

Nibbling at the Edges or Fiddling while Rome Burns? The Past, Present and Future Regulation of Insider Trading

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1. INTRODUCTION

Insider trading was first prohibited by statute in Australia in 1970 under the uniform *Securities Industry Acts*.¹ Since that time, insider trading has gained a reputation as a notoriously difficult offence to successfully prosecute and has been the subject of significant legislative and policy debate for many years, as evidenced by many different reviews of insider trading laws – including the Griffiths Report,² the Anisman Review,³ and the CAMAC Insider Trading Report⁴ and the many sets of resulting legislative amendments. Indeed, Australian insider trading laws have been considered by judges and academics alike to be overly complex, legalistic and unclear,⁵ as well as being ‘...*couched in language which is difficult of understanding and application.*’⁶ Whilst the analysis of insider trading laws has long been a popular topic amongst academic commentators – in particular, on issues such as whether insider trading should be decriminalized, and how to address the perceived difficulties in successfully prosecuting and convicting insider traders⁷ - there have been comparatively few prosecutions of insider trading in Australia and, as a result, there are only a relatively small number of decided cases on this area of the law. Indeed, the comment has been made that ‘...*there are many more journal articles discussing what [insider trading] should be than reported cases of what it is.*’⁸

In essence, insider trading occurs when a person trades in financial products (including, but not limited to, shares and securities) whilst in possession of price-sensitive information which is not publicly available. The elements of insider trading, which are set out in detail in sections 1042A and

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¹ *Securities Industry Act 1970 (Qld)*; *Securities Industry Act 1970 (NSW)*; *Securities Industry Act 1970 (WA)*; *Securities Industry Act 1970 (Vic)*.

² The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, “Fair Shares for All: Insider Trading in Australia”, 11 October 1990, commonly referred to as the ‘Griffiths Report’.

³ P Anisman, “Insider trading legislation for Australia: an Outline of the Issues and Alternatives” 1986.

⁴ CAMAC, Insider Trading Report, 2003.

⁵ Michael Whincop, “Towards a Proprietary Rights and Market Microstructural Theory of Insider Trading Regulation – The Case of Primary Securities Markets Transactions”, (1996) 7 *Journal of Banking and Finance Law and Practice* 212; Roman Tomasic, “Corporate Crime: Making the Law More Credible”, (1990) 8 *Company and Securities Law Journal* 369, 380; Corporations and Markets Advisory Committee, Insider Trading Discussion Paper (June 2001) para 0.5 (2001).

⁶ *Ampolex Ltd v Perpetual Trustee Trading Co (Canberra) Ltd* (1996) 20 ACSR 649, 658 per Rolfe J.

⁷ See, for example, Lori Semaan, Mark Freeman & Mark Adams, “Is Insider Trading A Necessary Evil for Efficient Markets?: An International Comparative Analysis”, (1999) 17 *Company and Securities Law Journal* 220; Ashley Black, “The Reform Of Insider Trading Law in Australia”, (1992) 15 *University of New South Wales Law Journal* 214 (1992); Vivien Goldwasser, “The Enforcement Dilemma in Australian Securities Regulation”, (1999) 27 *Australian Business Law Review* 482; Roman Tomasic & Brendan Pentony, “The Prosecution of Insider Trading: Obstacles to Enforcement” (1989) 22 *Australian and New Zealand Journal of Criminology* 65.

⁸ Michael Gething, “Insider Trading Enforcement: Where Are We Now and Where Do We Go From Here?” (1998) 16 *Company and Securities Law Journal* 607. This comment was cited and endorsed by Mason J in *R v Firms* (2001) 38 ACSR 223, 234.

1043A of the *Corporations Act 2001* (Cth),⁹ can be broadly summarised as follows:

- (a) a person possesses certain information;
- (b) the information is not generally available;
- (c) the person knows (or ought reasonably to know) that the information is not generally available;
- (d) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of certain financial products;
- (e) the person knows (or ought reasonably to know) that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of those financial products; and
- (f) whilst in possession of the information, the person trades in those financial products (that is, buys or sells those financial products) or procures another person to do so.

This paper will analyse the development and evolution of Australian insider trading laws, reviewing the various changes made to the law since the insider trading prohibition was first enacted. The key issues to be examined in this paper include legislative changes - the distinction between primary and secondary insiders; the nature of inside information; the impact of the availability of civil penalty proceedings; the extended definition of financial products; the widening of the types of prohibited conduct; and increases in the maximum penalties; as well as changes resulting from case law - when information is considered to be generally available; the clarification of the “Chinese wall” defence; and the role of regulatory and reform bodies – in particular the Australian Securities and Investments Commission (“ASIC”) and the Corporations and Markets Advisory Committee (“CAMAC”). This review will include a discussion of the impact of the various changes made to insider trading laws and will conclude with a consideration of likely future directions in this contentious area of corporate law.

2. LEGISLATIVE CHANGES

2.1 Primary and Secondary Insiders

Australian insider trading law no longer makes a distinction between “primary” and “secondary” insiders. This is in contrast to most overseas jurisdictions with well-developed insider trading laws.¹⁰ The relevant tests vary but, in general terms, other jurisdictions regard primary insiders as those who possess inside information because of some connection with the relevant company (for example, directors, shareholders, employees and those who have a professional relationship with the company) and who have derived the inside information by virtue of that connection. Secondary insiders are generally those who possess inside information but have no particular connection to the relevant company, but who knowingly receive the relevant information directly or indirectly from

⁹ To be referred to from now on as the “*Corporations Act*”.

