The Criminal Liability of Corporations for Insider Trading in Australia: Proposals for Reform

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STATEMENT

This thesis is entirely my own work and all sources used or referred to have been appropriately acknowledged.

This thesis does not contain any material which has been previously submitted or accepted for the award of any other degree or diploma from any university or educational institution and, to the best of my knowledge and belief, it does not contain any material written or published by another person, except where due acknowledgement is made in this thesis.

During my candidature I have published a number of journal articles, listed in Appendix 3, some of which contain extracts of material which has been included in this thesis. The inclusion of those extracts in this thesis does not infringe the copyright or other intellectual property rights of the publishers of the relevant journals, or any other person, and the articles are appropriately referenced throughout this thesis.

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Juliette Ruth Overland
ABSTRACT

The regulation of insider trading - the act of trading in securities or other financial products while in possession of relevant non-public, price-sensitive information - is a controversial and complex area of corporate law. Although there has been a marked increase in the number of individual offenders convicted of insider trading in recent years, there has never been a successful criminal prosecution of a corporation for insider trading in Australia, or even a successful set of civil penalty proceedings.

This thesis will focus on corporate criminal liability for insider trading in Australia - a topic of great theoretical and practical significance. Corporations are subject to the prohibition of insider trading under Australian law, yet the absence of any successful prosecution, and the dearth of cases concerning corporate defendants, means the law is untested on many relevant issues, complicated by conflicting views as to the proper application of insider trading laws to corporations.

The purpose of this thesis is threefold: (i) to determine the manner in which insider trading laws apply to corporations in Australia; (ii) to critically examine the application of those insider trading laws and identify any associated difficulties or flaws; and (iii) to set out proposals for reform and a new model of corporate criminal liability for insider trading in Australia.

This thesis will demonstrate that there are a number of specific problems which can be identified in the application of the elements of the insider trading offence to corporations. In particular, there are many mechanisms, existing under both the general law and statute, which can be used to attribute the elements of the insider trading offence to corporations, although there is a lack of clarity as to their availability and application. These different mechanisms also apply a variety of tests, many of which are conflicting, making it difficult to determine when a corporation will actually be regarded as engaging in insider trading. The Chinese Wall defence for corporations also contains a number of gaps in its operation, creating additional uncertainty.

This thesis critically analyses corporate criminal liability for insider trading in Australia. Having regard to the need for legislative certainty and the 'market integrity' rationale underpinning Australia's insider trading laws, this thesis recommends reforms to the existing regulatory regime in order to remedy the identified problems and to better apply the law to corporations. Accordingly, a new model of direct corporate criminal liability for insider trading in Australia is proposed.
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Any errors or omissions in this thesis are my responsibility.

I dedicate this thesis to my husband, my parents and my children. My parents, Olaf and Lynette Overland, instilled in me a love of learning, without which I would never have been able to complete this body of research. My two children, Imogen and Xavier, are my inspiration, to whom I hope to prove a worthy example. My husband, Ben Reichel, has supported me in ways too numerous to list but, most importantly, he has given me his sustaining love, without which almost nothing would be possible.
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CHAPTER 1
THE CRIMINAL LIABILITY OF CORPORATIONS FOR INSIDER TRADING IN
AUSTRALIA: AN INTRODUCTION

The regulation of insider trading is a controversial and complex area of corporate law. In essence, insider trading is the act of trading in financial products (such as shares or other securities) while in possession of relevant non-public, price-sensitive information.

Insider trading is generally acknowledged, if not universally accepted, as a significant threat to market integrity, which is widely regarded as an essential requirement for the proper, efficient functioning of securities markets.1 Indeed, the accepted rationale for prohibiting insider trading in Australia is to protect and maintain market integrity.2 However, regulators are regularly criticised for a perceived lack of enforcement action in relation to insider trading. Indeed, although there has been a marked increase in the number of individual offenders convicted of insider trading in recent years, there has never been a successful criminal prosecution of a corporation for insider trading in Australia, or even a successful set of civil proceedings.

In this thesis I will focus upon the criminal liability of corporations for insider trading in Australia, and in this chapter I will introduce my thesis topic, set out the purpose of this thesis, reveal the limitations of the current literature in this area, demonstrate the need for significant research on this topic, and describe the methodology adopted for my research.

While commonly referred to as ‘insider’ trading, the prohibition under Australian law is not limited to those who might generally be classified as corporate insiders - such as directors,


2 This rationale was confirmed by the majority of the High Court in Mansfield and Kizon v R (2012) 87 ALJR 20. A detailed analysis of the various rationales for prohibiting insider trading is set out later in this chapter.
senior executives or other officers – as it encompasses trading (or related conduct) by any person who possesses non-public, price-sensitive information. Therefore, in this thesis, I use the term ‘insider trading’ in this context. Additionally, when writing this thesis, I have chosen to use the inclusive term ‘corporation’, rather than ‘company’ or ‘body corporate’.3

Background

Insider trading has been the subject of significant international attention and scrutiny over recent decades. The United States of America (‘USA’) was the first country to formally prohibit insider trading.4 After the Second World War, Japan was pressured to adopt insider trading regulations modelled on the laws of the USA.5 Other countries gradually began to adopt laws regulating insider trading – in Australia, insider trading was first prohibited under statute in 19756 – and the vast majority of countries with securities markets now have legislation which prohibits insider trading.7 There appear to be a number of reasons for the rapid increase in the enactment of laws prohibiting insider trading. Countries within the European Union were obliged to adopt insider trading laws as a result of a binding directive

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3 The definition of ‘corporation’ in s 57A of the Corporations Act 2001 (Cth) (the ‘Corporations Act’) includes a company and other forms of body corporate.

4 Franklin A Gevurtz, ‘The Globalisation of Insider Trading Prohibitions’ (2002) 15 Transnational Lawyer 63, 64. SEC rule 10b5-1 is the basis for the prohibition of insider trading in the USA and was first adopted in 1942 pursuant to rule 10(b) of the Securities Exchange Act of 1934, 15 USC § 78a (1934).


7 Gevurtz, above n 4, 65.
of the European Council issued in 1989.8 Other nations enacted insider trading laws as they sought to make their stock exchanges more competitive internationally, often in response to the enactment of similar laws in other jurisdictions.9 Although the insider trading regimes of different countries do not have the same characteristics and the underlying reasons for the prohibition of insider trading vary,10 more than 90 countries now prohibit insider trading,11 with all developed nations and 80 per cent of nations with emerging securities markets regulating this form of conduct.12 Additionally, the International Organisation of Securities Commissions views the regulation of insider trading as a ‘cornerstone of securities trading laws’.13


9 Gevurtz, above n 4, 67.

10 The characteristics of the insider trading regimes of a number of other jurisdictions will be reviewed in chapter 2 and the various rationales for prohibiting insider trading are considered later in this introductory chapter.


12 Gevurtz, above n 4, 67; Corporations and Markets Advisory Committee, Insider Trading Discussion Paper (2001) [1.4]. Australia’s insider trading regime will be compared with those of other jurisdictions in chapter 2 of this thesis.

13 Paul Latimer and Philipp Maume, Promoting Information in the Marketplace for Financial Services – Financial Market Regulation and International Standards (Springer, 2014) 68. Of the 38 principles developed by the International Organisations of Securities Commissions to achieve its key objectives of securities regulation, principle 36 is that ‘regulation should be designed to detect and deter manipulation and other unfair market practices’: International Organisations of Securities Commissions, Objectives and Principles of Securities Regulation, 2010.
Despite the widespread adoption of insider trading laws internationally, insider trading has a reputation as a notoriously difficult offence to successfully detect and prosecute, and the regulation of insider trading continues to be the subject of ongoing debate. Some members of the financial services industry openly state that they believe insider trading is both rife and increasing, particularly when markets are volatile, and some commentators consider insider trading to be unavoidable and endemic to securities markets. Indeed, some anecdotal evidence appears to indicate that insider trading in shares in the period immediately prior to takeover announcements causes rises in share prices of, on average, 10 per cent. Empirical evidence, both within Australia and overseas, seems to indicate that corporate insiders are able to earn abnormal profits and avoid abnormal losses through share trading.

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14 See, for example, Peter Hunt, Chairman of Caliburn Partnership, as reported in Michael West, ‘Insider Trading Still on the Rise: Banker’, The Sydney Morning Herald (Sydney), 20 February 2008; Professor Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation, University of Melbourne, as reported in Vanessa Burrow, ‘ASIC on Insider Trading Hunt’, The Age (Melbourne), 21 March 2008.


As at the date of this thesis, 42 people have been convicted of insider trading in Australia, and two people have been found liable for insider trading in civil penalty proceedings. The

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18 R v Teh (District Court of Victoria, Kelly DCJ, 2 September 1991); R v Williams (District Court of NSW, Kinchington DCJ, 4 October 1996); R v Cribb (District Court of Western Australia, Hammond CJDC, 9 June 1998); R v Firms (District Court of New South Wales, Sides DCJ, 14 April 2000) – the conviction was later overturned on appeal: R v Firms [2001] NSWCCA 191 (New South Wales Court of Criminal Appeal, Mason P, Hidden J, Carruthers AJ, 21 May 2001); R v Hannes (District Court of New South Wales, Backhouse J, 17 September 1999), a retrial was subsequently ordered: R v Hannes [2002] NSWSC 1182 (Supreme Court of New South Wales, James J, 13 December 2002); R v Rivkin [2003] NSWSC 447 (Supreme Court of New South Wales, Whealy J, 29 May 2003); R v MacDermott (District Court of Western Australia, Kennedy DCJ, 1 August 2003); R v Sweetman (District Court of Queensland, Shanahan DCJ, 17 December 2004); R v Doff [2005] NSWSC 50 (Supreme Court of New South Wales, Barr J, 21 February 2005); R v Frawley (Supreme Court of New South Wales, Bell J, 24 June 2005); R v Hall [2005] NSWSC 890 (Supreme Court of New South Wales, Kirby J, 9 September 2005); R v McKay [2007] NSWSC 275 (Supreme Court of New South Wales, Whealy J, 30 March 2007); R v Reddell (District Court of Queensland, Martin DCJ, 26 July 2007); R v Woodland (County Court of Victoria, Friday, 16 November 2007); R v Panchal [2009] QDC 105 (Queensland District Court, Howell DCJ, 27 April 2009); R v O'Reilly [2010] VSC 138 (Supreme Court of Victoria, Forrest J, 16 April 2010); R v Stephenson [2010] NSWSC 779 (Supreme Court of New South Wales, Fullerton J, 16 July 2010); R v Hartman [2010] NSWSC 1422 (Supreme Court of New South Wales, McClellan J, 2 December 2010); R v De Silva [2011] NSWSC 243 (Supreme Court of New South Wales, Buddin J, 31 March 2011); R v Dalzell [2011] NSWSC 454 (Supreme Court of New South Wales, Hall J, 20 May 2011); R v Bateson [2011] NSWSC 643 (Supreme Court of New South Wales, Buddin J, 24 June 2011); R v O'Brien [2011] NSWSC 1553 (Supreme Court of New South Wales, Hoeben J, 14 December 2011); R v Rietbergen (District Court of New South Wales, 5 December 2012); R v Levi (District Court of New South Wales, 5 December 2012); R v Glynatsis [2012] NSWSC 1551 (Supreme Court of New South Wales, Johnson J, 12 December 2012); R v Fysh [2012] NSWSC 1587 (Supreme Court of New South Wales, McCallum J, 19 December 2012), although this conviction was overturned on appeal: Fysh v R [2013] NSWCCA 284 (New South Wales Court of Criminal Appeal, Bathurst CJ, Hoeben CJ at CL and Schmidt J, 20 November 2013); R v Zhu [2013] NSWSC 127 (Supreme Court of New South Wales, Hall J, 15 February 2013); R v Hebberd (Supreme Court of Western Australia, Corboy J, 27 February 2013); R v Lindskg (County Court of Victoria, Parson J, 14 March 2013); R v Tan (District Court of New South Wales, Marien J, 17 April 2013); R v Gay (Supreme Court of Tasmania, Porter J, 23 April 2013); R v Graham (County Court of Victoria, Allen J, 22 May 2013); R v Ang (District Court of New South Wales, 7 June 2013); R v Khoo (District Court of New South Wales, 12 July 2013); R v Turner (District Court of New South Wales, 1 April 2014); R v Breen (District Court of New South Wales, 1 April 2014); R v Jordinson (District Court of New South Wales, 1 April 2014); Commonwealth Director of Public...
first conviction for insider trading in Australia did not occur until 1991, and further convictions were obtained intermittently, with only four additional convictions for insider trading in the following ten years. Since that time, the frequency and number of insider trading prosecutions and convictions has significantly increased, and greater enforcement action has been taken, particularly in recent years – since January 2010, 27 individuals have been convicted of insider trading. All convictions and findings of liability relate only to natural persons – there have been no successful criminal or civil penalty proceedings brought against a corporation for insider trading in Australia. In 2007, the local regulator, the Australian Securities and Investments Commission (‘ASIC’), brought civil penalty

Prosecutions v Hill and Kamay [2015] VSC 86 (Supreme Court of Victoria, Hollingworth J, 17 February 2015); R v Farris (Supreme Court of Western Australia, Hall J, 15 July 2015).


20 R v Teh (District Court of Victoria, Kelly DCJ, 2 September 1991).

21 R v O’Reilly [2010] VSC 138 (Supreme Court of Victoria, Forrest J, 16 April 2010); R v Stephenson [2010] NSWSC 779 (Supreme Court of New South Wales, Fullerton J, 16 July 2010); R v Hartman [2010] NSWSC 1422 (Supreme Court of New South Wales, McClellan J, 2 December 2010); R v De Silva [2011] NSWSC 243 (Supreme Court of New South Wales, Buddin J, 31 March 2011); R v Dalzell [2011] NSWSC 454 (Supreme Court of New South Wales, Hall J, 20 May 2011); R v Bateson [2011] NSWSC 643 (Supreme Court of New South Wales, Buddin J, 24 June 2011); R v O’Brien [2011] NSWSC 1553 (Supreme Court of New South Wales, Hoebein J, 14 December 2011); R v Rietbergen (District Court of New South Wales, 5 December 2012); R v Levi (District Court of New South Wales, 5 December 2012; R v Glynatsis [2012] NSWSC 1551 (Supreme Court of New South Wales, Johnson J, 12 December 2012); R v Fysh [2012] NSWSC 1587 (Supreme Court of New South Wales, McCallum J, 19 December 2012), with the conviction overturned on appeal: Fysh v R [2013] NSWCCA 284 (New South Wales Court of Criminal Appeal, Bathurst CJ, Hoebein CJ at CL and Schmidt J, 20 November 2013); R v Zhu [2013] NSWSC 127 (Supreme Court of New South Wales, Hall J, 15 February 2013); R v Hebbard (Supreme Court of Western Australia, Corboy J, 27 February 2013); R v Lindskog (County Court of Victoria, Parson J, 14 March 2013); R v Tan (District Court of New South Wales, Marien J, 17 April 2013; R v Gay (Supreme Court of Tasmania, Porter J, 23 April 2013); R v Graham (County Court of Victoria, Allen J, 22 May 2013); R v Ang (District Court of New South Wales, 7 June 2013); R v Khoo (District Court of New South Wales, 12 July 2013); R v Turner (District Court of New South Wales, 1 April 2014); R v Breen (District Court of New South Wales, 1 April 2014); R v Jordinson (District Court of New South Wales, 1 April 2014); Commonwealth Director of Public Prosecutions v Hill and Kamay [2015] VSC 86 (Supreme Court of Victoria, Hollingworth J, 17 February 2015); R v Farris (Supreme Court of Western Australia, Hall J, 15 July 2015).
proceedings for insider trading against a corporation, the Australian subsidiary of the global investment bank, Citigroup, but those proceedings were unsuccessful.22

**The Purpose of this Thesis and its Contribution to the Literature**

My purpose in undertaking this thesis is to critically examine the application of Australian insider trading laws to corporations and to recommend necessary legislative reform. Throughout this thesis, I will analyse the elements of the insider trading offence and relevant defences, consider their application to corporations, and identify the difficulties and problems which result. Based upon this examination and review, I will set out proposals for law reform, to address the identified difficulties and problems, and to improve the application of Australian insider trading laws to corporations.

Through this thesis, I make an original and significant contribution to the study of insider trading laws, as well as to Australian corporate law in general, for three reasons. Firstly, this research is unique, as no such study has previously been undertaken. The lack of a comprehensive, critical analysis of the application of insider trading laws to corporations, especially under Australian law, is a significant gap in the literature and this research is the first of its kind. This thesis therefore seeks to make a major contribution to the knowledge in this area. Secondly, as insider trading is acknowledged to be a problem which has major negative impacts upon securities markets globally, the application of insider trading laws to corporations is a significant issue warranting further research and attention, because of the potential to reduce insider trading and improve the ability of regulators to take appropriate enforcement action. Thirdly, by proposing reforms to insider trading laws as they apply to corporations, this thesis offers Australia the opportunity to adopt laws of international significance, which would enable Australia’s securities markets to remain globally competitive.

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22 ASIC v Citigroup Global Markets Australia Pty Ltd (2007) 160 FCR 35. This case will be considered in detail in chapters 2 and 6 of this thesis.
Even though insider trading laws do apply to corporations, there has never been a successful set of proceedings for insider trading brought against a corporation. There are a number of possible reasons for this: (i) corporations may not engage in insider trading – insider trading may only be engaged in by individuals in circumstances that would not result in a corporation having any liability for insider trading; (ii) corporations may engage in insider trading, but prosecutors and regulators may be reluctant to pursue insider trading cases against corporations due to uncertainties in the law and difficulties in applying insider trading laws to corporations; or (iii) corporations may engage in insider trading, but in circumstances where individuals associated with the relevant corporations may also have liability for insider trading, so that prosecutors and regulators elect to take action against those individuals, rather than to pursue the corporation.

Although it might technically be possible that corporations do not engage in insider trading, the idea that insider trading is only engaged in by individuals in circumstances that would not result in a corporation having any liability is less than compelling. Why would it be the case that individuals engage in insider trading and not corporations? The majority of insider trading cases brought in Australia have involved conduct which occurred in a corporate context. It can also be observed that in certain circumstances where an individual has been successfully prosecuted for insider trading, a corporation may also have had potential liability for the offence.23 Insider trading may occur in circumstances where a corporation could be found to have engaged in that conduct, but prosecutors and regulators may be reluctant to take enforcement action, or may prefer to take action against individual offenders instead. Indeed, ASIC has noted, in the context of the general enforcement of corporate crime:

> We may take action against corporations, individuals, or both, depending on the circumstances of the case. For example, taking action against individuals who are directly responsible or in charge, instead of corporations, may reduce the incentive for those

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23 For example, in R v Rivkin (2004) 184 FLR 365, Mr Rene Rivkin purchased and sold shares in Qantas through a private corporation which he controlled – it could be argued that the corporation, Rivkin Investments Pty Ltd, also engaged in insider trading but no action was taken against it.
individuals and others in similar positions to engage in like misconduct given the potential impact on their reputation and livelihood. This approach is likely to have a greater deterrent effect.24

Following ASIC’s defeat in ASIC v Citigroup Global Markets Australia Pty Ltd (‘ASIC v Citigroup’),25 no further proceedings for insider trading have been brought against a corporation. However, if the difficulties in the application of insider trading laws to corporations could be identified and resolved, appropriate insider trading enforcement action might be brought against corporations, increasing the general deterrent effect for all potential offenders.

Australia is not the only country in which there has never been a successful action for insider trading brought against a corporation. Even though the majority of jurisdictions with insider trading laws also apply those laws to corporations, there are no recorded instances worldwide of a corporation being convicted in a criminal prosecution or found liable for insider trading in civil proceedings. Accordingly, the application of insider trading laws to corporations is a global issue. Therefore, while in this thesis I do focus upon the position under Australian law, and propose reforms to Australia’s system of insider trading regulation, the research and resulting law reform proposals have the potential for significant global application. Insider trading is acknowledged as a global problem affecting securities markets and there is regular co-operation between the various international regulators responsible for insider trading enforcement to confront issues in detecting and prosecuting insider trading in their respective jurisdictions. By implementing reforms to insider trading laws as they relate to corporations, Australia has the opportunity not only to improve the application of its own laws, but also to adopt laws of international significance demonstrating ‘best practice’ in the prohibition of insider trading. Indeed, Australia’s existing regime of insider trading regulation has already served as a model for other jurisdictions – such as

Singapore\textsuperscript{26} and New Zealand.\textsuperscript{27} Accordingly, there is the potential for reforms in the application of insider trading laws to corporations to have great international relevance and significance, particularly in jurisdictions which prohibit insider trading on the same rationale as Australia – the protection and maintenance of market integrity.

When corporations are bound by laws prohibiting insider trading, they must carry on business and conduct their activities within the ambit of that regulation. When this occurs, all participants in our securities markets must have confidence that the application of those laws is appropriate, and that the system of regulation is neither unnecessarily burdensome nor inappropriately lax, that there is certainty in the operation and application of those laws, and that those laws give effect to their stated aims.

As insider trading is prohibited in Australia in order to protect and maintain market integrity,\textsuperscript{28} all investors and market participants must have confidence that those who might otherwise gain an unfair informational advantage from insider trading will be identified and appropriately sanctioned. However, in order for such confidence to exist and for market integrity to be maintained, corporate insider traders must also be detected, not just individual offenders, and corporations found to have engaged in insider trading must be the subject of appropriate enforcement action. Market integrity requires legislative certainty for regulators, market participants, potential investors in securities markets, and all corporations. Therefore, current uncertainties as to the operation of insider trading laws and their application to corporations threaten market confidence and, as a result, market integrity. This study into the application of insider trading to corporations, and the law reforms which I propose in this thesis, offer an opportunity to address this problem.


\textsuperscript{28} The High Court in \textit{Mansfield and Kizon v R} (2012) 87 ALJR 20, [45].
Accordingly, through my analysis of the application of insider trading laws to corporations, I will demonstrate that the current Australian insider trading laws are flawed in three ways: (i) there is a significant lack of certainty regarding the manner in which insider trading laws apply to corporations, as there is confusion as to which mechanisms are to be used to attribute the various elements of the insider trading offence to corporations – this uncertainty exists because the relationship between the applicable statutory rules and general law is not clear, and also because there is uncertainty as to which are the applicable statutory rules; (ii) even when they are identified, the different mechanisms which may be used to attribute the different elements of the insider trading offence to corporations apply conflicting and varying tests – this leads to further uncertainty as to the circumstances in which corporations will be regarded as having engaged in insider trading; and (iii) the laws as currently drafted do not give effect to the stated rationale for prohibiting insider trading, being the maintenance and protection of market integrity.

Major amendments are recommended to Australia’s insider trading laws to better reflect and recognise the rationale for the prohibition of insider trading, to protect and maintain market integrity, to ensure that the current system of regulation is both adequate and appropriate, and to provide a regulatory model of international significance. I will propose that this area of the law be reformed by drafting a new set of statutory provisions to provide for the attribution of the elements of insider trading to corporations. These provisions would operate as the exclusive mechanism for attributing the elements of insider trading to corporations and would expressly exclude the operation of the general law. The new statutory provisions would be supplemented by an amended Chinese Wall defence. The new statutory provisions would provide greater clarity, be more consistent with the market integrity rationale for the prohibition of insider trading, and offer increased certainty for all affected and interested parties as to the intended operation of the law.

The Rationale for the Prohibition of Insider Trading

Despite the fact that the vast majority of countries with securities markets prohibit insider trading, the underlying rationale for such regulation differs between nations. In order to
understand the intended operation of insider trading laws, the reasons for its prohibition must also be considered. There are four primary reasons variously identified as the possible bases for the prohibition of insider trading: (i) market fairness; (ii) market efficiency; (iii) fiduciary duty; and (iv) misappropriation.

The 'market fairness' rationale, also referred to as an 'equal access' rationale, is based on the premise that it is not fair for some market participants to have access to price-sensitive information, and to be able to trade on the basis of that information, if it is not also available to all other market participants.29 Ideally, all market participants should have equal access to relevant information when making trading decisions and therefore be exposed to the same trading risks, but insiders with an 'unerodable informational advantage' are able to trade with a reduced risk, or almost no risk at all.30 Investor confidence in securities markets is reduced if some investors are believed to have the ability to use information which is not readily available.31 For this reason, market fairness requires insider trading to be prohibited to prevent those with access to inside information from exploiting that unfair advantage.32

In circumstances where price-sensitive information is not released to the market in a timely manner, the prices of financial products cannot be said to accurately represent their true value, and therefore market inefficiencies exist.33 If those with access to price-sensitive information delay its release to the market to allow themselves time to trade, the efficiency of

29 O'Hara, above n 15, 1053.
31 See, for example, ASIC, Consultation Paper 68, above n 1; Bhattacharya and Daouk, above n 1; Beny, above n 1.
32 CAMAC, Insider Trading Discussion Paper, above n 12, [1.20]; Semaan, Freeman and Adams, above n 5, 222. Green takes another view and suggests that insider trading is in fact a form of cheating, noting that the 'stock market is viewed as a highly formalized, rule-governed game. Confidence in the market depends on investors feeling that the game is being played fairly... Market participants who trade on undisclosed inside information... [are] cheaters': Stuart P Green, Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime (Oxford University Press, 2006) 235.
the market is eroded. Additionally, the participation of some investors in the market may be reduced, if those who hold and have access to price-sensitive information are perceived to have a trading advantage. Without investor confidence in market integrity, investors may choose alternative investments or demand a premium for assuming higher risks, which in turn increases the cost of capital to corporations. Thus, the 'market efficiency' rationale requires insider trading to be prohibited in order to maintain an efficient, effective market with the maximum possible participation.

According to the 'fiduciary duty' rationale, a person who is in a legal relationship which imposes obligations of trust and confidence must not profit from that relationship or allow a conflict of interest to arise. If a person who owes a corporation a fiduciary duty derives a personal benefit by using that corporation's confidential information to trade, or if a person owes a fiduciary duty to the counterparty to a trade and does not disclose to that counterparty price-sensitive information which they possess, the fiduciary duty is breached and for that reason insider trading should be prohibited. This reasoning is only applicable where the insider trading prohibition applies to those who owe a fiduciary relationship to the corporation which 'owns' the relevant information, or to their trading counterparty, and not where there is no such relationship in existence.

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The ‘misappropriation’ rationale is an extension of the ‘fiduciary duty’ rationale, being predicated on the basis that using confidential information to trade amounts to a misuse that is inconsistent with the proprietary rights of the true ‘owner’ of that information.39 Where the owner of the confidential information is the corporation to which the information relates, the use of that information to trade for personal profit amounts to a theft or misappropriation of that information, and for that reason insider trading should be prohibited.40

In this context, it must also be noted that, although the vast majority of countries with established securities exchanges have chosen to prohibit insider trading, a number of commentators consider that insider trading should not be regulated.41 The views and contributions of those writers will be discussed below in the context of the limitations of the current literature, but this thesis is predicated on the basis that insider trading is a form of criminal conduct – regardless of the various underlying rationales – and I intend to propose law reforms which are aimed at ensuring that the manner in which insider trading laws apply to corporations reflects the ‘mischief’ which those laws are intended to remedy.

In Australia, insider trading is prohibited on the basis of both the market fairness and market efficiency rationales,42 as both are considered necessary to maintain market integrity.43 In

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41 Such writers include Manne, Fama, Leyland and Estrada and, within Australia, writers such as Whincop, Semaan, Freeman and Adams.


43 Griffiths Committee Report, above n 42, [3.34]-[3.36]; CAMAC, Insider Trading Discussion Paper, above n 12, [0.20].
1981 it was stated in the report of the ‘Campbell Inquiry’ that insider trading should be prohibited in Australia:

   to ensure that the securities market operates freely and fairly, with all participants having equal access to information. Investor confidence... depends importantly on the prevention of the improper use of inside information.44

A similar position was taken by the ‘Griffiths Committee’ in 1989, when it was stated that:

    insider trading damages an essential component in the proper functioning of the securities markets, that is investor confidence.45

When the Corporations Law was amended by the Corporations Legislation Amendment Act 1991 (Cth), the Explanatory Memorandum specifically stated that:

    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.46

The underlying rationale for prohibiting insider trading has also been discussed in a number of Australian cases. In Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd,47 Young J stated that the prohibition of insider trading48 was ‘to prevent one person having an unfair advantage from another’,49 and the Court of Appeal endorsed this comment on appeal.50 In Exicom Pty Ltd v Futuris Corporation Ltd,51 Young J again commented on the rationale for prohibiting insider trading and determined that it was only

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45 Griffiths Committee Report, above n 42, 17.
46 Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), [307].
47 Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd (1986) 10 ACLR 462.
48 At that time contained in s 128 of the Securities Industry Code.
50 Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd (1986) 5 NSWLR 157, 163.
51 Exicom Pty Ltd v Futuris Corporation Ltd (1995) 18 ACSR 404.
relevant where ‘an insider [was] making use of information in a market to gain an advantage over another.’ In *R v Firns*, Mason P noted the various theories which have been offered as reasons for prohibiting insider trading, as well as arguments that insider trading is beneficial. His Honour stated that ‘market fairness… cannot be invoked as the sole basis’ for prohibiting insider trading and confirmed that the current Australian system of regulation embodies both market fairness and market efficiency theories. In the first appeal in *R v Mansfield and Kizon*, Buss J also noted and discussed the four policy rationales which may underlie the insider trading prohibition and confirmed that the market fairness and market efficiency theories underlie Australia’s insider trading laws.

In 2012, the majority of the High Court confirmed that the prohibition of insider trading exists to protect and maintain market integrity, stating that the laws were intended to ensure that:

> the securities market operates freely and fairly, with all participants having equal access to relevant information.

Thus, it appears to be certain that a market integrity rationale, premised on a need for both market fairness and market efficiency, has been generally accepted as the basis for prohibiting insider trading in Australia.

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52 Ibid 410.
54 Ibid 1501.
55 Ibid 1503.
56 Ibid 1502.
58 Ibid 296-298.
59 Ibid 312.
61 See for example, former ASIC Chairman, Tony D’Aloisio, *ASIC’s Approach to Market Integrity* (speech delivered at the Monash Centre for Regulatory Studies and Clayton Utz Luncheon Lecture, Melbourne, 11
Many other jurisdictions also base their insider trading laws on market fairness and market efficiency rationales. In the European Union, the ‘Market Abuse Directive’, which sets out the legal framework for insider trading and market misconduct to be adopted in local legislation by the Member States of the European Union, specifically states that:

An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities, derivatives and benchmarks.

Market fairness and market efficiency rationales are also accepted as the basis for prohibiting insider trading in the United Kingdom, Germany, Singapore, and New Zealand.

By contrast, in the USA, although concepts of market fairness and market efficiencies have previously been considered as appropriate bases for prohibiting insider trading, the fiduciary duty and misappropriation rationales are now both accepted as the appropriate

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63 Ibid (1).

64 UK Financial Services Authority, Consultation Paper 59, Market Abuse: A Draft Code of Market Conduct (2000), [1.6].


67 Walker and Simpson, above n 27, 388.

68 See, for example, Securities and Exchange Commission v Texas Gulf Sulphur Co, 401 F 2d 833 (1968); Shapiro v Merrill Lynch, 495 F 2D 228 (2d Cir 1974).
reasons for the prohibition.69 This approach can be traced to the origin and source of the prohibition of insider trading in the USA, which is founded on the ‘anti-fraud’ provisions of SEC Rule 10b5-1.70

Additionally, under the laws of the USA, a distinction is made between the liability of ‘primary insiders’ and ‘secondary insiders’, which focuses on the person’s relationship with the relevant corporation and the source of the inside information.71 Thus, primary liability is more easily attributed to those who are likely to owe duties to the relevant corporations, which makes the concepts of fiduciary relationships and misappropriation more relevant in these circumstances. Australian law no longer makes such a fine distinction between different types of insider and applies the insider trading prohibition to all who trade on material information which is not generally available.

Limitations of the Current Literature

While the literature on the global phenomenon of insider trading regulation is extensive, both internationally and within Australia, there is little writing and no comprehensive, critical analysis of the application of insider trading laws to corporations, especially under Australian law.


Much of the international literature is jurisprudential and doctrinal, considering the nature of the prohibition of insider trading and whether it is appropriate to criminalise such conduct. Manne\textsuperscript{72} took the view that insider trading actually allows economic efficiencies, by moving the price of securities towards their real value more quickly. This position was further advanced by others, such as Fama, who argued that share prices must reflect all available information in order that there be an efficient market,\textsuperscript{73} Leland, who further advanced the proposition that the prohibition of insider trading decreases the flow of information,\textsuperscript{74} and Estrada, who considered that securities prices are more likely to be accurate when insider trading is permitted.\textsuperscript{75} All are of the view that, if insiders can trade on inside information, price signaling will occur, causing the relevant share price to move more quickly towards equilibrium, creating a more accurate and efficient securities market.\textsuperscript{76} Manne has also argued that insider trading rewards innovation by allowing entrepreneurs to make additional profits on top of their ordinary salary and bonus arrangements.\textsuperscript{77} By contrast, Bainbridge argues that insider trading should be prohibited in order to properly protect the property rights in inside information,\textsuperscript{78} and also notes that much of the jurisprudence concerning insider trading relates to the laws of the USA, which was the first jurisdiction to prohibit insider trading, and the one with the largest capital markets in the world.\textsuperscript{79} Beny claims that securities markets are more liquid in jurisdictions where insider trading laws are more


\textsuperscript{73} Fama, above n 33.


\textsuperscript{76} Semaan, Freeman and Adams, above n 5, 225.


\textsuperscript{79} Bainbridge, above n 70, 1.
stringent, whereas Bhattacharya and Daouk state that the mere adoption of insider trading laws has no effect on securities markets and the cost of equity, but the cost of equity decreases when insider trading enforcement action is taken.

Significantly, while there is an extensive body of international literature on various aspects of insider trading, there is an absence of international research on the application of insider trading laws to corporations, other than in the context of the Chinese Wall defence, as later discussed.

As this thesis will focus primarily on the Australian legal position, the Australian literature must be considered. A number of government bodies and committees have undertaken reviews of insider trading laws and the appropriate model of regulation for Australia. The first such review was undertaken in the early 1970s by the Senate Select Committee on Securities and Exchange, which became known as the ‘Rae Committee’ after its chair, the Hon Peter Elliot Rae AO, and in 1974 it produced the first government commissioned-report into trading by insiders in Australia. Following the collapse of the boom in mining shares, the Committee had been appointed to enquire into the proposed establishment of a National Securities Commission and the ‘functions necessary for such a commission to enable it to act speedily and efficiently against manipulation of prices, insider trading and such other improper or injurious practices.’ This report was highly critical of the extent of securities trading by insiders in Australia and, in 1975, its recommendations resulted in the adoption of amendments to the existing State Securities Industry Acts, which included the first statutory prohibition of insider trading in Australia. Under this regime, a person who had acquired specific information relating to a corporation, as a result of their association with the

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81 Bhattacharya and Daouk, above n 1.
83 Ibid v.
corporation, was prohibited from acting on that information to benefit themself or someone else.84

The Committee of Inquiry into the Australian Financial System, also referred to as the ‘Campbell Inquiry’, was established in 1979 in order to undertake a broad review of the Australian financial system and banking regulation.85 This Committee also indirectly considered the issue of insider trading in Australia, confirming the prevailing view that insider trading should be prohibited in order to ensure market fairness and confidence.86 The Commonwealth Government enacted the Securities Industry Act 1980 (Cth), which contained an amended prohibition of insider trading in s 128, prohibiting dealing in the securities of a corporation if a person possessed material information that was not generally available as a result of a connection with the corporation.

In 1986, the then National Companies and Securities Commission commissioned Canadian academic, Professor Philip Anisman, to undertake a review in order to determine whether reform to the current system of insider trading regulation was needed. The resulting report87 contained two primary conclusions relating to insider trading – that it was essentially a problem of non-disclosure requiring mandatory reporting by listed corporations, and that the requirement for a connection with the relevant corporation to which the inside information related hampered the effective regulation of insider trading.88 However, no immediate action was taken to incorporate these recommendations.

