

IN THE HIGH COURT OF AUSTRALIA  
PERTH REGISTRY

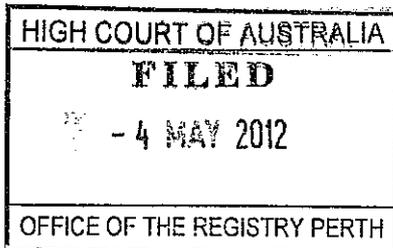
No. P60 of 2011

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF THE SUPREME COURT OF  
WESTERN AUSTRALIA

B E T W E E N:

NIGEL CUNNINGHAM SWIFT MANSFIELD  
Appellant

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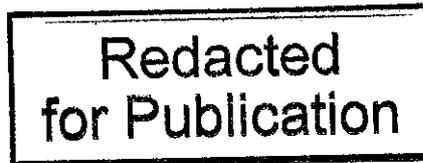


**ANNOTATED**

-and-

THE QUEEN  
First Respondent

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-and-

JOHN KIZON  
Second Respondent

**AMENDED APPELLANT'S (NIGEL CUNNINGHAM SWIFT MANSFIELD'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 certain paragraphs to be advised separately.

**PART II: CONCISE STATEMENT OF THE ISSUES**

2. The appeal calls for the construction of the definition "*information*" contained in section 1042A of the *Corporations Act 2001* (Cth) (and in respect of Counts 1, 1A- 1F, 4, 5, 6, 7, 8 and 9, 9A-D its predecessor, section 1002A (amended with effect from 11 March 2002)).
3. The issue of construction is whether "*information*" includes matters that are falsehoods or lies or, expressed alternatively, whether it is an element of the offence of insider trading, created by section 1043A of the *Corporations Act*

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(formerly section 1002G of the Act), that inside information in the possession of the accused person correspond with the factual reality in connection with the entity entitled to have or to use such information.

4. Whether the Court of Appeal (WA) erred in finding that the matters alleged by the First Respondent to constitute “*information*” for the purposes of section 1043A and 1002G constituted information in circumstances where the person who made or repeated the statement knew or believed that it was a lie or was otherwise false. AB2891

**PART III: SECTION 78B JUDICIARY ACT, 1903**

- 10 5. The Appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth). The appellant considers that no such notice is required.

**PART IV: CITATION**

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

**PART V: RELEVANT FACTS**

- 20 7. The appellant, Nigel Cunningham Swift Mansfield (“Mansfield”) and the appellant, John Kizon (“Kizon”), were tried jointly upon an indictment containing 52 Counts. AB2  
The Counts related to trading in the securities in two companies AdultShop.com Limited (“AdultShop”) and My Casino Limited (subsequently by change of name Eurast Limited) (“My Casino”). No issue was raised in the Court of Appeal (WA) or in this Court as to the Counts dealing with My Casino. Of the Counts dealing with AdultShop, Counts 1, 9, 14, 21 and 23 each alleged that Kizon and Mansfield AB2, AB10, AB16-17, AB22, AB27  
contrary to section 11.5(1) of the *Criminal Code* conspired with each other to commit an offence contrary to section 1311(1) of the Act by contravening the insider trading provisions of the Act with respect to trading in securities in AdultShop. With the exception of Count 22, which alleged that Kizon committed a AB27  
30 substantive offence under the insider trading provisions in respect of the purchase

of securities in AdultShop and Count 6 which alleged that Mansfield contravened section 1002G(3) of the *Corporations Act* by communicating information to one Lynette Kerry Puzey, all the other Counts alleged substantive offences by Mansfield in either personally purchasing shares in AdultShop or procuring a private company controlled by Mansfield, Glentown Nominees Pty Ltd, to purchase shares in AdultShop.

AB8-9

8. At all material times AdultShop was an Australian public company whose shares were listed for quotation on the Stock Exchanges in Australia and Germany. At all material times the Managing Director was Malcolm Day ("Day").

### 10 The alleged inside information

9. The alleged inside information falls into two categories and in respect of all matters is said to have been communicated by Day.

10. The first category of inside information concerns the profit and turnover.

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 AdultShop for the 2002 financial year had risen from \$3 million to \$11 million and the expected turnover for AdultShop for the same financial year had risen from \$30 million and \$50 million to about \$111 million.

