

BETWEEN:

JOHN KIZON  
Appellant

and

THE QUEEN  
First Respondent

and

NIGEL CUNNINGHAM SWIFT MANSFIELD  
Second Respondent

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APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION ON THE INTERNET

1. I certify that this submission is in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF THE ISSUES

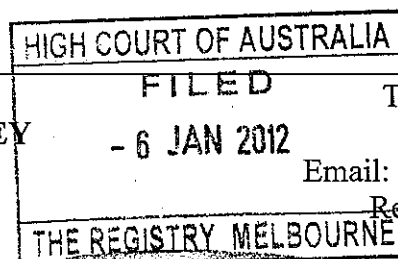
2. In relation to the former s.1002G of the *Corporations Act 2001* (Cth) ("the Act") and its successor s.1043A of the Act, whether 'information' and 'inside information' includes falsehoods or lies.
3. Whether it is an element of the offence of 'insider trading' created by the former s.1002G and its successor s.1043A of the Act that the inside information in the possession of the accused person in whole or material part correspond with actual information in the possession of the entity entitled to have or use it.
4. Whether the Court of Appeal of the Supreme Court of Western Australia erred in finding that a statement, opinion, prediction or forecast may be 'information' for the purposes of s.1002G and s.1043A in circumstances where the person who makes or repeats the statement, opinion, prediction or forecast knows or believes that it is false or a lie.

PART III: SECTION 73B JUDICIARY ACT 1903

5. The Appellant has considered whether any notice should be given in compliance with section 73B of the *Judiciary Act 1903* (Cth). No such notice is required.

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**PART IV: CITATION**

6. The ruling of Wisbey DCJ at first instance and the intermediate decision of the Court of Appeal are not contained in any authorized reports. The medium neutral citation for the decision of the Court of Appeal is *R v Mansfield* [2011] WASCA 132.

**PART V: RELEVANT FACTS**

- 10 7. The Appellant John Kizon ("Kizon") and the Second Respondent Nigel Mansfield ("Mansfield") were tried jointly upon an indictment containing 52 counts. Of those counts 1, 9, 14, 21, and 23 each alleged that Kizon and Mansfield contrary to s.11.5(1) of the *Criminal Code (Cth)* conspired with each other to commit an offence contrary to s.1311(1) of the Act by contravening the insider trading provisions of the Act with respect to trading in securities in the company AdultShop.com Limited ("AdultShop").
8. Count 22 alleged that Kizon committed a substantive offence under the insider trading provisions with respect to additional purchases of securities in AdultShop.
9. The insider trading prohibitions are contained in s.1002G(2)(b) (prior to 11 March 2002) or 1043A(1)(d) (after 11 March 2002) of the Act.
- 20 10. AdultShop is an Australian public company. At all material times, the Managing Director was Malcolm Day ("Day").

**THE PROFIT AND TURNOVER STATEMENTS**

11. It was alleged that on or about 4 January 2002, statements were made by Day to Mansfield to the effect that the expected profit for the 2002 financial year for AdultShop had risen from \$3 million to \$11 million, and the expected turnover for AdultShop for the 2002 financial year had risen from between \$30 million and \$50 million to about \$111 million.<sup>1</sup>
12. It was alleged that on 6 January 2002, those statements made by Day concerning Adultshop were discussed between Kizon and Mansfield.<sup>2</sup>
- 30 13. It was alleged that by these statements, and the subsequent discussions between them, both Kizon and Mansfield were in possession of 'inside information' concerning AdultShop, for the purposes of s.1002G(2)(b) of the Act (now repealed).
14. It was alleged that while aware of the statements made by Day, Kizon and Mansfield conspired with each other to purchase or procure the purchase of shares in AdultShop between 7 January 2002 and 30 January 2002 (count 1).
15. It was alleged that on or about 7 February 2002, further statements were made by Day to Mansfield to the effect that he (Day) was of the opinion that the figures for

<sup>1</sup> *R v Mansfield* [2011] WASCA 132 - Schedule to Buss JA's Reasons - Particulars of Count 1.

<sup>2</sup> Telephone Intercept 6 January 2002, 7:50pm.

AdultShop were still a good story, and that the company was getting huge figures. Further, it was expected that the market would be informed of the figures by March or April of 2002.<sup>3</sup>

16. It was also alleged that the further statements alleged to have been made by Day were discussed between Kizon and Mansfield.<sup>4</sup>
17. It was alleged that by these statements, in addition to the earlier statements the subject of count 1, and their subsequent discussion, both Kizon and Mansfield were in possession of 'inside information' concerning AdultShop, for the purposes of section 1002G(2)(b) (now repealed) and section 1043A(1)(d) of the Act.
- 10 18. It was alleged that while aware of the statements made by Day, Kizon and Mansfield conspired with each other to purchase or procure the purchase of further shares in AdultShop between 22 February 2002 and 12 March 2002 (count 9).
19. It was alleged that on or about 12 March 2002, further statements were made by Day to Mansfield concerning AdultShop, to the effect that AdultShop was intending to release to the market its profit figure for the previous six months on 18 March 2002, and that the figures were going to be 'alright' but not break any records. Further, AdultShop would announce the high or big quarterly figures to the market at the end of April 2002, and this release would show two quarters of good figures.<sup>5</sup>
- 20 20. It was alleged the further statements made by Day were discussed between Kizon and Mansfield.<sup>6</sup>
21. It was alleged that by these statements, in addition to the earlier statements the subject of counts 1 and 9, and their subsequent discussion, both Kizon and Mansfield were in possession of 'inside information' concerning AdultShop, for the purposes of s.1043A(1)(d) of the Act.
22. It was alleged that while aware of the statements made by Day, Kizon and Mansfield conspired with each other to purchase or procure the purchase of further shares in AdultShop between about 13 March 2002 and 20 March 2002 (count 14).

