Redefining Market Manipulation in Australia: The Role of an Implied Intent Element

Hui Huang*

I. Introduction ... 1
II. Overview of Australia's market manipulation regime ... 2
III. Criminal Proceedings: Statutorily implied intent element ... 3
IV. Civil penalty: Self-implied intent element ... 4
A. The role of civil penalty in reducing evidentiary difficulty ... 5
B. The feasibility of an objective test based on economics ... 8
C. The relevance of 'intent' ... 10
D. The way forward: specific intent v general intent ... 12
V. International experience ... 14
VI. Conclusion ... 16
Appendix ... 17

I. Introduction

Market manipulation has long been regulated because of the damaging effect that it has upon market efficiency and investor confidence.[1] Despite this, an examination of the regulatory regimes in various jurisdictions shows that it has been very difficult to satisfactorily capture a definition or indeed the scope of market manipulation.

In Australia, the legislation dealing with prohibitions on market manipulation has been amended with a view to improving the efficacy of the market manipulation regime. Among the major amendments is the removal of the concept of "intent" from the wording of the relevant provisions. Due to lack of judicial authority and guidance from the Australian Securities and Investments Commission (ASIC), there has been uncertainty about the effect of this particular change on the application of the market manipulation provisions, that is, whether regard must still be had to the intent or purpose of the trader when defining manipulative trade. While waiting for the definition to be refined, traders are likely to be left in a state of uncertainty. Therefore, there is a great need for clear and specific guidance on this issue in order to give confidence and peace of mind to traders who enter into socially desirable transactions,.

The purpose of this article is therefore to examine whether, and if so how, the concept of "intent" should be implied in the current market manipulation regime. The next part gives an overview of the current market manipulation provisions in Australia, followed by an examination of fault elements in criminal proceedings against market manipulation. The article then turns to the more complicated issue of whether fault elements are required in civil penalty cases. The next part sheds more light on the issue above by looking at the positions in other jurisdictions. The final part contains concluding remarks.

---

* PhD (UNSW), B Eng, LLB, LLM (Tsinghua University, China); Senior Lecturer, Law Faculty, University of New South Wales.

[1] The regulation of market manipulation in common law jurisdictions traces its lineage to the English case, *R v de Berenger* (1814) 3 M & S 66; 105 ER 536. For a detailed discussion of this case, see eg Loss L and Seligman J *Securities Regulation* (Aspen Publishers, 2004) Vol XIII, §3986.11; Baxt R, Black A and Hanrahan P, *Securities and Financial Services Law* (LexisNexis, 2003) pp 471-472.

II. Overview of Australia's market manipulation regime

Market manipulation is currently prohibited under Pt 7.10 of the *Corporations Act 2001* (Cth) (*Corporations Act*). Sections 1041A and 1041B provide the principal prohibitions of market manipulation, although the use of false or misleading statements and the misuse of inside information as prohibited under other provisions, are also vehicles for market manipulation.[2]

These two provisions were introduced by the *Financial Services Reform Act 2001* (Cth) to replace their *Corporations Law* predecessors of ss 997 and 998 with respect to securities and ss 1259 and 1260 with respect to futures. This legislative reform has made a number of important changes to Australia's market manipulation law. First, the prohibitions now apply to all financial products that can be traded on the financial market and are no longer limited to securities and futures. This aims to simplify the law by consolidating the different sets of provisions and then extending the single set of provisions to cover a broader range of financial products.[3] Secondly, unlike their predecessors, ss 1041A and 1041B are now civil penalty provisions. The standard of proof at civil law, namely on the balance of probabilities, is expected to assist with the successful enforcement against market manipulation.[4]

In addition, there are some other significant changes in the wording of the provisions. Under s 1041A,

> A person must not take part in, or carry out …
>
> (a) a transaction that has or is likely to have; or
>
> (b) 2 or more transactions that have or are likely to have;
>
> the effect of:
>
> (c) creating an artificial price for trading in financial products…
>
> (d) maintaining at a level that is artificial … a price for trading in financial products.

Thus, s 1041A can be contravened by a single manipulative transaction. This is to be contrasted with former s 997 of the *Corporations Law* whose contravention could only be established by two or more problematic transactions. This represents an improvement as a single manipulative transaction is no less objectionable than a series of such transactions.[5] More importantly, by contrast with its predecessor, s 1041A does not contain any requirement that the transactions be entered into *with intention to induce other persons to trade*.[6]

Similarly, s 1041B(1) has also removed the reference to "intent" from former s 998. It states:

> A person must not do, or omit to do, an act … if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance:

---

[2] Tomasic R et al, *Corporations Law in Australia* (Federation Press, 2002) p 621. Other market misconduct provisions under Pt 7.10, Div 2 of the *Corporations Act* include s 1041C (prohibiting fictitious or artificial transactions); s 1041D (prohibiting dissemination of information about illegal transactions); s 1041E (prohibiting false or misleading statements); s 1041F (prohibiting inducing persons to deal); s 1041G (prohibiting dishonest conduct); and s 1041H (prohibiting misleading or deceptive conduct).

[3] Revised Explanatory Memorandum to the Financial Services Reform Bill 2001, s 2.86, http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/framelodgmentattachments/14357E65D5775674CA2570C70002A7AF viewed 6 May 2007 (hereinafter Explanatory Memorandum).

[4] Explanatory Memorandum, n 3, s 2.87.

[5] Meyer PWR, "Fraud and Manipulation in Securities Markets: A Critical Analysis of Sections 123 to 127 of the Securities Industry Codes" (1986) 4 C&SLJ 92 at 95; see also Goldwasser V, "The Regulation of Stock Market Manipulation – A Blueprint for Reform" (1998) 9 *Australian Journal of Corporate Law* 109.

[6] For comparative purposes, the actual wording of former s 997 of the *Corporations Law* is provided in the Appendix below.

(a) of active trading in financial products …
(b) with respect to the market for, or the price for trading in, financial products.

By way of comparison, former s 998(1) states that a person is prohibited inter alia from doing anything "that *is intended to* ... create a false or misleading appearance of active trading in any securities on a stock market".[7]

In addition, assistance with regard to what may constitute a false or misleading appearance of active trading under s 1041B(1) can be found in the deeming provisions of s 1041B(2) concerning "wash sales" and "matched orders".[8] Under the previous regime, there was a defence contained in former s 998(6) under which the defendant will be exculpated if he or she proves that the purpose of the impugned transaction was not or did not include a purpose of creating a false or misleading appearance of active trading. This rebuttable presumption with respect to "wash sales" and "matched orders" has performed useful functions. On the one hand, it helps ease the burden of proof on the prosecution to the extent that those forms of transactions are deemed to breach the market manipulation provisions. This is appropriate since those transactions normally serve no other purposes than to manipulate the market. On the other hand, the presumption can be rebutted to avoid draconian liability because there are some instances, albeit few, where legitimate purposes are actually served by those transactions.[9] However, the explicit defence is now missing from the actual wording of the current regime.

