IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P61 of 2011

BETWEEN:

ANNOTATED

JOHN KIZON
Appellant

and

THE QUEEN
First Respondent

and

NIGEL CUNNINGHAM SWIFT MANSFIELD
Second Respondent

HIGH COURT OF AUSTRALIA
FILED
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OFFICE OF THE REGISTRY PERTH

Redacted for Publication

FIRST RESPONDENT'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, subject to the redaction of paragraph 5 (f) hereof.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The proper construction of the word information in the former s.1002G (as defined in s.1002A(1)) of the *Corporations Act 2001* (Cth) (the Act) and its successor s.1043A (as defined in s.1042A) of the Act, and in particular whether "information" must be a factual reality and cannot include falsehoods or lies.

3. Whether it is an element of the offence of insider trading under the former s.1002G and its successor, s.1043A, that the inside information in the possession of the accused correspond in whole or in material part with the actual internal affairs or internal workings of the entity entitled to possess it.

Part III: SECTION 78B JUDICIARY ACT 1903

4. The First Respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth). No such notice is required.

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Part IV: CONTESTED MATERIAL FACTS

5. The First Respondent agrees with the relevant facts outlined at paragraphs 7 to 27 and 33 of the Appellant's submissions save for the following:

(a) The First Respondent conducted the prosecution on the basis that the information that constituted the inside information were the actual statements made by Malcolm Day ("Day") to the Appellant or the Second Respondent or both[1].

(b) In relation to each of counts 1, 9, 14, 21, 22 and 23, the Crown alleged that the 'inside information' included, as a component, the fact that the information in each instance was imparted by Day, the Managing Director of AdultShop.com ("AdultShop"). The particulars for count 1 reproduced below provide a representative example. Sub paragraph (c) of the particulars is part of the 'information' allegedly possessed by the accused:

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

(c) In relation to each of counts 9 and 14, the Crown alleged that the inside information in each instance included the information previously imparted, in addition to the 'further statements' by Day referred to by the Appellant.

(d) Adultshop reported to the Australian Stock Exchange on 13 May 2002 that its forecast revenue from ordinary activities would reach $116

[1] Transcript at pp. 2731-2732, 2799-2802, during the course of the "no case submission". AB 523 (lines 40 – 50) to AB 524 (lines 10 – 50) and AB 527 (from line 30) to 530 (at line 10), respectively, Volume 2.

million. On the evidence that forecast could not be justified[2]. The evidence at the trial disclosed the price of Adultshop shares rose as a result of that release. The evidence also demonstrated the Appellant and the Second Respondent talking about the release, that the share price was rising and what they should do.

(e) The First Respondent does not concede that the evidence revealed that Day had probable knowledge that the statements were either false in whole or in part (see paragraph 34 of the Appellant's submissions.

[redacted]

6. The comments attributed to Senior Crown Prosecutor Mr Woinarski QC at paragraph 31 of the Appellant's submissions [Transcript 2459, AB 517, line 30, Volume 2] arose from argument that occurred towards the end of the prosecution case, as to whether the particulars were alternatives (the Crown's initial position) or cumulative (the argument of the Appellant and Second Respondent). It was during this argument that the passage from the transcript set out in paragraph 31 of the Appellant's submissions occurred. In the context of that argument, if the Crown could not establish, for example, either particular 1(a) or 1(b) with respect to Count 1, the source of the information (particular 1(c)) in isolation and alone could never of itself constitute inside information. The transcript then immediately continues on:

> "WISBEY DCJ: *Well, the accused persons would say that the source goes to whether it's - - -*
>
> WOINARSKI, MR: *Reliable.*
>
> WISBEY DCJ: *- - - reliable.*
>
> WOINARSKI, MR: *Yes. And we certainly will be saying to this jury, if we get to that situation, that they're entitled to have regard to the source as to being different, for example, from the man in the street simply saying, "This is the information". "*

AB 517, lines 30 – 40, Volume 2.

Towards the end of that argument the Crown advised it would conduct the matter on the basis that the jury needed to be satisfied the Appellant and the

[2] Transcript 2639. AB 522, lines 30 – 40, Volume 2.

Second Respondent possessed all of the information particularised for each count[3]. The trial Judge directed the jury in accordance with this[4] when charging the jury on the four remaining counts.

7. The particularised information included in each instance the fact that the information was imparted by Day. The information in most instances was initially imparted by Day to either the appellant or the Second Respondent and conveyed by the recipient to the other. The Crown did not particularise any of the particularised information as being truthful.