Following the stock market crash in October 1987, the Standing Committee on Legal and Constitutional Affairs, known also as the ‘Griffiths Committee’ after its chair, the Hon Alan

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84 See, for example, s 75A of the Securities Industry Act 1970 (NSW), later replaced by s 112 of the Securities Industry Act 1975 (NSW), s 112 of the Securities Industry Act 1975 (Vic) and s 112 of the Securities Industry Act 1975 (Qld).
85 Campbell Inquiry Report, above n 44 (the Inquiry was chaired by Sir Keith Campbell).
86 Ibid [21.123].
88 Lyon and du Plessis, above n 6, 7.
Griffiths, conducted an inquiry into ‘the adequacy of existing legislative controls over insider trading and other forms of market manipulation’, and the resulting report released in 1989 confirmed the widespread nature of insider trading in Australia and proposed further legislative reform, with a series of amendments made to the Corporations Act 1989 (Cth).

One of the most notable reforms resulting from the recommendations of the Griffiths Committee was the removal of the requirement for a ‘person connection’ in insider trading laws, and the adoption instead of an ‘information connection’. This meant that any person in possession of inside information, whether they had a connection with the relevant corporation or not, was subject to the same prohibition of insider trading. Statutory definitions for the terms ‘generally available’ information and ‘material’ information were also recommended and incorporated into the legislation at this time.

Acting on its own initiative, the Corporations and Markets Advisory Committee (‘CAMAC’) - previously known as the Company and Securities Advisory Committee - instigated a review of Australian insider trading laws in 2001, resulting in the release of a detailed report in 2003 which contained recommendations for a further round of legislative amendments, but those recommendations have not yet been implemented. In 2007, the Commonwealth Treasury released its own Insider Trading Position and Consultation Paper, setting out the then Government’s position in relation to CAMAC’s recommendations and seeking further public input – the Commonwealth Treasury indicated that it accepted the majority of CAMAC’s

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89 Griffiths Committee Report, above n 42, xi.
90 Ibid xv. This was recommendation two in the Griffiths Committee Report.
91 Lyon and du Plessis, above n 6, 8.
93 The primary reforms recommended by CAMAC included restricting the on-selling exemption for underwriters; repealing the exemption for external administrators; clarifying the relevant time for liability when trading through an intermediary; extending the Chinese Wall defence to the procuring of trading; permitting bid consortium members to acquire financial products for the consortium under the ‘own intentions’ exemption; protecting uninformed procured persons from civil liability; extending the ‘equal information’ defence to civil proceedings; permitting the range of civil claimants to be extended; amending the test of ‘generally available’ information; permitting the exercise of physical delivery option rights: CAMAC, Insider Trading Report, above n 61.
recommendations but sought public submissions on a number of issues, although no further action was then taken. Later, in 2009, in response to a request from the then Federal Minister for Superannuation and Corporate Law for advice on the effect of certain practices on the integrity of the Australian financial markets, CAMAC released a report on 'Aspects of Market Integrity'. This report considered insider trading issues in the context of the market practices under review but made no recommendations for the reform of insider trading laws.

Each of these various reviews and reports addressed insider trading in the context of the effectiveness and appropriateness of the relevant laws but, with the exception of the CAMAC Insider Trading Report, did not specifically consider the liability of corporations for insider trading. CAMAC did consider whether identified complexities associated with the Chinese Wall defence could be alleviated by amending the law so that only individuals would be subject to the prohibition of insider trading, but ultimately CAMAC determined that such an amendment was not necessary or appropriate.

The first major review of Australian insider trading laws which was not commissioned or conducted by a government body or organisation was undertaken by Tomasic in 1991.

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94 Issues on which public submissions were sought included whether the on-selling exemption for underwriters should be restricted; whether the exemption for external underwriters should be repealed; the manner in which the insider trading prohibition should apply to the exercise of options; whether the prohibition should apply to an entity making an individual securities placement; the manner in which the prohibition should apply to an issuer conducting a share buy-back; whether the prohibition should apply to information which is not required to be disclosed; and whether the test of ‘generally available’ information should be amended: Commonwealth Treasury, Insider Trading Position and Consultation Paper (2007).

95 The market practices which CAMAC was requested to consider were: the entry of directors into margin loans over shares in their own corporations; trading by directors during ‘black-out’ periods; the spreading of false or misleading information; and the corporate briefing of analysts.


97 CAMAC, Insider Trading Discussion Paper, above n 12, [1.45]-[1.56].

98 CAMAC, Insider Trading Report, above n 61, [3.2]. This issue will be returned to in chapter 3 of this thesis.

99 Roman Tomasic (with the assistance of Brendan Pentony), Casino Capitalism? Insider Trading in Australia (Australian Institute of Criminology, 1991).
This research, building upon an existing body of work in this area, was both empirical and qualitative, involving significant research into the attitudes and conduct of members of the securities industry and Tomasic’s work is widely referenced within the existing Australian literature on insider trading. While very comprehensive in scope, the issue of the liability of corporations for insider trading is addressed primarily in the context of a consideration of the Chinese Wall defence available to corporations, and not in relation to the general application of insider trading laws to corporations.

Since Tomasic’s contribution, insider trading has become a popular topic for Australian academic writers – indeed, the comment has been made that ‘there are many more journal articles discussing what [insider trading] should be than reported cases of what it is.’ However, Australian literature on insider trading largely focuses on a number of key areas: (i) the appropriateness and effectiveness of the prohibition of insider trading; (ii) the nature of the elements of the insider trading offence, including proposed reformulations of insider trading laws; and (iii) the difficulties in successfully enforcing insider trading laws and prosecuting suspected insider traders.

In relation to the appropriateness and effectiveness of the insider trading prohibition, writers such as Semaan, Freeman and Adams adopt some of the arguments espoused by Manne and Fama noted above, and take the view that Australia has too readily embraced

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102 Semaan, Freeman and Adams, above n 5, 222.
the prohibition of insider trading, and that the resulting system of regulation actually operates to reduce, rather than promote, market efficiency. Some, such as Whincop,\(^{103}\) have taken this position even further, arguing that the existence of insider trading is fundamental to achieving accurate price setting in securities markets. However, writers such as Kendall\(^{104}\) argue that prohibiting insider trading leads to greater market participation by removing obstacles to investment and Black notes that the courts have strenuously rejected the notion that insider trading is a ‘victimless crime’.\(^{105}\)

The existence of a large body of work on the nature of the elements of the insider trading offence, and proposed reformulations of insider trading laws, is evidenced by the varied writings of Black,\(^{106}\) Mannolini,\(^{107}\) Jacobs,\(^{108}\) North,\(^{109}\) Kendall and Walker,\(^{110}\) and O’Connell.\(^{111}\) Each of these writers addresses a variety of issues relevant to the Australian insider trading prohibition, but without a particular focus on the application of the relevant laws to corporations.


\(^{107}\) Mannolini, above n 69.


Debate on the difficulties in enforcing insider trading laws and successfully prosecuting suspected insider traders has led to much writing on the topic of a civil penalty regime for insider trading, endorsed by writers such as Rubenstein\(^{112}\) and Goldwasser,\(^{113}\) but criticized by Qu.\(^{114}\) Other writers, such as Gething\(^{115}\) and Duffy,\(^{116}\) focus their research on the practical reasons for the difficulties in successfully enforcing and prosecuting insider trading laws.

While almost all corporate law textbooks devote a chapter, or part of a chapter, to the topic of insider trading regulation,\(^{117}\) most only address the application of insider trading laws to corporations in a description of the operation of the Chinese Wall defence, and only a few analyse the attribution of the elements of the offence to corporations.\(^{118}\) Lyon and du

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\(^{115}\) Gething, above n 101.


\(^{118}\) See, for example, Austin and Ramsay, above n 117, [9.600]; J P Hambbrook, above n 117, [7.13.0145].
Plessis\textsuperscript{119} have written the only Australian monograph which focuses solely on insider trading laws. This monograph comprehensively describes insider trading cases, the history and application of the relevant legislative provisions, and the developments which have occurred in this area of the law. Due to the authors’ focus on all aspects of Australian insider trading laws, the analysis of the liability of corporations for insider trading is thorough but necessarily concise. The authors’ discussion of the attribution of the elements of the insider trading offence to corporations and the Chinese Wall defence will be addressed throughout this thesis.

It is therefore apparent that there is very little literature concerning corporate criminal liability for insider trading. Qu has considered the application of insider trading laws to corporations, but focuses only on civil liability.\textsuperscript{120} The topic of the Chinese Wall defence to insider trading is one of the few topics relevant to the application of insider trading laws to corporations which has been the subject of a body of research. Internationally, writers such as Lipton and Mazur\textsuperscript{121} and Poser\textsuperscript{122} have focused on the availability of the Chinese Wall defence for corporations, particularly in relation to its origins and the difficulties associated with the practical usage of such arrangements within large organisations. These works are of particular relevance to this thesis and will be considered in detail in chapter 6. Goldwasser has also undertaken a study of the local operation of the Chinese Wall defence,\textsuperscript{123} which is currently the most detailed of its kind in Australia. As noted above, Tomasic’s research has

\textsuperscript{119} Lyon and du Plessis, above n 6.


also examined Chinese Walls in an Australian context. Other writers, such as Black and Ziegelaar, address the Chinese Wall defence briefly within larger works on insider trading, which focus primarily on wider issues not relating solely to the application of the insider trading prohibition to corporations. Additionally, while there is also a large body of writing about the use of Chinese Walls in other contexts – for example, for the avoidance of conflicts of interest within professional service organisations, such as law firms and accounting firms - those works are not necessarily of direct relevance to insider trading and corporations.

Further, while a number of these works on the Chinese Wall defence and insider trading address issues which are relevant to the topic to be explored by this thesis, these works do not address other important topics which must also be examined to provide a comprehensive analysis of the application of insider trading laws to corporations. For example, these works do not consider the manner in which corporations can be regarded as having possession of relevant inside information, the manner in which corporations may be regarded as having the necessary knowledge that certain information is inside information, or the manner in which corporations may be regarded as having engaged in the prohibited

124 Tomasic, Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professional Firms, above n 100.
125 Black, above n 36.
128 These works will be reviewed and analysed within chapter 6 of this thesis, which explores the application of the Chinese Wall defence for corporations.
conduct. For these reasons, there still remains a significant gap in the literature and knowledge on this topic, which is not addressed by these existing pieces of research.

As insider trading is a criminal offence, it is also necessary to consider the literature which addresses the criminal liability of corporations. The general law has developed sets of rules for determining the circumstances in which criminal liability can be imposed on corporations, most commonly through what has become known as ‘organic theory’ or the ‘identification doctrine’, or through the adoption of principles of vicarious liability. Separately, statute law has addressed the issue of corporate criminal liability by imposing various models of liability, often through codified acts.129 Some of the earliest writing on the issue of corporate criminal liability was by Winn130 and Wolff,131 and the means by which corporations may be liable for criminal offences has continued to be the subject of much academic research, both local132 and international.133 In Australia, Fisse and Braithwaite134 have written extensively on

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129 See, for example, the Criminal Code Act 1995 (Cth).
various aspects of corporate criminal responsibility, and Clough and Mulhern\textsuperscript{135} have produced useful commentary on issues relevant to general corporate criminal liability under Australian law, pursuant to both statutory and general law. Odgers\textsuperscript{136} has described and analysed the application of the provisions of the \textit{Criminal Code Act 1995} (Cth) and, in particular, those sections specifically relating to corporate criminal responsibility. However, it is important to note that there has not, to date, been any detailed academic review of the specific application of principles of corporate criminality, under the general law or statute, to the liability of corporations for insider trading.

Thus, as is demonstrated above, a significant body of research has been dedicated to exploring a variety of topics concerning insider trading, both internationally and within Australia. However, although many aspects of insider trading regulation have been addressed and examined through such writing, there has to date been no fully comprehensive, critical analysis of the application of insider trading laws to corporations, especially under Australia law. Further, while concepts of corporate criminal liability are extensively addressed in many important works, the issue of corporate criminal liability for insider trading remains relatively unexplored. The purpose of this thesis is to address these gaps in the literature and to make a unique and novel contribution on this issue of the criminal liability of corporations for insider trading in Australia. It will be demonstrated in this thesis that significant reform is needed in the area of corporate criminal liability for insider trading because of the great uncertainty which arises in the application of Australian insider trading laws to corporations, and because the current operation of these laws does not truly reflect the accepted rationale for prohibiting insider trading in Australia and, as a result,

\textsuperscript{134} See, for example, Brent Fisse and John Braithwaite, \textit{Corporations, Crime and Accountability} (Cambridge University Press, 1983); Fisse and Braithwaite, above n 132; Fisse, above n 132.

\textsuperscript{135} Jonathan Clough and Carmel Mulhern, \textit{The Prosecution of Corporations} (Oxford University Press, 2002).

imposes significant direct and indirect costs on corporations, and therefore all market participants.

**Methodology**

Due to the nature of the thesis topic, a primarily doctrinal methodology has been utilised, which focuses on the reading and analysis of primary materials (legislation and case law) and secondary materials (journal articles, monographs and the reports of government agencies and law reform bodies).

Doctrinal legal research generally contains an exposition of legal rules, an analysis of those rules, an explanation of areas of difficulty and predictions of future developments. However, doctrinal legal research is not merely a matter of identifying applicable legislation and relevant cases and making comments about the state of the law. It also requires an understanding of the relevant social context and interpretation. Thus, as a primary purpose of this thesis is to consider not only what the law is, but whether it is appropriate and requires amendment, it has also been necessary to adopt, in part, a comparative approach, to consider the nature of the laws of other jurisdictions and the reasons for differences between the positions adopted in those jurisdictions and those existing under Australian law. Additionally, it has also been relevant and appropriate to consider the underlying policy reasons giving rise to the laws themselves, in order to determine if they are being appropriately reflected in the state of the legislation, or if amendment is required to better reflect the demonstrated legislative intention and to correct the identified ‘mischief’ which the laws are intended to remedy.

This thesis is comprised of seven chapters. In this chapter I have introduced the thesis topic, set out the purpose and contribution of my thesis, discussed the rationale for the prohibition of insider trading, demonstrated the limitations of the current literature and

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described the methodology adopted for my research. In the subsequent chapters I will provide the necessary regulatory background in order to understand the operation of Australian insider trading laws, the manner in which insider trading laws currently apply to corporations in Australia, and the challenges in attributing criminal liability to corporations. I will then examine the specific elements of the insider trading offence, and relevant defences, in order to demonstrate the manner in which they are currently attributed and applied to corporations, and to analyse the problems and difficulties which arise in that context. I will then propose amendments and reforms to the law, so that insider trading laws can be better applied to corporations, in a manner consistent with the market integrity rationale for prohibiting insider trading, and to ensure that Australian law provides an effective regulatory model within the international sphere.

In chapter 2, I will provide an overview of the key features of Australian insider trading laws, describing and analysing the elements of the insider trading offence – that a person possesses certain information; that the information is not generally available; that if the information were generally available, it would be material; that the person knows, or ought reasonably to know, that the information is not generally available and that, if it were, it would be likely to be material; and the person trades in relevant financial products, procures another person to engage in such trading, or communicates the information to another person likely to do so. This chapter will provide an appropriate background and necessary context for the further chapters of the thesis.

The manner in which insider trading laws apply generally to corporations will be considered in chapter 3. The manner in which a corporation, as a legal person, is caught by the insider trading prohibition will be discussed, and international comparisons will be made, looking at whether insider trading laws apply to corporations in other jurisdictions. The historical and theoretical basis for applying insider trading laws to corporations will be reviewed, as will the Australian cases which have focused on insider trading issues concerning corporations. This chapter will conclude with a consideration of the reasons why corporations should remain subject to the prohibition of insider trading.
Then, since the act of engaging in insider trading is a criminal offence, chapter 4 will review theories of corporate criminal responsibility and consider the manner in which corporations can be found to be liable for crimes. This chapter will consider the various general law and statutory rules which have been developed in order to apply principles of criminal liability to corporations - vicarious liability, direct liability through the identification doctrine, the aggregation doctrine, organisational fault, and discuss the most appropriate model for corporate criminal liability for insider trading in Australia.

Chapter 5 will examine the specific elements of the insider trading offence and the manner in which they can be attributed to corporations – possessing inside information (the ‘possession element’), having the relevant knowledge that the information is inside information (the ‘knowledge element’) and engaging in the conduct of trading, or the procuring of trading, in relevant financial products, or tipping (the ‘trading element’). In particular, it will be demonstrated in this chapter that there are a number of different statutory and general law mechanisms that can be used to attribute these elements to corporations and that the various, conflicting tests which are relevant to each mechanism create significant uncertainty when attempting to determine when a corporation engages in insider trading, thus necessitating reform of Australia’s insider trading laws.

Then, chapter 6 will explore the application of the Chinese Wall defence to insider trading, which can be used by a corporation to avoid liability for insider trading in some circumstances. This chapter will consider the requirements for an effective Chinese Wall and identify and discuss the difficulties in using and relying upon this defence under Australian law, which give rise to additional uncertainty in relation to corporate liability for insider trading.

Having then examined the application of insider trading laws to corporations throughout the preceding chapters of this thesis, chapter 7 will set out proposals for law reform in this area and suggested legislative amendments to give effect to those proposals – the proposed reforms will include the express exclusion of the general law from the statutory regime applying insider trading laws to corporations, the development of a new set of statutory
provisions to apply insider trading laws to corporations, and the redrafting of the Chinese
Wall defence. These proposals will respond to the problems and difficulties which have been
identified, having regard to the underlying rationale for the insider trading prohibition under
Australian law, the need for clarity and certainty in this area, and a desire to develop a
regulatory model which is of international significance, allowing Australia’s securities
markets to remain globally competitive.

The thesis also contains three Appendices, in order to provide an easy means of reference
for the reader. The first contains extracts from the current Corporations Act 2001 (Cth),
reproducing the prohibition of insider trading and related sections; the second contains
legislative extracts from other jurisdictions referred to throughout this thesis; and the third
lists the journal articles which I have published during my candidature.
CHAPTER 2
THE REGULATION OF INSIDER TRADING IN AUSTRALIA

While this thesis focuses on the application of insider trading laws to corporations, in order to undertake such a review it is necessary to first consider the key features of the Australian insider trading regulatory regime, so that the nature and scope of the relevant laws can be clearly understood. This chapter will provide an overview and analysis of the primary elements of Australian insider trading laws, in order to provide the necessary background and context for the central issues and arguments to be advanced throughout this thesis.

The Key Features of Australian Insider Trading Laws

It was noted by Jacobson J in ASIC v Citigroup\(^1\) that the statutory offence of insider trading was first created in Australia under the uniform Securities Industry Acts\(^2\), which provided that insider trading occurred:

> where a person, through his or her association with a corporation or body, had
> “knowledge of specific information relating to the corporation” and acted on that
> information to the benefit of himself or herself or to enable another person to gain an
> advantage by using that information.\(^3\)

Despite the passage of 40 years since insider trading was first prohibited under statute in Australia, the legislative framework which regulates insider trading is, unfortunately, regarded as particularly complex and unclear.\(^4\) Indeed, when discussing the complexity of

\(^1\) (2007)160 FCR 35.
\(^2\) As noted in chapter 1, insider trading was first prohibited by statute in Australia under amendments made in 1975 to the uniform Securities Industry Acts previously adopted by four States: Securities Industry Act 1970 (Qld); Securities Industry Act 1970 (NSW); Securities Industry Act 1970 (WA); Securities Industry Act 1970 (Vic).
\(^3\) (2007)160 FCR 35,104.
\(^4\) See, for example, Michael Whincop, 'Towards a Property Rights and Market Microstructural Theory of Insider Trading Regulation – The Case of Primary Securities Markets Transactions' (1996) 7 Journal of Banking and
the insider trading regulatory regime, many commentators\(^5\) have quoted Rolfe J's critical comments in *Ampolex Ltd v Perpetual Trustee Trading Co (Canberra) Ltd*:\(^6\)

> [I]t is a matter of concern that legislative provisions, which create serious criminal offences … should provide not only difficulties of interpretation because of the language used, but because of apparent internal inconsistencies. I would respectfully suggest that reconsideration be given to these provisions. They are intended to have a beneficial commercial effect. It is unfortunate that they should be couched in language which is difficult of understanding and application.\(^7\)

These sentiments were echoed by McLure P of the Court of Appeal of Western Australia in *R v Mansfield and Kizon*:\(^8\)

> The insider trading provisions of the *Corporations Act 2001* (Cth) … are devilishly difficult to construe. It is difficult to discern an entirely coherent, internally consistent statutory framework. Thus, it is difficult to be entirely confident as to their proper construction.\(^9\)

The present prohibition of insider trading is contained in s 1043A(1) of the *Corporations Act 2001* (Cth) (the ‘*Corporations Act*’), which provides as follows:

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\(^7\) Ibid 658.

\(^8\) (2011) 251 FLR 286.

Subject to this subsection, if:

(a) a person (the insider) possesses inside information; and

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

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

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

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

There is also an additional prohibition in s 1043A(2) of the Corporations Act, which prohibits tipping and which provides that an insider must not:

directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

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

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

It is not easy at first glance to determine the precise meaning or operation of the prohibition, particularly as it is necessary to consider the definitions in a number of other sections of the Corporations Act in order to understand the content of several elements of the offence.
However, in *Mansfield and Kizon v R*,\(^{10}\) which is to date the only insider trading case to be considered by the High Court, the majority neatly summarised the nature of insider trading as follows:

The *Corporations Act 2001* (Cth) prohibits trading in securities by persons who possess information that is not generally available and know, or ought reasonably to know, that, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of the securities.\(^{11}\)

Insider trading can therefore be broadly described as having the following elements: (i) a person possesses certain information; (ii) the information is not generally available; (iii) if the information were generally available, it would be material information; (iv) the person knows (or ought reasonably to know) that the information is not generally available and that, if the information were generally available, it would be material information; and (v) while in possession of the information, the person trades in relevant financial products or procures another person to do so, or communicates the information to another person likely to do so.

Each of these elements will be considered in turn, so that the nature of the insider trading offence can be more fully understood.

**Element One - A Person Possesses Certain Information**

The first element of the insider trading offence is that a person possesses certain information, which in turn must be ‘inside information’. This element is derived from s 1043A(1)(a) of the *Corporations Act*, which requires that ‘a person (the insider) possesses inside information’. Therefore, to understand the requirements of this element of the offence, two concepts need to be considered – what is meant by each of the terms ‘information’ and ‘possesses’?

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\(^{10}\) (2012) 87 ALJR 20.

\(^{11}\) Ibid 21. As discussed in Overland, above n 9, 191.
The Nature of Information

Section 1042A of the Corporations Act defines 'information' to include:

(a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and

(b) matters relating to the intentions, or likely intentions, of a person.

This definition was first used in the Corporations Law and was intentionally drafted to enable the word 'information' to be interpreted as broadly as possible. It is clear that the information does not need to be specific or precise. The absence of such a requirement means that rumours and speculation can amount to information caught by the insider trading prohibition, as information 'may include a rumour that something has happened with respect to a corporation which a person neither believes nor disbelieves.' In Mansfield and Kizon v R, it was made clear that information does not need to be 'truthful' or based on a 'factual reality.'

Information can also include knowledge obtained from a hint or suggestion, or a

12 This definition was inserted by the Corporations Legislation Amendment Act 1991 (Cth) which contained many amendments resulting from the recommendations of the report of the Griffiths Committee: Standing Committee on Legal and Constitutional Affairs, House of Representatives, Fair Shares for All: Insider Trading in Australia (1989).
13 Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), 90.
18 Ibid 25.
supposition made from non-specific information received from another.\textsuperscript{20} An inference
drawn from words or conduct can also amount to information, so long as those words or
conduct are communicated or observed in some way.\textsuperscript{21}

In ASIC v Citigroup,\textsuperscript{22} a set of civil penalty proceedings brought against a corporation for
insider trading, the issue arose as to whether an ‘uncommunicated thought process’ was a
supposition that could amount to inside information. Toll Holdings Limited was proposing to
takeover Patrick Corporation Limited and had retained the Investment Banking Division of
the investment bank, Citigroup, to provide it with advice on the takeover. ASIC had alleged
that, on the day prior to the announcement of the takeover bid, Mr Manchee (a Citigroup
employee who was engaged in proprietary share trading – that is, trading on Citigroup’s own
behalf rather than for its clients) purchased over one million Patrick shares. This trading was
noticed by personnel within the Investment Banking Division. An executive in the
Investment Banking Division then asked Mr Manchee’s manager, Mr Darwell, whether he
knew who was undertaking the trading and, when told, stated words to the effect that ‘we
may have a problem with that.’ Mr Darwell then took Mr Manchee outside and told him to
stop buying Patrick shares. After that conversation, Mr Manchee returned to the office and
began selling Patrick shares.

In subsequent insider trading proceedings brought against Citigroup, ASIC alleged that the
proprietary trader possessed inside information, being a supposition that he allegedly made
when told to stop buying Patrick shares, that Citigroup must be acting on Toll’s behalf in
relation to a takeover of Patrick. In its defence, Citigroup argued that, as that supposition (if
it had been made) had not actually been communicated to the proprietary trader but was
simply a deduction he may have made, it was an ‘uncommunicated thought process’ and
could not amount to information. Citigroup’s arguments were not accepted by Jacobson J of
the Federal Court, who determined that an uncommunicated supposition could amount to

\textsuperscript{21} Ibid 105.
\textsuperscript{22} Ibid.
‘information’, as can inferences or suppositions drawn from words or conduct.23

The year after the decision in ASIC v Citigroup, Mr Simon Hannes sought special leave to appeal to the High Court in relation to an earlier conviction for insider trading.24 The argument underlying the application for special leave was that the information he had allegedly possessed about a proposed takeover was not ‘information’ as defined in the Corporations Act because it was only a supposition he had made, not information communicated to him. Although special leave to appeal was refused on the basis that there were insufficient prospects of success, Gummow ACJ did note that the question as to whether there are any limitations on the concept of ‘information’ for the purposes of s 1043A of the Corporations Act had not, at that time, been considered by the High Court and was a question of public importance.25

The meaning of the term ‘information’ in the context of insider trading did come before the High Court in 2012 in Mansfield and Kizon v R.26 In that case, the High Court determined that information does not have to be true, it does not have to originate from the corporation to which it relates, and it need not be confidential information which can be said to belong to that corporation. Mansfield and Kizon v R concerned the purchase of shares in a listed corporation, where the corporation’s managing director had made false, but positive, statements to prospective investors about the corporation’s expected profits and turnover. When two of those investors were later charged with insider trading, they argued that a false statement could not properly amount to ‘information’ within the meaning used in the Corporations Act. However, the majority of the High Court27 stated that the word ‘information’ should be interpreted in accordance with its ordinary meaning and in accordance with that meaning:

23 Ibid 106. However, on the facts, Jacobson J was not satisfied that the proprietary trader had in fact actually made such a supposition. As discussed in Juliette Overland, ‘Back to the Future? The Impact of Financial Services Reform on Insider Trading in Australia’ (2008) 5 Macquarie Journal of Business Law 179, 192–193.
25 Ibid.
27 Hayne, Crennan, Kiefel and Bell JJ delivered a joint judgment, with a separate judgment from Haydon J.
the word “information” ... is not understood to be confined to knowledge communicated which constitutes or concerns objective truths. Knowledge can be conveyed about a subject-matter... and properly be described as “information” whether the knowledge conveyed is wholly accurate, wholly false or a mixture of the two. The person conveying that knowledge may know or believe that what is conveyed is accurate or false, whether in whole or part, and yet, regardless of that person’s state of mind, what is conveyed is properly described as “information”.28

Although the provenance of information does not matter for the purposes of this element of the offence,29 information may also include the source of the underlying state of affairs which has been communicated. For example, in R v Rivkin,30 the relevant information that Mr Rivkin possessed was that the executive chairman of Impulse Airline had stated that there was a proposed ‘merger’ deal between Impulse Airlines and Qantas. Of course, vague or imprecise information may have little material value, but this consideration is more relevant to whether the information is likely to be material than whether it can be categorised as information.31

Thus, a number of Australian cases have demonstrated that information may come in many forms, such as: (i) non-specific details about a proposed merger of two corporations, given verbally by the executive chairperson of one of the corporations;32 (ii) a court decision presented in open court in a foreign country;33 (iii) details of a press release about the discovery of a high-grade nickel deposit;34 and (iv) details of a proposed takeover, gleaned from office documents and discussions with staff advising on the proposed takeover.35

31 Ibid 389-390.
33 R v Kruse (District Court of New South Wales, O’Reilly DCJ, 2 December 1999); R v Firns (2001) 19 ACLC 1495.
34 R v Evans & Doyle (Supreme Court of Victoria, McDonald J, 15 November 1999).
While these different examples can be variously described as facts, details, data or gossip, all have been considered to amount to ‘information’. The manner in which they exist – whether in documentary form, electronic form or as a topic of conversation - has no bearing on their status as information and the form of the information is obviously of little consequence.\(^{36}\)

The current position under Australian law, which does not require information to be specific or precise, can be contrasted with that of a number of overseas jurisdictions, which have laws providing that insider trading will only occur as a result of trading on specific or precise information.\(^{37}\) It appears that the primary reason that such a position is adopted in some other countries is to exclude rumours from the definition of inside information, so that trading on the basis of rumours will not amount to insider trading in those jurisdictions.\(^{38}\) CAMAC revisited this issue when undertaking its review of Australian insider trading laws in 2001-2003, but determined that it would not be appropriate to amend the law to impose a requirement that information be ‘specific’ because it would ‘unduly narrow the application of the legislation and create artificial distinctions between what does and what does not constitute inside information.’\(^{39}\) This view was confirmed again by CAMAC in the 2009 report on ‘Aspects of Market Integrity’\(^ {40}\). ASIC has also indicated in its consultation paper on


\(^{37}\) For example, in Germany, inside information must be ‘specific information’ – Securities Trading Act (WpHG), s 13; in the European Union, inside information must be ‘information of a precise nature’ – chapter 2, Article 7.1 (a) of the Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation); in the United Kingdom, inside information must be ‘information of a precise nature’ – Criminal Justice Act 1993 (UK) c 36, s 56(1)(b); in South Africa, inside information must be ‘specific or precise information’ – Financial Markets Act 2012 (South Africa), s 77; and in Hong Kong, inside information must be ‘specific information’ – Securities and Futures Ordinance (Hong Kong) cap 571, s 245.


\(^{39}\) CAMAC, Insider Trading Report, above n 15, [3.7].

\(^{40}\) CAMAC, Aspects of Market Integrity Report, above n 15, 116.
the ‘Responsible Handling of Rumours’\(^{41}\) that it takes the view that trading on the basis of
rumours can clearly amount to insider trading.\(^{42}\) Despite this, almost all convicted insider
traders in Australia have traded on the basis of information which appears to be quite
specific. The two notable exceptions are Mr Rene Rivkin\(^{43}\) and Mr Bart Doff\(^{44}\) who traded on
the comparatively vague (and not quite correct) information that Qantas and Impulse Airlines
were about to ‘merge’, as conveyed to them by the executive chairperson of Impulse
Airlines. The definition of information, and whether or not it includes information that is not
specific or precise, does not have any particular bearing on the application of insider trading
laws to corporations, but it is clearly important that all market participants, investors and
regulators understand the nature and scope of the forms of information which are caught by
this term.

**The Possession of Information**

Part 7.10 of the *Corporations Act*\(^{45}\) which contains the prohibition of insider trading in s
1043A, does not contain a definition of the words ‘possess’ or ‘possession’. However, s 86
of the *Corporations Act*, contained in Part 1.2,\(^{46}\) does provide some guidance on the
meaning of the term ‘possession’, as it states that:

> A thing that is in a person’s custody or under a person’s control is in the person’s
> possession.

However, this definition is not particularly helpful in interpreting the elements of the insider
trading offence, as it is not clear if ‘information’ is intended to be a ‘thing’ and the definition of
‘information’ in s 1042A of the *Corporations Act* does not assist in this respect. The

\(^{41}\) ASIC, *Consultation Paper 118*, above n 15.

\(^{42}\) Ibid 10.


\(^{45}\) Part 7.10 is titled ‘Market Misconduct and Other Prohibited Conduct Relating to Financial Products and
Financial Services’.

\(^{46}\) Part 1.2 is titled ‘Interpretation’.
The definition of possession in s 86 does not import any notion of awareness, and requires only custody or control. As Steel\textsuperscript{47} notes in relation to the concept of ‘possession’:

\begin{quote}
The legal meaning of possession is complex, largely due to its long use in the common law and its wide adoption in statutory offences. This means courts have felt compelled to caution that: ‘the term “possession” … always giv[es] rise to trouble, and … in each case its meaning must depend on the context in which it was used.’\textsuperscript{48}
\end{quote}

In \textit{He Kaw Teh v R},\textsuperscript{49} the High Court considered whether awareness was necessary in connection with criminal offences concerning the possession of prohibited drugs, and in doing so made pronouncements about the general nature of possession under the criminal law. In particular, Dawson J stated that the concept of possession would ordinarily import a notion of awareness but that ‘the degree of knowledge required may vary according to context.’\textsuperscript{50} It was also stated by Brennan J that possession is ‘a state of affairs… proved by various acts varying with the nature of the subject matter’.\textsuperscript{51}

Certainly, in respect of criminal offences which relate to tangible property, the element of possession is generally satisfied where a person has either physical control or custody of that property.\textsuperscript{52} Within the \textit{Corporations Act}, the concept of the possession of information for the purposes of the prohibition of insider trading is not the only context within which the notion of possession arises - for example, s 419 of the \textit{Corporations Act} is concerned with controllers taking possession of a corporation’s property. It is certainly conceivable that the s 86 definition, concerned with custody and control rather than awareness, is intended to relate to provisions such as s 419 and not necessarily s 1042A. However, without a


\textsuperscript{49} (1985) 157 CLR 523.

\textsuperscript{50} Ibid 601.

\textsuperscript{51} Ibid 564, citing Isaacs J in \textit{Moors v Burke} (1919) 26 CLR 265, 271.

\textsuperscript{52} Steel, above n 47, 516.
separate definition of possession in Part 7.10 of the Corporations Act, this issue remains unclear.

The discussion above on the nature of information does indicate that it may come in a variety of forms. Those various forms of information could potentially be possessed in many different ways. For example: (i) information may be possessed in a tangible, physical sense – for example, information may be possessed by means of physical custody of the paper or documents on which the relevant information is contained in written form; (ii) information may be possessed in an intermediate physical sense – for example, information may be possessed by means of physical custody of computer disks or equipment which enable the information to be accessed electronically, such as via email; and (iii) information may be possessed in non-tangible, non-physical sense – for example, information may be possessed by a person because they know or are aware of the information, without any physical evidence of such possession.

Only information possessed in a non-tangible, non-physical sense requires any actual knowledge of the content of the information by the person who possesses it. Where there is possession in a tangible, physical sense or an intermediate physical sense, the person may have physical custody or control of the information or the means by which the information can be accessed, but it is possible that they may not necessarily be aware of the actual existence of the relevant information or its content. Of course, knowledge and physical custody may exist simultaneously, but that is not necessarily the case. Is knowledge, or physical custody and control, or both, necessary for there to be ‘possession’ of information for the purposes of the prohibition of insider trading? This issue is of particular importance when considering the position of corporations as potential insider traders, and when determining how a corporation may possess inside information, as it is possible for one person within a corporation to have physical custody and control of information without awareness of the content of the information, for another person to have awareness without physical custody or control of the information, and for a third person within the corporation to engage in the act of trading in relevant shares without awareness or physical custody or control of the information. Accordingly, the definition of possession in this context will
significantly impact on the circumstances in which a corporation might be considered to engage in insider trading.\textsuperscript{53}

Fortunately, despite the lack of clarity existing under the provisions of the \textit{Corporations Act}, case law provides useful guidance on this critical issue. Following his earlier conviction for insider trading, Mr Simon Hannes appealed to the New South Wales Court of Criminal Appeal.\textsuperscript{54} One of the numerous grounds of the appeal was that the trial judge erred when giving directions to the jury in relation to the requirement that the defendant ‘possess’ information. The defendant alleged that there was an error of law in that case in failing to distinguish between physical possession and awareness of information. Although the appeal was ultimately allowed and a direction given for a retrial, this particular ground of the appeal was rejected. In this context, the judgment of Spigelman CJ confirmed that in order for information to be possessed, there must be ‘an element of awareness’\textsuperscript{55} of the relevant information.