At first glance, the above change in relation to the "intent" requirement conveys the impression that ss 1041A and 1041B may have now adopted a purely objective test of market manipulation. That is, in determining whether a person has engaged in market manipulation, one needs only to look at the effect of the particular trade on the market without examining the person's purpose behind the trade. However, since neither case law nor ASIC has clarified this important issue so far, it is far from clear whether the situation is what it appears. Rather, upon close examination, it can be argued plausibly that despite the removal of the "intent" phrase, "intent" may still be implied in the market manipulative provisions.

III. Criminal Proceedings: Statutorily implied intent element

As noted above, ss 1041A and 1041B now carry with them both criminal liability and civil penalty. In cases of criminal liability, ss 1041A and 1041B need to be read in conjunction with the *Criminal Code Act 1995* (Cth) (*Criminal Code*). This is because s 1308A of the *Corporations Act* provides that Ch 2 of the *Criminal Code* applies to all offences against the Act, including criminal prosecutions of ss 1041A and 1041B.

The *Criminal Code* provides that an offence is made up of both physical and mental elements, unless it is one of either strict or absolute liability. For offences that are silent on the requisite mental element, the *Criminal Code* implies the relevant fault element, depending on the physical element of the offence. Under s 5.6 of the *Criminal Code*, if the law creating an offence does not specify a fault element for a physical element that consists of:

(a) conduct only, intention is the fault element for that physical element; and

---

[7] *Corporations Law*, s 998(1) (repealed). To assist comparison, former s 998 of the *Corporations Law* is reproduced in the Appendix below.

[8] A "wash sale" occurs where a person or her or his associate is both buyer and seller in the same transaction. A "matched order" occurs where a person and her or his associates place buy and sell orders at the same time, for substantially the same number of securities at substantially the same price.

[9] See below.

(b) a circumstance or a result, recklessness is the fault element for that physical element.

As ss 1041A and 1041B do not specifically indicate an element of mens rea or state that they are strict liability offences, it can be said that a criminal contravention of one of these provisions will involve an automatic fault element being implied from the *Criminal Code*. This is arguably the reason why the market manipulation provisions no longer include a reference to intention. Support can be found in the Explanatory Memorandum, which states that "in most instances the default fault elements in the *Criminal Code* … will be implied into offences".[10]

When applied to s 1041A, there are two implied fault elements as it has two physical elements. First, it must be shown that the person in question intentionally carried out the transactions described in paras (a) and (b) of the section. The second fault element, which corresponds to paras (c) and (d) of the section involving the result of creating or maintaining an artificial price, is reckless, and can be established by proving either intention, knowledge or recklessness. Similarly, in relation to s 1041B, the prosecution will need to prove that the person intentionally committed or omitted to perform an act and was reckless in creating or producing the likelihood of a false or misleading appearance.[11] Further, as a general rule, s 13.6 of the *Criminal Code* requires production of positive evidence of fault elements in relation to deeming provisions, stating (emphasis added):

> A law that allows the prosecution to make an averment is taken *not* to allow the prosecution:
> (a) to aver any fault element of an offence; or
> (b) to make an averment in prosecuting for an offence that is directly punished by imprisonment.

Thus, although the defence in former s 998(6) is not reproduced in s 1041B, the *Criminal Code* may apply to mitigate the otherwise harsh effect of the deeming provisions of s 1041B(2).

Given that intent here is implied by virtue of the *Criminal Code*, it can be termed the *Criminal Code*-implied intent or statutorily implied intent. It should be noted that there is some ambiguity surrounding the application of the *Criminal Code*. For instance, clarity is needed as to whether the prohibited "effect" in s 1041A can be properly characterised as the "result" within the term of s 5.6 of the *Criminal Code*.[12] Likewise, question marks hang over whether s 1041B(2)-(4) are "results" themselves or mere "circumstances" within the meaning of the *Criminal Code*.[13] However, they are essentially technical issues. In principle, it is reasonably clear that the *Criminal Code* operates to supply fault elements to criminal contraventions of ss 1041A and 1041B.

IV. Civil penalty: Self-implied intent element

The market manipulation provisions are now also subject to the civil penalty

---

[10] Explanatory Memorandum, n 3, s 6.115.

[11] See eg Baxt et al, n 1, pp 488-489 (discussing the interaction between s 1041B and the *Criminal Code*).

[12] Trichardt A, "Australian Green Shoes, Price Stabilisation and IPOs – Part 2" (2003) 21 C&SLJ 75 at 83 (using the word "if" to qualify the argument that "recklessness" is the default fault element for the "effect" within the meaning of s 1041A by operation of the *Criminal Code*).

[13] Longo J, "Market Misconduct Provisions of the Financial Services Reform Act: Challenges for Market Regulation", paper presented at Centre for Corporate Law and Securities Regulation seminar on Market Misconduct and the Financial Services Reform Bill, 25 July 2001 (Melbourne) and 14 August 2001 (Sydney), http://cclsr.law.unimelb.edu.au/research-papers/longo.html viewed 8 April 2008 (stating that "characterization of the physical elements of the offence is not entirely clear").

regime. When ss 1041A and 1041B apply as civil penalty provisions, the *Criminal Code* has no operation. Therefore, the default fault elements of ss 1041A and 1041B under the *Criminal Code* are unavailable in civil penalty cases. The question then arises whether, for the purposes of a civil penalty action, the intention requirement has now been completely removed or it should still be inferred in some other ways.

