IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M73 of 2012

BETWEEN

Director of Public Prosecutions (Cth)

Applicant

10

JM

Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

Part I – Certification

1. These submissions are in a form suitable for publication on the internet.

20 ### Part II – Issues

2. The issue raised by the notice of cross-appeal is logically anterior to the issues presented by the application for special leave to appeal. In the event that the cross-appeal is unsuccessful, the following two issues would arise on the appeal:

   (a) did the Court of Appeal err in deciding that the expression "artificial price" in s 1041A of the *Corporations Act 2001* (Cth) (***Act***) is used in the sense of a term having a legal signification (as opposed to its sense in ordinary English or some non-legal technical sense); and

   (b) did the Court of Appeal err in deciding that the legal signification of the expression "artificial price" in s 1041A is of market manipulation by conduct of
30 the kind typified by American jurisprudential conceptions of "cornering" and "squeezing"?

Part III – Section 78B

3. On 21 December 2012, the respondent (***the accused***) gave notices to the Attorneys-General of the Commonwealth, States and Territories that the proceeding involves a

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matter arising under the Constitution or involving its interpretation. That matter arises from the notice of cross-appeal. The accused considers that no further notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV – Facts

4. The facts set out by the applicant (***the Crown***) in Part V of its submissions (***AS***) and in its chronology are accepted, with the following qualifications and additions:

   (a) AS [7] refers to 41 charges comprising two conspiracy charges and 39 substantive charges. It should be noted that, prior to 2 September 2011, the accused had foreshadowed an application to dismiss the conspiracy charges pursuant to s 11.5(6) of the *Criminal Code* or alternatively to have the conspiracy charges tried separately from the other charges pursuant to s 195 of the *Criminal Procedure Act 2009* (Vic).[1]

   (b) The summary of the allegations in AS [8] does not delineate between the conspiracy and other charges and is generally an imprecise summary of the indictment. The statement in the fifth line that the "*transactions were entered into with the purpose ...*" does not make clear who is alleged to have entered into the transactions and to whose purpose reference is being made.

   (c) As to AS [9], the last sentence conveys the incorrect impression that, during preliminary hearings before the primary judge, the accused contended that "*to determine whether the price is artificial does not depend on the intention of the participant but requires close economic analysis*". The accused had not made any such contention prior to the reservation of questions for determination by the Court of Appeal on the case stated. Submissions along these lines were first made by the accused in his reply submissions dated 6 December 2011 before the Court of Appeal.

   (d) As to AS [10], the statement that "*initially both parties agreed to that course*" is incomplete and potentially misleading. The accused by his then Senior Counsel did initially acknowledge that he would "*[a]s a matter of practical reality*" have preferred a reference to the Court of Appeal.[2] However, immediately upon the primary judge raising the possibility of referring the question to the Court of Appeal on a case stated, the accused expressed the concern that it would be a request for an advisory opinion.[3] This was confirmed by letter to the Crown dated 16 September 2011, citing a line of authorities including *R v Assange* [1997] 2 VR 247 and *Bass v Perpetual Trustee Co Ltd* (1999) 198 CLR 334.[4] The primary judge was in no doubt that the accused objected on advisory opinion grounds: see J at [7], [8], [15]-[17].

   (e) The accused refers further to the summary of the facts set out in paragraphs 6 to 23 of his submissions on the notice of cross-appeal dated 25 January 2013.

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1 See the judgment of the primary judge (*J*) at [1] in Annexure B.

2 T18.13-19.22 of the transcript on the hearing before Weinberg JA (2 September 2011).

3 T3.6-16 of the transcript on the hearing before Weinberg JA (2 September 2011).

4 Exhibit AB-3 to the affidavit of Andrew Burnett sworn 16 September 2011.

Part V – Applicable provisions

5. The accused accepts the Crown's statement of applicable provisions.

Part VI – Argument

6. The accused's primary argument is that the Court of Appeal should not have restated the first reserved question and should simply have decided that all three questions reserved by the primary judge were "*inappropriate to answer*": see the accused's submissions on the notice of cross-appeal dated 25 January 2013.

7. However, in the event that this Court decides that the Court of Appeal was correct to restate the first question in the terms that it did, the accused submits that the answer to the restated question given by Nettle and Hansen JJA was correct.

The prohibition in s 1041A

8. Section 1041A of the Act prohibits (and at all relevant times prohibited) the taking part in or carrying out of transactions having or likely to have the effect of creating or maintaining an artificial price for trading in financial products. "Financial product" is defined in Div 3 of Pt 7.1 of the Act broadly so as to include both securities and futures.

9. Prior to the introduction of s 1041A in 2002,[5] there had in Australia been separate statutory prohibitions of market manipulation in respect of securities and futures:

   (a) section 997 of the Act, which related to securities;[6] and

   (b) section 1259 of the Act, which related to futures contracts[7] and the futures market.[8]

10. With the introduction of s 1041A of the Act, those prohibitions were repealed. Deliberate legislative policy decisions were taken to incorporate (or not incorporate) various elements of each of the provisions in formulating the new prohibition.

11. It is important to consider the statutory history in relation to both securities and futures (under ss 997 and 1259 of the Act and their predecessors) in order properly to understand the scope, purpose and meaning of s 1041A.

12. In so doing, two significant features of the statutory history will be observed:

   (a) first, the expression "artificial price" was always understood to be a technical concept requiring market analysis; and

   (b) second, predecessors to s 1041A prohibited not only transactions with the proscribed "artificial price" effect or likely effect but also transactions merely *intended* to have the proscribed effect (whereas s 1041A is narrower in scope, not extending to prohibit transactions which may have been *intended to have*, but in fact do not have and are not likely to have, the proscribed effect).

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5 By the *Financial Services Reform Act 2001* (Cth), Act No. 122 of 2001, commencing on 11 March 2002.

6 "Securities" was defined in s 92 of the Act to mean, generally speaking, shares, debentures and options.

7 "Futures contract" was defined in ss 9 and 72 of the Act essentially as an agreement to buy or sell a financial commodity at some future date at the price prevailing at the time of the agreement.

8 "Futures market" was defined in s 9 of the Act to mean "*a market, exchange or other place at which, or a facility by means of which, futures contracts are regularly acquired or disposed of*".

