with below market offers, thus using the drag-along provision as "an instrument of cooperative oppression". Thus, the majority shareholder first had to sell its own shareholding, so as to become a third party, before seeking to purchase 100 percent of the shares. The court held that this breach of contract, resulting in the forced sale of the minority shareholder's shares at less than market value, itself constituted oppression under CA s 232(e).

In *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89; BC201311740, the Full Court of the Federal Court allowed an appeal against a decision that a proposed distribution of the settlement proceeds of a representative proceeding amongst group members was fair and reasonable. The proposed distribution was that group members who had been involved in funding the claim would receive 42% of their lost investment, while the rest, who had not been involved in the proceeding, would receive 17%. The respondent sought to justify the premium on the basis that it was within the range of premiums afforded to litigation funders in respect of class actions. ASIC submitted that comparison to premiums afforded to commercial litigation funders in class actions was not appropriate and the premium constituted an arbitrary windfall at the expense of unrepresented group members. The court accepted that calculation of the premium by reference to success fees obtained by commercial litigation funders was not fair or reasonable, as the risks run by group members who fund their own litigation are very different to the risks run by commercial litigation funders.

# Articles

## [647] DPP v JM: High Court clarifies the meaning of "artificial price" under s 1041A

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In the recent unanimous decision of *DPP v JM* [2013] HCA 30; BC201303127, the High Court clarified the meaning of "artificial price" under s 1041A of the Corporations Act 2001 (Cth) (the Act). The High Court overturned a 2:1 decision by the VSCA which had held that creating or maintaining an artificial price for the purposes of s 1041A involved monopolistic, "market dominating" conduct typified by US jurisprudential conceptions of "cornering" and "squeezing". Instead, the High Court concluded that s 1041A contemplates transactions undertaken by the on-market buyer or seller of listed shares for the sole or dominant purpose of setting or maintaining the price at a particular level not reflecting the forces of genuine supply and demand in an open, informed and efficient market.

### [1] Background[1]

The respondent in the High Court proceedings, JM had been charged with 39 counts of market manipulation in contravention of s 1041A of the Act between September and October 2006, and a further two counts of conspiring with others to commit market manipulation at other times during 2006.[2] Section 1041A provides that:

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

(a) a transaction that has or is likely to have; or
(b) 2 or more transactions that have or are likely to have;

the effect of:

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

The Commonwealth Director of Public Prosecutions (CDPP) had alleged that an entity associated with JM had borrowed money to exercise a large number of call options for shares in an ASX-listed company (referred to in the proceedings as "X Ltd"). The CDPP alleged that on 4 July 2006 JM's daughter, T, bought shares in X Ltd on behalf of a company controlled by her husband, at a price and in circumstances that prevented the day's closing price for the shares falling below the point at which the lender to JM would make a margin call requiring JM to provide additional collateral for the loan. The CDPP alleged that T made the purchase for the sole, or at least the dominant, purpose of ensuring that the price of the shares did not fall below the price at which the lender would be entitled to make a margin call on her father's loan, and that the transaction had the effect of creating an artificial price for the shares or maintaining the price at a level that was artificial. The CDPP alleged that JM took part in the transaction through the agency of his daughter -- which JM did not dispute.[3] He was initially arraigned in the County Court of Victoria, but successfully applied for the proceedings to be transferred to the Supreme Court of Victoria.[4]

JM pleaded not guilty to all charges. After his plea had been made, but before a jury was empanelled, Weinberg JA, sitting in the Trial Division of the Supreme Court of Victoria, stated a case and reserved the following three questions for determination by the Victorian Court of Appeal under s 302 of the Criminal Procedure Act 2009 (Vic):[5]

1. For the purpose of s 1041A of [the Act], is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an "artificial price"?
2. Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an "artificial price" within the meaning [of] s 1041A(c) of [the Act]?
3. Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was "artificial" within the meaning of s 1041A(d) of the Act?[6]