Part V: Legislation

8. Sections 1000, 1001, 1041D and 1041F of the Act are also relevant.

Part VI: RESPONDENT'S ARGUMENT

The Crown's particulars

9. The First Respondent conducted its case at trial on the basis that the Appellant accepted the truthfulness of the statements made by Day, their contents being the 'information' particularised ("the particularised information") and which was alleged to be inside information. Similarly, the Appellant conducted his case on the basis that, at the material times, the Appellant and the Second Respondent accepted the truthfulness of the particularised information. In the course of a "no case submission", the First Respondent conceded that the prosecution could not prove beyond reasonable doubt that much of the particularised information was in fact accurate or correct[5]. The First Respondent could however prove that Day had imparted the particularised information to the Appellant and, or alternatively the Second Respondent.

10. In *R v Rivkin* (supra) the Court of Criminal Appeal of New South Wales held at [131]:

> *"We see no reason why the information should not, in addition to any underlying facts stated, identify the person who made the relevant statements. What the appellant was in possession of was the state of affairs described and its source".*

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[3] Transcript pp. 2468-2469. AB 519, line 40, to AB 520, line 20, Volume 2.
[4] Transcript p. 3022, to be provided.
[5] Transcript at 2798ff. AB 526 lines 10 – 40, Volume 2.

The statutory definitions

11. "Information" is defined in the Act prior to 11 March 2002 by section 1002A and from 11 March 2002 on by section 1042A of the Act. The definition in both sections is identical and provides as follows:

> *"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."*

12. The legislature initially by s.1002G of the Act and subsequently s.1042A of the Act, set out what constitutes "inside information" by (stated in basic terms) reference to the information being not generally available and that objectively it would have a material effect on the price or value of (for s.1043A) Division 3 financial products ("price sensitive"). There is no requirement that the information must be derived from any source. It is the effect of the information viewed objectively to influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire, or dispose of, such a product that is important.

13. The offence of insider trading now proscribes the application for, acquisition or disposal of Division 3 financial products whilst in possession of inside information. Division 3 financial products is an extensive term[6], which includes shares in listed companies, as in the instant case, and, for example, derivatives[7] or government bonds[8],

14. There are some variations in what needs to be proven in order for the "information" to become "inside information" under s.1002G and s.1042A of the Act. For the purposes of this appeal such differences are irrelevant and do not bear upon the proper construction of the word "information". However,

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[6] See definition in s.1042A of the Act.
[7] Paragraph (b) of the definition.
[8] Paragraph (ca) of the definition.

once those statutory elements are satisfied, nothing further is required in order for information to be "inside information".

Meaning of "information"

15. The meaning of "information" within the context of the insider trading provisions must take into account the wide range of financial products that are covered by the definition of Division 3 financial products. It is not suggested the legislature has in any way changed the meaning of "information" by the introduction of the definition of "Division 3 financial products", Rather, it is submitted that by increasing the financial products subject to the insider trading provisions, the legislature recognized that the meaning of the inclusive definition was sufficiently wide to cover price sensitive information concerning all Division 3 financial products. It is submitted this is an indication that "information" was being used in the insider trading provisions in its ordinary sense.

16. In its ordinary meaning the word has, as Buss JA identified at [105] (AB 2889, lines 10 – 20, Volume 9), a broad connotation. Both definitions set out by Buss JA include the concept of being told something. The Appellant in paragraph 49 of the Submission seeks to rely on a single aspect of the Oxford English Dictionary definition. Both acknowledge that news of some fact can, and often does, turn out to be incorrect or even false. Information does not cease to be information because it later turns out to be incorrect or wrong or even untrue. One can be informed of something (i.e. to have that information or to be apprised of it), but not know whether that something is true or not[9].

17. To give such a meaning to "information" is consistent with the extended definition which includes "matters of supposition". The ordinary meaning of a supposition includes the act of supposing, an assumption or an hypothesis[10] or a premise from which a conclusion is drawn and an idea that something is true[11]. A supposition may well be wrong, it certainly does not have to be factually correct. A supposition may be that drawn by the recipient of information and

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[9] See *State v Simpson* (1909) 118 SW 1187 at 1188; cited with approval by Young J in *HookerInvestments Pty Ltd v Baring Bos Halkerston & Partners Securities 7 ors* (1986) 10 ACLR 462 at 468.