¹⁰ See, for example, Canada: s 76(5) of the *Securities Act (1990)*(Ontario); the European Union: Directive 2003/6/EC, *Insider Dealing and Market Manipulation (Market Abuse)*, Article 2 and Article 4; Germany: s13(1) and s14(2) of the *Securities Trading Act (1994)*; Singapore: s203 of the *Securities Industry Act (1986)*; South Africa: s1(viii) of the *Insider Trading Act (1998)*; the United Kingdom: s57 of the *Criminal Justice Act (1993)*; the United States: *Dirks v SEC*, 463 US 646 at 655(1983), *Shaw v Digital Equipment Corp*, 82 F.3d 1194 (1996), *United States v O’Hagan*, 117 S Ct 2199, and *SEC v Falbo*, 14 F.Supp 2d (1998).

a primary insider. Prior to 1991, a distinction between primary and secondary insiders existed in Australia,¹¹ but this was abolished in the reforms which followed the *Griffiths Report*, on the basis that the need to ensure market integrity was not served by making a distinction between different types of insiders.

Market integrity and investor confidence are considered to be essential for the proper and efficient functioning of Australia's securities markets. Insider trading is acknowledged as a significant threat to the efficiency and integrity of securities markets, with the potential to greatly reduce investor confidence and, as a result, participation. Indeed, this is the principal legislative rationale for the prohibition on insider trading in Australia.¹² Even the belief by investors and market participants that company insiders have an informational advantage and unfair opportunities to trade in company shares is considered to reduce investor confidence in the integrity of securities markets.¹³ This position can be contrasted with the position in other jurisdictions, such as the United States, where conceptions of breach of fiduciary duty and misappropriation are considered a more appropriate reason for prohibiting insider trading.¹⁴

Interestingly, a review of the successful insider trading cases reveals that almost all convicted insider traders would be regarded as "primary" insiders, despite the removal of that requirement from the legislation.¹⁵ Indeed, one of the few convicted insider traders who would not have been regarded as a "primary" insider, since he came across the information in a purely personal capacity, was Mr Rene Rivkin, who was convicted of insider trading after a controversial prosecution in 2004.¹⁶

2.2 Nature of Inside Information

Australian insider trading laws no longer contain any requirement of specificity or precision.¹⁷ Section 1042A of the *Corporations Act* now defines "information" to include:

- (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
- (b) matters relating to the intentions or likely intentions of a person.

¹¹ See s128 of the *Securities Industry Code* (1980).

¹² The *Griffiths Report*, at [3.34] to [3.36]; Corporations and Markets Advisory Committee, *Insider Trading Discussion Paper*, June 2001 at [0.20].

¹³ See for example, ASIC Consultation Paper 68 "Competition for Market Services – Trading in Listed Securities and Related Data" (July 2007); U Bhattacharya and H Daouk, "The World Price of Insider Trading" (2002) 57(1) *Journal of Finance* 75; L Beny, "Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate" (2007) 32(2) *Journal of Corporation Law* 237.

¹⁴ J Mannolini, "Insider Trading – The Need for Conceptual Clarity" (1996) 14 *Company and Securities Law Journal* 151.

¹⁵ *R v Firms* [2001] NSWCCA 191, 21 May 2001; *R v Hannes* [2002] New South Wales Supreme Court 1182; *R v MacDermott* (unreported, District Court of Western Australia, Kennedy DCJ, 1 August 2003); *R v Sweetman* (unreported, District Court of Queensland, Criminal Division, Shanahan DCJ, 17 December 2004); *R v Doff* [2005] NSWSC 50; *R v Frawley* (unreported, Supreme Court of New South Wales, Criminal Division, Bell J, 24 June 2005); *R v Hall* [2005] NSWSC 890; *R v McKay* [2007] NSWSC 275; *R v Hartman* [2010] NSWSC 1422.

¹⁶ *R v Rivkin* [2003] NSWSC 447.

¹⁷ *Ampolex Ltd v Perpetual Trustee Trading Co (Canberra) Ltd* (1996) 20 ACSR 649, 658 per Rolfe J; *R v Hannes* [2000] NSW CCA 503, per Spigelman CJ at [28].

This broad, inclusive definition differs significantly from that contained in the legislation preceding both the *Corporations Act* and the *Corporations Law*, which required the alleged insider trader to possess “specific information”.¹⁸ The majority of overseas jurisdictions have insider trading laws which do require inside information to be specific or precise – it cannot be indefinite, vague or lack specificity.¹⁹ It appears that the primary reason for such requirements is in order that rumours do not amount to inside information and so therefore that trading on the basis of rumours is not caught by the insider trading laws of those countries.²⁰ CAMAC revisited this issue in its 2003 report on insider trading, but determined that it would not be appropriate to amend the law to impose a requirement that information be “specific” on that basis that it could ‘...*unduly narrow the application of the legislation and create artificial distinctions between what does and what does not constitute inside information.*’²¹ This position has been confirmed by ASIC in its consultation paper on the “Responsible Handling of Rumours”²² which indicates that the regulator takes the view that trading on the basis of rumours can clearly amount to insider trading,²³ and well as being confirmed in the recent CAMAC Report on Market Integrity.²⁴

Again, it is interesting to consider how this amendment has affected (or may have affected) the outcomes of decided insider trading cases. Almost all convicted insider traders in Australia have traded on the basis on information which appears to be quite specific. The two notable exceptions are Mr Rene Rivkin²⁵ and Mr Bart Doff²⁶ who traded on the comparatively vague (and not quite correct) information that Qantas and Impulse Airlines were about to “merge”, as conveyed to them by the executive chairperson of Impulse Airlines.