Securities legislation history

13. Initially, Australian securities legislation was State-based.

14. Subsection 71(1) of the *Securities Industry Act 1970* (Vic)[9] provided as follows:

> *Market rigging transactions*
>
> *71(1) A person shall not effect, take part in, be concerned in or carry out, either directly or indirectly, any transactions 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.*

15. That provision was subsequently repealed and replaced by a similar provision in s 123 of the *Securities Industry Act 1980* (Cth) which applied in each Australian State and Territory and, like its State-based predecessors, concerned only securities and not futures:

> *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 others to purchase or subscribe for securities of the body corporate or of a related body corporate.*

16. Subsections 123(2) and 123(3) were in equivalent terms, save that they respectively concerned the lowering of the price of securities with intent to induce others to sell and maintaining or stabilising the price of securities with intent to induce others to sell, purchase or subscribe for securities.

17. Section 123 of the *Securities Industry Act 1980* (Cth) was in 1991 repealed and replaced by s 997 of the *Corporations Act 1989* (Cth) (***Law***), which provided as follows:

> *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 corporation, being transactions that have, or are likely to have, the effect of increasing the price of securities of the corporation on a stock market, with intention to induce other persons to buy or subscribe for securities of the corporation or of a related body corporate.*

18. Subsections 997(4) and 997(7) of the Law were in equivalent terms, save that they respectively concerned reducing the price of securities with intent to induce others to sell and maintaining or stabilising the price of securities with intent to induce others to sell, buy or subscribe for securities.

19. With the commencement of the Act in 2001, s 997 was re-enacted in the same terms.

20. It should be noted that the expression "artificial price" did not appear in any of the legislation historically governing securities market misconduct.

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9 Which was in identical terms to equivalent provisions in New South Wales and other States.

21. Instead, the historical legislation relevantly prohibited the increasing, decreasing, maintaining or stabilising the price of securities for the purpose, or with the intention, of inducing others to buy, sell or subscribe for securities.

Futures legislation history

22. The concept of "artificial price" emerged first in futures market legislation. In that context, the concept was always a technical one, requiring analysis of market and market power.

23. The starting point was s 130 of the *Futures Industry Act 1986* (Cth) (***FIA***):

> *Futures market manipulation*
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> *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*
>
> *(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*
>
> *(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.*

24. The Explanatory Memorandum to the Bill which introduced the FIA was circulated in 1986 by authority of the then Deputy Prime Minister and Attorney-General, the Honourable Lionel Bowen, MP. The Explanatory Memorandum stated that s 130 of the FIA would prohibit "*a person from effecting or taking part in one or more transactions (whether involving futures contracts or not) that have or are intended to have or are likely to have the effect of creating an artificial price, or maintaining at an artificial level the price, for dealing in futures contracts on a futures market within the Territory*".[10] It went on to make clear that the section would be concerned with the exploitation of market power having (or intending to have or likely to have) an effect on futures prices by the manipulation of supply and demand:[11]

> *The two main forms of manipulation are 'squeezing' and 'cornering' which involve attempts to manipulate futures prices by 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.*

25. In other words, the concept of "artificial price" introduced and employed in s 130 of the FIA was directed towards prohibiting manipulation of underlying market supply and demand as understood and analysed in economic theory, rather than any lay notion of artificiality.[12]

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10 Explanatory Memorandum for the Futures Industry Bill 1985 at [284].

11 Ibid at [285].

12 This was noted, for example, by Mr David Ruthledge, the then executive director of Hill Samuel Australia Limited in a paper published in 1985. In his paper "*Is there a need for greater regulation of the*

26. Section 130 of the FIA was in 1991 repealed and replaced by s 1259 of the Law, which provided as follows:

> *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 or on a futures market in this jurisdiction.*

27. The Explanatory Memorandum to the Corporations Bill 1988 circulated by authority of the Honourable Lionel Bowen, MP noted (at [3741]) that s 1259 of the Law was to be "*based on*" s 130 of the FIA.

28. The technical nature of the concept of "artificial price" (requiring economic analysis of market power or dominance) in s 1259 of the Law—as in its predecessor, s 130 of the FIA—was noted by commentators at that time. For example, the following observations upon s 1259 were made in JS Currie, *Australian Futures Regulation*, 1994 (at p 223):

Australian Future Industry and does the draft bill meet this need?", Mr Rutledge made the following comments in respect of the then proposed s 130 of the FIA (at pp 15-16, 20):

> <u>*Monopoly*</u>
> *The possibility that a futures market participant, or several acting in concert, might acquire a dominant market position and exercise this market power to create, to their own advantage, an artificial price in the futures market has long been a concern of governments, exchanges and traders. Such monopoly power is easier to acquire in future markets than in many other markets because of the highly leveraged basis on which futures trading takes place and the ready access which futures markets offer. Monopolistic power has the potential to impair the price discovery function of future markets by sending distorted price signals to producers, consumers and other market participants and also to reduce their effectiveness as a hedging medium by distorting relationships between physical and futures prices.*
>
> ...
>
> *I would suggest that the objectives of any regulatory scheme for the futures industry should have the two fold objective of safeguarding against the acquisition of a dominant market position which may be used to create artificial prices, on the one hand, and implementing adequate consumer protections and prudential controls, on the other.*
>
> ...
>
> *With regard to anti-manipulative provisions the Bill is far less expansive. Clause 130 seeks to prohibit market manipulation by proscribing the effecting by or taking part in of two or more transactions that have the effect of creating an artificial futures price. Manipulative activity is extraordinarily difficult to define. Whilst the Clause 130 definition is probably the best that could be achieved, an offence under this provision will realistically, be difficult to establish. Nevertheless it is important that the legislation contain such a provision in order to restrain blatant attempts at manipulation and to provide statutory support for exchanges in their own policing activities.*

Market manipulation

The statutory description of the offence apart, 'manipulation' has been understood in the USA to involve three similar but distinct market practices, as set out below.

Price manipulation

This connotes the elimination of effective price competition in a commodity market or a futures market, or both, through the domination of either supply or demand - that is, the obtaining by one or more traders of economic power within the relevant market which is disproportionate to that of other traders. This position of dominance is used (and in the USA it appears that it must be intentionally used) to produce artificially high or low prices.