12. It was alleged that on 6 January 2002 the statements made by [REDACTED] concerning [REDACTED] were discussed between [REDACTED] and [REDACTED].<sup>1</sup> It is alleged by reason of those matters, both Kizon and Mansfield, were in possession of information for the purpose of Section 1002G(2)(b) of the Act.

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13. Count 1 alleges that, whilst 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.

AB2

14. It was separately alleged, while in possession of that information, Mansfield procured Glentown to purchase shares in AdultShop on 7 January 2002 (Count 1A), 17 January 2002 (Count 1B), 23 January 2002 (Count 1C), 25 January 2002 (Count 1D), separately on 25 January 2002 (Count 1E), between 25 January 2002 and 29 January 2002 (Count 1F), 25 January 2002 (Count 7), 25 January 2002

AB2-4

AB4-5

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AB5, AB9

<sup>1</sup> [REDACTED]

(Count 8) and 30 January 2002 (Count 1G). Separately, it was alleged that Mansfield while in possession of that information procured purchased shares in AdultShop on 7 January 2002 (Counts 4 and 5). Further, it was alleged that contrary to section 1002G(3) Mansfield communicated the "information" to one Lynette Kerry Puzey on 24 January 2002 when he knew or ought reasonably to have known that Puzey would or would be likely to purchase in shares in AdultShop or procure another person to purchase shares in AdultShop (Count 6).

AB9-10,  
AB5-6

AB7-8

AB8-9

15. It is further alleged that on or about 7 February 2002 further statements were made by Day to Mansfield to the effect that Day was of the opinion that the figures for AdultShop were still a good story and that AdultShop was getting "huge figures" and Day expected that the market would be informed of the figures by March or April of 2002 (particulars to Count 9).

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AB39-40

16. For the purpose of the indictment in Count 9 and subsequent Counts (9A-9E) it is alleged that the further statements combined with the statements the subject of Count 1 and following constituted "information" concerning AdultShop for the purpose of section 1002G.

AB10,  
AB10-13

AB31

17. It is alleged that whilst 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). It was separately alleged that while in possession of that information Mansfield procured Glentown to purchase shares in AdultShop on 22 February 2002 (Count 9A), 1 March 2002 (Count 9B), 4 March 2002 (Count 9C), 7 March 2002 (Count 9D) and 11 March 2002 (Count 9E).

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AB10

AB10-11

AB11, AB11-  
12, AB12  
AB12-13

18. It was separately alleged that on or about 12 March 2002 additional 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, that those figures were going to be "alright" but would not "break any records", AdultShop would announce the high

or big quarterly figures to the market at the end of April 2002 and that the release at the end of April 2002 would show two quarters of good figures.

19. [REDACTED]  
[REDACTED]<sup>3</sup>

20. It was alleged [REDACTED]  
[REDACTED] Kizon and Mansfield were in AB2, AB10  
possession of "inside information" for the purpose of section 1043A(1)(d) of the  
Act.<sup>4</sup>

10 21. It was alleged that [REDACTED]  
[REDACTED], Kizon and Mansfield conspired with each other to purchase or  
procure the purchase of shares in AdultShop between 13 March 2002 and 20  
March 2002 (Count 14). Separately, it was alleged that Mansfield procured AB16-17  
Glentown to purchase AdultShop shares on 13 March 2002 (Count 14A) and 20 AB17  
March 2002 (Count 14B). AB17-18

22. The remaining Counts on the indictment relate to a separate set of matters said to  
constitute "information". 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 been previously been forecast.

20 23. [REDACTED]  
[REDACTED]<sup>5</sup>

24. It was alleged [REDACTED], both Kizon  
and Mansfield were in possession of inside information concerning AdultShop for  
the purpose of section 1043A(1)(d) of the Act.

25. It was alleged that whilst 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 2002 (Count 21). AB22

26. It was further separately alleged that whilst aware of those statements Kizon  
procured a company, All Mediation Services Pty Ltd, to acquire shares in

<sup>3</sup> [REDACTED]

<sup>4</sup> The Act having been amended with effect from 11 March 2002

<sup>5</sup> [REDACTED]

AdultShop on or about 11 June 2002 (Count 22). It was separately alleged that whilst in possession of that information Mansfield procured the purchase of shares by Glentown Nominees Pty Ltd between 11 June 2002 (Count 21A) and between 11 June 2002 and 12 June 2002 (Count 21B), on 11 June 2002 (Count 21C), on or about 17 June 2002 (Count 21D), between 18 June 2002 and 21 June 2002 (Count 21E), between 20 June 2002 and 21 June 2002 (Count 21F), on or about 26 June 2002 (Count 21G) and on or about 2 July 2002 (Count 21H).