2.3 Introduction of Civil Penalty Proceedings

Once much vaunted amendment to insider trading laws was the introduction of civil penalty proceedings under the *Financial Services Reform Act 2001* (Cth),²⁷ which came into effect on 11 March 2002. The availability of civil penalty proceedings was intended to assist in overcoming perceived difficulties in prosecuting insider trading by providing an alternative regime with a lower standard of proof, based on the balance of probabilities and using civil rules of evidence.²⁸

¹⁸ For example, s75A of the *Securities Industry Act 1970* (NSW), as applied in *Ryan v Triguboff* [1976] 1 NSWLR 588.

¹⁹ For example, in Germany, inside information must be “specific information” - s13 of the *Securities Trading Act 2004*; in the European Union, inside information must be “information of a precise nature” - article 2(1) of the Directive 2003/6/EC of the European Parliament, OJ 2003 L 96/16; in the United Kingdom, inside information must be “information of a precise nature” - s56(1)(b) of the *Criminal Justice Act 1993*; in South Africa, inside information must be “specific or precise information” - s1(vii) of the *Insider Trading Act 1988*; and in Hong Kong, inside information must be “specific information” - s245 of the *Securities (Insider Dealing) Ordinance 2002* (cap 571).

²⁰ See, for example, P Osode, “The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?” (2000) 44 *Journal of African Law* 239 at 243; CAMAC, Insider Trading Discussion Paper (June 2001) at 45.

²¹ CAMAC, Insider Trading Report (2003) at [3.7].

²² ASIC Consultation Paper 118.

²³ *ibid*, at 10.

²⁴ CAMAC, “Aspects of Market Integrity Report” (July 2009) at 116.

²⁵ *R v Rivkin* [2003] NSWSC 447.

²⁶ *R v Doff* [2005] NSWSC 50.

²⁷ To be referred to from now on as the “FSR Act”.

²⁸ [2.78]-[2.79] of the *Explanatory Memorandum to the FSR Bill*; ss1317L and 1332 of the *Corporations Act*.

However there have been very few civil penalty proceedings for insider trading undertaken since they became available – most notably the unsuccessful civil proceedings in *ASIC v Citigroup*²⁹ and the case of *ASIC v Petsas and Miot*,³⁰ in which the respondents admitted liability. Thus civil penalty proceedings have hardly provided the fillip which may have been expected. Indeed, the *Citigroup* case demonstrated that even with the benefits of civil penalty proceedings, the complexities and technicalities associated with pursuing alleged insider traders remain - difficulties in detecting insider trading; complexity of insider trading laws and interpretational difficulties; limited judicial consideration of insider trading laws and inconsistent judicial interpretation; and in particular the difficulty in proving the knowledge elements of the offence.³¹

2.4 Extension of Definition of Financial Products

The *FSR Act* amendments to the *Corporations Act* also changed the nature of the relevant financial products caught by the insider trading prohibition. Prior to the implementation of the *FSR Act*, insider trading was prohibited in relation to “securities”. The old s 1002A of the *Corporations Act* provided that “securities”, in relation to a body corporate, means any of the following:

- (a) shares in the body corporate;
 - (b) debentures (including convertible notes) issued by the body corporate;
 - (c) interests in a managed investment scheme made available by the body corporate;
 - (d) units of shares referred to in paragraph (a);
 - (e) an option contract under which a party acquires from another party an option or right, exercisable at or before a specified time, to buy from, or sell to, that other party a number of securities of a kind referred to in paragraph (a), (b), (c) or (d) at a price specified in, or to be determined in accordance with, the contract;
- but does not include a futures contract or an excluded security.

The prohibition on insider trading now applies to all ‘Division 3 financial products’, which are defined under s 1042A of the *Corporations Act* as:

- (a) securities; or
- (b) derivatives; or
- (c) interests in a managed investment scheme; or
- (ca) debentures, stocks or bonds issued or proposed to be issued by a government; or
- (d) superannuation products, other than those prescribed by regulations made for the purpose of this paragraph; or
- (e) any other financial products that are able to be traded on a financial market.

Thus certain “financial products” which were not previously subject to insider trading laws have now been brought within the ambit of the prohibition. The reasoning behind this reform was the desire to ensure that conduct which amounts to an offence in relation to certain financial products

²⁹ *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963.

³⁰ *ASIC v Petsas and Miot* (2005) 23 ACLC 269.