Cornering

A 'corner' has a meaning similar to that of a 'squeeze', but is often restricted to the controlling or domination of the available supply of a physical commodity for non-commercial purposes (that is, attempts at concentration of supply having the purpose of influencing market prices for the physical commodity, or for a futures contract based on that commodity). For example, supply is cornered if it is captured by those holding long positions for the purpose of making the commodity unavailable to those holding short positions for delivery - which means that the 'shorts' will be forced to settle their futures contract with the 'longs' at inflated prices. Conversely, the shorts can corner if they come to control the supply of the commodity and wish to depress futures prices through massive deliveries of the commodity into the futures market. However, this is more rare than cornering by the longs. In the case of Cargill, Inc. v Hardin, *the United States Eighth Circuit Court of Appeals, whilst shying away from a formal definition, said:*

> *In its most extreme form, a corner amounts to nearly a monopoly of a cash commodity, coupled with ownership of long futures contracts in excess of the amount of that commodity, so that shorts—who because of the monopoly cannot obtain the cash commodity to deliver on their contracts—are forced to offset their contract [sic] with the long at a price which he dictates, which of course is as high as he can prudently make it.*

Squeezing

McBride Johnson and Hazen see a squeeze as having all of the attributes of price manipulations save one. That is the scarcity of the physical (or cash) commodity exists through no active effort of those holding long positions, but it is due to other factors such as drought, heavy exports, forwarding by commercial users, or transport interruptions. The longs, however, take advantage of this situation, and hold out for an arbitrary and artificially high prices.

(Emphasis added)

29. Similarly, the learned authors of Australian Corporation Law Principles and Practice, Butterworths in 1999 noted (at [8.1.0520]):

> *What is an "artificial price" will be a major issue in any action brought under the Corporations Law. Section 1259 is the provision prohibiting what is generally referred to as futures market manipulation.*

"Manipulation" of the futures market is broadly defined as the exploitation of a temporary distortion in the price of a commodity. Commodities in the present case would also mean financial instruments such as bank accepted bills. Dr Chaikin notes that:

This distortion may take two forms: a 'long' squeeze or a 'short' squeeze. The 'long' squeeze results when a supply shortage of a commodity is created at the end of a futures contract delivery period; the 'short' squeeze represents an excess of supply. The supply imbalance may develop from natural market factors, or it may result because a trader has managed to control a large portion of the available cash supply as well as a substantial number of the outstanding futures contracts. In either event, the trader then attempts to profit on his dominant position in the futures market by insisting on making or taking delivery. Normally, open contracts on an exchange are liquidated at the going price, without the underlying commodity actually changing hands. By insisting on delivery, the long squeeze operator can use his dominant position to force short traders who are unprepared to deliver to pay an arbitrarily high price in order to liquidate their contracts. If the squeezer has also cornered the available supply, he may be able to force his victim to purchase the commodity from him in order to redeliver it in satisfaction of his contractual obligation.

The short squeezer capitalises on the fact that most long traders have neither the intention nor the capacity to accept delivery. The long trader must then liquidate his position at a price that is less than the real market value of the commodity, or take delivery and try to resell. Often, he will end up reselling to the trader who made delivery. The trader who succeeds at a short squeeze may incur a small loss when he moves supplies into deliverable position, but he expects to more than recoup his loss after the price of the future (which he has sold short) plummets.

(Emphasis added)

30. Section 1259 was re-enacted in the same terms in the Act in 2001.

Section 1041A was based on the futures legislation

31. As was noted in paragraphs 9 and 10 above, ss 997 and 1259 of the Act were replaced by s 1041A of the Act. Whereas previously, different provisions had governed market conduct in respect of securities and futures, the new prohibition was to apply consistently to conduct in respect of both.

32. A deliberate choice was made for s 1041A of the Act to employ the language of "artificial price" from s 1259 of the Act (and its predecessor, s 130 of the FIA) rather than the language of s 997 of the Act and its predecessors which focussed upon a proscribed intention of inducing others to buy, sell or subscribe for securities.[13] This was confirmed by extrinsic materials and commentary at the time:

(a) In February 2000 the then Minister for Financial Services and Regulation, the Honourable Joe Hockey MP issued commentary on the draft provisions of the proposed Financial Services Reform Bill 2001 (***Bill***), including (at p 188):

11.8 Sections 997 and 1259 will be replaced by a new provision based on section 1259, but applying to all financial products traded on a financial products

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[13] Cf. *Baini v The Queen* [2012] HCA 59 at [14] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

market. The new provision will be a civil penalty provision so that contravention will attract both a civil penalty and, if the requisite intention is established, criminal consequences.

11.9 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'.

11.10 Section 997 currently contains an 'intention' element. A civil contravention of the new provision will not require that element of intention to be established. Criminal prosecutions will flow from a contravention only if the requisite intention is proved.

(b) The Explanatory Memorandum to the Bill stated (at pp 16, 168):

Market misconduct

Problems/options

2.74 Existing market misconduct provisions cover market manipulation, false trading and market rigging, dissemination of information about illegal transactions, false and misleading statements, and fraudulently inducing persons to deal. There are currently two sets of provisions - one for securities and one for futures contracts. As discussed above, the FSR Bill ends the legislative distinction between securities and futures contracts. Moreover, the two sets of provisions were drafted at different times and are inconsistent in some respects.

...

Market manipulation

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.

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

(c) Paragraphs 15.13 and 15.14 (at pp 175-176) of the Revised Explanatory Memorandum to the Bill were to the identical effect of paragraphs 15.12 and 15.13 of the Explanatory Memorandum.[14]

(d) Dr Vivien R Goldwasser analysed the proposed replacement of ss 997 and 1259 with a single provision, including an examination of what was and would be required to establish an "artificial price", in her paper "*The Regulation of Stock Market Manipulation—A Blue-Print for Reform*", Australian Journal of Corporate Law 9 (1998) 1 (at p 43):

On the other hand it must be conceded that the anti-manipulation proposal does

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[14] Only the word "*proposed*", which had preceded "*Corporations Act*" in para 15.12 of the Explanatory Memorandum, was omitted from para 15.13 of the Revised Explanatory Memorandum (as, by the date of circulation of the Revised Explanatory Memorandum, the Act had been enacted).

not pretend to overcome all existing difficulties in enforcing a provision against market manipulation and, in particular, it does not overcome the significant, but not insurmountable, difficulties in establishing artificial market price. Indeed the essence of the anti-manipulation provision is the creation (dishonestly or fraudulently; or alternatively knowingly) of an artificial market price with respect to the securities.[15] *Artificial market price is an economic issue which will require (as at present) expert evidence in each individual case. Once artificial price is established, it must then be proved that the artificial price was caused by the alleged manipulator, as opposed to being caused by some external influence. With so many factors affecting stock prices, the difficulty facing regulators in establishing that the market manipulator was responsible for affecting the price of securities acts as a break and filter on the scope of regulatory action.*

33. In short, the expression "artificial price" was always understood to be a technical concept requiring economic evidence analysing exploitation of market power. This construction is discernible from the first appearance of the expression in s 130 of the FIA consistently through to the present.