#### THE PACKER AND PROJECTED REVENUE STATEMENT

- 30 23. It was alleged that on or about 6 June 2002, Day made statements to Kizon to the effect that Packer had bought 4.9% of AdultShop, and that the projected revenue for AdultShop for the following month would significantly exceed what had previously been forecast.<sup>7</sup> On 9 June 2002, it was alleged that the statements made by Day were discussed between Kizon and Mansfield.<sup>8</sup>

<sup>3</sup> *R v Mansfield* supra - Schedule to Buss JA's Reasons - Particulars of Count 9.

<sup>4</sup> Telephone Intercept 8 February 2002, 2:25pm.

<sup>5</sup> *R v Mansfield* supra - Schedule to Buss JA's Reasons - Particulars of Count 14.

<sup>6</sup> Telephone Intercept 12 March 2002, 5:32pm.

<sup>7</sup> *R v Mansfield* supra - Schedule to Buss JA's Reasons - Particulars of Count 21.

<sup>8</sup> Telephone Intercept 9 June 2002, 7:27pm.

24. It was alleged that by these statements, and the subsequent discussion between them, both Kizon and Mansfield were in possession of 'inside information' concerning AdultShop, for the purposes of s.1043A(1)(d) of the Act.
25. It was alleged that while aware of the statements made by Day, Kizon and Mansfield conspired to purchase or procure the purchase of shares in AdultShop between 11 June 2002 and 2 July 200 (count 21).
26. It was further alleged that while aware of these statements, Kizon himself procured the acquisition of further shares in AdultShop on or about 11 June 2002 (count 22).
- 10 27. It was alleged that while aware of the statements the subject of count 21, there was a further discussion between Kizon and Mansfield on or about 9 July 2002,<sup>9</sup> subsequent to which Kizon and Mansfield conspired to purchase or procure the purchase of shares in AdultShop between 9 July 2002 and 12 July 2002 (count 23).

**MANNER IN WHICH THE ALLEGED INFORMATION WAS PARTICULARISED**

28. The alleged inside information was particularised in a similar manner for each of these counts. By way of example, the alleged information relating to Count 1 was particularised in the following manner:

*Count 1*

*In relation to AdultShop, the information of which the two accused were possessed was to the effect that:*

- 20 a. *The expected profit for AdultShop for the 2002 financial year had risen from \$3 million to \$11 million;*
- b. *The expected turnover for AdultShop for the 2002 financial year had risen from between \$30 million and \$50 million, to about \$111 million;*
- c. *The information at sub-paragraphs a and b above had been obtained on or about 4 January 2002 as a result of a private conversation between Malcolm Day, the Managing Director of AdultShop, and a person or persons the said Malcolm Day apparently treated as a confidant.*
- 30 29. This form, which was identical for all counts, noted in a series of lettered paragraphs each item of alleged 'information', followed by a paragraph recording how the 'information' was alleged to have been received.<sup>10</sup>
30. The particulars were explained by Crown Prosecutor, Mr. Champion SC, in his opening address in the following manner:

<sup>9</sup> Telephone Intercept 9 July 2002, 4:20pm.

<sup>10</sup> The 'information' as particularised for each count was the same 'information' relied upon for each count in the Statement of Material Fact, filed by the Crown prior to trial pursuant to s.95 of the *Criminal Procedure Act 2004* (WA).

*"If we look at the particulars, and we go back now to the very beginning, count 1, you can see how we put the case, that this is the information that is conveyed by looking in particular at count 1, that, firstly, (a) the expected profit for Adultshop for the 2002 financial year had risen from 3 million to 11 million, that, secondly, the expected turnover for Adultshop for the 2002 financial year had risen from between 30 million to 50 million to about 111 million.*

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*We set out in the particulars in the same way that we set out with the My Casino allegations that the information at paragraphs (a) and (b) had been obtained on or about 4 January as a result of a private conversation between Day and a confidante, in this case we say Mr Mansfield."*<sup>11</sup>

And additionally:

*"We allege that while the accused men were in possession of the information that we discussed with you just before lunch, the two particulars (a) and (b), that that information was to the knowledge of both men material and not generally available."*<sup>12</sup>

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31. The particularisation of the alleged inside information was further confirmed by Senior Crown Prosecutor Mr. Zichy-Woinarksi QC, in the course of argument when he said:

*"Now, the particulars that are provided in relation to that is (a) the expected profit for AdultShop for the 2002 financial year had risen from three to 11 million, and the expected turnover for AdultShop for the 2002 financial year had risen from between 30 and 50 million to about 111 million. Paragraph (c) is not particulars of the information at all. Paragraph (c) just particularises where the Crown alleges the information had come from. But it's (a) and (b) that's the information. So we don't really have to worry about (c) as such."*<sup>13</sup>

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32. It is significant that the information was particularised as being the substance of the statements alleged to have been uttered by Day to the accused, rather than the fact of those statements having been uttered to the accused.<sup>14</sup>

#### EVIDENCE CONCERNING THE TRUTH OF THE ADULTSHOP STATEMENTS

33. No evidence was led at trial by the Crown to establish the truth of the statements alleged to have been made by Day to Kizon and/or Mansfield, or that they had any basis in fact.<sup>15</sup>

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<sup>11</sup> Transcript [206].