³¹ See, for example, Simon Rubenstein, ‘The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading’ (2002) 20 *Company and Securities Law Journal* 89; Roman Tomasic and Brendon Pentony, ‘The Prosecution of Insider Trading; Obstacles to Enforcement’ (1989) 22 *Australian and New Zealand Journal of Criminology* 65; Roman Tomasic, *Casino Capitalism?: Insider Trading in Australia* (1991) 115-126; Lyon and du Plessis, *The Law of Insider Trading in Australia* (2005) 163-168.

should not, from a policy perspective, be permissible in relation to other financial products - especially given that it was an aim of the *FSR Act* to regulate 'functionally similar' financial products in a similar manner.³² All financial products that are tradable on a market (and some which are not) are now subject to the prohibition on insider trading.

As insider trading laws now apply to all dealings in "financial products", whether or not applicable market rules require disclosure of inside information, this creates particular issues for specialist OTC markets.³³ It has been suggested that OTC transactions should be excluded from the insider trading regime because, the OTC products and transactions are significantly different to those of exchange traded products in nature and function.³⁴ CAMAC supported the application of the insider trading prohibition to all financial products generally, but considered that there are some consequential amendments which should be made to meet the circumstances of different financial markets, such as specialist OTC markets.³⁵ CAMAC, by majority, proposed that this be done by adding further elements to the insider prohibition, so that the offence is only committed if the relevant information is also "disclosable information" or "announceable information",³⁶ with the new proposed definitions to be added to s1042A of the *Corporations Act*.³⁷ Despite the Commonwealth Treasury seeking submissions on this issue in 2007,³⁸ no amendments have been made and this issue remains unresolved at this stage. Interestingly, no cases instituted since the definition of "financial products" was extended relate to any financial products that would not have been caught by the previously used definition of "securities".

³² [2.76] of the *Explanatory Memorandum to the FSR Bill*.

³³ Also known as "over the counter" markets. OTC derivatives are traded on the basis of 'principle-to principle' contracts entered into off an exchange, which are negotiated and documented by sophisticated professional parties to suit their particular circumstances, where there is no obligation to make public disclosure. This is to be contrasted with securities traded on an exchange, where the identity of the other party is not generally known, and which occur in a market where continuous disclosure obligations apply.

³⁴ Julian Donnan, "Insider Trading and OTC Derivates under the Financial Services Reform Act" (2003) 14 *Journal of Banking and Finance Law and Practice* 32, at 38.

³⁵ It should be noted that a minority of CAMAC opposed this proposal, and suggested instead that any perceived problem with specialist OTC markets should be addressed by the introduction of specific defences or carve-outs tailored to the particular circumstances (although none were actually proposed): *CAMAC Insider Trading Report (2003)* at [4.7.5].

³⁶ *CAMAC Insider Trading Report (2003)* at [4.7].

³⁷ "Disclosable information" means information that:

- (a) has to be disclosed either now or in the future pursuant to any legal or regulatory requirement (other than a requirement for disclosure only to a counterparty), whether or not that obligation is complied with, or
- (b) would come under paragraph (a) were any person subject to the legal or regulatory requirement to be aware of the information; or
- (c) would come within paragraph (a) or paragraph (b) if the subject matter of the information came to fruition (whether or not it does so)."

"Announceable information" means information, other than "disclosable information" that:

- (a) will become the subject of a public announcement; or
- (b) would come within paragraph (a) if the subject matter of the information came to fruition (whether or not it does so)."

³⁸ Issue 5A and 5B, Commonwealth Treasury, *Insider Trading Position and Consultation Paper*, 20.

2.5. Widening the Types of Prohibited Conduct

Another amendment made by the *FSR Act* was to change the type of conduct prohibited by insider trading laws. The old 1002G (2) of the *Corporations Act* previously provided that a person in possession of “inside information” must not:

- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
- (b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

Section 1043A (1) of the *Corporations Act* now provides that an ‘insider’ must not:

- (a) apply for, acquire, or dispose of, relevant ... financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant ... financial products; or
- (b) procure another person to apply for, acquire, or dispose of, relevant ... financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant ... financial products.

Interestingly, there was no commentary in the Explanatory Memorandum explaining the motivation behind the decision to change the description of the prohibited conduct. The phrase “apply for” is broader in construction than its predecessor “subscribe for” and should therefore encompass a greater scope of conduct. The term “apply for” also arguably includes the making of offers and the entry of a bid offer on SEATS³⁹ for the purchase of securities,⁴⁰ and would therefore now avoid an outcome such as that in *R v Evans & Doyle*,⁴¹ where the jury was instructed to return a verdict of “not guilty” to insider trading because McDonald J stated that the act of instructing a broker to purchase securities does not amount to ‘...an agreement to purchase...securities and only amounts to an agency agreement between the broker and the instructing client’.⁴²

CAMAC suggested in its Insider Trading Report⁴³ that there should be clarification of the relevant time when liability arises where trading occurs through an intermediary, such as a broker. CAMAC’s recommendation is that, whilst a person should not be liable for insider trading unless a transaction ultimately takes place, the relevant time at which liability should arise, is when the person instructs an intermediary to act on their behalf.⁴⁴ This would be the time at which the person would be deemed to “enter into an agreement” to acquire or dispose of the relevant financial products. Whilst the Commonwealth Treasury indicated in 2007 that it agreed with this position,⁴⁵ no action has been taken to close this existing legal loophole. Once again, no cases instituted since the type of prohibited conduct was widened relate to any conduct that would not have been caught by the previous form of prohibited conduct.

