidder lodging a bid and making the numerous representations and warranties referred to in the Investor Placement Announcement and the Master ECM Terms, and by the JLMs actually considering the bids on the faith of the bidder's warranties and representations, dealing with the bidders as contemplated by the terms, and making recommendations to ANZ based on the bids received. In addition, those representations and warranties are conduct in trade or commerce that would be misleading if the bidder harboured an uncommunicated reservation as to whether it would treat it bids as irrevocable on close: *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) 16 IPR 189 (FC). Enforcement might involve orders requiring the bidder to pay damages, including by reference to the value of what had been promised but not delivered: *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [66]. So the representations and warranties were effectively "binding" by statute, whether or not they were binding in contract.

14 Even if it were accepted that technically investors' bids were not binding at the close of the bookbuild, this is of no significance in this case. This is so for numerous reasons, including:

(a) ASIC's case is that the bids (applications) of the Six Investors were amended "*at or prior to the close of the bookbuild*".[235] There is no dispute that before closure of the book bids could be amended. The factual dispute raised by the pleadings is whether this in fact happened. Whether bids were binding *after* that time is irrelevant;

(b) whether or not bids were binding at the time of the bookbuild close, by the time the Allocation Confirmation Letters and CARD forms were sent by the JLMs (no later than 12:30am on 7 August 2015), there existed a completed contract. This seems to be uncontentious;[236]

(c) the evidence establishes that there was, and was understood by the JLMs and investors to be, a difference between a bid and an amendment to a bid (on the one hand), and an expression of an allocation preference (on the other hand);

[235] CB 5 – Reply at [2(a)(i)].
[236] ASIC's Submissions at [18].

(d) most of the evidence on which ASIC relies concerns communications after the investors were told the close of the bookbuild was to occur, and after the confirmation letters and CARD forms were sent by the JLMs;[237]

(e) when the communications from the Six Investors on which ASIC relies are considered in their context, it is apparent they were not intended to be amendments to bids but rather expressions of the investor's preferred allocation (often in the specific context of having been advised what the allocation was). This proposition does not assume anything about the enforceability of these bids as a matter of contract law (analysed *ex post facto*). Rather, it addresses the objective meaning of the communications – what reasonable business people in the context would have taken them to convey;

(f) this is reinforced by the consideration that even if bids were revocable after the close of the bookbuild, it does not mean that revised bids could be entered after the close of the bookbuild. Whether bids were strictly revocable as a matter of contract is distinct from the question of what constituted a "bid" under the terms of the Placement. According to the Placement terms, investors were invited to make offers/bids during a specific window. If those bids were revised after the close of the bookbuild, such "revised bids" would not have constituted bids into this bookbuild. This reinforces a characterisation of the communication as expressions of allocation preferences, not changes to the bids;

(g) further and relatedly, it can be inferred from the fact that the Master ECM Terms were standard industry terms, that any attempt by an investor to argue that an allocation made to them in accordance with a bid made (and not amended) prior to the bookbuild close would have been in breach of market practice. For this reason too, investors and JLMs would be taken to have understood that any communications after the close were discussions about allocations and not amendments to bids.

A.2 Close of the bookbuild

15 The Investor Placement Announcement stated that the timetable for the Placement was that books opened "on launch", and that the book closed:

[237] ASIC accepts that this occurred by no later than 12:30am on 7 August 2015: see Annexure B (Chronology of Events) to ASIC's Submissions.

(a) for Australia and New Zealand at 3pm on 6 August 2015;

(b) for "International" at 6pm on 6 August 2015,

with all references to time being to "Sydney time" (*viz.* AEST).[238]

16 The Investor Placement Announcement stated that this timetable was subject to change, and (under the heading "**ACKNOWLEDGEMENT, IMPORTANT NOTICE AND DISCLAIMER**") also stated that

> (e) the Joint Lead Managers and ANZ reserve the right to close the bookbuild early or extend the bookbuild closing time in their absolute discretion (but have no obligation to do so), without recourse or notice to you …

17 It is apparent that the bookbuild closing time was 6pm and that investors (and in particular the Six Investors) were told and considered that this was the bookbuild closing time such that they would have considered any bids that they made to be binding at this time. For example:

(a) Jarrod Bakker of Citi sent an email to (what appears to be) all overseas investors at 5:01pm on 6 August 2015.[239] The title of the email was "**ANZ AU BOOKS CLOSE IN 1 HR; BOOK IS COVERED & WILL PRICE @ 30.95**". The body of the email said: "*Bids due by 6pm Sydney time for offshore investors*". The recipients of the email included each of the Six Investors;

(b) representatives of the JLMs involved in the book build confirmed in their section 19 examinations with ASIC that the book build closed at 6pm;[240]

(c) the Underwriting Agreement provided that the timetable for the Placement, including the bookbuild closing time of 6pm "*may be amended by agreement between the issuers and the Underwriters*".[241] There is no evidence of any such agreement with ANZ. To the contrary, the fact that ANZ was sent a 'draft allocation list' at 8:35pm on 6 August 2015,[242] and that the JLMs then discussed with ANZ the allocations to be made to investors shortly after this, conveyed to ANZ that the book was closed and that the process had moved to the stage of determining what allocations should be

[238] CB 162 (CIT.100.005.0316).
[239] CB 210 (CIT.101.011.2656).
[240] See, eg, CB 88 (ZIG.0005.0022.0002) – Richardson T51:5-52:6.
[241] CB 124 (ZIH.003.001.0086), cl 1(h).
[242] CB 232 (ANZ.505.001.3280) and CB 233 (ANZ.505.001.3281).

made. It is common ground that on this call shortly after 8:30pm ANZ accepted the JLMs' proposed allocations of Placement Shares,[243] and it is also evident that this was done on the basis of the understanding that the JLMs would then issue confirmations to the investors;[244]

(d) the fact that an allocation meeting took place is, in itself, inconsistent with the book still being open generally such that investors could amend their bids;

(e) there is no pleading or evidence of any of the Six Investors being told that the close of the book build had been extended beyond 6pm or holding this belief, such that any communications they may have had with the JLMs after 6pm might have been on the basis that it was still open to them to amend their bids;

(f) in fact the contemporaneous evidence shows that investors were told at the time that the local book closed at 3pm, and that the international book had closed, or was to close, at 6pm, and that the JLMs considered this to be the case. For example:

(i) in a Bloomberg message at 3:33pm on 6 August 2015, Joe Cruz of DB informed an investor that "*locals book closed – offshore books close in 2.5 hours*";[245]

(ii) in a Bloomberg message at 3:07pm on 6 August 2015, Cameron Wood of JPM informed an investor that "*FYI The local ANZ AU book just shut. ~3rs to go for offshore investors to reflect demand*";[246]

(iii) on 6 August 2015 Citi informed an investor in London in an email at 5:11pm AEST that "*International books close in 1 hour*".[247] At 6:12pm the investor then asked: "*How long do we still have*". The sales trader at Citi informed them that "*Books closed at 9am [6pm AEST]. I can pull a favour if needed. Be quick*";

(iv) other internal JLM emails show that while bids were solicited out of the US overnight "*the books were technically closed*".[248]

18 The fact that the JLMs may have continued to solicit bids out of individual investors in London and the US after 6pm AEST does not suggest that the book remained open so as to allow investors to *amend* bids already made, or that any investors understood that the book

[243] CB 3 – FASC at [12]; admitted at CB 4 – Defence at [12].
[244] See, eg, CB 87 (ZIG.0005.0021.0002) – Moscati T(1)75:18-76:4, T(1)78:21-79:7; CB (ZIG.0005.0023.0001) – Needham T81:8-82:8.
[245] CB 348 (DBA.521.001.6980).
[246] ZIH.009.001.2553.
[247] CB 225 (CIT.100.063.1200).
[248] CB 283 (DBA.504.005.8229).

remained open for this purpose. Consistently with the limited activity of soliciting bids from additional investors in the US after this time:

(a) Mr Moscati recalls that at the 8:30pm meeting he was told that the book was fully covered, given the composition of the book the JLMs didn't think it was appropriate to fully allocate to certain hedge funds, that the JLMs "*were going to perhaps talk to a couple of accounts that they may not have talked to into the US. … And so the allocations would perhaps move a little bit*", and that the JLMs would be sending confirmation letters;[249]

(b) ASIC seeks to tender a transcript of a call occurring on 6 August 2015 at 9:23pm.[250] ANZ has raised issues as to the admissibility of that transcript. If it is admitted into evidence, it records Mr McLean saying, by reference to the call that took place with ANZ at around 8:35pm, that the JLMs had "*[g]ot an approval to allocate to these numbers, and we're proposing to do that, you know, send letters out and get these allocations out as soon as we can and just keep working through the night to try and pull in what else we can pull in. And the message will be, you know, we've preserved some stock for US investors who are disgruntled given how late we launched the deal US time this morning.*"[251] In his section 19 examination, Mr McLean explained, by reference to this comment, that the comment indicated that the JLMs "*were planning to receive and accept further demand from offshore investors*";[252]

(c) further, if call recordings/transcripts are admissible in the way ASIC contends, then there are other recordings which are consistent with the book closing at 6pm (and allocation decisions then being made), while at the same time the JLMs kept soliciting orders out of the US overnight.[253]

19 Allocation Confirmation Letters were sent to investors very early in the morning of 7 August 2015 following allocations decisions having been made by the JLMs and accepted by ANZ. By way of example:

(a) an Allocation Confirmation Letter was sent by email to Myriad at 12:24am on 7 August 2015;[254]

[249] CB 87 (ZIG.0005.0021.0002) – Moscati T(1)75:18-76:4, T(1)78:21-79:7.
[250] CB 241 (ZIG.0003.0005.0071).
[251] CB 241 (ZIG.0003.0005.0071 at .0073-4).
[252] CB 94 (ZIG.0005.0031.0003) – McLean T(2)156:8-24.
[253] CB 215 (ZIG.0005.0027.0024) at p 3 lines 15-23.
[254] CB 288 (CIT.100.014.0412) – email from Maxwell Davies to John Hedigan at 12:24am, and email from John Hedigan at 12:42am.

(b) an Allocation Confirmation Letter was sent by email to Brevan Howard at 12:26am on 7 August 2015;[255]

(c) an Allocation Confirmation Letter was sent to Indus at some time prior to 12:42am on 7 August 2015.[256]

20 ANZ was then subsequently informed, by email at 2:27am on 7 August 2015, that "*Confirmation letters / CARD forms have now been sent out to each investor allocated, due back to the JLMs by 11am Friday morning*".[257] This was consistent with all the confirmation letters having been sent just after 12am on 6 August 2015 (as evidenced by the emails above). That is inconsistent with the suggestion that the book remained open into the day on 7 August 2015.

21 It can be inferred that all Allocation Confirmation Letters were sent at around the same time. These allocations were sent without the JLMs coming back to ANZ following its acceptance on the call around 8:30pm of the allocations to be made.

22 In light of this evidence, to the extent that there is evidence of allocations being made to investors who made a bid after 6pm on 6 August 2015, or there is general reference to the bookbuild time being extended, that is consistent with the JLMs accepting late bids and soliciting bids from investors in the US and London after the close of the book, but does not amount to the book remaining "open" after 6pm on 6 August 2015 in the sense that bids already made could be amended (in particular, by being reduced) or investors understanding this to be the case. There was no prohibition on the JLMs allocating shares to investors who made a bid after the close of the book.

A.3 Evidence in relation to the general conduct of a bookbuild

23 There is a range of evidence relevant to understanding some of the contemporaneous documents and communications.

24 *First*, ASIC's expert witness, Grahame Pratt, gives contextual evidence in relation to how bookbuild processes generally occur. In particular:

[255] CB 257 (CIT.100.012.3577) – email from Maxwell Davies to Johan Tellvik).
[256] As is evident from Mike Conway's email at 12:42am which relates to what he had been allocated. CB 285 (ZIH.009.003.0006).
[257] CB 274 (DBA.402.001.2920).

(a) Mr Pratt gives evidence on matters concerning bookbuilds in his supplementary report (**Supplementary Pratt Report**), giving evidence that:

(i) the term "covered" is a colloquialism in financial markets which is widely understood to mean that "*the demand from institutions (the target market) for … shares had been sufficient to purchase all shares in the placement*";[258]

(ii) in the calls between the JLMs and their clients (the institutional investors) there "*is usually a real great sense of urgency in these discussions as the time frame for decision making is limited and usually the book is closed at the end of the business on the day of the announcement*";[259]

(iii) "*In most cases, these deals are priced at a discount to the prevailing share price and keenly bid for. Clients are thus in a competitive situation with other participants and seek to position themselves by various means (eg overbidding; contacting the corporate directly) to secure a desirable allocation*";[260]

(iv) "*The Lead JLM collates the bids received from the other JLMs and manages the book*";[261]

(v) "*Clients often also provide the broker with some colour pertaining to its bid. Colour is a colloquialisation for ancillary verbal information regarding a client's bid such as: - the degree of overbidding that the client has made to secure a desirable outcome; the minimum the client would accept as being a satisfactory allocation; whether the client is overweight or underweight the stock and so on. The purpose of the colour is to provide the receiving broker with extra information as to why that client might be favoured in the allocation process in preference to its competitors and thus receive a financial/competitive advantage*";[262]

(vi) the allocations to investors are then determined during "*the allocation negotiations*" (that is the JLMs "negotiate" the allocations), and that this process can be contentious;[263]

(vii) JLMs, with knowledge of any "colour" provided by investors, then report to the issuer to discuss and determine the final price considering the demand (size, spread, identity of investor) and the likely after-market impact on the share price.[264]

[258] CB 25 – Supplementary Pratt Report at pp 9-10.
[259] CB 25 – Supplementary Pratt Report at p 16.
[260] CB 25 – Supplementary Pratt Report at p 16.
[261] CB 25 – Supplementary Pratt Report at p 16.
[262] CB 25 – Supplementary Pratt Report at p 17.
[263] CB 25 – Supplementary Pratt Report at p 17.
[264] CB 25 – Supplementary Pratt Report at p 18.

25 Accordingly, Mr Pratt recognises that in a bookbuild process:

(a) there is a clear distinction between the bid of an investor and the ultimate allocation to that investor;

(b) because it is a competitive situation where investors' bids may be scaled-back they may "overbid" in order to secure what they consider to be a desirable allocation;

(c) further, in order to seek to influence the allocation process, clients often provide "colour" in relation to their bid, including matters such as the degree of overbidding or the amount that the investor would consider to be a satisfactory allocation.

26 *Secondly*, Mr Pratt's evidence is generally consistent with that of representatives of the JLMs in relation to the bookbuild process.