AB27  
AB22  
AB22-23  
AB23-24  
AB24-25  
AB25-26

27. It was separately alleged that whilst aware of the statements the subject of Count 21 there was a further discussion [REDACTED]

AB22

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[REDACTED]<sup>6</sup> subsequent to which Kizon and Mansfield conspired to purchase or procure the purchase of shares in AdultShop on or about 12 July 2002 (Count 23).

AB27

28. Separately that Mansfield, whilst in possession of that information, procured Glentown to acquire shares on or about 12 July 2002 (Count 23A).

AB27-28

#### **Evidence concerning the truth of the AdultShop statements**

29. No evidence was led at trial by the Crown to establish that the truth of the statements alleged to have been made by Day or that they had any basis in fact. In relation to the alleged information that Packer had acquired 4.9% of AdultShop, the evidence positively disproved the truth of that statement.

30. In summary, the evidence revealed that the statements were either false in whole or in part, to the probable knowledge of Day (Day not being called as a witness by the Crown). In the course of argument before the Trial Judge, Mr Zichy-Woinarksi QC, conceded that the jury could not be satisfied beyond reasonable doubt that the information relied upon in support of the Counts in issue was fact.<sup>7</sup> The

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evidence of Martin John Alan Green given on 3 March 2010 (Transcript 1977 and following) was that he was an executive with Consolidated Press Holdings Pty Ltd in 2002. On 13 May 2002 Consolidated Press by its subsidiary called Cashthree Pty Ltd acquired 600,000 AdultShop shares on 8 May 2002, 191,100 AdultShop shares on 9 May 2002, 870,350 AdultShop shares on 10 May 2002 and 2,750,000 AdultShop shares on 13 May 2002. Thereafter, AdultShop having made an

AB490-515

<sup>6</sup> [REDACTED]

<sup>7</sup> The evidence of Martin John Alan Green given on 3 March 2010 (Transcript 1977 are following) AB490-515

announcement to the market on 13 May 2002, Cashthree sold out those shares on 15 May 2002, 16 May 2002, 21 May 2002, 22 May 2002, 23 May 2002, 24 May 2002, 27 May 200, 28 May 2002, 29 May 2002, 30 May 2002 and 31 May 2002 (transcript 1989 to 1990) having fully sold out of the shares by 31 May 2002. The maximum shareholding of Consolidated Press, through its subsidiary Cashthree, was 4,411,450 shares. The issued capital as at 31 December 2001 for AdultShop was 305,320,860 shares.<sup>8</sup>

AB502-503

- 10 31. Accordingly the percentage shareholding held by Cashthree in AdultShop did not exceed 1.4448%. It was only maintained at that level for a period of 2 days. As at the date particularised at Count 21 (6 June 2002), Cashthree Pty Ltd held no shares.

AB56

#### Ruling at first instance

32. At the close of the Crown case an application was made by each of Mansfield and Kizon pursuant to section 108 of the *Criminal Procedure Act 2004* that there was no case to answer in respect of any Count and that the Trial Judge should direct verdicts of acquittal.

AB521-533

33. The Trial Judge directed verdicts of acquittal on all AdultShop accounts on the ground that no jury could be satisfied beyond reasonable doubt that the accused persons possessed "*information*" for the purpose of the *Corporations Act*.

AB539

- 20 34. 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.*"

AB539

#### PART VI: APPELLANT'S ARGUMENT

35. The matters that were said to constitute "*information*" were particularised by the Crown – the particulars being annexed to the judgment of Buss JA in the Court of Appeal (WA).

AB2949

36. The form for Count 1 is to be compared to Count 14. It can be seen that the nature of the way in which the "*information*" was particularised was to note each separate statement in a series of lettered paragraphs followed by a series of paragraphs recording how the Crown alleged the matters said to be information

AB2949, AB2963

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<sup>8</sup> Exhibit 8.3 (page 146) AB1070

had been obtained. This form of particulars was repeated in the Statement of Material Facts filed by the Crown prior to trial pursuant to section 95 of the *Criminal Procedure Act 2004* (WA).