<sup>12</sup> Transcript [210].

<sup>13</sup> Transcript [2459].

<sup>14</sup> Contra, for example, the manner in which the inside information was particularised in *R v Rivkin* (2004) NSWLR 284. See [63] below.

<sup>15</sup> Cf: *R v Rivkin* supra, where the truth of the statements alleged to have been communicated by Gerard McGowan to Rivkin were established by direct evidence.

34. Instead, the evidence revealed that the statements were either false, in whole or in part to the knowledge of Day, or were probably false, in whole or in part to the knowledge of Day. Day was not called as a witness by the Crown. In the course of argument before the trial Judge it was conceded by Senior Crown Prosecutor Mr Zichy-Woinarski QC that there was insufficient evidence to establish the independent truth of the AdultShop statements made by Day.<sup>16</sup> His Honour Wisbey DCJ acknowledged this in his reasons upon dismissing the counts:

10                   “Mr Woinarski QC, lead counsel for the Crown, very properly conceded and the state of the evidence is eloquent of the fact that the jury could not be satisfied beyond reasonable doubt that the information relied upon in support of the following counts was fact.”<sup>17</sup>

#### RULING AT FIRST INSTANCE

35. Following the close of the Crown case, an application was made by each accused pursuant to section 108 of the *Criminal Procedure Act 2004* that there was no case to answer in respect of any count.
36. The learned trial judge directed verdicts of acquittal on all AdultShop counts on the ground that no jury could be satisfied beyond reasonable doubt that the accused persons possessed ‘information’ for the purposes of the insider trading provisions on the Act (contained in Division 2A of the Act pre-11 March 2002, and Division 3  
20 of the Act thereafter).
37. His Honour ruled that “*the information acted upon must, in general circumstances, be a factual reality and in this case, in my view, it is necessarily so*”.<sup>18</sup> Given the state of the evidence as conceded by the Crown the prosecution case was therefore defective.

#### APPEAL

38. The Crown appealed to the Court of Appeal against the judgments of acquittal.
39. By majority, the Court below allowed the Crown’s appeal, setting aside the judgment of acquittal and ordering a new trial of both accused on the AdultShop counts.
- 30 40. Buss JA (with whom Murray J. agreed) held that a statement, opinion, prediction or forecast may be ‘information’ for the purposes of the insider trading provisions even if the person making or repeating the statement, opinion, prediction or forecast knows, or believes, that it is false or a lie - [114].
41. In dissent, McLure P. held that ‘inside information’ must actually exist – [14]. That in order to establish that an accused is in possession of ‘inside information’, there must be a proven correlation or correspondence between the inside information in

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<sup>16</sup> Transcript [2798] – [2805]

<sup>17</sup> Transcript [2835]. This finding confirms that the information relied upon did not include the fact that the statements were made by Day.

<sup>18</sup> Transcript [2838]

the possession of the accused and the inside information in the possession of the entity entitled to it - [15].

#### SPECIAL LEAVE

42. On 9 December 2011, Hayne, Crennan and Keifel JJ granted the Appellant's application for special leave to appeal to this court.

#### PART VI: APPELLANT'S ARGUMENT

43. It is submitted that the majority in the Court of Appeal fell into error in concluding that statements containing lies or falsehoods could constitute 'information' for the purposes of the insider trading provisions of the Act.

#### 10 HISTORY OF THE LEGISLATIVE PROVISIONS

44. Prior to the two sections of the Act the subject of these charges, the insider trading prohibition was contained in section 1002 the *Corporations Act 1989* (Cth). The prohibition in s.1002 read as follows:

(1) *A person who is, or at any time in the preceding 6 months has been, connected with a corporation shall not deal in any securities of that corporation if, because of so being, or having been, connected with that corporation, the person is in possession of information that is not generally available but, if it were, would be likely materially to affect the price of those securities.*<sup>19</sup>

- 20 45. The central features of the insider trading prohibition were firstly, the connection between the person and a corporation and secondly, the possession by the person of information that was not generally available as a consequence of that connection. In other words the information was confidential company information that actually exists.

46. The report of the House of Representatives Standing Committee on Legal and Constitutional Affairs "*Fair Shares for All: Insider Trading in Australia*" (The Griffiths Report) in 1989 recommended wholesale changes to the prohibition. Central to this was the removal of the requirement that a person be connected to the corporation the subject of the information. In so recommending, the Committee  
30 concluded that:

*"The offence of insider trading must have its genesis in the use of information derived from within a company. The existing prohibition requiring a person to be connected to the corporation which is the subject of the information unnecessarily complicates the issue. It is the use of information, rather than the connection between a person and a corporation which should be the basis for determining whether inside trading has occurred."*<sup>20</sup>

<sup>19</sup> This mirrored s.128(1) of the *Security Industry Act 1980* (Cth).

<sup>20</sup> Griffiths Report [4.3.5].

47. The legislative reform that followed the Griffiths Report, contained in the *Corporations Legislation Amendment Act 1991* (Cth), adopted this proposal in its new formulation of the prohibition (then s.1002G of the Act). The Explanatory Memorandum to the Bill explained the change in the following terms:

*"...there will be no need for the prosecution to establish a connection between the person in possession of inside information and the company to which the information relates: instead the proposed provision will prohibit any person, including a tippee, who is in possession of inside information using it to trade in or subscribe for securities of the company."*<sup>21</sup>

- 10 48. As a result, the insider trading prohibition now applies to all persons regardless of whether the inside information was obtained by or from a person connected with the corporation whose securities were traded. What the amendments did not remove, however, was the central feature that the prohibition attach to possession of actual inside information. As was held by McLure P, such information must correspond, in whole or in material part, with the actual affairs or workings of the entity entitled to possess it. That is, the information must actually exist.