This means that mere physical possession of documents or the means to access information electronically would not be sufficient to constitute possession without an awareness or knowledge of the content of the relevant information.\textsuperscript{56} Steel notes that the result of such a decision is that ‘…“possession” in this context approaches a synonym for knowledge’.\textsuperscript{57} This position has also been implicitly confirmed by the New South Wales Court of Criminal Appeal in \textit{Fysh v R}.\textsuperscript{58} While the Court did not explicitly state that there is a requirement for actual awareness of information in order for there to be possession for the purposes of

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\textsuperscript{54} \textit{R v Hannes} (2000) 158 FLR 359.

\textsuperscript{55} Ibid 398.


\textsuperscript{57} Steel, above n 47, 518.

\textsuperscript{58} [2013] NSWCCA 284 (20 November 2013).
insider trading laws, when overturning Dr Fysh’s conviction for insider trading, it was made clear that Dr Fysh could not be regarded as having possession of all the information alleged, due to the Crown’s inability to prove that all the relevant information had been discussed with him or provided to him. Even though Dr Fysh might briefly have had physical possession or access to the information in written form, the Crown’s inability to prove that he had an opportunity to examine that information also meant that he was not considered to have possessed it for the purposes of Australian insider trading laws.\(^{59}\)

Of course, if a person cannot be shown to have knowledge or awareness of information, it will likely be difficult to prove the other elements of the insider trading offence, which will require proof that a person knew (or ought reasonably to have known) that the relevant information was not generally available and was likely to be material. However, that may only be the case for individual offenders. For corporations, the different elements of the insider trading offence may be attributed to a corporation as a result of the knowledge and conduct of different people within the organisation. So, depending on the applicable rules of attribution, it might be possible that the person who has possession of inside information is not the person who engages in the relevant trading in financial products. For this reason, it is particularly important in the context of corporate offenders to be able to understand the precise requirements of each of the elements of the offence.

There is no requirement that a person believe the relevant information to be true\(^{60}\) or to have received the information in confidence.\(^{61}\) There is also no need to prove that a person ‘used’

\(^{58}\) Commentators have offered some additional, if conflicting, assistance on this topic - Austin and Ramsay suggest that it is possible for a person to have possession of inside information, within the meaning of s 1043A of the Corporations Act, even if the person has temporarily forgotten it or has not read it: Austin and Ramsay, above n 5, [9.650]. However, Lyon and du Plessis state that a person cannot be considered to possess inside information without proof that the person knows and is aware of the information: Lyon and du Plessis, above n 29, 23. In this context, the view of Lyon and du Plessis must be preferred, due to its consistency with the judicial statements made in \(R \text{ v Hannes} \) (2000) 158 FLR 359 and \(Fysh \text{ v R} \) [2013] NSWCCA 284 (20 November 2013). As discussed in Overland, above n 56, 357.

\(^{60}\) Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd (1986) 10 ACLR 462.

\(^{61}\) \(R \text{ v Rivkin} \) (2004) 184 FLR 365, 390.
or relied on the information when deciding to engage in the prohibited conduct and it is no
defence that the person did not rely on the inside information (for example, because they
had already planned to trade prior to coming into possession of the information, or that they
based their decision to trade on alternative information which was not inside information).\textsuperscript{62}
This position differs from that of many overseas jurisdictions, some of which either require
that the ‘use’ of the relevant inside information be demonstrated, or have a defence of ‘non-use’
available, which requires the alleged offender to prove that he or she would still have
engaged in the relevant conduct, with or without the information.\textsuperscript{63} These differences can be
explained in a number of ways. Jurisdictions which prohibit insider trading on the basis of a
‘breach of fiduciary duty’ or ‘misappropriation’ rationale are essentially prohibiting the misuse
of inside information. In that context, it makes sense that the actual use of the information
must be demonstrated before there is liability. However, in jurisdictions relying on ‘market
efficiency’ or ‘market fairness’ rationales, investor confidence requires that market
participants with access to inside information should not have advantages over ordinary
market participants, rendering them unable to trade in affected securities at any time when
they possess inside information. When conducting its review of insider trading laws,
CAMAC did consider whether it would be appropriate to introduce a ‘use’ requirement to
Australian law, but determined that this would unnecessarily make the offence harder to

\textsuperscript{62} CAMAC, Insider Trading Report, above n 15, [3.4].

\textsuperscript{63} For example, in Germany, it must be shown that an alleged insider trader ‘made use’ of the inside
information: Securities Trading Act (WpHG), s 14(1); in the European Union, it must be shown that an alleged
insider trader ‘used’ the inside information: Article 8.1 of the Regulation (EU) 596/2014 of the European
Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation), although there is a
rebuttable presumption of use if the insider is in possession of inside information: Case C-45/08, Spector Photo
Group, 2009 ECR I-12073, as noted in Katja Langenbucher, ‘The “Use or Possession” Debate Revisited –
Spector Photo Group and Insider Trading in Europe’ (2010) 5 Capital Markets Law Journal 452, 466; in the
United Kingdom, insider trading only occurs where it is ‘on the basis’ of the relevant inside information: Criminal
Justice Act 1993 (UK) c 36, s 53. In the USA, it must be shown that the alleged insider trading occurred ‘on the
basis of’ the inside information. However, a person will be regarded as trading on the basis of information if the
person ‘was aware of the material, nonpublic information when the person made the purchase or sale’: SEC
Rule 10b5-1, SEC Release No 33-788.
prove and enable potential offenders to more easily offer plausible excuses for illegal activity.  

**Element Two - The Information Is Not Generally Available**

The second element of the insider trading offence requires that the information that the person possesses is not generally available. This element comes from the first limb of the definition of ‘inside information’ in s 1042C of the *Corporations Act*. Section 1042C provides that ‘inside information’ means information in relation to which the following paragraphs are satisfied:

(a) the information is not generally available; and

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

The term ‘generally available’ is also defined in s 1042C of the *Corporations Act*, which provides that information is generally available if:

(a) it consists of readily observable matter; or

(b) both of the following subparagraphs apply:

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

(ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or

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(c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(i) information referred to in paragraph (a);

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

It is therefore necessary to consider what each of the three limbs of the definition of the term ‘generally available’ mean: what is ‘readily observable information’, what is ‘publishable information’, and what are ‘deductions, conclusions or inferences’?

Readily Observable Information

The term ‘readily observable’ is not defined in the Corporations Act, but according to the Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (Cth), which first inserted the term into the Corporations Law, ‘readily observable’ is intended to mean ‘facts directly observable in the public arena.’ It appears that it does not matter how a person actually observes the information (or, indeed, if any person does actually observe it) so long as it would be possible for a person to observe it. Observation can occur by various means – for example, with the use of the ‘unaided human senses’ and with the assistance of devices such as the ‘telephone, telex, facsimile, television and the internet.’

There has previously been some confusion as to whether or not information must be readily observable in Australia or if it is sufficient if it is readily observable in an overseas jurisdiction. In R v Firns, an employee of a mining corporation, Carpenter Pacific Resources NL, received notification in Australia that the corporation had been successful in proceedings brought in the Supreme Court of Papua New Guinea in relation to a mining licence dispute. The employee then telephoned his son and, after passing on the

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65 Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), [328].
67 Ibid 1507 (Mason J).
68 District Court of New South Wales, Sides J, 4 November 1999.
information, asked him to buy shares in the corporation, which his son then arranged. The issue arose as to whether the information about the judgment delivered in open court in Papua New Guinea was readily observable and therefore generally available. The trial judge, Sides J, stated that the relevant information was readily observable overseas but not in Australia so was therefore not ‘generally available’ and the defendant was convicted of insider trading.

There was, however, a different outcome in *R v Kruse*, which resulted from a very similar set of facts. In that case, another employee of Carpenter Pacific Resources NL, who was actually present in the Supreme Court of Papua New Guinea when the judgment about the mining licence was handed down, bought shares in the corporation just after the judgment was given, while still in Papua New Guinea. The trial judge, O’Reilly J, found that information can be generally available even if it is only readily observable overseas, and the defendant in that case was not convicted of insider trading. The conviction in *R v Firns* was then overturned on appeal by the New South Wales Court of Appeal, with the majority of the Court finding that information need only to be readily observable in an overseas jurisdiction to be considered ‘generally available’.

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69 District Court of New South Wales, O’Reilly DCJ, 2 December 1999.

70 The decisions of the trial judges in *R v Firns* and *R v Kruse* proved difficult to reconcile, although Walker was able to distinguish the two cases on their facts, effectively arguing that the relevant provisions providing for extra-territorial application of the laws meant that where the relevant conduct occurred overseas (as was the case in *R v Kruse*) the information need only be readily observable in that location, but where the relevant conduct occurred in Australia (as was the case in *R v Firns*) the information must be readily observable in Australia: Gordon Walker, ‘Insider Trading in Australia: When is Information Readily Available?’ (2000) 18 *Company and Securities Law Journal* 213, 215-216. The subsequent appeal in *R v Firns* (2001) 19 ACLC 1495, overturning the original decision, meant that this argument was not judicially tested.


72 Carruthers AJ delivered a strong dissenting judgment.

73 When reviewing Australian insider trading laws in 2001-2003, CAMAC proposed a reformulation of the definition of ‘generally available’ information, under which information would only be generally available if it:

(a) is accessible to most persons who commonly invest in Division 3 financial products of a kind whose price or value might be affected by the information; or
Accordingly, under Australian law, it appears that information that is readily observable will be considered to be generally available, including information that is only observable overseas. Of course, now that electronic media easily enables information to be communicated globally in an almost instantaneous manner, it is much less likely that information observable overseas would not also be considered to be observable in Australia.

**Publishable Information**

Information is also generally available if it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products, and a reasonable period for it to be disseminated has elapsed, pursuant to paragraph (b) of the s 1042C definition of ‘generally available’ information. This limb of the definition is often referred to as the ‘publishable information’ test.74

This limb of the definition appears to apply to information that has been made available to those investors who would be likely to invest in the financial products to which the information relates. Section 1042A of the *Corporations Act* defines ‘Division 3 Financial Products’ very widely as:

(a) securities; or
(b) derivatives; or

(b) consists of deductions, conclusions or inferences made or drawn from information referred to in paragraph (a).

This proposal, which was contained in CAMAC’s *Insider Trading Report*, above n 15, [4.7.4], has not been accepted or adopted by Parliament and does not represent the current state of Australian law. However, although this proposal would certainly remove any remaining confusion about the term ‘readily observable’, a similar debate could erupt over the meaning of the term ‘accessible to’. While the proposal does provide that the information must be accessible to ‘persons who commonly invest’ in the relevant securities, there may still be doubt as to whether events occurring overseas or information being released overseas are ‘accessible’ to such persons. Accordingly, the implementation of such a proposal could lead simply to the substitution of one contentious issue with another. As discussed in Overland, above n 36, 209-210.

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

The amendments made to the Corporations Act by the Financial Services Reform Act 2001 (Cth) changed the nature of the relevant financial products caught by the insider trading prohibition. Prior to the implementation of the Financial Services Reform Act, insider trading was only prohibited in relation to ‘securities’.75 Thus certain ‘financial products’ which were not previously subject to insider trading laws have now been brought within the ambit of the prohibition. The reasoning behind this reform was the desire to ensure that conduct which amounts to an offence in relation to certain financial products should not, from a policy perspective, be permissible in relation to other financial products - especially given that it was an aim of the Financial Services Reform Act to regulate ‘functionally similar’ financial products in a similar manner.76 All financial products that are tradable on a market (and some which are not) are now subject to the prohibition of insider trading.77

It appears that the manner in which information would need to be disseminated in order to bring it to the attention of those likely to invest in the financial products has been intentionally

75 Section 1002A of the previous Corporations Law provided that ‘securities’, in relation to a body corporate, means any of the following:
(a) shares in the body corporate;
(b) debentures (including convertible notes) issued by the body corporate;
(c) interests in a managed investment scheme made available by the body corporate;
(d) units of shares referred to in paragraph (a);
(e) an option contract under which a party acquires from another party an option or right, exercisable at or before a specified time, to buy from, or sell to, that other party a number of securities of a kind referred to in paragraph (a), (b), (c) or (d) at a price specified in, or to be determined in accordance with, the contract; but does not include a futures contract or an excluded security.
76 Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth), [2.76].
77 As discussed in Overland, above n 23, 182.
left open. Where the relevant financial products are listed on an exchange, information may be made known to those who invest via continuous disclosure mechanisms, and the release of information to the exchange. This concept is more difficult to apply to non-listed entities. However, information is made known in a manner that would bring it to the attention of people who commonly invest in the relevant financial products if the information is admitted into evidence in open court.

The intention of this requirement is to allow potential investors time to absorb the impact of the relevant information, so that someone who already possesses the information prior to its publication does not receive an unfair trading advantage. There is no guidance given as to what amounts to a reasonable time, so it will necessarily depend on the circumstances as to how long must be allowed, which will also be influenced by the manner of dissemination of the information. It is also apparent that a class of investors who 'commonly invest' in securities is 'broader than current' shareholders and 'encompasses potential investors.'

**Deductions, Conclusions and Inferences**

The third limb of the definition of 'generally available information' enables a diligent researcher who is able to interpret other generally available information to act in accordance with the results of that research. Information will be considered to be generally available if it consists of deductions, conclusions or inferences drawn from readily observable matter or

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80 Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), [328].
83 Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), [326].
publishable information. However, research which is based on non-public information will not be protected, even if it is obtained as a result of the researcher’s own efforts.84

Element Three - If the Information were Generally Available, it would be Material

The third element of the insider trading offence requires that, if the relevant information was generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products. This element comes from the second limb of the definition of ‘inside information’ in s 1042A of the Corporations Act. As noted above, s 1042A provides that ‘inside information’ means information in relation to which the following paragraphs are satisfied:

(a) the information is not generally available; and

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

Section 1043D of the Corporations Act assists in determining when a reasonable person would expect information to have a material effect by providing that:

a reasonable person would be taken to expect information to have a material effect on the price or value of Division 3 financial products 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 first-mentioned financial products.

It is also useful to consider the provisions concerning continuous disclosure laws for listed corporations, as very similar concepts are used to determine when ‘material’ information concerning a corporation needs to be disclosed to an exchange. Section 674(2) of the Corporations Act provides as follows:

If:

(a) this subsection applies to a listed disclosing entity;

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

Section 677 of the *Corporations Act* then provides, in language that is almost identical to s 1042F of the *Corporations Act*, that:

a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.  

As was noted in *Hannes v DPP (No 2)*, 86 ‘…materiality is concerned with investor conduct and … the capacity of information to influence investor behaviour which, in turn, has a material effect on price or value of securities. Accordingly, materiality is concerned with information which might be said to be price sensitive.’  

85 The ASX considers that the reference in s 677 of the *Corporations Act* to ‘persons who commonly invest in securities’ means ‘persons who commonly buy and hold securities for a period of time, based upon their view of the inherent value of the security,’ thereby excluding high frequency traders seeking to take advantage of very short term price fluctuations: ASX Listing Rules Guidance Note 8, *Continuous Disclosure: Listing Rules 3.1 – 3.1B*, July 2015, 10.


87 Ibid [384].
The materiality of information may be demonstrated by the following methods: (i) expert evidence from financial specialists as to whether they would consider certain information to be likely to raise or lower the relevant share price once it becomes publicly known;\(^8\) and (ii) tracking the actual movement in share prices once the relevant information does become generally available.\(^9\)

Assessing the materiality of information solely by reference to its impact on short term movements in a corporation's share price is generally considered to be a 'simplistic' approach.\(^9\) In the context of continuous disclosure obligations, it has been stated that the materiality of information should be assessed on an 'ex ante' and not an 'ex post' approach – that is, the materiality of information is to be determined as a 'forward, not backward, looking exercise.'\(^9\) However, the ability to later consider the ultimate effect of the release of certain information, such as a retrospective inquiry into movements in share prices, is certainly still considered useful to test the reasonableness of a determination that information was material.\(^9\) Such 'ex post' enquiries are a common reference point for determining the materiality of information in Australian insider trading cases, as can be demonstrated below.

*R v Rivkin*:\(^9\) It was argued on appeal, following a conviction for insider trading at first instance, that a reasonable person could not have considered the relevant information that Mr Rivkin received from the executive chairman of Impulse Airlines about a proposed

\(^8\) For example, *R v Rivkin* (2003) 198 ALR 400.


\(^9\) *ASIC v Fortescue Metals Group Ltd* (2009) 264 ALR 201, [474]-[475].


‘merger’ with Qantas to be ‘material’ information, because its content was uncertain and indefinite, and a potential investor would have regarded the information as being unreliable. The Court of Criminal Appeal of New South Wales rejected this argument, although it did recognise that the source of information may have an impact on its materiality.94 That is, the more reliable the source is considered to be, the more likely it is that the information may be considered to be reliable and therefore likely to have a material effect on the price or value of securities. The fact that the source of the information was the executive chairperson of Impulse Airlines might make the information more likely to be reliable than if the same information had been received from an unrelated source. Accordingly, the source of the information could affect the materiality of the information because investors might consider some sources to be more credible or reliable than others. In that case, an upward movement in the price of Qantas Airways Limited shares, once it was publicly announced that Qantas was to acquire Impulse Airlines (after a period of speculation that the national airline industry could not support the four airlines operating at the time) was considered to assist in demonstrating the materiality of the information possessed by Mr Rivkin: ‘the fact of the price rise, after the announcement, meant the market had not factored in the disappearance of one of the players’.95

*R v Hannes*:96 The New South Wales Court of Criminal Appeal considered the impact of a takeover announcement on the increase in the share price of the target corporation, TNT Limited. Mr Hannes had allegedly purchased options in TNT with knowledge that a takeover was proposed and, when the takeover was later formally announced, the TNT share price rose. Mr Hannes argued that it was not appropriate to regard the information he possessed when he purchased the TNT options as material because, at that time, the takeover was merely a ‘prospect’, whereas when the takeover was later announced it had become more certain. Spigelman CJ stated that ‘…no doubt the effect on the price of securities of a mere prospect was less than the actuality, but that does not mean that what actually happened

94 Ibid 390.
95 Ibid 399.
was irrelevant to an assessment of the materiality of the prospect. 97 Clearly, a certain event is more likely to affect a corporation’s share price than an uncertain event, but the possibility of an uncertain event occurring may still have some effect.

*Fysh v R.* 98 The question arose as to whether the materiality of information is a matter of fact to be determined by a jury or whether it must be the subject of expert evidence. In this case, the New South Wales Court of Criminal Appeal stated that ‘the question of materiality must be measured against both reasonableness and some knowledge of the market’, 99 as determining the materiality of information is partly a question of ‘common sense’ but ‘could also be the subject of specialised knowledge’. 100 Accordingly, depending upon the particular circumstances of a case, a jury may be able to themselves determine whether information is likely to influence persons who commonly acquire the relevant financial products, or they may need to rely on expert evidence in order to make such an assessment. In *Fysh v R,* the increase in a corporation’s share price was not in itself considered to be evidence of materiality of certain information because there were other factors which may also have contributed to the increase, including the release of another unrelated announcement. 101

*ASIC v Petsas & Miot:* 102 The relevant inside information in this case concerned confidential merger negotiations between BRL Hardy Ltd and Constellation Brands. It was stated by Finkelstein J of the Federal Court, that ‘Mr Petsas and Mr Miot knew that if the information about the merger discussions became public it would affect the price of BRL’s shares’. 103 The materiality of the information was also determined by reference to a rise in the BRL share price when the merger was later announced.

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97 Ibid 409.
100 Ibid.
101 Ibid.
103 Ibid [7].
ASIC v Citigroup: 104 Jacobson J of the Federal Court found in relation to one charge of insider trading that, at the time Citigroup’s proprietary trader traded in Patrick shares, the relevant information concerning the proposed takeover of Patrick Holdings Ltd by Toll Holdings Ltd was unlikely to be material because the ‘share price had already moved to a price which reflected a substantial likelihood of a takeover’. 105 However, on a separate charge of insider trading, Jacobson J relied on an upward movement in the price of Patrick shares at an earlier time to demonstrate that information about the timing of the bid would have been material at that stage:

It seems to me to be likely that information as to the timing of the bid would have been price sensitive within the test stated in s 1042D of the Corporations Act. This seems to me to be borne out by the fact that Patrick shares opened on the day of the announcement at AUD$7.15, being 10.9% above the closing price on Friday 19 August 2005, and, during the course of very heavy trading on 22 August 2005, rose to AUD$7.38. 106

It can therefore be seen that, even though the legislation prescribes a test of the ‘reasonable person’ or ‘reasonable investor’ in order to determine the level of materiality of particular information, and the time for determining whether that information would be material to such an investor is the time at which the alleged insider trader trades in relevant financial products, courts regularly consider later movements in share price caused by the release of the information sometime after that relevant trading has occurred when determining whether the information was material at that earlier time.

104 (2007) 160 FCR 35. The facts of this case are set out earlier in this chapter.
106 Ibid 110. As discussed in Overland, above n 56, 360.
Element Four – The Person Knows, or Ought Reasonably to Know, that the Information is not Generally Available and that, if it were, it would be Likely to be Material

The fourth element of the insider trading offence is that the person knows, or ought reasonably to know, that the relevant information is not generally available and that, if it were generally available, it would be likely to be material. This element comes from the requirement in s 1043A(1)(b) of the Corporations Act that:

the person knows or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of inside information in s1042A are satisfied in relation to the information.

It has long been recognised that this ‘knowledge element’ of the insider trading offence is the most difficult to prove, and that this difficulty appears to create one of the greatest obstacles to the successful prosecution of insider trading cases.107

As noted above, the definition of inside information in s 1042C of the Corporations Act provides that ‘inside information’ means information in relation to which the following paragraphs are satisfied:

(a) the information is not generally available; and

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

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107 Explanatory Memorandum, Financial Services Bill 2001 (Cth), [2.78]-[2.79]; CAMAC, Insider Trading Report, above n 15, [2.139]; Roman Tomasic, Casino Capitalism? Insider Trading in Australia (Australian Institute of Criminology, 1991) 115-126. As has been noted by the former Chair of ASIC, Alan Cameron, ‘proving that a person had knowledge is often harder than it sounds unless there is smoking-gun type of evidence’: Alan Deans, ‘The Fetter of the Law’, The Bulletin (Sydney), 28 November 2000, 52; Rubenstein, above n 5, 106.
A careful examination of this element of the insider trading offence reveals that it must be proved that either: (i) the alleged insider trader knew that the relevant information was not generally available and that a reasonable person would have expected the information to be material; or (ii) the alleged insider trader ought reasonably to have known that the relevant information was not generally available and that a reasonable person would have expected the information to be material.

It was stated by the New South Wales Court of Criminal Appeal in *R v Rivkin*¹⁰⁸ that, when considering what an alleged insider trader ‘ought reasonably to have known’, the question is subjective to the particular defendant, having regard to all of the relevant circumstances.¹⁰⁹ This means that one does not consider whether the theoretical reasonable person ought to have had certain knowledge, but whether the particular defendant in question ought to have had such knowledge, bearing in mind subjective factors such as his or her particular level of knowledge, experience, level of business and commercial expertise and any other relevant personal characteristics.

This means that it must be proved either that the alleged insider trader knew what a reasonable person would have expected, or ought to have known what a reasonable person would have expected, in relation to the materiality of the information. Therefore, it seems that one must really consider: Did the person know that a reasonable person would have expected the information to have a material effect? If not (or if it cannot be proved), should the person have known that a reasonable person would have had that expectation?¹¹⁰ The effect of s 1043D of the Corporations Act, in providing when a reasonable person is taken to expect information to be material, is that the reasonable person in question is not

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¹⁰⁹ The New South Wales Court of Criminal Appeal cited the case of *Boughey v Queen* (1986) 161 CLR 10, 28-29, as authority for that proposition and noted that it was accepted by both counsel for Mr Rivkin and the Crown: *R v Rivkin* (2004) 184 FLR 365, 384.
necessarily taken to be in the position of the alleged insider trader. It must therefore be shown that the alleged insider trader knew, or ought reasonably to have known, that 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 those products.\textsuperscript{111} Accordingly, knowledge of what would be likely to influence the trading decisions of persons who commonly acquire the relevant financial products is necessary, resulting in a complicated set of tests.

As this element of the insider trading offence is recognised as one of the most difficult to prove, the introduction of civil penalty proceedings under the \textit{Financial Services Reform Act 2001} (Cth), which came into effect on 11 March 2002, was much vaunted. The availability of civil penalty proceedings was intended to assist in overcoming perceived difficulties in prosecuting insider trading by providing an alternative regime with a lower standard of proof, based on the balance of probabilities and using civil rules of evidence. Indeed, it was stated in the Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth) that:

\begin{quote}
[A] major problem that exists in relation to the market misconduct and insider trading provisions, is the difficulty ASIC has in successfully prosecuting a breach of the provisions. As the existing provisions are offence provisions, the criminal burden of proof (beyond reasonable doubt) applies. ASIC has found it difficult to prove elements of the offences beyond reasonable doubt, as many elements refer to the defendant’s state of mind. This difficulty may result in cases not being pursued even where there has been a breach of the provisions. This is undesirable as it casts the law into disrepute, and also threatens the integrity of financial markets. It is therefore proposed to make the market misconduct and insider trading provisions civil penalty provisions. The application of the civil burden of proof (balance of probabilities) will facilitate the bringing of actions for breaches of the provisions. The application of civil penalties is likely to act as a deterrent to market misconduct.\textsuperscript{112}
\end{quote}

\textsuperscript{111} \textit{Corporations Act}, s 1043D.

\textsuperscript{112} Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth), [2.78]-[2.79]; \textit{Corporations Act}, ss 1317L and 1332. As discussed in Overland, above n 23, 185.
The elements of the offence remained unchanged under the introduction of the civil penalty regime to insider trading, but the standard of proof was lowered when civil penalty proceedings were utilised. However, there have been very few civil penalty proceedings for insider trading undertaken since they became available – most notably the unsuccessful civil proceedings in *ASIC v Citigroup*¹¹³ and the case of *ASIC v Petsas and Miot*,¹¹⁴ in which the respondents admitted liability. Thus civil penalty proceedings have hardly provided the fillip which may have been expected - the level of the burden of proof has perhaps not been the major obstacle to the successful prosecution of insider trading cases, but rather the existence of appropriate evidence to prove the elements of the offence. Indeed, the case of *ASIC v Citigroup* demonstrated that, even with the availability of civil penalty proceedings, the complexities and technicalities associated with pursuing alleged insider traders remain – the challenges in detecting incidents of insider trading; the complexity of insider trading laws and resulting interpretational difficulties; the limited judicial consideration of insider trading laws; and, in particular, the obstacles to proving the knowledge element of the offence.¹¹⁵

The knowledge element is particularly contentious when considering the liability of corporations for insider trading, as the question of proving what a corporation knew, or ought reasonably to have known, is more complex than for a natural person. Accordingly, these issues will be explored in detail in chapter 5 of this thesis.

**Element Five - The Person Trades in Relevant Financial Products, Procures another Person to Engage in Trading, or Communicates the Information to Another Person Likely to Do So**

The final 'trading element' of the insider trading offence requires that the alleged insider trader, while in possession of information which they know or ought reasonably to know is

¹¹⁵ See, for example, Rubenstein, above n 5; Roman Tomasic and Brendan Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian and New Zealand Journal of Criminology* 65; Tomasic, above n 107, 115-126; Lyon and du Plessis, above n 29, 163-168.
inside information, either trades in the relevant financial products, \(116\) procures another person to do so, \(117\) or communicates the information to another person likely to either trade or procure trading in relevant financial products (commonly known as ‘tipping’). \(118\)

‘Procure’ is defined in s 1042F(1) of the *Corporations Act* as follows:

For the purposes of this Division, but without limiting the meaning that the expression procure has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to procure the act or omission by the other person.

Section 9 of the *Corporations Act* also provides that “procure” includes cause.’

The ‘tipping’ aspect of the offence is satisfied where a person, while in possession of information which they know or ought reasonably to know is inside information, communicates the information, or causes it to be communicated to another person, when the insider knows, or ought reasonably to know, that the other person would or would be likely to trade in relevant securities, or procure another person to do so.

In general, the trading element is one of the least contentious of the insider trading offence and it will usually not be in doubt, if the other elements have been satisfied, whether or not a person has traded, or procured another to trade in financial products, or tipped. However, in *R v Evans and Doyle*, \(119\) charges of insider trading were dismissed due to a failure to make out this element. The defendants in that case had placed instructions with a broker to purchase securities prior to certain inside information becoming generally available. The

\(116\) That is, applies for, acquires, disposes of or enters into an agreement to apply for, acquire or dispose of the relevant securities: *Corporations Act*, s 1043A(1)(c). Previously, under the repealed s 1002G(2), the relevant conduct was subscribing for, purchasing, selling or entering into an agreement to subscribe for, purchase or sell the relevant securities.

\(117\) *Corporations Act*, s 1043A(1)(d), previously s 1002G(2).

\(118\) *Corporations Act*, s 1043A(2).

\(119\) Supreme Court of Victoria, McDonald J, 15 November 1999.
trade was not actually effected by the broker until later that day, after a public release of the relevant information. The defendants were prosecuted for insider trading on the basis that they had 'entered into an agreement to purchase securities' while in possession of inside information. However, McDonald J determined that an agreement to purchase securities was not actually entered into until the broker had effected the trade, by which time the information had become generally available, so no offence was committed.\(^\text{120}\) The Corporations Act has now been amended so that a similar result would not occur in the future, as the relevant conduct now includes applying for, acquiring and disposing of securities, or entering into an agreement to do so,\(^\text{121}\) which would appear to include instructing a broker to buy (or sell) securities or other financial products.\(^\text{122}\)

No offence is committed if a person who had been intending to trade in securities comes into possession of ‘inside information’ and then, as a result, decides not to trade after all. Additionally, a person in possession of inside information may pass that information onto others to convince them not to trade. The proscribed conduct does not encompass either of these forms of activity, or non-activity. When undertaking its review of Australian insider trading laws, CAMAC considered whether it would be appropriate for an offence to occur in these circumstances, but recommended that this aspect of insider trading law remain unchanged\(^\text{123}\) as, since there is no other party to a trade, there is no party who is actually disadvantaged by that action or inaction.\(^\text{124}\)

**Contentious Aspects of the Elements of the Insider Trading Offence**

It has been shown throughout this chapter that there are many contentious aspects to Australia’s insider trading laws. In particular, (i) the legislation does not make it clear what is meant by the phrase ‘possesses inside information’ in s 1043A(1)(a) of the *Corporations Act*

\(^{120}\) Ibid [51].

\(^{121}\) *Corporations Act*, s 1043A(1) (emphasis added).

\(^{122}\) As discussed in Overland, above n 23, 183.

\(^{123}\) CAMAC, *Insider Trading Report*, above n 15, [3.5].

and judicial interpretation must be relied upon in order to determine the nature of the level of possession required; (ii) the tests for determining when, pursuant to s 1042D of the Corporations Act, a reasonable person would expect information to have a ‘material’ effect are unclear; and (iii) the tests for determining when a person ‘ought reasonably to know’ that certain information is inside information, in accordance with s 1043A(1)(b) of the Corporations Act, are clumsy and convoluted. While it is beyond the scope of this thesis to further address or attempt to resolve the difficulties that these issues of contention create in the general enforcement of insider trading laws, these problems highlight the difficult nature of the current legislative framework and serve as examples of the inherent uncertainties which exist when attempting to understand the general application of Australia’s insider trading laws.

Having now considered the system of regulation of insider trading in Australia, which provides a solid foundation for the examination of the central issues relevant to this thesis, I will now analyse the manner in which insider trading laws apply to corporations in the next chapter.
This chapter will consider the theoretical basis for applying insider trading laws to corporations. I will do this by first considering the manner in which Australian insider trading laws apply to corporations and, in particular, whether a corporation is a ‘person’ caught by the prohibition of insider trading. A comparative review of the positions taken in other jurisdictions will also be undertaken. Australian cases which have focused on insider trading issues relevant to corporations will be discussed. This chapter will also consider the historical and theoretical bases for applying insider trading laws to corporations, as well as whether it is appropriate for corporations to continue to be subject to the prohibition of insider trading in Australia.

Is a Corporation a ‘Person’ Caught by the Prohibition of Insider Trading?

The elements of insider trading have already been considered in detail in chapter 2 of this thesis, but it is important to recall that under s 1043A of the Corporations Act it is an offence for a ‘person’ to engage in insider trading. The Corporations Act does not state whether a ‘person’ includes a corporation, as the term is not defined. However, there are several factors which make it clear that corporations are intended to be regarded as persons subject to the prohibition of insider trading – firstly, the operation of applicable principles of statutory interpretation; and secondly, the content of other relevant provisions within the Corporations Act which specifically refer to corporations.

General principles of statutory interpretation can assist in this context, as s 2C(1) of the Acts Interpretation Act 1901 (Cth) clearly states as follows:
In any Act, expressions used to denote persons generally (such as “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” and “whoever”), include a body politic or corporate as well as an individual.¹

Despite a difficult legislative history for corporations legislation in Australia, the Corporations Act is quite clearly a Commonwealth statute, aided by the referral of powers to the Commonwealth by State Parliaments. Additionally, s 5C of the Corporations Act specifically states that the provisions of the Acts Interpretation Act 1901 (Cth) apply to the Corporations Act. Thus, when the term ‘person’ is used in the Corporations Act, it will include a corporation (as a body corporate), unless a contrary intention is indicated.

Such a contrary intention is not indicated in the Corporations Act as, while the term ‘person’ is not defined, and the sections of the Corporations Act which specifically provide for the offence of insider trading do not expressly refer to corporations, it is clear from the nature and scope of other provisions of the Corporations Act that the prohibition of insider trading is intended to apply to corporations as well as natural persons. This is evident for the following three reasons:

Firstly, there are specific exceptions to the insider trading offence which are relevant only to corporations: for example, s 1043F of the Corporations Act provides an exception for bodies corporate which enter into Chinese Wall arrangements,² and s 1043I of the Corporations Act provides a specific exception for a corporation in relation to ‘knowledge of its own intentions’ when proposing to acquire or sell shares in another corporation.

Secondly, s 1042G of the Corporations Act specifically sets out circumstances in which a corporation will be considered to possess information that is possessed by an officer of the corporation.³

¹ Emphasis added. Of course, the overall context is a relevant consideration and a presumption that the term ‘person’ includes a body corporate can be rebutted if a court finds that there is a contrary legislative intention: D C Pearce and R S Geddes, Statutory Interpretation in Australia (LexisNexis Butterworths, 8th ed, 2014) 305.
² The application of s 1043F of the Corporations Act is considered in detail in chapter 6 of this thesis.
³ The application of s 1042G of the Corporations Act is considered in detail in chapter 5 of this thesis.
Thirdly, the maximum penalty which may be imposed under the Corporations Act for insider trading differs between corporations and natural persons.\(^4\) Five years ago, the maximum penalties were increased as a result of amendments made to the Corporations Act by the Corporations Amendment (No 1) Act 2010 (Cth) – the maximum penalty for a corporation is a fine of $45,000 penalty units (currently $4,950,000),\(^5\) three times the total value of the benefits obtained that are reasonably attributable to the offence, or 10% of the corporation’s annual turnover for the twelve month period in which the offence occurred, whichever is the greater;\(^6\) the maximum penalty for a natural person is ten years’ imprisonment, or a fine of the greater of $4,500 penalty units (currently $495,000) or three times the total value of the benefits obtained that are reasonably attributable to the offence, or both.\(^7\)

The existence of such provisions indicates that corporations are intended to be ‘persons’ subject to the prohibition of insider trading and that there is no ‘contrary intention’ in the Corporations Act, which might otherwise provide evidence that the broad definition of ‘person’ in the Acts Interpretation Act was not intended to apply. Thus, these provisions offer support for the adoption of that definition in the context of insider trading. Therefore, under the current regulatory regime, the Australian prohibition of insider trading contained in the Corporations Act applies equally to corporations and natural persons.

**International Comparisons**

It is useful when considering potential law reform to review the legal position adopted in other jurisdictions, as a comparison of Australian insider trading laws with those of other jurisdictions offers an opportunity to determine if there are common approaches taken in regulating this type of conduct, or if there are substantial differences in the system of

\(^4\) Set out in item 310 of Schedule 3 of the Corporations Act.

\(^5\) Each penalty unit equals $170.00: Crimes Act 1914 (Cth), s 4AA.