27 Robert Jahrling of Citi gave evidence in his section 19 examination that there is a distinction between the bid of an investor (what is "*legally and financially allocable, which is the demand*") and the amount that is actually allocated.[265] Mr Jahrling also gave evidence that:

(a) the ultimate allocation decision takes into account a number of considerations, including in particular:

(i) what percentage allocation (relative to their bids) an investor may be accustomed to receiving;

(ii) forming a view as to "*what may be the best outcome for the after-market to create an [orderly] after-market based on those allocations*";[266]

(b) in relation to the scale-back of investors:[267]

> [T]he underwriters jointly made a decision that is based, amongst other things, around the final colour of the book … when all the facts had been collected or when all the orders had been aggregated and received and confirmed, that the underwriters at that point made a decision not only based on the order sizes for each investors that had been received but also with a reference to how we think or thought we could best manage or - and you can never ensure but how we could be - what's the right word - well, give the transaction the best opportunity to trade well in the aftermarket. So we obviously take that as a - as one of the reference points as part of an allocation policy once all information has been received.

[265] CB 93 (ZIG.0005.0039.0001) – Jahrling T114:18-115:2 and T118:18-28.
[266] CB 93 (ZIG.0005.0039.0001) – Jahrling T52:1-20.
[267] CB 93 (ZIG.0005.0039.0001) – Jahrling T84:10-85:1.

(c) Mr Jahrling was specific as to a likely consequence of "over-allocating" to hedge funds notwithstanding the existence of binding bids: being heightened volatility in the aftermarket. He said specifically:[268]

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

(d) that what was entered into the "demand column" in the bookbuild spreadsheet was the "*bids received by professional investors*".[269] Mr Jahrling specifically disagreed with the suggestion by ASIC that the demand represented anything other than the bids received and "*reconciled by all three of the JLMs and agreed by all three JLMs for that to be presented to the client*".[270]

28 As to the relevance of an allocation preference expressed by an investor, in contrast to their actual bid, Mr Jahrling explained how these are treated:[271]

> Just because [an investor] indicates to in this - to - in any transaction, just because someone indicates that they want to be allocated amount X doesn't make it so. They may by the syndicate be deemed to be allocated more, they may be deemed to be allocated that amount or they may be deemed to be allocated a lot less and that is not a decision that is based on what [the investor] says, that is a decision that is ultimately based and progresses during the day based on the information at hand, as we do, as I said, consider potential allocation scenarios because it's a fluid process. So even in the absence of those kind of indications we would still, within our own mind, have some reference as to what we think the ideal allocation scenario would look like. So that's why that doesn't look random because usually they're pretty experienced practitioners in terms of allocating books.

29 In relation to the distinction between a bid and the expression of an allocation preference, Mr McLean also gave the following evidence:[272]

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[268] CB 93 (ZIG.0005.0039.0001) – Jahrling T115:24-116:16.
[269] CB 93 (ZIG.0005.0039.0001) – Jahrling T120:11-121:22.
[270] CB 93 (ZIG.0005.0039.0001) – Jahrling T120:11-121:22.
[271] CB 93 (ZIG.0005.0039.0001) – Jahrling T132:1-133:17.
[272] CB 94 (ZIG.0005.0031.0003) – McLean T(2)169:22-170:3.

> Q. In circumstances where somebody provides an allocation preference and indicates, "that's my maximum allocation", what's the distinction between that and an order?
>
> A. A client - privilege. A client knows when he gives a order that it's a legally binding obligation and that's his decision as to how he formulates that order and then we make our allocation decisions based on our policies and practices.

A.4 Bid amendments, and new bids, after the Second Bookbuild Update

30 There is evidence that when bids were in fact amended down by investors that this was recorded in the "book" by the JLMs. This includes material amendments made late in the day on Thursday 6 August 2015. It is unclear why the JLMs would have been amending in the book some, but not all, bids that were amended (as ASIC alleges).

31 An analysis of the documents shows that when investors decreased their bids during the day this was recorded in the DealAxis book.[273]

32 Further, analysis of the documents also shows a significant number of bids being received late in the day (and after the Second Bookbuild Update), and a number of bids being amended after the Second Bookbuild Update and in the last hour before the book closed (i.e. between 5-6pm).[274]

33 Overall, analysis of the documents shows that:

(a) some hedge funds decreased bids late in the day, which is consistent with contemporaneous commentary that there was an outflow from hedge funds;

(b) the overall demand remained over 100% (given other bids that came in);

(c) when amendments to bids were in fact made they were recorded in the book.

34 As to this last point, there is no reason why the JLMs would have been accurately recording the amendments to bids made by some investors, while at the same time ignoring or not recording any amendments to bids made by other investors such that the JLMs only changed the bids for some investors in DealAxis but left other investors in at a level that did not reflect their bids.

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[273] See CB 239 (CIT.002.001.0001); CB 152 (ANZ.505.001.3413); CB 183 (ANZ.502.001.0002); CB 233 (ANZ.505.001.3281).
[274] See CB 239 (CIT.002.001.0001); CB 152 (ANZ.505.001.3413); CB 183 (ANZ.502.001.0002); CB 233 (ANZ.505.001.3281).

A.5 Allocation Policies

35 Each of the JLMs had guidelines which addressed capital market offerings such as the Placement, and in particular addressed the allocation of securities as part of a placement (together, the **JLM Allocation Policies**).[275]

36 The JLM Allocation Policies relevantly identify or demonstrate:

(a) the complex decision-making process that is involved in making allocation decisions, and the number of different factors that may need to be taken into account;[276]

(b) that in making allocation decisions the JLMs should consider a number of factors or criteria which are relevant to assessing the likelihood that an investor will hold the stock in the long-term (or not dispose of the stock in a disorderly way), which in turn will result in a stable aftermarket;[277]

(c) investors may bid for more than their desired ultimate allocation with the expectation of being scaled-back.[278]

37 The JLM Allocation Policies reinforce the likelihood that the JLMs would have had regard to trading in the aftermarket as a relevant consideration in determining allocations.

A.6 Contemporaneous documents evidencing that the book was covered

38 As set out in Section B in the body of these submissions, there is a range of material which records or evidences that the book was covered.

A.7 Evidence of JLMs as to whether the book was covered, and the reason for the scale-back

39 The evidence given by JLM representatives in compulsory examinations conducted by ASIC pursuant to section 19 of the *ASIC Act* was that their understanding was that the book was

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[275] CB 97 (CIT.003.001.0007) (Citi); CB 343 (DBA.501.005.1310) (DB); CB 99 (ZIH.007.001.0674) (JPM).
[276] Eg. CB 97 (CIT.003.001.0007) at Section 4; CB 343 (DBA.501.005.1310) at .1312; CB 99 (ZIH.007.001.0674) at Section 4.2.
[277] CB 97 – Citi policy (CIT.003.001.0007) at Section 3 (referring to gathering information about "*which investors have long-term interests in the Issuer*"), Section 4 (referring to whether an allocation "*is in the best interest of the Issuer and the investors*"), and Section 6.1 (at least the third, fourth, fifth, sixth, eighth and ninth bullet points, each of which is a matter that is relevant to assessing the likelihood that an investor would hold the stock in the long-term); CB 343 – DB policy (DBA.501.005.1310) at .1312 (at least the second, fourth, seventh and tenth bullet points); CB 99 – JPM policy (ZIH.007.001.0674) at Section 4.2 (at least the second, fourth, seventh and tenth bullet points).
[278] CB 343 – DB policy (DBA.501.005.1310) at .1312 (tenth bullet point); CB 99 – JPM policy (ZIH.007.001.0674) at Section 4.2 (tenth bullet point).

covered. Further, and consistently with the book being covered, the evidence as to the reason for the scale-backs was consistent. This evidence has been set out in the body of ANZ's submissions at Section B.4.

A.8 ASIC's reliance on internal JPM emails and the "JPM DealAxis book"

Emails

40 ASIC's Submissions place particular emphasis on an email from Aditi Varghese at 9:51pm on 7 August 2015, which is referenced in the submissions eight times, and is a key basis for ASIC's contention that the Six Investors amended their bids.[279]

41 *First*, the apparent suggestion in ASIC's Submissions at [45] is that this email and attached spreadsheet shows that each investor in this spreadsheet who was allocated an amount that was less than their bid had specified to the JLMs "real demand" that was lower than their bid and which aligned with their allocation. There are at least 23 investors in this list whose "allocation" is lower than their "demand". In this regard it can be noted that:

(a) ASIC has previously expressly confirmed that its allegation in its Reply at [5] that the hedge fund investors had indicated to one of more of the JLMs their "real demand" (i.e. that they did not want an allocation higher than the allocation figure in the spreadsheet) was limited to the Six Investors;[280]

(b) as such, it is not now open to ASIC to advance a broader case that the "real demand" for Placement Shares was only ~70% of the Placement Shares on the basis that investors other than the Six Investors had indicated a "real demand" for shares that was different to the demand set out in the spreadsheet.

42 *Secondly*, the email itself is unclear and ambiguous.

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[279] CB 246 (ZIH.007.004.0917) and attachment CB 247 (ZIH.007.004.0918). ASIC's Submissions at [44]–[45], Annexure B (Chronology of Events), Annexure C (Section 1, concerning Myriad; Section 2, concerning Soros; Section 3, concerning Brevan Howard; Section 4, concerning DE Shaw; Section 5, concerning Indus; Section 6, concerning Segantii Capital).

[280] At the Case Management Hearing on 17 February 2023, ANZ raised an issue as to the scope of [5] of the Reply (see ANZ's written submissions dated 16 February 2023 at [16]–[18]). In response to this Moshinsky J indicated that he would read [5] of the Reply as limited to the Six Investors (T7:43 - 8:2, T8:18-19, T9:1-8). Counsel for ASIC confirmed that this was the scope of [5] of the Reply (T9:10-17). See also the Ruling of his Honour: "insofar as ANZ contends that there is a lack of clarity in paragraph 5(a) of the draft reply, in that the particulars to paragraph 5(a) do not make clear whether the proposition is limited to the six investors in paragraph 2(a), I propose to read paragraph 5(a) as limited to those six investors".

43 *Thirdly*, there is no evidence as to the role Ms Varghese played in relation to the Placement such that an assessment as to the reliability of any statement she actually made about the "real demand" of certain investors can be made. All that can be discerned from her email is that she was based in Hong Kong and was part of the "Equity Capital Markets Syndicate" for JPM. There is no evidence to suggest that she spoke to any, let alone many, of the investors who did not receive a full allocation such that she could have knowledge as to what their "real demand" was. Further, there is no evidence to suggest that she was involved in any of the relevant meetings at which allocations were discussed. Indeed, her apparent involvement is so peripheral that she does not even feature in ASIC's own *dramatis personae* which identifies relevant individuals in relation to the Placement.

44 *Fourthly*, to the extent that ASIC is seeking to contend that Ms Varghese was representing that each of the Six Investors had amended its bid, not only is it not apparent how Ms Varghese could have had that knowledge, but such an assertion appears to be demonstrably false. To take one example, Niccolo Manno, who is the person whom ASIC alleges in its Reply was informed by Soros before bookbuild close that its bid was amended from US$100 million to US$50 million, expressly stated in contemporaneous correspondence his discussion with Soros on Thursday night prior to finalising allocation was a discussion about "allocation size preferences" and not bids (see paragraph 129 below).

45 *Fifthly*, contemporaneous emails record that there was confusion as to what was being done in relation to the preparation of spreadsheets by those from JPM in Hong Kong, and whether it was consistent with how the book was being managed in Australia.[281]

46 *Sixthly*, the spreadsheet apparently prepared by Ms Varghese[282] and only circulated internally within JPM, is inconsistent with other spreadsheets circulated among the JLMs (and relied on by ASIC) both *before* and *after* Ms Varghese's spreadsheet was sent internally. For example the spreadsheet circulated among the JLMs at 12:52am on 7 August 2015 (relied on in ASIC's Submissions at [46]),[283] records that DE Shaw's demand was for 3,295,638 shares (AU$102 million, or US$75 million), with a proposed allocation of $55 million. Inconsistently with this, the earlier spreadsheet prepared by Ms Varghese (but only circulated internally at JPM) records DE Shaw's demand as US$40 million, and its proposed allocation as US$36.411 million. The subsequent final allocation spreadsheet sent to ANZ (and also relied on by

[281] CB 261 (ZIH.003.001.1533).
[282] The meta data to the document identifies the author as Aditi Varghese.
[283] CB 253 (CIT.100.005.4119).

ASIC[284]) records DE Shaw's demand as $102 million and its allocation as $55 million. It then appears that the actual allocation made to DE Shaw was AU$55 million.[285] All of this is inconsistent with the allocation in the spreadsheet prepared by Ms Varghese. As a further example, Ms Varghese's spreadsheet does not include an entry for Nikko Asset Management NZ, while the Draft Allocation List (and other books/spreadsheets sent between the JLMs) include a bid for 100,000 shares. How Ms Varghese came to prepare such a spreadsheet, and in reliance on what matters, is unknown.

47 None of these matters can be tested, because ASIC has decided not to call Ms Varghese as a witness, nor to call any other person who can shed light on these matters. However, there is nothing in the evidence that would suggest that Ms Varghese had any knowledge of the "real demand" of any particular investor.

48 Similarly, ASIC seeks to rely on an email from Mr Manno at 12:52am on 7 August 2015.[286] It is unclear precisely what representation or implication ASIC seeks to draw from that email. However, what ASIC does not refer to is the question addressed to Mr Manno from those in Australia who were involved in the Placement and the allocation decisions (none less than Richard Galvin, who was the Head of Equity Capital Markets in Australia), who said:[287]

> Niccolo — why are you building another book in dealaxis given we have one here and will manage all allocations through the Aussie desk? We have final allocations as agreed with DB and Citi (which I understand Spider has sent you) and confirms have been sent except for one outstanding account

49 When Mr Manno attempted to provide an explanation of what had been done, Mr Galvin responded stating: "*It doesn't work that way here*".[288]

50 This exchange highlights the irrelevance of what was going on and being produced by JPM in Hong Kong.

51 Further and in any case, Mr Manno's email (on which ASIC relies) is entirely consistent with there having been certain discussions as to allocation preferences after book close.

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[284] ASIC's Submissions at [49]; CB 275 (ANZ.505.001.3254).
[285] CB 331 (ZIH.003.001.1519); CB 332 (ZIH.003.001.1521).
[286] ASIC's Submissions at [48].
[287] CB 261 (ZIH.003.001.1533).
[288] CB 261 (ZIH.003.001.1533).

JPM Book

52 As noted below, for certain individual investors ASIC relies heavily on a document it refers to as "DealAxis".[289] That "document" is in fact apparently extracted data prepared by JPM's solicitors as part of ASIC's investigation. ANZ objects to the admissibility of this document. However, if it is admitted into evidence the following general points can be noted:

(a) curiously, ASIC's Submissions focus on one "DealAxis" book only (that of JPM), and do not reference in any way the DealAxis books of Citi and DB. This is in circumstances where it is normal that the settlement agent (here, Citi) would handle the books;

(b) there is no evidence as to how the entries on which ASIC relies in the "JPM DealAxis book" came to be made. This is in circumstances in which it is evident from other contemporaneous emails that someone from JP Morgan's Hong Kong office (Aditi Varghese) was, well after the book had closed, amending the "book",[290] and that there may have been confusion as to what was being done by those in Hong Kong and whether it was consistent with how the book was being managed in Australia.[291] None of that can be tested or assessed because ASIC has not tendered any of the relevant primary documents (which are purportedly summarised by Gilbert + Tobin), nor called any of the relevant personnel to give evidence.