³⁹ The Stock Exchange Automated Trading System, which facilitates online trading.

⁴⁰ Simon Rubenstein, ‘The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading’ (2002) 20 *Company and Securities Law Journal* 89,111.

⁴¹ *R v Evans & Doyle* [1999] VSC 488 (15 November 1999), to be referred to from now on as the “*Evans and Doyle case*”.

⁴² The *Evans and Doyle case* at [51].

⁴³ CAMAC Insider Trading Report (2003) at [1.5].

⁴⁴ *Ibid.*

⁴⁵ Commonwealth Treasury, Insider Trading Position and Consultation Paper, 6.

2.6 Changes to Maximum Sentences

The Federal Government recently altered the maximum criminal penalties for insider trading pursuant to the *Corporations Amendment (No 1) Act 2010*, which has received assent (on 24 November 2010) but has not yet been proclaimed. The current maximum penalty for insider trading is:

- (a) for a natural person – a fine of 2,000 penalty units⁴⁶ (\$220,000) or 5 years' imprisonment, or both; and
- (b) for a body corporate – a fine of 10,000 penalty units (\$1,100,000).

The new maximum penalties for insider trading will be:

- (a) for a natural person – ten years' imprisonment, or a fine of the greater of:
 - (i) 4,500 penalty units (\$495,000); or
 - (ii) three times the total value of benefits obtained from the offence; or both.
- (b) for a body corporate – a fine of the greater of:
 - (i) 45,000 penalty units (\$4,950,000);
 - (ii) three times the total value of benefits obtained from the offence; or
 - (iii) 10% of the body corporate's annual turnover during the 12 month in which the offence was committed.

In January 2010 the then minister, the Hon Chris Bowen MP, stated that '*...the increased penalty provisions send a clear message to those who seek to profit from these types of market offences that behaviour that undermines the proper functioning of our financial markets will not be tolerated.*'⁴⁷

It is not surprising that the Federal Government wishes to deter prospective insider traders from engaging in this conduct and proposals which will properly protect financial markets from unlawful activity deserve wide-spread support. However, the practical impact of increasing the *maximum* penalties which may be imposed on those convicted of insider trading must be carefully considered. It is a key principle of sentencing that cases which are similar should have similar results.⁴⁸ Consistency in sentencing is important for the maintenance of public trust and confidence in the judicial process, as well as the deterrence of potential future offenders.⁴⁹ Even though the current maximum term of imprisonment is five years, no offender has ever received this maximum sentence. The longest sentence ever imposed for insider trading is full time imprisonment for four and half years, which Mr John Hartman received in December 2010.⁵⁰ Previously the longest sentence imposed was 26 months' full time imprisonment for Mr Martin Hannes.⁵¹

⁴⁶ Each penalty unit equals \$110.00: s4AA of the *Crimes Act 1914* (Cth).

⁴⁷ Press Release, "Greater Powers to the Corporate Regulator to Pursue Market Misconduct", 28 January 2010.

⁴⁸ New South Wales Sentencing Council, "How Best to Promote Consistency in Sentencing in the Local Court" (2003) *Law Court NSW Annual Review* 11.

⁴⁹ *Johnson v The Queen* (2004) 205 ALR 346; New South Wales Sentencing Council, above n3, 12; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) [5.18].

⁵⁰ *R v Hartman* [2010] NSWSC 1422.

⁵¹ *R v Hannes* [2002] NSWSC 1182

Section 16A(1) of the *Crimes Act 1914* (Cth) provides that, when sentencing federal offenders,⁵² the Court must make an order that is appropriate in all the circumstances. Whilst each case must ultimately be considered on its own facts, it is common practice for judges to consider the sentences imposed on other convicted offenders, and the circumstances of such cases, when determining the appropriate sentence for a convicted insider trader, as is borne out by a study of the relevant sentences imposed.⁵³ In particular, other insider trading cases assist judicially by giving an indication of the appropriate sentencing range.⁵⁴ The consideration of sentences imposed in previous cases, using them as a 'benchmark' for the purposes of consistency and fairness, means that it is unlikely that a greater sentence will be imposed for the same conduct just because the maximum penalties have been increased. Accordingly, increasing the maximum penalties available for insider trading will not necessarily result in increased sentences being imposed, and may therefore have no greater deterrent effect than the current penalties can be presumed to have. It will therefore be interesting to observe the future judicial treatment of the increase in the maximum available penalties for insider trading.

3. CHANGES THROUGH CASE LAW

3.1 Generally Available Information

Section 1042C of the *Corporations Act* provides that information is considered to be "generally available" if:

- (a) it consists of readily observable matter; or
- (b) 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 ... financial products of a kind whose price might be affected by the information; and
 - (ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
- (c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
 - (i) information referred to in paragraph (a);
 - (ii) information made known as mentioned in subparagraph (b)(i).

⁵² A "federal offence" is defined as an offence against a law of the Commonwealth: s16 of the *Crimes Act*. As insider trading is prohibited under the *Corporations Act*, it is clearly a federal offence, and convicted insider traders are therefore federal offenders.

