

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (Cth)

Applicant

and

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JM

Respondent

APPLICANT'S SUBMISSIONS

Part I: Internet publication

- 20 1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. First, did the majority in the Court of Appeal err in their application of the principles of statutory construction (as elucidated in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 335) in determining the meaning of the expression 'artificial price' in s. 1041A of the *Corporations Act 2001* (the Act)?
- 30 3. Secondly, did the majority err in determining that the legal signification of the expression 'artificial price' in s. 1041A was of market manipulation by conduct of the kind typified by American jurisprudential concepts of 'cornering' and 'squeezing'?

Part III: Section 78B of the *Judiciary Act 1903*.

4. The respondent/cross appellant has given notice in accordance with section 78B. The applicant will file separate submissions with respect to the respondent's cross appeal.

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Part IV: Citation

5. **Primary Court** - The publication of the decision of the primary court has been restricted.
Intermediate Court - *DPP (Cth) v JM* [2012] VSCA 21 and *DPP (Cth) v JM (No 2)*, Unreported 28 June 2012

Part V: Relevant facts

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6. On 15 December 2008, the respondent was arrested and charged with offences of contravening s. 1041A. On 4 February 2010 the respondent was committed to stand trial in the Victorian County Court and on 30 June 2011 the applicant filed an indictment in that court containing 41 charges; 2 of conspiring to contravene s. 1041A and 39 substantive charges of contravening that provision.

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7. On the 30 April 2011, by order of Forrest J, the proceedings were transferred to the Supreme Court of Victoria. On 30 June 2011 the applicant filed an indictment in the Supreme Court containing 41 charges; 2 of conspiring to contravene s.1041A and 39 substantive charges of contravening that provision. On 2 September 2011 the respondent was arraigned and pleaded not guilty to all the charges.

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8. The allegations against the respondent are that he participated in transactions involving the purchase of shares on the Australian Securities Exchange (ASX), which transactions had, or were likely to have the effect of creating or maintaining an artificial price for the trading of such shares. In short, it is alleged that the transactions were entered into with the purpose of increasing or maintaining the price at which the shares traded, in order to avoid the payment of margin calls, should the share price have fallen. In such circumstance, the resulting price is an 'artificial price' and thus the transactions contravened s. 1041A.

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9. During preliminary hearings, it became apparent that there was an issue as to the effect of the expression 'artificial price'; the position of the respondent being that the price would not be artificial if it resulted from a transaction of the sort alleged by the applicant, without more. The respondent maintains that to determine whether the price is artificial does not depend on the intention of the participant but requires close economic analysis.
10. The applicant asked the trial judge, Weinberg JA, to make various rulings in accordance with s.199 of the *Criminal Procedure Act 2009* (Vic) including a ruling as to the effect of 'artificial price'. His Honour considered it preferable to state a case the Court of Appeal in accordance with s. 302 of the *Criminal Procedure Act*, and initially both parties agreed to that course, however the respondent later resisted.
11. The trial judge, reserved three questions for the Court of Appeal's determination, the first of which was; "For the purpose of s. 1041A of the *Corporations Act 2001*, is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of

creating or maintaining a particular price for that share on the ASX an ‘artificial price’?”

12. The trial judge annexed to his reasons the facts and circumstances upon which the Case Stated was to be determined. The joint reasons of Nettle and Hansen JJA briefly referred to the facts at [283] to [285], as did the Chief Justice at [7] to [21].
13. Nettle and Hansen JJA, who were in majority, declined to answer Question 1 in the form in which it had been submitted for determination as they were of the view that it was a question of mixed fact and law, dependent upon assumed but as yet, unfound facts – at [287] to [289] and [300] to [306]. The majority declined to answer Questions 2 and 3 [343].
14. The Case Stated was remitted to the trial judge for amendment of Question 1 so that it posed a question of pure law that could be answered without regard to the facts of the case – at [369]. The question remitted for consideration of the trial judge and to be reserved for determination by the Court of Appeal is at [304].
15. The trial judge amended Question 1 and referred it to the Court of Appeal for determination; (*DPP (Cth) v JM (No 2)*, Unrep. 28 June 2012) at [2]. The Court of Appeal answered the amended question at [3] without reference to the facts which had been stated by Weinberg JA in the Case Stated.
16. On 14 December 2012, the applicant’s application for special leave was referred by Hayne, Heydon and Bell JJ to an enlarged Bench of the High Court.
17. On 21 December 2012, the respondent filed a notice of cross appeal against the decision of the Court of Appeal.

30 Part VI: Applicant’s argument

Introduction

18. In the Court of Appeal there was a difference of opinion between the majority and Warren CJ as to the meaning to be attributed to ‘artificial price’. In essence, Warren CJ at [227] adopted the definition (with a qualification) given to the expression by Goldberg J in *ASIC v Soust* (2010) 183 FCR 21, followed by Dowsett J in *ASIC v AAT* (2010) 187 FCR 334. The majority at [309] and [333] rejected Goldberg and Dowsett JJ’s definition in favour of an interpretation based on American jurisprudential concepts of ‘cornering’ and ‘squeezing’, which concepts had their origins in trading on futures markets.

The first issue

19. Having noted the general approach to statutory construction of an expression at [302] the majority relied heavily on the legislative history of s. 1041A and its predecessors to interpret the meaning of ‘artificial price’ – at [310] to [334].

20. The majority focused upon similar wording in s. 130 of the *Futures Industry Act 1986* (Cth) and gave undue weight to the explanatory memorandum to that provision.
21. In any event, the majority incorrectly analysed the history of the provisions in the Act dealing with market manipulation and false trading and market rigging.
22. The majority gave no, or no proper weight to the purpose of the provisions introduced into the Act by the *Financial Services Reform Act 2001*, and the fact that s. 1041A was not confined to futures markets but rather one covering all financial products, including listed shares.
- 10 23. The Explanatory Memorandum (“EM”) for the *Financial Services Reform Bill 2001* (“FSR Bill”), which introduced s. 1041A, made it clear that it was the intention of Parliament to eliminate the legislative distinction between securities and futures contracts.
- 20 24. The EM pointed out that the FSR Bill was the legislative response to a number of recommendations of the Financial System Inquiry (“FSI”), which represented a “comprehensive stocktake of Australia’s financial system structure and regulation” [1.2]. The FSI found that financial system regulation was piecemeal and varied, and was determined according to the particular industry and the product being provided [1.3].
- 30 25. At [2.7] the EM noted that the FSI report recommended *inter alia* that the law covering financial markets adopt a broad definition of ‘financial products’ subject to generic requirements and supplemented by specific regulation for particular classes of products – to replace existing separate regulation of securities and futures contracts. At [2.74] to [2.78] the EM noted the existence of two sets of provisions covering market manipulation and false trading and market rigging — one for securities and one for futures contracts. The FSR Bill was designed to end the legislative distinction between securities and futures contracts which were “*drafted at different times and ... inconsistent in some respects*” (emphasis added). The FSR Bill was intended to consolidate the different sets of provisions, and then extend the single set of provisions to cover all financial products that may be traded on a financial market.
- 40 26. The majority did not refer to the language or purpose of the Act as a whole (in particular, Chapter 7 of the Act – see s. 760A), nor the context of the provision being construed (being part of a suite of legislative reforms designed to prevent market manipulation and to promote confidence, fairness and transparency in modern financial markets), nor the definitions of ‘financial product’ (see s. 763A) or ‘financial market’ (see s. 767A). The definition of financial product is broad, and includes, but is not confined to shares and futures contracts, and likewise the definition of financial market is broad being a facility through which financial products are traded. The misconduct provisions in part 7.10 of the Act were designed to be equally broad and apply to dealings in all financial products on all financial markets. In failing to have regard to such matters, the majority incorrectly applied the rules of statutory construction as elucidated in *Project Blue Sky* (at [69] to [70], per McHugh, Gummow, Kirby and Hayne JJ).