\(^6\) Previously, the maximum penalty for a corporation was a fine of 10,000 penalty units ($1,700,000.00).

\(^7\) Previously, the maximum penalty for a natural person was a fine of 2,000 penalty units ($340,000.00) or imprisonment for 5 years or both.
regulation that would offer opportunities for appropriate amendment. While Australia’s insider trading laws do not mirror those of any other jurisdiction in their application to corporations, it will be seen that there is no one uniform model amongst other jurisdictions in relation to the manner in which insider trading laws are to be applied to corporations, or the availability or requirements of a Chinese Wall defence to insider trading. While deficiencies and problems may be identified in the application of insider trading laws to corporations in Australia, such deficiencies and problems are unlikely to be rectified by simply importing the legal position adopted in another jurisdiction. However, some aspects of the approach taken in other jurisdictions may afford suggestions for improvement for the Australian position. A significant difficulty arises when attempting to compare the application of insider trading laws to corporations in a variety of jurisdictions – there is a notable absence of applicable case law or corporate prosecutions on which to base any resulting analysis. The wording of the legislation can be compared and contrasted, but without judicial interpretation of the various provisions, it is more difficult to make meaningful or informed comparisons.

Although, as has been noted, almost all countries with securities exchanges prohibit insider trading,8 there is no uniform application of such a prohibition to corporations. Of the jurisdictions reviewed in detail in this thesis,9 all prohibit insider trading,10 and all apply the

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9 It is clearly beyond the scope of this thesis to examine the laws of every regulatory regime which prohibits insider trading – accordingly, I have conducted a review of the laws of a number of jurisdictions - the European Union, Germany, Hong Kong, New Zealand, Singapore, South Africa, the United Kingdom, and the USA. I have chosen to focus on these countries and jurisdictions because they represent a variety of nations with securities markets, with varying characteristics and attributes, in an attempt to ensure a degree of diversity - they include common law jurisdictions (the United Kingdom, South Africa, the USA, New Zealand, Hong Kong and Singapore) and civil law jurisdictions (Germany) - thus ensuring the laws do not all have the same common source; they include countries with well-developed securities markets which have long prohibited insider trading (the United Kingdom, South Africa, the USA, Hong Kong and Singapore) and those whose securities markets have only relatively recently criminalised or prohibited insider trading (Germany and New Zealand); and they include countries from a variety of continents and regions – Europe, the Americas, Asia and Australasia, and Africa. A number of these jurisdictions were analysed by CAMAC when it undertook a review of Australian insider trading laws, as set out in CAMAC, Insider Trading Discussion Paper (2001), although the
prohibition to corporations, as well as to natural persons, as either a civil or criminal offence, or both. Indeed, the United Kingdom is the only jurisdiction to apply only civil liability for insider trading to corporations.\footnote{Kern Alexander, ‘UK Insider Dealing and Market Abuse Law: Strengthening Regulatory Law to Combat Market Misconduct’ in Stephen M Bainbridge, Research Handbook on Insider Trading (Edward Elgar, 2013) 407, 412.} All the other jurisdictions examined apply criminal liability for insider trading to corporations as well as natural persons.\footnote{Kern Alexander, ‘UK Insider Dealing and Market Abuse Law: Strengthening Regulatory Law to Combat Market Misconduct’ in Stephen M Bainbridge, Research Handbook on Insider Trading (Edward Elgar, 2013) 407, 412. In the United Kingdom, the criminal offence of ‘insider dealing’ applies only to ‘individuals’ under s 52 of the Criminal Justice Act 1993 (UK) c 36, thus limiting the application of the criminal offence to natural persons only, with no direct criminal liability for a corporation for insider trading. However, s 118B of the Financial Services and Markets Act 2000 (UK) c 8 defines ‘insiders’ to include ‘any person’, and therefore applies the civil prohibition to corporations: schedule 1 of the Interpretation Act 1978 (UK) c 30. It appears that in the United Kingdom, the original rationale underlying the limitation on the application of criminal insider trading laws to natural persons was to specifically avoid the difficulties large corporations (such as merchant 73}
However, while all the jurisdictions examined apply insider trading laws to corporations as well as to natural persons in some form, there is no uniform manner in which those laws are applied. This is because there is no single jurisdiction that has made it a criminal offense to engage in insider trading by corporations. In some jurisdictions, corporations are subject to civil liability for insider trading, which necessitates the implementation of Chinese Walls and other arrangements to prevent conflicts of interest and ensure the flow of information.

In South Africa, insider trading is prohibited as both a criminal and civil offense under the Financial Markets Act 2012 (South Africa), and s 78 of that Act provides that a person who is an ‘insider’ is prohibited from engaging in insider trading. Although previous legislation in South Africa limited the application of insider trading laws to natural persons - under the Insider Trading Act 1998 (South Africa) – the current definition of ‘insider’ has been extended to include natural persons, legal persons and other entities: Financial Markets Act 2012 (South Africa), s 77. In the European Union, the Market Abuse Directive provides in recital (18) that Member States should extend liability for the offences provided for in this Directive to legal persons. In Germany, both natural persons and legal persons are subject to the prohibition of insider trading contained in the Securities Trading Act (WpHG): The British Institute of International and Comparative Law, Comparative Implementation of EU Directives (I) – Insider Dealing and Market Abuse (2005) 41. In Hong Kong, the insider dealing provisions of the Securities and Futures Ordinance (Hong Kong) cap 571 apply to any ‘person’ who is ‘connected with’ a corporation under s 270, which includes both natural and legal persons, such as corporations: s 3 of the Interpretation and General Clauses Ordinance (Hong Kong) cap 1. Section 247(2) of the Ordinance also expressly states that a corporation can be a person connected with another corporation. Section 241 of the Financial Markets Conduct Act 2013 (NZ) prohibits insider trading by any ‘information insider’, which is defined in s 234 of that act to be a ‘person’ in possession of inside information. The reference to a person includes both natural persons and legal persons, such as corporations: Interpretation Act 1999 (NZ), s 29. Section 234(2) of the Financial Markets Conduct Act 2013 (NZ) also provides that ‘a listed issuer may be an information insider of itself.’ Section 218 of the Securities and Futures Act 2001 (Singapore) prohibits a ‘person’ from engaging in insider trading, which includes both natural and legal persons: Interpretation Act 1965 (Singapore), s 2. In the USA, the insider trading prohibition applies to natural and legal persons, as evidenced by the applicable penalties under the Insider Trading and Securities Fraud Enforcement Act of 1988 P.L.100-704 - the maximum fine for insider trading by legal persons such as corporations is $USD25 million, although a further penalty representing three times the profit made or loss avoided can also be imposed. Additionally, the first case brought against a corporation for insider trading was the case of Merrill Lynch, Pierce, Fenner and Smith, 43 S.E.C. 933 (1968) in the USA. This case will be discussed in detail in chapter 6 of this thesis.
applied. As will be discussed in detail in chapter 5 of this thesis, Australia has a set of statutory provisions in the Corporations Act which specifically set out the manner in which the elements of the insider trading laws are to be applied to corporations. However, most of the examined jurisdictions do not have such statutory provisions within the relevant legislation prohibiting insider trading and, as a result, the general principles of corporate criminal liability which are applicable in the relevant jurisdiction must be relied upon to determine the manner in which corporations may be found liable for insider trading.\(^\text{13}\) The exceptions are South Africa,\(^\text{14}\) where the relevant statute provides that principles of vicarious liability are to be used to determine corporate liability for insider trading, and Singapore,\(^\text{15}\) where the relevant statute adopts specific statutory rules to apply the elements of the insider trading offence to corporations.\(^\text{16}\) Additionally, even though corporations are subject to

\(^{13}\) Jurisdictions which do not have statutory provisions specifically providing for the application of the insider trading prohibition to corporations include the European Union, Germany, the United Kingdom, the USA, New Zealand and Hong Kong.

\(^{14}\) Section 82(8) of the Financial Markets Act 2012 (South Africa) states that, in connection with liability for insider trading, ‘the common law principles of vicarious liability apply’.

\(^{15}\) Section 226(1) of the Securities and Futures Act 2001 (Singapore) specifically provides that:

\(\text{(a)}\) a corporation is taken to possess any information which an officer of the corporation possesses and which came into his possession in the course of the performance of duties as such an officer; and

\(\text{(b)}\) if an officer of a corporation knows or ought reasonably to know any matter or thing because he is an officer of the corporation, it is to be presumed, until the contrary is proved, that the corporation knows or ought reasonably to know that matter or thing.

Section 236B of the Securities and Futures Act 2001 (Singapore) also provides that:

\(\text{(1)}\) Where an offence of contravening any provision in this Part is proved to have been committed by an employee or an officer of a corporation (referred to in this section as the contravening person) —

\(\text{(a)}\) with the consent or connivance of the corporation; and

\(\text{(b)}\) for the benefit of the corporation,

the corporation shall be guilty of that offence as if the corporation had committed the contravention, and shall be liable to be proceeded against and punished accordingly.

\(^{16}\) These provisions will be returned to in chapter 5 when the application of insider trading laws to corporations in Australia is analysed in detail.
insider trading laws in most jurisdictions, a Chinese Wall defence for corporations\textsuperscript{17} is not available in all jurisdictions - there is no Chinese Wall defence to insider trading in the European Union, Germany or South Africa. A number of jurisdictions do have a Chinese Wall defence available for corporations in respect of liability for insider trading,\textsuperscript{18} but as will be seen in chapter 6, those defences are similar to the Chinese Wall defence found in s 1043F of the \textit{Corporations Act}, but with a number of points of departure.

\textbf{The Historical and Theoretical Basis of the Application of Insider Trading Laws to Corporations}

In Australia, it was originally unclear as to whether insider trading laws were intended to apply to corporations. The original prohibition of insider trading under the State \textit{Securities Industry Acts} focused on a 'person-connection' rather than an 'information-connection', with primary liability for insider trading depending on a person being 'connected with a body corporate'. This approach resulted in a distinction between 'primary insiders' - those who possessed inside information and had a connection with the relevant corporation (such as directors, officers, substantial shareholders, and those who had some form of business or professional relationship with the corporation) - and 'secondary insiders' - generally tippees who knowingly received the inside information from a primary insider.

One of the very first Australian cases to consider the application of insider trading laws to corporations and the operation of the relevant provisions, at that time contained in s 128 of the \textit{Securities Industry (NSW) Code}, was \textit{Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd.}\textsuperscript{19} This case concerned a proposed issue of shares in Email Ltd to a number of parties pursuant to an underwriting agreement. Hooker

\textsuperscript{17} The Chinese Wall defence to insider trading will be examined in detail in chapter 6.

\textsuperscript{18} United Kingdom: \textit{Financial Services and Markets Act 2000 (UK) c 8, s 147}, in conjunction with SYSC 10.2.3R of the \textit{Financial Conduct Authority Handbook}; New Zealand: \textit{Financial Markets Conduct Act 2013 (NZ), s 261}; Hong Kong: \textit{Securities and Futures Ordinance} (Hong Kong) cap 571, s 271(2); Singapore: \textit{Securities and Futures Act 2001, s 226(2)}; the USA: rule 10b5-1c(2)(ii), promulgated pursuant to the \textit{Securities Exchange Act of 1934, 15 USC § 78a (1934), s 10(b)}.

\textsuperscript{19} (1986) 10 ACLR 462.
Investments, an existing shareholder of Email Ltd, sought an injunction to restrain the issue of shares to Baring Bros, one of the underwriters, on the basis that an employee of Baring Bros, a corporation, had come into possession of inside information about the financial and corporate affairs of Email Ltd. Accordingly, it was alleged that the receipt of the issue of shares in Email Ltd under the underwriting agreement would amount to insider trading by Baring Bros.

At that time, s 128(1) of the Securities Industry (NSW) Code provided that a person ‘connected with a body corporate’ must not deal in any of its securities ‘if he is in possession of information that is not generally available and if it were likely materially to affect the price of those securities’. Section 128(8) then set out the circumstances in which a person could be so connected. Young J of the Supreme Court of New South Wales determined that the circumstances set out in s 128(8) could relate only to natural persons, and that the provision was exhaustive rather than inclusive so, as a result, His Honour found that only a natural person could be regarded as being ‘connected with a body corporate’. As a result, s 128 of the Securities Industry (NSW) Code could only apply to a natural person, so that a corporation could not have primary liability for insider trading. A corporation could have liability as a secondary insider if it received information from a primary insider, but the relevant employee of Baring Bros did not fit within the definition of a primary insider, because his position could not ‘reasonably be expected’ to give him access to inside information (even if it actually did). Thus, there was no liability for insider trading as a result of the issue of shares to Baring Bros. The correctness of this aspect of the decision has since been questioned judicially in Brockley Investments Ltd v Black, despite the fact that the result and reasoning were approved on appeal by the Court of Appeal. However, there is now a specific exception for underwriters in s 1043C of the Corporations Act, to allow the

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20 Ibid 465.
21 Ibid 466.
22 (1991) 9 ACLC 255.
purchase of shares by underwriters pursuant to underwriting agreements to occur without any liability arising for insider trading.

These issues also arose in the case of *Brockley Investments Ltd v Black*, which concerned the operation of s 128 of the Securities Industry (WA) Code. Mr Black was a director of two corporations. Brockley Investments Ltd bought shares in one of those corporations (Western Reefs Limited) from the other corporation (to be referred to as the ‘selling corporation’, as it was not referred to by name in the decision). Brockley Investments Ltd later alleged that Mr Black and the selling corporation possessed inside information which would preclude them both from dealing in the securities of Western Reefs Limited. Basing its argument on the reasoning in *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd*, the selling corporation asked for the claim against it to be struck out, on the basis that the insider trading prohibition applied only to natural persons and not to corporations. Master White did not agree with the relevant reasoning of Young J in *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd*, determining as a matter of statutory interpretation that it was not necessary for a corporation to be a person ‘connected with a body corporate’ in order for the prohibition of insider trading in s 128(3) of the Securities Industry Code to apply. Accordingly, Master White accepted that both natural and legal persons could have primary liability for insider trading, and the application to strike out the relevant claim was not successful.

The divergence between these two decisions result from differing interpretations of the loose drafting of the relevant provisions of the Securities Industry Codes. General provisions prohibit ‘persons’ from engaging in insider trading, with other later provisions applying the prohibition to ‘bodies corporate’ in certain specific circumstances, such as where an officer of the body corporate possessed inside information. The ultimate results of the two decisions can be reconciled on their facts, on the basis that, although a corporation could potentially be liable for insider trading, in *Hooker Investments Pty Ltd v Baring Bros Halkerston & Partners Securities Ltd* there could be no such liability because the relevant employee who possessed the information was not sufficiently senior for that information to

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24 (1991) 9 ACLC 255.
be regarded as being in the corporation's possession. However, in *Brockley Investments Ltd v Black*, due to the fact that a director possessed the relevant information, such information could be attributed to the corporation.\(^{25}\) Regardless, it is no longer necessary to be concerned with the conflicting nature of these decisions, as in the Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (Cth) it was specifically noted that the insertion of a definition of 'person' would include corporations and would therefore overcome the effect of the decision in *Hooker Investments v Baring Bros Halkerston & Partners Securities Ltd*.\(^{26}\) The previous distinction between primary and secondary insiders was abolished at this time, to focus only on an 'information connection' rather than a 'person connection',\(^{27}\) so that any person in possession of material information was then prohibited from insider trading. Thus, while these two decisions highlight the ambiguity that had previously existed as to the application of insider trading laws to corporations, that uncertainty has now been resolved.

The next case to consider the application of insider trading laws to corporations was *Ex Parte Sun Securities Ltd*.\(^{28}\) This case concerned the application of the *Securities Industry (WA) Code*, which at that time provided, in s 128(6), that:

…a body corporate shall not deal in any securities at a time when any officer of that body corporate is precluded... from dealing in those securities.

Section 128(1) of the *Securities Industry (WA) Code* also provided that:

A person who is, or 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

\(^{25}\) The attribution to a corporation of information possessed by employees, officers and others is considered in detail in chapter 5 of this thesis.


\(^{27}\) Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (Cth), [37].

\(^{28}\) (1990) 1 ACSR 588.
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 those securities.

Mr Smith, an officer of Sun Securities Ltd, was alleged to have been connected with another corporation, Australian Shipbuilding Industries Ltd, and to have been in possession of inside information concerning a proposed takeover of Australian Shipbuilding Industries. Mr Smith was also alleged to have negotiated and concluded the purchase of shares in Australian Shipbuilding Industries by Sun Securities while he possessed that inside information. As a result, action was brought against both Mr Smith and Sun Securities, with Sun Securities being the first corporation to be charged with insider trading. Mr Smith and Sun Securities applied for an order nisi for writs of mandamus and prohibition, and for further and better particulars of the offences contained in the charge, but these applications were dismissed at first instance and on appeal.

When first hearing these applications, Kennedy J of the Supreme Court of Western Australia rejected a submission that for a corporation to commit the offence of insider trading 'it requires the element of fault or knowledge by the company to be proved.' In this context, His Honour appears to have accepted clearly, without detailed analysis, that a corporation could be liable for insider trading under these provisions, but the proceedings against Sun Securities were ultimately discontinued after a jury acquitted Mr Smith of the insider trading charges at trial in February 1991.

*Exicom Pty Ltd v Futuris Corporation Ltd* was the next case to consider the application of insider trading laws to corporations, but the relevant statutory provision in this case was s 1002G of the *Corporations Law*. Exicom Pty Ltd wished to raise funds and sought the

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31 *Ex Parte Sun Securities Ltd* (1990) 1 ACSR 588, 594.
assistance of a number of potential investors, disclosing certain information to them as a result. The first investor later proposed to buy shares in Exicom on the open market. Exicom was able to obtain an interim order to restrain this purchase on the basis that the investor possessed inside information acquired as a result of the initial investment discussions with Exicom and the later purchase might amount to insider trading. Exicom and the second investor then entered into an agreement for the second investor to subscribe for shares in Exicom, thereby enabling Exicom to raise some necessary funds. The first investor applied for an order to prevent Exicom from issuing the shares to the second investor, on the basis that it would also amount to insider trading by Exicom, but the issue as to whether it would amount to insider trading by the second investor was not raised.

It was clearly accepted that the insider trading prohibition in s 1002G of the Corporations Law could apply equally to corporations as to natural persons, but the application from the first investor was dismissed on the basis that a corporation cannot be considered an ‘insider’ in relation to its own shares or in respect of information that relates to its own securities. The reasoning behind the decision was based on the notion that insider trading laws rely on the existence of a fiduciary duty and that, since a corporation cannot owe a fiduciary duty to itself, it cannot be regarded as an ‘insider’ in relation to its own information or in relation to its own shares.\(^\text{34}\) As it is now well established that Australian insider trading laws are based not on a concept of fiduciary obligation but on a desire to maintain and protect market integrity and efficiency,\(^\text{35}\) the basis of this decision has since been heavily criticised.\(^\text{36}\)

Since that time it has been accepted without question that insider trading laws apply equally to corporations as to natural persons. In the case of *Westgold Resources NL v St George Bank Ltd*,\(^\text{37}\) it was alleged that a corporation which held a put option over certain shares

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\(^{34}\) Ibid 1763 (Young J).

\(^{35}\) A detailed discussion of this issue, and the rationale for the prohibition of insider trading, is contained in chapter 1 of this thesis.


could not lawfully exercise the option because it possessed inside information about the corporation over whose shares the option related, so that the exercise of the put option would amount to insider trading. While it was clearly accepted in this case that the insider trading prohibition applied to that corporation, the application to restrain the exercise of the put option was refused due to the application of s 1015A of the *Corporations Law*, which exempted a bank or financial institution from the application of the insider trading prohibition where the relevant transaction amounted to an exercise of security or other activity conducted by a bank in the ordinary course of its banking business.38

Similarly, in *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd (No 2)*,39 the application of insider trading laws to corporations was clearly accepted without argument. This case involved a dispute, resulting from a drafting error, over the terms of convertible notes which Ampolex Ltd had issued. The convertible notes had been sold to a group of brokers and investors and they made an announcement to the ASX, stating what they believed to be the correct conversion ratio under the convertible notes. Ampolex Ltd claimed that those parties had engaged in insider trading because knowledge of the content of the forthcoming ASX announcement amounted to inside information. All the parties to the trade were aware of the relevant information and the group of brokers and investors applied for a summary dismissal of the action. However the application was refused on the basis that a defence that the counterparty to a trade also possessed the relevant inside information (then contained in s 1002T(2)(b) of the *Corporations Act*, and now in s 1043M(2)(b) of the *Corporations Act*) could only be relied on in a criminal prosecution and not in civil proceedings.

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38 A similar, but not identical, exemption exists under the current *Corporations Regulations 2001* (Cth): Regulation 9.12.01(e) provides that s 1043A(1) of the *Corporations Act* does not have effect in relation to:

(e) a sale of financial products under:

(i) a mortgage or charge of the financial products; or

(ii) a mortgage, charge, pledge or lien of documents of title to the financial products.

In *Rivkin Financial Services Ltd v Sofcom Ltd*, a publicly-listed corporation related to Mr Rene Rivkin, against three corporations related to Mr Farooq Khan, the Court clearly accepted that corporations are subject to the prohibition of insider trading. Mr Khan had wished to significantly increase his holding in Rivkin Financial Services and, if possible, to gain control of the board, and as a result he bought a large parcel of shares through three corporations which he controlled. Rivkin Financial Services brought a civil action against Mr Khan and the three corporations which alleged, amongst other things, that as a result of those purchases the three corporations had engaged in insider trading. Rivkin Financial Services argued that the fact that Mr Khan wished to increase his shareholding and control its board was inside information and that the three corporations possessed that information through Mr Khan, who was the managing director of each corporation. Emmet J of the Federal Court did find that the information about Mr Khan’s intentions was to be attributed to each of the three corporations, but determined that there had in fact been no insider trading as the information was not material. The application of insider trading laws to corporations was accepted without question in this case, but the manner in which the information was possessed by the three corporations was not analysed.

The facts of *ASIC v Citigroup* were set out in some detail in chapter 2 of this thesis. In this set of civil penalty proceedings for insider trading brought against the Australian subsidiary of a global investment bank, it was clearly accepted that the insider trading prohibition applies to corporations. Even though there was an eventual finding that Citigroup had not actually engaged in insider trading - due to the fact that the relevant information was not considered to be material; the relevant employee did not actually possess inside information; the corporation was not taken to possess the alleged information since the employee was not an officer of the corporation; and the corporation was found to have an effective Chinese

43 Ibid 516.
Wall in place - the applicability of insider trading laws to Citigroup, as a corporation, was never in question.

The change in position which can be observed when reviewing the cases above – from circumstances in which it was unclear whether Australian insider trading laws applied to corporations to those where it is now readily accepted they do – is attributable primarily to the adoption of a new regulatory regime and legislative modification. The law has moved from a requirement that a ‘primary insider’ must be a ‘person connected with a body corporate’, to a system which no longer distinguishes between primary and secondary ‘insiders’ and applies the prohibition of insider trading more broadly to any ‘person’. Even though there are in fact very few Australian insider trading cases which relate to corporations, those cases that do exist evidence the current clear acceptance that the insider trading regime applies to legal persons such as corporations, as well as to natural persons. However, all existing convictions and findings of liability relate only to natural persons – there have been no successful criminal or civil penalty proceedings brought against a corporation for insider trading in Australia. When considering the topic of this thesis – the criminal liability of corporations for insider trading in Australia – the absence of such proceedings produces a number of challenges. The dearth of cases means that the opportunity to consider the judicial interpretation of the relevant provisions is extremely limited, and it is therefore not a topic addressed at length in the literature. However, that absence does not reduce the importance of the thesis topic – indeed, the fact that there have been no successful proceedings brought against a corporation could potentially be remedied if the reforms suggested in this thesis were to be adopted, as the proposed reforms are aimed at better applying the insider trading laws to corporations and ensuring that there is certainty as to their operation.

**Why Should Corporations Be Liable for Insider Trading?**

Having determined that corporations are subject to the prohibition of insider trading in Australia, it is important to consider whether it is appropriate for corporations to continue to be caught by that prohibition. If the application of insider trading laws to corporations is to
be analysed and reforms proposed where appropriate, it is imperative that it be determined whether it is fitting for those laws to apply to corporations at all.

It has been noted above that it was originally unclear, after insider trading was first prohibited by statute in Australia, whether insider trading laws were intended to apply to corporations. However, this uncertainty has now been overcome and the prohibition of insider trading clearly extends to corporations as well as to natural persons. It has also been noted above that other jurisdictions apply insider trading laws to corporations as well as natural persons, with the United Kingdom being the only country to apply only civil liability for insider trading to corporations, purportedly to avoid difficulties and negative effects on business efficacy for large corporations.

When CAMAC conducted its review of Australian insider trading laws in 2001 to 2003, it considered whether it might be appropriate to limit the application of insider trading laws to natural persons. CAMAC noted that, if the application of insider trading laws was limited to natural persons, the legislative provisions could be simplified because there would be no need for the Chinese Wall defence for corporations. However, CAMAC ultimately determined that there is no compelling reason why corporations should not be subject to the prohibition of insider trading, and that it was beneficial to retain the Chinese Wall defence for corporations. In particular, CAMAC considered that limiting the application of the insider trading prohibition to natural persons would undermine incentives for large organisations to control the internal flow of confidential information.

While there are a number of different models of corporate criminal liability, each of which will be addressed in detail in the next chapter, those models are all clearly predicated on the basis that it is appropriate for corporations to have criminal liability, with the primary issue being the determination of the manner in which such liability is to be attributed. However, the difficulties associated with prosecuting and sentencing corporations have lead to

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45 CAMAC, Insider Trading Discussion Paper, above n 36, [1.54].
suggestions by some commentators that criminal liability should only be imposed on natural persons. This view is generally referred to as 'individualism', as it is argued that ‘corporations don’t commit offences, people do.’47 Arguments in favour of individualism are commonly justified on the basis that corporations cannot be imprisoned, that significant fines cause hardship to the shareholders of the corporation rather than to those within the corporation who carry out the relevant criminal acts and omissions, and that the imposition of punishments upon corporations does little to actually deter criminal activity.48 However, these views are generally countered by arguments in favour of ‘collectivism’ that, as corporate crimes are so often hard to detect, corporations are more likely to take internal action to prevent the relevant criminal conduct occurring, if the corporation itself is likely to have liability for any resulting crime.49 As a result, the existence of corporate criminal liability can act as a deterrent to those who would engage criminal conduct within an organisation, with Fisse and Braithwaite stating that:

Individualism persistently fails to capture the corporate significance of corporate operations over which the law seeks to exercise control... The logic and practical imperatives of deterrence do not preclude corporate criminal responsibility, but, on the contrary, impel it.50

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49 Jonathan Clough and Carmel Mulhern, The Prosecution of Corporations, (Oxford University Press, 2002) 7; John C Coffee, ‘Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions’ (1980) American Criminal Law Review 419, 421; Fisse and Braithwaite, above n 47, 489. Indeed, in 1929, Winn argued for direct criminal liability for corporations on the basis that they are more powerful than individuals and therefore more likely to cause harm, as well as the fact that the existence of corporate criminal liability is more likely to deter agents within the corporation from engaging in criminal conduct: C R N Winn, ‘The Criminal Responsibility of Corporations’ (1929) 3 Cambridge Law Journal 398, 412-413, 415.
50 Fisse and Braithwaite, above n 47, 510.
Some commentators take a ‘middle ground’ between individualism and collectivism, arguing that corporate criminal liability is only appropriate where no one individual can be identified as having criminal responsibility.\textsuperscript{51} However, in Australia it is generally accepted that it is appropriate to impose criminal liability on corporations as well as natural persons. By way of example, the \textit{Criminal Code Act 1995} (Cth) (‘\textit{Criminal Code}’) provides in s 12.1(b) that ‘A body corporate may be found guilty of any offence, including one punishable by imprisonment.’

I propose that corporations should remain subject to both criminal and civil liability for insider trading in Australia for a number of reasons. Firstly, the imposition of criminal liability for insider trading on corporations reinforces the notion that insider trading is regarded as a serious threat to market integrity and that all persons, natural and legal, should be subject to the prohibition of insider trading. Criminal sanctions are appropriate for any conduct which ‘involves, or has the potential to cause, considerable harm to society or individuals, the environment or Australia’s national interests, including securities interests.’\textsuperscript{52} In this context, it is important to refer to the rationale for the prohibition of insider trading. It was shown in chapter 1 of this thesis that insider trading is prohibited in Australia on the basis of a ‘market integrity’ rationale – a rationale which aims to protect and ensure market integrity on two bases: that it is necessary for both market fairness and market efficiency. Accordingly, the question must be asked: is market integrity more likely to be protected and maintained if corporations are subject to the prohibition of insider trading, or would market integrity be better served by removing the application of insider trading laws to corporations? As insider trading has the potential to cause significant harm to Australia’s securities markets, I consider that it is appropriate that all persons who may be regarded as engaging in such conduct be caught by the relevant prohibition and subject to criminal liability. The impact of

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insider trading is not reduced or minimised merely because the conduct is engaged in by a corporation rather than a natural person.

Secondly, the fact that a corporation has never been convicted of insider trading in Australia, and that there have been no successful civil proceedings for insider trading brought against a corporation, is not a compelling reason to simply cease to apply insider trading laws to corporations. Even if corporations were to have only civil instead of criminal liability for insider trading, the elements of the insider trading offence must still be applied and proven, even if subject to a different standard of proof. 53 There are a number of reasons why corporations may not have been the subject of successful proceedings for insider trading in Australia, including the complexity of Australian insider trading laws, particularly in relation to their application to corporations. If the difficulties in the application of insider trading laws to corporations can be identified and resolved, greater enforcement action for insider trading might be brought. In particular, any concerns that may relate to the operation or efficacy of Chinese Walls within corporations are better addressed by regulation aimed at improving such operation and efficacy, rather than a determination that liability for insider trading should be removed or reduced. While the regulator may have a discretion to elect to pursue either criminal or civil proceedings against an alleged insider trader – whether that defendant is a natural person or a legal person – it would not be appropriate to remove insider trading liability for corporations, or to limit it to civil consequences only, as the significant impact of insider trading warrants the availability of both criminal and civil liability as a deterrent factor for all potential insider traders.

Finally, that fact that insider trading is extremely difficult to detect and identify reinforces the importance of continuing to apply criminal liability for insider trading to corporations. The continuing existence of direct corporate criminal liability for insider trading makes it more likely that corporations will take steps to proscribe such conduct and prevent it from occurring within the organisation. This will limit opportunities for individuals associated with

53 In civil proceedings for insider trading, the civil standard of proof, ‘on the balance of probabilities’ is applied, instead of the criminal standard, ‘beyond a reasonable doubt’. 
the corporation to engage in insider trading, either on their own account or on behalf of the corporation.

Accordingly, for these reasons, I consider that the intended rationale to protect and maintain market integrity is best served by continuing to apply the prohibition of insider trading to corporations. Thus, having demonstrated that insider trading laws do currently apply to corporations in Australia, and that it is appropriate that they should continue to do so even though amendments to the manner in which they apply might be necessary, the next chapter of this thesis will consider the nature of corporate criminal liability in this context, looking at the manner in which the law has developed rules to provide for corporate criminal liability under the general law and statute, in order to apply principles of criminal liability to corporations.
CHAPTER 4
CORPORATE CRIMINAL LIABILITY

As insider trading is both a criminal and civil offence, and having determined that it is appropriate for corporations to have criminal liability for insider trading, the manner in which a corporation can be liable for a criminal offence is the necessary focus of this chapter. In order to be able to properly analyse the application of the elements of the insider trading offence to corporations – that is, to determine how a corporation can possess inside information; how a corporation can have the requisite knowledge that certain information is inside information; and how a corporation can engage in the relevant trading conduct - corporate criminal liability, and the nature of the physical and fault elements of criminal offences, need to be addressed and understood.

Determining the manner in which criminal liability should be imposed on corporations has long proved to be a complex and vexed legal issue. The common law has attempted to address the issue of corporate liability for crimes in two primary ways: through principles of vicarious liability and through direct liability, incorporating the identification doctrine. Additionally, specific statutory rules have been developed to provide for the application of the necessary elements of various criminal offences to corporations. While the Corporations Act contains particular provisions relating to corporate criminal liability for insider trading, and sets out rules for attributing the possession of information, knowledge and conduct of certain individuals to corporations, those provisions of the Corporations Act are not necessarily exclusive and may still allow the general law rules to operate, as will be demonstrated in later chapters of this thesis. Thus, this chapter will consider the manner in which the law has developed rules to provide for corporate criminal liability under the general law, and then review the statutory rules which have been developed in order to apply principles of criminal liability to corporations. The specific provisions of the Corporations Act which relate to corporate criminal liability for insider trading will be addressed in order to provide a clear context for the later chapters of this thesis. It is necessary to determine which is the most appropriate model for corporate liability for insider trading when considering potential reform to the current provisions.
Models of Corporate Criminal Liability

The common law has traditionally applied concepts of ‘actus reus’ (in essence, a guilty act) and ‘mens rea’ (a guilty mind) to most criminal offences. The ‘actus reus’ is the ‘forbidden act’ or unlawful conduct which gives rise to the offence,¹ and includes the relevant ‘act or omission, the circumstances in which it takes place, and any consequences.’² The ‘mens rea’ is often considered to be ‘an evil intention, or a knowledge of the wrongfulness of the act.’³ The term also refers to a ‘variety of states of mind, including intent, knowledge and recklessness.’⁴ However, the Criminal Code, which provides for principles of criminal responsibility for Commonwealth offences, does not use the terms ‘actus rea’ or ‘mens rea’, but instead separates offences into ‘physical elements’ and ‘fault elements’.⁵

The general law concepts of actus reus and mens rea were originally developed with individual offenders in mind,⁶ and have often proved difficult to apply to corporations, due to the fact that a corporation can only act through its officers and agents and has no physical body or mind of its own.⁷ Fisse has stated that:

‘The attribution of criminal liability to corporations is an intractable subject; indeed, it is one of the blackest holes in criminal law.’⁸

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³ *Sherras v De Rutzen* (1895) 1 QB 918, 921, approved in *R v He Kaw Teh* (1985) 157 CLR 523, 528 (Gibbs CJ).
⁴ Brown et al, above n 2, 145.
⁵ *Criminal Code*, s 3.1(1).
As a reflection of this difficulty, the first recorded cases of corporations being found liable for crimes involved offences of strict liability only.9 Such cases concerned regulatory offences, such as criminal nuisance, which required only that it be demonstrated that the relevant acts or omissions had occurred (the actus reus), without needing any proof of mens rea.10

The common law has now developed to recognise two primary models of corporate criminal liability - vicarious liability - where the corporation is liable for the criminal conduct of its employees or agents; and direct liability through the identification doctrine – where the corporation is actually regarded as having engaged in the criminal conduct itself due to the actions and intentions of its organs.11 There are also two other significant theories of corporate criminal liability which have received statutory recognition, if not judicial endorsement, in Australia – the ‘aggregation’ doctrine – under which a corporation can be liable for the collective actions and intentions of more than one individual within the organisation;12 and the ‘organisational fault’ model – which seeks to impose liability where there is perceived to be blameworthy conduct by the corporation itself, without needing to identify particular individuals whose actions and intentions must be attributed to the corporation.13

**Vicarious Liability**

Vicarious liability, a form of indirect liability, arises when one person is held responsible for the misconduct of another, due to the nature of the relationship between them. For example, employers are generally vicariously liable for the acts or omissions of their

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9 For example, *R v Birmingham and Gloucester Railway Co* (1842) 114 ER 492; *R v The Great North of England Railway Co* (1846) 115 ER 1294.
10 Clough and Mulhern, above n 7, 72-73.
11 Law Reform Commission of New South Wales, above n 6, [2.5].
employees occurring within the scope of their employment. Where the employer is a corporation, the corporation will bear the vicarious liability for the conduct of its employees, as would a natural person in the same position. Although vicarious liability is most commonly used in tort to impose liability for negligence, corporations can also be found vicariously liable for crimes in respect of the conduct of their officers or employees acting within the scope of their employment or authority. Courts have generally not been willing to find corporations vicariously liable for crimes committed by their officers or employees where the crime is prohibited by statute, unless the statute indicates a clear legislative intent that there should be such liability. In *Mousell Bros Ltd v London and North-Western Railway Co*, Viscount Reading CJ stated that:

> Prima facie ... a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. In those cases the legislature absolutely forbids the act and makes the principal liable without a mens rea.