**[2] VSCA decision**

In the VSCA, the CDPP and JM disputed the meaning of "artificial price" in s 1041A. Section 1041A had previously been considered by the Federal Court in *Australian Securities and Investments Commission v Soust* (2010) 183 FCR 21; [2010] FCA 68; BC201000512 (*Soust*) and *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2010) 187 FCR 334; [2010] FCA 807; BC201005339 (*AAT*). The Crown adopted the definition of "artificial price" from these cases as:

> "connot[ing] a price created not for the purpose of implementing or consummating a transaction between genuine parties wishing to buy and sell securities, but rather for a purpose unrelated to achieving the outcome of the interplay of genuine market forces of supply and demand.": *Soust* at [90] -- approved as the "proper approach" in *AAT*.[7]

JM argued that *Soust* and *AAT* were wrongly decided, and that "artificial price" effect (or likely effect) was a "technical economic concept". Whilst not positing a definition of "artificial price", JM submitted that in the absence of agreement, artificiality of a price can only be established by expert economic evidence; that conduct known as "cornering" and "squeezing" are examples of conduct that leads to an artificial price; and that creation of an artificial price requires misuse of market dominance.[8]

The VSCA held (per Nettle and Hansen JJA, Warren CJ dissenting) that JM's trading had not created a price that was "artificial" under s 1041A. The legislative history of s 1041A was examined in detail by both Warren CJ,[9] and by Nettle and Hansen JJA,[10] and was subsequently reviewed by the High Court.[11] To provide context for the analysis of those two judgments in [2.2], the legislative history of s 1041A is summarised in four phases below.

**[2.1] The legislative history of s 1041A**

First, in 1970, Securities Industry Acts were passed in New South Wales, Victoria and Western Australia and, in 1971,

in Queensland. All of these Acts prohibited various forms of misconduct in connection with trading in securities. Three relevant types of misconduct were identified in the Acts of New South Wales, Victoria and Queensland: false trading and markets,[12] market rigging transactions,[13] and "affecting" or "effecting" "market price by fictions".[14] In particular, s 70 Securities Industry Act 1970 (NSW) proscribed "false trading and markets", and provided that:

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

The construction and application of s 70 was considered by the High Court in *North v Marra Developments Ltd (North v Marra)*.[15] Mason J, with whose reasons in this respect all other members of the court agreed, held that there was a breach of the section "[w]hen purchases have been made of shares in a company at or about a particular level *for the purpose of setting and maintaining a market price* for those shares"[16] (Emphasis added).

Following an intergovernmental agreement between New South Wales, Victoria and Queensland in 1974 providing for "uniformity in administration and reciprocal arrangements within those States" with respect, among other things, to the "regulation of the securities industry and trading in securities",[17] in 1975, New South Wales, Victoria, Queensland and Western Australia all passed new, substantially uniform, Securities Industry Acts regulating the conduct of securities business and trading in securities. These 1975 Acts contained[18] a prohibition of false trading and markets which was substantially identical with the false trading and markets provision considered in *North v Marra*. Subsequent Acts regulating the securities industry, made first in accordance with the 1978 Agreement between the Commonwealth and the States[19] about co-operative companies and securities regulation,[20] and later to implement, in accordance with the Corporations Agreement,[21] the national scheme based on the Corporations Act 1989 (Cth), all contained[22] false trading and markets prohibitions of generally similar effect to the provision considered in *North v Marra*.

Second, due to the increasing prominence of futures trading during the late 1970s and early 1980s, the federal Parliament enacted the Futures Industry Act 1986 (Cth),[23] which prohibited various forms of market misconduct and contained the first Australian legislative reference to "artificial price". Section 130 of this Act[24] prohibited transactions intended to have, or likely to have, the effect of "creating an artificial price for dealing in futures contracts on a futures market" or "maintaining at a level that is artificial (whether or not that level was previously artificial) a price for dealing in futures contracts on a futures market". The Explanatory Memorandum for the Bill that became the Futures Industry Act 1986 noted in relation to the offence created by s 130 that: "The two main forms of manipulation are 'squeezing' and 'cornering' which involve attempts to manipulate futures prices by manipulating supply and demand for the physical commodities that are deliverable under futures contracts so that available supply is exceeded and artificial prices are created".[25] As explained in [2.2] below, "cornering" and "squeezing" are American jurisprudential concepts -- which have been considered in several US cases pertaining to the manipulation of futures markets.