27. None of the more traditional methods of statutory interpretation was utilised. For example:

- the requirement that the interpretation that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object (*Acts Interpretation Act 1901*, s15AA¹);
- the requirement to consider the context, which includes the policy and purpose of the provision and, in particular, the mischief it is seeking to remedy (*Alcan v (NT) Alumina Pty Ltd v Commissioner for Territory Revenue* (2009) 239 CLR 27 at [46-47] per Hayne, Heydon, Crennan and Kiefel JJ, *The Board of Bendigo Regional Institute of Technical and Further Education v Barclay & Anor* [2012] HCA 32 at [42] per French CJ and Crennan J);
- the preference for giving the words of a statutory provision their natural and ordinary and grammatical meaning (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 319);
- having regard to the consequences of different constructions to see if a construction would render a section ineffectual, or result in inconvenience, or injustice, or absurdity, or incongruity or anomaly, whereas another would not (*Cooper Brookes*, supra at 320, *IW v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J, *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, per Windeyer J);
- the warning that historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text (*Alcan v (NT) Alumina Pty Ltd v Commissioner for Territory Revenue* (2009) 239 CLR 27 at [46-47] per Hayne, Heydon, Crennan and Kiefel JJ, *Khreich v NSW Trustee & Guardian* [2012] NSWSC 1299 at [48] citing Kirby J in *Samsley v Barnes* [1990] NSWCA 161).

28. The legislative intent in enacting s. 1041A was to proscribe transactions in *financial products on financial markets* (the definitions of which include shares on share markets), which had or were likely to have the effect of creating or maintaining an artificial price. Section 760A of the Act provides that the main object of the Chapter containing s. 1041A is to “promote: (a) confident and informed decision making by consumers of financial products ... and; (c) fair, orderly and transparent markets for financial products ...”

29. Warren CJ expressed the view that, “the primary role of the misconduct provisions are to protect the market against outside interference and it will often be the case that the market is harmed more by an interference with actual price as opposed to the appearance of price” [254].

30. In *ASIC v AAT*, Dowsett J found that the statutory objective underlying s. 1041A was “maintaining an informed market for share trading” [19]. In *R v Chan* [2010] VSC 312, Forrest J (citing *Soust and North v Marra Developments Ltd* (1981) 148

¹ As that provision was on 1 January 2005 – see s. 5C(1) *Corporations Act 2001*.

CLR 242) noted that the “object of s. 1041A is to protect the securities market from ‘artificial or managed manipulation’” [22].

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31. The definition of ‘artificial price’ favoured by the majority precludes s. 1041A from having any practical use in modern equity markets and effectively limits its operation to misuse of market domination or monopoly on futures markets: [323] to [325] and [331] to [333]. Whilst examples of misuse of market dominance, by ‘cornering’ or ‘squeezing’, in an equities context are in theory conceivable, in reality, s. 1041A would have no practical use.
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32. The particular factors that give rise to the need to regulate corners and squeezes in the futures market do not exist in the equities market. Corners and squeezes in a futures market exploit the congestion that can occur at the end of a delivery period when a contract must be settled. This contract end-point enables the exercise of illegitimate market power over those with a “short” position. In contrast, shares have no contractual end-point but apply in perpetuity, and transactions settle regularly at the same time and generally three business days after the transaction. Unlike futures, shares do not directly derive their value from an underlying commodity that must be delivered at expiry.
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33. The extent of short selling in the equities market at any given time is usually relatively small - as compared with futures markets where, by definition, there are an equal number of long and short positions.
34. Legislative restrictions related to holdings of equities above particular levels prevent the ability to corner or squeeze a market for shares.²
35. The legislative restrictions on short selling of securities³ (ie. selling without a “presently exercisable and unconditional right to the securities”) prevents the risk of settlement failure that might bring about a greater risk of cornering or squeezing in a market for shares.
36. The legislative history of s. 1041A has proved to be an unreliable determinant of the meaning of ‘artificial price’. In *Soust*, Goldberg J traced the history of s. 1041A [69] to [80] and concluded that “the expression ‘artificial price’ in s. 1041A connotes a price created not for the purpose of implementing or consummating a transaction between genuine parties wishing to buy and sell securities, but rather for a purpose unrelated to achieving the outcome of the interplay of genuine market forces of supply and demand” [90]. It is noteworthy that his Honour also had regard

² Section 608 of the Act prohibits, *inter alia*, the acquisition of more than 20% of the securities of a listed entity except in circumstances where a takeover offer is made (pursuant to the requirement set out in s. 611). Under sec. 671B, any shareholder who acquires (alone or with associates) a relevant interest in 5% or more of a company’s shares must disclose that fact by lodging an ASIC Form 603 “Notice of Initial Substantial Shareholder” with the Company and the stock exchange. This lodgment requirement also extends to a shareholder making a takeover bid even if the initial holding is below 5%.

³ Pursuant to section 1020B(2) of the Act - only “covered” short selling of securities and naked short selling in certain circumstances are allowed. Also, s. 846 of the Act as it existed at the time s. 1041A was introduced, permitted short selling only where there was a presently exercisable and unconditional right to vest the securities in the buyer.

to the plain meaning of the word ‘artificial’ [89] and the context in which the expression appeared [90].

- 10 37. In the Court of Appeal, the Chief Justice examined the history of s. 1041A at [184] to [245] and concluded that, “an artificial price is a price which does not come about through transactions reflecting basic forces of supply and demand working in an open, efficient and well-informed market. This may capture a variety of transactions, including those that involve cornering and squeezing. More relevantly for the purposes of this case, it is a long-standing and accepted principle in Australia that a trader whose purpose in conducting transactions is to set or maintain the market price is excluded from being part of the genuine market forces of supply and demand” [227]. Her Honour’s conclusion was remarkably similar to those of Goldberg J in *Soust* and Dowsett J in *ASIC v AAT*.
- 20 38. The majority in the Court of Appeal also traced the history of s. 1041A [310] to [334]. Their conclusion on the meaning of ‘artificial price’ based on that history was that the expression bore the legal meaning of “market manipulation by conduct of the kind typified by American jurisprudential conceptions of ‘cornering’ and ‘squeezing’” [335]. This interpretation, relying as it does substantially upon the history of the provision, is inconsistent with the language and purpose of all the provisions of the statute, and the general purpose and policy of the section (*Project Blue Sky* at [69]). It is in contrast to the interpretations of those other judges who conducted the same historical analysis.
- 30 39. The historical analysis of the majority was, in any event, erroneous - the analyses of Warren CJ and Goldberg J in *Soust* are to be preferred. Those analyses trace the progenitors of s. 1041A and correctly conclude that they are to be found in earlier transaction based stock market manipulation⁴ and futures market manipulation⁵ provisions.
- 40 40. The different conclusion of the majority results from the emphasis placed upon the fact that s. 1041A follows the wording of s. 130 of the *Futures Industry Act 1986* and the Explanatory Memorandum to that provision [322 – 330].
41. The majority’s reliance on the Explanatory Memorandum to s. 130 as the primary aid to discern the meaning of s. 1041A was misconceived; s. 130 being a superseded provision relevant only to trading in futures contracts and which had never been used in a prosecution nor fallen for judicial consideration.
- 40 42. Indeed, the critical term in s. 130, ‘artificial price’, was not defined in the *Futures Industry Act 1986* nor was there any meaningful guide to its meaning contained in the Explanatory Memorandum, clause 285 of which provided:

“The two main forms of futures market manipulation are ‘cornering’ and ‘squeezing’ which involve attempts to manipulate futures prices by

⁴ Section 71 of the *Securities Industry Act 1970* (Vic), s. 123 *Securities Industry Act 1980* (Cth), s. 997 of the *Corporations Act 1989* and s. 997 of the Act.