It has been argued that fault elements, though necessary in criminal proceedings, are not required for civil penalty applications, and that this is an "important distinction between the section as a civil penalty provision and as an offence".[14] According to this argument, civil penalty provisions are more advantageous because they enable ASIC to bring actions where it is difficult to prove the fault element necessary for a criminal prosecution.[15] Further, the requirement of "artificial price" will be sufficient to define market manipulation and prevent "limitless liability in respect of legitimate commercial activity".[16]

The above argument can be challenged on two somewhat inter-related grounds. First, it fails to properly comprehend the nature of civil penalty and the various ways it can apply to improve law enforcement. It is an overgeneralisation that the advantage of civil penalty links invariably to the *absence* of the hard-to-prove intent element required for a criminal conviction. While the requirement of intent is the distinction between a civil penalty and a criminal offence in regard to some provisions in the *Corporations Act*, this is not so in the case of market manipulation. Secondly, it is doubtful that an objective test of market manipulation can be framed in terms of "artificiality" as found in the current provisions to adequately distinguish manipulative from non-manipulative transactions. When deciding the artificiality of a price, it is necessary to look at the mental state of the trader. It can be said that "intent" is integral to the concept of "artificiality" and therefore the definition of market manipulation. As the intent element here can be inferred from the concept of "artificiality" rather than the *Criminal Code*, it is termed the self-implied intent. These two arguments are developed in greater detail below.

A. The role of civil penalty in reducing evidentiary difficulty

The civil penalty scheme was introduced in 1993 and contained in Pt 9.4B of the *Corporations Act*. It straddles the divide between civil and criminal enforcement and combines their compensatory and deterrent purposes.[17] The rules of evidence and procedure for civil matters are applied in civil penalty cases, even though the sanctions may be of a quasi-criminal nature. Thus, it is not strictly correct to attribute the advantage of civil penalty provisions to the absence of fault elements in all instances.

In some areas of corporate law where civil penalties are provided for, such as directors' duties, there are clear distinctions in the elements of conduct that will breach the criminal offence as opposed to civil penalty, and they relate specifically to "intent" in the form of "dishonesty" or "recklessness".[18] There, persons involved in the contravention are subject to civil penalty and criminal sanctions arise only where

---

[14] Trichardt, n 12 at 83.

[15] Trichardt, n 12 at 83.

[16] Trichardt, n 12 at 83.

[17] See eg Gillian G, Bird H and Ramsay I, "Civil Penalties and the Enforcement of Directors' Duties" (1999) 22(2) UNSWLJ 417 at 424.

[18] See eg, the criminal offences created by s 184 compared with the civil equivalents of ss 181, 182 and 183.

the involvement is reckless or intentional. Thus, for those types of conduct, "intent" is the *additional* requirement for criminal liability, and there may still be contraventions and civil penalties in the absence of "intent".

However, this is not the case for market manipulation. The constituent elements of the market manipulation provisions for the purposes of civil proceedings are the same as for a criminal offence. As shall be discussed later, "intent" is inherently embedded in the definition of market manipulation. In other words, "intent" is an *essential* element of market manipulation without which a transaction would not be manipulative at all. This is in contrast to the above-mentioned provisions like those governing directors' duties where "intent" is *additionally* layered only in a criminal prosecution. Thus, "intent" is required in both criminal and civil breaches of the market manipulation provisions. The differences between criminal liability and civil penalty for market manipulation lie in the differing standard of proof of "intent" rather than the necessity of "intent".

In short, in the case of market manipulation, civil penalty can be expected to improve law enforcement because it has a lower standard of proof, namely on the balance of probabilities rather than beyond reasonable doubt. It is this less stringent evidential burden which makes it easier to bring proceedings under civil penalty provisions.[19] This approach helps to strengthen the enforcement of the market manipulation regime while at the same time retaining the intent element as a yardstick to discern legitimate market transactions.

Indeed, the difficulty of proving the intent requirement is one of the main reasons for the introduction of civil penalties to the market manipulation regime in the 2001 reform. It had been argued before the reform that intention was too difficult to prove and this had impeded successful market manipulation prosecutions.[20] Parliament has now responded by introducing the civil penalty regime. It would be a perfect solution to the evidentiary problem if intent could be eliminated altogether in civil penalty cases. However, as noted earlier, this is not practically achievable due to the special nature of market manipulation. Therefore, the difference the civil penalty regime can make is to reduce the standard of proof, and this should be sufficient to address the evidentiary problem for the reasons explained below.

In the first instance, the difficulty of proving intention is not as serious as suggested by some commentators. Market manipulation often leaves a trace and can be proved by direct evidence from sources such as letters, emails or telephone communication. For instance, in *Donald v Australian Securities and Investments Commission* (2001) 38 ACSR 10; [2001] AATA 366, the accused was found to have actually said that he "want(ed) to give [the share price] a bit of a nudge upwards". This directly showed the intent to manipulate the share price and thus was relied on for the final judgment. Even where direct evidence is not available, proof of intention can rest upon inferences deduced from circumstantial evidence. In practice, circumstantial indicators include, among other things,

> consistent increases in a trader's bid to acquire shares from the previous sale price ("upticking"); the making of purchases and sales at successively higher prices ("ramping"); purchases of a significant volume of shares, allowing a trader to dominate the market and artificially set market

---

[19] Goldwasser, n 5 at 111. Moreover, there are some procedural advantages in civil penalty proceedings. See eg Middleton T, "The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act" (2003) 21 C&SLJ 507.

[20] Goldwasser, n5 at 126.

prices; and placing actual bids at or near the close of trading, causing the stock to close at a higher price than the previous sale price.[21]

Recent cases have shown that the courts are prepared to infer the intent element from the circumstances surrounding the case so that the absence of the defendant's admission may not be an insurmountable barrier for the prosecution to establish its case[22]

Further, although the intent element of manipulation presents difficult problems of proof, the law is by no means without experience of cases of this kind. The intent element is required in many offences in other areas of law and relies on a judgment to be made from circumstantial evidence. The concept of "acting in concert" in takeover laws and cases of criminal conspiracy are among the most obvious examples, where the common purpose of defendants must be established.[23] Thus, the reduced standard of proof in the civil penalty regime, coupled with the fact that "intent" can be inferred from circumstantial evidence, will further significantly alleviate the evidentiary problem.

Finally, a more informed assessment is needed as to the impact of the evidentiary problem on legal enforcement in practice. It has been suggested that the difficulty of proving intent is primarily responsible for the dearth of market manipulation cases in Australia, particularly when compared with the United States where there is a substantial body of case law dealing with prosecutions for market manipulation.[24] While it has some merit, the force of this argument has been exaggerated for reasons explained below.