#### MEANING OF 'INFORMATION' IN SECTIONS 1002G AND 1043A

- 20 49. The ordinary meaning of 'information' is the communication of knowledge or news of some fact or occurrence (Oxford English Dictionary 2<sup>nd</sup> Ed, Vol VII). Volume V of the OED describes 'fact' as a thing done or performed; something that has really occurred or is actually the case.
50. Statements containing falsehoods or lies do not, within the ordinary meaning, convey information. This was recognised by Wisbey DCJ who held that falsehoods or lies, far from constituting information, are in fact the antithesis of information.<sup>22</sup>
- 30 51. In concluding that 'information' may include falsehoods or lies, Buss JA observed that the definition of 'information' in s.1042A did not contain any express stipulation to the effect that the information must be truthful, or a factual reality - [116]. He further noted that Division 3 of the Act fails to expressly include the truthfulness of the information as an *element* of the offence of insider trading - [117]. These constituted two of his stated thirteen reasons justifying his ruling on the matter. With respect to His Honour, an express stipulation to that effect is unnecessary: the ordinary meaning of 'information' carries with it the requirement that the material be in some meaningful way truthful or reasonably based. Insofar as that ordinary definition is extended by the Act, it does not go so far as to include false statements or lies.
52. The ordinary meaning of information is so extended by the former section 1002A of the Act and its successor section 1042A to include:

*1 Matters of supposition and other matters that are insufficiently definite to warrant being known to the public; and*

<sup>21</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth) 85.

<sup>22</sup> Transcript [2835].



2 *Matters relating to the intentions, or the likely intentions, of a person.*

53. This extended definition of 'information' derives from the *Corporations Legislation Amendment Act 1991*, which also abolished the previous requirement that inside information be 'specific information'. The purpose behind the inclusion of the extended definition was discussed in the Explanatory Memorandum to the Bill as follows:

10 *Doubt was also expressed as to whether the term 'information' would be interpreted as encompassing supposition, intentions and other matter not sufficiently certain to require its release to the public... Proposed section 1002A(1) provides definitions of 'information' and 'securities', in relation to a body corporate, to apply for the purposes of the insider trading provisions. The definition of information is an inclusive one, with information being taken to include supposition and other matters insufficiently definite to warrant being made known to the public and matters relating to the intentions, or likely intentions, of a person.<sup>23</sup>*

- 20 54. It is submitted that this extended definition does not operate to extend the ordinary meaning of information to include lies or falsehoods. The legislature expressed no intention to so extend its meaning in either the language of the provisions, or in documents such as the explanatory memorandum. Nor is such an intention to be gleaned from the evident purpose of the statutory scheme.

55. Lies or falsehoods are not matters of supposition where the maker or utterer of the false statement knows of the falsity of those statements. Nor are they matters of supposition in the mind of the *receiver* of the statement, in circumstances where they are represented as being matters of fact. Statements that are lies or falsehoods could likewise never constitute matters 'insufficiently definite to warrant being known to the public'. Lies or falsehoods, by their very nature, can never crystallise into a state of sufficient definiteness to warrant being known to the public. They are matters that, in fact, should *never* be made known to the public, save for the purpose of disclosing their falsity.

- 30 56. There is a regime contained in the Act designed to prevent precisely this category of conduct. Division 2 of Part 7.10 of the Act includes prohibitions on false or misleading statements (s.1041E), inducing persons to deal (s.1041F), dishonest conduct (s.1041G) and misleading or deceptive conduct (s.1041H), as well as creating a civil liability regime for victims of such conduct (s.1041I).

- 40 57. The civil liability provisions, in particular, highlight the point at hand: the legislature intended that a person who was misled or induced to deal, or is otherwise the victim of dishonest conduct, should be permitted to recover damages for their loss. It would be anomalous if that same person should also be prosecuted because the false statements they were induced by also constituted inside information under the Act.

58. Buss JA set out the history of the definition of 'information' in insider trading provisions in Australia in his judgement - [69] to [82]. That history reveals that the

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<sup>23</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth) 90.

concept has in contemporary times been given an expansive breadth. In *Commissioner for Corporate Affairs v Green* [1978] V.R. 505 McInerney J noted that under the prohibition in s.124(2) of the *Companies Act 1961*, a hint may be sufficient to suggest information or may enable an inference to be drawn as to information, sufficient to enliven the prohibition (at 511). In *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd* (1986) 10 ACLR 462 Young J held at 468 that “*Information... goes further than knowledge and includes the situation where someone has been informed of something which he does not know to be true nor does he care whether it is true or not. In other words information may include a rumour that something has happened with respect to a company which a person neither believes nor disbelieves*”.

59. The Court of Appeal in *Hannes v DPP (Cth) (No 2)* [2006] NSWCCA 373 cited with approval the above remark from *Green*, adding that in some cases an inference may be drawn “*with varying degrees of certainty as to its accuracy*” but will nevertheless remain ‘information’ under the Act (at 411).

60. The situations considered in these judgments do nothing to support the proposition that falsehoods, known to be false by the utterer, constitute information under the Act. The provisions as interpreted plainly extend the meaning to cover matters of *uncertainty*, but that is quite distinct from falsehoods.