B. ANALYSIS OF THE SIX INVESTORS RELIED ON BY ASIC

53 An analysis of the documents relied on by ASIC, which are addressed in detail below for each of the Six Investors, shows that:

(a) most of the communications relied on were after the close of the book, and after investors had been informed of their allocation;

(b) these communications or discussions relate to the allocation process, rather than investors' bids;

[289] CB 57 (ZIG.1037.0001.0007).
[290] CB 310 (ZIH.003.001.1509).
[291] CB 261 (ZIH.003.001.1533).

(c) where ASIC does rely on communications from during the bookbuild period, the communications are consistent with the investors expressing a preferred allocation rather than an amendment to their bid;

(d) it is common practice in capital raising for investors to make a bid that reflects their expectation of being scaled-back to a lower allocation. This does not undermine the binding nature of their bid. As noted above, there is a clear distinction between bids and allocations.

54 ASIC does no more in its submissions than refer, in chronological order, to some but not all relevant documents concerning the Six Investors. Further, this partial recitation of relevant documents is set out without any regard or analysis by reference to: (a) the matters set out in Section A above; or (b) the evidence given by JLM representatives who ASIC examined pursuant to its compulsory examination powers under section 19 of the *ASIC Act*, but whose evidence on these matters it does not seek to put before the Court.

55 When regard is had to a complete set of relevant material, and when the available material is read fairly and in context, it is evident that the Six Investors did not amend their bids as ASIC alleges.

B.1 Myriad Asset Management

56 At 8:35pm on 6 August 2015 ANZ received from the JLMs the Draft Allocation List[292] which recorded that Myriad Asset Management's (**Myriad**) demand (i.e. its bid) was for $100 million of shares at $30.95 per share.

57 ASIC alleges that Myriad's bid was in fact amended prior to close of the bookbuild from an initial bid of $100 million to a bid for $35 million of shares, with that amendment being made by way of email or phone communication to each Underwriter.[293]

Myriad's bid and bookbuild updates

58 On 6 August 2015 at 10:13am, Robert Jahrling of Citi sent an email to other Citi personnel stating: "*Myriad … Carl is in NY. Will place an order in ~2 hours*".[294]

[292] CB 232 (ANZ.505.001.3280) and CB 233 (ANZ.505.001.3281).
[293] CB 5 – Reply at [2(a)], first bullet point particulars.
[294] CB 129 (CIT.100.005.3610).

59 A Bloomberg chat between Cameron Wood of JPM and John Hedigan of Myriad recorded that on 6 August 2015 at 11:40am AEST Mr Hedigan said "*put me in the book for A$100 mm at 30.95*".[295] Shortly after this, Mr Wood emailed other personnel at JPM at 11:43am stating that Myriad was "*Bidding for A$100m @ $30.95*".[296]

60 The Citi DealAxis Book records demand from Myriad of $100 million, being a maximum of 3,231,018 shares at $30.95.[297] The bid is recorded as follows:

Myriad Asset Management

Demand	Demand Factor	Limit	Limit Factor	Instrument	Entered By
	6-Aug-15 11:50 AES		Max Demand 3,231,018		
100,000,000	AUD	30.95	AUD per Share	Share	Jarrod Bakker

61 That demand figure was not changed prior to the close of the bookbuild, or at any time.

62 All versions of the book circulated among the JLMs (and by the JLMs to ANZ) were consistent with Myriad's bid being for $100 million of shares. In this regard:

(a) an initial cut of the "book" was circulated among the JLMs for discussion at 11:30am on 6 August 2015.[298] This book did not record any bid for Myriad. This was consistent with the bid being received after 11:30am;

(b) an initial bookbuild update spreadsheet entitled "ANZ Book 11:30" (**First Bookbuild Update**) was then emailed by the JLMs to ANZ at 12:03pm on 6 August 2015.[299] The First Bookbuild Update did not record any bid from Myriad;

(c) the "second bookbuild update" emailed at 2:34pm on 6 August 2015 (at row 19) (**Second Bookbuild Update**) recorded demand for 3,231,018 shares at $30.95 for Myriad;[300]

(d) the ANZ Book Allocations v6 spreadsheet emailed by the JLMs to ANZ at 8:35pm on 6 August 2015, being the Draft Allocations List, recorded Myriad's demand in row 19 as 3,231,018 shares at $30.95, for a bid of $100 million.[301] The proposed allocation recorded for Myriad was 1,615,509 shares for a total of $50 million and a

[295] CB 142 (ZIH.009.001.2570).
[296] CB 144 (ZIH.009.001.1514).
[297] CB 239 (CIT.002.001.0001) at p 1 of 22.
[298] CB 147 (DBA.504.003.7870); CB 148 (DBA 504.003.7871).
[299] CB 151 (ANZ.505.001.3412); CB 152 (ANZ.5005.001.3413).
[300] CB 182 (ANZ.502.001.0001); CB 183 (ANZ.502.001.0002).
[301] CB 232 (ANZ.505.001.3280); CB 233 (ANZ. 505.001.3281).

fill of 50%. The reference to a "fill of 50%" is consistent, and only consistent, with the allocation being 50% of the bid;

(e) at 10:57pm on 6 August 2015, a further version of the ANZ Book Allocations spreadsheet (v9) was emailed among the JLMs. This spreadsheet recorded Myriad's bid as 3,231,018 shares ($100 million). The proposed allocation for Myriad was now 2,261,712 shares ($70 million), being a "fill" of 70% (row 2);[302]

(f) the ANZ Book Allocations spreadsheet emailed by the JLMs to ANZ at 2:26am on 7 August 2015 (row 19) again recorded Myriad's demand as 3,231,018 shares at $30.95, for a bid of $100 million.[303] The proposed allocation recorded for Myriad now was 1,292,407 shares for a total of $40 million and a fill of 40%.

Evidence of communications following the close of the book

63 At 12:24 am on 7 August 2015 Maxwell Davies of Citi emailed to Myriad its Allocation Confirmation Letter, with an allocation of 2,261,712 shares (for an amount of ~$70 million).[304]

64 John Hedigan at Myriad responded by email to Jarrod Bakker at Citi on 7 August 2015 at 12:42am stating:[305]

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

65 Following this:

(a) Kristopher Salinger at Citi sent an email to personnel at each of the JLMs in which he noted that "*[a]fter much discussion, we have agreed upon the following adjustments to the allocations: … Myriad now A$40mm (previously A$70mm). Finalized allocation list*

[302] CB 249 (CIT.100.005.4112); CB 250 (CIT.100.005.4113).
[303] CB 274 (ANZ.505.001.3253); CB 275 (ANZ.505.001.3254).
[304] CB 288 (CIT.100.014.0412); CB 289 (CIT.100.014.0414).
[305] CB 288 (CIT.100.014.0412).

attached".[306] The attached allocation list included Myriad with a demand of 3,231,018 shares ($100 million), and an allocation of 1,292,407 shares ($40 million);[307]

(b) the allocation spreadsheet as amended to include an allocation of $40 million for Myriad was sent to ANZ (see paragraph 62(f) above).

66 The only direct evidence as to the indication of a maximum allocation of $35 million (as referred to in Mr Hedigan's email) is an earlier Bloomberg chat between him and Joe Cruz of DB.[308] This Bloomberg chat is omitted from ASIC's chronology of relevant documents in Annexure C. In this Bloomberg chat:

(a) Mr Hedigan sent a message which said: "*keep me in for A$100 mm usd [sic] but my real max demand is A$35mm fill to be clear*". The time of this message was 3:31pm AEST on 6 August 2015. It can be noted that in his message Mr Hedigan is clear that the bid for Myriad should remain at $100 million ("*keep me in for A$100 mm*"), while at the same time indicating an allocation preference for a lesser amount of $35 million. This language of "*keep me in for*" was consistent with the language used when the bid was placed ("*put me in … for*");

(b) importantly, Mr Cruz then responded around two hours later (at 5:21pm) saying "*have kept you in there for US$100m*". The reference to "US" is an obvious error, since in all documents Myriad's demand is recorded as AU$100 million. Mr Cruz's message is wholly inconsistent with Myriad's bid having been amended;

(c) Mr Hedigan did not respond to say that Myriad's bid was not $100 million and should not be retained as $100 million in the book. Rather, Mr Hedigan only subsequently responded when his allocation was greater than the allocation preference that he had expressed.

67 On the morning of 7 August 2015 at 9:13am and then 10:22am Jarrod Bakker sent an internal Citi email in which he noted confusion as to the allocation to Myriad, stating:[309]

> First they got email saying they got 70bucks

[306] CB 270 (CIT.100.005.4124).
[307] CB 271 (CIT.100.005.4126).
[308] CB 277 (DBA.521.001.4785).
[309] CB 304 (CIT.100.014.0460); CB 313 (CIT.100.014.0457).

> Then they get email saying 40bucks
>
> Real demand was only 35bucks ..
>
> The dealer is all over me ..
>
> Has anyone had another conversation with Carl overnight that is different to the instructions that I received before going to bed?
>
> …
>
> Myriad COO now all over the dealer on this.
>
> They know $35m .. we are telling them $40m
>
> Sounds like we have a problem

68 The final version of the allocation list then sent among the JLMs on 7 August 2015 at 5:29pm included an allocation for Myriad of $35 million (with stated demand of $100 million, for a "fill" of 35%).[310]

ASIC's case that the bid was formally amended prior to the close of the book

69 ASIC relies on several documents to suggest that Myriad formally amended its bid from $100 million to $35 million prior to the close of the book.[311] Those documents, understood in context and viewed objectively, do not establish ASIC's allegation as to an amendment of Myriad's bid.

70 *First*, ASIC relies on emails sent after the close of the book and after Myriad had received notification of its allocation (on the morning of 7 August 2015) in which Mr Hedigan, upon receiving notification of an allocation of $70 million, stated that he had indicated to the JLMs that his "max allocation" was to be $35 million (being the communications set out in paragraph 64 above). It is notable that Mr Hedigan uses the specific language as to his "max *allocation*", and does not say that this was his bid.

71 *Secondly*, ASIC points to an email between the JLMs with a "finalized allocation list" which records an allocation of $40 million for Myriad.[312] As to this it can be noted that:

[310] CB 331 (ZIH.003.001.1519); CB 332 (ZIH.003.001.1521).
[311] The relevant documents are identified in the particulars to the Reply [2(a)], first bullet point.
[312] CB 272 (ZIH.003.001.0534).

(a) the attached allocation list records Myriad's demand as being for 3,323,018 shares ($100 million);[313]

(b) the reference to an allocation of $40 million is entirely consistent with a bid of $100 million;

(c) an allocation of $40 million is not consistent with a bid of $35 million (being the amended bid which ASIC alleges), and is therefore inconsistent with ASIC's case.

72 *Thirdly*, ASIC refers to the emails on the morning of 7 August 2015 at 9:13am and then 10:22am referred to in paragraph 67 above. The reference in the emails to "*Real demand was only 35bucks*" is consistent with an expression of an allocation preference, especially when it is noted that Mr Hedigan had expressly been told that his bid would remain at $100 million following his expression of his allocation preference.

73 *Fourthly*, the primary document on which ASIC now appears to rely to prove an "altered bid" is a document that ASIC refers to as "DealAxis".[314] The importance of this "DealAxis" document on ASIC's case is that it has an entry, for 4:31pm on 6 August 2015, which records a bid from Myriad of $35 million. ANZ has the following responses in relation to ASIC's reliance on this document:

(a) as noted in paragraph 52 above, ANZ objects to the admissibility of this "book";

(b) even if this document was admitted into evidence, the weight to be afforded to it should be very low, and it does not establish the existence of a binding amendment to Myriad's bid when regard is had to matters including that:

(i) the DealAxis books maintained by Citi does not include any such entry;

(ii) as ASIC's own expert (Mr Pratt) has stated, it is the lead JLM (here Citi) which collates the bids and manages the book (see paragraph 24(a)(iv) above);

(iii) curiously, ASIC's Submissions focus on one "DealAxis" book only (that of JPM), and do not reference in any way the DealAxis books of Citi and DB;

[313] CB 273 (ZIH.003.001.0536).
[314] ASIC's Submissions, Annexure C, referring to CB 57 (ZIG.1037.0001.0007) as "DealAxis" and as evidencing an "[a]ltered bid".

(iv) further, in terms of the books, it is the case that:[315]

(A) it is normal that the settlement agent (here, Citi) would handle the books;

(B) there was a typical process after the books are closed where junior members of the team spend time "scrubbing the books" to check the veracity of orders and the accuracy of orders;

(C) after this there is a meeting between the JLMs to discuss allocations;

(D) this meeting occurred at around 7pm on 6 August 2015 at the offices of Citi;

(E) the book agreed following this discussion included a bid for Myriad of $100 million;[316]

(c) the book maintained by the other JLM, DB, also recorded Myriad's bid at all times as being for $100 million. The copy of the DealAxis Book maintained by DB was emailed from Jessica Lin of DB to Anthony Hanna and Harry Florin of DB on 6 August 2015 at 4:45pm;[317]

(d) there is no evidence as to how the entry in the "JPM book" came to be made. This is in circumstances in which it is evident from other contemporaneous emails that someone from JPM's Hong Kong office (Aditi Varghese) was, well after the book had closed, amending the "book",[318] and that there may have been confusion as to what was being done by those in Hong Kong and whether it was consistent with how the book was being managed in Australia.[319] None of that can be tested or assessed because ASIC has not tendered any of the relevant primary documents (which are purportedly summarised by Gilbert + Tobin), nor called any of the relevant personnel to give evidence;

(e) insofar as the 'JPM book' has an entry for a bid of $35 million for Myriad, it can be inferred that whoever made that entry misunderstood the (or a similar) communication from Mr Hedigan as set out in paragraph 66(a) above, and incorrectly recorded an amended bid (when this was not what had been communicated);

[315] CB 88 (ZIG.0005.0022.0002) – RichardsonT59:13-60:20.
[316] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
[317] CB 204 (DBA.408.001.2068); CB 205 (DBA.408.001.2069).
[318] CB 310 (ZIH.003.001.1509).
[319] CB 261 (ZIH.003.001.1533).

(f) there is evidence of multiple versions of the book being emailed between JLMs, and from the JLMs to ANZ, after 4:31pm on 6 August 2015, where each version records Myriad's bid as being $100 million. Notwithstanding this, at no time does any person from JPM seek to suggest that the bid for Myriad was in fact for some lower amount and that the book should be amended. It is highly unlikely that if in fact the bid had been amended that representatives of JPM would have sat by in the face of such documents (including documents sent to ANZ) and said nothing;

(g) in the conversation of 6 August 2015 at 9:23pm,[320] representatives of the JLMs re-iterated that Myriad's order was for "*a hundred bucks*", and noted that in this context the (then) proposed allocation of $50 million was "*not too bad*".