First, it takes more than just the evidentiary problem to explain the complex issue why there is such a big disparity in the number of market manipulation cases between Australia and the United States. The number of reported cases allows of different interpretations and should not be the only indicator of enforcement efficacy. Other relevant factors, particularly the number of actual market manipulation cases in practice, need to be taken into account. Unfortunately, however, it is extremely difficult, if not impossible, to assess, with a meaningful degree of precision, the extent to which market manipulation activities are prevalent in the market. The Australian market is smaller and less liquid than its United States counterpart, but it is unclear whether there are fewer market manipulation activities in Australia. On the one hand, it can be said that a smaller and less liquid market is likely to be more susceptible to manipulation.[25] On the other hand, it may also be argued that its relatively small size may make it easier to detect market manipulation, which will have a deterrent effect in the first place.

Secondly and more importantly, it is less than convincing to attribute the discrepancy to the difficulty of proving intent in Australia because the United States legal regime requires the element of intent as well. For instance, s 9(a)(2) of the *Securities Exchange Act 1934* (US) is expressed in broadly similar terms to former s 997 of the *Corporations Act*, making it unlawful for any person to effect a series of transactions raising or lowering the security price *for the purpose of* inducing others to purchase or sell the security.[26] This situation is well captured by one commentator

[21] Black A, "Regulating Market Manipulation: Sections 997-999 of the Corporations Law" (1996) 70 ALJ 987 at 997. It should be noted that circumstantial evidence is just indicative and not conclusive.

[22] See eg *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58.

[23] See eg *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127; (1984) 2 ACLC 829 at 833 (McPherson J).

[24] Goldwasser, n 5 at 115.

[25] Black, n 21 at 1005.

[26] For more discussion of the United States market manipulation provisions, see below.

who stated that the evidentiary difficulty associated with distinguishing manipulative from non-manipulative transactions "exists under both Australian and United States law, and may be unavoidable in any prohibition of market manipulation".[27]

One point to note is that in the United States, the majority of cases are not decided under the specific market manipulation regime as contained in s 9 of the *Securities Exchange Act 1934*, but under the generic anti-fraud provisions of s 10(b) and rule 10b-5 promulgated thereunder.[28] True, rule 10b-5 and not s 9 is often used to prosecute market manipulation in the United States, but this is for a reason unrelated to the difficulty of proving intent. Although r 10-5 is very broad and flexible, it does not dispense with the evidentiary burden as to the defendant's state of mind. In *Ernst & Ernst v Hochfelder* 425 US 185 at 193 (1976), the United States Supreme Court held that the proof of "scienter", that is, *intent to deceive, manipulate, or defraud*, is required in a private cause of action for damages under s 10(b) of the *Securities Exchange Act 1934* and rule 10b-5.[29]

Professor Coffee, one of the world's leading corporate lawyers, has explained the reason for preferring r 10-5 over s 9 in market manipulation cases in the United States:

> Briefly, manipulation charges are usually brought with respect to "pump and dump" schemes in thinly traded stocks. But Section 9(a) requires that the stock be listed on a national securities exchange, and most of these stocks were not, thus requiring the use of Rule 10b-5, which applies universally. Typically, the manipulated stocks were traded in the over the counter market or the "pink sheets" which are not "exchanges" or they were traded on Nasdaq, which only became an "exchange", rather than an "association", two years ago. In short, *the non-use of Section 9 has nothing to do with the required level of intent,* and Section 9 could come into greater use in the future with respect to Nasdaq listed stocks.[30]

Therefore, the evidentiary problem in relation to the intent element is also present in the United States and its relatively effective enforcement is not explicable on the basis of the evidentiary issue. Given that the United States has achieved some success in regulating market manipulation even under the normal standard of proof, it is fair to say that the reduced standard of proof in civil penalty cases is adequate to allow Australia to improve enforcement.

B. The feasibility of an objective test based on economics

At a more fundamental level, the problem with the argument for removing the intent element in civil penalty cases is that it is not feasible to formulate an objective test of market manipulation. According to the proponents of the argument, market manipulation under s 1041A can be adequately defined on the basis of the concept of "an artificial price", which is capable of being objectively determined by expert

[27] Black, n 21 at 1005.

[28] See eg Goldwasser, n 5 at 137.

[29] In *Ernst & Ernst v Hochfelder* 425 US 185 at 193-194 (1976), the court declined to decide whether recklessness is sufficient for the purposes of imposing liability under s 10(b) and rule 10b-5. . In subsequent cases, almost all of the Courts of Appeals have concluded that recklessness could be enough to meet the scienter requirement in non-criminal cases, though these courts have set forth different versions of the definition of "recklessness". It seems clear, however, that recklessness may not suffice in criminal cases. For more discussion of this issue, see Huang H, *International Securities Markets: Insider Trading Law in China* (Kluwer Law International, The Hague, 2006) pp 221-223.

[30] Email from Professor John C Coffee to this author, 23 July 2008 (emphasis added). Professor Coffee restated this point during a conversation with the author after the Third Annual Supreme Court of New South Wales/Law Society of New South Wales Conference on Corporate Law 2008, Sydney, 20 August 2008 (stressing that intent is "critical" to the definition of market manipulation).

evidence because it is "essentially an economic issue".[31] In other words, the concept of "artificiality" is able to produce an objective test of market manipulation to adequately distinguish manipulative from non-manipulative transactions. The same has been said of the phrase "false or misleading appearance" as found in s 1041B. However, this argument suffers from serious theoretical and practical problems.

Artificiality is not defined in the *Corporations Act* and appears to be a particularly elusive concept. Artificial price could mean simply a manipulated price, in which case the artificiality-based definition of manipulation would be a tautology. This has been described as a situation where we would be faced with "the problem of circularity – improper trades are trades that produce an artificial price and artificial price is defined as a price produced by improper trade".[32] Therefore, as the proponents of the argument noted, economic studies have been resorted to in the hope that they may ascertain the content of artificiality, but none has proven satisfactory.

There are traditionally two main economic methods used to produce evidence of price artificiality and within each method some variations exits. Under one method, a price will be considered artificial if it deviates in its relationship to other prices from a set of expected price relationships.[33] Put another way, an artificial price is one that is historically unusual, either because of its absolute level or because of its relationship to other prices. In determining whether a price is unusual, courts have considered, among other things, the historical price movement. An artificial price will then be identified as severance of the normal pricing mechanisms with no apparent reason.

It is acknowledged that the above "historically unusual price" method has a number of weaknesses. The first problem results from the fact that its assumption about comparability of historical data frequently is unwarranted.[34] Plainly, in order to conduct a meaningful comparison, the prices with which the comparison is drawn must be historically comparable and not themselves "artificial" or manipulated. In comparing a current price with a prior price, there is often no basis to believe that the current price, rather than the prior one, is artificial. In fact, it is quite possible that the historical prices might themselves have been influenced by manipulation that in turn forced them to artificial levels. Secondly and more importantly, it is inconsistent with the commercial reality that new circumstances constantly arise and prices respond accordingly in an ever-changing market. A total reliance on historical comparisons incorrectly assumes that the commercial world always develops in a preset trajectory, and thus runs the risk of labelling as artificial any price which deviates from historical patterns, even when that price is justified by unusual circumstances.