⁵ Section 130 of the *Futures Industry Act 1986* (Cth), s. 1259 of the *Corporations Act 1989* and s. 1259 of the Act.

manipulating supply and demand for the physical commodities that are deliverable under futures contracts so that available supply is exceeded and artificial prices are created.”

43. It is apparent enough from the use of the word ‘main’, that the clause did not purport to confine ‘market manipulation’ and thus the meaning of ‘artificial price’ to prices resulting from cornering or squeezing. If that were the case, an artificial price could only result if the demand of a physical commodity underlying a futures contract exceeded its supply. And then an artificial price could only be artificially high. Much less could that clause provide a definition or even a meaningful guide to the interpretation of ‘artificial price’ as it applies to all financial products, including equities.
44. On the other hand, it is significant that clause 285 recognised that the mechanism by which the artificial price was created was the manipulation of supply and demand. It is the distortion of the forces of supply and demand that is at the foundation of the definitions favoured by Warren CJ in the Court of Appeal and Goldberg J in *Soust*.
45. Over-reliance on the historical background of s. 1041A has led to an interpretation of the critical words in the section which is “unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless or artificial” (*Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 at p.401).
46. The regulation of “financial products” in “financial markets” by s. 1041A has been compromised by the interpretation of the Court of Appeal. The effect of that interpretation is to limit the scope of the terms “financial product”, which is defined in s. 763A, and “financial market”, which is defined in s. 767A, for the purposes of s. 1041A, so that these terms no longer carry their defined meanings. The majority’s use of extrinsic material has effectively resulted in a redrafting of critical provisions of the Act. Resort to legal history to explain a statutory enactment is a more reliable guide to meaning when the statute “enters a field that has been governed by the common law [as] the pre-existing common law almost invariably gives guidance as to the statute’s meaning and purpose” (*Conway v The Queen* (2002) 209 CLR 203, 207). Section 1041A had no common law antecedents and resort to legal history denied the possibility that the legislature enacted the provision as it saw the need for an enactment with wider scope and application than previous provisions which had dealt with market manipulation. A purposive or textual approach to construing the section would have confirmed the correctness of the interpretation in *Soust*.
47. In concluding that an ‘artificial price’ was a price brought about by cornering or squeezing, the majority did not actually define ‘artificial price’. Rather they focused on two mechanisms through which an ‘artificial price’ might be created. The resultant definition lacks utility in an equities market and by concentrating exclusively on the mechanism used rather than outcome, i.e. the price achieved through devices such as cornering or squeezing, perpetuates the distinction between different types of financial markets and financial products – which the amendments (including s. 1041A) to the Act introduced by the *Financial Services Reform Act 2001* were intended to eliminate.

48. Further, the restrictive definition of the majority freezes the section in time and limits its usefulness as a mechanism to combat novel trade-based methods of creating artificial prices. The pace of financial market transformation and sophistication requires a flexible regulatory regime. That has been compromised by the approach adopted by the majority.

The second issue

- 10 49. The expression, ‘artificial price’ is not defined in the Act, or in any antecedent legislative provisions. Nor is it explained in the EM, which accompanied the *FSR Bill*. There is no indication that Parliament intended any meaning other than that which the words ordinarily have (*New South Wales Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, 512).
50. Section 1041A was introduced as part of a package of measures designed, *inter alia*, to strengthen the financial sector. The *FSR Bill* was said to put in place:
- 20 “a competitively neutral regulatory system which benefits participants in the industry by providing more uniform regulation, reducing administrative and compliance costs, and removing unnecessary distinctions between products. In addition, it will give consumers a more consistent framework of consumer protection in which to make their financial decisions. The Bill will therefore facilitate innovation and promote business, while at the same time ensuring adequate levels of consumer protection and market integrity” (EM [1.5]).
51. It is unlikely that the legislature would have intended a critical term in a statutory provision in a bill with such objects to bear an esoteric or arcane meaning, not readily apparent to the consumers of financial services – “...those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished” (*International Finance Trust Company v NSW Crime Commission* (2009) 240 CLR 319, at [42] per French CJ).
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52. In *Soust*, Goldberg J observed that, “the expression ‘artificial price’ is defined in the *Shorter Oxford Dictionary* as ‘constructed, contrived’, ‘not natural though real’ and ‘not real’” [89]. A price for a financial product that has been created by a transaction on the market, which such transaction was motivated by a desire to create that price rather than by a desire to buy the financial product at the lowest possible price or to sell at the highest possible price, is a constructed or contrived price. It is an artificial price. There is no need to resort to complex economic theories to so conclude. If s. 1041A was intended, in the words of the EM to the *FSR Bill*, to “promote business while at the same time ensuring adequate levels of consumer protection and *market integrity*” (emphasis added), then giving the subject words their plain meaning was the surest way of achieving that outcome.
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53. So what meaning should be given to the expression ‘artificial price’? In *Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner* [1977] AC 287 the Privy Council considered the word ‘artificial’ in the context of a provision in the *Income Tax Act* that permitted the Commissioner to disregard any “artificial or fictitious” transaction which reduced the amount of tax payable by any person. Lord Diplock said – “Artificial is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used... Where in a provision of a statute an ordinary English word is used, it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case” (at p. 298).
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54. This approach to interpretation of the word ‘artificial’ was later adopted by the Privy Council when again called upon to construe the same section of the *Income Tax Act*. In *Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica* [2012] UKPC 9, Lord Walker, in referring to *Seramco*, said [22] – “While mindful of Lord Diplock’s warning against too much judicial exegesis the Board consider that in this context a transaction is ‘artificial’ if it has, as compared with normal transactions of an ostensibly similar type, features that are abnormal and appear part of a plan.”
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55. In construing the expression ‘artificial price’ great weight should be given to the plain English meaning of the word ‘artificial’ – it is a price which is contrived, it having been effected or created by a transaction which was abnormal (the abnormality being of the type identified by Goldberg J in *Soust* at [90], [91] and [95] and the Chief Justice in *JM* at [227], [248] and [257]). The meaning attributed to the expression by the majority robs the words of their plain meaning and replaces that meaning with a meaning that narrows the provision and severely limits its utility as a weapon against market manipulation.
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56. The majority and Warren CJ differed in their views as to the antecedents of s. 1041A. The majority concluded that s. 1041A “represented the application to ‘financial products’ of all kinds of the proscription of futures market manipulation which began life as s. 130 of the *Futures Industry Act 1986*” [310]. In effect the majority suggested that s. 1041A had no antecedents in earlier securities legislation [328(a)]. The ancestry of s. 1041A was traced by the Chief Justice (at [184] to [245], particularly at [201] and [245]). Her Honour correctly concluded that s. 1041A has its origins in earlier securities legislation⁶ that prohibited participation in transactions having the effect of raising or lowering the price of securities with the specific intent of inducing others to purchase or sell such securities, alloyed with futures legislation⁷ designed to proscribe the participation in transactions that created an artificial price.
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⁶ Section 71 of the *Securities Industry Act 1970* (Vic), s. 123 of the *Securities Industry Act 1980* (Cth), s. 997 of the *Corporations Act 1989* (Cth) and s. 997 of the Act.