Conclusion on Myriad

74 All of the emails relied on by ASIC in relation to Myriad were sent after the close of the book.

75 In any case, it is evident from the actual direct communications with Myriad that its bid remained at $100 million, and that the reference to $35 million was only a communication of a preferred allocation. This is particularly evident from:

(a) Mr Hedigan's Bloomberg message in which he expressly directed the JLMs to "*keep me in for A$100mm*", while at the same time he expressed a lower allocation preference;

(b) the response to Mr Hedigan's Bloomberg message which informed him that Myriad had been kept in the book for $100 million, in response to which at no time did he suggest that this was not Myriad's bid.

76 Mr Hedigan's subsequent email the following morning after Myriad's allocation was notified to him, in which he queried Myriad's allocation of $70 million, is consistent with the bid having remained at $100m, but with Myriad seeking to apply pressure to the JLMs to have its final allocation reduced notwithstanding its bid. Indeed, the allocation of $70 million in itself was inconsistent with the JLMs having understood Mr Hedigan to have amended Myriad's bid to $35 million, and was entirely consistent with the bid being $100 million.

[320] CB 241 (ZIG.0003.0005.0071). ANZ objects to the admissibility of this call, but if it is admitted it is inconsistent with ASIC's case insofar as Myriad is concerned.

B.2 Segantii Capital

77 At 8:35pm on 6 August 2015 ANZ received from the JLMs the Draft Allocation List which recorded that Segantii Capital Management Ltd's (**Segantii Capital**) demand (i.e. its bid) was for $250 million of shares at $30.95 per share.[321]

78 ASIC alleges that Segantii Capital's application was amended prior to close of the bookbuild by it informing "*one or more Underwriters*" of an amendment from an initial bid of $250 million to a bid for $50 million of shares.[322]

Segantii Capital's bid

79 The Citi DealAxis Book records bids made by Segantii Capital on 6 August 2015 at 12:23pm AEST for a maximum number of 8,077,544 shares, and more specifically:

(a) $250 million of shares at $31.50 per share;[323] and

(b) $100 million of shares at $31.60 per share.[324]

80 The bids are recorded as follows:

Segantii Capital Management Limited (HK)

Demand	Demand Factor	Limit	Limit Factor	Instrument	Entered By
6-Aug-15 12:23 AES			Max Demand 8,077,544		
250,000,000	AUD	31.5	AUD per Share	Share	Jarrod Bakker
100,000,000	AUD	31.6	AUD per Share	Share	Jarrod Bakker

81 The max demand figure of 8,077,544 corresponds to ~$250 million of shares at the floor price of $30.95. This bid was not amended in the Citi DealAxis Book at any time.

82 The direct evidence of the bid is consistent with this information. By email on 6 August 2015 at 10:59am AEST from Arjuna Rajasingham at Segantii Capital to Michael Richardson and Joe Cruz at DB, Mr Rajasingham requested DB to "*put us in the book*" for AU$100 million at $31.60 and AU$250 million at $31.50.[325] This email was copied to group email addresses for "Segantii Middle Office" and "Segantii Deals".

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[321] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
[322] CB 5 – Reply at [2(a)], second bullet point of particulars.
[323] Where the lowest priced bid for an investor was placed for an amount higher than $30.95 per share, where the Placement price was $30.95 the bid stood, in substance, as a bid at $30.95 per share.
[324] CB 239 (CIT.002.001.0001) at p 1 of 22.
[325] CB 146 (DBA.504.003.7866); CB 137 (CIT.100.013.4754).

83 Shortly after this, an initial cut of the "book" was circulated among the JLMs for discussion at 11:30am on 6 August 2015.[326] This book recorded that Segantii Capital's demand started at the floor price (of $30.95) at 8,077,544 shares (i.e. a bid of ~$250 million), with the number of shares bid at each price up to $31.50 being the number required for a bid of $250 million.[327]

84 The First Bookbuild Update emailed by the JLMs to ANZ at 12:03pm on 6 August 2015,[328] recorded that Segantii Capital had bid for 8,077,544 shares at $30.95 (equalling ~$250 million).

85 Further, each version of the book provided by the JLMs to ANZ recorded Segantii Capital's demand at $30.95 to be for 8,077,544 shares for a bid of $250 million (with the proposed *allocation* to Segantii Capital varying over time). This includes:

(a) the Second Bookbuild Update emailed at 2:34pm on 6 August 2015 (at row 2);[329]

(b) the Draft Allocation List emailed by the JLMs to ANZ at 8:35pm on 6 August 2015 (row 2), which recorded Segantii Capital's bid as 8,077,544 shares ($250 million) and its proposed allocation as 2,100,162 shares ($65 million), being a "fill" of 26%;[330]

(c) the ANZ Book Allocations spreadsheet emailed by the JLMs to ANZ at 2:26am on 7 August 2015 (row 2) recorded Segantii Capital's bid as 8,077,544 shares ($250 million) and its proposed allocation now as 1,615,509 shares ($50 million), being a "fill" of 20%.[331]

86 Consistently with this, all versions of the book emailed internally between the JLMs recorded Segantii Capital's bid as being for $250 million, albeit that the proposed allocation to Segantii Capital varied following the close of the book. For example:

(a) at 10:57pm on 6 August 2015, the ANZ Book Allocations spreadsheet v9 emailed among the JLMs recorded Segantii Capital's bid as 8,077,544 shares ($250 million)

[326] CB 147 (DBA.504.003.7870); CB 148 (DBA 504.003.7871).
[327] At the price of $31.05, the book recorded demand for 8,051,530 shares (i.e. 8,051,530 x 31.05 = ~$250 million); at the price of $31.45 the book recorded demand of 7,949,126 shares (i.e. 7,949,126 x 31.45 = ~$250 million).
[328] CB 151 (ANZ.505.001.3412); CB 152 (ANZ.505.001.3413).
[329] CB 182 (ANZ.502.001.0001); CB 183 (ANZ.502.001.0002).
[330] CB 232 (ANZ.505.001.3280); CB 233 (ANZ. 505.001.3281).
[331] CB 274 (ANZ.505.001.3253); CB 275 (ANZ.505.001.3254).

and its proposed allocation as 2,423,263 shares ($75 million), being a "fill" of 30% (row 2);[332]

(b) at 12:04am on 7 August 2015, the ANZ Book Allocations spreadsheet v10 emailed among the JLMs recorded Segantii Capital's bid as 8,077,544 shares ($250 million) and its proposed allocation as 1,615,509 shares ($50 million), being a "fill" of 20% (row 2);[333]

(c) at 2:08am on 7 August 2015, the ANZ Book Allocations spreadsheet vF emailed among the JLMs recorded Segantii Capital's bid as 8,077,544 shares ($250 million) and its proposed allocation as 1,615,509 shares ($50 million), being a "fill" of 20% (row 2);[334]

(d) at 11:21am on 7 August 2015, Kristopher Salinger (Citi) emailed Harry Florin (JPM) with the ANZ Book Allocations vF2.[335] The email noted that "*Segantii moved back to A$75mm*". The attached spreadsheet recorded Segantii Capital's bid as $250 million, and its "fill" being 30% of its demand, for a final allocation of $75 million;

(e) at 5:29pm on 7 August 2015, the ANZ Book Allocations V2pm Friday circulated among the JLMs recorded Segantii Capital's bid as $250 million, and its "fill" being 30% of its demand, for a final allocation of $75 million.[336]

Discussions about Segantii Capital's allocation

87 It is apparent that various discussions took place with Arjuna Rajasingham of Segantii Capital after the close of the book in relation to the allocation to be made to Segantii Capital.

88 On 7 August 2015 at 4:27am, Michael Richardson at DB sent an email in which he said:[337]

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

[332] CB 249 (CIT.100.005.4112); CB 250 (CIT.100.005.4113).
[333] CB 252 (CIT.100.008.4399); CB 253 (CIT.100.008.4401).
[334] CB 270 (CIT.100.005.4124); CB 271 (CIT.100.005.4126).
[335] CB 314 (ZIH.007.004.0799); CB 315 (ZIH.007.004.0800).
[336] CB 331 (ZIH.003.001.1519); CB 332 (ZIH.003.001.1521).
[337] CB 284 (DBA.504.002.8184).

89 At 9:44am on 7 August 2015 Niccolo Manno from JPM sent an email with the subject line "*Segantii will take aud75m instead of aud50m in the end to help out*", and which said "*Just spoke to Arjuna who will reflect this to citi and db too*".[338]

90 These discussions, after the book close, were reflected in the varying allocations for Segantii Capital as noted in the documents in paragraph 86 above.

ASIC's case as to an amended bid

91 As against all of that material, ASIC relies on several documents to suggest that Segantii Capital amended its bid from $250 million to $50 million prior to the close of the book.[339] Those documents, understood in context and viewed fairly, do not establish ASIC's allegation as to an amendment of Segantii Capital's bid.

92 *First*, ASIC relies on the email from Michael Richardson at 4:27am on 7 August 2015 (set out in paragraph 88 above).[340] This email does not support ASIC's contention, and is in fact inconsistent with it. Mr Richardson expressly notes that Segantii Capital "[b]id $250m", and then notes that based on discussions overnight (i.e. after book close) Arjuna Rajasingham indicated that he "would only take $50m" (being an apparent expression of what he wanted Segantii Capital to be allocated, with that being expressed after Segantii Capital had received its final allocation).

93 *Secondly*, ASIC then points to a number of emails which address discussions with Segantii Capital in relation to it taking an allocation of $75 million rather than the $50 million. These emails are:

(a) an email at 9:44am on 7 August 2015 in which Niccolo Manno from JPM sent an email with the subject line "*Segantii will take aud75m instead of aud50m in the end to help out*", and which said "*Just spoke to Arjuna who will reflect this to citi and db too*";[341]

(b) an email from Niccolo Manno of JPM to Arjuna Rajasingham at 9:50am on 7 August 2015 in which Mr Manno says "*Your allocation is now aud75m, exact nbr of shares to come from Citi. Very much appreciate the help*";[342]

[338] CB 307 (ZIH.003.001.1508).
[339] The relevant documents are identified in the particulars to CB 5 – Reply at [2(a)].
[340] CB 284 (DBA.504.002.8184).
[341] CB 307 (ZIH.003.001.1508).
[342] CB 308 (ZIH.003.001.1514).

(c) on 7 August 2015 at 10:02am Niccolo Manno sent an email to others within JPM which said "*Segantii called to pro-actively help in taking more stock, ie aud75m*".[343]

94 These emails reflect no more than the fact that there were continuing discussions with Mr Rajasingham well into Friday 7 August 2015, after the close of the book and after he had been advised of the allocation to Segantii Capital, as to whether Segantii would be allocated more than $50 million. The fact that Mr Rajasingham apparently accepted a higher allocation of $75 million is simply a reference to the earlier proposed allocation of $50 million, and is not evidence of a bid other than that of $250 million being made prior to the close of the book and prior to the allocation being advised to Segantii Capital. The fact that there were discussions in relation to, and changes of, the actual allocation to Segantii Capital after this says nothing about the bid having been amended.

95 *Thirdly*, ASIC relies on a transcript of a telephone call which is said to be between Richard Newton and an unknown person on 7 August 2015 at 9:51am.[344] ANZ objects to the admissibility of this transcript. Further and in any case, even if the transcript is admitted into evidence it does not assist ASIC's position. The transcript records the following as having been said:

RN Hi Mate, So Segantii wants another 25.

M2 What bucks?

RN 25 yeah so 75 bucks now.

M2 Right OK so you are going to communicate that to them?

RN Yeah, well they know they communicated it to us.

M2 Right OK.

…

RN They were in Aussie right? They bid 250 Aussie.

M2 Yes, they did.

[343] CB 310 (ZIH.003.001.1509).
[344] CB 309 (ZIH.002.001.0851). ASIC does not seek to tender, and has not discovered, any audio file from which this transcript has been prepared.

RN So 75 Aussie.

…

RN They originally bid for 250 and they said what we really want is 50 and now they have come back at 75.

M2 Right OK. I'll amend it now mate.

96 It is apparent from this discussion that the bid of Segantii Capital was $250 million, and that it then communicated a desire to be allocated a lower amount after it was advised of its allocation. This is consistent with the other evidence referred to above.

97 *Fourthly*, ASIC also refers to a recording of a call which ASIC says in its Tender List is between Sean Larcombe, Adam Lavis and Ravi Bairns on 7 August 2015.[345] There is also a purported transcript of this call at ZIG.0003.0005.0273, being a transcript prepared by ASIC. Again, ANZ objects to the admissibility of these documents.

98 In any case, even if these documents were admitted into evidence, they do not assist ASIC. The transcript records the following being said on the call:

> MR LARCOMBE: So, just so you know, Segantii's pulling down a shit load of borrowing, yeah? I think.
>
> MR LAVIS: Segantii's? Well, they - well, that doesn't surprise me because they increased their bid size from 20 - they've taken 75 bucks. They were at 25.
>
> MR LARCOMBE: Yeah.
>
> MR LAVIS: So they've been lent on.
>
> MR LARCOMBE: Yeah.
>
> MR LAVIS: Sorry, they were at 50 and they've gone to 75.
>
> MR LARCOMBE: Yeah, yeah. Okay. Yeah, so they're pulling down the borrow because they need the borrow in place before they can sell it or something?

99 The comments made relate, again, merely to discussions the day after the book closed as to the allocations to be made to Segantii Capital.

[345] CB 311 (CIT.019.001.0276).

100 *Fifthly*, ASIC refers to a further document[346] which purports to be a transcript (prepared by ASIC) of a call between Itay Tuchman, John McLean, Angus Richardson and "unknown" person on 6 August 2015 at 9:23pm.[347] ANZ objects to the admissibility of this transcript. If it is admitted, it can be noted that the transcript records the following as being said on that call (emphasis added):

> MR RICHARDSON: Okay. And Segantii's saying around number, make it 51 million – ie, around number in shares. I think he's already been yelling at Rob --
>
> MR TUCHMAN: Those are the – you know, those kind of numbers are the ones we have real problems with, right? I mean, the guy's in the book for 250; you're giving him 50.
>
> You're giving Regal 150.
>
> MR RICHARDSON: Yeah.
>
> MR TUCHMAN: Right? You're going to have a problem with that.
>
> MR RICHARDSON: That's a good point.
>
> MR TUCHMAN: Right, I know you guys are all scared shitless of this guy, Segantii, but somebody's going to have to make it clear – I'm not that comfortable giving him only 50 bucks.
>
> MR McLEAN: We've got him in at 65, so Spider wants to bring him down, does he?
>
> MR TUCHMAN: That's right. Apparently the guy screamed at him and screamed at Rob.
>
> MR McLEAN: Has Rob had that same conversation?
>
> MR RICHARDSON: Yeah.
>
> MR TUCHMAN: Yes.
>
> …
>
> MR RICHARDSON: So you're saying that Segantii wasn't a real order?
>
> MR McLEAN: That's the only conclusion you can draw. I mean, an auditor comes and has a look at it, that's what's going to happen.
>
> UNKNOWN: <u>But it was a real order. He was in early</u>.