[10] Macquarie Dictionary 2nd. Ed.

[11] Shorter Oxford Dictionary 6th .Ed.

could be demonstrated to be wrong by other information not made known to the recipient.

18. Whilst providing an inclusive definition for "information" in Division 3 of Part 7.10 of the Act, it cannot have been the intention of the legislature that "information" in Division 2 of Part 7.10 of the Act should have a wider meaning than in Division 3 of Part 7.10 of the Act.

19. Courts have considered the meaning in other contexts and have expressed the view that its ordinary meaning includes false information[12] and "*is not confined to material that is reliable or has a sound factual basis*"[13]. In the context of the *Freedom of Information Act* 1982 (Cth) and social security legislation, that "*deliberately false information, albeit malicious*" is still information[14]. In the context of the Refugee Review Tribunal, that "information" is not confined to "*material that is reliable or has a sound factual basis*" and includes "*fabricated*" information"[15]. In the case of information for the issue of a search warrant, that "*I can think of no reason why false information could not be in a relevant sense "information"*"[16].

20. The submitted meaning is consistent with the legislative history, the policy rationale, earlier decisions and the contextual framework of Part 7.10 of the Act.

The development of the statutory definition of information

21. The definition of "information" for the purposes of the insider trading prohibitions was introduced by the *Corporations Legislation Amendment Act 1991* (Cth) ("the 1991 Amendment Act") following a series of recommendations contained in the report of the House of Representatives Standing Committeee on Legal and Constitutional Affairs, entitled "Fair Shares for All: Insider Trading in Australia", published in October 1989 ("the Griffiths Report"). That definition of "information" came into force on 1 August 1991 and remains unchanged.

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[12] *Hook v John Fairfax* (1982) 42 ACTR 17 at 19 ("information can be true or untrue").
[13] *Wharton v Official Receiver in Bankruptcy* (2001) 107 FCR 28; 182 ALR 208 at [57]-[67]
[14] *McKenzie v Secretary, Department of Social Security* (1986) 65 ALR 645, 648-649.
[15] *Win v Minister for Immigration & Multicultural Affairs* (2001) FCR 212, 217-218; [2001] FCA 56 at [17]-[21] (Full Fed Ct); and VAF v *Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 206 ALR 471 at [24] (following *Win*).
16 Per Hill J in *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157 at 165.

22. Prior to the 1991 Amendment Act, insider trading was prohibited in a narrower set of circumstances. Section 128(1) of the *Securities Industry Act 1980* (Cth) was considered in New South Wales, when the co-operative scheme was in force, in *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd*[17]. Section 128(1) of the *Securities Industry (NSW) Code 1980* (the Securities Industry Act) was in the following form:

> *"A person who is, or at any time in the preceding 6 months has been, connected with a body corporate shall not deal in any securities of that body corporate if by reason of his so being, or having been, connected with that body corporate he is in possession of information that is not generally available but, if it were, would be likely materially to affect the price of this securities".*

23. The Securities Industry Act did not define "information". In *Hooker* Young J held[18] that by reason of section 128(8), a "person" under section 128(1) had to be a natural person and not a body corporate. That exposed an anomalous situation, namely that only a natural person and not a corporation could be a "connected person" under section 128(1). The Griffiths Report considered submissions to the effect that this was too restrictive and the *Hooker* case was cited as an example[19].

24. The Griffiths Report also noted an Australian Stock Exchange Limited submission to the effect that it is not the "connection" with a corporation that matters, rather it is the use of inside information under certain circumstances[20].

25. Accordingly, the Griffiths Report 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 insider trading has occurred"* [21][Emphasis added].

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[17] (1986) 10 ACLR 462
[18] Supra at 465 - 466
[19] At paragraph 4.3.1 of the Griffiths Report.
[20] At paragraphs 4.3.3 and 4.3.4 of the Griffiths Report.
[21] At paragraph 4.3.5.

26. This passage was cited in part by McLure P in her Honour's judgment[22]. McLure P seems to have placed emphasis on the words "*information derived from within a company*". However, it is submitted that the Griffiths Committee's focus had been on:

(a) removing the need for there to be a connected person;

(b) identifying the use of information, as opposed to the connection between a person and a corporation, as giving rise to the "genesis" of the insider trading offence and as the "basis for determining whether insider trading has occurred".