34. Section 1041A of the Act is to be construed accordingly, rather than by reference to lay notions of artificiality or subjective purposes or intentions.

United States jurisprudence confirms that "artificial price" is a technical concept

35. United States jurisprudence confirms that "artificial price" is a technical concept requiring economic market analysis.

36. In *General Foods Corp. v Brannan* 170 F.2d 220 at 231(7th Cir. 1948), the United States Court of Appeals, Seventh Circuit said:

> *We are favoured 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'.*

37. This definition was subsequently approved by the United States Court of Appeals, Eighth Circuit in the leading decision of *Cargill, Inc. v Hardin* 452 F.2d 1154 at 1163 (8th Cir. 1971). Moreover, the Eighth Circuit in *Cargill, Inc.* confirmed that:

    (a) the legislative history suggested that the prohibition of price manipulation was directed towards "squeezes" and "corners" amounting "*to nearly a monopoly*" (at 1161-1162);

    (b) a "squeeze" cannot be successfully executed without sufficient or dominant control of the market so as to enable the exaction of an arbitrary or artificial price (at 1164);

    (c) economic analysis is required (at 1166); and

    (d) it is relevant to consider the economic principles of market and monopoly power in the "*closely related area of antitrust regulation under the Sherman Act*" (at 1166).

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[15] Dr Goldwasser added in a footnote here that "*The creation or maintenance of an artificial price lies at the heart of s 1259 of the Corporations Law, which deals with futures market manipulation*".

38. Likewise, in *In re Indiana Farm Bureau Coop. Ass'n, Inc.* [1982-1984 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 21,796 at 27,285 (CFTC Dec. 17, 1982), it was said that "*[t]he acquisition of market dominance is the hallmark of the long manipulative squeeze*".

39. Commentators in the United States explain the concepts of "price manipulation" and "artificial price" in similar terms. For example, in "*Commodities Regulation*", (2nd Ed, Boston Little, Brown 1989) McBride Johnson and Hazen define "price manipulation" (at p 10) as:

> *the elimination of effective price competition in a market for cash commodities or futures contracts (or both) through the domination of either supply or demand, and the exercise of that domination intentionally to produce artificially high or low prices. Price manipulation is kindred to the exercise of monopoly power to dictate prices that would be unachievable in a truly competitive environment.*

40. McBride Johnson and Hazen also observe (at pp 32-34):

> *Having the ability to create artificial prices is of legal significance in finding an actual manipulation only if it results in the creation of artificial prices [citing* Great Western Food Distrib., Inc. v Brannan *201 F.2d 476 (7th Cir. 1953)]. Thus, even after the ability issue has been resolved against the accused, it is necessary to make a largely economic analysis of whether the futures or cash commodity over which the accused has dominance reached artificial prices at that time.*
>
> ...
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> *The importance of offering proof of price artificiality in a manipulation case is vividly illustrated by* General Foods Corp. v Brannan *[170 F.2d 220 at 231(7th Cir. 1948)] where the government failed to present expert evidence or otherwise to establish that the price of rye or rye futures was artificial.*

Applicability of "artificial price" analysis to securities

41. Section 1041A of the Act is a single provision applying to transactions having or likely to have the proscribed artificial price effect on futures trading or securities trading.[16] As is evident from the statutory history traversed above, the concepts of "cornering" and "squeezing" emerged from the commodity futures trading context, in which the potential for an artificial price effect is most readily apparent.[17]

42. Nevertheless, the principles may be transposed applicably to the context of securities trading. Particularly is that so once regard is had to the practice of short-selling securities,[18] the economic characteristics and effect of which is similar to trading in

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16 See paragraph 8 above.

17 See BE Kozinn, "The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debacle?" (2001) 69 *Fordham Law Review* 243 at 256-7.

18 The Crown (at AS [35]) refers to legislative restrictions on short-selling of securities (in ss 1020B and 846 of the Act) which it says prevent the risk of settlement failure that might bring about a greater risk of cornering or squeezing a market for shares. However, s 846 is not relevant because it was repealed upon the introduction of ss 1041A and 1020B, from which time short-selling of securities was permitted. Further, at the time of the introduction of ss 1041A and 1020B, s 1020B was not a blanket prohibition upon short-selling. There were at that time a number of exceptions to the prohibition in s1020B(2). See Act No. 122 of 2001 (effective 11 March 2002). "Cornering" in relation to shares is specifically referred to, for example, in *Australian Corporation Law Principles & Practice* (LexisNexis, loose-leaf service),

options or futures based upon underlying securities (cf. commodities). A contract for the short-sale of securities has an "*end-point*", just as does a commodity futures contract.[19]

43. Further, the technical definition of artificial price may have application in a securities market even outside the context of short-selling. The definition requires exploitation of market power in manipulation of underlying market supply and demand. This is "*typified by*"[20] cornering and squeezing (which are the "*two main forms of manipulation*").[21] But full-scale cornering or squeezing of a market is not the only means of creating an artificial price. Market power in a securities market may be attained and manipulated even within the legislative restrictions relating to equity holdings above particular levels.[22]

44. It is thus wrong to contend[23] that the technical definition of artificial price "*lacks utility*", or precludes s 1041A from having "*any practical use*", in the regulation of equity markets.

The construction of Nettle and Hansen JJA was correct

45. Consistently with the foregoing, Nettle and Hansen JJA concluded that:[24]

    (a) the expression "artificial price" in s 1041A is used in the sense of a term having a legal signification; and

    (b) its legal signification is of market manipulation by conduct of the kind typified by American jurisprudential conceptions of market "cornering" and "squeezing".