⁵³ See for example, the comments of Hammond CJDC in *R v Cribb* (1998) District Court of Western Australia, unreported, 9 June 1998 at 38-39; Sides J in *R v Firms* (2000) District Court of New South Wales, unreported, 14 April 2000 at [51]-[53]; Shanahan J in *R v Sweetman* (2004) District Court of Queensland, unreported, 17 December 2004 at 8; Barr J in *R v Doff* [2005] NSWSC 50; Bell J in *R v Frawley* [2005] NSWSC 585 at [42]; Kirby J in *R v Hall* [2005] NSWSC 890 at [121]-[123]; Whealy J in *R v McKay* [2007] NSWSC 275 at [54]-[56]. For more detail, please see J Overland in "Towards Better Deterrence of Securities Fraud: Promoting Consistency in Sentencing Insider Traders" (2008) 5 *Macquarie Journal of Business Law* 191.

⁵⁴ *R v Hall* [2005] NSWSC 890 at [123].

“Readily observable matter” is considered to mean “facts directly observable in the public arena.”⁵⁵ It does not matter how many people actually observe the information (or, indeed, if any do) so long as it would be possible for them to observe it.⁵⁶ Observation can occur by various means – for example, with the use of the “unaided human senses” and with the assistance of devices such as the “telephone, telex, facsimile, television and the internet.”⁵⁷ There has in the past been considerable confusion as to whether or not information needs to be readily observable in Australia or if it is sufficient if it is readily observable in an overseas jurisdiction. In *R v Firms*⁵⁸ the trial judge found that information which was readily observable overseas but not in Australia was not “generally available”, and the defendant was convicted of insider trading.⁵⁹ However, in *R v Kruse*⁶⁰, a case based on an almost identical situation, the trial judge found that, in order to be considered to be “generally available”, it is sufficient if information is readily observable overseas, and the defendant was not convicted of insider trading. These two decisions appear irreconcilable,⁶¹ but the conviction in *Firms’ case* was overturned on appeal by the New South Wales Court of Appeal and the majority of the Court found that information need only be readily observable in an overseas jurisdiction for it to be “generally available”, although Carruthers AJ delivered a strong dissenting judgment. Thus, the majority judgment in the appeal in *Firms’ case* now appears to represent the current state of the law.⁶²

In an attempt to remove some of the confusion surrounding these concepts, CAMAC proposed in 2003 that the test of whether information is “generally available” be reformulated: by deleting the first limb of the definition - which provides that information is generally available if it consists of “readily observable matter” - and by removing the requirement in the second limb - that a reasonable amount of time must have elapsed after information has been made known to people who commonly invest in that type of security. Under CAMAC’s proposal, information would only be “generally available” if:

- (a) it is *accessible to* persons who commonly invest in ... financial products of a kind whose price might be affected by the information; or
- (b) it consists of deductions, conclusions or inferences made or drawn from information referred to in paragraph (a).⁶³

This proposal has not been accepted or adopted by Parliament and does not represent the current state of Australian law. However, this proposal would certainly remove the current confusion relating to the term “readily observable”, as that term would no longer form part of the definition. However, a similar debate could erupt over the meaning of the term “accessible to”. Whilst the proposal does provide that the information must be accessible to “persons who commonly invest”

⁵⁵ [328] of the *Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991* (Cth).

⁵⁶ *R v Firms* (2001) 19 ACLC 1495.

⁵⁷ *R v Firms* (2001) 19 ACLC 1495, 1507 per Mason J.

⁵⁸ *R v Firms* [1999] 98/11/0895 (Unreported, Sides J. District Court NSW, Nov. 4, 1999).

⁵⁹ In that case the information in question was a judgment delivered by the Supreme Court of Papua New Guinea.

⁶⁰ *R v Kruse* [1999] 98/11/0908 (Unreported, O’Reilly J, District Court NSW, Dec. 2, 1999).

⁶¹ But contrast Gordon Walker, “Insider Trading in Australia: When is Information Generally Available?” (2000) 18 *Company and Securities Law Journal* 213, 215-216.

⁶² See for example, S Rubenstein, *The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading* (2002) 20 *Company and Securities Law Journal* 89, 103.

⁶³ CAMAC, Insider Trading Report (2003) at [4.7.4].

in the relevant financial products, there may be doubt as to whether events occurring overseas or information being released overseas are “accessible” to such persons. Accordingly, even if such a proposal were implemented, it may lead simply to the substitution of one contentious issue with another.

Additionally, in *ASIC v Citigroup*,⁶⁴ His Honour, Jacobson J determined that the test of whether matter is “readily observable” is not whether it was widely observed, but whether it *could* have been.⁶⁵ In that case, ASIC had argued that the relevant information possessed was that Citigroup was acting for Toll on a possible takeover of Patrick by Toll. Whilst there had been significant industry and press conjecture about the possibility of such a takeover, Citigroup’s role was not the subject of such speculation and was this not readily observable.⁶⁶ Therefore, the information allegedly possessed was not generally available. However, His Honour separately determined that the information was not price sensitive and was not actually possessed by the relevant employee.⁶⁷

3.2 Clarification of Chinese Wall Defence

The *Citigroup case* was a controversial and much publicised set of proceedings, and was the second case instituted by the ASIC under the civil penalty regime for insider trading. The *Citigroup case* had the potential to significantly alter the face of insider trading regulation in Australia because, if ASIC had been successful, it would have been the first time a corporation had been found liable for insider trading. However, in a crushing defeat for ASIC, Jacobson J of the Federal Court of Australia found for Citigroup, and ASIC soon indicated that it did not intend to appeal the decision.⁶⁸