27. The Griffiths Report recommendations concerning the removal of the "connected" person were adopted in the next iteration of the insider trading provisions enacted pursuant to the 1991 Amendment Act, namely sections 1002 to 1002U of the Corporations Act. They remain unchanged in this respect.

28. The Griffiths Report had not, by paragraph 4.3.5 intended to incorporate, within the offence creating provision, an element to address the mechanism for the derivation of information. That is evident when the actual Recommendations are analysed. Recommendations 2 – 10 make specific recommendations concerning the text of the proposed insider trading provisions. None of these recommendations address the mechanism for the derivation of the inside information. For example:

(a) Recommendation 2[23] recommended that a proscription upon certain share dealings be imposed on a person (including a corporation) who is in possession of inside information under specified circumstances. The need for an underwriter's exception was addressed.

(b) Recommendation 3[24] recommended that there be a statutory definition of inside information. [The recommended definition was very similar to that enacted in s.1002G of the Act by the 1991 Amendment Act.]

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[22] *R v Mansfield* [2011] WASCA 132 at [19]. AB 2865, line 20, Volume 9.
[23] At paragraph 4.3.7.
[24] At paragraph 4.4.17.

29. Under the Act the gravamen of the insider trading offence is the act of trading whilst in possession of "inside information". The method by which one comes into possession of that "inside information" does not bear upon the commission of the offence. In the case of an offence relating to share trading, the "information" may come from many sources. For example, from within the corporation whose shares are being traded by a range of means. It may come from within another corporation or it may come directly or indirectly from another individual who is unconnected with the corporation whose shares are being traded. In this regard the offence is very different from the first specific Australian prohibition on insider trading[25]: s.75A of the *Security Industry Act* 1970 (NSW). That provision required the insider to have knowledge of specific information relating to a corporation through the insider's association with the corporation[26].

30. Prior to the 1991 Amendment Act there was no requirement within the statutory framework to the effect that the "inside information" in the possession of the accused correspond in whole or in material part with the actual internal affairs or internal workings of the entity entitled to possess it. It is submitted the 1991 amendments did not introduce such a requirement. The "inside information" does not need to have this quality in order to "actually exist".

The policy rationale

31. The Griffiths Committee endorsed the market fairness rationale:

> *".....it must be emphasised that the basis for regulating insider trading is the need to guarantee investor confidence in the integrity of the securities markets. Accordingly, the Committee confirms the principles adopted in 1981 by the Committee of Inquiry into the Australian Financial System (the Campbell Committee) as a basis for the prohibition of insider trading:*
>
> > *The object of restrictions on insider trading is to ensure that the securities market operates freely and fairly, with all participants having equal access to relevant information. Investor confidence, and thus the ability of the market to mobilise savings, depends importantly on the prevention of the improper use of* ***confidential information***". [3.3.6] [Emphasis added]

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[25] The Griffiths Report at paragraph 2.1.6.
[26] This section was considered in *Ryan v Triguboff* (1976) 1 NSWLR 588.

32. In referring to "confidential information", the Campbell Committee was not introducing fiduciary or misappropriation concepts. Rather, it was addressing the character of the information, which evolved into information that is not "generally available" as found in section 1002G(1) read together with section 1002C, and section 1042A read together with section 1042D.

33. The Griffiths Committee also stated that:

> *"...insider trading legislation should not be based on any theory which may limit the scope of the prohibition, either by some concept of fiduciary duty or a theory of misappropriation"* [27]:

34. The legislative requirement is that the "information" must have a "*material effect on price or value of* [shares]". The legislature is concentrating on the benefit available of possessing the information in circumstances where a reasonable person would be taken to expect that information to have a material effect on the price or value of particular Division 3 financial products. That occurs if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire, or dispose of, the Division 3 financial product and which is unlikely to be possessed by others at that time who are acquiring, or disposing of, the particular Division 3 financial products.

35. The insider trading offences in section 1002G and section 1043A of the Act are intended to prohibit persons from applying for, acquiring, or disposing of, Division 3 financial products at a time when they have "information" that is "not generally available" and which is "material". Consistent with the legislative policy rationale, the insider trading offences focus upon the potential benefit of the possession of the "information" at the time the relevant transaction occurred, rather than the extent to which any benefit was actually realised by the insider. The prohibition applies even if the person makes a loss.

36. Crucially, the market trades on the basis of "information" without reference to absolute concepts, such as its objective truthfulness, and is full of rumours and innuendos. At [123] Buss JA held that[28] :

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27 At paragraph 3.3.5.