Where vicarious liability operates so that a corporation is considered to be guilty of a criminal offence, the corporation is not actually regarded as having engaged in the offence itself, but it has liability because of the relationship between the corporation and the person actually committing the offence.

The imposition of vicarious liability for criminal offences has been criticised because a corporation can be liable for the criminal acts of junior employees in circumstances in which the corporation derives no benefit from the relevant acts and, in very large organisations,

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16 For example, *Mousell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836, applied by the High Court in *R v Australasian Films Ltd* (1921) 29 CLR 195.
17 [1917] 2 KB 836.
18 Ibid 844.
there can be great difficulty in closely supervising every employee.\(^{19}\) As a result, there are often ‘due diligence’ defences available under statutes which impose vicarious liability for criminal offences, which provide that there is no liability where a corporation has taken reasonable precautions to prevent the relevant act or omission occurring.\(^{20}\) Criminal vicarious liability is usually only imposed for less serious offences, such as those which are regulatory in nature – for example, fair-trading, consumer protection and environmental offences - or where it would be impossible to enforce the offence without vicarious liability.\(^{21}\) As a result, vicarious liability is not used, or proposed, as a model for corporate criminal liability for insider trading.

**Direct Liability**

The common law model of ‘doctrine of identification’ - also known as ‘organic theory’ or the ‘alter ego’ doctrine\(^{22}\) - operates to impose direct criminal liability on corporations, so that the actus reus and mens rea of certain officers or agents, as the corporate organs, are taken to be those of the corporation.\(^{23}\) This means that the corporation itself is regarded as having committed the crime, rather than merely being held responsible for crimes committed by others.

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\(^{19}\) See, for example, James Gobert, ‘Corporate Criminality: Four Models of Fault’ (1994) 14 *Legal Studies* 393, 398.

\(^{20}\) Fisse, above n 8, 279. An example of such a ‘due diligence’ defence can be found in s 12.3(3) of the *Criminal Code* which provides that:

Paragraph (2)(b) [which sets out the means by which authorisation or permission for relevant conduct might be established] does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

\(^{21}\) Clough and Mulhern, above n 7, 124.

\(^{22}\) Ross Grantham, ‘Attributing Responsibility to Corporate Entities: A Doctrinal Approach’ (2001) 19 *Company and Securities Law Journal* 168, 168; Sullivan, above n 13, 515. For ease of reference, the term ‘identification doctrine’ will be used throughout this thesis.

The identification doctrine relies on the concept of the ‘directing mind and will’ of a corporation, which originated from the judgment of Viscount Haldane LC\textsuperscript{24} in the civil case of *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd.*\textsuperscript{25} Under this doctrine, where there is a person who can be regarded as an organic part of the corporation, their actions and state of mind can be considered to be those of the corporation itself. Viscount Haldane LC stated that:

...A corporation is an abstraction. It has no mind of its own any more than a body of its own; its active and directing will must consequently be sought in the person of somebody who ... may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation... That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some corporations it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the corporation, and can only be removed by the general meeting of the corporation.\textsuperscript{26}

The concept of the directing mind and will of a corporation was further developed by Lord Denning in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd,*\textsuperscript{27} another civil case, where His Honour noted that:

Some of the people in the company are mere servants and agents who ... cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company... Whether their intention is the company’s intention depends on the nature of the matter under consideration, the relative

\textsuperscript{24} The Law Lords – Lord Dunedin, Lord Atkinson, Lord Parker of Waddington and Lord Parmoor – all concurred with Viscount Haldane LC’s judgment.
\textsuperscript{25} [1915] AC 705.
\textsuperscript{26} Ibid 713-714.
\textsuperscript{27} [1957] 1 QB 159.
position of the officer or agent and the other relevant facts and circumstances of the case.28

In *Tesco Supermarkets Ltd v Nattrass*,29 the principle of the ‘directing mind and will’ of a corporation was then applied to criminal liability. This case involved criminal proceedings brought against Tesco Supermarkets under the *Trade Descriptions Act 1968* (UK) due to the advertisement of certain products at a price lower than the marked price on the products displayed in the supermarket. All the products marked at the lower advertised price had been sold and a shop assistant had replaced them on the shelf with products marked at the original higher price. The store manager, who, in accordance with the corporation's procedures, was responsible for supervising the shop assistant, was not aware that this had occurred. The *Trade Descriptions Act* contained a defence which could be relied on in such proceedings if it could be proved that:

(a) the commission of the offence was due to ... the act or default of another person; and

(b) he [the corporation] took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence...30

Having been found guilty of the offence by the Magistrates Court, and after unsuccessfully appealing to the Divisional Court, Tesco Supermarkets appealed to the House of Lords on that basis that the offence was due to the act of the store manager, who was ‘another person’ within the meaning of s 24(1)(a), and that Tesco Supermarkets had taken all reasonable precautions and exercised all due diligence within the meaning of s 24(1)(b) of the *Trade Descriptions Act*, having set up proper systems for the running of the store. It was ultimately determined that Tesco Supermarkets was entitled to rely on the defence in s 24(1) of the *Trade Descriptions Act* on this basis.

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28 Ibid 172.
29 *Tesco Supermarkets Ltd v Nattrass* (1972) AC 153.
30 *Trade Descriptions Act 1968* (UK), s 24(1) (emphasis added).
Lord Reid approved the comments of Viscount Haldane LC\textsuperscript{31} in \textit{Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd},\textsuperscript{32} and those of Lord Denning\textsuperscript{33} in \textit{H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd},\textsuperscript{34} noting that:

A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company’s servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.\textsuperscript{35}

Lord Reid then stated that:

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have

\textsuperscript{31} \textit{Tesco Supermarkets Ltd v Nattrass} (1972) AC 153, 170.

\textsuperscript{32} [1915] AC 705.

\textsuperscript{33} \textit{Tesco Supermarkets Ltd v Nattrass} (1972) AC 153, 170.

\textsuperscript{34} [1957] 1 QB 159.

\textsuperscript{35} \textit{Tesco Supermarkets Ltd v Nattrass} (1972) AC 153, 170.
thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.36

The other Lords also approved the comments of Viscount Haldane LC in Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd,37 and Lord Denning in H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd,38 and accepted the application of the principle of the ‘directing mind and will’ when considering the imposition of criminal liability on the relevant corporation, in this case Tesco Supermarkets.39 The Lords also each separately determined that the store manager was not the directing mind and will of Tesco Supermarkets, so could properly be regarded as ‘another person’ for the purposes of the defence found in s 24(1)(b) of the Trade Descriptions Act.

The use of the identification doctrine to impose direct criminal liability on corporations - particularly in accordance with the statements of Lord Reid in Tesco Supermarkets Ltd v Nattrass40 - has been accepted and applied in a number of Australian cases41 and approved by the High Court in the decision of Hamilton v Whitehead.42 However, it must be acknowledged that there can be great difficulty in determining who actually is or may be

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36 Ibid 171. It was determined by Lord Reid that the store manager was not the directing mind and will of Tesco Supermarkets, so that he could be considered to be ‘another person’ for the purposes of the defence relied upon, and that Tesco Supermarkets had also engaged in an appropriate degree of due diligence – the board of Tesco Supermarkets had developed an operational system for the proper running of its stores, and had not delegated its managerial function to the store manager, so that the store manager’s acts were not the acts of the corporation: Tesco Supermarkets Ltd v Nattrass (1972) AC 153, 175.
37 Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705.
38 H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159.
40 (1972) AC 153.
42 (1988) 166 CLR 121.
regarded as the directing mind and will of a corporation. The directing mind and will of the corporation may be, as stated by Lord Reid, the board of directors; the managing director; or a superior officer who ‘carr[ies] out the functions of management and speak[s] and act[s] as the corporation’. The concept does not apply to ‘all servants of a company…who exercise some managerial discretion under the direction of superior officers’. A person who is the directing mind and will of a corporation can only be a person or persons given ‘full discretion to act independently of instruction’ from the board. Thus, this approach has been widely criticised because it restricts liability to the conduct or fault of directors and high level managers, favouring larger corporations which will escape liability for acts of most employees and because criminal liability may be easily avoided by retaining an ultimate discretion within the board.

In *Meridian Global Funds Management Asia Limited v Securities Commission*, a case from New Zealand which went on appeal to the Privy Council, the identification doctrine was stated to be only one form of attribution available to determine direct corporate criminal liability. This case concerned an investment management corporation, Meridian, which had two senior employees who had used Meridian’s funds to purchase shares in a listed corporation on Meridian’s behalf. Due to the quantity of shares purchased, Meridian became a substantial shareholder of the listed corporation. The managing director and board of directors of Meridian were unaware of the share purchase, or that Meridian had become a substantial shareholder of the listed corporation, although the two senior employees had authority to make investments on behalf of Meridian. The relevant provisions of the *Securities Amendment Act 1988* (New Zealand) required a person who

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43 *Tesco Supermarkets Ltd v Nattrass* (1972) AC 153, 171.
44 Ibid 171 (Lord Reid).
47 Gobert, above n 19, 400; Colvin, above n 12, 15.
became a substantial shareholder of a listed corporation to notify the Securities Commission as soon as they knew, or ought to have known, that they had become a substantial shareholder.\textsuperscript{50} One of the employees was the corporation's chief investment officer and his knowledge of the share purchase was attributed to Meridian, which meant Meridian ought to have known that it was a substantial shareholder of the listed corporation, placing it in breach of the notification obligation. This determination was made, not because the chief investment officer was considered to be Meridian’s ‘directing mind and will’ but because it was considered by the Privy Council to be the natural construction of the statute.\textsuperscript{51}

In reaching the decision in this case, the Privy Council emphasised that the decision of the House of Lords in \textit{Tesco Supermarkets Ltd v Nattrass} ‘was based not on general principle but on interpretation of particular statutory provisions’,\textsuperscript{52} in that case being those within the \textit{Trade Descriptions Act 1968} (UK). Lord Hoffman\textsuperscript{53} stated that, when determining whether a corporation is to be liable for a particular crime, the question to be answered is:

whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.\textsuperscript{54}

Lord Hoffman then classified the rules of attribution into three separate groups: (i) \textit{primary} rules of attribution - where the relevant acts were authorised by a resolution of the board of directors or unanimous agreement of shareholders; (ii) \textit{general} rules of attribution - such as the rules of agency and vicarious liability, which operate in respect of natural persons as well as corporations; and (iii) \textit{special} rules of attribution - to be determined by the courts for the purpose of applying particular rules. In such circumstances, the court must determine

\textsuperscript{50} \textit{Securities Amendment Act 1988} (NZ), ss 20(3) and (4).


\textsuperscript{52} Brown et al, above n 2, 253.

\textsuperscript{53} All other Lords agreed with Lord Hoffman in this decision.

whose act or knowledge was intended by the legislature to be counted as the act or
knowledge of the corporation, taking into account the policy of the relevant law.55

According to these classifications, the identification doctrine is regarded as one of the
special rules of attribution, but not as the only way of determining direct corporate criminal
liability. This means that it is not always necessary to determine who might be the directing
mind and will of a corporation, as:

it is a question of construction in each case as to whether the particular rule requires that
the knowledge that an act has been done, or the state of mind with which it was done,
should be attributed to the company.56

Following this decision would mean that employees who would not necessarily be regarded
as the 'directing mind and will' of a corporation could still have their acts and intentions
attributed to the corporation, depending upon the language, policy and intention of the
relevant statute.57

While the decision in Meridian Global Funds Management Asia Limited v Securities
Commission58 was welcomed by many commentators for its flexibility and recognition of the
‘realities of diffused organisational decision making’,59 others criticised its lack of certainty
and predictability, due to difficulties in determining whether a corporation is likely to have
liability in any particular case.60 As noted in ABC Developmental Learning Centres Pty Ltd v
Wallace,61 a decision of Bell J of the Supreme Court of Victoria, the pronouncements of Lord
Hoffman in Meridian Global Funds Management Asia Limited v Securities Commission have

55 Ibid 507 (emphasis added).
56 Ibid 511.
59 See, for example, Grantham, above n 57.
60 See, for example, Clough and Mulhern, above n 7, 101.
'been frequently followed or cited with approval in various contexts'; for example, by the Supreme Court of Western Australia, the Federal Court, the Supreme Court of South Australia, the Supreme Court of New South Wales, and the Supreme Court of Victoria. However, it was also noted in ABC Developmental Learning Centres Pty Ltd v Wallace, that each of these instances involved cases which were regulatory in nature. The statements made by Lord Hoffman in Meridian Global Funds Management Asia Limited v Securities Commission have not yet been adopted by the High Court, whose approval of the reasoning in Tesco Supermarkets Ltd v Nattrass in Hamilton v Whitehead remains the definitive pronouncement on direct corporate criminal liability in Australia. Additionally, despite the decision in Meridian Global Funds Management Asia Limited v Securities Commission, the identification doctrine seems to have remained the judicially preferred basis for corporate attribution in relation to serious crimes involving mens rea.

As will be discussed in detail in chapter 5 of this thesis, while the Corporations Act does provide specific statutory mechanisms for determining when a corporation is to be regarded as engaging in the relevant elements of the insider trading offence, the Corporations Act does not exclude the general law or provide that the statutory mechanisms are to be exclusive. Thus, while these statutory mechanisms might be regarded as 'special rules of

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62 Ibid [6].
63 The City of Perth and Ors v DL (Representing the Members of People Living With Aids (WA) (Inc) and Ors BC960167 [1996] EOC 92-796 (27 March 1996) (Ipp J).
66 AAPT Ltd v Cable & Wireless Optus Ltd and Others (1999) 32 ACSR 63 (Austin J).
67 Director of Public Prosecutions Reference No 1 of 1996 [1998] 3 VR 352 (Callaway JA); Emhill Pty Ltd v Bonsoc Pty Ltd (2005) 55 ACSR 379 (Callaway JA).
68 ABC Developmental Learning Centres Pty Ltd v Wallace [2006] VSC 171 (3 May 2006) [12].
69 (1988) 166 CLR 121.
70 Attorney-Generals’ Reference (No 2 of 1999) [2000] QB 796; Ferran, above n 46, 246.
attribution’ in accordance with the statements of Lord Hoffman in *Meridian Global Funds Management Asia Limited v Securities Commission*, attribution through the identification doctrine and as a result of the acts and intentions of the directing mind and will of a corporation, may also be available to attribute the elements of the insider trading offence to corporations.

The reforms which I propose to corporate liability for insider trading, and which are set out in detail in chapter 7 of this thesis, adopt a model of direct liability that would operate as an exclusive set of ‘special rules of attribution’ for determining whose acts and knowledge are to be counted as the acts and knowledge of the relevant corporation.

**Aggregation Doctrine**

Ordinarily, to find a corporation criminally liable for an offence, it will be necessary to show that the person who engaged in the relevant actus reus also had the necessary mens rea. However, the aggregation doctrine, also referred to as the doctrine of ‘collective knowledge’, enables the ‘aggregation’ of the conduct or knowledge of more than one individual within a corporation. Even though no individual associated with the corporation would have criminal liability, the conduct or knowledge of two or more individuals who represent the corporation, or for whom the corporation is vicariously liable, can be aggregated so that the corporation has criminal liability. Primarily developed in the USA, this concept has been adopted in Australia in connection with civil liability, including liability for fraudulent misrepresentation, but the High Court rejected the aggregation doctrine as a general principle for criminal liability in *R v Australasian Films Ltd*. Despite this, the aggregation

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72 Clough and Mulhern, above n 7, 106.
73 Colvin, above n 12, 18-19.
74 Sullivan, above n 13, 527.
76 See, for example, *Krakowski v Eurolynx Properties Ltd* (1995) 182 CLR 563.
77 (1921) 29 CLR 195.
doctrine has been implemented in some Australian statutes - for example, s 12.4(2) of the *Criminal Code.*\(^78\)

As will be discussed in more detail in chapter 5, despite the fact that the provisions of the Criminal Code relating to corporate criminal liability do not apply to Chapter 7 of the *Corporations Act* and therefore do not apply to the insider trading provisions,\(^79\) the current model of corporate liability for insider trading in Australia does enable the aggregation model to operate. The knowledge and actions of different individuals within a corporation can potentially be aggregated to attribute overall liability for insider trading to the corporation, regardless of whether any of those individuals would themselves have personal liability for insider trading. The new legislative provisions proposed in this thesis, and set out in detail in chapter 7, would remove the concept of aggregation from the current statutory provisions so that a corporation is only liable for insider trading where a person who possesses inside information, which the corporation is taken to possess, also knows or ought reasonably to know that the information is inside information, and either engages in or authorises the relevant conduct or gives advice about the relevant conduct. This is consistent with the rationale for the prohibition of insider trading in Australia – the protection of market integrity – and corporate criminal liability will only arise where an informational advantage might actually be obtained.

**Organisational Fault**

The organisational fault model of liability operates on the basis that while there may be circumstances where there is no particular individual whose conduct is actually criminal, the

\(^{78}\) Section 12.4 of the *Criminal Code* provides that:

- If:
  - (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of the body corporate has that fault element, that fault element may exist on the part of the body corporate if the body corporate is negligent when viewed as a whole (that is, by aggregating the conduct of any numbers of its employees, agents or officers.) (emphasis added).

\(^{79}\) Section 769A of the *Corporations Act.*
‘organisational conduct’ of the corporation itself is blameworthy and the corporation should be held criminally liable.80 This model also responds to the criticism of the ‘directing mind and will’ form of direct liability, that merely because one managerial representative of a corporation may be at fault, it does not necessarily mean that the corporation as a whole should be regarded as being at fault.81 ‘Organisational fault’ can arise under statute where the actus reus of the offence is committed by a person for whom the corporation is vicariously liable and the overall conduct of the corporation fulfils the mens rea through a corporate policy of non-compliance or a failure to take reasonable precautions or exercise due diligence.82 It has been suggested that the organisational fault model is most suitable for serious offences where it is necessary to consider corporate blameworthiness.83 The Criminal Code provides an example of this model of liability in s 12.3(2).84 Organisational fault is not currently applied in relation to corporate liability for insider trading, and it is not proposed to be applied as part of the new reforms set out in this thesis as, once again, the new reforms are focused on ensuring that market integrity is protected and corporations will only have liability where an informational advantage might actually be obtained.

Statutory Principles of Corporate Criminal Liability

In addition to the mechanisms available under the general law, statutory regimes may also provide particular rules for determining corporate criminal liability. By way of example, Part 2.5 of the Criminal Code sets out general principles of criminal responsibility for

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80 Sullivan, above n 13, 524.
83 Clough and Mulhern, above n 7, 124.
84 Section 12.3(2) of the Criminal Code sets out means by which a fault element can be attributed to a corporation by:

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
Commonwealth offences. Instead of using the common law terminology of ‘actus reus’ and ‘mens rea’, s 3.1(1) of the Criminal Code provides that offences consist generally of ‘physical elements’ and ‘fault elements’. The Criminal Code describes a variety of matters which may amount to a fault element – intention, knowledge, recklessness or negligence. A physical element may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs.

Section 3.2 of the Criminal Code then states that:

In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

It is clear that an offence may have more than one physical element. The majority of the High Court noted in The Queen v LK, that the Criminal Code applies fault elements to particular physical elements of an offence and makes no provision for the specification of a fault element that does not directly relate to a specified physical element.

Despite the use of different terminology, in The Queen v LK French J approved the statement that the drafting of the Criminal Code adopted the usual analytical division of criminal offences into the actus reus and the mens rea or physical elements and fault

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85 Criminal Code, s 5.1.
86 Criminal Code, s 4.1(1).
87 Ansari v The Queen [2010] HCA 18, [50] (French CJ).
88 [2010] HCA 17 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
89 Ibid [132].
90 Ibid 17.
elements'. Part 2.5 of the *Criminal Code* also sets out general principles pursuant to which corporate criminal responsibility can be established and s 12.1(2) provides that a corporation can be found guilty of any offence. This part of the *Criminal Code* also provides specific rules for determining when a physical element and a fault element are to be attributed to a corporation.

However, the provisions in the *Criminal Code* are just one example of a set of statutory rules providing for corporate criminal liability and they apply only to Commonwealth offences. Additionally, certain statutes restrict the application of the rules contained within the *Criminal Code*. In particular, the *Corporations Act* provides that the operation of Part 2.5 of the *Criminal Code* does not apply to any offences created under Chapter 7 of the *Corporations Act*, and a separate regime for corporate criminal liability for those offences is created in s

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92 Section 12.2 of the *Criminal Code* provides as follows:

> If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

93 Section 12.3(1) of the *Criminal Code* provides that a fault element must be attributed to a corporation that expressly, tacitly or impliedly authorises or permits an offence. Pursuant to s 12.3(2) such an authorisation or permission may be established by:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

94 *Criminal Code*, s 2.1.

95 *Corporations Act*, s 769A.
769B of the Corporations Act. The insider trading prohibition, contained in Part 7.10 of Chapter 7 of the Corporations Act, is therefore an offence excluded from the operation of Part 2.5 of the Criminal Code, and the principles of corporate criminal liability contained in that part are not applied to the insider trading offence.

In relation to the conduct of a corporation, which is usually relevant to the physical element of a criminal offence, s 769B(1) of the Corporations Act provides that conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body, within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also by the body corporate.

Almost identical provisions are contained in other Commonwealth statutes, such as s 84(2) of the former Trade Practices Act 1974 (Cth) and s 12GH(2) of the Australian Securities and Investments Commission Act 2001 (Cth). Similar provisions are contained in s 78(2) of the Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) and s 8ZD of the Taxation Administration Act 1953 (Cth). These provisions will be useful for further interpretation of the elements of insider trading in later chapters of this thesis, as it will be seen in chapter 5 that such provisions have been interpreted to be non-exhaustive and not intended to exclude the operation of the general law.

96 The Trade Practices Act 1974 (Cth) has been replaced by the Competition and Consumer Act 2010 (Cth), which (unlike the former act) applies Chapter 2 of the Criminal Code in relation to corporate criminal responsibility: Competition and Consumer Act 2010 (Cth), s 6AA(1). The provisions of Part 2.5 of the Criminal Code in relation to corporate criminal responsibility do not apply to a small number of specified offences under the Competition and Consumer Act 2010 (Cth): Competition and Consumer Act 2010 (Cth), s 6AA(2).
The conduct caught by s 769B(1) of the Corporations Act goes further than that which would be caught by s 12.2 of the Criminal Code, as s 769B(1) of the Corporations Act includes conduct engaged in by a person at the direction or with consent or agreement of a director, employee or agent, even if it is not within the scope of the first person’s authority.

In relation to criminal offences where it is necessary to establish the state of mind of a body corporate, which will usually be relevant to fault elements, s 769B(3) of the Corporations Act provides that:

If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body [corporate], being a director, employee or agent by whom the conduct was engaged in within the scope of the person’s actual or apparent authority, had that state of mind.

Again, almost identical provisions are contained in s 84(1) of the former Trade Practices Act 1974 (Cth) and s 12GH(1) of the Australian Securities and Investments Commission Act 2001 (Cth). Similar provisions are contained in s 8ZD of the Taxation Administration Act 1953 (Cth) and s 78(1) of the Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth).

In Division 3 of Part 7.10 of the Corporations Act, which contains the insider trading prohibition, there is an additional means of establishing a corporation’s possession of information and knowledge, which may be relevant for both the physical and fault elements of the insider trading offence. For example, s 1042G(1) of the Corporations Act states that, for the purposes of Division 3 of Part 7.10:

(a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and
(b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows the matter or thing.

Section 1042G(2) also specifically states that ‘this section does not limit the application of section 769B in relation to this Division.’ These provisions will be examined in detail in chapter 5 of this thesis. The reforms proposed in this thesis and set out in detail in chapter 7 would amend the current provisions of the Corporations Act to provide for a new statutory regime to apply the insider trading laws to corporations, and would not adopt the currently excluded provisions of the Criminal Code relating to corporate criminal liability. As the insider trading laws are intended to maintain and protect ‘market integrity’, it is most appropriate to utilise a particular set of provisions focused on achieving that rationale, rather than relying on the general statutory provisions applicable to the majority of Commonwealth criminal offences, which do not necessarily have similar aims or appropriate application to the insider trading offence.

The Appropriate Model for the Liability of Corporations for Insider Trading in Australia

It can be seen that there are a variety of models that are available for determining corporate criminal liability under both the general law and statute, with complex and intricate variations. Currently, corporate criminal liability for insider trading in Australia operates through a combination of models because the statute does not exclude the operation of the general law, and also incorporates concepts of direct liability and aggregation under the Corporations Act. The manner in which these different models currently operate will be explored in detail in the next chapter of this thesis.

I propose that a new model of direct liability be adopted as the exclusive means for determining the liability of corporations for insider trading in Australia – it would operate as a
set of ‘special rules of attribution’ for determining whose acts and knowledge are to be counted as the acts and knowledge of the relevant corporation.  

It causes significant confusion and uncertainty as to the operation of the law for multiple models of liability to operate concurrently in relation to the liability of corporations for insider trading. As discussed in detail in chapter 1 of this thesis, insider trading is prohibited in Australian in accordance with a market integrity rationale, intended to ensure market fairness and promote market efficiency. Underlying this rationale is the desire to prevent certain participants from gaining an unfair advantage over others, and limiting their opportunities to trade on the basis of information which is not available to all participants. The model of liability to be imposed should reflect this rationale. Accordingly, a model of direct liability, in which a corporation will have liability for insider trading where it is regarded as having engaged in the prohibited conduct itself, is the only model which is truly consistent with this aim. A corporation will only be obtaining an unfair advantage over other participants in securities markets, where it can be regarded as engaging in insider trading itself. Further, a corporation does not obtain an unfair advantage over other market participants, if officers, employees or agents who may possess inside information are not aware that other officers, employees or agents may be trading or procuring trading in financial products to which that information might relate. As a result, the model of direct liability which I propose in this thesis, and describe in full in chapter 7, has the following characteristics – a corporation would only be taken to have engaged in insider trading if the person who engaged in or authorised the relevant trading conduct on the corporation’s behalf, within the actual or apparent scope of their authority, also possessed the relevant information and had the requisite knowledge that it was inside information. Under the operation of the new provisions, there would be no vicarious liability and no liability by aggregation. The new provisions, which would set out when a corporation is taken to possess inside information, to have the requisite knowledge that the information is inside information, and when it is taken to have engaged in the relevant trading conduct, would provide for the direct liability of the corporation.

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In the next part of this thesis, I will consider in detail the individual elements of the insider trading offence - the possession of information (the ‘possession element’), the knowledge that the relevant information is inside information (the ‘knowledge element’), and the trading or procuring of trading in relevant financial products, or tipping (the ‘trading element’) - and the manner in which those elements can be attributed to a corporation. Though the application of the relevant models of liability, it will be determined how and when a corporation can be regarded as having engaged in insider trading and the difficulties of interpretation and resulting issues of lack of clarity and certainty will be discussed and analysed.
CHAPTER 5
ATTRIBUTING THE ELEMENTS OF INSIDER TRADING TO CORPORATIONS

Having considered the principles of corporate criminal liability in chapter 4, this chapter focuses on the manner in which the elements of the insider trading offence are attributed to a corporation. There are several issues which must be addressed in this chapter: when an alleged insider trader is a corporation, how does that corporation possess information? How does a corporation have knowledge that certain information is inside information? How does a corporation engage in the relevant trading conduct? How do the relevant provisions of the Corporations Act operate, and are general law principles of the identification doctrine and agency also to be considered? Accordingly this chapter will be comprised of three major parts: attributing the possession element to corporations; attributing the knowledge element to corporations; and attributing the trading element to corporations. The legal complexities associated with each of these issues will be examined in this chapter, to attempt to reach a definitive answer in relation to the liability of corporations for insider trading, and to highlight legislative difficulties and inconsistencies that could be overcome with reform. An analysis of these issues reveals significant uncertainty in the attribution of the elements of insider trading to corporations, which can only be resolved by significant legislative amendment.

The Relevant Elements of Insider Trading

In order to determine the manner in which elements of the insider trading offence are to be attributed to corporations, the following elements must be examined – the possession of inside information; the knowledge that certain information is inside information; and the relevant trading conduct.

As was noted in chapter 2 of this thesis, s 1043A of the Corporations Act sets out the offence of insider trading, which can be summarised as having the following elements: (i) a person possesses certain information; (ii) the information is not generally available; (iii) if the information were generally available, it would be material information; (iv) the person knows (or ought reasonably to know) that the information is not generally available, and, that if the
information were generally available, it would be material information; and (v) while in possession of the information, the person trades in relevant financial products or procures another person to do so, or engages in tipping.

Elements (ii) and (iii) will not be applied any differently when the alleged insider trader is a corporation rather than a natural person, as it will be a question of determining, based on the relevant tests in ss 1042C and 1042D of the Corporations Act, whether the relevant information is generally available, and, if it were, whether that information would be material. However, it is not immediately clear how a corporation can be shown to satisfy elements (i), (iv) and (v) – that is, it needs to be determined how a corporation can be considered to possess information (to be referred to from now on as the 'possession element'); how a corporation can be considered to know (or be considered to ought reasonably to know) that information is not generally available and, if it were, that the information would be material (to be referred to from now on as the 'knowledge element'); and how a corporation can be considered to trade, or procure trading, in financial products or engage in tipping (to be referred to from now on as the 'trading element').

Section 1043A of the Corporations Act states that:

(3) For the purposes of the application of the Criminal Code in relation to an offence based on subsection (1)...

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

¹ As discussed in chapter 4, s 3.1(1) of the Criminal Code provides that offences generally consist of ‘physical elements’ and ‘fault elements’. Although s 769A of the Corporations Act provides that Part 2.5 of the Criminal Code does not apply to offences created under Chapter 7 of the Corporations Act, Part 2.5 of the Criminal Code (which comprises ss 12.1 to 12.6) is concerned only with ‘Corporate Criminal Responsibility’. Thus, s 3.1 of the Criminal Code is still generally applicable to the insider trading offence. When the current insider trading regime was inserted into the Corporations Act, it was noted that the insider trading provisions ‘are Criminal Code compliant’: Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth), [15.23].
As the element set out in paragraph (1) (a) of s 1043A is that ‘a person (the insider) possesses inside information’ and the element set out in paragraph (1)(b) is that ‘the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of inside information in section 1042A are satisfied in relation to the information’, this means that the physical element of the insider trading offence is the possession of inside information, and the fault element is the knowledge that the information is inside information. The conduct described in s 1043A(1)(c) of the Corporations Act relates to trading in relevant financial products – whether by applying for them, acquiring or disposing of them, or entering into an agreement to do any of those things. Section 1043A(1)(d) concerns the procuring of another person to do any of those things, and s 1043A(2) concerns the communication of inside information to another person likely to do any of those things or procure another person to do so. While this is the conduct which a person who possesses inside information, and who knows or ought reasonably to know that it is inside information, must not engage in, such conduct is not stated to be a ‘physical element’ of the insider trading offence. In this chapter, it will be determined how these three elements of the insider trading offence can be applied to corporations. As will be demonstrated below, there are a number of statutory mechanisms and general law principles which can be used to determine when a corporation has possession of information, when a corporation has certain knowledge, and when a corporation has engaged in particular conduct. However, as will also be demonstrated, the manner of their application is not at all certain.

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2 As set out in chapter 2, s 1042A of the Corporations Act provides that ‘inside information’ means information in relation to which the following paragraphs are satisfied:

(a) the information is not generally available; and

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

3 Section 1043(1) of the Corporations Act expressly states that an insider must not (whether as principal or agent):

(c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.
ATTRIBUTING THE POSSESSION ELEMENT TO CORPORATIONS

The meaning of the terms ‘information’ and ‘possession’ were discussed in detail in chapter 2, and it was noted there that the pronouncements of Spigelman CJ in *R v Hannes* make it clear that, in the context of the insider trading offence, the possession of information requires actual ‘awareness’ of the relevant information, not mere physical possession or access to the information. Therefore, when applying this element to corporations, the question to be answered is – how does a corporation come to have actual ‘awareness’ of information?

Within Division 3 of Part 7.10 of the *Corporations Act* there is a provision under which a corporation is taken to possess information that is possessed by one of its officers in certain circumstances. Section 1042G(1)(a) of the *Corporations Act* provides that:

> a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer.

In *ASIC v Citigroup*, this provision was the only mechanism considered by the Court when determining whether Citigroup possessed certain information relating to the proposed takeover of Patrick by Toll. In that case, Jacobson J determined that even if the proprietary trader, Mr Manchee, had possessed the relevant information, that information was not taken to have been possessed by Citigroup under s 1042G(1)(a) because he was not an ‘officer’ of

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4 An earlier draft of this section of the thesis was published as the following journal article: Juliette Overland, ‘There Was Movement at the Station for the Word had Passed Around: How Does a Company Possess Inside Information under Australian Insider Trading Laws?’ (2006) 3 Macquarie Journal of Business Law 241.
6 Ibid 398.
7 (2007) 160 FCR 35. This case was discussed in detail in chapter 2 and will be the subject of further discussion in chapter 6 of this thesis.
the corporation within the meaning of s 9 of the Corporations Act. As there are other potential mechanisms which could also be used to determine whether a corporation possesses certain information, before the application of s 1042G(1)(a) is examined, it is important to consider whether it is actually intended to be the exclusive mechanism for this purpose.

I consider that there are three reasons why s 1042G(1)(a) of the Corporations Act should not be regarded as the exclusive means for determining when a corporation possesses inside information: (i) the language of s 1042G(1)(a) itself indicates an absence of exclusivity; (ii) cases which have interpreted other statutes which use the same or very similar language to s 1042G(1)(a) have found that there is an absence of exclusivity; and (iii) in order to make sense of other provisions of the Corporations Act, it is necessary to infer a lack of exclusivity in s 1042G(1)(a).

When reaching these conclusions in relation to the interpretation of s 1042G(1)(a) of the Corporations Act (and other sections of this statute), careful examination and interpretation of the language used is necessary in order to discern the true meaning and underlying intention. In this context, principles of statutory interpretation are clearly relevant – it is necessary in a number of instances to consider the manner in which the language of the Corporations Act has been interpreted in cases concerning other statutes which use the same or similar language, as well as to interpret the relevant sections of the Corporations Act in a manner which ensures that other provisions of the Corporations Act can continue to make sense.

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While clearly all words must be given their ‘plain and ordinary meaning’, when interpreting words and phrases used in the Corporations Act which have not been judicially considered in that context, principles of statutory interpretation allow reference to be had to cases which interpret their meaning when used in other statutes. Additionally, an interpretation which allows all words used within the statute to have ‘some meaning and effect’ is to be preferred over an interpretation which would result in certain words being considered meaningless or redundant.

Section 1042G(1)(a) of the Corporations Act is not expressed in language which indicates a legislative intention that it be regarded as an exclusive mechanism. Looking again at the precise language of s 1042G(1) – it states that:

For the purposes of this Division:

(a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer.

The opening phrase – ‘For the purposes of this Division, a body corporate is taken to possess…’ – does not require or imply exclusivity. Indeed, it is expressly stated in s 1042G(2) that ‘this section does not limit the application of section 769B in relation to this Division.’ Since s 769B of the Corporations Act contains the rules of corporate criminal responsibility which are applicable to Chapter 7 of the Act in place of Chapter 2.5 of the

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9 See, for example, Cody v J H Nelson Pty Ltd (1947) 74 CLR 629, 647 (Dixon J); Herbert Adams Pty Ltd v Federal Commission for Taxation (1932) 47 CLR 222, 228 (Dixon J); D C Pearce and R S Geddes, Statutory Interpretation in Australia (LexisNexis Butterworths, 8th ed, 2014) 61.
10 See, for example, Gett v Tabet (2009) 254 ALR 504, [289]; Marshall v Director-General, Department of Transport (2001) 205 CLR 603, [62] (McHugh J); Pearce and Geddes, above n 9, 10.
11 Commonwealth v Baume (1905) 2 CLR 405, 404 (Griffith C J); Beckwith v R (1976) 135 CLR 569, 574 (Gibbs J); Pearce and Geddes, above n 9, 62.
12 Emphasis added.
Criminal Code, this means that the relevant rules from s 769B will also be applicable, further indicating that s 1042G of the Corporations Act is not intended to be exclusive.