The other method of defining artificiality does not look directly at the price, but rather the forces of supply and demand behind the price. Under this approach, artificial price is defined as "a price that does not reflect the "basic" or "legitimate"

---

[31] Trichardt, n 12 at 79.

[32] Fischel D and Ross D, "Should the Law Prohibit Manipulation in Financial Markets?" (1991) 105 Harv L Rev 503 at 509.

[33] This method has been used to determine manipulation with respect to commodities and securities. See Perdue WC, "Manipulation of Futures Markets: Redefining the Offence" (1987) 56 Fordham L Rev 345 at 367 (discussing the usage of the method in the commodities market); Avgouleas E, *The Mechanics and Regulation of Market Abuse – A Legal and Economic Analysis* (Oxford University Press, New York, 2005) p 110 (examining the method in the context of securities trading).

[34] See eg Johnson P, "Commodity Market Manipulation" (1981) 38 Wash & Lee L Rev 725 at 747; McDermott E, "Defining Manipulation in Commodity Futures Trading: The Futures 'Squeeze'" (1979) 74 Nw U L Rev 202 at 211-13.

forces of supply and demand".[35] In economic language, it is a non-equilibrium price.[36] This method involves quantifying the divergence between two equilibria derived from historical data: the equilibrium arising as a result of abuse and the equilibrium forecasted to have arisen in the absence of the abusive interference.

As with the first method discussed above, this "legitimate supply and demand" approach is also fraught with difficulties. Determining "supply and demand" is not a simple mechanical process. This is because neither supply schedules nor demand schedules have tangible manifestations in a marketplace and it is necessary to take into account a wide spectrum of unquantifiable factors.[37] As such, it is very difficult to determine supply and demand. This problem is further exacerbated by the fact that the historical data do not incorporate new buyers' demand and new suppliers' supply and thus do not provide an accurate measure of the current size of supply and demand.[38] Indeed, in assessing whether a past price is adequately reflective of supply and demand, one must look not at whether that price reflects conditions as we now know them with hindsight, but at whether it reflects conditions as they were then understood.

In sum, there is significant difficulty in establishing artificial price for the purpose of market manipulation. All the existing economic methods used to define an artificial price have proven conceptually problematic and practically unreliable. Experts may arrive in different conclusions depending on the methods used and the assumptions made. This makes the concept of "artificiality" either inappropriate to, or unhelpful in, the determination of what constitutes manipulation. Therefore, defining manipulation on the basis of artificiality simply substitutes one unhelpful term for another.[39]

C. The relevance of 'intent'

The preceding discussion has shown the difficulty of objectively determining the artificiality of a price and therefore market manipulation from an economic perspective. In fact, apart from those technical problems, there is one more fatal weakness inherent in any attempt to find an objective test of market manipulation.

As some leading commentators stated, "there is no objective definition of manipulation – manipulation trade must be defined with respect to the intent of the trade",[40] because manipulative trades do not result in "objectively harmful act or bad outcome" and they "are indistinguishable from all other trades".[41] Indeed, every transaction will naturally have an impact on the price of the security traded. A manipulative transaction may look exactly the same as a non-manipulative one in terms of its price impact and other economic indicators, and the only differentiating factor is the intention of the trader. When alleged manipulative transactions are examined in isolation without regard to the underlying intent, it would be very difficult, if not impossible, to state conclusively whether the transaction is of a manipulative nature. This view about the indispensable role of intent in defining

[35] Perdue, n 33 at 370; see also Hieronymus T, "Manipulation in Commodity Futures Trading: Towards a Definition" (1977) 6 Hofstra L Rev 41 at 45; Edwards L and Edwards F, "A Legal and Economic Analysis of Manipulation in Futures Markets" (1984) 4 J Fut Mkts 333.

[36] Avgouleas, n 33, p 108.

[37] Avgouleas, n 33.

[38] Avgouleas, n 33, p 109; Perdue, n 33 at 371.

[39] Perdue, n 33 at 348.

[40] Fischel and Ross, n 32 at 510.

[41] Fischel and Ross, n 32 at 519.

market manipulation has been supported by many commentators.[42]

In Australia, the courts have long firmly and consistently recognised the importance of intent as a yardstick to discern legitimate market transactions. In *North v Marra Developments Ltd* (1981) 148 CLR 42, Mason J suggested that intent is the key factor distinguishing culpable manipulation from activities which should not be so regarded, stating (at 59, emphasis added):

> The section seeks to ensure that the market reflects the forces of genuine supply and demand. By "genuine supply and demand" I exclude buyers and sellers whose transactions are undertaken *for the sole or primary purpose of* setting or maintaining market price.

Although the section Mason J referred to in the case, the equivalent of what is now s 1041B(2), was framed in slightly different terms (the word "calculated" is now replaced with "likely"), the reasoning about the policy goal of the market manipulation regime and the role of intent still holds.

Fame Decorator Agencies Pty v Jeffries Industries Ltd (1998) 28 ACSR 58 provides another good example. This case concerned the attempt of the appellant to push down the relevant share price to increase its entitlement on conversion of preference shares. The appellant sold a large amount of relevant stock within about three minutes of the close of trading, not at the highest possible price but at the lowest possible price. Since the shares were then thinly traded, this transaction easily resulted in the share price dropping from 35 cents rapidly down to 13 cents. Although this transaction appeared quite abnormal, this evidence alone was insufficient to prove that the transactions were manipulative. It was the intent behind the transactions, namely lowering the price so as to obtain more shares out of the conversion, which persuaded the court of the manipulative nature of the transaction. In fact, the court disbelieved the explanation of the appellant that the shares were sold due to pressing needs for cash to pay debts. Clearly, had the transaction been carried out for the purposes stated by the appellant or due to other legitimate reasons such as complying with margin calls, the conclusion would have been different.

Therefore, the trader's intention is pivotal in distinguishing legitimate and illegitimate transactions. The objectively similar transactions can be treated differently, depending on the subjective motivations of the trader which inform the issue of determining artificiality. When deciding the artificiality of a price, it will still be necessary to have regard to the individual circumstances and the intention of the trader. In short, the artificiality-based definition of market manipulation does not obviate the need to inquire into the mind of the trader.