20 61. Indeed, they tend to suggest the contrary conclusion. If information could consist of matters known by the utterer to be false, this would then capture imputations or inferences *wrongly* drawn. It cannot have been the intention of the legislature to include in the concept of ‘inside information’ a conclusion, wrong *in fact*, drawn in error by a person from a statement made by another, perhaps innocently. The notion that a ‘hint’ may suggest information or enable an inference to be drawn as to information can only have sensible meaning if the inference drawn or suggestion received in fact corresponds with *actual* information (including, as per section 1042A, matters of supposition or the intention or likely intention of a person).

30 62. It must be noted that in *R v Rivkin*, in refusing an application for a directed acquittal, Whealy J, while not required to rule on the issue, stated in obiter that “*I incline to the tentative view that a statement as to the existence of a state of affairs, even though it may not be precisely accurate – even though it might not be accurate at all – may nevertheless be comprehended within the concept of information for the purposes of the insider trading legislation*” (at 15 [50]).

63. That case was concerned with statements made, as here, by an officer of the company concerning the company’s affairs. The ‘information’ pleaded in that case was not only the state of affairs communicated by the officer (Gerard McGowan), but also the fact of his having made them – for example:

40 “*Gerard McGowan said that there was a deal for the merging of Impulse’s business with Qantas*”.

This is to be contrasted to the present case where, as noted above [28] - [32], the alleged ‘information’ as pleaded is the actual substance of the statements made – for example:

*"The expected profit for AdultShop for the 2002 financial year had risen from \$3 million to \$11 million"*

64. His Honour's comment was in the context of whether the making of a statement concerning a state of affairs was itself information for the purposes of the insider trading provisions. His tentative view was that it was, even if it was inaccurate. This view provides no support for the notion that falsehoods or lies can themselves constitute information under the insider trading provisions. Particularly in a case such as the present where the information alleged was confined to the actual substance of the statements made, not the fact that they were made.

10 65. Buss JA in considering the meaning of 'information' in the context of the insider trading provisions, had little if any regard to the particulars of the information alleged to be possessed by the accused in the present case. Although his Honour observed that "[t]he 'inside information' comprised statements alleged to have been made by..Day" - [26], he stated in the sixth reason for reaching his opinion, that "[t]he fact that 'information', as defined, has been obtained from a particular source is itself 'information'. For example, where a person makes a statement, the 'information' as defined, is not confined to the underlying statement, but extends to the fact that the statement was made or allegedly made and the identity of the person who made or allegedly made it" - [121]. Whilst that was the form of the  
20 particulars in *Rivkin*, it was not this case.

66. In contrast, McLure P had specific regard to the manner in which the Crown particularised the information in the present case - [4] & [5]. Having found that "*there must be a proven correlation or correspondence between the inside information in possession of the accused and the inside information in the possession of the entity entitled to it*" - [15], the form of the particulars was significant in her Honour's reasons for dismissing the Crown's appeal - [17].

#### OTHER PROVISIONS OF THE ACT

30 67. Other provisions of the Act support the proposition that 'information' must have some element of truth to it, in that it must correlate to actual information belonging to a person or entity. That is, it is a matter which an entity or person knows or believes to be a fact, or an opinion or matter of supposition which an entity or person honestly holds or has some basis for holding or an intention or likely intention that a person actually has.

68. The meaning of 'inside information' in s.1042A of the Act bears this out. In order to be 'inside information' under the Act, 'information' must be:

- a. *Information which is not generally available; and*
- b. *If the information were generally available a reasonable person would expect it to have a material effect on the price or value of a particular Division 3 financial product.*

40 69. Lies or falsehoods communicated are not generally available, almost as a matter of course. As McLure P correctly observed, "*it cannot have been the legislature's*

*intent to prohibit the use of information that was not generally available only because the information did not actually exist in the first place” - [20].*

70. The language of s.1042C of the Act concerning when information is generally available, further makes it apparent that the provisions are only intended to apply to information that is connected to the entity to whom it relates (whether by being objectively true, or an opinion honestly held, etc). Information is ‘generally available’ if:

a. *It consists of readily observable matter; or*

b. *Both of the following sub paragraphs apply:*

10 i. *It has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information; and*

ii. *Since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or*

c. *It consists of deductions, conclusions or inferences made or drawn from either or both of the following:*

i. *Information referred to in paragraph (a);*

ii. *Information made known as mentioned in subparagraph (b)(i).*

20 71. None of these factors, which establish when ‘information’ is generally available, are meaningful if the information consists of falsehoods or lies. As McLure P correctly noted, it is a corollary of the notion of information being ‘not generally available’ that such information must be confidential to, or *belong* to, someone or some entity - [12]. This is also evident, as her Honour found, from the defences in s.1043H, s.1043I and s.1043J of the Act - which exempt a person from the insider trading prohibition eg: *“when that person's intended action is itself the confidential price-sensitive information”* - [15].

30 72. Information may belong to someone – and therefore be sufficiently rooted to an actual state of affairs - in the sense that it reflects a fact or situation about that entity (such as the financial position of a company), or it may belong to someone in the sense that it is an accurate statement of that person’s intentions or likely intentions. As stated by McLure P at [12], it is not a “retreat to the misappropriation theory” (which has been rejected as basis for the insider trading prohibition) to so conclude. It simply follows as a matter of commonsense from the idea that if information is ‘confidential’ – it must be confidential to someone or something.

40 73. In the present case, the prosecution failed to establish that the statements alleged to have been made by Day to Kizon and Mansfield constituted information in the possession of Day himself – in that the statements were not to his knowledge falsehoods or lies – or information in the possession of the AdultShop - in that it possessed actual information to which the statements materially corresponded.