28 *R v Mansfield [2011] WASCA 132 at [123].* AB 2893, lines 30 – 40, Volume 9.

> *"... 'information' that is not 'truthful' or not a 'factual reality' or not based on reasonable grounds may, nevertheless, influence persons who commonly acquire div 3 financial products in deciding whether or not to acquire or dispose of the financial products in question:*
>
> *(a) if the untruthfulness or absence of factual reality or absence of reasonable grounds is unknown to them; or*
>
> *(b) if the untruthfulness or absence of factual reality or absence of reasonable grounds is known to them, and they use this knowledge in deciding whether or not to acquire or dispose of the relevant financial products".*

37. The real issue for consideration is an assessment of what is capable of influencing the relevant persons. If the information is an obvious lie, that is to be assessed by reference to the materiality test. This provides the balance to the breadth of the definition of "information". At [124] (AB 2893, lines 40 – 50 and AB 2894, line 10, Volume 9) Buss JA held that:

> *".....if the 'information' relied on by the Crown in an insider trading prosecution was not 'truthful' or not a 'factual reality' or not based on reasonable grounds, that characteristic of the 'information' may, depending on the circumstances, be relevant to the inquiry mandated by s 1042D, namely, whether the 'information' would, or would be likely to, influence persons who commonly acquire div 3 financial products in deciding whether or not to acquire or dispose of the financial products in question.* ***For example, a statement which appears, on its face, to be completely without foundation, would be unlikely to influence persons who commonly acquire the relevant financial products in deciding whether or not to acquire or dispose of those products***" [Emphasis added].

38. Further, the identity of the person imparting the information will form part of the evaluations undertaken from the perspective of a reasonable person in the assessment of materiality under s. 1002C or 1042D of the Act.

39. The moral turpitude of a person who acquires or disposes of shares whilst in possession of what they consider to be "inside information" at the material time is not to be assessed by reference to hindsight – that is, that the information they sought to take advantage of turns out to be false, and their actions are thereby absolved. In many cases the alleged insider will, at the

time of the actus reus, not be in a position to ascertain the truthfulness or accuracy of the inside information possessed and may well never be in such a position.

40. In many instances an insider will have no idea, and often not be capable of discovering, whether the information is truthful, factually correct, exaggerated, partly untrue or deliberately misleading. That is why the focus is on the ability of the information viewed objectively to influence persons who commonly acquire Division 3 financial products in deciding whether to acquire, or dispose of, such products.

41. Adopting the Appellant's own argument, had he profited from the trading, he would have been entitled to keep the profits if Day had lied, but would have been guilty of insider trading if Day had told the truth. This is so despite the fact that the Appellant himself accepted the truthfulness of Day's statements and accepted that they were price sensitive and not generally available.

42. The Appellant essentially contends that he ought to be absolved because Day was a "rogue director". This fails to take into account the fact that if such information is released to the market and becomes "generally available" other traders may believe it to be true and may trade, with the likely consequence of the share price increasing. The advantage gained by the Appellant (the "insider") in being afforded an opportunity to engage in, essentially, a risk reduced transaction, is the very harm that the insider trading provisions seek to address. The fact that in this case, the Appellant acted to sell most of his shares before the release and consequential price increase is not to the point.

43. Insider trading under s.1002G or s.1043A of the Act is to be assessed by reference to the perception of the reasonable person, and what an accused knew or ought to have known, with respect to the inside information. It is not assessed by reference to the mental state of the person who imparts the information. To interpret "information" in the manner proposed by the Appellant would divert the focus of an insider trading trial away from the consideration of the materiality of the information alleged to have been possessed into questions of the objective or absolute truth of that information. That in turn, given the nature of the market and the existence of

suppositions and rumour, would create insurmountable evidentiary issues. This is particularly so when it is known that information may come by way of hints or veiled suggestions, that it may include matters of supposition and matters concerning the likely intentions of a person.

44. The evidence in this case demonstrates that the effects of insider trading can occur regardless of whether the 'information' ultimately turns out to be "a factual reality", slightly less than "a factual reality", or a complete falsehood.

45. Having regard to the policy rationale for the insider trading offences it is irrelevant whether a company's profitability announcement may have been a significant exaggeration such that if the company's accounts had been carefully scrutinised by an expert team of accountants and, or alternatively, auditors they would have revealed a very different "factual reality": for example, that the company's profitability had decreased to such an extent that it had actually made a loss.