[346] CB 241 (ZIG.0003.0005.0071).
[347] There is also a recording of this call at CB 240 (CIT.010.001.0192).

MR McLEAN: Yeah.

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

101 This transcript does not support the contention that Segantii Capital amended its bid, before the close of the book, to $50 million. It is in fact inconsistent with that contention.

102 *Sixthly*, ASIC then refers to a further document (as to which ANZ has objected to its admissibility)[348] which purports to be a transcript (prepared by ASIC) of a call between Itay Tuchman and Richard Heyes on 7 August 2015 at 2:13pm.[349] The transcript records the following as being said on that call:

MR TUCHMAN: You know, and adjust it in the book. Right, you know, you have Segantii in there for $250 million --

MR HEYES: Yeah.

MR TUCHMAN: -- when his order (indistinct) not a single penny over $50 million, right?

MR HEYES: Yeah.

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

103 This call has been elevated in ASIC's Submissions to be the primary document which evidences an altered bid.[350] It is apparent from its reliance on this conversation that ASIC is contending that:

(a) Mr Tuchman had knowledge of the bid made by Segantii Capital such that these statements are admissible and probative evidence;

(b) Mr Tuchman is stating that Segantii Capital amended its bid to $50m prior to the close of the book.

104 ASIC puts forward this evidence, and asks the Court to made findings along the lines set out above, notwithstanding that ASIC conducted a compulsory examination of Mr Tuchman under section 19 of the *ASIC Act* during which he was examined and gave

[348] CB 327 (ZIG.0003.0005.0090).
[349] There is also a recording of this call at CB 326 (CIT.010.001.0196).
[350] ASIC's Submissions at Annexure C, Section 6, row for "Altered bid".

evidence as to these specific comments. ASIC has omitted to put that evidence before the Court. Mr Tuchman's evidence was to the effect that:[351]

(a) Mr Tuchman recalled a discussion that Segantii Capital was in the book for $250 million but that it was not going to be happy with anything over $50 million;

(b) his recollection is that Segantii Capital was expressing a preference for scaling, and that it was not amending its bid;

(c) he did not think that Segantii Capital's bid was "*not genuine*";

(d) he believed that Segantii Capital's order of $250 million was a "*real order*";

(e) he doesn't recall anyone saying to him that Segantii Capital had expressed a preference for $50 million before the book closed, and he had no specific knowledge about the timing of any statements by Segantii Capital;

(f) he is not a capital markets person by background.

105 It can also be noted from the call set out in paragraph 100 above, which took place before Mr Tuchman's subsequent call with Mr Heyes, that Mr Tuchman:

(a) was told that Segantii Capital's order of $250 million was a real order;

(b) was questioning why Segantii Capital was only being given an allocation of $50 million, and in fact stated that he was uncomfortable with it only being allocated $50 million;

(c) was told, by those actually involved in the syndicate process, that Segantii Capital had thought the domestic investors would have sufficient demand such that Segantii Capital would get scaled-back, but that it didn't play out that way.

106 *Seventhly*, ASIC also relies on the fact that the "JPM book" recorded an amendment to Segantii Capital's bid on 7 August 2015 at 10:53am. For the reasons set out in paragraph 73(b) above, this "book" is inadmissible or should be accorded little weight. Even if it was admitted into evidence, it does not assist ASIC for reasons including that:

(a) neither of the DealAxis Books maintained by Citi or DB includes any such entry;

[351] CB 95 (ZIG.0005.0041.0001) – Tuchman T(2)40:1-41:9, T(2)62:21-63:24, T(2)65:7-66:2, T(2)76:26-80:2.

(b) the entry is made around 16 hours after the book closed, and well after Segantii Capital had been advised of its allocation. It therefore does not suggest an amended bid being made prior to the book being closed, and is in fact inconsistent with this. The amendment itself appears to (erroneously) conflate the ongoing discussions about the allocation to Segantii Capital with its stated bid;

(c) the amendment is to a figure of $75 million, which is inconsistent with ASIC's pleaded case of an amendment of the bid to $50 million.

107 *Finally*, it can also be noted that ASIC omits to refer to other evidence from JLM representatives in relation to Segantii Capital (again, this evidence being given during compulsory examinations conducted by ASIC), including:

(a) John McLean, whose evidence was that:[352]

(i) the bid from Segantii Capital was technically capable of being allocated in full;

(ii) the comment in the transcript referred to at paragraph 100 above as to Segantii Capital's order being real, and the reason for Segantii Capital bidding an amount in the expectation of getting scaled-back, were comments that he made;

(b) Michael Richardson, whose evidence was that the reason that Segantii Capital was allocated $50 million, notwithstanding that it bid $250 million, was because the JLMs were concerned about its behaviour in the aftermarket.[353] Mr Richardson also gave evidence that the increase from $50 million to $75 million was based on conversations on the Friday morning in which Segantii Capital expressed a willingness, after allocation letters had been sent, to accept an allocation of $75 million;[354]

(c) Robert Jahrling, who gave evidence that he could not recall Segantii Capital amending its bid, but that if it did it would be reflected in the final book.[355] He also gave evidence, based on his extensive experience in capital raising and book build

[352] CB 94 (ZIG.0005.0031.0003) – McLean T(2)118:21-26, T(2)155:22-167:21.
[353] CB 88 (ZIG.0005.0022.0002) – Richardson T63:14-65:13.
[354] CB 88 (ZIG.0005.0022.0002) – Richardson T65:14-66:12.
[355] CB 93 (ZIG.0005.0039.0001) – Jahrling T70:20-72:16.

processes, as to the fact that if the bid had been amended there was a reconciliation process which would have resulted in it being recorded in the book.[356]

Conclusion in relation to Segantii Capital

108 All of the communications relied on by ASIC in relation to Segantii Capital in its Reply occurred after the close of the book and after it had been sent its allocation. ASIC has not identified any contemporaneous material from during the bookbuild showing any change in Segantii Capital's bid.

109 Further, it is clear from post-close documents relied on by ASIC that any references by Segantii Capital to $50 million (or to $75 million) were only a communication of a preferred allocation, and that its bid was in fact for $250 million.

110 These matters are supported by transcripts of section 19 examinations of JLM witnesses in which they state that they understood Segantii Capital's $250 million bid into the book to be a genuine or "real order", that was capable of being allocated in full.

B.3 Soros Funds Management LLC

111 At 8:35pm on 6 August 2015 ANZ received the Draft Allocation List which recorded that Soros Fund Management LLC's (**Soros**) demand (i.e. its bid) was for AU$136 million (US$100 million) of shares at $30.95 per share.[357]

112 ASIC alleges that Soros' application was amended prior to close of the bookbuild from an initial bid of US$100 million to a bid for US$50 million of shares, and that this occurred by Soros informing Niccolo Manno of JPM that its bid at the floor price was for US$50 million.[358]

Soros' bid

113 The DealAxis books maintained by each of the JLMs recorded Soros' bid as being, at all times, for US$100 million.

114 The Citi DealAxis Book records demand from Soros of US$100 million, being a maximum of 4,394,184 shares at $30.95.[359]

[356] CB 93 (ZIG.0005.0039.0001) – Jahrling T70:20-72:16 and T74:24-75:19.
[357] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
[358] CB 5 – Reply at [2(a)], third bullet point particulars.
[359] CB 239 (CIT.002.001.0001) at p 1 of 22.

115 The bid is recorded as follows:

Soros Fund Management LLC

Demand	Demand Factor	Limit	Limit Factor	Instrument	Entered By
6-Aug-15 13:18 AES			Max Demand 4,394,184		
100,000,000	USD	30.95	AUD per Share	Share	Jarrod Bakker

116 That demand figure was not changed in the Citi DealAxis Book.

117 The copy of the DealAxis Book maintained by DB also records the bid for Soros as being for 4,394,184 shares at $30.95 per share.[360]

118 This demand figure was not changed in the DB DealAxis Book.

119 The JPM DealAxis Spreadsheet (assuming that it is admissible – see paragraph 73 above)[361] records as follows with respect to Soros:

(a) a bid of US$100 million at $32.58 per share made at 2:16pm AEST on 6 August 2015 for "Soros / Quantum";[362]

(b) a bid of US$100 million at $30.95 per share made at 2:21pm AEST on 6 August 2015 for "Soros / Quantum";[363]

(c) a bid of US$100 million at $30.95 per share made at 2:46pm AEST on 6 August 2015 for "Soros Fund Management LLC (New York)";[364] and

(d) a bid of US$100 million at $30.95 per share made at 3:01pm AEST on 6 August 2015 for "Soros Fund Management".[365]

120 Other evidence as to Soros' bid is consistent with this evidence.

121 In a Bloomberg chat Roshan Sundarum of DB sent a message to Joe Cruz of DB at 1:10pm AEST on 6 August 2015 which said: "*Pls put Soros in for floor price (5%) for $100M USD*".[366]

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[360] CB 204 (DBA.408.001.2068); CB 205 (DBA.408.001.2069).
[361] CB 57 (ZIG.1037.0001.0007).
[362] Row 92 of CB 57 (ZIG.1037.0001.0007). The recorded date is 5 August 2015, but this corresponds to the time of 11:02pm EST, which is 2:16pm AEST on 6 August 2015.
[363] Row 96 of CB 57 (ZIG.1037.0001.0007). The recorded date is 5 August 2015, but this corresponds to the time of 11:21pm EST, which is 2:21pm AEST on 6 August 2015.
[364] Row 127 of CB 57 (ZIG.1037.0001.0007). The recorded date is 5 August 2015, but this corresponds to the time of 11:46pm EST, which is 2:46pm AEST on 6 August 2015.
[365] Row 151 of CB 57 (ZIG.1037.0001.0007).
[366] CB 169 (DBA.521.001.3391).

122 An initial cut of the "book" was circulated among the JLMs for discussion at 11:30am on 6 August 2015.[367] This book did not record any bid for Soros, which is consistent with Soros' bid being made after this time.

123 The First Bookbuild Update emailed by the JLMs to ANZ at 12:03pm on 6 August 2015 also did not record any bid from Soros.[368]

124 The Second Bookbuild Update emailed at 2:34pm on 6 August 2015 (at row 15) recorded demand for 4,394,184 shares at $30.95 for Soros.[369]

125 The Draft Allocation List emailed by the JLMs to ANZ at 8:35pm on 6 August 2015 (row 16) also recorded Soros' bid as 4,394,184 shares at $30.95 for $136 million.[370] The proposed allocation recorded for Soros was 2,746,365 shares for a total of $85 million and a "fill" of 63%.

126 At 10:57pm on 6 August 2015, a further version of the ANZ Book Allocations spreadsheet (v9) was emailed among the JLMs. This spreadsheet recorded the same demand and fill (allocation) figures for Soros as the Draft Allocation List referred to above.[371]

127 The ANZ Book Allocations spreadsheet emailed by the JLMs to ANZ at 2:26am on 7 August 2015 (row 16) also recorded Soros' demand as 4,394,184 shares at $30.95 for a bid of $136 million.[372] The proposed allocation recorded for Soros was now for 2,250,000 shares for a total of $69,637,500 and a fill of 51%.

Discussions about Soros' allocation

128 Following the close of the book, there were a number of communications (only some of which are relied on by ASIC) in relation to the allocation for Soros. The documents relied on by ASIC are specifically discussed below.

129 Importantly, what ASIC omits to refer to in its Reply or in its opening submissions is an email from Niccolo Manno of JPM on 12 August 2015 at 8:42pm. Mr Manno is the person whom ASIC alleges in its Reply was informed by Soros before bookbuild close that its bid

[367] CB 147 (DBA.504.003.7870); CB 148 (DBA 504.003.7871).
[368] CB 151 (ANZ.505.001.3412); CB 152 (ANZ.505.001.3413).
[369] CB 182 (ANZ.502.001.0001); CB 183 (ANZ.502.001.0002).
[370] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
[371] CB 249 (CIT.100.005.4112); CB 250 (CIT.100.005.4113).
[372] CB 274(ANZ.505.001.3253); CB 275 (ANZ.505.001.3254).

was amended from US$100 million to US$50 million. In that email Mr Manno said (emphasis added):[373]

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

ASIC's case as to an amended bid

130 ASIC relies on several documents to suggest that Soros amended its bid from US$100 million to US$50 million prior to the close of the book. Those documents, understood in context and viewed fairly, do not establish ASIC's allegation as to an amendment of Soros' bid, and ASIC's case is contradicted by clear contrary evidence.

131 *First*, ASIC relies on an email sent in the early morning on 7 August 2015 from Aditi Varghese.[374] That email said: "*Please note that the global head of trading at Soros had told Niccolo [Manno] earlier today they want no more than USD50mm – please bear in mind unless they provide an updated view overnight*". Even reading that email in isolation it is apparent that:

(a) it is referring to a conversation that took place after the close of the book;

(b) it is discussing proposed allocations rather than an amendment to the bid (which is evident both from the timing of the conversation as well as its tone – i.e. "*please bear in mind*" is inconsistent with the bid having been amended).

132 If there were otherwise any doubt as to these matters (which ANZ submits there could not reasonably be) the position is made clear by the subsequent email sent by Niccolo Manno. In that email (referred to in paragraph 129 above), Mr Manno stated that the call which he had with Soros (which Ms Varghese refers to in her email) was in relation to Soros' "allocation size preference".

133 This material is directly inconsistent with ASIC's case.

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[373] CB 398 (ZIH.007.002.1244).

[374] CB 262 (CIT.100.014.0150). The exact time of this email is not evident, but it is between an earlier email in the same email chain at 12:03am on 7 August 2015, and a later email at 1:06am on 7 August 2015.

134 It can also be noted that ASIC asked Robert Jahrling of Citi questions about this email during his section 19 examination.[375] Based on his experience with capital raisings and book builds, Mr Jahrling gave evidence that he understood this email (even without the benefit of being taken to Mr Manno's direct explanation of what it concerned) as relating to "*potential allocation scenarios*" and not an amended bid.

135 *Secondly*, ASIC relies on two emails sent later in the morning on 7 August 2015, being:

(a) an email at 12:12am on 7 August 2015,[376] in which Richard Newton of JPM sent an email to Niccolo Manno and Harry Florin of JPM in which he said: "*Here is the final book except for Soros and ex anything we get from the USA. … I have told them clearly that at the moment Soros demand is at 2.25m shares [which equates to $69,637,500 or ~US$50m]*";[377]

(b) an email at 2:08am on 7 August 2015 in which Kristopher Salinger of Citi emailed personnel from all JLMs noting that: "*After much discussion, we have agreed upon the following adjustments to the allocations: Soros now 2.25mm shares (previously $85mm)*".[378]

136 These emails are entirely consistent with the earlier discussion which Mr Manno had with Soros about its allocation size preference. They say nothing about an amended bid, let alone an amended bid prior to the close of the book.