46. Further, the majority held[25] that the question of whether conduct amounts to cornering and squeezing is largely one of fact and degree involving determinations of whether the requisite domination or monopoly exists and whether an artificial price is caused by the exercise of that power.

47. The Crown does not challenge the first part of the conclusion set out in paragraph 45 above, viz. that the expression has a legal signification as opposed to an ordinary (or non-legal technical) meaning. Indeed, were such a challenge to be open, the consequential question of interpretation might not be a question of law capable of determination by the Court of Appeal or this Court under Div 5, Pt 6.3 of the *Criminal*

"Financial Services and Markets/Liability for Misconduct in Financial Product Transactions/Short selling", at [7.13.0295].

19 Cf. AS [32].

20 See the judgment of the Court of Appeal below (***CA***) at [330], [331], [334], [335], [369] per Nettle and Hansen JJA. Cf. AS [43].

21 Explanatory Memorandum for the Futures Industry Bill 1985 at [285].

22 Cf. AS [34].

23 See AS [31], [47], [69].

24 CA at [309], [333], [335].

25 CA at [333] per Nettle and Hansen JJA.

Procedure Act 2009 (Vic).[26] The accused submits that the conclusion that the expression has a legal signification was correct.[27]

48. Their Honours engaged in a careful consideration of the statutory text and context, including past enactments and the "mischief" at which the relevant predecessor provision was directed.[28] This approach was entirely consistent with orthodox principles of statutory construction as elucidated by this Court.[29] Their Honours rightly identified that the first proscription of market manipulation to speak in terms of "artificial price" was s 130 of the FIA[30] and referred to the passages from the relevant Explanatory Memorandum extracted in paragraph 24 above.[31] Nettle and Hansen JJA observed that the Explanatory Memorandum did not otherwise define "squeezing" and "cornering" but that the brief explanation it did contain accorded with the understanding of their meaning as reflected in American case law including *Cargill, Inc. v Hardin.*[32]

49. Tracing the statutory developments and extrinsic materials through to the current legislation, Nettle and Hansen JJA noted that "*[t]he proscription of market manipulation creating an 'artificial price' (of the kind typified by 'cornering' and 'squeezing') which began life as s 130 of the* Futures Industry Act 1986 *was restated in almost identical terms as s 1041A of the* Corporations Act 2001 *(Cth)*".[33] Accordingly, it was proper for their Honours to have had regard to materials bearing upon the interpretation of s 130 of the FIA in construing s 1041A.[34]

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26 See *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-397 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ.

27 See Pearce & Geddes, *Statutory Interpretation in Australia*, 7th Ed, [4.13]-[4.19] and Bennion, *Bennion on Statutory Interpretation* (5th Ed, 2008), Sections 365-368, particularly at pp 1197-1199, 1203 and 1207-1209.

28 See CA at [310]-[334] per Nettle and Hansen JJA. This Court has engaged in similar analysis, for example, in *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 256-260 and 262-263 per McHugh, Gummow, Hayne and Heydon JJ. See further Bennion, *Bennion on Statutory Interpretation* (5th Ed, 2008), Sections 208-211, particularly at pp 598-602 and 607. The reference by the Crown to *Conway v The Queen* (2002) 209 CLR 203 at 207 [5] per Gaudron ACJ, McHugh, Hayne and Callinan JJ is not to the contrary. Their Honours there said "*[r]esort to legal history to explain a statutory enactment evinces no distaste for construing the statutory language*". Cf. AS [46].

29 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ and cases there cited. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71] and 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.

30 CA at [322] per Nettle and Hansen JJA.

31 CA at [323] per Nettle and Hansen JJA, citing the Explanatory Memorandum for the Futures Industry Bill 1985 at [284]-[285]. The reference in the Explanatory Memorandum to "*[t]he two main forms of manipulation*" being squeezing and cornering is consistent with their Honours' view that s 1041A is concerned with market manipulation of the kind "*typified by*" cornering and squeezing: see, eg. CA at [330], [331], [334], [335], [369] per Nettle and Hansen JJA. Cf. AS [43].

32 452 F.2d 1154 (8th Cir. 1971). See CA at [324] per Nettle and Hansen JJA. See, similarly, CA at [325] per Nettle and Hansen JJA, referring to McBride Johnson and Hazen, *Commodities Regulation* 2nd Ed, Boston Little, Brown 1989.

33 CA at [328] per Nettle and Hansen JJA. The intermediate step in futures legislation between s 130 of the *Futures Industry Act 1986* (Cth) and s 1041A of the Act was s 1259 of the *Corporations Act 1989* (Cth). Their Honours had previously considered the early securities legislation, from the State-based legislative schemes through to the *Corporations Act 1989* (Cth). See CA at [310]-[317] per Nettle and Hansen JJA.

34 Cf. AS [41] which suggests the contrary, referring to s 130 of the *Futures Industry Act 1986* (Cth) as a "*superseded provision relevant only to trading in futures contracts and which had never been used in a prosecution nor fallen for judicial consideration*".

50. The conclusion of the majority that "artificial price" in s 1041A is a term of legal signification of market manipulation by conduct of the kind typified by American jurisprudential conceptions of "cornering" and "squeezing" was correct.

The Crown's construction should be rejected

51. The Crown contends, in reliance on *Australian Securities and Investments Commission v Soust*,[35] that the expression "artificial price" in s 1041A means:[36]

> *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.*

52. It is convenient to note at the outset that this construction was rejected by the Chief Justice, as well as by Nettle and Hansen JJA. The Chief Justice said: "*My conclusions as to artificial price are different from those contended by the Crown*".[37]

53. The assertion by the Crown that her Honour "*[i]n essence...adopted*"[38] or reached a "*conclusion... remarkably similar to*"[39] the *Soust* construction does not withstand scrutiny. Like the majority, Warren CJ held that ss 1041A and 1041B of the Act are to be contrasted rather than to be construed as being co-extensive.[40] Her Honour's conclusion was that a sole or dominant purpose of creating or maintaining a particular price "*could lead to the creation of an artificial price*" but was not sufficient of itself to constitute an artificial price within the meaning of s 1041A.[41] For that reason, her Honour would have answered Question 1 as originally stated with a proviso for which the Crown did not and does not contend.[42]