AB63

37. In the opening address on behalf of the Crown, Mr Champion SC explained Count 1 (which he explained to the jury was an example of how each Count was to be advanced by the Crown) as follows:

*"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.*

AB176

*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>9</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>10</sup>

AB179

38. In addition the manner in which the alleged "information" was contended for by the Crown was explained by Senior Crown Prosecutor Mr Zichy-Woinarski QC on 15 March 2010 in the course of an argument in the absence of the jury 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>11</sup>

AB517

<sup>9</sup> Transcript [206]. AB176

<sup>10</sup> Transcript [210]. AB179

<sup>11</sup> Transcript [2459]. AB517

39. And further at page 2461:

*“we say the information for count 1 is either (a) ... (b) or a combination of them. If the jury were satisfied beyond reasonable doubt that they possessed (a) and that was inside information, and the rest was made out then the element would be established ... Now, if they weren't satisfied of (a) that it was inside information, they look at (b) and if they were satisfied that was inside information and it would have the material effect and was subject and – and the objective and subjective first were satisfied then that would be alright. And if they weren't about that then they would look at the combination of (a) and (b) and ask themselves that”.*

AB518

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40. And further at page 2462:-

*“now that's the way we propose to put it to the jury, your Honour and in our submission, it makes it very clear to our learned friends exactly how we are putting it and is consistent with what we said the other day”.*

AB518A

### **Statutory Construction**

41. The principles applicable to statutory construction are well settled.<sup>12</sup>

42. The construction is to be derived having regard to the words in the statute, the context of the legislative provisions, its general purpose including the existing state of the law and the mischief to which the legislation is addressed.<sup>13</sup>

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43. The essential focus, accordingly, must be the words used by the legislature in Chapter 7.

### **The word used**

44. The word *“information”* in its ordinary meaning is consistent only with the appellant's primary argument. It is defined to mean:

(a) according to the Macquarie Dictionary (3<sup>rd</sup> Edition, 1997)

*“1 knowledge communicated or received concerning some fact or circumstances; news. 2 knowledge on various subjects, however acquired;*

(b) according to the Oxford English Dictionary (2<sup>nd</sup> Edition, 1989)

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*“3. a knowledge communicated concerning some particular fact, subject or event; that of which one is apprised or told”.*

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<sup>12</sup> *Singh v Commonwealth of Australia* (2004) 222 CLR 322 [19], *Byrnes v Kendall* [2011] HCA 26 at [97]

<sup>13</sup> *AB v Western Australia* [2011] HCA 42 [10]

45. *"Information"* accordingly carries a requirement for a fact or a precise set of factual circumstances. Logically one cannot be *"informed"* by a falsity.

46. The balance of the statutory definition enlarges on the ordinary meaning being introduced by the word *"includes"*.<sup>14</sup>

47. The first of the expanded meanings of information is in terms:

*"matters of supposition and other matters that are insufficiently definite to warrant being made known to the public"*.

48. *"Supposition"* is defined by the Oxford Dictionary as *"a fact or idea etc supposed"*.

*"Supposed"* is defined to mean as

10 *"1 assume, especially in default of knowledge be inclined to think supposed as defined as generally accepted as being so believed, be expected or required"*.

49. The Macquarie Dictionary defines *"supposition"* as *"the act of supposing"* and *"supposed"* is defined as:

*"assumed as true regardless of fact, hypothetical. 2. Accepted or received as true without positive knowledge and perhaps erroneously."*

50. The second expanded definition is *"matters relating to the intentions or likely intentions of a person"*. Intention of a person is a fact and is consistent with the ordinary meaning of information.

20 51. An example of a factual circumstance falling within the first extension to the ordinary meaning would be a circumstance where a geologist supervising field drilling inspected a core sample, saw flecks of gold and supposed (in advance of an assay laboratory report) that there was a significant presence of gold in the company's tenements.

52. It is important in this case to identify that the Crown did not place any reliance upon matters of supposition. The matters particularised in the indictments relevant to the appeal were stated as fact or precise matters (for example in relation to Count 21, Packer had bought 4.9% of Adult Shop).

AB22

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<sup>14</sup> See Samuels JA, *Hook v Rolfe* (1986) 7 NSW LR 40 at 49-50. *Robinson v Barton-Eccles Local Board* (1883) 8 App Cas 798 at 801.