In Rowe v Transport Workers Union of Australia, Cooper J of the Federal Court considered whether the general law identification doctrine was applicable to determining whether an industrial association had engaged in certain conduct, or if only the specific statutory rules set out in s 298B of the Workplace Relations Act 1996 (Cth) were relevant. Section 298B(2) of the Workplace Relations Act provided that certain 'action done by one of the [prescribed bodies or persons] is taken to have been done by an industrial association'. To that extent, it is similar to s 1042G(1)(a) of the Corporations Act providing that a body corporate is taken to possess information possessed by an officer in certain circumstances. Cooper J found that the phrase ‘is taken to’ implies an additional alternative statutory mechanism, rather than an exclusive one, which:

as a matter of construction, [is] not intended to exclude the operation of the directing mind principle… Indeed, the operation of the principle and the two sections may overlap.

In order to make sense of later provisions of the Corporations Act, it is also necessary to assume that other mechanisms (such as other statutory provisions and the general law rules) can also operate to attribute the possession of information to a corporation. Importantly, s 1043F of the Corporations Act, which sets out the Chinese Wall defence for corporations, refers to ‘information in the possession of an officer or an employee’. If s 1042G(1) is to be the only means by which the possession of information can be attributed to a corporation, requiring that it be possessed by an officer of the corporation, the words ‘or an employee’ in s 1043F of the Corporations Act would be meaningless, as information possessed by a mere employee would not be relevant. Further, in the Explanatory

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14 Emphasis added.

Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth), which repealed a redundant definition of ‘officer’ in s 82A of the Corporations Act, there is a statement that ‘in cases where particular provisions of the Corporations Act dealing with personnel are intended to extend to employees, this will be expressly stated.’ If the Chinese Wall defence is intended to apply when employees possess information, s 1042G(1)(a) of the Corporations Act must not be an exclusive mechanism because it does not provide for a corporation to possess information known only to an employee who is not an officer. While some might regard this as only a drafting error in need of minor correction, such an interpretation still creates significant uncertainty as to the intended operation of these provisions.

The need to rely on general law principles of attribution in connection with the possession of information by corporations is recognised by Qu, but he does so based on a view that s 1042G(1)(a) of the Corporations Act contains a rebuttable presumption that the information possessed by an officer is also possessed by the corporation, and that general law principles of attribution can be used to rebut that presumption. While, for the reasons discussed above, the language of s 1042G(1) of the Corporations Act, in stating that ‘a body corporate is taken to possess any information which an officer of the body corporate possesses’, is not intended to be exhaustive, I respectfully disagree that it creates a rebuttable presumption in this instance. If this statutory rule could be rebutted by demonstrating that the general law rules would not attribute possession of the relevant information to the corporation, it means that the statutory rule would only apply to attribute the possession of information to a corporation when the general law rules also have that effect. If the statutory rule had that effect but the general law rules did not, and the general law rules could then be used to rebut the statutory rule, it would have the overall effect that

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16 Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth), [5.574].
17 See, for example, Kevin A Lewis, ‘A Decade On: Reforming the Financial Services Law Reforms’ (Paper presented at Sixth Annual Supreme Court Corporate Law Conference, Sydney, 23 August 2011).
19 Ibid 191.
only the operation of the general law would be relevant, as the possession of information would only occur if the general law rules had that effect, thereby making the statutory provision redundant. This cannot have been the legislative intention behind this provision. I consider that the better view is that both the general law rules and the statutory rules can be relied on as alternative means of attributing the possession of information to a corporation.

Thus, it can be seen that, without exclusivity in s 1042G(1)(a) of the Corporations Act, other mechanisms can apply to attribute the possession of information to a corporation, even though the provisions of the Criminal Code are excluded.20 This is despite the fact that in ASIC v Citigroup, Jacobson J considered only the operation of s 1042G(1)(a) of the Corporations Act in this context. One can infer from the judgment that arguments relating to alternative means of attributing the possession of information to a corporation such as Citigroup were not presented to Jacobson J, particularly since it appears that ASIC assumed that the proprietary trader would be regarded as an officer of Citigroup and that s 1042G(1)(a) would therefore apply.21

In Rivkin Financial Services Ltd v Sofcom Ltd,22 Emmet J found that, while the alleged inside information was not actually material and therefore that no insider trading had taken place, the three corporations controlled by Mr Khan did possess the information about Mr Khan's intentions to attempt to increase his shareholding and gain control of the board. However, His Honour did not give reasons for that determination and did not analyse any provisions of the Corporations Act or consider the general law in this context. As a result, this decision does not assist in determining how corporations might possess inside information and which mechanisms are to be used for that purpose.

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20 Corporations Act, s 769A.
22 (2004) 51 ACSR 486. The facts of this case were set out in chapter 2 of this thesis.
Other mechanisms which could potentially be used to determine when a corporation possesses certain information are, firstly, other provisions in the Corporations Act, such as s 1042G(1)(b) and s 769B(3), and secondly, general law agency rules and the identification doctrine.

Section 1042G(1)(b) of the Corporations Act provides that:

> if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing.

Is ‘information’ a matter or thing? Even if information is not a ‘thing’, it clearly includes matter, as the definition of ‘information’ in s 1042A of the Corporations Act states that information includes:

(a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and

(b) matters relating to the intentions, or likely intentions, of a person.23

Additionally, s 1042C(1)(a) of the Corporations Act provides that information is generally available if, among other things, it consists of readily observable matter.24 Thus, it appears that information can include a ‘matter’ and therefore s 1042G(1)(b) may be used to determine when a corporation possesses certain information.

Some commentators, such as Lyon and du Plessis25 and Black,26 apply s 1042G(1)(b) of the Corporations Act to the knowledge element of insider trading – whether there was knowledge that the relevant information was not generally available and likely to be material.

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23 Emphasis added.
24 Emphasis added.
Others, such as Austin and Ramsay\textsuperscript{27} and Hambrook,\textsuperscript{28} consider that it is applicable to both the possession element and the knowledge element of insider trading. The title of s 1042G gives little assistance – the section is titled ‘Information in Possession of Officer of Body Corporate’. Reliance on this heading\textsuperscript{29} would support the proposition that s 1042G(1)(b) actually relates to an alleged insider’s possession of inside information, rather than the knowledge that he or she may have about the qualities of that information. However, later paragraphs of s 1042G(1) of the \textit{Corporations Act} provide that:

\begin{itemize}
  \item[(c)] if an officer of a body corporate, in that capacity, is reckless as to a circumstance or results, it is to be presumed that the body corporate is reckless as to that circumstance or result; and
  \item[(d)] for the purposes of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate ought reasonably to know that matter or thing.
\end{itemize}

Neither of these additional subsections appear to relate exclusively to the possession of information, or knowledge as to the qualities of that information, so it seems that the heading of s 1042G is not helpful in this respect and that s 1042G(1) of the \textit{Corporations Act} contains

\textsuperscript{27} Robert P Austin and Ian M Ramsay, \textit{Ford’s Principles of Corporations Law} (LexisNexis Butterworths, 16\textsuperscript{th} ed, 2014) [9.630].
\textsuperscript{28} J P Hambrook, ‘Market Misconduct and Offences’ in LexisNexis, \textit{Australian Corporations Law Principles and Practice} [7.13.0145].
\textsuperscript{29} Section 13(1) of the \textit{Acts Interpretation Act 1901} (Cth) provides that:

\begin{quote}
All material from and including the first section of an Act to the end of:
\begin{itemize}
  \item[(a)] if there are no Schedules to the Act--the last section of the Act; or,
  \item[(b)] if there are one or more Schedules to the Act--the last Schedule to the Act;
\end{itemize}

is part of the Act.
\end{quote}

In the Explanatory Memorandum to the \textit{Acts Interpretation Amendment Bill 2011} (Cth), which inserted this provision into the \textit{Acts Interpretation Act 1901} (Cth), it was noted that the ‘…new section 13 is intended to capture all headings… within the Act’. However, it was also noted that, while headings are to be regarded as part of an Act, the weight to be given to headings ‘…will ordinarily be less than the words of the section itself’:

Explanatory Memorandum to the \textit{Acts Interpretation Amendment Bill 2011} (Cth), [93].
provisions which are capable of relating to both elements of the insider trading offence. Therefore, s 1042G(1)(b) appears to be applicable to both the possession and knowledge elements of the insider trading offence, and therefore to determining when a corporation may have possession of certain information. However, the differing approaches on the availability of this subsection to attribute the possession of information to a corporation illustrate the difficulties of interpretation and uncertainty created by these provisions and highlight the need for legislative reform.

Section 769B(3) of the Corporations Act provides that:

If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.30

If the 'state of mind' of the body corporate can include the possession of information, this provision may also be a potential means of determining when a corporation has such possession. Section 769B(10)(c) states that:

A reference to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reason for the person's intention, opinion, belief or purpose.31

Since the possession of information does require 'awareness' and therefore knowledge of the contents of the information,32 it is arguable that this provision is relevant to the possession element of insider trading – the possession of inside information. However, most commentators generally treat provisions similar to s 769B(3) of the Corporations Act as being relevant only to a fault element, rather than a physical element of an offence. As was

30 Emphasis added.
31 Emphasis added.
32 In accordance with the pronouncements of Spigelman CJ in R v Hannes (2000) 158 FLR 359, 398.
noted in chapter 4, provisions very similar to s 769B(3) of the Corporations Act were found in s 84(1) of the former Trade Practices Act 1974 (Cth) and s 12GH(1) of the Australian Securities and Investments Commission Act 2001 (Cth). Clough and Mulhern33 and Gillies34 consider that such provisions are relevant to the fault elements of offences only. However, these provisions can be contrasted with s 769B(3) of the Corporations Act which refers to the ‘state of mind’ of a body corporate, whereas s 84(1) of the former Trade Practices Act 1974 (Cth) and s 12GH(1) of the Australian Securities and Investments Commission Act 2001 (Cth) refer only to the ‘intention’ of a body corporate. The use of this much broader language differentiates s 769B(3) of the Corporations Act from those other statutory provisions and, accordingly, it need not be considered to be limited to a fault element only.

The state of mind of a corporation can conceivably relate to both the awareness of the content of information (which would equate to the possession element of the insider trading offence), as well as to awareness of the qualities of that information – such as whether it is generally available or material (which would equate to the knowledge element). Thus, it appears that s 769B(3) of the Corporations Act can relate to both the possession element and the knowledge element of insider trading and can be considered in both contexts to determine whether a corporation is to be regarded as having engaged in insider trading.

Therefore, having established that s 1042G(1)(a) of the Corporations Act is not the exclusive mechanism for determining when a corporation may possess inside information, and having determined that there are a number of possible mechanisms which may be used to determine when a corporation possesses information – ss 1042G(1)(a), 1042G(1)(b) and 769B(3) of the Corporations Act, as well as general law rules – each can now be analysed in order to determine how that possession occurs.

Application of Statutory Provisions Concerning Possession

Returning to s 1042G(1)(a) of the Corporations Act, the precise language of the section states that:

For the purposes of this Division:

(a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer.

Thus, in order for information to be possessed by a corporation in accordance with s 1042G(1)(a) of the Corporations Act, there are two requirements which must be satisfied: (i) the information must be possessed by an officer of the corporation; and (ii) the information possessed by the officer must have come into his or her possession in the course of performing his or her duties.

In ASIC v Citigroup, determining whether a proprietary trader who allegedly possessed inside information was an officer of Citigroup was treated as a ‘threshold question’ as to whether that information could be attributed to the corporation, as evidenced by the following statement of Jacobson J of the Federal Court:

Even if Mr Manchee was in possession of inside information, his knowledge is not attributable to Citigroup unless he was an officer of that body corporate.

The requirement under s 1042G(1)(a) of the Corporations Act that information will only be taken to be possessed by a corporation where it is acquired by an officer, will generally require that the person must be a director, company secretary or senior executive, as the term ‘officer’ is defined in s 9 of the Corporations Act to mean:

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36 Ibid 99 (emphasis added).
(a) a director or secretary of the corporation; or
(b) a person:
   (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
   (ii) who has the capacity to significantly affect the corporation's financial standing; or
   (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
(c) a receiver, or receiver and manager, of the property of the corporation; or
(d) an administrator of the corporation; or
(e) an administrator of a deed of company arrangement executed by the corporation; or
(f) a liquidator of the corporation; or
(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

It is for this reason that, in ASIC v Citigroup, the information allegedly possessed by the proprietary trader was not regarded as being possessed by Citigroup itself, as the proprietary trader did not fall within this definition of an ‘officer’. He was clearly not a director or company secretary of Citigroup, or any form of trustee or insolvency controller within the meaning of paragraphs (c) to (g) of the definition in s 9, and he was also not a ‘shadow director’ of Citigroup, being ‘a person in accordance with those instructions or wishes the directors of the corporation are accustomed to act’ as required by paragraph (b)(iii). This meant that the decision as to whether he was an officer of Citigroup was an issue which turned on:

whether he was a person:
   - who made, or participated in making, decisions that affected the whole, or a substantial part, of the business of Citigroup; or

37 Ibid 99.
who had the capacity to affect significantly the financial standing of Citigroup.38

These parts of the definitions of ‘officer’, found in paragraphs (b)(i) and (b)(ii), are concerned with ‘identifying persons who are involved in the management of the corporation.’39 Mr Manchee, theproprietary trader, did not have ‘any involvement in policy making or decisions that affected the whole or a substantial part of the business of Citigroup.’40 He was one of five proprietary traders employed by Citigroup and he did not have anyemployees reporting to him or have any other responsibilities aside from proprietary trading. The fact that he had a daily trading limit of $10 million did not ‘make him a person who had the capacity to affect Citigroup’s financial standing’, as this was not a significant sum ‘in the context of Citigroup’s very substantial business.’41

Thus, only a person who fulfills at least one of the elements of the s 9 definition of ‘officer’ will be a person whose possession of information will be attributed to a corporation pursuant to s 1042G(1)(a) of the Corporations Act. By contrast, s 1042H(1)(a) of the Corporations Act provides that each member of a partnership is regarded as possessing any information which another member of the partnership came to possess in their capacity as a member, and any information which an employee of the partnership possesses and which came into his or her possession in the course of the performance of their duties. So a partner in a partnership will be taken to possess information that is acquired by a member of the partnership or any employee but, under s 1042G(1)(a) of the Corporations Act, a corporation is only taken to possession information acquired by or known to an officer.

As is noted above, s 1042G(1)(a) of the Corporations Act provides that, for a corporation to be considered to possess information, the relevant officer who possesses the information must have acquired it in the course of the performance of their duties. Although the phrase ‘in the course of performance of duties’ is not defined in the Corporations Act, or in any other

38 Ibid 99.
39 Ibid 99.
40 Ibid 99.
41 Ibid 101.
available Australian legislation, it is a concept which is relevant to the duties of directors, particularly in cases concerning conflicts of interest where it is necessary to consider whether certain information or opportunities came to directors in their capacity as a director or in a personal capacity.

In *Peso Silver Mines v Cropper*, a director who acquired an interest in a mining claim, which had been previously offered to and rejected by the corporation of which he was a director, was found not to be liable to account to the corporation for any of the profits he made because he had been approached ‘not in his capacity as a director’ but ‘as an individual member of the public.’ In *Regal Hastings v Gulliver*, directors who took up shares in an investment so that the corporation of which they were directors could also participate, were found to be liable to account to the corporation for the relevant profits because the opportunity to take up the investment only came to them only because they were directors of the corporation. In *Boardman v Phipps*, a trustee of a trust and the solicitor for the trust were both found to be in breach of duty and liable to account to the trust for profits they made when they purchased certain shares in a corporation in which the trust had a substantial holding, because information about the shares came to them only because of their position as trustee and solicitor, and because they would never have acquired the information if they were not acting for the trust. The common feature in each of these cases is that information or an opportunity that would not have been acquired or available ‘but for’ the person’s connection with the corporation is regarded as being information or an opportunity which has been acquired in the course of the performance of a person’s duties.

Therefore, returning to the possession of inside information, the requirement in s 1042G(1)(a) of the *Corporations Act* that information be acquired by an officer ‘in the course
of performance of duties’ clearly requires a nexus between the duties that the particular officer ordinarily performs, or is authorised to perform, for the corporation and the manner in which the information comes into that officer’s possession.

This requirement gives rise to an important issue: what is the position if information may be considered to have been acquired in two or more different capacities, only one of which relates to the performance of the officer’s duties? For example: What is the status of information which could have been acquired in either a private or a professional capacity? What is the status of information which could have arisen in one of two different professional capacities, one of which is unrelated to the performance of the officer’s duties?

Information which is acquired in a private capacity is necessarily excluded from the operation of the s 1042G(1)(a) of the Corporations Act, because it falls outside the performance of the officer’s duties. For example, if an officer of a corporation is informed of some inside information by a close personal friend at a social event, the director is unlikely to have received the information ‘in the course of performing his or her duties’, and therefore the corporation will not be regarded as possessing the information pursuant to s 1042G(1)(a) of the Corporations Act. By contrast, if the officer was informed of the inside information by a client of the corporation at a formal business meeting, the officer would be more likely to be regarded as acquiring the information ‘in the course of performing his or her duties’ and so the information would also be considered to be possessed by the corporation pursuant to this provision.

However, the distinction between information acquired in a private capacity and information acquired in a professional capacity may not always be easily drawn. What would be the result if an officer acquired information in a context which had both private and professional aspects? How are such issues to be determined? The difficulties associated with this question can be demonstrated by the following example: An officer may, over time, become very friendly with a client of the corporation, so that they sometimes socialise together. Both the officer and the client may regularly, as part of their professional activities, attend industry functions for networking and marketing purposes. If the officer and client were to run into
each other at such a function and then, when the function ended, move onto a bar for a post-function drink where they discussed both professional and social topics, would information passed on to the officer by the client be information acquired in the course of the officer's performance of his or her duties? The attendance at the industry function suggests a professional capacity, but the post-function drinks are more likely to be described as a mere social occasion, giving the event a more private capacity. Is this really a satisfactory test, particularly in light of the reason for the prohibition of insider trading in Australia? Since insider trading is prohibited in order to attempt to protect and maintain market integrity, ensuring a fair and efficient market, the application of the prohibition to corporations should be focused on ensuring that the corporation does not obtain an unfair informational advantage, rather than on the manner in which the information comes into the possession of various officers or employees.

What then of information acquired in another professional capacity? It is not uncommon for officers of corporations to have other professional roles and responsibilities outside their 'primary' corporate role. For example, a director may be on the board of more than one corporation. Where such a director acquires inside information, how is it to be determined in which capacity he or she was acting when they acquired it? Austin and Ramsay consider that if one corporation controls enough shares in a second corporation to be able to appoint an officer of the first corporation as a director of the second, any information acquired by that officer while serving as a director of the second corporation will be possessed by the first corporation as well, because the information will be acquired by the officer in the course of performing his or her duties for the first corporation. However, in circumstances where a person is a director of two unrelated corporations, with no relationship or link between the two roles, there is generally no possession of information by one corporation if the director acquires the information while performing duties for the second corporation. Austin and Ramsay suggest that the common law agency rules may be relevant here, so that if a person is a director of two corporations and acquired information in the course of performing

48 Austin and Ramsay, above n 27, [16.220].
49 Re David Payne & Co Ltd [1904] 2 Ch 608.
50 Austin and Ramsay, above n 27, [16.220].
their duties for the second corporation, the first corporation would only be considered to possess the information if the director was under a duty to acquire it for, or disclose it to, the first corporation and could do so without breaching any duties to the second corporation from which it was acquired.\textsuperscript{51} Alternatively, if the director was regarded as being the ‘directing mind and will’ of both corporations at general law, each corporation could be regarded as possessing the information under the identification doctrine,\textsuperscript{52} as will be discussed below. Once again, insider trading laws should be directed to ensuring a corporation does not obtain an unfair informational advantage, rather than focusing on the capacity in which an officer was acting when he or she came to possess inside information.

Section 1042G(1)(b) of the \textit{Corporations Act} may also be used as a mechanism for determining that certain information is possessed by a corporation. As set out above, section 1042G(1)(b) states that:

\begin{quote}
if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing.
\end{quote}

Thus, in order for information to be possessed by a corporation in accordance with s 1042G(1)(b) of the \textit{Corporations Act} there are two requirements which must be satisfied: (i) the information must be known by an officer of the corporation; and (ii) the officer must know the information because he or she is an officer of the corporation.

The requirement that the person who knows the information must be an officer of the corporation is the same as for s 1042G(1)(a) and the definition of the term ‘officer’ in s 9 of the \textit{Corporations Act} will be equally applicable.


\textsuperscript{52} \textit{Endrez v Whitehouse} (1997) 24 ACSR 208, 228.
A requirement that a person knows information because he or she is an officer of a corporation is similar but not identical to the requirement in s 1042G(1)(a) of the Corporations Act that the officer acquired information in the course of performance of their duties. The phrase ‘because he or she is an officer’ is not defined in the Corporations Act or in any other Australian legislation. However, it clearly requires a link between the position the person occupies within the corporation and the circumstances which lead to the person ‘knowing’ the information. Consequently, it will necessarily lead to the same or a similar result as under s 1042G(1)(a) of the Corporations Act, where information acquired in a private capacity will not be attributed to the corporation. Thus, despite the variation in language used, there is likely to be little discernible difference between the operation of these two potential mechanisms of determining when a corporation will possess inside information.

Turning now to s 769B(3) of the Corporations Act, another potential means of determining when a corporation possesses inside information, it has been noted above that this statutory provision states that:

If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.

There are two requirements which must be satisfied to show that a corporation had a certain state of mind – in these circumstances, an awareness of information in order to amount to possession - under s 769B(3) of the Corporations Act: (i) a director, employee or agent of the corporation must be aware of relevant information; and (ii) the same director, employee or agent of the corporation must have engaged in certain conduct, within the scope of the person's actual or apparent authority.
Section 769B(3) of the *Corporations Act* is widely drafted so that any director, employee or agent can possess the relevant information. Unlike ss 1042G(1)(a) and 1042G(1)(b) discussed above, it is not limited to an officer of the corporation, but also applies to employees who possess relevant information. An employment relationship is typically one in which an employee enters into a contract of service with an employer, in contrast to a contract for services entered into between a principal and an independent contractor. While the totality of the relationship needs to be examined, the key criteria which are usually addressed to determine if there is an employment relationship are: the degree of control exercised, the mode of remuneration, whether there is an obligation to provide and maintain equipment, the obligation to work, the hours of work and provision of holidays, the deduction of income tax and the delegation of work.

Section 769B(3) of the *Corporations Act* also extends further to agents of a corporation. An agent of a corporation may also be a director, officer or employee of the corporation, but that is not necessarily the case. Agency is a relationship under which an agent agrees to act or, in the case of apparent authority, appears to act, on behalf of a principal, and under their control and direction, in relation to a particular matter, usually with the agent having the ability to effect a legal relationship between the principal and third parties. General law

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53 The term ‘director’ is extensively defined in s 9 of the *Corporations Act*, which states that:

“director” of a company or other body means:

(a) a person who:
   (i) is appointed to the position of a director; or
   (ii) is appointed to the position of an alternate director and is acting in that
        capacity;

   regardless of the name that is given to their position; and

(b) unless the contrary intention appears, a person who is not validly appointed as a director
    if:
    (i) they act in the position of a director; or
    (ii) the directors of the company or body are accustomed to act in accordance with
         the person’s instructions or wishes.


55 *International Harvester Co of Australia Pty Ltd v Carrigan’s Hazledene Pastoral Co* (1958) 100 CLR 644, 652; *Peterson v Maloney* (1951) 84 CLR 91, 94.
rules of agency will apply to determine whether a particular person is considered to be a corporation's agent (whether by express actual authority, implied actual authority or apparent authority). Independent contractors, who are not regarded as employees, will generally be considered to be agents of a corporation.

While it might be possible for a variety of agents who are engaged by corporations to come into the possession of inside information, the most likely agent to be representing a corporation while coming into possession of inside information is a securities broker, or another type of securities intermediary. Security broking services may be provided by specialist securities brokers, or investment banks which offer their clients a wide range of financial intermediary services.\(^\text{56}\)

Accordingly, it can be seen that s 769B(3) of the Corporations Act, in applying to directors, employees and agents of a corporation, extends significantly beyond the scope of ss 1042G(1)(a) and 1042G(1)(b). However, while under this provision any director, employee or agent may have the relevant state of mind, being the awareness of certain information amounting to possession, it is only considered to be the state of mind of the corporation if the same person engaged in certain conduct in the scope of their actual or apparent authority. The relevant conduct for insider trading can be described as the trading, or procuring of trading, in relevant financial products. As noted above, this is specifically set out in s 1043A of the Corporations Act, which has the title ‘Prohibited Conduct by Person in Possession of Inside Information’, where it is stated that an insider:

(1) …must not (whether as principal or agent):

\(^{56}\) Such services may include issuing, buying and selling of securities, and the giving of related financial advice, securities underwriting and financial advisory services in connection with takeovers, mergers and acquisitions, divestitures, restructurings, joint ventures and privatizations, as well as a range of trading, investment research, financing asset management and foreign exchange dealings: Andrew Tuch, ‘Investment Banks as Fiduciaries: Implications for Conflicts of Interest’ (2005) 2 Melbourne University Law Review 478, 486.
(c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or

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

An additional form of prohibited conduct is set out in s 1043A(2) of the Corporations Act, where it is stated that an insider must not:

- directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

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

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

This means that, for s 769B(3) of the Corporations Act to apply, the person in possession of the relevant inside information must also be the same person who traded, or procured the trading, in the relevant financial products, or engaged in tipping.

It must also have been within the person’s actual or apparent authority to do so. When assessing whether an act is done within the scope of authority – actual or apparent – general law principles of agency will be relevant. It will be necessary to establish that the person either had: (i) express actual authority;\(^{57}\) (ii) implied actual authority;\(^{58}\) or (iii)

\(^{57}\) As described in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502.
apparent authority,\textsuperscript{59} to engage in that conduct as part of their ordinary duties, or as part of the broader role for which they are retained by the corporation. Such a person is likely to include, for example, an employee specifically authorised to buy and sell shares on a corporation’s behalf, such as the proprietary trader whose activities were the subject of \textit{ASIC v Citigroup},\textsuperscript{60} and employees who advise clients of the corporation on share trading and facilitate such trading, such as securities brokers. As the relevant conduct includes the procuring of trading, it will also include a senior manager or executive who directs a more junior employee to engage in the actual trading.

Thus the ability to trade in financial products, or procure such trading, must be conduct in which the relevant person engages, with some form of authority. The fact that the actual trading in question was not expressly authorised or permitted will not prevent the conduct from being considered to be within the scope of that general authority.\textsuperscript{61}

Where the person who engaged in the relevant trading conduct also possesses the relevant inside information, s 769B(3) of the \textit{Corporations Act} will therefore operate so that the corporation will also be considered to possess the information. This section must be contrasted with ss 1042G(1)(a) and 1042G(1)(b) of the \textit{Corporations Act}, which do not contain any requirement that the relevant officer who possesses inside information also engage in the relevant trading conduct.

\textbf{The Application of General Law Agency Rules}

As the \textit{Corporations Act} does not provide an exclusive mechanism for determining when information is possessed by a corporation, as has been demonstrated earlier in this chapter,

\textsuperscript{58} As described in \textit{Hely-Hutchinson v Brayhead Ltd} [1968] 1 QB 549, 583.

\textsuperscript{59} As described in \textit{Crabtree-Vickers v Australian Direct Mail} (1975) 33 CLR 72.

\textsuperscript{60} (2007) 160 FCR 35. This case was discussed in detail in chapter 2 of this thesis, and will be a major focus of chapter 6.

\textsuperscript{61} See, for example, \textit{Meridian Global Funds Management Asia Limited v Securities Commission} [1995] AC 500.
general law mechanisms are still available as an additional means of determining when a corporation possesses inside information.

At general law, a corporation may be regarded as possessing information that is known to an authorised agent (who need not be the directing mind and will of a corporation) if the following conditions are satisfied: (i) the information is acquired by the agent in his or her capacity as a representative of the corporation;62 (ii) the agent has authority to receive information on the corporation's behalf and a duty to disclose the information to the corporation;63 and (iii) the agent is not under a duty to another person to refrain from communicating the information to the corporation.64 If an agent of a corporation satisfying these criteria possesses certain inside information, the corporation could also be considered to possess that information pursuant to the general law agency rules.

As has been noted above in the discussion concerning s 769B(3) of the Corporations Act, an agent of a corporation may also be a director, officer or employee of the corporation, but that is not necessarily the case, and general law rules of agency will apply to determine whether a particular person is considered to be a corporation's agent (again, whether by express actual authority, implied actual authority or ostensible authority). However, merely because an agent of the corporation knows certain relevant information, the corporation will not be found to possess it, if the agent did not acquire the information in their capacity as a representative of the corporation. This raises similar issues to those which arise in connection with ss 1042G(1)(a) and 1042G(1)(b) of the Corporations Act, where a corporation will only be regarded as possessing inside information if an officer of the corporation came into possession of the information in the course of performance of their duties, or because he or she was an officer of the corporation. Information acquired by an agent in another professional capacity, or privately, will not be information which the principal corporation is considered to possess.

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62 Societe Generale de Paris v Tramways Union Co Ltd (1884) 14 QBD 424.
64 Re Marseilles Extension Railway Company (1971) LR 7 Ch App 161.
Although the agent must have a duty to disclose the information to the corporation, in order for knowledge to be regarded as the information of the corporation, a failure to actually make such a disclosure will not prevent the corporation from being considered to possess the information.65 Thus, if the agent has acquired the information while representing the corporation, but does not pass the information onto the corporation as required, the corporation will still be regarded as possessing the information under general law agency rules.

If the information acquired by an agent is information which is confidential to another person, and it would breach the agent’s duty to that other person to disclose the information to the corporation, the agent is bound not to disclose the information and the corporation will not be regarded as possessing the information known to the agent.66 This will be the case even if the agent would otherwise have been obliged to disclose the information to the corporation.

**Possession of Information by the Directing Mind and Will of the Corporation**

As noted above, various cases have found that the words ‘is taken to’ in legislation similar to s 1042G(1)(a) of the **Corporations Act** indicate a lack of exclusivity and allow ‘the operation of the directing mind principle’67 to operate in addition to statutory mechanisms.

The general law identification doctrine provides that certain people act not just as agents of a corporation but as the corporation itself, so that their acts and intentions are taken to be those of the corporation, as discussed in chapter 4. Such persons, referred to as the directing mind and will of a corporation, may possess information which is then regarded as

being possessed by the corporation itself. Such persons include: (i) a person under the
direction of the shareholders in general meeting; (ii) the board of directors; and (iii) a person
who has the authority of the board of directors, given under the corporation's constitution,
and appointed by the shareholders.68

As the board of directors is responsible for the overall management of a corporation,
information which is known collectively to the board will automatically be imputed to the
corporation.69 Similarly, if the board of directors has delegated their day-to-day
management powers to a managing director or chief executive officer, the corporation will be
regarded as possessing information which is possessed by that managing director or chief
executive officer.70 However, if the information is possessed by one director only, who is not
a managing director, that will not be sufficient for the information to be considered to be
possessed by the corporation, as such a director will not ordinarily be regarded as the
directing mind and will of the corporation, unless the board has delegated particular authority
to that director.

The ultimate test of whether a person is the directing mind and will of a corporation is
whether the person manages and controls the actions of the corporation in relation to the
relevant activity.71 For example, while a corporation may have a managing director who
ordinarily would be regarded as the directing mind and will of the corporation in relation to
most of its activities, if a particular employee has been given authority to act for the
corporation in relation to a certain transaction or certain types of transactions (for example,
to undertake securities trading on the corporation's behalf) and the person has been vested
with 'authority, control, discretion and a significant degree of responsibility'72 in relation to the
relevant transactions, that employee can be regarded as the corporation's directing mind
and will in relation to the securities trading but not other activities. This makes it possible for

68 Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705, 713-714.
69 Houghton and Co v Nothard, Lowe and Wills Ltd [1928] AC 1, 18-19.
71 El Ajou v Dollar Land Holdings Ltd Plc [1994] 2 All ER 685.
72 The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1, [539].
more than one person to be regarded as a corporation’s directing mind and will in relation to a variety of different activities of the corporation.\footnote{Brambles Holdings v Carey (1976) 2 ACLR 126.} However, as there is no separation of the relevant actus reus and mens rea between different people within a corporation when the identification doctrine is relied upon, in order for a corporation to be regarded as engaging in the offence under this doctrine, the person who is the directing mind and will of the corporation will need to engage in, or satisfy, all the relevant elements, so that the person’s acts and intentions are regarded as those of the corporation. Accordingly, when applying the principles of the identification doctrine to the liability of corporations for insider trading, it will therefore be necessary to demonstrate that the person who is regarded as being the directing mind and will of the relevant corporation possessed the relevant information, had the necessary knowledge that it was inside information, and engaged in the relevant trading conduct.

**Collective Knowledge**

At general law it is possible, in certain circumstances, to find that a corporation has collective knowledge, comprised of separate pieces of information known by more than one person within the corporation.\footnote{The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1, 539; Krakowski v Eurolinx Properties (1995) 130 ALR 1, 16.} Not every piece of information held by separate employees can be aggregated,\footnote{The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1, 539.} and a distinction is made between the aggregation of mere knowledge of facts and the aggregation of a particular state of mind - while the first type of aggregation is often possible, the second is rare.\footnote{Ibid 540.}

In *Re Chisum Services*,\footnote{(1982) 7 ACLR 641.} it was acknowledged by Wootten J of the Supreme Court of New South Wales that the aggregation of knowledge of facts within a corporation was possible, but only if one of the people who possessed some of the information was under a duty to communicate it to the other person (for example, if the first person reported to the second

\footnote{Brambles Holdings v Carey (1976) 2 ACLR 126.}
\footnote{The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1, 539; Krakowski v Eurolinx Properties (1995) 130 ALR 1, 16.}
\footnote{The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1, 539.}
\footnote{Ibid 540.}
\footnote{(1982) 7 ACLR 641.}
person) or if both people in possession of separate pieces of information reported to the same superior and had a duty to report it to him or her.\(^78\)

As was stated by Owen J of the Supreme Court of Western Australia in *The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9)*:\(^79\)

> Whether a Court is prepared to infer that a company had particular knowledge or had a particular state of mind, based on collective knowledge of its officers and agents, depends on the circumstances of the case. It may depend on the type of information and the effect that such a piece of information may have (or should have had) on the particular employee. It will also depend on the particular employees’ positions, their duties and responsibilities, and their proximity to the relevant transaction.\(^80\)

Thus, at general law it may be possible for separate pieces of information possessed by more than one person to be aggregated, so that the corporation is deemed to possess all the information. However, there are no known cases concerning insider trading in which the concept of collective knowledge has been applied. The concept of collective knowledge is not expressly addressed by the *Corporations Act* in relation to insider trading, as s 1042G(1)(a) refers only to a body corporate being taken to possess information which ‘an officer’ possesses and s 1042G(1)(b) provides only that if ‘an officer’ of a body corporate knows any matter or thing, it is presumed that the body corporate knows it. Section 769B(3) of the *Corporations Act* links the state of mind of ‘a director, employee or agent’ with conduct that person engages in within the scope of his or her authority. However, it is possible, in the absence of express language to the contrary, to determine that if separate pieces of information were known to two different officers of a corporation, the corporation could be regarded as possessing all of that information which together amount to inside information.

\(^{78}\) Ibid 650.

\(^{79}\) (2008) 70 ACSR 1.

\(^{80}\) Ibid 542.
Relationship with Continuous Disclosure Obligations

It is useful to consider the continuous disclosure obligations which exist under the ASX Listing Rules and require listed public corporations to immediately notify the ASX:

once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material impact on the price or value of the entity’s securities.81

In chapter 19 of the ASX Listing Rules, the term ‘aware’ is given the following meaning:

An entity becomes aware of information if, and as soon as, an officer of the entity... has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.82

The continuous disclosure obligations contained in the ASX Listing Rules are considered to be ‘critical to the integrity and efficiency of the ASX market’.83 The ASX states that the definition of ‘aware’ is based on s 1042G of the Corporations Act.84 There is, however, an important distinction as, under the Listing Rules a corporation is regarded as being aware of information not only where the relevant person has come into possession of the information in the course of performance of their duties but also where they ought reasonably to have come into possession of the information.