These proceedings arose out of a takeover bid for Patrick Corporation Limited (Patrick) by Toll Holdings Limited (Toll), in which Citigroup acted as an adviser to Toll through its Investment Banking Division. ASIC had alleged that, on the day prior to the announcement of the takeover bid, Mr Manchee, a Citigroup employee who was engaged in proprietary share trading – that is, trading on Citigroup’s own behalf rather than for its clients – purchased over one million Patrick shares. This trading was noticed by some executives within the Investment Banking Division. One of those executives then asked Mr Manchee’s manager, Mr Darwell, who was undertaking the trading and, when told, stated words to the effect that “we may have a problem with that”. Mr Darwell took Mr Manchee outside and told him to stop buying Patrick shares. Mr Manchee then returned to the office and began *selling* Patrick shares.

These circumstances gave rise to two claims of insider trading against Citigroup:

- (a) ASIC alleged that the sale of Patrick shares by Mr Manchee, which occurred after he was told by his manager to stop buying Patrick shares, amounted to insider trading attributable to Citigroup; and

⁶⁴ *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963.

⁶⁵ Citing with approval *R v Forns* [2001] NSWCCA 191 at [88] and [91]; *Hannes v DPP* [2006] NSWCCA 373 at [626].

⁶⁶ The *Citigroup case* [545]-[565].

⁶⁷ The *Citigroup case* [479]-[515].

⁶⁸ ASIC Media Release 07-193, 17 July 2007.

- (b) ASIC alleged that there was not an effective Chinese wall in place, so that all proprietary trading by Mr Manchee amounted to insider trading because of the inside information possessed by executives in the Investment Banking Division advising Toll on the proposed takeover of Patrick.

The case also gave rise to claims that Citigroup had failed to properly manage “conflicts of interest” and that it breached fiduciary duties it owed to its client, Toll.⁶⁹

The first insider trading claim ultimately failed because the proprietary trader, Mr Manchee, was not found to be an “officer” of Citigroup – primarily because he was found to be only an employee not involved in management, and therefore not an “officer” of the corporation within the statutory definition in s9 of the *Corporations Act*,⁷⁰ thus information which may have been in Mr Manchee’s possession was not attributable to the corporation, Citigroup. Additionally, as a matter of fact, it was found that Mr Manchee had not made the necessary supposition alleged by ASIC - that Citigroup was acting for Toll on an imminent takeover of Patrick⁷¹ - and that such a supposition had not been conveyed to him by his manager.⁷²

Most interestingly, in this context, the second insider trading claim ultimately failed because Citigroup’s Chinese wall was found to satisfy the necessary requirements to defend an action for insider trading. Although officers of Citigroup, in the Investment Banking Division acting for Toll, were aware of relevant inside information concerning Patrick shares, at a time when trading in those shares was occurring in another part of the organisation (that is, at the time Mr Manchee was engaging in trading in those shares on Citigroup’s behalf), the Chinese wall in place between the Investment Banking Division (which was on the “private” side of the Chinese wall) and the proprietary trading group (which was on the “public” side of the Chinese wall), was found to be effective.⁷³

The existence of an effective Chinese wall meant that no insider trading took place. Jacobson J described the type of organizational arrangements which would ordinarily be effective:

- (a) the physical separation of departments to isolate them from each other;
- (b) an educational program, normally recurring to emphasize the importance of not improperly or inadvertently divulging confidential information;
- (c) strict and carefully designed procedures for dealing with situations where it is thought the Chinese wall should be crossed, and the maintaining of proper records where this occurs;
- (d) monitoring of the effectiveness of the Chinese wall by compliance officers; and
- (e) disciplinary sanctions where there has been a breach of the Chinese wall.⁷⁴

⁶⁹ Jacobson J ultimately determined that there was no duty to avoid a conflict of interest because of the absence of a fiduciary relationship between Citigroup and Toll, but a discussion of those issues is beyond the scope of this article.

⁷⁰ The *Citigroup case* at [479] to [515].

⁷¹ The *Citigroup case* at [502] to [505].

⁷² The *Citigroup case* at [516] to [525].

⁷³ The *Citigroup case* at [579] to [598].

⁷⁴ The *Citigroup case* at [319], citing with approval statements of Lord Millett in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 238, to be referred to from now on as “Bolkiah’s case”.

Interestingly, His Honour did note that a Chinese wall arrangement ‘...[does] not require a standard of absolute perfection. The test stated...is an objective one.’⁷⁵ Indeed, His Honour noted the ‘... potential fragility of Chinese walls’⁷⁶ and that there is a ‘...practical impossibility of ensuring that every conceivable risk is covered by written procedures and followed by employees.’⁷⁷