Third, the Corporations Law as set out in the Corporations Act 1989 (which formed the foundation for Australia's national scheme of corporations and securities regulation) contained separate provisions regulating the securities market and the futures market. Within this legislation, Division 2 of Part 7.11 (ss 995-1002) prohibited several forms of conduct pertaining to the trading of securities. Relevantly, s 997[26] prohibited transactions effected by persons entering into, or carrying out, two or more transactions in securities of a corporation that had, or were likely to have, the effect of increasing,[27] reducing,[28] or maintaining or stabilising,[29] the price of securities on a stock market with intent to induce others to buy or subscribe for the securities of the corporation or a related body corporate. Division 2 of Part 7.11 did not include any mentions of "artificial price". Part 8.7 (ss 1251-1267 provided for offences relating to a "futures contract". Section 1259[30] proscribed futures market manipulation in terms substantially similar to those originally used in s 130 of the Futures Industry Act 1986 -- including the retention of references to the creation or maintenance of an "artificial price". These separate market manipulation offences for securities markets and for futures markets were re-enacted in the Corporations Act 2001 (Cth) which replaced the former national corporate and securities scheme legislation.

Fourth, the Financial Services Reform Act 2001 (Cth) repealed the whole of Chapters 7 and 8 of the Corporations Act 2001 (including Parts 7.11 and 8.7) and enacted a new Chapter 7, including Part 7.10 dealing with market misconduct and other prohibited conduct relating to financial products and financial services. The offences under the new Part 7.10 applied to all forms of "financial product", and unlike its legislative predecessors, did not include separate market manipulation offences for securities and for futures contracts. With effect from 11 March 2002, the (current) s 1041A of the Corporations Act 2001 (excerpted in [1] above) created an offence of market manipulation that was expressed in terms drawn from the former provisions dealing with futures markets that had first been enacted as s 130 of the Futures Industry Act 1986.

**[2.2] Analysis of the two VSCA judgments**

As outlined below, the two VSCA judgments differed considerably in their assessment of how "artificial price" should be understood in light of the above legislative history.

Warren CJ examined US jurisprudence on market manipulation, in which the concept of "artificial price" was a central element.[31] Her Honour noted the majority of these US cases decided during the 1970s and early 1980s were concerned with "cornering" and "squeezing" -- which led her Honour to opine that "s 130 [of the Futures Industry Act 1986 (Cth)] was written with the US experience, as well as the Australian, in mind".[32] However after reviewing these US cases, Warren CJ rejected JM's argument that creation of an artificial price requires misuse of market dominance. While her Honour noted that the US futures market manipulation cases had involved situations involving the misuse of market power, nothing in the Corporations Act 2001 (Cth) restricted "artificial price" to situations involving market dominance. Rather, in her Honour's view, s 1041A only required someone to have the ability to create an artificial price.[33]

Her Honour declared that an "artificial price" is a price that does not come about through transactions reflecting genuine forces of supply and demand working in an open, efficient and well-informed market;[34] and also noted "a long-standing and accepted principle in Australia that a trader whose purpose in conducting transactions is to set or maintain the market price is excluded from being part of the genuine market forces of supply and demand".[35] Warren CJ also held that it was still necessary to show the impugned trading involving the creation or maintenance of an "artificial price" actually went on to affect the behaviour of genuine buyers and sellers in the market. However as noted in [3] below, the High Court did not uphold this conclusion.[36]

