## Article Information

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# Update: ANZ to Appeal Court Findings on Shortfall Allocation Disclosure

There have been two developments since we published the alert below in October:

- The Federal Court imposed a penalty of $900k on ANZ for failure to disclose that about $750 million of its $2.5 billion capital raising in 2015 was purchased by Citigroup, Deutsche Bank and JP Morgan, and ordered that ANZ pay ASIC's costs; and
- ANZ has filed notice of intention to appeal.

As to why ANZ would choose to appeal this small fine in relation to events that took place 8 years ago, ANZ's Chief Risk Officer, Kevin Corbally, said:

> *"Given the importance of continuous disclosure laws, there is benefit for financial market participants in obtaining guidance from the Full Federal Court"*

Although the $900k fine is relatively small in the context of a $2.5 billion capital raising, it is towards the upper end of the scale available to the Court for matters that occurred in 2015. To this point, ASIC Deputy Chair, Karen Chester said:

> *"If such a contravention occurred today, the maximum penalty could be anywhere between $15 million to $780 million"*

We will provide further updates as they unfold if ANZ does follow through with its intention to spend further moneys on this matter for the benefit of the "public interest".

### Shortfall allocations to underwriters must be disclosed on ASX, Court finds

*19/10/2023*

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*Eight years after ANZ placed circa $750 million in shares to the underwriters of its $2.5 billion equity capital raising (**Placement**), the Federal Court of Australia (**Court**) has held that ANZ should have immediately disclosed that information in accordance with its continuous disclosure obligations under the Corporations Act 2001 (Cth) (**Corporations Act**).**[1]***

Unless successfully appealed by ANZ, this decision is the law on disclosure of such shortfall allocations, which has been a contentious issue amongst Australian securities lawyers.

This case was delayed for an unusually long time after the Placement in 2015 because ASIC's enforcement action was paused when the ACCC brought separate cartel conduct proceedings in relation to disposing of the shortfall shares. ASIC's action recommenced when the ACCC proceedings were then abandoned by that regulator.

**Regulatory context**

ASX Listing Rule 3.1 requires listed entities to disclose to the market any information a reasonable person would expect to have a material effect on the price or value of that entity's securities. This Rule acts in conjunction with section 674 of the Corporations Act which requires a listed entity to announce to the market any information that (among other things):

- is not generally available; and
- is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's securities (note the consistency with the wording of LR 3.1).

**The pleaded "Information"**

ASIC pleaded that prior to ANZ issuing its completion announcement on 7 August 2015, ANZ held the information that:

- shares with a value between approximately $754 million and $791 million were to be acquired by the underwriters; and/or
- a significant proportion of the shares the subject of the placement were to be acquired by the underwriters.

The Court was asked to determine whether ANZ was required to disclose this information to the market under section 674 of the Corporations Act and the ASX Listing Rules.

**Shortfall was "material"**

Section 677 of the Corporations Act provides that the materiality limb of the continuous disclosure test in section 674 may be satisfied if the pleaded information *"would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities."*

The Court accepted ASIC's argument that the shortfall would have a 'material effect' on the securities' price. Had the shortfall been disclosed, typical investors would have expected the underwriters to promptly sell the allocated or acquired placement shares, and in so doing place downward pressure on ANZ's share price. This is despite the argument from ANZ that the underwriters' actual incentive in these circumstances was to not become short-term sellers of the ANZ shares.

The Court cited evidence from ANZ personnel who had made numerous calls to the underwriters before the market opened on 7 August 2015 seeking assurances from the underwriters as to their intentions with the shortfall shares. It was clear to the Court that the assurances were sought due to a belief that a quick sell-down from the underwriters would place downward pressure on the ANZ share price. ASIC's contention, which was accepted by the Court, was that persons who commonly invest in securities would have held similar concerns or beliefs, and that these concerns or beliefs would influence such persons in their decision to acquire or dispose of ANZ shares (therefore meeting the materiality criteria set out in section 677).

While the Court accepted the underwriters made statements to the effect that they had hedged their positions and that they were in no rush to sell any shares they acquired, it did not meaningfully affect the assessment of the materiality of the shortfall. In making this finding, the Court noted that these statements from the underwriters were of a general nature and lacked sufficient detail to constitute contextual information for the purposes of assessing the materiality of the pleaded information.

**The extent of the shortfall was not "generally available"**

ANZ admitted that information as to the amount of the shortfall, and the value of the shares to be placed with the underwriters, was not generally available.

ANZ argued, though, that the more generic information, that the underwriters were to be placed a significant number of the shares, was generally available before trading in ANZ shares recommenced following the Placement at 10:00am on 7 August 2015. ANZ relied on expert evidence opining that, although ANZ did not expressly disclose the information (due to confidentiality obligations under the Underwriting Agreement), the information was available by inference from "*the information flow from the book-build, the analyst reports and/or the media articles*". However, the Court noted factual evidence which showed that, shortly before the recommencement of trading, the underwriters and senior ANZ personnel did not believe that the information was generally available to the market.

**What this means for ASX listed entities and underwriters**

The decision of the Court is confirmation that a material allocation of a shortfall to underwriters in a capital raising must be disclosed to the market.

The decision of the Court was made despite assurances and hedge positions made by the relevant underwriters to negate any potential downward pressure the information might have on the ANZ share price.

Issuers who do not immediately disclose their shortfall allocations face substantial penalties.  However, penalties in the ANZ case are yet to be determined by the Court.

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