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81 ASX Listing Rule 3.1.
82 Prior to May 2013, when this definition was amended, an entity was considered to be ‘aware’ of information when a director or executive officer of the entity had, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as director or executive officer of that entity.
83 ASX Listing Rules Guidance Note 8, Continuous Disclosure: Listing Rules 3.1 – 3.1B, July 2015, 4. As noted by the ASX, the view has also received judicial endorsement, as evidenced by the statement of the New South Wales Court of Appeal (comprised of Spigelman CJ, Beazley JA and Giles JA) in James Hardie Industries NV v ASIC [2010] NSWCA 332, [355], where it was noted that the policy objective of the continuous disclosure obligations is to ‘enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed.’
84 ASX Listing Rules Guidance Note 8, Continuous Disclosure: Listing Rules 3.1 – 3.1B, July 2015, 12.
disclosure obligations being interpreted to as having both subjective and objective elements, so that where a director or an executive officer of a corporation has access to information, even without actual knowledge of the contents, they are deemed to have it in their possession. Thus, despite the similarity underlying the rationale for continuous disclosure rules and insider trading laws – both existing to protect and maintain market integrity – the difference in significant aspects of the statutory requirements means that, in this context, the continuous disclosure obligations are of little assistance in interpreting the insider trading laws.

The ASX offers an explanation for including information that an officer ‘ought reasonably to have come into possession of’ as information that a corporation is ‘aware’ of, by stating that it is intended to prevent corporations from seeking to avoid their obligations and liability ‘by not bringing market sensitive information to the attention of its officers in a timely manner’. However, for insider trading laws, such a position clearly falls outside the judicial interpretation of the meaning of ‘possession’ of inside information. It is certainly not desirable that two sets of rules dealing with similar issues and with the same underlying rationale should differ significantly in this respect.

**Comparison between Different Mechanisms for Determining when a Corporation Possesses Information**

Having determined that there are a number of mechanisms which are available to determine when a corporation possesses information – the statutory provisions found in ss

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85 ASIC v Fortescue Metals Group Ltd [2011] FCAFC 19 (18 February 2011) [185]. Although the ultimate decision of the Full Court of the Federal Court was overturned on appeal by the High Court, the High Court did not address the issue of objective and subjective considerations in relation to the possession of information: Forrest v ASIC; Fortescue Metals Group Ltd v ASIC [2012] HCA 39 (2 October 2012).


87 While it is beyond the scope of this thesis to consider potential amendments to the continuous disclosure obligations under the Listing Rules as well the insider trading laws under the Corporations Act, it is hoped that any future reforms made to both the Corporations Act and the ASX Listing Rules may lead to greater consistency between these two interrelated sets of rules.
1042G(1)(a), 1042G(1)(b) and 769B(3) of the Corporations Act, and the general law principles of the identification doctrine and agency rules - the differences between these methods can now be analysed.

Sections 1042G(1)(a) and 1042G(1)(b) of the Corporations Act require the person who possesses the information to be an officer of the corporation; s 769B(3) of the Corporations Act has potential application to directors, employees and agents; and the general law requires the person to be the directing mind and will of the corporation, or an agent of the corporation with authority to receive the information and a duty to disclose it. While the person who is regarded as the directing mind and will of a corporation will generally be a ‘superior officer’\textsuperscript{88} and is likely to fall within the definition of ‘officer’ contained in s 9 of the Corporations Act, this will not necessarily be the case. Indeed, not all officers of a corporation would be regarded as the corporation’s directing mind and will.

Whether a particular agent with authority to receive the information and a duty to disclose it would be an officer or the directing mind and will of the corporation will obviously depend on the circumstances, but as an agent may be a person external to the corporation (such as a securities broker) it is certainly possible that such an agent would be neither an officer of the corporation nor the corporation’s directing mind and will. Such an agent may also be an employee who is neither an officer of the corporation or the directing mind and will. Sections 1042G(1)(a) and 1042G(1)(b) of the Corporations Act require either that the information known by the relevant officer came into his or her possession ‘in the course of the performance of the duties’ as an officer or was known by them ‘because he or she is an officer of the corporation’. Both require a clear nexus with the person’s role or duties as an officer of the corporation and therefore exclude information acquired in a private capacity. Section 769B(3) of the Corporations Act requires no such nexus with the person’s role or duties when coming into possession of the information, but does require that the person also engaged in the relevant conduct – in this case, the trading or procuring or trading in relevant financial products, or tipping. Under the general law, information obtained by an agent of the corporation with authority to receive the information and a duty to disclose it must also be

\textsuperscript{88} Tesco Supermarkets Ltd v Nattrass (1972) AC 153, 171.
obtained in the course of performing the agent's duties for the corporation. However, there is no such requirement for possession by a person who is the directing mind and will of a corporation, as the information will still be possessed by the corporation if it is possessed by the person who is its directing mind and will, regardless of how it is obtained. It also seems that the doctrine of collective knowledge has potential operation, so that a corporation may be regarded as being in possession of several different pieces of information each possessed by a different person within the corporation.

As noted in chapter 3, most of the examined jurisdictions do not have statutory provisions within the relevant legislation prohibiting insider trading which set out the particular manner in which the elements of the insider trading laws are to be applied to corporations – this includes the European Union, Germany, the United Kingdom, the USA, New Zealand and Hong Kong. As a result, the general principles of corporate criminal liability which are applicable in the relevant jurisdiction must be relied upon to determine the manner in which corporations may be found liable for insider trading. The exceptions are South Africa, where s 82(8) of the Financial Markets Act 2012 (South Africa) provides that, in connection with liability for insider trading, ‘the common law principles of vicarious liability apply’, and Singapore, which has a set of specific statutory rules to apply the elements of the insider trading offence to corporations. Section 226(1) of the Securities and Futures Act 2001 (Singapore) specifically provides that:

(a) a corporation is taken to possess any information which an officer of the corporation possesses and which came into his possession in the course of the performance of duties as such an officer; and

(b) if an officer of a corporation knows or ought reasonably to know any matter or thing because he is an officer of the corporation, it is to be presumed, until the contrary is proved, that the corporation knows or ought reasonably to know that matter or thing.
Section 236B(1) of the *Securities and Futures Act 2001* (Singapore) also provides that:

Where an offence of contravening any provision in this Part is proved to have been committed by an employee or an officer of a corporation (referred to in this section as the contravening person) —

(a) with the consent or connivance of the corporation; and

(b) for the benefit of the corporation,

the corporation shall be guilty of that offence as if the corporation had committed the contravention, and shall be liable to be proceeded against and punished accordingly.

I do not recommend that Australian insider trading laws adopt the model utilised in jurisdictions such as the European Union, Germany, the United Kingdom, the USA, New Zealand and Hong Kong, where there are no statutory provisions within the relevant legislation prohibiting insider trading providing for manner in which the elements of the insider trading offence are to be applied to corporations. Such a position would create additional uncertainty and in Australia would require reliance only on the common law agency rules or identification doctrine, or necessitate the use of the existing principles of corporate criminal responsibility contained in the *Criminal Code* but currently excluded from operation in respect of the insider trading offence. Instead, the drafting of improved statutory provisions to better provide for the attribution of the elements of the insider trading offence to corporations is the basis of my reform proposals.

The South African position, relying on vicarious liability, differs significantly from that adopted under Australian law. As was noted in chapter 4, vicarious liability is generally only imposed for regulatory offences and is not usually a model utilised for serious criminal offences. Accordingly, it is not recommended that the South African position be explored as an alternative on which to base proposed new amendments to Australian laws.

The Singaporean provisions are similar to those in Australia, having developed particular statutory rules for determining when a corporation possesses information, has knowledge and engages in an offence. Indeed, s 226(1)(a) of the *Securities and Futures Act 2001* (Singapore) is almost identical to s 1042G(1)(a) of the *Corporations Act*, but this is not
surprising since the Singaporean insider trading laws were modeled on the Australian provisions. As a result, the Singaporean position, as a set of insider laws derived from Australia’s own, does not provide an alternative base on which to model potential reforms to the Australian legislation.

The concurrent operation of both the general law and statute in this area, with overlapping but differing sets of rules, leads to significant difficulty and uncertainty in determining when a corporation possesses inside information, has knowledge that certain information is inside information, and engages in the relevant trading conduct. It is not desirable that such uncertainty exist, particularly as the general law rules have also been demonstrated to apply, but with their application untested judicially in this context. Legislative reform is vital in order to provide clarity and certainty in relation to the liability of corporations for insider trading.

It can be seen from the analysis above, that the different mechanisms which may be used to attribute the possession of information to corporations are capable of giving quite varied results. As has been noted, in ASIC v Citigroup, Jacobson J considered the operation of just one of these mechanisms, s 1042G(1)(a) of the Corporations Act, and did not address any other statutory mechanisms or the operation of the general law. By contrast, Qu regards the general law as relevant to rebut statutory presumptions which might otherwise apply elements of the offence to a corporation. A careful review of the element of possession leads to the necessary conclusion that both the statutory provisions and general law rules operate concurrently to provide a variety of mechanisms which can be used to establish that a corporation possesses inside information. The Corporations Act is silent on the application of the general law, but the operation of the general law is not excluded. This is in contrast to other sections of the Corporations Act which expressly refer to the general law – for example, s 133 of the Corporations Act excludes the operation of the general law in relation

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90 Qu, above n 18, 191.
to pre-registration contracts\textsuperscript{91} and s 236(3) of the \textit{Corporations Act} abolishes the general law derivative action,\textsuperscript{92} whereas s 185 of the \textit{Corporations Act} expressly provides that the statutory directors’ duties and obligations contained in ss 180 to 184 operate in addition those which exist under the general law.\textsuperscript{93}

Cases interpreting other pieces of legislation which use the same or very similar language to these provisions make it clear that the general law is not intended to be excluded and, in order to make sense of other provisions of the \textit{Corporations Act}, it is necessary to infer that the general law is also intended to apply. Even when considering the statutory tests alone, there is confusion as to which of those tests relate to the possession of information and which relate to the requisite knowledge. For example, as is noted earlier, there is a divergence of opinion as to whether s 1042G(1)(b) of the \textit{Corporations Act} applies only when attempting to determine whether a corporation had the requisite knowledge, or whether it is applicable to both the possession of information \textit{and} the requisite knowledge. This uncertainty needs to be resolved.

In addition to the uncertainty which exists in determining whether both statutory and general law mechanisms are available to determine when a corporation possesses information, each of various available mechanisms applies a different set of tests - some require that, for a corporation to be considered to possess information that a natural person possesses, the

\textsuperscript{91} Sections 131 and 132 of Part 2B.3 of the \textit{Corporations Act} set out the statutory rules relating to pre-registration contracts and s 133 provides:

This Part replaces any rights or liabilities anyone would otherwise have on the pre-registration contract.

\textsuperscript{92} Section 236(1) and (2) of the \textit{Corporations Act} provide for the statutory derivative action and s 236(3) provides:

The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

\textsuperscript{93} Section 185 of the \textit{Corporations Act} provides:

Sections 180 to 184:

\begin{itemize}
  \item[(a)] have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
  \item[(b)] do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).
\end{itemize}
natural person must be an officer of that corporation, whereas others will operate in
respect of any employee or agent who is able to act on the corporation's behalf. Some
require that there be a link or nexus with the person's role within the corporation. Some
require that possession of information must be linked to the relevant conduct, while others
do not. When the general law mechanisms are also considered, the confusion
compounds, as the principles of the identification doctrine will apply so that a corporation
possesses information which is possessed by its 'directing mind and will', with no necessary
connection with their role or other elements of the offence. The proposed reforms discussed
at the end of this chapter and set out in detail in chapter 7 are intended to remedy these
many problems. I propose to expand the class of persons who may possess information on
behalf of a corporation to include all officers, employees and agents, and to remove any
requirement that they must acquire the information in connection with the performance of
their duties or role. However, a corporation would only be regarded as engaging in insider
trading if the same person who possesses the relevant information, also has the knowledge
that it is inside information and engages in the relevant conduct.

ATTRIBUTING THE KNOWLEDGE ELEMENT TO CORPORATIONS

As noted above, the 'knowledge element' of the insider trading offence is that a person
knows, or ought reasonably to know, that the relevant information possessed is not generally
available, and that if it were, a reasonable person would expect it to be material. That is, the
person knows, or ought reasonably to know, that the relevant information is 'inside

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94 Corporations Act; ss 1042G(1)(a) and 1042G(1)(b).
95 Corporations Act, s 769B(3).
96 Corporations Act, ss 1042G(1)(a), 1042G(1)(b), and 769B(3).
97 Corporations Act, s 769B(3).
98 Corporations Act, ss 1042G(1)(a) and 1042G(1)(b).
99 An earlier draft of this section of the thesis was published as the following journal article: Juliette Overland,
'Corporate Liability for Insider Trading: How Does a Company have the Necessary 'Mens Rea'?' (2010) 24
Australian Journal of Corporate Law 266.
Therefore, the next issues to be addressed in this chapter are how a corporation comes to have the requisite knowledge of these matters, and when it is that a corporation ‘ought reasonably to know’ something.

As there has never been a criminal prosecution brought against a corporation for insider trading in Australia, and no successful civil penalty proceedings, the application of the knowledge element of insider trading to a corporation has never been considered judicially. However, as will be shown, this important issue concerning the liability of corporations for insider trading is unnecessarily unwieldy and complex. I will demonstrate that there are currently a number of statutory mechanisms which can be used to determine that a corporation has certain knowledge, in addition to the general law principles of the identification doctrine.

**Statutory Mechanisms for Establishing Knowledge**

There are two provisions in the *Corporations Act* which could potentially be used to determine when a corporation has certain knowledge, and which therefore may be applicable to the knowledge element of insider trading: (i) s 104G(1)(b) of the *Corporations Act*; and (ii) s 769B(3) of the *Corporations Act*.

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100 As set out above, the knowledge element of the insider trading offence, contained in s 1043A(1)(b) of the *Corporations Act*, is that:

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

The matters specified in paragraphs (a) and (b) of the definition of ‘inside information’ in s 1042A of the *Corporations Act* are:

(a) the information is not generally available; and

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

101 It was not necessary for this issue to be addressed in *ASIC v Citigroup* (2007) 160 FCR 35 due to the determinations made by the Court in relation to the other elements of insider trading.
Section 1042G(1)(b) of the Corporations Act has already been examined above in the context of the possession element. In order to establish that a corporation had certain knowledge under the operation of this section, it must be established that: (i) an officer of the corporation had the relevant knowledge; and (ii) the officer had the knowledge because he or she was an officer of the corporation. The application of this section in relation to the knowledge element does differ from its application to the possession element, as it is more difficult to determine how a person is likely to have knowledge of the qualities of certain information because he or she is an officer of a corporation.

Section 1042G(1)(b) of the Corporations Act requires an officer of the corporation to have the relevant knowledge. Thus, the definition of ‘officer’ set out in s 9 of the Corporations Act must be satisfied, so the person will generally need to be a director, secretary or senior executive of the corporation. Then, the relevant officer must have the knowledge because he or she was an officer of the corporation. As noted above, the phrase ‘because he or she is an officer’ is not defined in the Corporations Act or in any other Australian legislation, but in cases concerning directors’ duties and fiduciary obligations the courts make it clear that there must be a causal link between the position the person occupies within the corporation and the reason they have acquired that particular knowledge, thereby excluding knowledge acquired or resulting from a private role or as a member of the general public.

102 Section 1042G(1)(b) of the Corporations Act provides that ‘if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing.’ It was noted above that some commentators view s 1042G(1)(b) of the Corporations Act as relevant only to the knowledge element of insider trading, whereas others consider that it is also applicable to both the possession element and the knowledge element. On either interpretation, s 1042G(1)(b) of the Corporations Act is relevant to the knowledge element.

103 This definition was set out in full and discussed above.

104 See, for example, Peso Silver Mines v Cropper [1966] SCR 673; Regal Hastings v Gulliver [1967] 2 AC 134; and Boardman v Phipps [1967] 2 AC 46, as discussed above.
While this may be a concept which is fairly easy to apply to the possession element of insider trading – to determine whether a person came into the possession of information because of their position within a corporation – it is much more difficult to apply to the knowledge element. This element obviously requires a person to have knowledge of certain qualities of the information – whether it is generally available and likely to be material – so how can it be said that a person has that sort of knowledge because he or she is an officer of a particular corporation? If the person acquires the relevant information in connection with their role as an officer – for example, while working on a particular transaction – and it is made clear to them by the person imparting the information that it is confidential and would be likely to affect the price of certain financial products, it could potentially be said that the officer had such knowledge because of their position. However, if they came into possession of the information in connection with their role as an officer, but were not expressly told that it was confidential and would be likely to affect the price of certain financial products, it is difficult to conclude that the person would have that knowledge because he or she was an officer of the corporation.

It may be the case that certain people are more likely to be aware of these qualities of information - when it is generally available and when it is likely to be material – because they have a certain occupation. For example, a proprietary trader or securities broker is more likely to be knowledgeable about such matters than many other employees or executives within an organisation. However, merely because a person has a certain occupation which enables him or her to better assess the qualities of certain information than others, and also happens to be an officer of a corporation, does not necessarily lead to the conclusion that he or she had that knowledge because they are an officer. Thus, the application of this provision to the knowledge element of insider trading is unclear and contains significant ambiguity.

As noted above, s 769B(3) of the Corporations Act provides that:

If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show
that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.\textsuperscript{105}

Section 769B(3) of the \textit{Corporations Act} is clearly also relevant to the knowledge element of insider trading, due to the inclusion of ‘knowledge’ as the definition of ‘state of mind’ in s 769B(10)(c) and the fact that almost identical provisions which give rise to criminal offences under other pieces of legislation\textsuperscript{106} are considered to apply to the fault element of those other offences.\textsuperscript{107}

In order to establish that a corporation had certain knowledge under s 769B(3) of the \textit{Corporations Act}, there are two requirements which must be satisfied: (i) a director, employee or agent of the corporation must have the relevant knowledge; and (ii) the same director, employee or agent of the corporation must have engaged in the relevant conduct, within the scope of the person’s actual or apparent authority.

As noted above in relation to the ‘possession element’ to which this section can also be applied, while any director, employee or agent may have the relevant knowledge, it is only considered to be the knowledge of the corporation if the same person engaged in the relevant conduct which, for insider trading, is not the physical element - the possession of the inside information – but the trading, or procuring of trading, in financial products, or tipping – the ‘trading element’. Accordingly, for s 769B(3) of the \textit{Corporations Act} to apply so that the corporation is regarded as having the relevant knowledge, the person with the knowledge that the information is inside information must also be a person who engaged in the relevant trading conduct.

\textsuperscript{105} As previously set out, s 769B(10)(c) of the \textit{Corporations Act} provides that:

\begin{quote}
A reference to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reason for the person's intention, opinion, belief or purpose (emphasis added).
\end{quote}

\textsuperscript{106} For example, s 84(1) of the former \textit{Trade Practices Act 1974} (Cth) and s 12GH(1) of the \textit{Australian Securities and Investments Commission Act 2001} (Cth).

\textsuperscript{107} For example, Clough and Mulhern, above n 33, 127 and Gillies, above n 34, 74.
It must also have been within the person's actual or apparent authority to trade or procure trading in the relevant financial products, or engage in tipping. As discussed above, this means that the general law principles of agency must be relied upon to establish such authority as part of their ordinary duties, or as part of the broader role for which they are retained by the corporation. However, the fact that the actual trading conduct in question was not specially authorised or permitted will not prevent the conduct from being considered to be within the scope of that general authority. 108

Where the person who engaged in the relevant conduct knows that the relevant information is not generally available and would be likely to be material, s 769B(3) of the Corporations Act will therefore operate so that the corporation is considered to have such knowledge. This section can be contrasted with s 1042G(1)(b) of the Corporations Act, which does not require any link between the knowledge element and the trading element of insider trading.

The Application of General Law Principles

As well as utilising the statutory mechanisms in ss 1042G(1)(b) and 769B(3) of the Corporations Act, general law principles may also be relevant to determine when a corporation has the requisite knowledge.

As noted above, s 1042G(2) of the Corporations Act states that 'this section does not limit the application of section 769B in relation to this Division', indicating that ss 1042G and 769B of the Corporations Act can both be applied and that s 1042G(1)(a) is not the exclusive means of determining when a corporation possesses inside information. For the same reasons, as it is part of the same section, s 1042G(1)(b) of the Corporations Act is clearly not intended to be the exclusive means of determining when a corporation has the knowledge that certain information is inside information.

Likewise, s 769B(3) of the Corporations Act does not appear to require exclusivity, or the exclusion of the general law rules, as it uses the phrase ‘it is sufficient to show’, which does indicate an intention that it be exclusive, or that the general law should be excluded. Section 84(1) of the former Trade Practices Act 1974 (Cth) contained a provision almost identical to s 769B(3) of the Corporations Act, and in a number of cases the courts have determined that such a provision extends liability beyond the general law rules, but does not exclude them. For example, in the case of Universal Telecasters (Qld) Ltd v Guthrie, the liability of a television station for broadcasting an advertisement that allegedly contained ‘false or misleading statements concerning the existence of or amounts of price reductions’ in breach of s 53(e) of the Trade Practices Act 1974 (Cth). The corporation’s sales manager looked after all dealings and communications concerning the advertisement, including viewer complaints. In order to be able to rely on a defence in s 85(3) of the Trade Practices Act, the television station needed to establish that it ‘did not know and had no reason to suspect that its publication would amount to a contravention.’ Section 84(1) of the Trade Practices Act provided that ‘where it is necessary to establish the intention of the corporation, it is sufficient to show that a servant or agent had the particular intention.’ The Full Court of the Federal Court found that the language in this section did not exclude the general law and the identification doctrine was still relevant to determine whether or not the knowledge of the sales manager should be attributed to the corporation. Although the sales manager had received complaints about the advertisement and should have had reason to suspect the contravention, the Court determined by majority that this did not amount to intention within the scope of s 84(1), and that the sales manager was not the directing mind and will of the television station and therefore that his knowledge was not that of the corporation itself.

109 Universal Telecasters (Qld) Ltd v Guthrie (1978) 32 FLR 360; Walplan Pty Ltd v Wallace (1985) 8 FCR 27; Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd (1996) ATPR 41-525; Ballard v Sperry Rand Aust Ltd (1975) 8 ALR 696; See also Clough and Mulhern, above n 33, 127; Gillies, above n 34, 76.

110 (1978) 32 FLR 360.

111 Emphasis added.

112 Bowen CJ and Franki J (Nimmo J dissenting).
Thus, in addition to the statutory mechanisms, it appears that general law rules can also be used to determine when a corporation has the necessary knowledge to satisfy the knowledge element of insider trading.

**Knowledge of the Directing Mind and Will of the Corporation**

As discussed above and in chapter 4, there are certain persons who may be considered to be the ‘directing mind and will’ of a corporation under the identification doctrine, so that their acts and intentions are taken to be those of the corporation itself. Depending on the circumstances, such persons may include the board of directors, a managing director or a superior officer of the corporation, so long as they have ‘full discretion to act independently of instruction’ from the board.\(^{113}\) If a person who is considered to be the directing mind and will of a corporation has the necessary knowledge that certain information is inside information, the corporation will therefore be regarded as having that knowledge. There is no need to demonstrate that the person, or persons, regarded as the corporation’s directing mind and will acquired the relevant knowledge because they are the directing mind and will of the corporation, or in the course of performing their duties. However, the need to demonstrate that the person who is the directing mind and will of the corporation has engaged in, or satisfies, all the relevant elements means that it will be necessary to show that the person who is the directing mind and will of the relevant corporation possessed the relevant information, had the necessary knowledge that it was inside information, and engaged in the relevant trading conduct.

Such a person may be anyone who manages and controls the actions of the corporation in relation to the relevant activity\(^{114}\) which, when considering insider trading, may be a person who has been given authority to undertake securities trading on the corporation’s behalf, regardless of whether they are a director or officer of the corporation, so long as the person is entitled to undertake such activities without direction or instruction. In the case of *ASIC v*

\(^{113}\) *Tesco Supermarkets Ltd v Nattrass* (1972) AC 153, 171 (Lord Reid).

\(^{114}\) *El Ajou v Dollar Land Holdings Ltd Plc* [1994] 2 All ER 685.
Citigroup, it is unlikely that Mr Manchee, the proprietary trader who had engaged in the relevant trading in Patrick shares, could be regarded as the directing mind and will of Citigroup in relation to proprietary trading, because it was clear that he was one of five proprietary traders who reported to Mr Darwell, the Head of Equities and Derivatives at Citigroup, and he was clearly subject to Mr Darwell’s direction and instruction.116

Knowledge of an Agent of the Corporation

As discussed above, at general law a corporation can be considered to possess information which is possessed by an agent, who need not be the directing mind and will of the corporation, if certain conditions are satisfied. However, such rules appear to more obviously relate to the actual possession of information rather than knowledge or a state of mind. Cases on this topic concern the imputation of knowledge about certain facts or circumstances that a corporation was deemed (or not deemed) to know, due to the possession of that information by an agent, not knowledge amounting to an intention or ‘mens rea’. Additionally, the relevant criteria are very difficult to apply to knowledge amounting to a corporation’s state of mind. For example, a requirement that the agent have authority to receive information on behalf of the corporation and a duty to disclose it, is applicable to knowledge of certain matters or facts, but not a subjective state of mind. How can a person be authorised to have a certain state of mind or knowledge? It is not possible to say that an agent can be authorised to know that certain information is not generally available or is likely to be material. However, it could be possible that an agent who is authorised to receive information on behalf of a corporation and who has a duty to disclose it, might then have the knowledge that the information is inside information. While this issue does not appear to have been considered judicially, the potential application of agency rules to the knowledge element of insider trading is clearly problematic and uncertain.

117 See, for example, Societe Generale de Paris v Tramways Union Co Ltd (1884) 14 QBD 424; Beach Petroleum NL and Claremont Petroleum NL v Johnson (1993) 115 ALR 411; Re Marseilles Extension Railway Company (1971) LR 7 Ch App 161; International Harvester Co of Australia Pty Lt v Carrigan’s Hazledene Pastoral Co (1958) 100 CLR 644; Peterson v Maloney (1951) 84 CLR 91; Kelly v Cooper [1993] AC 205.
Comparison between Different Mechanisms for Establishing the Knowledge of Corporations

Both the statutory mechanisms under ss 1042G(1)(b) and 769B(3) of the Corporations Act, which can be used to determine when a corporation has certain knowledge, expressly require that a nexus with the person’s role or authority be demonstrated, either because the relevant director, employee or agent with the knowledge engaged in the relevant conduct in the scope of their actual or apparent authority,\footnote{Corporations Act, s 769B(3).} or because the relevant officer had the knowledge \textit{because} he or she was an officer of the corporation.\footnote{Corporations Act, s 1042G(1)(b).} This is not explicitly required under the general law principles of the identification doctrine, as it does not matter how the directing mind and will came to have the relevant knowledge, only that such knowledge should be regarded as the knowledge of the corporation. The general law rules of agency are difficult to apply to knowledge of information, rather than possession, and would create significant uncertainty if relied upon in this context.

Section 769B(3) of the Corporations Act enables the knowledge of a corporation to be established by showing that a director, employee or agent of the corporation had the relevant knowledge and engaged in the ‘relevant conduct’, \textit{within the scope of their actual or apparent authority}. However, s 1042G(1)(b) of the Corporations Act does not require the person with the requisite knowledge to have also engaged in the relevant conduct. General law principles of the identification doctrine do not expressly contain any such requirement in relation to conduct, although it will generally be necessary to show that the person who is the directing mind and will of a corporation had the requisite intention and engaged in certain conduct which should necessarily be regarded as those of the corporation.

The general law ordinarily requires that the person who is considered to be the directing mind and will of the corporation carries out a ‘function of management’ with authority before their state of mind can be attributed to the corporation. Section 1042G(1)(b) requires that
the person with the relevant knowledge be an officer of the corporation, but s 769B(3) of the
Corporations Act has no such requirement – encompassing any director, employee or agent - and
does not require the person to have any particular role or degree of authority, so long as the
relevant conduct they engage in falls within their own area of authority, regardless of how
limited that authority may be. They need not have the ability to act independently or without
instruction as is required under the general law to demonstrate that a person is the
 corporation’s directing mind and will.

Thus, there is great divergence between the different statutory and general law mechanisms
as to the status of the person who may have the relevant knowledge, whether there are any
particular requirements as to how they came to have such knowledge, and whether there
must also be any link to the relevant conduct for the offence.

This divergence leads to significant uncertainty as to how the knowledge element of insider
trading is actually to be applied to corporations, where there are three potential mechanisms – s
1042G(1)(b) of the Corporations Act, s 769B(3) of the Corporations Act and the general
law identification doctrine - available to attribute that knowledge element to a corporation,
each with different requirements. Commercial and legal certainty would obviously benefit
from a more clearly articulated application of the law in this respect. The reforms proposed in
this thesis are intended to overcome this uncertainty by excluding the general law
provisions and creating one statutory mechanism for attributing knowledge to a corporation.
The new statutory provisions would provide that a body corporate is taken to know, or to
ought reasonably to know, that information is inside information if an officer, employee or
agent of the body corporate knows, or ought reasonably to know, this. These provisions
would not require that the officer, employee or agent have such knowledge as a result of
their position or role within the corporation, but would require that the person who has such
knowledge be the same person who engaged in or authorised the relevant trading conduct.
Demonstrating that a Corporation ‘Ought Reasonably’ to Have Had Certain Knowledge

As well as determining when a corporation is regarded as ‘knowing’ that certain information is inside information, it also needs to be determined when a corporation will be in a position where it ‘ought reasonably to know’ that certain information is inside information, as the knowledge element set out in s 1043A(1)(b) of the Corporations Act requires that it be demonstrated that:

the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of inside information in section 1042A are satisfied in relation to the information.\(^{120}\)

Thus, it needs to be determined when a corporation ‘ought reasonably’ to know that certain information is not generally available and is likely to be material.

Section 1042G(1)(d) of the Corporations Act states that:

for the purpose of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate ought reasonably to know that matter or thing.

Section 1043M(2) provides a defence to insider trading if the other party to the trade also knew, or ought reasonably to have known, of the inside information before trading.\(^{121}\) Thus,

\(^{120}\) Emphasis added.

\(^{121}\) Section 1043M(2) of the Corporations Act provides that:

In a prosecution brought against a person for an offence based on subsection 1043A(1) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person’s possession:
while s 1042G(1)(d) might appear to assist in determining when a corporation ‘ought reasonably to know’ something, the fact that it is expressly limited to s 1043M(2)(b) of the Corporations Act means that it does not apply to the knowledge element of insider trading.

By contrast, s 1002E of the previous legislative regime, the repealed Corporations Law, provided that:

(b) if an officer of a body corporate knows or ought reasonably to know any matter or thing because he or she is an officer of a body corporate, it is to be presumed that the body corporate knows or ought reasonably to know that matter or thing.

Unlike the current s 1043A(1)(b) of the Corporations Act, s 1002E(b) of the Corporations Law was not limited in application to a provision such as the current s 1043M. Thus, while the current regulatory regime provides in s 1042G(1)(b) of the Corporations Act that if an officer knows a matter or thing because he or she is an officer of a body corporate, the body corporate is presumed to know that matter or thing, there is no equivalent provision in relation to matters or things that the officer, and therefore the body corporate, ought reasonably to know. The Explanatory Memorandum to the Financial Services Reform Bill 2001, which inserted the current insider trading regulatory regime into the Corporations Act, does not reveal any reason why an equivalent provision was not incorporated into the Corporations Act.

However, even if such a provision did exist, in the same way that it is difficult to apply s 1042G(1)(b) to show that a person knew that certain information was inside information ‘because’ they were an officer of a corporation, as discussed above, it would also be difficult to demonstrate that a person ought reasonably to know that information was inside information because he or she was an officer.

(b) it is a defence if the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.
There are no other provisions in the Corporations Act which would apply to assist in determining when a corporation ‘ought reasonably to know’ something. Thus, there appears to be a gap in the legislation in relation to the application of this aspect of the knowledge element to corporations. As discussed in chapter 2, the courts have determined that, when considering whether a person ‘ought reasonably to know’ that certain information was not generally available and was likely to be material, the question is subjective to the particular defendant, having regard to all of the relevant circumstances.\(^{122}\) This means that one considers whether the particular defendant in question ought to have had such knowledge, so in the case of a corporation it would require an assessment as to whether that particular corporation ‘ought reasonably’ to have known that the information was inside information.

Knowledge of directors, officers, agents or employees might be relevant to this assessment, but without any guidance from the statute or the courts as to when a corporation should be regarded as being in a position where it ‘ought reasonably’ to have that knowledge, significant uncertainty exists. As this matter has never been considered judicially, the uncertainty is further exacerbated.

**International Comparisons**

Singapore is the only jurisdiction amongst those examined which has a specific provision providing for the attribution of knowledge to a corporation. As noted above, s 226(1)(b) of the Securities and Futures Act 2001 (Singapore) specifically provides that:

> if an officer of a corporation knows or ought reasonably to know any matter or thing because he is an officer of the corporation, it is to be presumed, until the contrary is proved, that the corporation knows or ought reasonably to know that matter or thing.

This provision combines the concepts contained in ss 1042G(1)(b) and 1042G(1)(d) of the Corporations Act.\(^{123}\) However, as has been noted, under the Corporations Act it is only

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123 As noted above, s 1042G(1)(b) of the Corporations Act provides that:
presumed that a corporation ‘ought reasonably to know’ a matter or thing that an officer of the body corporate ought reasonably to know because he or she is an officer of the body corporate for the purposes of s 1043M(2)(b), when a defence to insider trading is available if the other party to the trade also knew, or ought reasonably to have known, of the inside information before trading. The Singaporean provision does not limit the circumstances in which a corporation ‘ought reasonably to know a matter or thing’, so the provision is of wider application in connection with knowledge that a corporation has, or ought reasonably to have, which could include knowledge that certain information is inside information. In that respect, s 226(1)(b) of the Securities and Futures Act 2001 (Singapore) is very similar to s 1002E of the repealed Corporations Law.

In the reforms set out in this thesis, I propose that a new provision be included in the Corporations Act, so that a body corporate would be taken to know, or to ought reasonably to know, that information is inside information if an officer, employee or agent of the body corporate has, or ought reasonably to have, that knowledge. However, the provision would not import a requirement that the officer, employee or agent have such knowledge (or that the officer, employee or agent ought reasonably to have such knowledge) because he or she is such an officer, employee or agent of the corporation. As previously identified above, it is extremely difficult to show that a person knew, or ought reasonably to have known, that certain information was inside information ‘because’ of a position he or she held within a corporation.

As has been noted, the application of the knowledge element of insider trading to a corporation has not been considered judicially. However, an examination of the Corporations Act indicates that both statutory provisions and general law rules can be used

if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing.

Section 1042G(1)(d) of the Corporations Act provides that:

for the purposes of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate ought reasonably to know that matter or thing.
to determine when a corporation knows that certain information is inside information. The differences and discrepancies between the various rules create significant uncertainty. Each of the rules attribute to the corporation the state of mind of a person within or connected to the corporation in some way – whether an officer, director, employee, agent or other person. The status of such a person and the nature of the connection required vary from rule to rule. Some rules require a nexus between the person's state of mind and their position within the corporation, and others do not. Some rules require that the person who had the relevant state of mind also engaged in the relevant conduct, while others have no such requirements. This creates further uncertainty when it becomes clear that both the general law and statutory rules are applicable when determining when a corporation actually engages in the relevant conduct and these rules contain variations similar to those found when attempting to determine the corporation's state of mind. Additionally, it is particularly unclear how it can be determined when a corporation 'ought reasonably to know' that information is inside information. All of these ambiguities lead to the clear conclusion that it is increasingly difficult to be certain when the knowledge element will be made out when applying the insider trading laws to corporations, and that reform is needed in this area.

ATTRIBUTING THE TRADING ELEMENT TO CORPORATIONS

As has been noted above, the final element of the insider trading offence, as set out in s 1043A(1) of the Corporations Act, is that:

- the insider must not (whether as principal or agent):
  - apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
  - procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Further prohibited conduct is set out in s 1043A(2), pursuant to which an insider must not:
directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

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

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

The conduct described in s 1043A(1)(c) relates in essence to trading in relevant financial products – whether by applying for them, acquiring or disposing of them, or entering into an agreement to do any of those things. Section 1043A(1)(d) concerns the procuring of another person to do any of those things and s 1043A(2) relates to tipping. While this is the conduct which a person who possesses inside information, and who knows or ought reasonably to know that the information is inside information, must not engage in, it is not the ‘physical element’ of the insider trading offence.\(^\text{124}\)

The issue to be determined in relation to the trading element in this chapter is how a corporation can be regarded as engaging in the relevant conduct of trading, or the procuring of trading, in relevant financial products, or tipping. I will demonstrate that the existing statutory mechanisms, and general law principles of the identification doctrine, can both be used to determine when a corporation has engaged in this form of conduct.