In contrast to Warren CJ, in their joint judgment Nettle and Hansen JJA held that "artificial price" in s 1041A was a term of legal signification embodying United States' jurisprudential conceptions of market "cornering" and "squeezing".[37]

Their Honours rejected the definitions of "artificial price" from *Soust* and *AAT* approved by Warren CJ,[38] and placed greater emphasis on the influence of the former s 130 of the Futures Industry Act 1986 on the meaning of "artificial price" under s 1041A. In particular, their Honours highlighted that the Explanatory Memorandum to the Futures Industry Act 1986 had included references to "cornering" and "squeezing".[39] Their Honours also made reference to the 1971 US futures market manipulation case of *Cargill Inc v Hardin* (*Cargill*),[40] where the United States Court of Appeals, Eighth Circuit, had said that a "corner", in its most extreme form, amounted:

> to nearly a monopoly of a cash commodity, coupled with the ownership of long futures contracts in excess of the amount of that commodity, so that shorts -- who because of the monopoly cannot obtain the cash commodity to deliver on their contracts -- are forced to offset their contract with the long at a price which he dictates, which of course is as high as he can prudently make it.[41]

The Court of Appeals also described a "squeeze" as "a less extreme situation than a corner" in which "there may not be an actual monopoly of the cash commodity", but deliverable supplies of the commodity in the delivery month were low.[42]

Their Honours went on to examine the "chain of statutory development" behind s 1041A, s 1041B(1)[43] and s 1041C[44]

of the Act. Relevantly, their Honours regarded s 1041A as being the sole legislative successor to s 130 of the Futures Industry Act 1986, and ss 1041B and 1041C being the legislative successors of several previous statutory provisions -- including s 70 of the Securities Industry Act 1970 (NSW), which had been considered by Mason J in *North v Marra*, and s 131 of the Futures Industry Act 1986 (Cth).[45] This led their Honours to determine that the form of market manipulation proscribed under the former s 130 was focused on "the misuse of monopoly or dominant market power, by the cornering of supply or taking advantage of short supply, in order to drive up or drive down true market prices to what is conceived of as being an 'artificial' level".[46]

This led their Honours to characterise the concepts of artificiality under ss 130 and 131 of the Futures Industry Act 1986 (Cth) as being markedly different. Their Honours considered the concept of "artificial price" under s 130 to be one of a price that in truth reflects market forces of supply and demand in a free and informed market -- but which is the result of a monopolist or party otherwise in a position of market dominance taking unfair advantage of market power in order to extract a price different to that which would apply in times of adequate supply. In contrast, their Honours regarded the concept of "artificial transaction" under the former s 131 as being one which bespeaks the kind of market rigging activity, of which Mason J spoke in *North v Marra*, that is calculated, in the sense of adapted, to set or maintain prices at a level that does not truly reflect the forces of supply and demand in a free and informed market (whether monopolistic or informed by pure competition).[47]

From the basis of this reasoning, their Honours concluded that:

> We do not overlook the possibility that Parliament may have used the term "artificial price" in s 1041A in a sense sufficiently protean to cover both market manipulation of the kind typified by "cornering" and "squeezing" -- and also one or more of the kinds of false trading, market rigging and artificial setting and maintenance of prices which were once the province of ss 70, 71 and 72 of the 1970 Act, and more lately its legislative successors in the form of s 109 of the Securities Industry Act 1975, ss 123 and 124 of the Securities Industry Act 1980, s 131 of the Futures Industry Act 1980 and ss 997 and 998 of the Corporations Act 1989, and now, therefore, ss 1041B and 1041C of the Corporations Act. *But we reject that as a realistic possibility*. Given the history of the legislation to which we have referred, and because Parliament has specifically provided ss 1041B and 1041C for churning and price rigging of the kinds previously dealt with in ss 70, 71 and 72 of the 1970 Act, s 109 of the 1975 Act and ss 997 and 998 of the 1989 Act, the presumption of statutory interpretation, expressed in the maxim specialia generalibus derogant implies that s 1041A is directed to different kinds of activities. The Extrinsic materials support that conclusion.[48] (Emphasis in original.)