### Statutory Context

53. It is necessary to consider the balance of Part 7.10 and in particular Divisions 1 and 2. Division 2 deals with prohibited conduct other than insider trading prohibition. It deals effectively with conduct that distorts the market. Section 1041A prohibits transactions that have the effect of creating an artificial price or maintaining it at a level that is artificial the price for trading in a financial product. Section 1041B prohibits the creation or causing the creation of a false or misleading appearance of active trading in a financial product. Section 1041C prohibits fictitious or artificial transactions or devices that result in the price for trading in a financial product being maintained, inflated or depressed.
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54. Section 1041E prohibits the making of statements or information that is false in a material particular or materially misleading. Significantly, section 1041I provides a civil right of recovery for any person who suffers loss or damage by reason of conduct engaged in contravention of Section 1041E. Accordingly, the Act reveals an intention in circumstances where a falsity is disseminated or a fact is distorted and rendered false by a material particular or a material omission to penalise the maker of the statement and provide a mechanism for compensation for the person who relies upon the statement. This is the obverse for the insider trading provisions which penalise the person who relies upon the information to trade or communicate that information to a person who would trade (see section 1043A(2)).
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### Legislative purpose

55. The legislative overview is dealt with in the Court of Criminal Appeal in the judgment of Buss JA [46] – [48]. Prior to the *Legislation Amendment Act 1991*, the position in Australia was as follows: AB2870-2871
- (a) prior to 1970 there was no legislation specifically prohibiting insider trading. At that time section 124 of the *Uniform Companies Act* (enacted by each State and by the Commonwealth in 1961-62) prohibited company officers from using “*information*” acquired by virtue of their position to gain an advantage for themselves. It was effectively as reflected in what
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are currently sections 183 and 184 of the *Corporations Act*. In 1973, section 124 was supplemented by section 124A.

(b) the first Statute in Australia specifically prohibiting insider trading was enacted in New South Wales. Section 75A of the *New South Wales Securities Industry Act 1970* prohibited direct or indirect insider trading by a person who obtained "*information*" through their association with a corporation. The concept of information appears to have been taken from section 124 of the *Uniform Companies Act*.

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(c) in 1989 the Standing Committee on Legal and Constitutional Affairs of the House of Representatives of the Commonwealth Parliament published a report entitled "*Fair Shares for All – Insider Trading in Australia*" (the Griffiths Report). It is important that the Griffiths Report recognised 23 years ago:

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*"the continued erosion of national boundaries in relation to the world securities market has made it imperative that, in examining insider trading in Australia, due consideration is given to the experience of overseas jurisdictions in this regard. The growing interdependence and global reach of the world's securities market has created a situation whereby insider trading is increasingly becoming a matter of international concern. It is, therefore, important to understand international attitudes and regulatory approaches to insider trading, as a basis for considering the adequacy of Australia's own attitudes and approach to regulation."*

56. The appellant subsequently examines in these submissions the international regulatory situation. In brief summary, the international regulatory approach to insider trading is consistent only with the appellant's primary submission that "*information*" necessarily means a matter of fact or precise circumstances as opposed to a falsity.

57. The Griffiths Report identifies four theories as a basis for prohibiting insider trading.<sup>15</sup>
58. The policy rationales are identified and explained by Buss JA in the Court of Criminal Appeal [49] - [55]. The Griffiths Report confirmed the principles adopted eight years earlier (the Campbell Committee) that the basis for the prohibition of insider trading is as follows:

AB2871-  
2873

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*"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."*

59. It can be seen that the foundation for this philosophical basis is the concept of "relevant information" or relevant "confidential information". It can only philosophically support the objectives of free and fair trading if the relevant information is factual.

60. The Explanatory Memorandum to the *Corporations Legislation Amendment Act 1991* confirms this purpose.

61. As recited by Buss JA [57] the Explanatory Memorandum expressly provides:

AB2874

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*"The Government's policy view is ... that it is necessary to control insider trading to protect investors and make it attractive for them to provide funds to the issuers of securities, for the greater and more efficient development of Australia's resources".*

62. The definition of information has remained the same since the introduction of the *Corporations Law* in 1992. The introduction in 2002 of a definition of "inside information" repeats the statutory emphasis on the word "information" which is expanded by the express provisions of section 1042C which legislatively provides when information is "generally available".