54. The burden of the Crown's argument is that an "artificial price" effect necessarily arises in circumstances where the purpose of one of the parties to the transaction is to create or maintain a particular price for a financial product.[43] No analysis or explanation is provided as to why an "artificial price" *effect* (or likely effect) should in all cases be inferred from a subjective *purpose* or intention. Even if, in some circumstances, it might be possible to infer effect from purpose, any such inference must depend on the facts of the case. That a party to a transaction may have had the intention or purpose of creating or maintaining a particular price is not sufficient in all cases to establish that an artificial price was in fact created or maintained. For instance, a transaction entered into by one party for the impugned purpose may have been a small and isolated one, and the

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35 (2010) 183 FCR 21 (***Soust***). The Crown relies upon *Soust* for example in AS [44], [46], [52], [55] and [78] and the order sought by the Crown in its Amended Draft Notice of Appeal filed 25 January 2013 (***Amended Draft Notice of Appeal***) at [3.2] paraphrases the reasoning in *Soust* at 41-42 [83], 43 [90], 44 [93].

36 See Amended Draft Notice of Appeal at [3.2].

37 CA at [229] (and see also at [182]) per Warren CJ.

38 AS [18].

39 AS [37].

40 CA at [246], [249], [250], [253] per Warren CJ.

41 CA at [257]-[260] per Warren CJ.

42 CA at [276] per Warren CJ. Cf. AS [82].

43 See the Crown's Amended Draft Notice of Appeal at [3.2].

price at which it was executed may have been no different from what the market price would have been even absent that purpose.

55. Moreover, to argue that an "artificial price" effect (or likely effect) is to be inferred from a subjective purpose or intention is to ignore the apparently deliberate legislative decision to narrow the scope of s 1041A as compared to its (futures) predecessors by omitting a proscribed *intention* alternative from the prohibition. As has been shown, those predecessors to s 1041A[44] prohibited not only transactions with the proscribed effect or likely effect but also transactions merely intended to have the proscribed effect. Section 1041A of the Act by contrast is narrower in its terms, as the language of the section does not extend to prohibit transactions which may have been intended to have, but in fact do not have and are not likely to have, the proscribed effect.[45] In the civil context, intention is therefore not relevant. In order to establish an offence against s 1041A, the Crown must prove an intention element, but that is distinct from the "artificial price" element.[46] The intention element is subjective whereas the "artificial price" element must be objective.[47]

56. A construction encompassing cornering and squeezing but also accommodating the Crown's contention was specifically considered and rejected by the majority, at [334]:

> *We do not overlook the possibility that Parliament may have used the term 'artificial price' in s 1041A in a sense sufficiently protean to cover both market manipulation of the kind typified by 'cornering' and 'squeezing' and also one or more of the kinds of false trading, market rigging and artificial setting and maintenance of prices which were once the province of ss 70, 71 and 72 of the 1970 Act, and more lately its legislative successors in the form of s 109 of the* Securities Industry Act *1975, ss 123 and 124 of the* Securities Industry Act 1980, *s 131 of the* Futures Industry Act [1986] *and ss 997 and 998 of the* Corporations Act 1989, *and now, therefore, ss 1041B and 1041C of the* Corporations Act. *But we reject that as a realistic possibility. Given the history of the legislation to which we have referred, and because Parliament has specifically provided in ss 1041B and 1041C for churning and price rigging of the kinds previously dealt with in ss 70, 71 and 72 of the 1970 Act, s 109 of the 1975 Act and ss 997 and 998 of the 1989 Act, the presumption of statutory interpretation, expressed in the*

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44 Section 130 of the FIA, s 1259 of the Law and s 1259 of the Act.

45 Cf. The observations in CA at [230]-[232] per Warren CJ regarding the attempt provision in s 11.1 of the *Criminal Code*. The *Criminal Code* provision of course applies only in a prosecution for a criminal offence against s 1041A and not in the context of a civil contravention against the prohibition. The expression "artificial price" in s 1041A of the Act must have the same meaning regardless of whether or not it is applied in a civil or criminal context. Only the *mens rea* or intention element, and the standards of proof, will vary.

46 The United States prohibition is similarly comprised of separate intention and "artificial price" elements: see *General Foods Corp. v Brannan* 170 F.2d 220 at 231 (7th Cir. 1948), approved by the United States Court of Appeals, Eighth Circuit in the leading decision of *Cargill, Inc. v Hardin* 452 F.2d 1154 at 1163 (8th Cir. 1971). See also the definition of price manipulation in McBride Johnson and Hazen, *Commodities Regulation* 2nd Ed, Boston Little, Brown 1989 at p 10: "*the elimination of effective price competition in a market for cash commodities or futures contracts (or both) through the domination of either supply or demand, and the exercise of that domination intentionally to produce artificially high or low prices*". Contrary to AS [74], this separateness of the intention element in the United States prohibition does not support the construction for which the Crown contends.

47 See the observations on a predecessor to s 1041A of the Act, s 1259 of the Law, in Currie, *Australian Futures Regulation*, 1994, at pp 225, 227.

maxim specialia generalibus derogant implies that s 1041A is directed to different kinds of activities.[48] *The Extrinsic materials support that conclusion.*

57. The Crown contends[49] that the correct historical analysis is that the earlier securities industry market manipulation provisions (viz. s 71(1) of the *Securities Industry Act 1970* (Vic), s 123 of the *Securities Industry Act 1980* (Cth), s 997 of the Law and s 997 of the Act) are "*progenitors*" of s 1041A. But, while s 1041A "*replaced*" both the securities industry and the futures industry market manipulation provisions, the new provision was "*based on*" the futures industry provision (see paragraphs 27 and 32 above). The wording of the securities industry market manipulation provision was different to the wording of the futures industry provision. Thus the type of conduct proscribed by the two provisions was necessarily different. By adopting the futures industry provision wording, Parliament chose to proscribe *that conduct*, albeit in respect of a broader class of financial products.