⁷ Section 130 of the *Futures Industry Act 1986* (Cth), s. 1259 of the *Corporations Act 1989* (Cth) and s. 1259 of the Act.

57. It is apparent that, historically, two streams developed in securities legislation dealing with manipulative conduct. The first is defined broadly as “market manipulation” and involves the participation in transactions that have an effect upon security prices, with or without intent, (now represented in s. 1041A), and the second is defined broadly as “false trading and market rigging”. The latter includes two forms of prohibited conduct; first, conduct giving a false appearance of active trading (s. 1041B (1)), which includes transactions involving no change in beneficial ownership (s. 1041B (2)); and second, fictitious or artificial transactions or devices that inflate, depress or cause price fluctuations (s. 1041C).
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58. These streams can be identified in the earliest form of the securities legislation in Victoria, the *Securities Industry Act 1970*. The first stream can be seen in s. 71, which prohibited the participation in transactions that had the effect of raising or lowering the price of securities with the intent of inducing the purchase or sale of such securities by others. The second stream can be seen in s. 70 and 72. Section 70 of the *Securities Industry Act 1970* proscribed conduct calculated to create a false or misleading appearance of active trading in securities or a false or misleading appearance with respect to the market for or the price of any securities. Section 72 proscribed the inflation, depression or fluctuation in the market price of securities by means of transactions in securities involving no change in beneficial ownership or by any fictitious transactions or devices.
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59. The first federal securities legislation, the *Securities Industry Act 1980*, proscribed these streams under the headings “Stock market manipulation” (s. 123) and “False trading and market rigging transactions” (s. 124). Section 123 proscribed participation in transactions having the effect of raising, lowering and maintaining or stabilising the price of securities with intent to induce others to purchase or sell. Section 124 proscribed conduct giving a false appearance of active trading and transactions involving no change in beneficial ownership (the conduct proscribed by s. 1041B) and fictitious or artificial transactions or devices that inflate, depress or cause price fluctuations (the conduct proscribed by s. 1041C).
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60. Thus by 1980, the legislature evinced an intention to proscribe the two streams of market misconduct with respect to trading in securities. This distinction continued through to the immediate predecessor of the current legislation in the Act in s. 997 and s. 998. Section 997 also fell under the heading “Stock market manipulation” and proscribed transactions entered into that had the effect of increasing, reducing, maintaining or stabilizing the price of securities with intent to induce others to buy, sell or subscribe to such securities. Section 998, headed “False trading and market rigging transactions”, dealt with conduct designed to give the misleading appearance in active trading in securities, transactions involving no change in beneficial ownership and fictitious transactions or devices that maintain, increase, reduce or cause fluctuations in the market price for securities.
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61. The first provisions dealing solely with futures trading were in the *Futures Industry Act 1986*. Section 130 was under the heading “Futures market manipulation”. In place of the wording employed in the securities legislation dealing with “Stock market manipulation” a provision proscribing transactions engaged in with the intention of, or the likely effect of, creating or maintaining artificial prices for dealings in futures contracts was introduced.
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62. Although clearly worded differently to the securities “market manipulation” provisions, the effect of s. 130 was to proscribe conduct that was intended to affect prices (and thus of a similar character to the first stream of proscribed conduct with respect to securities) and the provision was under the appropriately similar heading “Futures market manipulation”. Section 131 which perpetuated the second stream of manipulative conduct under the heading “False trading and market rigging” proscribed conduct calculated to create, a false or misleading appearance of active dealing in futures contracts on a futures market (131(1)) and fictitious or artificial transactions or devices, that maintain, inflate, depress or cause fluctuations in, the price for dealing in futures contracts on a futures market (131(2)). Thus, save for the absence of provisions specifically proscribing transactions involving no change in beneficial ownership (presumably because “wash” and “matched” trades are not a feature of futures transactions) the futures “false trading and market rigging” provisions were equivalent to their securities counterparts.
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63. Section 130 and s.131 of the *Futures Industry Act 1986* were replicated in similar form in s. 1259 and s. 1260 of the *Corporations Act 1989* and s. 1259 and s. 1260 of *the Act* (headed respectively “Futures market manipulation” and “False trading and market rigging”).
- 20
64. Warren CJ at [211] was correct in her conclusion that s. 130 was designed to be the futures counterpart of s. 123 of the *Securities Industry Act 1980*, and intended to apply to similar conduct. The provision was designed to catch conduct that was intended to, or likely to affect prices. At [208] to [226], Warren CJ considered the reasons for the use of the expression ‘artificial price’ in s. 130 of the *Futures Industry Act 1986* and concluded at [226], contrary to the majority, that it was intended to cover at least the same ground as s. 123 of the *Securities Industry Act 1980*. The Chief Justice’s view is correct.
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65. The Explanatory Memorandum to the *Futures Industry Bill 1985* in relation to s. 130, at paragraph 284 neither defined ‘artificial price’ nor confined the types of market manipulation that the provision was designed to catch, although at paragraph 285, it was noted that the two *main* forms of manipulation of futures trading were ‘cornering’ and ‘squeezing’ (emphasis added). The use of the word “main” supports the correctness of Warren CJ’s explanation that s. 130 was not intended to be confined to ‘cornering’ and ‘squeezing’.
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66. Further, it is of note that the proscription of conduct designed to cause changes in the price of securities has consistently co-existed with the proscription of conduct amounting to fictitious transactions or devices that maintain, increase, reduce or cause fluctuations in the market price for securities. Thus, the view by the majority⁸ that s.1041C (rather than s. 1041A) restated s. 71 of the *Securities Industry Act 1970*, s. 123 of the *Securities Industry Act 1980* and s. 997 of the *Corporations Act 1989* is unsustainable as it ignores the fact that the conduct proscribed by s. 1041C was specifically proscribed by s. 72, s. 124(2) and s. 998(3) and (4) respectively, of those same statutes. Further it is ignores that fact that s. 131(2) of the *Futures Industry Act 1986* and s. 1260(2) of the *Corporations Act*

⁸ At [328(c)]

1989 each contained specific provisions proscribing fictitious or artificial transactions or devices that maintain, inflate, depress or cause fluctuations in the price for dealings in futures contracts.

67. The historical analysis of the Chief Justice set out in [201] under the column headed "A" should be preferred.

10 68. When the separate provisions dealing with securities and futures trading were united in the FSR Bill, it was the intention of Parliament to retain a provision equivalent to s. 997, which prohibited participation in transactions having the effect of raising or lowering the price of securities; thus s. 997 and s. 1259 (which had restated s. 130 of the *Futures Industry Act 1986*) were replaced by s. 1041A of the Act.⁹ It appears also to have been the intention that s. 1041B and s. 1041C replace s. 998 and s. 1260 (which had restated s. 131 of the *Futures Industry Act 1986*). The following appears at 15.12 to 15.17 of the EM:

Market manipulation

20 15.12 Sections 997 and 1259 of the proposed Corporations Act will be replaced by a new provision (proposed section 1041A) based on section 1259, but applying to all financial products traded on a financial market. The new provision will be a civil penalty provision so that a contravention could attract both civil penalty and criminal consequences.