137 *Thirdly*, ASIC in its Reply also relies on a further document which is said by ASIC to be a transcript (prepared by ASIC) and recording (which ANZ objects to) of a call on 6 August 2015 at 9:23pm.[379] If admitted notwithstanding ANZ's objection, the transcript records the following exchange in relation to Soros:

> MR RICHARDSON: Right. Soros they're talking to. What have we got them in for now?
>
> MR RICHARDSON: Eighty-five.
>
> MR McLEAN: Eighty-five.

138 Nothing about that exchange evidences any amendment of Soros' bid prior to the close of the book, let alone an amendment to US$50 million (which was ~AU$69 million).

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[375] CB 93 (ZIG.0005.0039.0001) – Jahrling T101:26-109:16, T132:1:133:17.
[376] This email chain shows that this email was after 12:03am on 7 August, and before 3:19am on 7 August 2015.
[377] CB 310 (ZIH.003.001.1509).
[378] CB 272 (ZIH.003.001.0534).
[379] CB 241 (ZIG.0003.0005.0071); CB 240 (CIT.010.001.0192).

139 *Fourthly,* ASIC's particulars in relation to Soros also state that reliance is placed on "*placement spreadsheets circulating between Underwriters on 6 and 7 August 2015*".[380] By letter dated 25 January 2023, in response to a request for particulars of the placement spreadsheets relied on, ASIC stated that the placement spreadsheets referred to in the third bullet point of the particulars relating to Soros were CIT.100.005.4113, CIT.100.005.4119, ZIH.003.001.0536, ANZ.505.001.3254 and ZIH.003.001.1521. None of these spreadsheets supports ASIC's case, and each is in fact inconsistent with it. As to this:

(a) The spreadsheet at CIT.100.005.4113 was titled "ANZ Book Allocations v9"and was emailed from Anthony Hanna at Citi to personnel from all of the Underwriters at 10:57pm on 6 August 2015.[381] The spreadsheet recorded that Soros' bid was for 4,394,184 shares for $136 million, with a proposed allocation of 2,746,365 shares for $85m being a "fill" of 63%;

(b) the spreadsheet at CIT.100.005.4119 was titled "ANZ Book Allocations v10" and was attached to an email at 12:04am on 7 August 2015.[382] The spreadsheet recorded that Soros' bid was for 4,394,184 shares for $136 million, with a proposed allocation of 2,746,365 shares for $85 million being a "fill" of 63%. The figure of $85 million is highlighted in yellow. This is consistent with the covering email, which indicates that the Head of Trading at Soros had indicated that Soros wanted a lower allocation of US$50 million (~AU$69 million) and hence the allocation amount still being subject to discussions;

(c) the spreadsheet at ZIH.003.001.0536 was titled "ANZ Book Allocations vF" and was emailed from Kristopher Salinger at Citi to personnel from all of the Underwriters at 2:08am on 7 August 2015.[383] The spreadsheet recorded that Soros' bid was for 4,394,184 shares for $136 million, with a proposed allocation of 2,250,000 shares for $69,637,000 being a "fill" of 51%;

(d) the spreadsheet at ANZ.505.001.3254 was titled "ANZ Book Allocations vF" and was emailed from Kristopher Salinger at Citi to Rick Moscati and John Needham at ANZ at 2:26am on 7 August 2015.[384] The spreadsheet recorded that Soros' bid was

[380] CB 5 – Reply at [2(a)], third bullet point of the particulars.
[381] CB 249(CIT.100.005.4112).
[382] CB 252 (CIT.100.005.4117); CB 262 (CIT.100.014.0150).
[383] CB 272 (ZIH.003.001.0534).
[384] CB 274 (ANZ.505.001.3253).

for 4,394,184 shares for $136 million, with a proposed allocation of 2,250,000 shares for $69,637,000 being a "fill" of 51%;

(e) the spreadsheet at ZIH.003.001.1521 was titled "ANZ Book Allocations V2pm Friday" and was emailed from Anthony Hanna at Citi to personnel from each of the Underwriters at 7:29am on 7 August 2015.[385] The spreadsheet recorded that Soros' bid was for 4,394,184 shares for $136 million, with a proposed allocation of 2,250,000 shares for $69,637,000 being a "fill" of 51%.

Conclusion in relation to Soros

140 All of the communications relied on by ASIC in relation to Soros occurred after the close of the book. ASIC has not identified any contemporaneous material from during the bookbuild showing any change in Soros' bid.

141 Further and in any case, it is evident from the documents that any references by Soros to a lower amount were only a communication of a preferred allocation. If there were otherwise any doubt about this, the position is made clear by the email from Mr Manno in which he expressly confirms that what was communicated to him on the Thursday night was an "allocation size preference".

142 Further still, all versions of the "book", whether circulated among the JLMs, kept internally within the JLMs (i.e. the DealAxis books), or provided to ANZ, recorded Soros' bid as being for US$100 million (or shares equating to that amount).

B.4 DE Shaw

143 At 8:35pm on 6 August 2015 ANZ received from the JLMs the Draft Allocation List which recorded that DE Shaw's demand (i.e. its bid) was for $102 million (US$75 million) of shares at $30.95 per share.[386]

144 ASIC alleges DE Shaw's application was amended prior to close of the bookbuild from an initial bid of $102 million to a bid for $60 million of shares by DE Shaw informing "one or more" of the JLMs of this amended bid.[387]

[385] CB 331 (ZIH.003.001.1519).
[386] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
[387] CB 5 – Reply at [2(a)], fourth bullet point particulars.

DE Shaw's bid

145 A Bloomberg message from Robert Black at DE Shaw at 2:17pm on 6 August 2015 said: "*pls put us in for USD 75mm @ AUD 30.95*".[388] An email from Cameron Wood of JPM to other JPM personnel at 2:20pm on 6 August 2015[389] records DE Shaw "*Bidding for USD$75m @ $30.95*".

146 The Citi DealAxis Book records demand from DE Shaw of US$75 million, being a maximum of 3,295,638 shares at $30.95.[390]

147 The bid is recorded as follows:

DE SHAW

Demand	Demand Factor	Limit	Limit Factor	Instrument	Entered By
	6-Aug-15 14:20 AES		Max Demand 3,295,638		
75,000,000	USD	30.95	AUD per Share	Share	Jarrod Bakker

148 That demand figure was not changed in the Citi DealAxis Book.

149 The copy of the DealAxis Book maintained by DB similarly recorded a bid of 3,295,638 shares at $30.95 per share.[391]

150 This demand figure was not changed in the DB DealAxis Book.

151 An initial cut of the "book" was circulated among the JLMs for discussion at 11:30am on 6 August 2015.[392] This book did not record any bid for DE Shaw. That was consistent with the bid being received after this time.

152 The First Bookbuild Update was then emailed by the JLMs to ANZ at 12:03pm on 6 August 2015.[393] The First Bookbuild Update also did not record any bid from DE Shaw.

153 The Second Bookbuild Update emailed at 2:34pm on 6 August 2015 (at row 16) recorded demand for 3,295,638 shares at $30.95 for DE Shaw.[394]

[388] CB 231 (DBA.521.001.4432).
[389] CB 179 (ZIH.009.001.1537).
[390] CB 239 (CIT.002.001.0001) at p 1 of 22.
[391] CB 204 (DBA.408.001.2068); CB 205 (DBA.408.001.2069).
[392] CB 147 (DBA.504.003.7870); CB 148 (DBA 504.003.7871).
[393] CB 151 (ANZ.505.001.3412); CB 152 (ANZ.505.001.3413).
[394] CB 182 (ANZ.502.001.0001); CB 183 (ANZ.502.001.0002).

154 The Draft Allocation List emailed by the JLMs to ANZ at 8:35pm on 6 August 2015 (row 17) recorded DE Shaw's bid as 3,295,638 shares at $30.95, for a bid of $102 million.[395] The proposed allocation recorded for DE Shaw was 2,261,712 shares for a total of $70 million.

155 The ANZ Book Allocations spreadsheet emailed by the JLMs to ANZ at 2:26am on 7 August 2015 (row 17) recorded DE Shaw's bid as 3,295,638 shares at $30.95, for a bid of $102 million.[396] The proposed allocation recorded for DE Shaw was now for 1,777,060 shares for a total of $55 million.

ASIC's case as to an amended bid

156 ASIC alleges that DE Shaw before bookbuild close amended its bid from $102 million to $60 million at the floor price.[397] ASIC relies on three matters in support of this allegation.

157 *First*, ASIC relies an email chain commencing at 12:03am on 7 August 2015 (i.e. after the close of the book).[398] The emails are between JPM personnel. An email from Aditi Varghese at 3:19am on 7 August 2015 says:

> DE Shaw's total order size in the book is USD40mm and they have been allocated USD40.441mm – please would you check and amend as appropriate.

158 None of the emails prior to 3:19am referred to DE Shaw. This email at 3:19am was well after the close of the book, and erroneously says that DE Shaw's total order size in the book was US$40 million. In fact, the book recorded a bid of US$75 million for DE Shaw (see paragraphs 147 to 155 above). There is no evidence as to what involvement Ms Varghese had in relation to the book build process or what "spreadsheet" she was looking at in making the comment in this email, nor any evidence to establish that Ms Varghese had any knowledge (whether direct or hearsay) as to the bid of DE Shaw.

159 *Secondly*, ASIC again relies on the transcript of the call said to be at 9:23pm (objected to by ANZ).[399] If admitted, it can be noted that the transcript records the following as being said on that call:

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[395] CB 232 (ANZ.505.001.3280); CB 233 (ANZ. 505.001.3281).
[396] CB 274 (ANZ.505.001.3253); CB 275 (ANZ.505.001.3254).
[397] The relevant documents are identified in the particulars to ASIC's Reply at [2(a)] (CB 5), fourth bullet point particulars.
[398] CB 310 (ZIH.003.001.1509).
[399] CB 241 (ZIG.0003.0005.0071); CB 240 (CIT.010.001.0192).

MR RICHARDSON: And Spider said the same thing. You know, Spider reckons DE Shaw amended their order. Well, he's out of it.

MR TUCHMAN: Why is it not amended in the book?

MR McLEAN: I know.

MR RICHARDSON: Um, and they're saying, you know, 55 Aussie. We had them – we were trying to give them – the minimum was, the max was 60, we were trying to give them 75, I think.

MR TUCHMAN: Really.

…

MR RICHARDSON: D E Shaw at 55 Aussie.

MR McLEAN: He wants to make it 55 Aussie, does he?

MR RICHARDSON: Well, that's what he's talking. And I think we've got them in for 70.

MR McLEAN: We do.

160 Again, this conversation is after the close of the book. To the extent that the transcript records "Mr Richardson" saying that "*Spider reckons DE Shaw amended their order*", this is at best indirect hearsay in circumstances where there is no evidence of "Spider" having any dealings with DE Shaw. Further, the comment immediately after this "*Well, he's out of it*", is suggestive of the fact that "Spider" did not in fact have any involvement with DE Shaw. And, there is no surrounding material to indicate any direct communications between "Spider" and DE Shaw, let alone between "Spider" and "Mr Richardson".

161 *Thirdly*, ASIC also relies on the document, prepared by Gilbert + Tobin, referred to in paragraph 73 above.[400] ANZ objects to that document being admitted into evidence. Even if this document was admitted into evidence, the weight to be afforded to it should be very low, and it does not establish the existence of an amendment to DE Shaw's bid prior to the close of the book build having regard to the following matters:

(a) the spreadsheet purports to record a bid of US$40 million at 6:55pm AEST on 6 August 2015.[401] The "user" who made this amendment is recorded as "Matthew

[400] CB 57 (ZIG.1037.0001.0007).
[401] Row 501 of CB 57 (ZIG.1037.0001.0007).

Alvarez". There is no evidence as to who Mr Alvarez is, or as to what role (if any) he had in relation to the Placement;

(b) it is evident that personnel from JPM in Hong Kong may have been amending the spreadsheet in (unidentified) ways, that may not have reflected changes to bids but rather to proposed allocations (see paragraph 73(d) above);

(c) the DealAxis books maintained by Citi and DB do not include any such entry;

(d) the entry is made after the close of the book (6:55pm);

(e) there is evidence of multiple versions of the book being emailed between the JLMs, and from the JLMs to ANZ, after 6:55pm on 6 August 2015, where each version records DE Shaw's bid as being for US$75 million. Notwithstanding this, at no time does any person from JPM seek to suggest that the bid for DE Shaw was in fact for some lower amount and that the book should be amended. It is highly unlikely that if in fact the bid had been amended that representatives of JPM would have sat by in the face of such documents (including documents sent to ANZ) and said nothing.

Conclusion in relation to DE Shaw

162 All of the documents or communications relied on by ASIC in relation to DE Shaw occurred after the close of the book. ASIC has not identified any contemporaneous material from during the book build showing any change to DE Shaw's bid.

163 Further, the documents ASIC refers to are not inconsistent with the references to DE Shaw to a lower amount being to communications of preferred allocation. The fact that the proposed allocation to DE Shaw as at 8:35pm on 6 August 2015 was for $70 million, being higher than the "amended bid" of $60 million which ASIC alleges, is itself inconsistent with ASIC's allegations. Further, ASIC's case is also inconsistent with the fact that at 10:57pm on 6 August 2015 a further version of the book was circulated among the JLMs and it included a proposed allocation to DE Shaw of $75 million.[402]

164 Finally, the material on which ASIC relies is directly inconsistent with the documentary evidence maintained by Citi and DB, and with what was communicated to ANZ.

[402] CB 249 (CIT.100.005.4112); CB 250 (CIT.100.005.4113).

B.5 Brevan Howard

165 At 8:35pm on 6 August 2015 ANZ received from the JLMs the Draft Allocation List which recorded that Brevan Howard Asset Management LLP's (**Brevan Howard**) demand (i.e. its bid) was for $34 million (US$25 million) of shares at $30.95 per share.[403]

166 ASIC alleges that Brevan Howard's application was amended prior to close of the bookbuild from an initial bid of US$25 million of Placement Shares to a bid for US$7 million of shares.[404] ASIC's allegation is that Brevan Howard's bid was amended "*in writing to Deutsche Bank*".

Brevan Howard's bid and proposed allocations

167 Robert Jahrling of Citi dealt directly with Johan Tellvik in relation to Brevan Howard's bid. On 6 August 2015 at 12:04pm Mr Jahrling asked Mr Tellvik "*Are you playing ANZ?*",[405] and subsequently sent an email saying "*pls give me a call re ANZ*".[406] Mr Tellvik:

(a) emailed Mr Jahrling at 1:22pm in relation to ANZ saying "*Interesting opportunity*";[407]

(b) responded directly to Mr Jahrling's email of 12:04pm by email at 2:19pm saying: "*Yeah am in the book sir*".[408]

168 A Bloomberg conversation between Mr Tellvik and Dean Thomas and Joe Cruz of DB evidences Brevan Howard's bid into the book.[409] The conversation includes the following:

(a) an initial message from Mr Tellvik which says: "*ANZ USD25mln at aud 32.68*";

(b) there are then some subsequent messages including a message from Mr Tellvik which says "*ANZ IS EXCITING*";

(c) Mr Cruz informs Mr Tellvik that his bid needs to be in 10c increments from $30.95, and he asks whether he can amend to $32.65;

(d) Mr Tellvik then says "*Make that 31.05*".