Their Honours proposed to return the case to the trial judge. Their Honours concluded that if Question 1 as originally stated by Weinberg JA was restated as a pure question of law in the terms earlier suggested, their Honours would answer it as follows:

(a) The expression "artificial price" in s 1041A A is used in the sense of a term having legal signification (as opposed to its ordinary English or some non-legal technical sense);
(b) Its legal signification is of market manipulation by conduct of the kind typified by American jurisprudential conceptions of "cornering" and "squeezing".[49]

Given their conclusion regarding Question 1, their Honours considered Questions 2 and 3 inappropriate to answer.[50] The CDPP appealed to the High Court.

**[3] The High Court's decision**

After reviewing the legislative history behind s 1041A,[51] the High Court determined there were two separate reasons for rejecting the VSCA's majority conclusion as to the interpretation of s 1041A.

**[3.1] The High Court's rejection of the conclusion by the majority of the VSCA: [59]-[66]**

First, the High Court rejected the conclusion of Nettle and Hansen JJA[52] that the concept of "artificial price" in s 1041A should be understood as originating solely from s 130 of the Futures Industry Act 1986 (Cth)[53] -- which, as

[2.1] above noted, was drafted with considerations of monopolistic or market-dominating "cornering" and "squeezing" in mind. The High Court also rejected their Honours' conclusion that transactions involving the creation or maintenance of "artificial" prices should be distinguished from the "false trading and market rigging" activity formerly addressed in s 131(2) of the Futures Industry Act 1986 (Cth) and restated in ss 1041B and 1041C of the Act. The VSCA majority considered these provisions to have their genesis in s 70 of the Securities Industry Act 1970 (NSW), -- which was considered by Mason J in *North v Marra*.[54]

In contrast to the VSCA majority, the High Court held that, when read as a whole, Division 2 of Part 7.10 of the Act did not suggest that the offences prescribed in it were to be understood as operating in separate "watertight compartments", whereby a given set of facts could constitute only one of the offences proscribed by specific sections. Their Honours also pointed to s 1041J, which provides that, subject to any express provision to the contrary, the various sections in Division 2 of Part 7.10 "have effect independently of each other", and that "nothing in any of [those] sections limits the scope or application of any of the other sections".[55]

Second, the High Court rejected the conclusion by Nettle and Hansen JJA that s 1041A was concerned only with transactions effected from a position of monopoly or dominant market power. In the High Court's view, such an interpretation "would give [s 1041A] little work to do in respect of shares listed on the ASX".[56] They distinguished the US jurisprudential concepts of "cornering" and "squeezing" as referring to, and depending for their application upon, the separation between the futures market and the market for the commodity that is the subject of the futures contract. By contrast, the High Court pointed out that securities markets such as the ASX do not involve separate markets for the future delivery or sale of particular shares. They also concluded it would be highly unlikely that a person could acquire monopoly or dominant power in the market for ASX-listed shares in a particular company other than by making a successful takeover for that company under Chapter 6 of the Act. These factors lead the High Court to conclude that it would be highly unlikely that any buyer or seller could, in any practical sense, "corner" or "squeeze" the market for listed shares.[57]

**[3.2] The High Court's articulation of the meaning of "artificial price" under s 1041A: [67]-[74]**

The High Court distinguished the factual context of *Cargill*, and determined the concepts of "cornering" and "squeezing" could have no direct application to the market for listed shares. Nevertheless, it concluded there were relevant points that could be drawn from *Cargill*. The High Court considered that the Court of Appeals in *Cargill* did not intend to restrict the notion of market manipulation to "cornering" and "squeezing". Rather, it noted the Court of Appeals stated that "market manipulation is centrally concerned with intentional conduct which has resulted in a price which does not reflect the forces of supply and demand".[58]