5.13 As is currently provided in section 1259, the new provision will apply to a transaction, or two or more transactions, with the effect of creating or maintaining an 'artificial price'.

False trading and market rigging

30 15.14 Sections 998 and 1260 of the proposed Corporations Act will be replaced by two provisions (proposed sections 1041B and 1041C) based on section 1260, but applying to all financial products traded on a financial market. The new provisions will be civil penalty provisions.

15.15 Subsections 1260(2) and (3) of the Corporations Law are replicated in proposed section 1041C. Subsection 1260(1) is contained in proposed section 1041B. In addition, the deeming provision in subsections 998(5) and 998(7) that provides an example of what constitutes creating a 'false or misleading appearance' will be retained in proposed section 1041B.

40 69. It could not have been the intention of Parliament by replacing ss. 997 and 1259 with a new provision based on s. 1259 to so narrow the effect of the earlier "Stock market manipulation" provisions in the new "Market manipulation" provision, viz. s. 1041A, that it only applied to conduct involving cornering and squeezing, being concepts that are realistically applicable to futures trading only. There is nothing within the text, or context of the provision, which suggests that it ought be confined to conduct carried out by persons in a position because of market domination or monopoly to corner or squeeze the market for either commodities or financial products. To so restrict the provision would deprive the section of practical use in the regulation of equity markets. The instant case provides a good example of

⁹ See EM at 2.74 to 2.80, 15.12 to 15.15.

thinly traded shares, the price of which could easily be affected by trading conducted by a person not having a monopoly or even a dominant market position.

10 70. The majority in the Court of Appeal confused the mechanism of creating or maintaining an 'artificial price' with the outcome of such conduct. Squeezing and cornering are mechanisms through which a position of dominance in the futures market can be used to manipulate the price of a commodity – the free and natural interplay of the forces of supply and demand being distorted to achieve that outcome. The result of such conduct is the creation of an artificial price for the commodity. Buying shares at an inflated price for the purpose of fixing the price of the share is as much a manipulation of those same forces as squeezing and cornering. The price effected by such conduct is contrived, it not having been set by the operation of the undistorted forces of supply and demand. The majority did not define the term "artificial price"; rather they considered particular types of conduct that could cause the price of a commodity to be the product of a distorted market and elected to describe such a price as "artificial".

20 71. Thus, the distinction drawn by the majority at [332] between the "two concepts of artificiality" is illusory and arises because of the unwarranted emphasis given to the words 'cornering' and 'squeezing' in the explanatory memorandum to s.130 of the *Futures Industry Act 1986* and the conflation of the mechanism for achieving the artificial price with the artificial price itself. In the case of market domination manipulation the improper conduct is the intentional bringing about of a situation where demand exceeds supply leading to an increase in the price. The demand is not natural as it has deliberately been altered by restricting or cornering supply. Whilst "in truth" the price reflects the supply and demand circumstances, the price is artificial because the demand has been distorted by the intentional conduct of the market participant. It is no different in the case of a trader who trades with the primary purpose of increasing the price of a financial product (eg. a share). The demand for the share is not the natural demand (i.e. desire to purchase the share at the best price) but the desire to alter the price in the share. In the same way, the price comes about through market forces "in truth", however those forces are distorted, in this case by the intentional conduct of the purchaser to behave in a way contrary to the basic forces of supply and demand. The demand is not genuine and the resulting price is artificial.

40 72. The underlying premise of Mason J, with whom Stephen and Aickin JJ agreed, in *North v Marra*, was that "buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting the market price" are not part of the genuine forces of demand and supply. The majority (Gleeson CJ and Powell JA) in *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58 agreed with Mason J and noted that his view;

"...accords with United States authority on similar legislation where a price reflecting basic forces of supply and demand working in an open efficient and well informed market, is contrasted with an artificial price resulting from manipulative conduct: see eg. *Cargill Incorporated v M Hardin J*, 452 F2d 1154 (1971) ...

... Markets, in reflecting the interaction of forces of supply and demand, may suffer from a variety of imperfections, including mismatches of information, without such imperfections destroying their integrity. However, the conduct of a seller of thinly traded shares, calculated to effect sales at the lowest, rather than the highest, obtainable price, and timed so as to deflect the possibility of some purchasers bidding up the price, had both the purpose and effect of creating, temporarily, an artificial market and price" [p.62-3].

10 73. In *Cargill* it was determined that the company had established dominant positions in the futures and cash markets and had then exacted an artificially high price in settling its long contracts. It was noted by the Court at [15] that:

"In order for the futures market to perform its functions effectively, prices must reflect as nearly as possible market factors of supply and demand. Manipulation of prices by means not reflecting basic supply and demand factors creates conditions which prevent the futures market from performing its basic economic function and hence diminishes its utility to those members of the trade and general public who rely on its basic purposes."

20 At [43] and [44]:

The Commodity Exchange Act itself does not define "manipulation", and definitions from other sources are of a most general nature. One of the few judicial definitions is to be found in *General Foods Corporation v. Brannan*, 170 F.2d 220, 231 (7th Cir. 1948), where the court said:

30 "We are favored with numerous definitions of the word 'manipulation.' Perhaps as good as any is one of the definitions which appears in the government's brief, wherein it is defined as 'the creation of an artificial price by planned action, whether by one man or a group of men.'"

At [47]:

We think the test of manipulation must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished. The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.

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74. Relying on *Cargill's* experience in the futures market and knowledge of both its control of almost all deliverable wheat and its substantial position in the futures market, the court held that *Cargill* had intentionally caused the squeeze and had thus manipulated the futures market price. Thus both interference with natural market forces and intention to create an artificial price were found to be the basis of *Cargill's* liability (such an analysis supports the applicant's definition of 'artificial price'). The majority cited *Cargill*, however only by way of identifying the meaning of the terms used in the explanatory memorandum to s. 130 of the *Futures Industry Act 1986*. On the other hand, Warren CJ at [218] observed that by 1986, the US Courts had developed considerable jurisprudence around the phrase

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‘artificial price’; that *Cargill* defined it as ‘a price which does not reflect basic forces of supply and demand’. The majority’s interpretation of ‘artificial price’ in the context of s. 1041A fails to have regard to the fact that both the features of market manipulation can be found in conduct other than cornering and squeezing and, in a share market, are more likely to be so found.

- 10 75. *Anderson v Dairy Farmers of America Inc* (United States District Court, D. Minnesota. September 30, 2010) provides an illustration of the appropriately flexible approach taken by US courts to the notion of ‘artificial price’. *Anderson v DFA* was a motion for summary judgment on the basis that the plaintiffs had not adduced evidence to prove artificial price in a case alleging that DFA had violated section 9 of the CEA which “prohibits the manipulation of prices for commodities in interstate commerce”. It was alleged that DFA, purchased large quantities of the commodity (cheddar cheese) underlying futures contracts in which it held a long position, in order to sustain the price of those futures while the long position was liquidated. DFA otherwise had no need to purchase the cheese.
- 20 76. The court, in dismissing the motion, noted that *Cargill* stood for the proposition that an artificial price is a price that does not reflect basic forces of supply and demand. It also referred to *United States v Socony Oil Co.*, 310 US 150, 223 (1940) in which the Supreme Court said:–
- “... market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.”
- 30 77. The court concluded that “the appropriate inquiry is whether the specific facts of a case support a finding that the commodity price was determined by forces other than legitimate forces of supply and demand and whether the defendant intended to cause that artificial price”.
- 40 78. In this case, the Chief Justice i adopted a similar approach, in stark contrast to that of the majority – “...an artificial price is a price which does not come about through transactions reflecting basic forces of supply and demand working in an open, efficient and well-informed market ... a trader whose purpose in conducting transactions is to set or maintain the market price is excluded from being part of the genuine forces of supply and demand” [227] (footnote omitted). See also [248] and [257]. The approach of the majority also stands in contrast to that of Goldberg J in *Soust* – “It is fundamental to the working of the free market forces of securities exchanges such as the ASX Ltd that buyers are concerned to buy securities at the lowest possible price and sellers are concerned to achieve the highest possible price. Any different approach to the price for which securities are traded is a distortion of the interplay of the open market forces of supply and demand” [91]. Furthermore, it stands in contrast to the approach of Dowsett J in *ASIC v AAT* – “...the relevant mischief [to which s. 1041A is addressed] is the potentially misleading effect of market transactions which are not between a buyer and a seller who are both seeking the most favourable price [48]... It is true that s. 1041A does not directly proscribe any particular intention, but the notion of artificial price