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<sup>15</sup> Paragraph 3.1.2 namely

- (i) Fairness – market participants should have equal access to the relevant information, company that issues the securities.  
(ii) Fiduciary duty – a person who holds the position of trust should not make a personal profit from that position without the informed consent of the beneficiaries.  
(iii) Economic efficiency – insider trading is damaging to the integrity of the financial market.  
(iv) Corporate injury – insider trading injures a company which issues the securities, the shareholders in the company and investors who deal with.

63. *"Materiality"* is defined in section 1042D to be *"information"* which a reasonable person would expect *"to have a material effect on the price or value of a ... financial product"*. Section 1042G(1)(a) expressly provides that a body corporate is taken to possess any *"information"* which an officer of the body corporate possesses, which came into his or her possession in the course of performance duties of an officer. Similarly, section 1042H deals with *"information"* in the possession of a partner or employee of a partnership. Both of these provisions sit uncomfortably with the expanded definition in sub-paragraph (a); namely matters of supposition. When for example does an officer enter into possession of a supposition? The concept of possession of information is consistent with information being knowledge of a fact.
64. The appellant submits that the concept of what constitutes information is the anterior construction issue prior to determining the definition of inside information and prior to considering materiality.

#### Overseas Legislation

65. In almost every jurisdiction with whom Australia engages in trading, the key concept is the word *"information"*.
66. In the United Kingdom the matter is dealt with by both the *Criminal Justices Act 1993* (section 56(1)), which defines inside information in a manner which obviously is only consistent with the ordinary common meaning of information as conveying a fact and section 118C of the *Financial Services and Markets Act 2000*, which defines information as being *"information of a precise nature"*. Information is precise if it *"indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur and is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments"*. The reference to circumstances that exist or events that have occurred emphasises the reliance upon the concept of fact.
67. The *German Securities Trading Act 1994* by section 13 defines *"inside information"* as *"any specific information about circumstances which are not public knowledge relating to one or more issuers of insider securities"*.

68. The French Article (Article 621-1 General Regulation of the Autorite des Marches Financiers) defines "*inside information*" as:

*"Any information of a precise nature which has not been made public relating directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments".*

69. Information is deemed to be precise "*if it indicates a set of circumstances or event that has occurred or is likely to occur and a conclusion may be drawn as to the possible effect of such set of circumstances or event on the prices of financial instruments or related financial instruments*".

10 70. The Spanish Securities Market Law, Ley 24/1988, Article 81(1), as amended by Ley 44/2002, again defines inside information to be information of a precise nature, which has not been made public.

71. Similarly, the Netherlands in section 5.53 of their *Act on Financial Supervision 2006* define inside information to mean "*awareness of specific information that relates directly or indirectly to an issuer as referred to in subsection (4)(a) to which the financial instruments pertain, or to the trade in those financial instruments*". Section 5.53 of the *Act on Financial Supervision 2006* replaces the now repealed Article 46(4) of the *Act on Supervision of Securities Trading 1995*, which previously defined inside information to mean "*the knowledge of information that is of a precise nature and that directly or indirectly relates to the legal person, company or institution to which the securities relate or to the trade in such securities*".

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72. The European Union by Directive 89/592/EEC Article 1.1 (the Insider Dealing Directive) defines "*inside information*" to mean information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question.

73. This directive was supplemented by the Market Abuse Directive (Directive 2003/6/EC Article 1.1) which emphasises the precise nature.

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74. In New Zealand the *Securities Markets Act 1988* by section 8A defines who is an information insider as being: "*a person is an information insider of a public issuer if that person:*

(a) *has material information relating to the public issuer that is not generally available ...”.*

75. The meaning of inside information is defined in section 8B as follows:

*“In this sub-part inside information means the information in respect of which a person is an information insider of the public issuer in question”.*

76. The *Canadian Business Corporations Act* does not define information nor inside information. However, it defines an insider in section 131(1)(g) as being a person who received whilst in any of the capacities referred to in paragraphs (a) to (f) (affiliates, directors, officers, shareholders, employees, consultants) a person who received *“material confidential information concerning the corporation”*.

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77. In South Africa the *Securities Services Act 2004* defines *“inside information”* at section 72 to mean *“specific or precise information which has not been made public and which (a) has obtained and learned as an insider ...”*.