46. The physical and fault elements of an offence must coincide in time[29]. Thus, the First Respondent was required to prove that the Appellant either knew, or ought reasonably to have known, that the 'information' he possessed was "inside information" at the time when the relevant share trades were placed. It is not a matter of hindsight.

47. To interpret the definition in the manner submitted by the Appellant would result in a situation where, if two accused are both thought to have inside information and to have traded, and both are prosecuted at different times:

    (a) one may be convicted if the information is considered to be truthful.

    (b) one may be acquitted if later, upon further analysis, the information is found to be false.

48. Additionally, if it were otherwise:

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[29] *Campbell v R* (2008) 188 A.Crim.R.1: per Spigelman CJ, with whom Simpson J and Weinberg AJA agreed, at [43] and [44] and Weinberg AJA at [137] and [180]. Simpson J also expressly agreed with the additional observation of Weinberg AJA.

(a) any insider trading charge could be defended by asserting that the person imparting the information lied, in whole or in part – the provisions and their legislative intent become unworkable;

(b) the fact that certain information was a fraudulent misrepresentation may emerge many years after a successful prosecution and ought not, of its own accord, operate to retrospectively absolve an offender.

49. None of the judges in the Court below found that "information" has to be a factual reality. The dissenting judgment of McLure P (at AB 2861 – 2865, Volume 9) is based on her conclusion that the information needed to exist in the entity entitled to it, not that it was true.

50. Buss JA in the Court below addresses the purposive approach to statutory construction, with the function of a definition being not to enact substantive law, but to provide an aid to construing a statute (at [101] (AB 2888, line 20, Volume 9) considering McHugh J in *Kelly v The Queen* [2004] HAC12; (2004) 218 CLR 16).

51. The definition of "information" is to be looked at by reference to the harm that the Part 7.10 Division 3 seeks to address. It is given an expanded meaning in s1042A because that takes into account the manner in which information affects the securities market in the context of insider trading.

Case law on the meaning of "information"

52. The Explanatory Memorandum to the Act, at [319 - 320] addressed the need for a definition for "information" notwithstanding the breadth of the interpretation afforded to that term in the previously decided *Commissioner for Corporate Affairs v Green*[30], to the effect that information may be suggested by a hint and may often be veiled. This pre existing interpretation was not disavowed. Rather, any remaining doubt as to the breadth of the meaning of "information" was addressed by the introduction of an inclusive definition:

> *"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*

[30] [1978] VR 505 at 511

> *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." [Explanatory Memorandum, paragraph 320]*

53. In *Green*, McInerney J in considering "information" had noted the contrast between other legislative provisions that referred to "specific information" (at 511) and declined to import into s 124(2) of the *Companies Act, 1961*, a word which was not there[31]. Having determined there was no need to import the additional requirement for specificity or precision of information, McInerney J concluded:

> *"In many cases a hint may suggest information or may enable an inference to be drawn as to information".*[32]

54. This line of reasoning continued to be reflected in the *obiter dicta* comments in *Hooker Investments Pty Ltd v Baring Bros*[33], where Young J, after referring to *Green* expressed the view that information "*may include a rumour that something has happened with respect to a company which a person neither believes nor disbelieves.*" Similarly, with the ruling of Whealy J in *R v Rivkin*[34] that "*a statement of a falsehood may in certain circumstances come within the concept of information.*". This line of reasoning was also acknowledged with the comments of the NSW Court of Criminal Appeal in *R v Rivkin*[35].

55. Jacobson J in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd*[36] in considering the definition of "information" in s 1042A expressed the view that information can be non specific and that what is drawn from it by way of inference, is also "information" as defined[37].

56. In *Hannes v Director of Public Prosecutions (No. 2)*[38] Barr and Hall JJ considered the meaning of "matters relating to the intention or likely

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[31] For this reason, an analysis of overseas legislation, expressed differently and often containing the word "precise" or "specific" in connection with information, does not assist.
[32] [1978] VR 505 at 511.
[33] (1986) 10 ACLR 462 at 467-468.
[34] NSW Supreme Court, 70065/12, 10 April 2003.
[35] [2004] NSWCCA 7 at [125] to [128].
[36] (2007) 241 ALR 705; [2007] FCA 963 at [536] to [544].
[37] Supra, at 537
[38] (2006) 165 A Crim R 151 at 250-251, [408]-[415].