invites attention to the *effect or likely effect* (emphasis added) of the transaction in question” [50].

79. The majority at [334] invoked “*specilia generalibus derogant*” to read down the intended breadth of s. 1041A by comparing it, and its use, to that of s. 1041B and s. 1041C. In doing so, they ignored s. 1041J of the Act which provides – “*Subject to any express provision to the contrary, the various sections in this Division have effect independently of each other, and nothing in any of the sections limits the scope or application of any of the other sections.*”
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80. The fact that the impugned conduct in the present case may also constitute an offence against s. 1041B or s. 1041C (as to which, see [246] to [249] per Warren CJ, and [337] to [340] per Nettle and Hansen JJA), cannot be allowed to determine the meaning and effect of the provision. The criminal law is replete with examples of conduct that is capable of contravening more than one statutory provision; it is part of the prosecutorial discretion to decide which provision(s) will be invoked in any given fact situation.
81. The contention of the applicant does not deprive the later provisions of work. Section 1041A is confined to transaction- based conduct creating an artificial price. While ss. 1041B and 1041C may also involve transaction- based conduct, it is not a prerequisite for either provision. The use of a “device”, other than a transaction, to inflate a share price would contravene s. 1041C, but not s. 1041A. For example a planned scheme to publically leak confidential information may be a “device” designed to affect a company’s share price and thereby contravene s. 1041C, but not s. 1041A. In any event, as noted above, in earlier iterations of the Securities legislation, provisions proscribing participation in transactions having the effect of raising, lowering and maintaining or stabilising the price of securities with intent to induce others to purchase or sell, typically co-existed with provisions that proscribed fictitious or artificial transactions or devices that inflated, depressed or caused price fluctuations.
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- 30
82. At [259] – [260] Warren CJ added a proviso to her conclusion as to the meaning of ‘artificial price’ that neither the applicant nor the respondent advanced in argument before the Court of Appeal, and for which her Honour did not cite authority. Her Honour concluded that it may be necessary to established that an impugned transaction affected the behaviour of genuine buyers and sellers in the market before it could be said that the price was a ‘real’ price [260]. This proviso did not derive support from *Soust*, *ASIC v AAT*, *Fame* or *Marra*. The applicant contends that the proviso is an unnecessary appendage to the meaning of ‘artificial price’. If the transaction entered into by a buyer for the purpose of raising or maintaining the price of a share has that effect, then the resulting price, even if it be temporary, is artificial, without more.
- 40

REASONS WHY SPECIAL LEAVE SHOULD BE GRANTED

83. The meaning of s. 1041A in the Act and, in particular, that to be attributed to the expression “artificial price” has never fallen for determination by the High Court of Australia. This is a matter of public importance because of its of general application (*Judiciary Act 1903*, s. 35A (a)(i)).
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84. There was disagreement in the Court of Appeal between Nettle and Hansen JJA, and the Chief Justice as to the meaning, or legal signification, of the expression “artificial price”.
85. There is now, also, a conflict between the decisions of two judges of the Victorian Court of Appeal (Nettle and Hansen JJA) and two judges of the Federal Court of Australia (Goldberg and Dowsett JJ). The interpretation of the Chief Justice of Victoria of “artificial price” is largely consonant with that of the judges of the Federal Court. Accordingly, there is a need to resolve a difference in interpretation of s1041A between the Federal Court and the Court of Appeal of Victoria (*Judiciary Act 1903*, s. 35A (a)(ii)).
86. This application raises an issue of general public importance – the meaning to be given to the term ‘artificial price’ in s. 1041A. Being Commonwealth legislation, the answer will have Australia-wide significance and it will resolve a difference of opinion that presently exists in the Victorian Court of Appeal and between that court and the Federal Court.
87. The misapplication of the rules of statutory interpretation has, in this case, led to a miscarriage of justice. Unless corrected, that miscarriage will have an impact on all future prosecutions under s. 1041A of the Act.
88. The judgment in *JM* has seriously constrained the effectiveness of s. 1041A as a weapon against stock market manipulation.
89. The present prosecution of *JM* could not proceed in its present form if the judgment of the Court of Appeal stands (*Judiciary Act 1903*, s. 35A (b)).
90. The judgment in *JM* effectively ignores the legislative intent behind the introduction of s. 1041A into the Act. Among the problems with the existing regulatory approach identified by the Financial System Inquiry was “incomplete coverage by the existing Corporations Law...the narrow definitions of “securities” and “futures contracts” – EM [2.6]. The Inquiry recommended that “the law covering financial markets adopt a broad definition of “financial products” subject to generic requirements...to replace existing Corporation Law regulation of futures and securities contracts” – EM [2.7]. The definition of “artificial price” in *JM* perpetuates and entrenches the regulatory distinction between the futures and equities trading.
91. The correctness of convictions already recorded in Victoria on the basis of *Soust* having been correctly determined, including two cases in which terms of immediate imprisonment were imposed for contravention of s. 1041A of the Act, may be called into question. This is of importance to the administration of justice generally (*Judiciary Act 1903*, s. 35A (b)).
92. The question posed for consideration and answered by the majority is a question of law, the answer to which is not dependent on facts. A similar question was considered by the High Court in *Mansfield v R; Kizon v R* [2012] HCA 49, although in that case there had been a directed acquittal at the end of the

prosecution case. However the question did not require a factual substratum to be answered and, indeed, because of the circumstances in which the question came before the High Court, there could not have been a set of agreed facts.

93. The answer to a question so framed has greater jurisprudential value, as it will be much harder to distinguish on the basis of relevance to a particular set of facts. This is particularly important if, as here, the provision under consideration has been interpreted differently by different courts and has never before fallen for judicial consideration by the High Court.

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Part VII: Statutory provisions

94. See annexure.

Part VIII: Orders sought

95. (a) Special leave to appeal be granted.
(b) The appeal be allowed.
(c) The order of the Court of Appeal in respect of the answer to the amended
Question 1 in the Case Stated be set aside and in lieu thereof the following
be substituted –

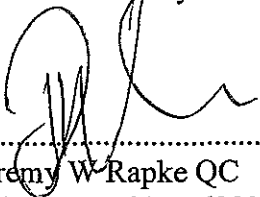
20

The expression “artificial price” in s. 1041A of the *Corporations Act 2001* means a price for a financial product on a financial market that has been effected by a transaction that was not the product of the genuine forces of supply and demand in the sense that at least one of the parties to the transaction took part in it or carried it out for the dominant purpose of creating or maintaining the price of the financial product in question.