The High Court noted similar conclusions having being reached by Mason J in *North v Marra* in relation to s 70 of the Securities Industry Act 1970 (NSW). Mason J determined the objective of s 70 as being to ensure that the market reflects the forces of "genuine supply and demand", by excluding "buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting or maintaining the market price".[59] Mason J further explained that:

> Transactions which are real and genuine but only in the sense that they are intended to operate according to their terms, like fictitious or colourable transactions, are capable of creating quite a false or misleading impression as to the market or the price. *This is because they would not have been entered into but for the object on the part of the buyer or of the seller of setting and maintaining the price*, yet in the absence of revelation of their true character they are seen as transactions reflecting genuine supply and demand and having as such an impact on the market.[60] (Emphasis added in original.)

Proceeding from its approval of these observations by Mason J in *North v Marra*, the High Court further explained that "the forces of 'genuine supply and demand' are those forces that are created in a market by buyers whose purpose is to acquire at the lowest available price and sellers whose purpose is to sell at the highest realisable price".[61]

The High Court went on to declare that the references to "artificial price" under s 1041A should be construed as

including transactions undertaken by the on-market buyer or seller of listed shares for the sole or dominant purpose of setting or maintaining the price at a particular level -- which would not reflect the forces of genuine supply and demand in an open, informed and efficient market.[62]

The High Court also explained that because s 1041A prohibits transactions that are *likely to have* the effect of creating or maintaining an artificial price, it would not be necessary to demonstrate, whether by some counterfactual analysis or otherwise, that the impugned transactions actually created or maintained an artificial price. Nor would it be necessary to proffer some additional proof that the impugned transactions went on to affect the behaviour of genuine buyers and sellers in the market. Rather, the High Court concluded it would be sufficient to show that the buyer or seller set the price with the sole or dominant purpose of creating or maintaining an artificial price.[63]

Lastly, the High Court explained that "in applying s 1041A, no distinction can or should be drawn according to whether the purpose of setting or maintaining a price was the sole or dominant purpose of the person concerned. Proof of a dominant, as distinct from sole, purpose of setting or maintaining a price would establish that the relevant transaction established or maintained an artificial price".[64] In the High Court's view, proof of a sole or dominant purpose of setting or maintaining a price was one way of demonstrating that the impugned transaction was at least likely to have the effect of setting or maintaining an artificial price -- but concluded that it was neither necessary nor appropriate in the appeal before it to consider by what other ways that effect or likely effect might be established.[65]

**[4] Conclusion**

The High Court allowed the CDPP's appeal and answered the three questions originally reserved by Weinberg JA in the affirmative.[66] As the first consideration by the High Court of s 1041A, this decision has provided valuable clarity on the meaning of "artificial price" and the elements that will, and will not, be necessary to prove to establish a contravention of the section.

1 The procedural history of this case is set out in *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30; BC201303127 at [4]-[10].

2 *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30; BC201303127 at [4].

3 See n 2 above at [6].

4 See n 2 above at [4]-[5] and at [22]-[23].

5 "Reservations of questions of law".

6 See n 2 above at [8].

7 *Director of Public Prosecutions (Cth) v J M* [2012] VSCA 21; BC201204126 at [176].

8 See n 7 above at [177].

9 See n 7 above at [186]-[202].

10 See n 7 above at [310]-[328].

11 See n 2 above at [44]-[54].

12 Securities Industry Act 1970 (NSW), s 70; Securities Industry Act 1970 (Vic), s 70; Securities Industry Act 1971 (Q), s 91.

13 Securities Industry Act 1970 (NSW), s 71; Securities Industry Act 1970 (Vic), s 71; Securities Industry Act 1971 (Q), s 92.

14 Securities Industry Act 1970 (NSW), s 72; Securities Industry Act 1970 (Vic), s 72; Securities Industry Act 1971 (Q), s 93. See also Securities Industry Act 1970 (WA), s 79.

15 (1981) 148 CLR 42; [1981] HCA 68; BC8100118.