58. The Crown complains that the judgment below did not refer to the purpose of the Act as a whole or of Chapter 7 of the Act as expressed in s 760A.[50] This Court has cautioned against fixing upon general legislative purposes (such as the purpose of promoting "*fair, orderly and transparent markets for financial products*" referred to in s 760A of the Act) to construe particular expressions or provisions.[51] A proper construction analysis should focus upon the particular provision, its policy and purpose and the mischief it was seeking to remedy.[52]

59. The Crown relies[53] on the proposition that a price reflecting the basic forces of supply and demand working in an open, efficient and well-informed market is to be contrasted with an artificial price resulting from manipulative conduct.[54] That much may be accepted. Where market manipulation occurs with the consequence that the price of shares or commodities is higher or lower than it otherwise would have been, the price is aptly described as "artificial". But that is very different from the construction advanced in the Amended Draft Notice of Appeal, by which the purpose of one party to the transaction is sufficient to deem the price artificial.

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48 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1, 29 (Dixon J); Pearce & Geddes, *Statutory Interpretation in Australia,* 6th Ed, [4.32]. [See also, 7th Ed, [4.38].]

49 AS [39], [56]-[69].

50 AS [26]-[28].

51 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51] per Hayne, Heydon, Crennan and Kiefel JJ, citing *Carr v Western Australia* (2007) 232 CLR 138 at 143 [6] per Gleeson CJ where his Honour said "*the underlying purpose of an* Income Tax Assessment Act *is to raise revenue for government. No one would seriously suggest that s 15AA of the* Acts Interpretation Act *has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue*". A similar observation is to be made in response to the generic assertion by the Crown that s 1041A was "*part of a suite of legislative reforms designed to prevent market manipulation and to promote confidence, fairness and transparency in modern financial markets*" (AS [26]).

52 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

53 AS [72]-[77].

54 See, eg. the quotation set out in AS [72].

60. The Crown relies on *Soust*,[55] which decision in turn relied on the judgment of Mason J (as his Honour then was) in *North v Marra Developments Ltd*.[56] However, the provision considered in that judgment was s 70 of the *Securities Industry Act 1970* (NSW) which is a predecessor to s 1041B, not s 1041A.[57] The careful reading by the majority of the Court of Appeal of the provisions and extrinsic materials in their proper legislative and historical context demonstrated that it is wrong to suggest[58] that the reasoning of Mason J in relation to a false or misleading appearance prohibition is "*equally applicable*"[59] to the artificial price prohibition.[60]

61. It may be acknowledged that there are examples within the criminal law of conduct that is capable of contravening more than one statutory provision and that s 1041J may be relevant to construction of the provisions of Div 2 of Pt 7.10 of the Act.[61] Nevertheless, in construing a statutory provision, a court should apply the relevant principles referred to by Nettle and Hansen JJA at [334] (quoted in paragraph 56 above) and strive to construe the provisions of a statute so that each has some distinct work to do. Partial overlap in the scope of application of provisions would be unremarkable. But it is another thing altogether to propound a construction which covers the conduct which is the intended subject of another prohibition.

62. The Crown has not demonstrated that the construction adopted by the majority "*has seriously constrained the effectiveness of s 1041A as a weapon against stock market manipulation*".[62] There is nothing to prevent the Crown adducing economic evidence of the relevant kind, just as regulators do in other statutory contexts.

63. The reference by the Crown[63] to *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd*[64] is not on point. That was a case, like *North v Marra Developments Ltd*, concerning a predecessor to s 1041B rather than s 1041A.[65]

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55 See footnote 35 above.

56 (1981) 148 CLR 42.

57 At first instance in *North v Marra Developments Ltd* [1978] 2 NSWLR 338, Meares J held that there had been no contravention of s 71 of the *Securities Industry Act 1970* (NSW), but did find a breach of s 70. The New South Wales Court of Appeal agreed that s 70 had been contravened and said that it was not necessary to decide if there had been a breach of s 71: *North v Marra Developments Ltd* [1979] 2 NSWLR 887 at 902. The leading judgment in the High Court was given by Mason J. Stephen and Aickin JJ relevantly agreed (at 47-48) and Murphy and Wilson JJ agreed (at 61). It is clear that the High Court was considering only s 70. The reasoning does not address, or even advert to, any predecessor of s 1041A of the Act.

58 Cf. *Soust* at 43 [90], 44 [93]. The subsequent first instance decision in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2010) 187 FCR 334 at 349-350 [47]-[48] is likewise erroneous. Dowsett J therein was (at 341 [13]) wrong to characterise s 70 of the *Securities Industry Act 1970* as a provision broadly similar to s 1041A of the Act. Note the submissions of the applicant Commission at 345 [23]-[24].

59 *Soust* at 43 [90], 44 [93].

60 See CA at [329]-[333] (and generally at [307]-[328]) per Nettle and Hansen JJA.

61 Cf. AS [79]-[80].

62 Cf. AS [88] (and see, similarly, AS [46]).

63 AS [72].

64 [1998] NSWSC 157; (1998) 28 ACSR 58 at 62-63.

65 In any event, the approach adopted in that case by Priestley JA in dissent is to be preferred. The Court of Appeal of the Supreme Court of New South Wales was considering whether sales of shares deliberately below previous sale prices (for the purposes of a more favourable conversion of convertible preference shares) contravened ss 995 and/or 998 of the Law. Those provisions (like s 1041B of the Act and unlike s 1041A of the Act) concerned misleading or deceptive conduct and false or misleading appearances

Additional points by way of response to the Crown's submissions

64. In AS [20], the Crown contends that the majority gave undue weight to the Explanatory Memorandum to the FIA. For the reasons given in paragraphs 48 and 49 above, it was perfectly correct for the Court of Appeal to have regard and give weight to the "mischief" identified in the Explanatory Memorandum.

65. In AS [27], the Crown contends that the majority did not utilise traditional methods of statutory interpretation. That is not correct. Responding to each bullet point in turn:

- The majority did adopt a purposive construction – in particular, they looked at the Explanatory Memorandum to the Bill that introduced the original provision using the expression "artificial price" to ascertain the mischief at which the provision was directed.

- The majority did consider the context, including the policy and purpose of the provision and, in particular, the mischief it is seeking to remedy.

- The Crown's third bullet point (preference for natural and ordinary meaning) overlooks that the first part of the restated question required the Court of Appeal to determine whether the words were used in their technical legal sense or in their ordinary (or non-legal technical) meaning. The majority decided that the words were used in a technical legal sense and that decision is not challenged (see paragraph 47 above).

