Article Information

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Underwriting Shortfalls must be Disclosed

Nearly a decade has passed since ANZ placed circa $750 million in shares to the underwriters of its $2.5 billion equity capital raising leading to a dispute with ASIC over ANZ's failure to disclose the shortfall. The Federal Court has now upheld the primary judgement that ANZ should have disclosed their shortfall under its continuous disclosure obligations under the *Corporations Act 2001* (Cth).[1]

Speaking on the primary decision from last October, ASIC provided a media release noting that the decision reaffirms ASIC's "long-standing expectation that an issuer of securities must disclose material shortfalls in capital raisings to the market."[2]

The Federal Court has solidified ASIC's position. The court found that shortfalls must be disclosed as they are expected to materially affect the price or value of company shares. Since this is important information for a hypothetical investor, it must be publicly disclosed.[3]

Justice Lee, with Markovic and Button JJ agreeing, clarified the test for materiality under the continuous disclosure regime:

> *"The contention the materiality test requires the information to have an established economic value effect is a gloss. Relatedly, there is no necessity to prove that a change in the price of securities occurred to establish liability."**[4]***

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

[2] 'ASIC wins landmark continuous disclosure case against ANZ', *ASIC* (Web Page, 13 October 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-277mr-asic-wins-landmark-continuous-disclosure-case-against-anz/>.

[3] *Australia and New Zealand Banking Group Limited v Australian Securities and Investments Commission* [2024] FCAFC 128 [106]

[4] Ibid [78].