74. Insofar as AdultShop was itself possessed of confidential information concerning its profit expectations and trading results (for example), it cannot be that false statements by Day on the same subject matter *also* constitutes information belonging to the company. A company cannot be simultaneously possessed of two conflicting sets of information concerning the same objective matter – one true and one false. It is possessed of information concerning its profit forecasts and trading results. Deliberately false statements communicating inflated figures is not information at all. It is misinformation.

10 75. It is submitted therefore that McLure P was correct in finding that “*it is an element of the offence of insider trading that the inside information in possession of the accused correspond in whole or in material part with actual information in the possession of the entity entitled to use it. Thus, a fraudulent misrepresentation as to the internal affairs of an entity, even if made by an officer thereof, is incapable of being inside information*” - [18].

#### RATIONALE BEHIND THE PROHIBITION

20 76. It is well established that the literal or grammatical meaning of words or provisions in legislation may not prevail if they do not give effect to the purpose of the legislation (*Saraswati v R* (1991) 172 CLR 1 at 21). The rationale behind the insider trading prohibition as it now stands was explained by the Griffiths Committee as the “need to guarantee investor confidence in the integrity of the securities markets” (at 3.3.6), citing with approval the principles adopted by the 1981 Committee of Enquiry into the Australian Financial System (Campbell Committee) as the basis for the prohibition, being “to ensure that the securities market operates freely and fairly, with all participants having equal access to relevant information”.

30 77. In *R v Firns* (2001) 51 NSWLR 548, Mason P stated, “*equality of access to the relevant market information is the critical factor. Under this theory, restrictions on insider trading are designed to ensure that the market operates fairly, with all participants having equal access for relevant information. The playing field is to be level*” (at 558).

78. If the central objective is to ensure investor confidence in the integrity of the securities markets, that objective is met *vis-à-vis* lies and false statements, by the provisions in Division 2 of Part 7.10 of the Act (set out above) prohibiting false statements, misleading conduct, etc.

40 79. Other objectives, such as ensuring fairness and equal access to information (the level playing field) are not in any way furthered by prohibiting trading while in possession of lies or false statements. Indeed, if equal access to information is a key objective of the insider-trading scheme, this further reinforces the notion that information must have some connection to fact. It cannot be the objective of the scheme to ensure that lies or falsehoods are equally disseminated throughout the market. Further, it follows that an individual trading while in possession of false statements obtains no advantage over the market generally. In fact, they are trading at a distinct disadvantage.

80. There is no need to extend the definition of information in the Act beyond its ordinary meaning, as extended expressly, to include false statements and lies, in order to satisfy a purposive approach to interpreting the legislation.

**PART VII: LEGISLATION**

81. Relevant legislation is attached.

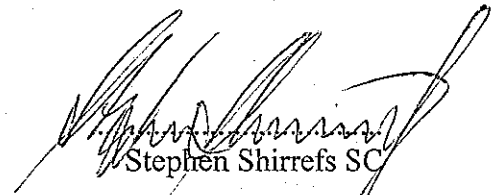
**PART VIII: ORDERS SOUGHT**

82. The Appellant seeks the following orders:

- 1 Appeal allowed; and
- 2 Judgment and orders of the Court of Appeal made on 16 June 2011 be set aside.

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Dated: 6 January 2012



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IN THE HIGH COURT OF AUSTRALIA  
PERTH REGISTRY

No. P61 of 2011

BETWEEN:

JOHN KIZON  
Appellant

and

THE QUEEN  
First Respondent

and

NIGEL CUNNINGHAM SWIFT MANSFIELD  
Second Respondent

**ANNEXURE TO PART VII OF THE APPELLANT'S SUBMISSIONS  
APPLICABLE LEGISLATIVE PROVISIONS**

**PART I: RELEVANT PROVISIONS AS AT THE RELEVANT POINT IN TIME**

The applicable statutory provisions as they existed at the relevant time are sections 1002A, 1002B, 1002G, 1041E, 1041F, 1041G, 1041H, 1041I, 1042A, 1042C, 1043A, 1043H, 1043I, 1043J and 1311(1) of the *Corporations Act 2001* and section 11.5(1) of the *Criminal Code Act 1995*.

All of these provisions are still in force, in that form, at the date of making these submissions, save that sections 1002A, 1002B and 1002G of the *Corporations Act 2001* were repealed by the *Financial Services Reform Act 2001* as of 11 March 2002. There are no relevant transitional provisions.

**PART II: LEGISLATIVE EXTRACTS**

## Division 2A—Insider trading

### 1002 Application of Division

This Division applies to:

- (a) acts and omissions in this jurisdiction in relation to securities of any body corporate, whether formed or carrying on business in this jurisdiction or in Australia or not; and
- (b) acts and omissions outside this jurisdiction, whether in Australia or not, in relation to securities of a body corporate that is formed or carries on business in this jurisdiction.

### 1002A Securities

- (1) In this Division and in section 1013:

*information* includes:

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

*purchase*, in relation to securities, includes, in the case of an option contract under which a party acquires an option or right from another party, acquire the option or right under the contract, or take an assignment of the option or right, whether or not on another's behalf.

*securities*, in relation to a body corporate, means any of the following:

- (a) shares in the body corporate;
- (b) debentures (including convertible notes) issued by the body corporate;
- (c) interests in a managed investment scheme made available by the body corporate;



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- (d) units of shares referred to in paragraph (a);
- (e) an option contract under which a party acquires from another party an option or right, exercisable at or before a specified time, to buy from, or sell to, that other party a number of securities of a kind referred to in paragraph (a), (b), (c) or (d) at a price specified in, or to be determined in accordance with, the contract;

but does not include a futures contract or an excluded security.