Conversely, if the intent element was to be completely removed from the new provisions, bona fide traders carrying out socially desirable transactions could be caught as manipulative. This has caused grave concerns in the securities industry and prompted the Securities and Derivative Industry Association (SDIA) to make repeated requests for review of this issue in 2003, 2006 and 2007. In its 2007 submission,[43] SDIA was deeply worried about the serious implications of the civil consequences of ss 1041A and 1041B for *legitimate* transactions, eg those that are large and/or involve

---

[42] See eg McCabe L, "Puppet Masters or Marionettes: Is Program Trading Manipulative as Defined by the Securities Exchange Act of 1934?" (1993) 61 Fordham L Rev 207 at 223 (arguing that "the presence of an improper purpose ... is necessary to determine whether the activity should condemned as unlawful manipulation"); Loke A, "The Investors' Protected Interest Against Market Manipulation in the United Kingdom, Australia and Singapore" (2007) 21 *Australian Journal of Corporate Law* 1 at 10 (contending that there is "an irreducible relevance of motivations" in market manipulation cases).

[43] Securities and Derivative Industry Association, *Submission to Treasury re Review of Sanctions for Breaches of Corporate Law* (June 2007), http://www.treasury.gov.au/documents/1285/PDF/SDIA.pdf viewed 8 August 2008.

no change in beneficial ownership that are executed in accordance with the dealing rules applying to its members. Indeed, even for transactions such as "wash sales" and "matched orders" which generally smack of manipulation and thus are deemed to be manipulative,[44] there are instances where they perform legitimate functions. For instance,

> it is not uncommon for fund managers to decide that a security … no longer suits the profile of one of its funds but does now suits the profile of another fund and hence they instruct their stockbroker to transfer the securities from one fund to another … In order to ensure the same purchase/sale price the transaction often goes through the market as a crossing transaction based on the knowledge that the buying and selling funds are different. However, since the order comes from and the securities are held in the name of a single responsible entity (albeit with different designations) the responsible entity would be deemed under s 1041B of having an interest in the securities both before and after the transaction – hence, no change to beneficial ownership.[45]

Apart from portfolio switching for fund managers, further examples include crossing between proprietary trading accounts, and crossing stock between family members or members of a corporate group or in/out of superannuation funds for tax or other reasons.[46] In these circumstances, the beneficial ownership of financial products is moved from one person to another in the same group for a commercially justifiable reorganisation of the holding in ownership of assets. However, under a purely objective test for manipulation, they could be caught even if there were no intention to manipulate the market as long as the action was likely to effectuate an appearance of false or misleading trading as per s 1041B. Plainly enough, these would be questionable consequences of the provisions, which highlight the importance of "intent" in separating legitimate trading from illegitimate trading.

It should be noted that s 1317S may provide a relief of liability in civil penalty proceedings against market manipulation. Under s 1317S, in a civil penalty proceeding, if the court thinks that the defendant has acted honestly and the circumstances of the case call for a relief from liability for contravention, the court has discretion to relieve the defendant from such liability. Therefore, if the defendant can establish that he or she carried out the impugned transactions for legitimate purposes, a relief of liability may be available under s 1317S. This may provide some comfort to SDIA and again illustrates the relevance of intent in the test of market manipulation.

D. The way forward: specific intent v general intent

As discussed above, intent plays an indispensable role in differentiating between manipulative and non-manipulative transactions. It is thus submitted that despite the legislative removal of intent, this element should nonetheless be implied into the civil penalty provisions through the concept of "artificiality" or "a false or misleading appearance". This self-implied or general intent requirement can be carefully developed and decided by the courts on a case-by-case basis. It is preferable to the reform proposal by SDIA that the specific intent requirement and defence contained

---

[44] For discussion of what the terms mean, see above.

[45] Securities and Derivatives Industry Association, *Submission to Treasury re Market Manipulation* (2003) p 6.

[46] Doug Clark (policy executive, Securities & Derivative Industry Association), "FSR & the Stockbroking Industry", Presentation to Monash University FSR Forum (14 July 2006), p 10, http://www.sdia.org.au/sdiawr/pdf/fsr%20and%20the%20stockbroking%20industry_140706.pdf viewed 8 April 2008.

in the former provisions be restored to the *Corporations Act*.[47] First, the SDIA proposal would require another costly exercise of legislative reform which simply undoes part of the reform made just six years ago. More importantly, were the SDIA proposal to be accepted, Australia might lose an opportunity to improve the efficacy of its market manipulation regime, because the implied intent approach has the advantage of being desirably flexible to deal with market manipulation.

Take s 1041A as an example. On the one hand, the implied intent approach provides a solution to the potential over-inclusiveness of the specific intent of "induce others to trade". As pointed out by some commentators, every bid can be seen as an intention to induce others to sell and every offer can be seen as an intention to induce others to buy.[48] Thus, the definition of manipulation centring on the specific intent requirement has been criticised as "hopelessly overbroad – it includes value maximising exchanges in which the transaction makes each party better off".[49] This problem, however, can be effectively dealt with under the implied intent system as the courts can properly limit the intent requirement to those truly manipulative transactions thus avoiding an over-reaction.

On the other hand, the removal of the requirement to prove the specific intent of inducing others to trade may enable the legislation to prohibit manipulative activity which has previously escaped regulation. This addresses the criticism of former provisions that the element of "intent to induce" makes the legislation too restrictive in its scope of application, effectively creating loopholes and overcomplicating the issue.[50] Indeed, a person who does not have the specific intent to induce others to trade may, nevertheless, manipulate the market. Program trading offers a good example.[51] Although program trades may not have the specific intent to induce others to trade, it does not make the conduct any less manipulative. In contrast, there would be no such difficulty in regulating program trading through the implied intent as the courts can interpret it liberally to mean a *general* intent to manipulate.

This is also illustrated in *Fame Decorator Agencies Pty v Jeffries Industries Ltd* (1998) 28 ACSR 58 where the court was divided on the culpability of the transaction. The majority of the court held that the transaction was manipulative because its purpose was to artificially push down the share price to increase the appellant's entitlement on conversion of preference shares. However, according to the minority, the transaction occurred simply because of the market's own mechanism, and the appellant did nothing to that market mechanism other than accept offers in accordance with market rules. This division of opinion highlights the limits of the specific intent requirement because it could be plausibly argued, as the minority judge did in this case (at 64), that

> [i]n acting for his own advantage, the appellant's purpose was not to create a false or misleading appearance with respect to the market … His purpose was to bring about a close of market price which would be to his advantage [with respect to the conversion of preference shares].