- The accused agrees that the majority did not have regard to the consequences of different constructions. In particular, in the absence of any facts, the Court of Appeal could not consider the consequences even in the present case of the construction it adopted. This supports the accused's contentions on the cross-appeal and the contention that this case is an inappropriate vehicle for consideration of the issue presented by the appeal.

- The Crown says the majority failed to heed the warning that historical considerations and extrinsic materials cannot displace the "*clear meaning of the text*". But the construction for which the Crown contends is hardly clear from the text. Indeed, much of the Crown's argument relies on the earlier securities legislation provisions and the proposition that s 1041A was intended to cover all conduct proscribed by either the futures industry predecessor or the securities industry predecessor.

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rather than the technical concept of "artificial price". The relevant sales (as in the present case) were arms' length transactions between parties not suggested to have been colluding. The majority of the Court of Appeal of the Supreme Court of New South Wales nevertheless affirmed the decision of the primary judge that there had been contraventions of ss 995 and 998 of the Law. Priestley JA dissented. Relevantly, his Honour observed (at 64-65) that:

(a) "*The appellant took the market as he found it*";

(b) "*The appellant did nothing in that market beyond selling shares in a way and for prices publicly to any holder of those shares who wished to sell at those prices*";

(c) "*What happened in the market happened because of the market's own mechanism. The appellant did nothing to that mechanism other than accept offers, made in accordance with market rules, to buy shares in Jeffries at set prices. The appellant had nothing to do with those offers being on foot*"; and

(d) "*I do not see how the appellant, doing nothing more than sell shares in accordance with market procedures, without collusion, connivance, prearrangement or even communication with any other person than his agent fell within the words of either ss 995 or 998 of the Corporations Law*".

66. In AS [38], sixth line, the Crown contends that the majority's interpretation is inconsistent with the language and purpose of "*all the provisions of the statute*". It is not clear why this is said to be the case.

67. In AS [45], the Crown asserts that the majority's construction is "*unworkable or impracticable*", etc. But this is mere assertion. In the absence of any facts, it is not possible to make good this proposition by reference to the facts even of one case.

68. In AS [48], the Crown contends that the majority's construction "*freezes the section in time*". It is not clear why this is said to be the case. The types of conduct referred to by the majority are capable of occurring today. In any event, the type of conduct proscribed by the section is broader than full-scale cornering and squeezing: see paragraph 43 above.

69. In AS [51], fifth line, the Crown contends that those who are bound by the law are generally entitled to rely upon the "*ordinary sense of the words*" that Parliament has chosen. But that principle is inapplicable where, as here, the words are used in a technical legal sense. That was the majority's (unchallenged) answer to the first part of the restated question. The same submission is made with respect to AS [52]-[55], which seeks to rely on the "*plain meaning*" of the words.

70. In AS [70], seventh line, the Crown refers to "*[b]uying shares at an inflated price for the purpose of fixing the price of the share*". That assumes that the price is an inflated one, which is something that the Crown does not wish to have to prove. On the Crown's construction, the Crown merely needs to prove that the accused had the proscribed purpose and the price of the transaction would then be, without more, an "artificial price".

71. In AS [71] the Crown contends that there is no difference between the case of market domination manipulation (described in lines 5-11) and the case of a trader who trades with the primary purpose of increasing the price of a share (lines 11-18). But in the latter case, there may only be a small single transaction which has no impact on the market price of the share. In those circumstances, the price of the transaction is not aptly described as "artificial". (The conduct may, however, fall foul of other provisions of the Act which are designed to prohibit such conduct.)

72. In AS [79], the Crown contends that the majority used the *specialia generalibus derogant* maxim to "*read down the intended breadth*" of s 1041A. But the majority did not "*read down*" the section. And the sentence assumes that the provision was intended to have a broader effect, which is contentious. The majority's reasoning at [334] is set out in paragraph 56 above. The manner in which the majority reasoned, by reference to ss 1041B and 1041C, was not inconsistent with s 1041J. They did not use s 1041B or 1041C to "*limit*" the scope of s 1041A. Rather, the fact that ss 1041B and 1041C specifically provided for the false trading, price rigging, etc. meant that the majority rejected the possibility that Parliament might have used the expression "artificial price" in s 1041A in some sense different from that which otherwise presented itself.

73. In AS [80], the Crown refers to "*the impugned conduct in the present case*". But the relevant facts of the present case are not established.

Reasons why special leave should not be granted

74. The construction of s 1041A of the Act adopted by Nettle and Hansen JJA was correct or is not attended by sufficient doubt to warrant the grant of special leave.[66]

75. The Crown contends for a construction which would conflate the "artificial price" prohibition in s 1041A with the "false or misleading appearance" prohibition in s 1041B and which was rejected by all members of the Court of Appeal of the Supreme Court of Victoria.[67]

76. Further and in any event, this case is an inappropriate vehicle for consideration of the issue as this Court would not have the benefit of facts found or agreed to inform the question of construction.[68]

Costs

77. The accused seeks the costs of the application and any appeal in the event that either is dismissed. There is jurisdiction to award costs against the Crown in a criminal case and an application for special leave to appeal by the Crown is sufficiently exceptional to ground the exercise of jurisdiction in appropriate cases.[69] In this application, like the one in *R v Whitworth*, the Crown seeks special leave in order to canvas the construction of a statutory provision which it says has importance to the administration of justice generally.[70]

Part VII – Argument on notice of cross-appeal

78. See the submissions of the accused on the notice of cross-appeal dated 25 January 2013.

Part VIII – Estimate

79. The estimate of the number of hours required for the presentation of the accused's argument in response to the application for special leave to appeal (for consideration by an enlarged Bench and argument as on appeal) is three hours. This does not include the time estimated for the cross-appeal.

Dated: 15 February 2013

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66 Assuming, contrary to the submissions of the accused on the notice of cross-appeal dated 25 January 2013, that the Court of Appeal was correct to engage in the exercise of construction of s 1041A of the Act. See paragraphs 6 and 7 above.

67 CA at [229], [259]-[260], [276] per Warren CJ; [309], [333], [335] per Nettle and Hansen JJA.

68 See the submissions of the accused on the notice of cross-appeal dated 25 January 2013.

69 *R v Whitworth* (1988) 164 CLR 500 at 501.

70 AS [91]. See also AS [83], [86].