78. In the United States there is no statutory definition. Inside information has been dealt with judicially in the control of officers of a corporation by expanding this fiduciary duty obligation.<sup>16</sup> The *Securities Exchange Act 1934* authorises the making of general rules and regulations. Rule 10b5-1(a) of Part 240: ‘Trading “on the basis of” material non-public information in insider trading’ provides:

*“The “manipulative and deceptive devices” prohibited by Section 10(b) of the Act and Rule 10(b)-5 thereunder include, among other things, the purchase or sale of security of any issuer, on the basis of material non-public information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material non-public information”.*

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## Conclusion

79. This review of international legislation shows a consistent focus on information as a key concept. Moreover, as dealt with in South Africa and the members of the European Union, information is defined to mean a precise set of circumstances or events.

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<sup>16</sup> See the authorities referenced by Buss JA at [87]-[97] AB2883-2886

80. The construction of “*information*” submitted by the appellant is consistent with this global regulatory framework. The construction held by the majority of the Court of Appeal (WA) is not consistent.

**Decision of the Court of Appeal (WA)**

81. It is respectfully submitted that the decision of the majority of the Court of Appeal (WA) was in error.

82. The principal judgment was given by Buss JA with whom Murray JA concurred – subject to his separate expression of opinion in relation to supplementary matters.

- 10 83. The critical conclusion reached by Buss JA as to the interpretation of the *Corporations Act* [114] was that:

AB2891

*“a statement may be information as defined irrespective of whether the matters stated are reliable or have a sound factual foundation and a prediction or forecast may be information irrespective of whether or not there are reasonable grounds for the opinion, prediction or forecast.”*

84. For this conclusion Buss JA advances thirteen matters or reasons.

85. It is respectfully submitted that in these thirteen matters His Honour erred.

- 20 86. The first reason Buss JA advanced [116] is that the definition of “*information*” in section 1042A on the balance of Division 3 of Part 7.10 of the *Corporations Act* do not contain an express stipulation to the effect that “*information*” must be “*truthful*” a factual reality or based on reasonable grounds. His Honour erred in failing to consider the ordinary meaning of the word “*information*”. It is this ordinary meaning that introduces expressly the requirement of fact – in other words a requirement of truth or factual reality.

AB2891

- 30 87. Secondly, Buss JA [117] repeats his observation that Division 3 of Part 7.10 does not include as an element of the offence created by section 1043A that the information was truthful or a factual reality and then observes that Division 3 of Part 7.10 does not establish a defence for an accused where the information possessed by him was not truthful or was not a factual reality or based on reasonable grounds. The analysis with respect is fundamentally flawed. The proper construction of the offence provision is not assisted by supposing the

AB2892

statute containing it would need to expressly provide a defence in the terms posited, namely, the absence of a matter establishing the offence.

88. Thirdly at [118], Buss JA draws attention that information includes opinions, predictions, forecasts, hypotheses, assumptions, hints, suggestions and conjecture. He fails to explain why these matters support his construction. The answer to this is given by McLure P at [15] in Her Honour's dissent namely the inference, deduction or assumption must be based on, caused or contributed to by actual events or information – in other words it cannot be entirely false or devoid of factual reality. AB2892 AB2864
- 10 89. Fourthly [119], Buss JA draws attention to the phrase "*matters of supposition*" and argues that if a matter of supposition will be "*information*" even if the matter of supposition would never warrant being made known to the public then this should lead to an expanded definition of "*information*". His Honour interprets the words "*insufficiently definite to warrant being made known to the public*" to mandate the inclusion of falsehoods. The answer remains that, given by McLure P at [15], namely on a proper interpretation of the provision as a whole, a supposition must be based on, caused or contributed to by facts, actual events or information. Because it is a matter of supposition it does not warrant being made known to the public. AB2892 AB2864
- 20 90. Fifthly [120], Buss JA concludes that Division 3 of Part 7.10 does not confine information to information generated by or on behalf of the corporation whose securities are traded. He identifies that the absence of any connection between the person who has generated the matters in question and the corporation bears solely on the issue of materiality. At its highest, this point is neutral and does not bear on the ordinary meaning of "*information*". The answer however is given by McLure P [12] that in a broad non-technical sense the information must be confidential or available to someone or belong to someone connected with the company. AB2892-2893 AB2863
- 30 91. Sixthly [121], Buss JA identifies that information obtained from a particular source is itself information. That is the source of information is capable of having an impact. The analysis is flawed with respect. The source may go to the materiality AB2893

of the information (see the decision in Whealy J in *R v Rivkin* (NSW SC) 70065 of 2002, 10 April 2003) or alternatively if the source of the information is itself part of the information then this must itself be a fact.