The issue raised by this minority argument can be addressed by the interpretation of a general intent to manipulate. Even accepting the minority view that the appellant had no purpose to create a false or misleading appearance of the market as he arguably did nothing more than sell shares in accordance with market procedures, the transaction was nevertheless manipulative because the appellant clearly had an intent

---

[47] Securities and Derivative Industry Association, n 43.

[48] Meyer, n 5 at 96.

[49] Fischel and Ross, n 32 at 507.

[50] Goldwasser V, *Stock Market Manipulation and Short Selling* (CCH Australia and Centre for Corporate Law and Securities Regulation, University of Melbourne, Melbourne, 1999) p 153.

[51] For a detailed analysis of program trading, see Goldwasser, n 50, p 138.

to manipulate with respect to the *conversion transaction*. In other words, the manipulation law is not limited to deception of a purchaser or seller of securities, but rather covers any manipulative device used *in connection with* securities transactions.

Although this reasoning may appear to be a bit broad, it can be justified on several grounds. First, it would be practically more effective in combating market manipulation. Consistently with the proposal for a general anti-fraud provision made by some commentators,[52] the implied intent approach can broaden the ambit of the anti-manipulation law, and therefore improve the rate of enforcement and the rate of deterrence. This is particularly important given the current poor record of enforcement in Australia.[53] Secondly, there seems to be some judicial support for it. Actually, the above reasoning was applied in the majority view in *Fame* that "the conduct of Fame *in connection with* the sale was … likely to mislead or deceive *third parties* who [were entitled to rely on the market price to decide the conversion rate]" (at 63, emphasis added). In other words, it was the impact of the transaction on third parties that prompted the court to find the transaction manipulative. Finally, if the United States experience is any guide, the famous misappropriation theory of its insider trading law was developed just in this way under the general anti-fraud rule 10b-5. According to the misappropriation theory, the fraud is on the source of information rather than market traders.[54] This suggests that the general intent approach, although broad, is a viable option.

In short, despite some difficulties, the implied intent approach should be the way forward to improve the efficacy of the market manipulation regime. It will not only broaden the test of manipulation and thus make the regime more responsive to new and emerging manipulative practices, but also prevent over-deterrence, that is, deterring market participants from entering into legitimate and socially desirable transactions. Therefore, the general intent to be judicially developed through the self-implied intent approach may represent an improvement on the specific intent requirement found in the former provisions.

V. International experience

When debating over the way Australia's market manipulation law should be interpreted or reformed, it is instructive to look at the international experiences, particularly those in common law jurisdictions including the United States, the United Kingdom and New Zealand.

In the United States, s 9 of the *Securities Exchange Act 1934* (US) deals specifically with manipulative practices. On the one hand, s 9(a)(1), the United States equivalent of former s 998 of the *Corporations Law*, prohibits a person from carrying out transactions such as "wash sales" and "matched orders" *for the purpose of* creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security. On the other hand, s 9(a)(2) broadly corresponds to former s 997 of the *Corporations Law*, making it unlawful for any person, alone or with others, to effect a series of transactions in any security registered on a national

[52] See eg Goldwasser, n5 at 139.

[53] Goldwasser V, "Regulating Manipulation in Securities Markets: Historical Perspectives and Policy Rationales" (1999) 5 *Australian Journal of Legal History* 149 at 189 (stating that Australia had produced only two successful prosecutions since the early 1970s).

[54] See Huang, n 29, pp 148-151.

securities exchange creating actual or apparent active trading in the security, or raising or lowering its price, *for the purpose of* inducing others to purchase or sell the security.

As noted earlier, market manipulation cases in the United States are often brought under general anti-fraud rule 10b-5, rather than the specific provisions of s 9, but the calculus of choice has nothing to do with the intent issue.[55] Although rule 10b-5 is very broad in coverage, it requires the element of "scienter", a peculiarly United States concept encompassing intention and recklessness. Consequently, no matter which one, s 9 or rule 10b-5, is used to bring action, there is an essential requirement for fault elements in the United States market manipulation regime.[56]

In the United Kingdom, although there appears to be an attempt towards formulating an objective test of manipulation, intent still remains irreducibly relevant.[57] To begin with, s 397(3) of the *Financial Services and Market Act 2000* (UK) applies to a criminal prosecution against manipulative conduct, providing that there will be a contravention if the accused created "a false or misleading impression as to the market in or the price or the value of any investments … *for the purpose of* creating that impression and of thereby inducing another person to [trade in those investments]".[58] Clearly, intention is required for criminal liability under s 397(3) of the Act.

For civil liability under s 118(2)(b) of the *Financial Services and Market Act 2000* (UK), it may appear at first glance that intention is not necessary. This section prohibits "behaviour that is likely to give a regular user of the market a false or misleading impression as the supply of, or demand for, or as to the price or value of, investment of the kind in question".[59] However, the above attempt to dispense with the subjective elements in the United Kingdom legislation has been found inconsistent with the *European Union Market Abuse Directive* (EU Directive).[60] In 2005, the United Kingdom extensively revised its market abuse provisions to bring them into line with the EU Directive. As a result, manipulative conduct now refers to:

> behaviour [that] consists of effecting tractions or orders to trade (otherwise than for *legitimate reasons* and in conformity with accepted market practices on the relevant market) which
>
> (a) give or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or
>
> (b) secure the price of one or more such investments at an abnormal or artificial price.[61]

Further, the Code of Market Conduct (the Code) promulgated by the Financial Services Authority under s 119 of the *Financial Services and Market Act 2000* (UK) is relevant in the determination of behaviour that would amount to market abuse. The Code expressly mentions the requisite fault elements and what are considered "legitimate reasons". For example, it makes explicit reference to "purpose" both in the prohibition on creating "false or misleading impressions"[62] and in the "price positioning" prohibition.[63] In those sections that do not feature a "purpose" qualifier,

---

[55] See above.

[56] See eg *Trane Co v O'Connor Securities* 561 F Supp 301 at 304 (1983).

[57] Loke, n 42 at 11.

[58] *Financial Services and Markets Act 2000* (UK), s 397(3).

[59] *Financial Services and Markets Act 2000* (UK), s 118(2)(b).

[60] Directive of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (No 2003/6/EC).