*sell*, in relation to securities, includes, in the case of an option contract under which a party acquires an option or right from another party:

- (a) grant or assign the option or right; or
- (b) take, or cause to be taken, such action as releases the option or right;

whether or not on another's behalf.

- (2) A provision of this Division or of section 1013 that applies in relation to securities of a body corporate:
  - (a) also applies in relation to securities (as defined by subsection 92(1)) issued by a government, an unincorporated body or any other person; and
  - (b) applies, in relation to securities so issued, in the same way, as nearly as practicable, as if the government, body or person were a body corporate.

**1002B Information generally available**

- (1) This section has effect for the purposes of this Division and section 1013.
- (2) Information is generally available if:
  - (a) it consists of readily observable matter; or
  - (b) without limiting the generality of paragraph (a), both the following subparagraphs apply:
    - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information; and

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- (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.
- (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
  - (a) information referred to in paragraph (2)(a);
  - (b) information made known as mentioned in subparagraph (2)(b)(i).

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**1002G Prohibited conduct by person in possession of inside information**

- (1) Subject to this Division, where:
- (a) a person (in this section called the *insider*) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and
  - (b) the person knows, or ought reasonably to know, that:
    - (i) the information is not generally available; and

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(ii) if it were generally available, it might have a material effect on the price or value of those securities;  
the following subsections apply.

- (2) The insider must not (whether as principal or agent):
  - (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
  - (b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.
  
- (3) Where trading in the securities referred to in subsection (1) is permitted on the stock market of a securities exchange, the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:
  - (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
  - (b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

**1041E False or misleading statements**

- (1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:
- (a) the statement or information is false in a material particular or is materially misleading; and
  - (b) the statement or information is likely:
    - (i) to induce persons in this jurisdiction to apply for financial products; or
    - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
    - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and

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(c) when the person makes the statement, or disseminates the information:

- (i) the person does not care whether the statement or information is true or false; or
- (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

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

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

(2) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1), paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(c).

(3) For the purposes of an offence based on subsection (1), strict liability applies to subparagraphs (1)(b)(i), (ii) and (iii).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 1041F Inducing persons to deal

(1) A person must not, in this jurisdiction, induce another person to deal in financial products:

- (a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or
- (b) by a dishonest concealment of material facts; or
- (c) by recording or storing information that the person knows to be false or misleading in a material particular or materially misleading if:
  - (i) the information is recorded or stored in, or by means of, a mechanical, electronic or other device; and
  - (ii) when the information was so recorded or stored, the person had reasonable grounds for expecting that it would be available to the other person, or a class of persons that includes the other person.

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

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

(2) In this section:

*dishonest* means:

- (a) dishonest according to the standards of ordinary people; and
- (b) known by the person to be dishonest according to the standards of ordinary people.

(3) This section applies in relation to the following conduct as if that conduct were dealing in financial products:

- (a) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
- (b) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
- (c) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product.

**1041G Dishonest conduct**

(1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.

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

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I.

(2) In this section:

*dishonest* means:

- (a) dishonest according to the standards of ordinary people; and

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- (b) known by the person to be dishonest according to the standards of ordinary people.

**1041H Misleading or deceptive conduct (civil liability only)**

- (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

- (2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

- (a) dealing in a financial product;
- (b) without limiting paragraph (a):
  - (i) issuing a financial product;
  - (ii) publishing a notice in relation to a financial product;
  - (iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;
  - (iv) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
  - (v) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
  - (vi) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with a beneficiary of that entity as such a beneficiary;
  - (vii) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;



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- (viii) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product;
  - (ix) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;
  - (x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).
- (3) Conduct:
- (a) that contravenes:
    - (i) section 670A (misleading or deceptive takeover document); or
    - (ii) section 728 (misleading or deceptive fundraising document); or
  - (b) in relation to a disclosure document or statement within the meaning of section 953A; or
  - (c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

**1041I Civil action for loss or damage for contravention of sections 1041E to 1041H**

- (1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

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(1A) Subsection (1) has effect subject to section 1044B.

Note: Section 1044B may limit the amount that the person may recover for a contravention of section 1041H (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

(1B) Despite subsection (1), if:

(a) a person (the *claimant*) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the *defendant*) that was done in contravention of section 1041H; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Division 2A also applies proportionate liability to a claim for damages under this section for a contravention of section 1041H.

(2) An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.

(3) This section does not affect any liability that a person has under any other law.

(4) Section 1317S (which provides for relief from liability) applies in relation to liability under subsection (1) as if:

(a) the sections referred to in subsection (1) were civil penalty provisions; and

(b) proceedings under subsection (1) were eligible proceedings.

Note: Relief from liability under this section may also be available (depending on the circumstances) under Division 4.

## Division 3—The insider trading prohibitions

### Subdivision A—Preliminary

#### 1042A Definitions

In this Division:

*able to be traded* has a meaning affected by section 1042E.

*Division 3 financial products* means:

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

*generally available*, in relation to information, has the meaning given by section 1042C.

*information* includes:

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

*inside information* means information in relation to which the following paragraphs are satisfied:

- (a) the information is not generally available;
- (b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

*material effect*, in relation to a reasonable person's expectations of the effect of information on the price or value of Division 3 financial products, has the meaning given by section 1042D.

*procure* has a meaning affected by section 1042F.

*relevant Division 3 financial products*, in relation to particular inside information, means the Division 3 financial products referred to in paragraph (b) of the definition of *inside information*.