92. Seventhly [122], Buss JA observes that Division 3 of Part 7.10 does not require the Crown to prove that the accused relied on the inside information when he traded in the securities. The observation is correct but does not inform any conclusion as to the proper meaning of "*information*". It is with respect an irrelevant observation. AB2893
- 10 93. Eighthly [123], Buss JA observes that without proper elaboration that a falsehood may influence persons to deal in financial products in circumstances where they do not know of a falsity or where they do know of a falsehood. It is impossible to know what Buss JA had in mind in the second of these circumstances. Plainly, a falsehood may trick people into dealing with securities (a separate offence under Division 2 of Part 7.10) but where a person knows a falsity it is difficult to conceive of why they would then be influenced in any trading except perhaps in circumstances where the falsity is uttered by an officer of the corporation (such as the managing director) and knowledge of the falsity causes a person to sell the securities. This would be a fact – if the shareholders knows as a fact that the Chief Executive is a liar then this may cause them to deal in securities. AB2893
- 20 94. Ninthly [124], Buss JA analyses that a false statement would be unlikely to influence persons. Implicit in that analysis is the assumption that the person in question knows of the falsity. Further this analysis involves a separate factual question not relevant to the construction of the word "*information*". It goes to the separate subsequent issue of materiality. AB2893-2894
- 30 95. Tenthly [125], Buss JA concludes that the inclusion of falsehoods within information is consistent with market fairness policy rationale and the market efficiency policy rationale. The argument with respect is fallacious. There is no basis in either policy rationale to encourage or permit trading on false information. There is no unfairness vis a vis the non-insider trader for an insider to have the advantage (if such be the case) of a falsehood or lie. AB2894

96. Eleventhly [126], Buss JA observes that if an insider provides inside information which is not truthful to a person a liability would be created. The argument does not support Buss JA's construction of information. It is irrelevant. AB2894
97. At [127], for his twelfth reason, Buss JA concludes that the United States cases are of no assistance. This is with respect short sighted. The legislative framework worldwide is of relevance. A significant aspect of the American regulatory regime (being developed judicially rather than legislatively) is to focus on the fiduciary duty – possession of information, in this sense, must be a possession of fact. An officer cannot owe a fiduciary duty in respect of the falsity that is possessed by an officer. 10 AB2894
98. Finally [128], Buss JA disagrees with the conclusion of the trial judge as to the difficulty of directing a jury as to how to approach its task where information is false. With respect Buss JA's reasoning is unconvincing. The explanation that the jury be directed to focus on the question of materiality (a repetition of Buss JA's ninth reason) involves a subsequent statutory consideration to which the definition of information is necessarily anterior. AB2893
99. The additional reason given by Murray JA<sup>17</sup> is His Honour's observation that there is nothing in the statutory context to indicate that "*information*" is to be given a special or confined meaning.<sup>18</sup> Such an observation ignores the ordinary meaning of "*information*" which necessarily incorporates the concept of fact. In so far as Murray JA observes that he can see no reason "*concerned with the policy to which this legislation is designed to give effect*" he ignores and does not explain how false information is consistent with the efficient market hypothesis and the fair trading hypothesis both suggested as the basis or policy behind the legislation. It is respectfully submitted that Murray JA at [309] to [311] errs by conflating the question of materiality (price sensitivity) with the meaning of information by suggesting that in some cases the source of false information (such as a managing director) elevates the falsity. This analysis focuses on a separate issue – the effect of the information and not the meaning of what constitutes information. 20 AB2947 AB2947-2948

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<sup>17</sup> After concurring with the analysis of Buss JA [301] AB2946

<sup>18</sup> [306] AB2947

**PART VII: LEGISLATION**

100. Relevant legislation is attached.

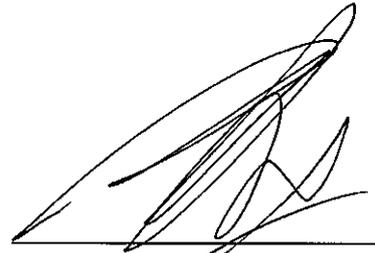
**PART VIII: ORDERS SOUGHT**

101. The appellant seeks the following orders:

1. Appeal allowed.
2. The judgment and the orders of the Court of Appeal made on 16 June 2011 be set aside.

Dated 4 May 2012

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