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403 CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).
404 CB 5 – Reply at [2(a)], particulars fifth bullet point.
405 CB 178 (CIT.100.013.4915).
406 CB 163 (CIT.100.013.4851).
407 CB 165 (CIT.100.013.4901). A "write up" in relation to ANZ was attached: CB 166 (CIT.100.013.4902).
408 CB 178 (CIT.100.013.4915).
409 CB 168 (DBA.521.001.3380).

169 These messages were sent between about 1:26pm and 1:30pm on 6 August 2015.

170 Consistently with these messages, the DealAxis Book maintained by each of the JLMs recorded Brevan Howard's bid as being for US$25 million.

171 The Citi DealAxis Book records demand from Brevan Howard of US$25 million and a max demand of 1,098,546 shares (which at $30.95 equates to ~AU$34 million, or ~US$25 million).[410]

172 The bid is recorded as being entered at 1:32pm as follows:

Brevan Howard Asset Management

Demand	Demand Factor	Limit	Limit Factor	Instrument	Entered By
6-Aug-15 13:32 AES			Max Demand 1,098,546	(-)	
25,000,000	USD	31.05	AUD per Share	Share	Jarrod Bakker

173 That demand figure was not subsequently changed in the Citi DealAxis Book.[411]

174 The copy of the DealAxis Book maintained by DB recorded a bid of 1,098,546 shares at $30.95 per share.[412] This demand figure was not changed in the DB DealAxis Book.

175 The "JPM DealAxis Spreadsheet"[413] (insofar as it is admissible) records as follows with respect to Brevan Howard:

(a) a bid of US$25 million at $31.05 per share made at 2:33pm AEST on 6 August 2015;[414]

(b) a bid of US$25 million at $31.05 per share made at 2:46pm AEST on 6 August 2015;[415]

(c) a bid of US$25 million at $31.05 per share made at 3:01pm AEST on 6 August 2015.[416]

[410] CB 239 (CIT.002.001.0001) at p 4 of 22.
[411] There was an earlier bid for US$25 million at $32.58 per share with a time of 1:25pm, which appears to reflect Mr Tellvik's earlier messages with a higher figure than $31.05.
[412] CB 204 (DBA.408.001.2068) and CB 205 (DBA.408.001.2069).
[413] CB 57 (ZIG.1037.0001.0007).
[414] Row 103 of CB 57 (ZIG.1037.0001.0007). The recorded date is 5 August 2015, but this corresponds to the time of 11:33pm EST, which is 2:33pm AEST on 6 August 2015.
[415] Row 123 of CB 57 (ZIG.1037.0001.0007). The recorded date is 5 August 2015, but this corresponds to the time of 11:46pm EST, which is 2:46pm AEST on 6 August 2015. There is another entry at row 124 with the same details save for a bid price of $32.58.
[416] Row 157 of CB 57 (ZIG.1037.0001.0007).

176 An initial cut of the "book" was circulated among the JLMs for discussion at 11:30am on 6 August 2015.[417] This book did not record any bid for Brevan Howard.

177 The First Bookbuild Update was then emailed by the JLMs to ANZ at 12:03pm on 6 August 2015.[418] The First Bookbuild Update did not record any bid from Brevan Howard.

178 The Second Bookbuild Update emailed at 2:34pm on 6 August 2015 (at row 29) recorded Brevan Howard's demand as 1,098,546 shares at $30.95 (or 1,095,008 shares at $31.05).[419]

179 The Draft Allocations List emailed by the JLMs to ANZ at 8:35pm on 6 August 2015 (row 32) recorded Brevan Howard's demand as 1,098,546 shares at $30.95 for a bid of $34 million (or 1,095,008 shares at $31.05).[420] The proposed allocation recorded for Brevan Howard was 323,102 shares for a total of $10 million and a "fill" of 29%.

180 At 10:57pm on 6 August 2015, a further version of the ANZ Book Allocations spreadsheet (v9) was emailed among the JLMs. This spreadsheet recorded:

(a) Brevan Howard's demand as 1,098,546 shares at $30.95 for a bid of $34 million;

(b) the proposed allocation recorded for Brevan Howard was 646,204 shares for a total of $20 million and a "fill" of 59%.[421]

181 The ANZ Book Allocations spreadsheet emailed by the JLMs to ANZ at 2:26am on 7 August 2015 (row 31) recorded Brevan Howard's demand as 1,098,546 shares at $30.95, with a proposed allocation of 323,102 shares for a total of $10 million and a "fill" of 29%.[422]

ASIC's case as to an amended bid by Brevan Howard

182 ASIC relies on the following material in its Reply to contend that Brevan Howard amended its bid to US$7 million.

183 *First*, there is a Bloomberg conversation between Joe Cruz of DB and Johan Tellvik of Brevan Howard on 6 August 2015. It is apparent that ASIC's allegation that Brevan Howard amended its bid in writing to DB is based on this document. In that conversation Mr Tellvik says: "*goal is about USD7mln as that leaves me room to buy more tomorrow in case*", and then there is

[417] CB 147 (DBA.504.003.7870); CB 148 (DBA 504.003.7871).
[418] CB 151 (ANZ.505.001.3412); CB 152 (ANZ.505.001.3413).
[419] CB 182 (ANZ.502.001.0001); CB 183 (ANZ.502.001.0002).
[420] CB 232 (ANZ.505.001.3280); CB 233(ANZ.505.001.3281).
[421] CB 249 (CIT.100.005.4112); CB 250(CIT.100.005.4113).
[422] CB 274 (ANZ.505.001.3253); CB 275 (ANZ.505.001.3254).

a subsequent message in which he says "*Don't want more…*".[423] ASIC contends that by these messages the bid of Brevan Howard was amended to US$7 million worth of shares.

184 However, when the full message from Mr Tellvik is read in context, it is plain that in fact he was not amending the bid of Brevan Howard, but was merely indicating his preferred allocation. The broader context for the comments relied on by ASIC is that

(a) at 5:01pm on 6 August 2015 Jarrod Bakker of Citi sent an email to all relevant overseas investors (including Mr Tellvik at Brevan Howard), which email was titled: "*ANZ AU BOOKS CLOSE IN 1HR; BOOK IS COVERED & WILL PRICE @ 30.95*";[424]

(b) the Bloomberg conversation commences with a message from Mr Cruz at 17:04:22 on 6 August 2015 in which he says: "*Hi Johan, ANZ price is fixed at 30.95*", and then a message in which he also says "*book covered*";[425]

(c) at 17:04:39 Mr Tellvik sends a message in which he says "*Not sure how much I will get*".[426] It is apparent at this point that Mr Tellvik is referring to how much Brevan Howard may be allocated (i.e. how much it "*will get*");

(d) a few seconds later (at 17:04:54) Mr Tellvik then says "*But goal is about USD7mln …*". The timing of this message is consistent with Mr Tellvik referring to what allocation Brevan Howard may receive. The reference to this being the "*goal*" is also entirely consistent with Mr Tellvik referring to the possible allocation to Brevan Howard. Further still, the reference to "*about*" US$7 million is consistent with this being an indication of a preferred allocation: a general reference to "about" is inconsistent with this being intended to be an bid. Similarly, the subsequent communication ("*Don't want more…*") is, in the context of the earlier messages, a reference to the preferred allocation to Brevan Howard. More particularly, Mr Tellvik's messages were in response to, and sent a matter of less than a minute after, he was informed by Mr Cruz that the price was fixed at $30.95 and that the book was covered. In the context of this message the most obvious inference, and one consistent with the

[423] CB 228 (DBA.521.001.4421).
[424] CB 210 (CIT.101.011.2656).
[425] CB 228 (DBA.521.001.4421).
[426] CB 228 (DBA.521.001.4421).

messages sent, was that Mr Tellvik was turning his mind to what the allocation to Brevan Howard would be given that the book was covered.

185 *Secondly*, ASIC then relies on two emails sent early on 7 August 2015 (after the book had closed). These are:

(a) an email from Mr Tellvik to Rob Jahrling of Citi on 7 August 2015 at 12:32am.[427] It can be inferred that the context for this email was that following the final allocation meetings between the JLMs late on 6 August 2015 Mr Tellvik had been informed that Brevan Howard had been allocated AU$20 million worth of shares. In response Mr Tellvik said: "*I told all banks I wanted USD5-7mln. I did not want aud20mln*". This message was no more than Mr Tellvik seeking to negotiate with Citi to be allocated a lower amount, and in doing so referring to his earlier stated allocation preference to the JLMs. It does not evidence an amended bid;

(b) there is also an internal email chain between Citi personnel at around the same time.[428] At 12:33am Kristopher Salinger emailed Robert Jahrling saying that he has had a call from Mr Tellvik, and that he "*Noted he indicated for 25mm but only wanted USD5-7mm. He wants to talk when you get a chance*". This email is, again, reflective of the fact of Mr Tellvik having indicated an allocation preference as opposed to having amended Brevan Howard's bid. The email draws a distinction between Brevan Howard's bid of $25 million (what "*he indicated for*"), and what Brevan Howard subsequently communicated by way of a preferred allocation ("*but only wanted USD5-7mm*"). Mr Jahrling then sends an email at 12:40am which says "*He will not accept $20m. $10m max. Apparently DB confirmed with him last night. We don't have a choice here.*" The reference to "*last night*" is consistent with a reference to discussions concerning allocations taking place after the close of the book, and the reference to not having a "*choice here*" is an apparent reference to the perceived commercial position of the JLMs (as opposed to being a statement as to the bid actually made).

186 Further still, the evidence of Robert Jahrling during his section 19 examination was that based on his experience the messages from Mr Tellvik on which ASIC relies were an expression of Brevan Howard's "*ideal allocation outcome*" and that the JLMs could have allocated the full US$25 million to Brevan Howard.[429]

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[427] CB 255 (CIT.100.014.0152).
[428] CB 256 (CIT.100.005.4107).
[429] CB 93 (ZIG.0005.0039.0001) – Jahrling T164:16-172:3.

187 *Thirdly*, ASIC also refers to the transcript the call said to be at 9:23pm on 6 August 2015 (which ANZ objects to).[430] That transcript records the following concerning Brevan Howard:

> MR RICHARDSON: Oh, okay. Brevan Howard, he's saying 10, not 15.
>
> MR McLEAN: They are 10.

188 This communication is entirely consistent with discussions concerning preferred allocations, and does not support an inference that Brevan Howard's bid was amended.

Conclusion in relation to Brevan Howard

189 The only communications that ASIC relies on from prior to the close of the book is the Bloomberg exchange between representatives of DB and Brevan Howard shortly after 5pm on 6 August 2015. When that exchange is read as a whole, it is clear that Mr Tellvik of Brevan Howard was expressing an allocation preference as opposed to purporting to amend Brevan Howard's bid.

190 The other documents relied on by ASIC were after the close of the book, and in any event were consistent with Brevan Howard having at an earlier time communicated a preferred allocation. Indeed, the fact that as at 10:57pm the JLMs were proposing to allocate $20 million to Brevan Howard (see paragraph 180(b) above) is inconsistent with the JLMs having understood Mr Tellvik to have amended his bid as opposed to having expressed an allocation preference.

191 Further, the DealAxis books from each of the JLMs recorded at all times that the bid from Brevan Howard was for US$25 million (or shares equating to that amount).

B.6 Indus Capital

192 At 8:35pm on 6 August 2015 ANZ received from the JLMs the Draft Allocation List which recorded that Indus Capital's demand (i.e. its bid) was for US$30 million of shares at $30.95 per share.[431]

[430] CB 241 (ZIG.0003.0005.0071).
[431] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).

193 ASIC alleges Indus Capital's application was amended prior to close of the bookbuild from an initial bid of US$30 million to a bid for approximately US$2 million and that this amended bid was expressed to "*one or more Underwriter personnel*".[432]

Indus' bid

194 The Citi DealAxis Book records a bid made by Indus Capital of US$30 million (for 1,318,255 shares) at $30.95 made on 6 August 2015 at 10:40am.[433] The bid is recorded as follows:

Indus Capital

Demand	Demand Factor	Limit	Limit Factor	Instrument	Entered By
6-Aug-15 10:40 AES			Max Demand 1,318,255		
30,000,000	USD	30.95	AUD per Share	Share	Jarrod Bakker

195 This bid of US$30 million (1,318,255 shares) was not amended in the Citi DealAxis Book at any time.

196 Consistently with this entry, there is primary evidence of bids being made at this level, including:

(a) an email from Michael Duggan of Indus Capital to Michelle Chinnery of DB requesting that she put Indus Capital in "*for $30 ml at the low end of $30.95*";[434]

(b) a Bloomberg chat between Cameron Wood (JPM) and Jeffrey Hammond of Indus Capital. On 6 August 2015 at 10:56am AEST Mr Hammond sent a message which said "*we're in for $30m at the low*".[435]

197 An initial cut of the "book" was circulated among the JLMs for discussion at 11:30am on 6 August 2015.[436] This book recorded that Indus Capital had made a bid for 1,318,255 shares at $30.95.

198 The First Bookbuild Update was then emailed by the JLMs to ANZ at 12:03pm on 6 August 2015.[437] The First Bookbuild Update recorded that Indus Capital had bid for 1,318,255 shares at $30.95 (equalling $40.8 million).

[432] CB 5 – Reply at [2(a)], sixth bullet point of particulars.
[433] CB 239 (CIT.002.001.0001) at p 3 of 22.
[434] CB 122 (DBA.518.001.2137).
[435] CB 138 (ZIH.009.001.2548). The entry is recorded as 5 August 2015 at 10:55pm EST.
[436] CB 147 (DBA.504.003.7870); CB 148 (DBA 504.003.7871).
[437] CB 151 (ANZ.505.001.3412); CB 152 (ANZ.505.001.3413).