#### **1042B Application of Division**

This Division applies to:

- (a) acts and omissions within this jurisdiction in relation to Division 3 financial products (regardless of where the issuer of the products is formed, resides or located and of where the issuer carries on business); and
- (b) acts and omissions outside this jurisdiction (and whether in Australia or not) in relation to Division 3 financial products issued by:
  - (i) a person who carries on business in this jurisdiction; or
  - (ii) a body corporate that is formed in this jurisdiction.

#### **1042C When information is *generally available***

- (1) For the purposes of this Division, information is *generally available* if:
    - (a) it consists of readily observable matter; or
    - (b) both of the following subparagraphs apply:
      - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information; and
      - (ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
    - (c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
      - (i) information referred to in paragraph (a);
      - (ii) information made known as mentioned in subparagraph (b)(i).
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Part 7.10 Market misconduct and other prohibited conduct relating to financial  
products and financial services  
Division 3 The insider trading prohibitions

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- (2) None of the paragraphs of subsection (1) limits the generality of any of the other paragraphs of that subsection.

### Subdivision B—The prohibited conduct

#### 1043A Prohibited conduct by person in possession of inside information

- (1) Subject to this Subdivision, if:
- (a) a person (the *insider*) possesses inside information; and
  - (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of *inside information* in section 1042A are satisfied in relation to the information;

the insider must not (whether as principal or agent):

- (c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
- (d) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

- (2) Subject to this Subdivision, if:
- (a) a person (the *insider*) possesses inside information; and

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(b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of *inside information* in section 1042A are satisfied in relation to the information; and

(c) relevant Division 3 financial products are able to be traded on a financial market operated in this jurisdiction;

the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

(d) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or

(e) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

(3) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1) or (2):

(a) paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(b); and

(b) paragraph (2)(a) is a physical element, the fault element for which is as specified in paragraph (2)(b).

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**1043H Exception for knowledge of person's own intentions or activities**

A natural person does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the person is aware that he or she proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.

**1043I Exception for bodies corporate**

- (1) A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the body corporate is aware that it proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.
- (2) Subject to subsection (3), a body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because an officer or employee of the body corporate is aware that the body corporate proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.
- (3) Subsection (2) does not apply unless the officer or employee of the body corporate became aware of the matters referred to in that subsection in the course of the performance of duties as such an officer or employee.



**1043J Exception for officers or agents of body corporate**

- (1) Subject to subsection (2), a person (the *first person*) does not contravene subsection 1043A(1) by entering into a transaction or agreement on behalf of a person (the *second person*) in relation to financial products issued by another person (the *third person*) merely because the first person is aware that the second person proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the third person or by a fourth person.
- (2) Subsection (1) does not apply unless the first person became aware of the matters referred to in that subsection in the course of the performance of duties as an officer or employee of the second person or in the course of acting as an agent of the second person.

## Division 2—Offences generally

### 1311 General penalty provisions

- (1) A person who:
- (a) does an act or thing that the person is forbidden to do by or under a provision of this Act; or
  - (b) does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or
  - (c) otherwise contravenes a provision of this Act;
- is guilty of an offence by virtue of this subsection, unless that or another provision of this Act provides that the person:
- (d) is guilty of an offence; or
  - (e) is not guilty of an offence.
- (1A) Paragraphs (1)(a), (b) and (c) only apply to a provision in the following list if a penalty, pecuniary or otherwise, is set out in Schedule 3 for that provision, or for a provision or provisions in which that provision is included:
- (a) Chapters 2A, 2B and 2C;
  - (b) Parts 2F.2 and 2F.3;
  - (c) Chapters 2G, 2H, 2J, 2M (other than Part 2M.4), 2N and 5A;
  - (d) Parts 5B.1 and 5B.3;
  - (e) Chapter 10.
- (2) Subject to section 1312, a person who is guilty of an offence against this Act, whether by virtue of subsection (1) or otherwise, is punishable, on conviction, by a penalty not exceeding the penalty applicable to the offence.
- (3) Where:
- (a) subsection (1) operates in relation to a provision of this Act so as to make a person guilty of an offence; or
  - (b) a provision of this Act (other than this section) provides that a person is, in circumstances referred to in the provision, guilty of an offence;
- and a penalty, pecuniary or otherwise, is set out in Schedule 3 for that provision, or for a provision or provisions in which that

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provision is included, the penalty applicable to the offence is the penalty so set out.

- (4) Where a provision of this Act (other than this section) provides that the penalty applicable to a contravention of a particular provision of this Act is a specified penalty, pecuniary or otherwise, the penalty applicable to an offence constituted by a contravention of the particular provision is the specified penalty.
- (5) Except as provided in subsection (3) or (4) or in a provision of this Act (other than this section), the penalty applicable to the offence is a fine of 5 penalty units.

### 11.5 Conspiracy

- (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*.

- (2) For the person to be guilty:
- (a) the person must have entered into an agreement with one or more other persons; and
  - (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
  - (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

- (2A) Subsection (2) has effect subject to subsection (7A).

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- (3) A person may be found guilty of conspiracy to commit an offence even if:
- (a) committing the offence is impossible; or
  - (b) the only other party to the agreement is a body corporate; or
  - (c) each other party to the agreement is at least one of the following:
    - (i) a person who is not criminally responsible;
    - (ii) a person for whose benefit or protection the offence exists; or
  - (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
- (4) A person cannot be found guilty of conspiracy to commit an offence if:
- (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
  - (b) he or she is a person for whose benefit or protection the offence exists.
- (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
- (a) withdrew from the agreement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
- (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
- (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.
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