16 See n 15 above at 59.

17 Companies (Interstate Corporate Affairs Commission) Act 1974 (Vic), Sch 1, cl 2(1)(b).

18 See, for example, Securities Industry Act 1975 (NSW), s 109(1).

19 National Companies and Securities Commission Act 1979 (Cth), s 3(1), definition of "Agreement".

20 Securities Industry Act 1980 (Cth) and the several State Securities Industry Codes.

21 Being the agreement made on 23 September 1997 between the Commonwealth, the States and the Northern Territory.

22 See, for example, Securities Industry (New South Wales) Code, s 124, Corporations Law, s 998.

23 The Futures Industry Act 1986 (Cth) which was taken up and applied by State Futures Industry (Application of Laws) Acts enacted in accordance with the 1978 intergovernmental agreement providing for the co-operative scheme of com-panies and securities regulation.

24 "Futures market manipulation".

25 Australia, House of Representatives, Futures Industry Bill 1986, Explanatory Memorandum at [285].

26 "Stock Market Manipulation".

27 s 997(1).

28 s 997(4).

29 s 997(7).

30 "Futures Market Manipulation".

31 See n 7 above at [216]-[219].

32 See n 7 above at [217].

33 See n 7 above at [221].

34 The authorities cited by Warren CJ in expressing this conclusion at [227] included *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58 at 62 as followed in *Australian Securities and Investment Commission v Soust* (2010) 183 FCR 21 [84]; *R v Manasseh and Austin* [2002] NSWCCA 27 [38]-[39]; *Donald v Australian Securities and Investment Commission* (2000) 104 FCR 126 [20]-[21]; *JTMJ v Australian Securities and Investments Commission* [2010] AATA 350, [136]; and *AAT* (2010) 187 FCR 334 [47], following *Soust*.

35 *North v Marra Developments* (1981) 148 CLR 42 at 59; *Soust* (2010) 183 FCR 21 at [44]. Cited with approval by Warren CJ at [257].

36 See n 7 above at [260].

37 See n 7 above at [309].

38 See n 7 above at [307]-[308]; See n 34 above.

39 See n 7 above at [324].

40 452 F 2d 1154 (1971).

41 452 F 2d 1154 (1971) at 1162; Cited by *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30 at [57].

42 452 F 2d 1154 (1971) at 1162; Cited by *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30 at [57].

43 "False trading and market rigging--creating a false or misleading appearance of active trading etc".

44 "False trading and market rigging--artificially maintaining etc. trading price".

45 See n 7 above at [328].

46 See n 7 above at [331]-[332].

47 See n 7 above at [332].

48 See n 7 above at [334].

49 See n 7 above at [335]-[336].

50 See n 7 above at [343].

51 See n 2 above at [44]-[54].

52 See n 7 above at [328]-[334].

53 "Futures market manipulation".

54 *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30 at [59]-[62]. See also *Director of Public Prosecutions (Cth) v JM* [2012] VSCA 21 at [328], where Nettle and Hansen JJA set out their conclusions regarding "the chain of statutory development".

55 See n 2 above at [64].

56 See n 2 above at [65].

57 See n 2 above at [65]-[66].

58 See n 2 above at [67]-[70].

59 (1981) 148 CLR 42 at 59 -- cited with approval by *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30 at [70].

60 (1981) 148 CLR 42 at 59 -- cited with approval by *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30 at [70].

61 See n 2 above at [71].

62 See n 2 above at [71]-[72].

63 See n 2 above at [73]-[74].

64 See n 2 above at [75].

65 See n 2 above at [76].

66 See n 2 above at [77]-[78].

# Recent Cases

# [648] Auditor seeks orders setting aside production of insurance documents

***Ben Langford, Lawyer, Ashurst***

*Banksia Securities Limited (Receivers and Managers Appointed)* [2013] VSC 416; BC201311846 (13 August 2013, Gardiner AsJ)