199 Further, each version of the ANZ Book provided by the JLMs to ANZ recorded that Indus Capital's bid was for 1,318,255 shares at $30.95 per share. This includes:

(a) the Second Bookbuild Update emailed at 2:34pm on 6 August 2015 (at row 25);[438]

(b) the Third Bookbuild Update (ANZ Book Allocations spreadsheet) emailed by the JLMs to ANZ at 8:35pm on 6 August 2015 (row 28);[439]

(c) the ANZ Book Allocations spreadsheet emailed by the JLMs to ANZ at 2:26am on 7 August 2015 (row 28).[440]

200 Other contemporaneous communications also refer to the bid of US$30 million. For example, Cameron Wood of JPM emailed Henry Polkinghorne and Sujit Dey of JPM on 6 August 2015 at 11:46am AEST stating that Indus Capital was "*Bidding for US$30m @ 30.95*".[441]

201 Consistently with this, both the DB and JPM DealAxis spreadsheets recorded Indus Capital's bid at US$30 million at all times:

(a) the JPM DealAxis Spreadsheet (to the extent that it is admissible)[442] records as follows with respect to Indus Capital:

(i) a bid of AU$30 million at $31 per share made at 10:48am AEST on 6 August 2015;[443]

(ii) a bid of US$30 million at $31 per share made at 10:52am AEST on 6 August 2015;[444]

(iii) a bid of US$30 million at $31 per share made at 12:11pm AEST on 6 August 2015;[445]

[438] CB 182 (ANZ.502.001.0001); CB 183 (ANZ.502.001.0002).
[439] CB 232 (ANZ.505.001.3280); CB 233 (ANZ. 505.001.3281).
[440] CB 274 (ANZ.505.001.3253); CB 275 (ANZ.505.001.3254).
[441] CB 145 (ZIH.009.001.1527).
[442] CB 57 (ZIG.1037.0001.0007).
[443] Row 7 of CB 57 (ZIG.1037.0001.0007). The row records the date of 5 August 2015, but it is apparent that this relates to the time recorded of 7:48pm EST (which corresponds to 10:48am AEST on 6 August 2015).
[444] Row 9 of CB 57 (ZIG.1037.0001.0007). The row records the date of 5 August 2015, but it is apparent that this relates to the time recorded of 7:52pm EST (which corresponds to 10:52am AEST on 6 August 2015).
[445] Row 35 of CB 57 (ZIG.1037.0001.0007). The row records the date of 5 August 2015, but it is apparent that this relates to the time recorded of 9:11pm EST (which corresponds to 12:11pm AEST on 6 August 2015).

(iv) a bid of US$30 million at $31 per share made at 3:27pm AEST on 6 August 2015;[446]

(v) a bid of AU$30 million at $31 per share made at 3:27pm AEST on 6 August 2015 (this entry being an apparent error in terms of the currency of the bid);[447]

(b) the copy of the DealAxis Book maintained by DB also records for Indus Capital a bid of 1,318,255 shares at $30.95 per share, with a recorded "first demand" time of 2:21pm on 6 August 2015.[448]

ASIC's case that Indus Capital amended its bid

202 As against that material, ASIC relies on several documents to suggest that Indus Capital amended its bid, prior to the close of the book, from US$30 million to US$2 million.[449] Those documents, understood in context and viewed fairly, do not establish ASIC's allegation as to an amendment of Indus Capital's bid.

203 *First*, ASIC relies on an email chain between certain representatives of the JLMs after the book had closed and final allocations had been advised to ANZ on the morning of Friday 7 August 2015.[450] The final allocation spreadsheet[451] recorded that Indus Capital had placed an order for 1,318,255 shares at $30.95 (AU$40.8 million), and had been allocated 161,551 shares (AU$5 million). In an email chain sent after this final allocation spreadsheet was sent to ANZ, Richard Newton from JPM sent an email to Kristopher Salinger of Citi saying: "*the only issue that I can see at the moment is Indus which needs to be 65/ shares at 30.95 which is 2 million dollars AUD as agreed*". John McLean of Citi then sent a subsequent email which said "*OK we are hearing same from our US desk. We will make the change*". These emails are consistent with the JLMs having agreed an allocation of 65,000 shares to Indus Capital, and Indus Capital having indicated to the JLMs a desire to be allocated this number of shares. They do not establish that an amended bid was placed, and are notably silent as to when or how such an amended bid was communicated.

[446] Row 182 of CB 57 (ZIG.1037.0001.0007).
[447] Row 183 of CB 57 (ZIG.1037.0001.0007).
[448] CB 204 (DBA.408.001.2068); CB 205 (DBA.408.001.2069).
[449] The relevant documents are identified in the particulars to ASIC's Reply at [2(a)] (CB 5), sixth bullet point of the particulars.
[450] CB 291 (ZIH.003.001.1138).
[451] CB 232 (ANZ.505.001.3280); CB 233 (ANZ.505.001.3281).

204 *Secondly*, the primary documents on which ASIC relies is an email from Michael Conway at Indus Capital to Richard Newton of JPM at 12:11pm on 6 August 2015.[452] In this email Mr Conway said:

> The Pms [Portfolio Managers] do not care in the deal[.] If anything they didn't like the downgrade with the deal dynamic.
>
> On that basis in not keen to go against that for what feels like a tight trade.
>
> I'm at the bottom anyway but if you don't need to allocate me I'm fine with that
>
> If you do just a couple of bucks only is fine
>
> Tried calling you by you were busy Crashing now.

205 It is apparent from the documents referred to above that Indus Capital had made formal bids for US$30 million prior to this, and that at least one of those bids had been made by Mr Conway less than two hours before he sent this email (at around 10:48am AEST). The email sent by Mr Conway is consistent with him indicating a preferred allocation, and in doing so appreciating the difference between the bid and the amount that might be allocated.

206 Further and importantly, this email must be considered in the context of other documents which record that bids on behalf of Indus for US$30 million were placed after this particular email on which ASIC relies to allege that Indus amended its bid. For example, the DealAxis spreadsheets maintained by both DB and JPM each record that bids of US$30 million were made after this email was sent by Mr Conway by a Mike Duggan of Indus Capital at 2:21pm and 3:37pm (see paragraphs 201(a)(iv) and 201(b) above).

207 In the email chain Mr Conway later complains when Indus Capital is allocated AU$5 million. This email is consistent with Mr Conway seeking to apply pressure so that his allocation was reduced, as opposed to evidencing that Indus Capital had in fact made a lower bid.

208 It can also be noted that in the evening of 6 August 2015, apparently during discussions as to allocations, Richard Newton of JPM forwarded this email from Mr Conway to Robert Jahrling and Angus Richardson from Citi.[453] This is consistent with this indicated allocation preference being taken into account by the JLMs as part of the allocation process.

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[452] CB 285 (ZIH.009.003.0006); CB 286 (ZIH.003.001.1538). See ASIC's Submissions, Annexure C, Section 5, in the row "Altered bid".
[453] CB 230 (ZIH.003.001.1143).

209 *Thirdly*, ASIC refers to an email chain commencing with an email from Eric Langner.[454] In this email Mr Langner sends an email to Chris Chung (and others) which says: "*please put Indus in for $5mm USD of ANZ, their real demand is for $2mm. Order already with JPM*". This email was sent at 6:53am on 7 August 2015.[455]

210 Accordingly, this email chain reflects a communication made to JLM personnel by Indus Capital after the close of the book and after Indus had been informed of its allocation, and therefore in the context of discussions as to that allocation. Subsequent emails in the chain refer to an allocation of 65,000 shares being agreed with Indus, which confirms that the discussions concerned proposed allocations and not bids. Further, in relation to the initial email:

(a) there is no evidence as to who Eric Langner is or what his role was, nor any evidence as to the roles of any of the individuals to whom Mr Langner's email was sent;

(b) there is no evidence as to whom from Indus Capital Mr Langner may have communicated with;

(c) the subsequent emails in the chain referring to an allocation of 65,000 shares are not inconsistent with Indus Capital's bid being for a much higher number, but a lower allocation being agreed (noting that those emails were after the book had closed and after Indus had been informed of its allocation).

211 *Fourthly*, there is an email from Richard Newton to Carney Leith on 7 August 2015 at 8:03am AEST[456] which says that he "*spoke to Mike the 65k shares is the right number and Citi has agreed to amend*". Again, this is consistent with Mr Newton discussing with Indus Capital their preferred allocation during the allocation process (and after the book had closed) and then seeking to allocate consistently with this.

212 *Fifthly*, on 7 August 2015 at 11:21am Kristopher Salinger of Citi sent an email to Harry Florin of JPM which attached the latest ANZ book allocations.[457] In that email Mr Salinger said "*Indus moved to 65k shares*". That was merely a description of the allocation in fact made to Indus. It said nothing about the bid made by Indus Capital.

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[454] CB 294 (CIT.100.005.4129).
[455] It is common ground that the time stamp on the email is EST time (as the participants are based on New York and Boston, and that the email was sent at 6:53am AEST on 7 August 2015.
[456] CB 292 (ZIH.003.001.1536).
[457] CB 314 (ZIH.007.004.0799).

213 *Sixthly*, ASIC relies on the further document which is said by ASIC to be a transcript (prepared by ASIC) and recording of a call between Itay Tuchman, John McLean, Angus Richardson and "unknown" person on 6 August 2015 at 9:23pm.[458] ANZ challenges the admissibility of that transcript. If it is admitted, it can be noted that the relevant part on which ASIC relies is:

> MR McLEAN: Well, Gray's proposing that we revisit it and just go a bit harder and say, "Sorry." He's just had the chat with Phil King and forced him to take 150. And he said, "Righto, right, I'll take it." Trafalgar was smart enough to pull theirs out, so you don't – they're not obliged. But he's saying things like Manikay and Indus and others, we need to just stump them up a bit more and say, "Sorry, that's what you've been allocated."
>
> …
>
> MR RICHARDSON: We still don't know where Indus is. Are they at 30 or are they at 2?
>
> MR McLEAN: We've got them at 5. So what's your view? You think we can't really do it? How are you going to survive an audit? So, we've used our best judgment, based on our commercial relationships with these guys.
>
> UNKNOWN: Yeah, (indistinct) allocations.
>
> MR RICHARDSON: Um --
>
> UNKNOWN: Yeah, no, I don't think (indistinct).
>
> MR TUCHMAN: John, I think we need to take this up the chain.
>
> MR RICHARDSON: See, John, we can't have Spider agreeing things with hedge funds without --
>
> MR TUCHMAN: I agree.
>
> MR RICHARDSON: -- the Deutsche guy and you agreeing with him.
>
> MR McLEAN: Yeah, yeah.
>
> UNKNOWN: I'm very worried about it --
>
> MR McLEAN: Yeah, he's made that – I mean, to be clear, he's made that point from the outset, though, Moose. He's not changed his tune, has he?
>
> MR RICHARDSON: Well, he's sort of brought these down a little bit and Ninemasts up.

[458] CB 214 (ZIG.0003.0005.0071); CB 240 (CIT.010.001.0192).

> MR TUCHMAN: Listen, whoever put the orders in the book at that amount, if that's an order, right?
>
> MR RICHARDSON: Yeah.
>
> MR McLEAN: Did you guys tell him that?
>
> MR TUCHMAN: You know and --
>
> MR RICHARDSON: Well, he keeps saying, "Well, I've got a book, but it was changed." I said, "Well, we didn't – it's not changed on Anthony's spreadsheet."
>
> MR McLEAN: Fuck.
>
> MR RICHARDSON: But then, if it's his error and he's got a Bloomberg from the client at 4.30, then --
>
> MR McLEAN: Well, that's what he said. He said from the moment we walked into the room, guys. I mean, I hear you, but he did say it from the moment he walked into the room, and he had the Bloomberg.
>
> MR TUCHMAN: But why is it not changed in the book?
>
> MR McLEAN: Well, we have changed it in the – well, we put a bloody colour around it because we knew he had to check it, so that's what he's done.

214 It can also be noted that during this call Mr McLean of Citi drew a distinction between Trafalgar (who "*was smart enough to pull theirs out*") with other investors such as Regal, Manikay and Indus (who did not amend their bids, and for whom the JLMs had the option of allocating them the full amount of their bid).[459]

215 *Seventhly*, ASIC also refers to the further document[460] which purports to be a transcript (prepared by ASIC) of a call between Itay Tuchman and Richard Heyes on 7 August 2015 at 2:13pm.[461] Again, ANZ challenges the admissibility of this transcript. If the transcript is admitted into evidence, it records the following as being said on that call:

> MR TUCHMAN: The other bit around the syndicate process is that the degree of attention to detail around the orders was appalling.
>
> MR HEYES: Talk to me about that, in terms of --

[459] CB 241 (ZIG.0003.0005.0071) at .0076.
[460] CB 327 (ZIG.0003.0005.0090).
[461] There is also a recording of this call at CB 326 (CIT.010.001.0196).

> MR TUCHMAN: I'll give you an example. I walk in there. Indus, right?
>
> MR HEYES: Yeah.
>
> MR TUCHMAN: He's initial is for $30 million.
>
> MR HEYES: Yeah.
>
> MR TUCHMAN: Rob Jahrling, yeah, I spoke to the trader there, they're fine with 30. You know, I spoke to the trader, the same guy, (indistinct). I spoke to the (indistinct) there, and he only wants two. Why the hell is he in the book for 30?

216 It is apparent that ASIC is asking the Court to infer from these two calls that Indus had amended its bid and that this proved by comments from, *inter alios*, Mr Tuchman. But the following points can be made:

(a) ASIC ignores and does not put before the Court the evidence given by Mr Tuchman during his section 19 examination.[462] This evidence included direct evidence about the statements made by Mr Tuchman in the 7 August 2015 2:13pm call relied on by ASIC. In relation to this, Mr Tuchman's evidence was that:

> This refers to my attempt to provide a paraphrasing of what I heard at the allocation meeting, which is Rob saying it's 30 million and then somebody from one of the other JLMs saying, "No, I spoke to the trader. It's - only wants two", and ambiguity about who the last person who had spoken to the client and what the true last order given in terms of what should shape in the book was. I didn't speak to any of these people.

(b) it is evident from Mr Tuchman's evidence that he did not personally speak to anyone at Indus, and that his subsequent comments to Mr Heyes reflected nothing more than the fact that there was some uncertainty in the discussion about Indus Capital;

(c) part of Mr Tuchman's uncertainty may have arisen from his understanding that someone said that they "had a Bloomberg" for Indus Capital bidding a lower amount. In fact no such Bloomberg exists;

(d) the call on 6 August 2015 at 9:23pm also, at its highest, evidences some uncertainty as to Indus Capital's bid, as opposed to evidencing an amendment to the bid of US$30 million (which bid is clearly evidenced by other material). Indeed, in the comment (attributed to Mr McLean) in which the speaker discusses the fact that Trafalgar had "*pull[ed] theirs out*" (i.e. amended its bid), a contrast is drawn to other

[462] CB 95 (ZIG.0005.0041.0001) – Tuchman T(2):74:19-75:12.

investors such as Indus Capital who could be "*stump[ed] up*" for more. This, if anything, is consistent with Indus Capital not having amended its bid (but rather just having expressed an allocation preference).

Conclusions in relation to Indus Capital

217 All but one of the communications relied on by ASIC in relation to Indus Capital occurred after the close of the book. The one contemporaneous communication is the email in paragraph 204 above. But that email related to Indus Capital's preferred allocation (and indicates that Indus Capital appreciated the difference between the amount it bid and the amount it might actually be allocated). In any case, other documents show that subsequent to this email Indus Capital confirmed its earlier (higher) bid of US$30 million.

218 All of the other material relied on by ASIC is well after the close of the book and, at its highest and when read in context, suggests nothing more than some uncertainty among certain individuals as to what Indus Capital's bid was.

219 As against this, all versions of the DealAxis book maintained by the JLMs, and all spreadsheets circulated among the JLMs and sent to ANZ, recorded Indus Capital's bid as being for US$30 million (or shares equating to that amount).

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	18/04/2023 7:21:04 PM AEST
Date Accepted for Filing:	18/04/2023 7:21:09 PM AEST
File Number:	VID1153/2018
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

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