[61] *Financial Services and Markets Act 2000* (UK), s 118(5) (inserted by the *Financial Services and Markets Act 2001 (Market Abuse) Regulations 2005*, SI 381/2005) (emphasis added).

[62] Financial Services Authority, MAR 1.6.2(3).

[63] Financial Services Authority, MAR 1.6.4(4)(c).

acts with “legitimate reasons” are expressly permitted.[64] Further guidance is provided on the relevant factors to be taken into account when deciding what would be “legitimate reasons”.[65] This shows that intent remains a key element in the United Kingdom market manipulation law.

Similarly, New Zealand requires intent for the determination of market manipulation. Since February 2008, the new provisions in the *Securities Market Act 1988* (NZ) relating to market manipulation have been in force, along with new regulations enacted thereunder.[66] As the equivalent of s 1041B of Australia’s *Corporations Act*, s 11B of the *Securities Market Act* now prohibits “acts or omissions that have, or are likely to have, the effect of creating a false or misleading appearance with respect to the extent of active trading in the securities of a public issuer; the supply of or demand for the securities; or their trading price or value”. Unlike s 1041B, however, s 11B will only be contravened if the person “knows or ought reasonably to know that the person’s act or omission will, or is likely to have, that effect”. Moreover, s 11C of the *Securities Market Act* expressly provides that proof of a “legitimate reason” is a defence.

Therefore, it is the common position of the jurisdictions examined above that when deciding market manipulation, regard must be had not only to the objective elements of the impugned conduct but also to the fault elements of the trader. This should inform the interpretation of the Australian market manipulation law and lend support to the argument that despite the removal of “intent” from the wording of the provisions, intent is to be implied into the law to properly define market manipulation.

VI. Conclusion

As a result of the *Financial Services Reform Act 2001* (Cth), the Australian market manipulation law has undergone significant changes, one of which is the removal of the explicit requirement of “intent” from the wording of relevant provisions. Due to the difficulties in defining market manipulation and the lack of case law in this area, it remains unclear, however, whether the manipulation law is now devoid completely of any mental element. This has caused serious concerns, given the stiff liability attached to market manipulation.

This article argues that although the word “intent” has been removed from the current legislation, it is still to be implied into the provisions. For criminal liability, the *Criminal Code* supplies the fault elements, albeit with some technical problems with its application. This is termed the statutorily implied intent approach. In civil penalty cases where the *Criminal Code* has no operation, intent should be implied through the concept of “artificiality”. This is dubbed the self-implied intent approach as “intent” is inherently embedded in the concepts of “an artificial price” and “a false or misleading market”.

The argument for implying intent in civil proceedings is advanced on several grounds. First, while the requirement of intent is the distinction between a civil penalty and a criminal offence in regard to some provisions in the *Corporations Act*, this is not so in the case of market manipulation due to the special nature of market

---

[64] Financial Services Authority, MAR 1.6.2(1)-(2); MAR 1.6.4(1)-(3).

[65] Financial Services Authority, MAR 1.6.5-8.

[66] *Securities Markets Act 1988* (NZ) was amended by s 5 of the *Securities Markets Amendment Act 2006* (NZ). See Securities Commission New Zealand, “New Securities Law for Investment Adviser and Market Participants 2008: Market Manipulation”, http://www.newsecuritieslaw.govt.nz/guide/guide11.php viewed 8 August 2008.

manipulation. Secondly, the idea of formulating a purely objective test of manipulation is not feasible as it has serious conceptual and practical defects. The intent element plays a pivotal role in distinguishing between manipulative and non-manipulative conduct. Further, the general intent to be judicially developed through the self-implied intent approach may represent an improvement on the specific intent requirement found in the former provisions. Finally, the relevance of intent has been confirmed by a comparative study of other common jurisdictions including the United States, the United Kingdom and New Zealand.

Appendix

Corporations Law, s 997: Stock market manipulation

(1) A person shall not enter into or carry out, either directly or indirectly, 2 or more transactions in securities of a body corporate, being transactions that have, or are likely to have, the effect of increasing the price of securities of the body corporate on a stock market, with intention to induce other persons to buy or subscribe for securities of the body corporate or of a related body corporate.

(4) A person shall not enter into, or carry out, either directly or indirectly, 2 or more transactions in securities of a body corporate, being transactions that have, or are likely to have, the effect of reducing the price of securities of the body corporate on a stock market, with intent to induce other persons to sell securities of the body corporate or of a related body corporate.

(7) A person shall not enter into, or carry out, either directly or indirectly, 2 or more transactions in securities of a body corporate, being transactions that have, or are likely to have, the effect of maintaining or stabilising the price of securities of the body corporate on a stock market, with intent to induce other persons to sell, buy or subscribe for securities of the body corporate or of a related body corporate.

(10) A reference in this section to a transaction, in relation to securities, includes:

(a) a reference to the making of an offer to sell or buy securities; and

(b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or buy securities.

Corporations Law, s 998: False trading and market rigging transactions

(1) A person shall not create, or do anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities.

(3) A person shall not, by means of purchases or sales of any securities that do not involve a change in the beneficial ownership of those securities or by any fictitious transactions or devices, maintain, increase, reduce, or cause fluctuations in, the market price of any securities.

(5) Without limiting the generality of subsection (1), a person who:

(a) enters into, or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities;

(b) offers to sell any securities at a specified price where the person has made or proposes to make, or knows that an associate of the person has made or proposes to make, an offer to buy the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price; or

(c) offers to buy any securities at a specified price where the person has made or proposes to make, or knows that an associate of the person has made or proposes to make, an offer to sell the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price;

shall be deemed to have created a false or misleading appearance of active trading in those securities on a stock market.

(6) In a prosecution of a person for a contravention of subsection (1) constituted by an act referred to in subsection (5), it is a defence if it is proved that the purpose or purposes for which the person did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a stock market.

(7) A purchase or sale of securities does not involve a change in the beneficial ownership for the purposes of this section if a person who had an interest in the securities before the purchase or sale, or an associate of the person in relation to those securities, has an interest in the securities after the purchase or sale.

(8) In a prosecution for a contravention of subsection (3) in relation to a purchase or sale of securities that did not involve a change in the beneficial ownership of those securities, it is a defence if it is proved that the purpose or purposes for which the securities were bought or sold was not, or did not include, the purpose of creating a false or misleading appearance with respect to the market for, or the price of, securities.

(9) The reference in paragraph (5)(a) to a transaction of sale or purchase of securities includes:

(a) a reference to the making of an offer to sell or buy securities; and

(b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or buy securities.