4. THE ROLE OF REGULATORY AND LAW REFORM BODIES

4.1 The Role of ASIC

ASIC, as the relevant regulator with responsibility for market oversight, has been the subject of significant criticism in recent times for its conduct in relation to insider trading cases. Many recent insider trading cases have been controversial, including the successful criminal prosecution in *R v Rivkin*,⁷⁸ the civil proceedings brought in the case of *ASIC v Vizard*⁷⁹ for breaches of directors’ duties, not insider trading, and the well-publicized loss in the *Citigroup* case. Despite such losses and criticism (or perhaps because of them), ASIC has continued to focus attention on insider trading. At a time when prominent and well-respected members of the financial services industry and academia have been publicly stating that insider trading is rife or increasing⁸⁰ and there are opportunities for insider trading in a volatile market because its effects are masked,⁸¹ ASIC representatives have acknowledged that more needs to be done to better enforce insider trading laws.⁸² Indeed, recent anecdotal evidence appears to indicate that trading in shares in the period immediately prior to takeover announcements causes rises in share price of, on average, 10% - suggesting insider trading.⁸³

ASIC also established a Capital Markets Taskforce in November 2007 to review what could be done to build confidence in the integrity of Australia’s capital markets, overseen by Commissioner Belinda Gibson.⁸⁴ Additionally, ASIC has recently taken over the surveillance previously undertaken by the ASX, as a result of amendments made to the Corporations Act by the *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth).

Further, ASIC’s powers to detect insider trading have been increased, by enabling ASIC to access telecommunications interception material collected by the Australian Federal Police under warrant. The then Minister for Financial Services, Superannuation and Corporate Law stated in January 2010 that ‘... these reforms will bring ASIC’s investigative powers into line with other regulators,

⁷⁵ at [592].

⁷⁶ at [522].

⁷⁷ at [591].

⁷⁸ (2004) 59 NSWLR 284.

⁷⁹ [2005] FCA 1037. In controversial and well-publicised circumstances, Mr Vizard was not prosecuted for insider trading. On 28 July 2005 he pleaded guilty to a breach of directors’ duties (primarily for misuse of confidential information and failing to avoid a conflict of interest) and was fined \$390,000, ordered to pay ASIC’s costs and disqualified from managing a company for 10 years.

⁸⁰ See for example, Peter Hunt, Chairman of Caliburn as reported in “Insider Trading Still on the Rise: Banker” *The Sydney Morning Herald*, 20 February 2008.

⁸¹ See, for example, Professor Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation, University of Melbourne, as reported in “ASIC on Insider Trading Hunt” *The Age*, 21 March 2008.

⁸² Belinda Gibson, ASIC Commissioner, ASIC/ASX seminar, 26 March 2008.

⁸³ See, for example, “Insider Trading Rife in Australia”, *The Australian*, 20 February 2008.

⁸⁴ Belinda Gibson, ASIC/ASX seminar, 26 March 2008.

such as the Australian Competition and Consumer Commission... and ... will significantly reduce the potential for evidence to be destroyed before a warrant is executed.⁸⁵ The Corporations Amendment (No 1) Act 2010 (Cth) included amendments to the Telecommunications (Interception and Access) Act 1979 (Cth) to make this possible. As noted above, the Corporations Amendment (No 1) Act 2010 received assent on 24 November 2010, but has not yet been proclaimed. Therefore, at this stage, it is too soon to comment on the true impact on such developments.

4.2. The Role of CAMAC

CAMAC is an organisation selected by the Australian Federal Government to review of areas of corporate law in need of reform. In November 2003, acting on its own initiative and having sought public submissions through a Discussion Paper and subsequent Proposals Paper, CAMAC released a Report on Insider Trading, which detailed a variety of recommendations for insider trading law reform (a number of which have already been discussed throughout this paper). No action was taken in relation to the amendments described in the CAMAC Insider Trading Report until March 2007, when the Commonwealth Treasury released its own Insider Trading Position and Consultation Paper seeking further public input. However, following the receipt of public submissions, no further action was taken by the former Federal Government. With the change of Federal Government in November 2007, there then appeared to be a loss of momentum on this topic and none of the recommendations in the CAMAC Insider Trading Report have been implemented, despite the passage of more than 7 years since the release of that report.

Indeed, several other proposals by CAMAC in the more recent *Aspects of Market Integrity Report*⁸⁶ which related to insider trading⁸⁷ also remain to be acted on – despite the fact that the relevant Minister sought CAMAC’s urgent advice on Market Integrity in early 2009.

5. FUTURE DIRECTIONS AND CONCLUDING REMARKS

One of the most interesting things to note about the development of Australian insider trading laws is that there have been a great number of changes made to the law with little discernable effect on the number of successful insider trading proceedings, or impact on the outcome of those cases which are brought. Additionally, despite bodies such as CAMAC recommending a variety of further changes to the law (following reviews undertaken on its own initiative and on Ministerial request, which have seemingly met with Federal Government approval) those proposals have not been enacted as legislative amendments. Regardless of the impact of those proposed changes on insider trading, it is somewhat puzzling that a Government which professes to wish to “send a message” to prospective insider traders,⁸⁸ would fail to take action or otherwise fully respond to these proposals.

Overall, this approach of “nibbling at the edges” of insider trading laws must be seen as less than satisfactory, and does not bode well for effective regulation of this area in the future.

⁸⁵ The Hon Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law, Press Release, “Greater Powers to the Corporate Regulator to Pursue Market Misconduct”, 28 January 2010.

⁸⁶ CAMAC, *Aspects of Market Integrity*, July 2009.

⁸⁷ For example, recommendations in relation to the insider trading aspects of directors’ trading during black-out periods, directors entering margin loans over securities of their own companies, and private analysts’ briefings.

⁸⁸ See n47 above.