intentions, of a person" in former s1002A(1), now s 1042A, concluding that intentions may be held with varying degrees of certainty. Further that:

> *"The existence of such an intention is information. If it is passed on to others, it is information in the hand of the recipients. However, the intention may be inferred by others from the conduct of the directors. The inference may be drawn with varying degrees of certainty as to its accuracy. Nevertheless such an inference is information...where the director tells a third party of his or her intentions, the information is in fact inferred not merely from receiving the communication but from forming a belief as to its veracity."* [39]

57. The above cases support the proposition that since the 1991 Amendment Act "information" has been defined broadly. None of the cases suggest that "information" needs to be truthful, or free of falsehoods or lies. None suggest that "information" needs to correspond in whole or in material part with the actual internal affairs or internal workings of the entity entitled to possess it. In fact, the situation is quite the opposite. Inferences may be drawn by the recipients, so that the recipient's own contribution to the state of affairs, whether accurate or not, can be considered in assessing what the "information" comprises.

58. The conclusions reached by Buss JA (at [114] (AB 2891, lines 30 – 40, Volume 9)) and Murray J (at [308] (AB 2947, lines 30 – 40, Volume 9)) in the Court below to the effect that "information" need not be truthful, to qualify as such, are consistent with the case law on this point, to date.

59. The statute law of the Commonwealth in enacting offence provisions has recognized that information may be false[40]. Indeed, it does so in the Act in ss.1041E(1) and 1041F(1)(c).

Insider trading provision within the context of the statutory framework

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[39] Supra at 251, [411].

[40] See for example section 90.1 of the *Criminal Code* (Cth) which states that for the purposes of that section ***"information"*** means information of any kind, whether true or false and whether in a material form or not, and includes:

(a) an opinion; and

(b) a report of a conversation.

60. To conflate the definition of "information" with principles governing the obligation for continuous disclosure misapprehends the legislative intention behind:

(a) the insider trading prohibition, which addresses market unfairness in securities transactions between persons; and

(b) the continuous disclosure provisions, which separately address the obligation of a corporation to keep the market informed of relevant information. These provisions seek to attack insider trading (Mason P in *Firns*, cited by Buss JA at [83] (AB 2883, line 10, Volume 9) in the Court below) but that is not their only purpose.

61. The continuous disclosure provisions are found in Chapter 6CA of the Act. The Act has provided an expanded definition for "information" within the insider trading provisions in order to capture the conduct that gives rise to insider trading. The continuous disclosure provisions in s.674 of the Act and applicable to certain listed disclosing entities were created in the context of, and refer to, the market listing rules. Failure to comply with the listing rules is a precursor for the commission of an offence pursuant to s.1311(1) of the Act. The market listing rules provide disclosure exemptions for information of a certain quality. This has the consequence that "information" as defined in ss.1002A(1) and 1042A includes information that would not be required to be disclosed pursuant to the listing rules.

62. By reference to the Act as it applied from 11 March 2002 , Part 7.10 of the Act addresses market misconduct and prohibited conduct of a related nature. The insider trading prohibitions are found in Division 3 of Part 7.10. Division 2 of Part 7.10 addresses certain prohibited conduct. Broadly speaking Division 2 is aimed at proscribing conduct that amounts to market manipulation, market rigging, making false or misleading statements or otherwise engaging in dishonest conduct with the aim of inducing others to deal in shares or otherwise distort the market.

63. Divisions 2 and 3 of Part 7.10 sit comfortably together. The former deals with proactive conduct that distorts the market. The latter deals with the behaviour of the recipients of "information" that constitutes inside information. They are not

mutually exclusive Divisions. They address different types of market misconduct, from different angles and in this regard, there are synergies between the two Divisions. Both Divisions protect the integrity of the market. It is not a matter of choosing the application of one or other Division. For example, it promotes market integrity to both seek to prevent a director lying about his or her company's prospects (s 1041E) and to also seek to prevent a trader from engaging in a transaction whilst in possession of that information, albeit a lie, pending the release of inside information (which may include that lie) to the market. Furthermore, the prohibition on market manipulation is assisted if a person who possesses that information (the lie) is prohibited from trading if the information otherwise falls within the concept of inside information. The judgment of Buss JA in the Court below (AB 2865 – 2945, Volume 9) provides a clear exposition of the relevant principles having regard to the purposive approach to statutory construction and the statutory framework for the insider trading provisions. Nothing within that judgement mandates the dissemination of falsehoods. Rather, the insider trading provisions, the continuous disclosure provisions and the market misconduct provisions work together to prevent the dissemination of falsehoods, and include the prevention of insider trading when falsehoods are disseminated as inside information. This promotes market integrity.