30 **Part IX: Time estimate**

96. It is estimated that the presentation of oral argument will take 2 to 3 hours.

Date: 25 January 2013



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A. SECTIONS 1041A, 1041B and 1041C Corporations Act 2001 as at the relevant dates

SECTION 1041A MARKET MANIPULATION

1041A A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):

- 20 (a) a transaction that has or is likely to have; or
 the effect of:
 (b) 2 or more transactions that have or are likely to have;
 (c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or
 (d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

30 Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see section 1317S.

SECTION 1041B FALSE TRADING AND MARKET RIGGING – CREATING A FALSE OR MISLEADING APPEARANCE OF ACTIVE TRADING ETC.

1041B (1) [False appearance of active trading] A person must not do, or omit to do, an act (whether in this jurisdiction or elsewhere) 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:

- 40 (a) of active trading in financial products on a financial market operated in this jurisdiction; or
 (b) with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

50 **1041B(2)** [Circumstances creating misleading appearance] For the purposes of subsection (1), a person is taken to have created a false or misleading appearance of active trading in particular financial products on a financial market if the person:

- (a) enters into, or carries out, either directly or indirectly, any transactions of acquisition or disposal of any of those financial products that does not involve any change in the beneficial ownership of the products; or
 (b) makes an offer (the **regulated offer**) to acquire or to dispose of any of those financial products in the following circumstances:
 (i) the offer is to acquire or to dispose of at a specified price; and
 60 (ii) the person has made or proposes to make, or knows that an associate of the person has made or proposes to make:
 (A) if the regulated offer is an offer to acquire – an offer to dispose of; or
 (B) if the regulated offer is an offer to dispose of – an offer to acquire;

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the same number, or substantially the same number, of those financial products at a price that is substantially the same as the price referred to in subparagraph (i).

Note: The circumstances in which a person creates a false or misleading appearance of active trading in particular financial products on a financial market are not limited to the circumstances set out in this subsection.

20 **1041B(3)** [No change to beneficial ownership] For the purposes of paragraph (2)(a), an acquisition or disposal of financial products does not involve a change in the beneficial ownership if:

- (a) a person who had an interest in the financial products before the acquisition or disposal; or
- (b) an associate of such a person;

has an interest in the financial products after acquisition or disposal.

1041B(4) [Invitation or offer] The reference in paragraph (2)(a) to a transaction of acquisition or disposal of financial products includes:

- 30
- (a) a reference to the making of an offer to acquire or dispose of financial products; and
 - (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to acquire or dispose of financial products.

SECTION 1041C FALSE TRADING AND MARKET RIGGING – ARTIFICIALLY MAINTAINING ETC, TRADING PRICE

40 **1041C(1)** [False transactions causing change] A person must not (whether in this jurisdiction or elsewhere) enter into, or engage in, a fictitious or artificial transaction or device if that transaction or device results in:

- (a) the price for trading in financial products on a financial market operated in this jurisdiction being maintained, inflated or depressed; or
- (b) fluctuations in the price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

50 Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

1041C(2) [Intention of parties] In determining whether a transaction is fictitious or artificial for the purposes of subsection (1), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms is not conclusive.

10 **B. SECTIONS 1041A, 1041B and 1041C Corporations Act 2001 as from 13 December 2010**

SECTION 1041A MARKET MANIPULATION

1041A A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):

- (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:
- 20 (c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or
- (d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see section 1317S.

30 **SECTION 1041B FALSE TRADING AND MARKET RIGGING – CREATING A FALSE OR MISLEADING APPEARANCE OF ACTIVE TRADING ETC.**

1041B(1) [Creation of false or misleading appearance] A person must not do, or omit to do, an act (whether in this jurisdiction or elsewhere) 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:

- (c) of active trading in financial products on a financial market operated in this jurisdiction; or
- 40 (d) with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

1041B(1A) [Fault elements] For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1):

- 50 (a) intention is the fault element for the physical element consisting of doing or omitting to do an act as mentioned in that subsection; and
- (b) recklessness is the fault element for the physical element consisting of having, or being likely to have, the effect of creating, or causing the creation of, a false or misleading appearance as mentioned in that subsection.

Note 1: For *intention*, see section 5.2 of the *Criminal Code*.

Note 2: For *recklessness*, see section 5.4 of the *Criminal Code*.

60 **1041B(2)** [Where person is taken to have created misleading appearance] For the purposes of subsection (1), a person is taken to have created a false or misleading appearance of active trading in particular financial products on a financial market if the person:

- (a) enters into, or carries out, either directly or indirectly, any transactions of acquisition or disposal of any of those financial products that does not involve any change in the beneficial ownership of the products; or

- 10 (b) makes an offer (the **regulated offer**) to acquire or to dispose of any of those financial products in the following circumstances:
- (i) the offer is to acquire or to dispose of at a specified price; and
 - (i) the person has made or proposes to make, or knows that an associate of the person has made or proposes to make:
 - (A) if the regulated offer is an offer to acquire – an offer to dispose of; or
 - (B) if the regulated offer is an offer to dispose of – an offer to acquire;

20 the same number, or substantially the same number, of those financial products at a price that is substantially the same as the price referred to in subparagraph (i).

Note: The circumstances in which a person creates a false or misleading appearance of active trading in particular financial products on a financial market are not limited to the circumstances set out in this subsection.

30 **1041B(3)** [Acquisition or disposal] For the purposes of paragraph (2)(a), an acquisition or disposal of financial products does not involve a change in the beneficial ownership if:

- (a) a person who had an interest in the financial products before the acquisition or disposal; or
- (b) an associate of such a person;

has an interest in the financial products after acquisition or disposal.

1041B(4) [Interpretation] The reference in paragraph (2)(a) to a transaction of acquisition or disposal of financial products includes:

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- (a) a reference to the making of an offer to acquire or dispose of financial products; and
 - (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to acquire or dispose of financial products.

SECTION 1041C FALSE TRADING AND MARKET RIGGING – ARTIFICIALLY MAINTAINING ETC, TRADING PRICE

50 **1041C(1)** [Fictitious or artificial transaction] A person must not (whether in this jurisdiction or elsewhere) enter into, or engage in, a fictitious or artificial transaction or device if that transaction or device results in:

- (a) the price for trading in financial products on a financial market operated in this jurisdiction being maintained, inflated or depressed; or
- (b) fluctuations in the price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

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1041C(2) [Where transaction is fictitious or artificial] In determining whether a transaction is fictitious or artificial for the purposes of subsection (1), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms is not conclusive.

10 **C. Provisions of previous legislation**

Securities Industry Act 1970 (Vic)

70. A person shall not create or cause to be created or do anything which is calculated to create, a false or misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any such securities.

20 71. (1) A person shall not effect, take part in, be concerned in or carry out, either directly or indirectly, any transaction in any class of securities which have the effect of raising or lowering the price of securities of that class for the purpose of inducing the purchase or sale of securities of that class by others.

 (2) It shall be a defence to a prosecution under sub-section (1) if the defendant satisfies the Court that he acted without malice and solely to further or protect his own lawful interests.

30 (3) A person shall not, in consideration or anticipation of a reward or benefit, circulate or disseminate or authorize or be concerned in the circulation or dissemination of any statement or information to the effect that the price of any securities will or is likely to rise or fall because of any act that to his knowledge is or would be a contravention of sub-section (1).