Judgment of McLure P

64. It is submitted that the conclusion of McLure P that "*inside information must actually exist*"[41] was based on two reasons:

(a) the introduction of the concept of confidentiality into the meaning of inside information[42]; and

[41] *R v Mansfield* [2011] WASCA 132 at [14]. AB 2863, line 40, Volume 9.
[42] Supra at [12]. AB 2863, line 30, Volume 9.

(b) the manner in which the learned President characterised the First Respondent's particulars[43], which differed from the manner in which Buss JA[44] characterised them.

65. The concept of confidentiality brings with it duties of confidence and ownership. McLure P stated this was not a retreat to the "misappropriation theory", which was rejected by the Griffiths Committee as a policy basis for insider trading laws[45]. The First Respondent respectfully submits that it is an expression of the Misappropriation Rationale, which extends the Fiduciary Duty Rationale[46] . These rationales were rejected by the Griffiths Committee as being too limiting[47].

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[43] Supra at [5] and [17]. AB 2862, line 10 and AB 2864, lines 30 – 40, respectively, Volume 9.
[44] Supra at [26]. AB 2866, line 40, Volume 9.
[45] Supra at [12]. AB 2863, line 30, Volume 9.
[46] See Buss JA at [50] and [51]. AB 2871, lines 30 – 40, Volume 9.
[47] Griffiths Report paragraph 3.3.5.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. P60 of 2011**

BETWEEN: **NIGEL CUNNINGHAM SWIFT MANSFIELD**
Appellant

and

THE QUEEN
First Respondent

and
JOHN KIZON
Second Respondent

ANNEXURE TO PART VII OF THE FIRST RESPONDENT'S SUBMISSIONS APPLICABLE LEGISLATIVE PROVISIONS

PART 1: RELEVANT PROVISIONS AS AT THE RELEVANT POINT IN TIME

The applicable statutory provisions as they existed at the relevant time are sections 1000, 1001, 1041D and 1041F of the *Corporations Act 2001*.

All of the provisions are still in force, in that form, at the date of making these submissions, save the sections 1000 and 1001 of the *Corporations Act 2001*.

PART 2: LEGISLATIVE EXTRACTS

1000 Fraudulently inducing persons to deal in securities

(1) A person must not:

(a) by making or publishing a statement, promise or forecast that the person knows to be misleading, false or deceptive; or

(b) by a dishonest concealment of material facts; or

(c) by the reckless making or publishing (dishonestly or otherwise) of a statement, promise or forecast that is misleading, false or deceptive; or

(d) by recording or storing in, or by means of, any mechanical, electronic or other device information that the person knows to be false in a material particular or materially misleading;

induce or attempt to induce another person to deal in securities.

(3) It is a defence to a prosecution for a contravention of subsection (1) constituted by recording or storing information as mentioned in paragraph (1)(d) if it is proved that, when the information was so recorded or stored, the defendant had no reasonable grounds for expecting that the information would be available to any other person.

1001 Dissemination of information about illegal transactions

A person must not circulate or disseminate any statement or information to the effect that the price of any securities of a body corporate will or is likely to rise or fall or be maintained because of any transaction entered into or other act or thing done in relation to securities of that body corporate or of a body corporate that is related to that body corporate, in contravention of section 997, 998, 999 or 1000 if:

(a) the person, or an associate of the person, has entered into any such transaction or done any such act or thing; or

(b) the person, or an associate of the person, has received, or expects to receive, directly or indirectly, any consideration or benefit in respect of the circulation or dissemination of the statement or information.

1041D Dissemination of information about illegal transactions

A person must not (whether in this jurisdiction or elsewhere) circulate or disseminate, or be involved in the circulation or dissemination of, any statement or information to the effect that the price for trading in financial products on a financial market operated in this jurisdiction will, or is likely to, rise or fall, or be maintained, because of a transaction, or other act or thing done, in relation to those financial products, if:

(a) the transaction, or thing done, constitutes or would constitute a contravention of section 1041A, 1041B, 1041C, 1041E or 1041F; and

(b) the person, or an associate of the person:

(i) has entered into such a transaction or done such an act or thing; or

(ii) has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.

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

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

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.

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.