72. (1) A person shall not by means of purchases or sales of any securities involving no change in the beneficial ownership of those securities, or by any fictitious transactions or devices inflate, depress or cause fluctuations in the market price of any securities.

40 (2) A purchase or sale of securities involves no change within the meaning of sub-section (1) if a person who held an interest in the securities before the purchase or sale or a person associated with the first-mentioned person in relation to those securities holds an interest in the securities after the purchase or sale.

 (3) In determining whether a person held or holds an interest within the meaning of sub-section (2) the provisions of section 6A of the *Companies Act 1961* shall have effect and in applying those provisions any reference to shares shall be read as a reference to securities.

50 (4) For the purposes of sub-section (2) a person is associated with another person in relation to securities if the first-mentioned person is –

 (a) a corporation that by virtue of sub-section (5) of section 6 of the *Companies Act 1961* is deemed to be related to that other person;

 (b) a person in accordance with whose directions instructions or wishes that other person is accustomed or likely to act in relation to the securities;

 (c) a person who is accustomed or likely to act in accordance with the directions instructions or wishes of that other person in relation to the securities;

60 (d) a body corporate that is or the directors of which are accustomed or likely to act in accordance with the directions instructions or wishes of that other person in relation to the securities; or

 (e) a body in accordance with the directions instructions or wishes of which or of the directions of which that other person is accustomed or likely to act in relation to the securities.

Securities Industry Act 1975 (Vic)**109 False trading and markets and market rigging transactions**

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

(2) 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 inflate, depress or cause fluctuations in the market price of any securities.

(3) Without affecting the generality of subsections (1) and (2), a person who—

(a) effects, takes part in, is concerned in 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) makes or causes to be made an offer to sell any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, an offer to purchase 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) makes or causes to be made an offer to purchase any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, 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 securities on a stock market.

(4) It is a defence to a prosecution of a person for an offence under this section in respect of acts referred to in subsection (3) done by him if the person proves that he did the acts for a purpose other than the purpose of creating a false or misleading appearance of active trading in securities on a stock market.

(5) 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 a person associated with the first-mentioned person in relation to those securities, has an interest in the securities after the purchase or sale.

10 **Securities Industry Act 1980 (Cth)**¹

Stock market manipulation

123. (1) A person shall not, whether within or outside the Territory, effect, take part in, be concerned in 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 raising the price of securities of the body corporate on a stock market in the Territory, with intent to induce other persons to purchase or subscribe for securities of the body corporate or of a related body corporate.

20 (2) A person shall not, whether within or outside the Territory, effect, take part in, be concerned in 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 lowering the price of securities of the body corporate on a stock market in the Territory, with intent to induce other persons to sell securities of the body corporate or of a related body corporate.

30 (3) A person shall not, whether within or outside the Territory, effect, take part in, be concerned in 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 stabilizing the price of securities of the body corporate on a stock market in the Territory, with intent to induce other persons to sell, purchase or subscribe for securities of the body corporate or of a related body corporate.

(4) A reference in this section to a transaction, in relation to securities of a body corporate, includes:
(a) a reference to the making of an offer to sell or purchase such securities of the body corporate; and
40 (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or purchase such securities of the body corporate.

False trading and market rigging transactions

124. (1) A person shall not, whether within or outside the Territory, create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active trading in any securities on a stock market in the Territory or a false or misleading appearance with respect to the market for, or the price of, any such securities.

50 (2) 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, inflate, depress, or cause fluctuations in, the market price of any securities.

(3) Without affecting the generality of subsection (1), a person who:
(a) effects, takes part in, is concerned in or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a

¹ Section 6 of the *Securities Industry (Application of Laws) Act 1981 (Vic)* provided that subject to this Act the provisions of the *Securities Industry Act 1980 (Cth)* applied as laws of Victoria.

10 transaction that does not involve any change in the beneficial ownership of the securities;

(b) makes or causes to be made an offer to sell any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, an offer to purchase the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price; or

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(c) makes or causes to be made an offer to purchase any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, 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;

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

(4) In a prosecution of a person for an act referred to in subsection (3), it is a defence if the defendant establishes that the purpose or purposes for which he 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.

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(5) 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 a person associated with the first-mentioned person in relation to those securities, has an interest in the securities after the purchase or sale.

(6) In a prosecution for an offence against subsection (2) 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 the defendant establishes that the purpose or purposes for which he purchased or sold the securities 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.

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(7) The reference in paragraph (3) (a) to a transaction of sale or purchase of securities includes:

- (a) a reference to the making of an offer to sell or purchase 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 purchase securities

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10 ***Futures Industry Act 1986 (Cth)***²

Futures market manipulation

130. A person shall not, whether within or outside the Territory, take part in, be concerned in or carry out, whether directly or indirectly:

(a) a transaction (whether or not the transaction is a dealing in a futures contract) that has, is intended to have or is likely to have;
or

20 (b) 2 or more transactions (whether or not any of the transactions is a dealing in a futures contract) that have, are intended to have or are likely to have;

the effect of:

(c) creating an artificial price for dealing in futures contracts on a futures market within the Territory; or

30 (d) maintaining at a level that is artificial (whether or not that level was previously artificial) a price for dealing in futures contracts on a futures market within the Territory.

False trading and market rigging

131. (1) A person shall not, whether within or outside the Territory, create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active dealing in futures contracts on a futures market within the Territory or a false or misleading appearance with respect to the market for, or the price of dealing in, futures contracts on a futures market within the Territory.

40 (2) A person shall not, by any fictitious or artificial transactions or devices, maintain, inflate, depress or cause fluctuations in, the price for dealing in futures contracts on a futures market within the Territory.

(3) For the purpose of determining whether a transaction is fictitious or artificial within the meaning of subsection (2), the fact that the transaction is, or was at any time, intended by the parties who entered into the transaction to have effect according to its terms shall not be conclusive.

² Section 5 of the *Futures Industry (Application of Laws) Act 1986 (Vic)* provided that subject to the Act the provisions of the *Futures Industry Act 1980 (Cth)* applied as laws of Victoria.

Section 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.

Section 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;

³ Sections 997, 998, 1259 and 1260 were reproduced in the *Corporations Act 2001* and were in operation under that Act between 15 July 2001, on the commencement of that Act, until 11 March 2002 when the provisions were repealed and replaced with sections 1041A, B and C.

(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.

Section 1259. Futures market manipulation

A person must not, in this jurisdiction or elsewhere, take part in, be concerned in, or carry out, whether directly or indirectly:

(a) a transaction (whether a dealing in a futures contract or not) that has, is intended to have, or is likely to have; or

(b) 2 or more transactions (whether any of them is a dealing in a futures contract or not) that have, are intended to have, or are likely to have: the effect of:

(c) creating an artificial price for dealings in futures contracts on a futures market in this jurisdiction; or

(d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for dealings in futures contracts on a futures market in this jurisdiction.

Section 1260. False trading and market rigging

(1) A person must not, in this jurisdiction or elsewhere, create, cause to be created, or do anything that is calculated to create, a false or misleading appearance:

(a) of active dealing in futures contracts on a futures market in this jurisdiction; or

(b) with respect to the market for, or the price for dealings in, futures contracts on a futures market in this jurisdiction.

(2) A person must not, in this jurisdiction or elsewhere, by any fictitious or artificial transactions or devices, maintain, inflate, depress, or cause fluctuations in, the price for dealings in futures contracts on a futures market in this jurisdiction.

(3) In determining whether a transaction is fictitious or artificial for the purposes of subsection (2), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms is not conclusive.