### Statutory Mechanism for Determining when a Corporation has Engaged in Conduct

Unlike the ‘possession element’ and the ‘knowledge element’ of insider trading, Division 3 of Part 7.10 of the Corporations Act (Market Misconduct and Other Prohibited Conduct

\(^{124}\) As has been noted above, s 1043A(3)(a) of the Corporations Act states that ‘for the purposes of the application of the Criminal Code’ in relation to an insider trading offence under s 1043A(1), ‘paragraph (1)(a) is a physical element.’ Section 1043A(1)(a) relates not to the trading or procuring of trading in financial products, but to the possession of information.
Relating to Financial Products and Financial Services) does not contain a specific provision relating to corporations and the ‘trading element’ of the offence. Accordingly, there is only one provision in the Corporations Act which could be used to determine when a corporation engages in certain conduct, and which may therefore be applicable to the trading element of insider trading – s 769B(1) of the Corporations Act.

Section 769B(1) of the Corporations Act provides that:

Subject to subsections (7) and (8), \textit{conduct} engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body, within the scope of the person’s actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken for the purposes of this Chapter\textsuperscript{126} or a proceeding under this Chapter, to have been engaged in also by the body corporate.

Accordingly, in order for conduct to be attributed to a corporation in accordance with s 769B(1) of the Corporations Act, there are two possible mechanisms available, either of which may be satisfied.

Under the first: (i) the conduct must be undertaken on behalf of the corporation; (ii) the conduct must be engaged in by a director, employee or agent of the corporation; and (iii) the conduct must be within the scope of the person’s actual or apparent authority.

\textsuperscript{125} Sections 769B(7) and 769B(8) of the Corporations Act are not relevant in this context, as they exclude the operation of the section in connection with the provision of financial services and financial products in certain circumstances.

\textsuperscript{126} Being Chapter 7 of the Corporations Act, in which the insider trading prohibition is contained.
Under the second: (i) the conduct must be undertaken on behalf of the corporation; (ii) the conduct may be engaged in by any person; (iii) the conduct must be done at the direction, or with the consent or agreement, of a director, employee or agent of the corporation; and (iv) it must be within the scope of the actual or apparent authority of the director, employee or agent to give the relevant direction, consent or agreement.

The phrase ‘conduct engaged in on behalf of a body corporate' has not yet been considered in this thesis, as it is not used in any of the statutory provisions analysed in relation to the possession element and knowledge element of the insider trading offence. When considering the meaning of this phrase, it is useful to consider the operation of other legislation which uses the same terminology. Section 84(2) of the former Trade Practices Act 1974 (Cth) was expressed in very similar language to s 769B(1) of the Corporations Act, and it stated that:

Any conduct engaged in on behalf of a body corporate by a director, agent or servant of the body corporate or by any other person at the direction or with the consent or agreement (whether express or implied) of a director, agent or servant of the body corporate shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.127

In cases that interpreted the meaning of s 84(2) of the former Trade Practices Act 1974

127 Section 84(2) of the Competition and Consumer Law 2010 (Cth), which has replaced the former Trade Practices Act 1974 (Cth), now provides in language that is even more similar to s 769B(1) of the Corporations Act, that:

Any conduct engaged in on behalf of a body corporate:
(a) by a director, employee or agent of the body corporate within the scope of the person’s actual or apparent authority; or
(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.
(Cth), the courts determined that a person is taken to engage in conduct ‘on behalf of’ a corporation if the person intends to do an act ‘as a representative of’ or ‘for’ the corporation, or in the course of the corporation’s business, affairs or activities. The phrase ‘on behalf of’ does not have a strict legal meaning but it requires ‘some involvement’ with the ‘activities of the corporation’ and will clearly encompass acts done by an employee in the course of his or her employment, as well as activities of a broader nature. It has a similar meaning to the phrase ‘in the course of [a] body corporate's affairs or activities’.

This means that, in relation to insider trading, the relevant conduct must be engaged in on the corporation's behalf, and not by a person intending to trade on their own account. By way of example, the proprietary trader in ASIC v Citigroup, was clearly acting ‘on behalf’ of Citigroup when engaged in proprietary trading – buying and selling securities in the corporation’s name, as part of the activities permitted by the terms of his employment, from which the corporation was intended to benefit. However, an employee of a corporation, buying shares in his or her own name, intending to keep any personal profits resulting from the trading, will not be acting on behalf of that corporation.

Section 769B(1) of the Corporations Act is widely drafted so that any director, employee or agent can engage in the relevant conduct. The term ‘director’ and the meanings of the terms ‘employee’ and ‘agent’ have already been discussed in detail above. With such a broad category of persons specified, and subject to satisfying the other necessary limbs of the mechanisms in s 769B(1), any trading, procuring of trading or tipping engaged in by any director, employee or agent of the corporation will be regarded as having been engaged in

129 Walplan Pty Ltd v Wallace (1985) 8 FCR 27, 37 (Lockhart J).
130 Ibid.
132 As discussed elsewhere in this thesis, the insider trading claims made against Citigroup were not successful for a number of reasons, including the fact that the trader was not considered to have actually possessed any inside information and, because he was not an officer of Citigroup, Jacobson J determined that any information he might have possessed was not to be taken to be possessed by Citigroup anyway.
by the corporation.

When considering whether certain conduct is within the scope of a person's actual or apparent authority, it is worth noting that s 349 of the former Workplace Relations Act 1996 (Cth) used language very similar to s 769B(1) of the Corporations Act, providing that:

Any conduct engaged in on behalf of a body corporate by:
(a) an officer, a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or
(b) any other person at the direction or with the consent or agreement (whether express or implied) of an officer, director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the officer, director, employee or agent;

shall be taken, for the purposes of this Act, to have been engaged in also by the body corporate.

The meaning of the phrase ‘within the scope of his or her actual or apparent authority’ was considered in this context by the Full Court of the Federal Court in Hanley v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union. In that case, the Court stated, in a joint judgment, that:

there must at least be circumstances which would justify a belief on the part of a person dealing with the "officer, director, employee or agent" that that "officer, director, employee or agent" is acting with authority.

The fact that certain conduct may have been unlawful will not place that conduct outside the scope of a person’s authority – otherwise a corporation would be able to avoid liability for all unlawful conduct engaged in by its officers, employees or agents.

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133 (2000) 100 FCR 530.
134 Ibid, 544 (Ryan, Moore and Goldberg JJ).
Concepts of actual and apparent authority are well defined in the general law in relation to agency, and have been discussed above in relation into the possession element and knowledge element. Here, it will be necessary to demonstrate that the person either had sufficient authority to trade or procure trading in the relevant financial products or engage in tipping as part of their ordinary duties, or as part of the broader role for which they are retained by the corporation. Such a person is likely to include, for example, an employee specifically authorised to buy and sell shares on a corporation’s behalf, such as the proprietary trader whose activities were the subject of ASIC v Citigroup, and employees who advise clients of the corporation on share trading and facilitate such trading, such as securities brokers.

Thus the ability to trade in financial products, or procure such trading, or give advice in relation to those activities, must be conduct in which the relevant person engages, with some form of authority. The fact that the actual trading in question was not specially authorised or permitted will not prevent the conduct from being considered to be within the scope of that general authority.

If the relevant trading conduct is not undertaken by a director, employee or agent of the corporation (which is already a wide category of roles), it may still be regarded as having been undertaken by the corporation if it is done on the corporation’s behalf at the direction,

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136 The concept of actual and apparent authority import the notions of express actual authority (as described in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, 502), implied actual authority (as described in Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549, 583) and apparent authority (as described in Crabtree-Vickers v Australian Direct Mail (1975) 33 CLR 72).

137 (2007) 160 FCR 35. This case was discussed in detail in chapter 2 of this thesis.

138 See, for example, Meridian Global Funds Management Asia Limited v Securities Commission [1995] AC 500.
or with the consent or agreement, of a director, employee or agent of the corporation. This very broad language enables the conduct to be undertaken by any person on the corporation’s behalf, if the necessary direction, consent or agreement can be demonstrated. It also means that it does not need to be demonstrated that it was within the scope of the usual role or responsibilities of the person who engaged in the conduct to carry out such activities, if they received a direction, consent or agreement to do so on the relevant occasion from a director, employee or agent of the corporation.

It must also be within the scope of the actual or apparent authority of the director, employee or agent to give such a direction, consent or agreement to another person to engage in the conduct on behalf of the corporation. Once again, the general law principles of agency will be used to determine whether such actual or apparent authority existed. This would encompass a situation where a senior executive of a corporation directs a more junior employee to undertake trading on behalf of the corporation, even if the more junior employee was not ordinarily authorised to carry out such an activity, so long as the senior executive has the necessary authority to do so.

Is s 769B(1) of the Corporations Act intended to be an exclusive mechanism for determining when a corporation engages in relevant conduct? As noted above, the language of s 769B(1) of the Corporations Act is very similar to s 84(2) of the former Trade Practices Act 1974 (Cth). There are a number of statutory provisions which also use the same or very similar language – such as s 349 of the former Workplace Relations Act 1996 (Cth) and s 12GH(2) of the Australian Securities and Investments Commission Act 2001 (Cth). In a number of cases, these provisions have been found to extend the operation of the general law, rather than exclude it. For example, in Trade Practices Commission v Queensland Aggregates Pty Ltd, Morling J of the Federal Court stated, in relation to the operation of s 84(2) of the former Trade Practices Act 1974 (Cth), that:

139 (1982) 44 ALR 391, 404
The sub-section is not expressed to take effect to the exclusion of the common law... The language of s 84(2) appears to disclose a legislative intention to extend, rather than limit, the liability of corporations for the actions of others.\textsuperscript{140}

The same conclusion was reached by Toohey J of the Federal Court in \textit{Trade Practices Commission v Tubemakers of Australia Ltd.}\textsuperscript{141} when His Honour found that s 84(2) of the former \textit{Trade Practices Act 1974 (Cth)} did not exclude the operation of the general law:

In my view s 84(2) is not intended to be an exhaustive statement of corporate responsibility under the \textit{Trade Practices Act}.\textsuperscript{142}

Similarly, in \textit{Hanley v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union},\textsuperscript{143} when considering the operation of s 349 of the former \textit{Workplace Relations Act 1996 (Cth)} which, as noted above, used very similar language to s 769B(1) of the \textit{Corporations Act}, Ryan, Moore and Goldberg JJ of the Federal Court, stated that the section:

\begin{quote}
\hspace*{1cm} does not exclude the operation of common law vicarious liability or direct liability under the principles in \textit{Tesco Ltd v Nattrass}... Rather, it provides an alternative statutory mechanism for imposing direct liability on a body corporate.\textsuperscript{144}
\end{quote}

Accordingly, since s 769B(1) of the \textit{Corporations Act} uses almost identical language to those considered in these cases, it can be argued that, in the absence of any express language to the contrary, the relevant general law principles are not excluded and s 769B(1) is not intended to be an exclusive statutory mechanism for determining when a corporation engages in particular conduct. As a result, both s 769B(1) of the \textit{Corporations Act} and the general law rules of the identification doctrine are potentially relevant to determining when a

\textsuperscript{140} The full text of s 84(2) of the former \textit{Trade Practices Act 1974 (Cth)} is set out above.

\textsuperscript{141} (1983) 47 ALR 719.

\textsuperscript{142} Ibid 739.

\textsuperscript{143} (2000) 100 FCR 530.

\textsuperscript{144} Ibid 544.
corporation trades or procures trading in securities, or engages in tipping. Thus, the operation of those general law rules will now be considered.

**The General Law Identification Doctrine**

As has been discussed, at general law a corporation may be found to have engaged in certain criminal conduct if it is undertaken by a person who is considered to be the corporation’s directing mind and will. The nature of the directing mind and will of a corporation may, as noted above, include the following people: (i) a person under the direction of the shareholders in general meeting; (ii) the board of directors; or (iii) a person who has the authority of the board of directors, given under the corporation’s constitution and appointed by the shareholders.145

If such persons trade, or procure trading, in relevant financial products, or engages in tipping, the corporation may be regarded as having engaged in that conduct. This will clearly include the situation where the board of directors, or a managing director or chief executive, authorises particular trading activity. As discussed above, the ultimate test of whether a person is the directing mind and will of a corporation is whether the person manages and controls the actions of the corporation in relation to the relevant activity.146

So, even though a corporation may have a managing director who ordinarily would be regarded as the directing mind and will of the corporation in relation to most of its activities, if a particular employee has been given authority to act for the corporation in securities trading on the corporation’s behalf, so long as that employee has been vested with ‘authority, control, discretion and a significant degree of responsibility’147 in relation to the relevant transactions, that employee can be regarded as the corporation’s directing mind and will in relation to the securities trading but not other activities.

145 *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713-714, as discussed in chapter 4 of this thesis.

146 *El Ajou v Dollar Land Holdings Ltd Plc* [1994] 2 All ER 685.

147 *The Bell Group Ltd (in Liq) v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1, [539].
Comparisons between Different Mechanisms for Establishing the Conduct of Corporations

When determining whether a corporation has engaged in certain conduct, the statutory mechanisms in s 769B(1) of the Corporations Act offer a variety of alternatives – it includes conduct undertaken by a director, employee or agent on the corporation's behalf, so long as the conduct is within the scope of the person's actual or apparent authority, as well as conduct undertaken by any person on the corporation’s behalf if undertaken at the direction of, or with the agreement or consent of, a director, employee or agent given within the scope of their actual or apparent authority. The general law will permit conduct engaged in by the directing mind and will of the corporation to be attributed to the corporation if the person engages in the relevant conduct. There is no requirement at general law that the particular conduct be within the scope of the authority of the person who is regarded as the corporation's directing mind and will. However, for an employee to be regarded as the directing mind and will of a corporation, as noted above, that employee must have been vested with ‘authority, control, discretion and a significant degree of responsibility’148 in relation to the relevant transactions. For an employee to be regarded as being in such a position, it would be highly likely that the general agency principles relating to actual and apparent authority would be satisfied anyway.

Thus, as with the various tests for determining the possession of information for the physical element and the knowledge of the corporation for the fault element of insider trading, there is a wide variance between the role of the relevant person and any link between their role, and their authority, before the corporation is considered to have engaged in the relevant conduct. The wide variation in the role of the relevant person whose conduct is relevant, the presence or absence of a requirement for a nexus with that role, creates significant uncertainty in determining when a corporation will be regarded as having engaged in certain conduct. This uncertainty - which exists for regulators who seek to enforce the law as well as corporations who are required to comply with it - should be remedied by legislative reform in order that

148 Ibid.
there can be an appropriate level of clarity and certainty in connection with the attribution of this element of the insider trading offence to corporations.

Like the knowledge element of the insider trading offence, the application of the trading element to a corporation has not been considered judicially. However, this chapter has revealed that both statutory provisions and general law rules can be used to determine when a corporation has engaged in the prohibited conduct, creating significant uncertainty due to the differing elements of those mechanisms – s 769B(1) of the Corporations Act and the general law rules of the identification doctrine do not contain the same elements or tests. While a similar position exists under other legislation, allowing statutory rules and general law rules to operate simultaneously – such as under the former Trade Practices Act 1974 (Cth), and now under the Competition and Consumer Act 2010 (Cth) – such legislation can be distinguished from the offence of insider trading under the Corporations Act. In particular, the regimes which exist under those statutes contain ‘due diligence’ defences and a defence that the relevant act was engaged in by ‘another person’.149 Such defences do not exist under the Corporations Act in relation to insider trading. The availability of the Chinese Wall defence, which will be examined in detail in chapter 6 of this thesis, differs from a defence of due diligence because, while it requires that a corporation have in place arrangements that ‘could reasonably be expected to ensure that information was not communicated’ and no advice was given,150 there is an additional requirement that there must be no actual communication of the information or giving of advice.151 While it is not proposed that a due diligence defence be created for insider trading, it is clear that for offences where such an defence is available to avoid corporate criminal liability, the uncertainty created by the

149 For example, as noted above, most criminal offences under the Competition and Consumer Act 2010 (Cth) apply the rules of corporate criminal responsibility set out in Part 2.5 of the Criminal Code: Competition and Consumer Act 2010 (Cth), s 6AA(1). As noted earlier in this thesis, s 12.3(3) of the Criminal Code provides that a fault element is not attributed to a body corporate on the basis that it expressly, tacitly or impliedly authorised or permitted the commission of the offence if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

150 Paragraph (b) of s 1043F of the Corporations Act.

151 Paragraph (c) of s 1043F of the Corporations Act.
various available mechanisms which may be used to attribute liability for criminal conduct, can be avoided by ensuring an appropriate degree of due diligence is exercised.

Preliminary Conclusions and Recommended Reforms

The reforms that I recommend to Australian insider trading laws would remedy the many difficulties and problems with the attribution of the elements of the insider trading offence to corporations as identified in this chapter. I propose that the operation of the general law be expressly excluded from the statutory regime applying insider trading laws to corporations, and that a new set of provisions be adopted to provide for a model of direct liability as the exclusive means for determining when a corporation possesses inside information, has knowledge that the information is inside information, and trades or procures trading in relevant financial products, or engages in tipping.

The proposed amendments to the Corporations Act are set out in full in chapter 7 of this thesis. The reforms specifically provide that the only means by which a body corporate would be liable for the insider trading prohibitions in s 1043A are those set out in what would be a new s 1042G of the Corporations Act, to be entitled ‘Liability of Bodies Corporate’. This would exclude the operation of the general law, so that the identification doctrine and the rules of agency would not operate in relation to the application of the elements of insider trading to a corporation in this context. The operation of s 769B of the Corporations Act would also be specifically excluded, and Part 2.5 of the Criminal Code would continue to be excluded, so that there are not multiple statutory mechanisms which may apply, using different tests, to determine when a corporation satisfies the various elements of the insider trading offence.

The new s 1042G would specifically state that a body corporate will be taken to possess information if an officer, employee or agent of the body corporate possesses the information, and would not limit the application of the law to information possessed only by officers of a corporation. The new section would not require that the officer, employee or agent came to possess the information in the course of their duties or because they are an officer,
employee or agent of the corporation. However, other provisions would apply so that a corporation would only be regarded as having engaged in insider trading if the person who possessed the information also had the requisite knowledge that it was inside information and engaged in, or authorised, the prohibited conduct of trading or procuring of trading in relevant financial products or tipping, within the actual or apparent scope of their authority. Thus, aggregation would not be possible and a link with the prohibited conduct would be required before a corporation would be considered to have engaged in insider trading.

The new s 1042G of the Corporations Act would also specifically state that a body corporate would be taken to know, or to ought reasonably to know, that information is inside information if it was known, or ought reasonably to have been known, by an officer, employee or agent of the body corporate. Similarly with the new position in relation to the possession of information, the new section would not require that the officer, employee or agent have such knowledge as a result of their position or role within the corporation. The new s 1042G would provide that a body corporate would be taken to engage in the relevant trading conduct if an officer, employee or agent of the body corporate engages in the conduct on behalf of the body corporate within the scope of their actual or apparent authority, or any person engages in the conduct on behalf of the body corporate with the authorisation of an officer, employee or agent of the body corporate. The section would further provide that conduct is taken to be authorised by a person if the conduct is undertaken at that person’s direction, or with the person’s consent or agreement (whether express or implied) where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of that person.

The model proposed is one of direct liability, so that a corporation would itself be regarded as having engaged in insider trading, rather than having vicarious liability for conduct engaged in by others. Such a model is appropriate, as it is only where a corporation actually engages in insider trading that market integrity is threatened. Accordingly, even though the new provisions would provide that a corporation would be taken to possess information that is possessed by an officer, employee or agent, the new requirement that a corporation would only be liable for insider trading if the same person also had the requisite knowledge that the
information is inside information, and engaged in or authorised the relevant conduct within the scope of their authority, provides an appropriate nexus for the corporation to be considered to have engaged in insider trading.

I do not consider that the new provisions should require an officer, employee or agent to have come into possession of the inside information in the course of performing their duties, or otherwise as a result of their position. Market integrity requires that those who have an informational advantage should not be able to trade in relevant financial products – the manner in which a natural person came to possess the information has no bearing on their personal liability. Similarly, for a corporation to be taken to have engaged in insider trading, it should not be relevant how its officers, employees and agents came to possess the relevant information, if allowing them to trade (or authorise trading) on the corporation’s behalf would give it an unfair advantage. Accordingly, the new provisions would apply so that information possessed by an officer, employee or agent of a corporation is taken to be possessed by the corporation, regardless of how the officer, employee or agent came to possess that information.

The proposed amendments to the *Corporations Act* are set out in full in chapter 7 of this thesis, where I will return to the issues raised in this chapter.
CHAPTER 6
CORPORATIONS AND THE CHINESE WALL DEFENCE TO INSIDER TRADING

There are various statutory exceptions and defences available in relation to the insider trading offence. When the alleged insider trader is a corporation, the manner in which those exceptions and defences may apply is not always straightforward. This chapter will examine the most important and relevant defence for corporations - that of the Chinese Wall. This defence purportedly exists to allow a corporation to avoid, in some circumstances, liability for insider trading that it might otherwise have as a result of the operation of various statutory mechanisms relating to the liability of corporations for insider trading. In this chapter, the nature of a Chinese Wall will be considered, as well as the arrangements that must be put in place to establish a Chinese Wall that will satisfy the statutory requirements. The problems associated with this defence will be identified and analysed in order to demonstrate that there are significant flaws in the current regulatory regime which could be improved by legislative reform. In particular, it will be shown that the Chinese Wall defence as currently drafted does not serve the stated rationale for the prohibition of insider trading – the maintenance of market integrity – because of the significant uncertainty that exists: there is a gap in the operation of the defence because it extends only to trading and not the procuring of trading; and it does not apply where inside information is possessed by an agent of the corporation who is not an officer or employee. Additionally, the uncertainty which exists in relation to the various mechanisms for determining when a corporation possesses inside information, has knowledge that the information is inside information, and engages in the trading or procuring of trading in financial products, leads to further uncertainty in the application of the Chinese Wall defence when a corporation would otherwise have fulfilled the various elements of the insider trading offence. Accordingly, the reforms proposed to the application of the insider trading laws to corporations necessitate amendment to the Chinese Wall defence in order to best protect and maintain market integrity and ensure the international competitiveness of Australia's securities markets.  

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1 An earlier version of this chapter was published as the following journal article: Juliette Overland, ‘All in All, Just Another Brick in the Wall: The Use of Chinese Walls as a Defence to Insider Trading’ (2011) 6 Journal of Applied Research in Accounting and Finance 2.
The Nature of the Chinese Wall Defence

The Corporations Act provides a variety of exceptions and defences to the offence of insider trading. The defence most applicable to corporations is that of the Chinese Wall, which allows a corporation to avoid liability for insider trading which might otherwise arise if the corporation can demonstrate, amongst other things, that it has a sufficient Chinese Wall in place.

It is not clear whether it is more appropriate to refer to a 'Chinese Wall defence' or a 'Chinese Wall exception'. As noted by Lyon and du Plessis, the Corporations Act does not use either term in connection with s 1043F and appears to alternate between the two terms 'defence' and exception' when providing for other circumstances in which a person will not be liable for insider trading. Sections 1043B to 1043E, and ss 1043H to 1043J, are referred to in their titles as 'exceptions', whereas ss 1043F, 1043G and 1043K do not use the term 'defence' or 'exception'. Sections 1043B to 1043E provide that each of ss 1043A(1) or 1043A(2) 'does not apply' in respect of the stated circumstances, whereas ss 1043F to 1043K instead state that a person who satisfies the requirements of the relevant section 'does not contravene' ss 1043A(1) or 1043A(2). In s 1043M(1) of the Corporations Act it is stated that 'it is a defence' if the 'facts or circumstances' existed which would, 'preclude the

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2 There is an exception for withdrawal by a member from a registered scheme: s 1043B; an exception for underwriters entering into or acting under an underwriting agreement: s 1043C; an exception for an acquisition pursuant to a requirement imposed by the Corporations Act: s 1043D; an exception for bodies corporate entering into a transaction or agreement in relation of financial products issued by another person if the inside information is merely the body corporate's knowledge of its own intentions or activities: s 1043I; and an exception for financial service licensees entering transactions of behalf of a principal: s 1043K. Section 1043M also contains additional defences to a prosecution - defences where a person came into possession of the inside information solely as a result of it having been made known in a manner likely to bring it to the attention of people who commonly invest in financial products of a kind whose price might be affected by the information: ss 1043M(2)(a) and 1043M(3)(a); and defences where the other party knew, or ought reasonably to have known, of the information: ss 1043M(2)(b) and 1043M(3)(b).


4 Which relates to Chinese Wall arrangements by partnerships.
act or omission from constituting a contravention' under ss 1043B to 1043K. There does not appear to be any discernible reason for the different use of the terms ‘defence’ and ‘exception’, or ‘does not apply’ and ‘does not contravene’, in these provisions. In general, an exception limits the scope of conduct which is prohibited by an offence and a defence is an excuse for conduct that would otherwise be prohibited. However, in the context of considering the liability of corporations for insider trading, there is no practical consequence to the use of the alternative terms. Section 13.3(3) of the *Criminal Code* clearly provides that:

> A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

‘Evidential burden’ is then described in s 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.’ Thus, the defendant relying on an exception or a defence to insider trading will bear the evidential burden of proof in relation to the relevant matters. If the legal burden of proof is imposed on a defendant, the defendant must establish the existence of the exception or defence on the balance of probabilities,\(^5\) and the prosecution must then refute the exception or defence beyond reasonable doubt. However, the legal burden of proof in relation to exceptions or defences to insider trading is not imposed on the defendant under the *Corporations Act*. Thus, the position of a person accused of insider trading is not altered by use of the term ‘defence’ instead of ‘exception’ in relation to the certain matters which may enable them to avoid liability.

In the case of *ASIC v Citigroup*,\(^6\) Jacobson J used the term ‘Chinese Wall defence’ rather than ‘Chinese Wall exception’ and that term appears to be favoured by the majority of

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\(^5\) *Criminal Code*, s 13.5

academic commentators. Accordingly, for consistency and simplicity, I refer to a ‘Chinese Wall defence’ and not a ‘Chinese Wall exception’ in this thesis.

Section 1043F of the Corporations Act provides as follows:

A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of an officer or employee of the body corporate if:

(a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee; and

(b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and

(c) the information was not so communicated and no such advice was so given.

Thus, the defence operates so that a corporation is not liable for insider trading, even if an officer or employee in the corporation possesses inside information at the time when the corporation trades in certain financial products, so long as the person who decided to trade did not possess the inside information, the corporation had a sufficient Chinese Wall in place, and the inside information was not communicated to the person deciding to trade.

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The ‘arrangements’ referred to in s 1043F(b) of the Corporations Act have become known as ‘Chinese Walls’, although in recent times such arrangements are increasingly referred to as ‘information barriers’. As will be seen below, the arrangements comprise physical, documentary and electronic barriers. Section 1043F is titled ‘Chinese Wall arrangements by bodies corporate’ but the term ‘Chinese Wall’ is not used elsewhere in the legislation. There is divergence over the origin of the term Chinese Wall in this context - some consider that it is a reference to the ‘Great Wall of China’, while others consider that it is a reference to the fact that the ‘Chinese used to make walls out of paper through which you could whisper and therefore the name is a flagrant indication of what frequently goes on’. Regardless of the origins of the term, in Mallesons Stephen Jaques v KPMG Peat Marwick, Ipp J stated that:

The derivation of the nomenclature is obscure. It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous.

The Origins of Chinese Walls

The first documented use of a Chinese Wall in relation to insider trading occurred in the USA, as a settlement device in the case of Re Merrill Lynch, Pierce, Fenner and Smith, Inc. Merrill Lynch, a large multi-national financial institution, became the subject of an insider trading claim in connection with its dual role as underwriter and retail broker to a client, Douglas Aircraft. As a result of the underwriting activities, a number of Merrill Lynch

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9 Other than in the title of s 1043G of the Corporations Act, which contains a similar exception for partnerships.
10 See, for example, Charles Hollander and Simon Salzedo, Conflicts of Interest and Chinese Walls (Sweet & Maxwell, 2000) 96.
12 [1990] WAR 357.
14 43 S.E.C. 933 (1968); Tomasic, above n 7, 53; Goldwasser, above n 7, 232.
employees obtained information about a severe reduction in projected future earnings for Douglas Aircraft and, before the market was properly informed, trading on the basis of this inside information occurred through Merrill Lynch’s retail brokerage division. The SEC alleged that Merrill Lynch had engaged in insider trading but the case was ultimately settled, with a term of the settlement being an undertaking given by Merrill Lynch to impose stricter policies and procedures on its business operations in an effort to limit the sharing of inside information within the corporation in the future – effectively amounting to a Chinese Wall.\footnote{Stanislav Dolgopolov, ‘Insider Trading, Chinese Walls, and Brokerage Commissions: The Origins of Modern Regulation of Information Flows in Securities Markets’ (2008) 4 Journal of Law, Economics and Policy 311, 347; Norman S Poser, ‘Chinese Wall or Emperor’s New Clothes? Regulating Conflicts of Interest of Securities Firms in the U.S. and the U.K’ (1988) 9 Michigan Yearbook International Legal Studies 91, 106.}

This type of structure was then adopted by other investment banks and multi-service organisations to try to limit any potential liability for insider trading and avoid conflicts of interest.\footnote{Martin Lipton and Robert B Mazur, ‘The Chinese Wall Solution to the Conflicts Problems of Securities Firms’ (1975) 50 New York University Law Review 459, 461.} Chinese Wall arrangements have since become common and accepted practice in investment banking.\footnote{Norman S Poser, International Securities Regulation (Little Brown & Co, 1991) 207.} Australian law first provided for these types of structures as a statutory defence to insider trading under s 128(7) of the former Securities Industry Code.\footnote{And then under s 1002(7) of the Corporations Law, as noted by Goldwasser, above n 7, 230.}

Using language that is similar, but not identical, to that in the current s 1043F of the Corporations Act, s 128(7) of the Securities Industry Code then provided that:

\[
\text{A body corporate is not precluded … from entering into a transaction at any time by reason only of information in the possession of an officer of that body corporate if:}
\]

\begin{enumerate}
\item \text{the decision to enter into the transaction was taken on its behalf by a person other than the officer;}
\item \text{it had in operation at that time arrangements to ensure that the information was not communicated to that person and that no advice with respect to the transaction was given to him by a person in possession of the information; and}
\end{enumerate}
The two primary differences between s 128(7) of the Securities Industry Code and s 1043F of the Corporations Act are that s 128(7) referred only to information in possession of an officer of the corporation, whereas s 1043F also refers to information in the possession of an employee. Section 128(7) also required arrangements ‘to ensure’ information was not communicated to the person deciding to enter the relevant transaction, whereas s 1043F more leniently requires arrangements ‘that could reasonably be expected to ensure’ that the information was not communicated. These concepts will be discussed in detail below.

Chinese Wall arrangements have been described as a form of ‘procedural architecture’19 whose primary purpose is to separate areas of conflict of interest and prevent the transfer of information.20 In general, Chinese Walls aim to prevent officers and employees of a corporation from sharing confidential information by separating those parts of a corporation that are most likely to receive inside information, such as corporate advisory, research and analysis departments (the ‘private’ side of a corporation) from those which are most likely to engage in securities trading (the ‘public’ side of a corporation).21

The most common types of corporations which utilise Chinese Walls are investment banks – large organisations providing a wide range of financial intermediary services. Such services include issuing, buying and selling of securities and giving of related financial advice, securities underwriting and financial advisory services in connection with mergers and acquisitions, divestitures, restructurings, joint ventures and privatisations. A wide range of additional services are also commonly provided, such as securities trading, investment research, financing asset management and foreign exchange dealings.22

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19 Roman Tomasic, Casino Capitalism? Insider Trading in Australia (Australian Institute of Criminology, 1991) 89.
20 Goldwasser, above n 7, 228.
Apart from being utilised as a defence to insider trading, Chinese Walls are also frequently created to avoid more general conflicts of interest. There are a wide variety of cases involving Chinese Walls in other contexts, particularly those concerning conflicts of interests in accounting and law firms. In these situations, Chinese Walls may be established in an effort to ensure there is no breach of fiduciary and contractual duties to act in the best interests of clients and avoid a conflict of interest, and to avoid the sharing of information between lawyers and accountants acting for different parties, or each side of a dispute or set of proceedings. Chinese Walls are also utilised by organisations which carry on a business of providing financial services, due to a requirement under s 912A(1)(aa) of the Corporations Act that a person licensed to carry on such a business must maintain Chinese Wall arrangements in order to manage conflicts.23

**Why Are Chinese Walls Necessary?**

For the purposes of insider trading, the Chinese Wall defence is considered to be necessary due to the operation of the mechanisms which set out when a corporation will possess information, have the requisite knowledge that information is inside information, and engage in the trading or procuring of trading in financial products. Theoretically, it may be possible for one person in a corporation to possess inside information (which is information that the corporation may be regarded as possessing) and for another person elsewhere in the corporation to engage in trading or procuring trading in relevant financial products (which is conduct that the corporation may be considered to have engaged in). Therefore, the corporation could potentially be regarded as having engaged in trading in relevant financial products while in possession of inside information and therefore be potentially liable for

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23 Section 912A(1) of the Corporations Act provides that:

A financial services licensee must:

(aa)  have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative.
insider trading, even if neither of the relevant individuals would have any such liability themselves. The varying operation of different statutory and general law mechanisms for determining when a corporation is considered to possess inside information, have the requisite knowledge that the information is inside information, and to have engaged in the relevant trading conduct, has been discussed in detail in chapter 5 of this thesis.

In certain circumstances, in order to avoid the cumulative effect of these various mechanisms, the Chinese Wall defence provides, in essence, that there will be no liability for insider trading just because an officer or employee of a corporation possesses inside information, so long as any trading in affected financial products is undertaken by or at the direction of another officer or employee to whom the inside information or related advice has not been communicated, and so long as the corporation has arrangements in place that could ‘reasonably be expected to ensure’ that the inside information would not be communicated.

In addition to operating as a means of avoiding liability for insider trading, Chinese Walls may also prevent insider trading from occurring, by restricting access to inside information to employees on the ‘public side’ of organisations. As stated by Poser:

...a Chinese wall can have two very different regulatory purposes. Its purpose may be merely prophylactic: to prevent inside information in the possession of persons in one part of a firm from being misused by persons in another part of the firm. Its purpose may also, however, be legal: to provide a defence to the firm against liability for insider trading or breach of duty to a customer that would normally arise as a result of the imputation of knowledge of an employee to the employer.

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25 Poser, above n 15, 189-190.
Requirements for Reliance on the Chinese Wall Defence

Section 1043F of the Corporations Act has three distinct elements which must be satisfied before a corporation can rely on the Chinese Wall defence to insider trading, which can be summarised as follows: (i) the person deciding to trade in the relevant financial products did not possess the inside information; (ii) the corporation had a sufficient Chinese Wall in place; and (iii) the person deciding to trade did not receive the inside information or advice from a person in possession of the inside information. These elements will now be examined in turn to determine the circumstances in which the Chinese Wall defence will operate.

The Person Deciding to Trade in Relevant Financial Products Did Not Possess Inside Information

Section 1042F(a) of the Corporations Act requires that the decision to enter a transaction or agreement – effectively, the decision to trade in certain financial products – must have been made by a person who did not possess inside information. To repeat the precise language of the section, the first element requires that:

the decision to enter into the transaction or agreement was taken on its [the body corporate’s] behalf by a person or person other than that officer or employee [in possession of inside information].

This gives rise to three issues to consider: (a) Is making ‘the decision to enter’ a transaction or agreement different from the prohibited conduct for the insider trading offence? (b) What occurs if inside information is possessed by an agent of the corporation who is not also an officer or employee? (c) As the defence refers to a decision to enter into a transaction or agreement ‘on its behalf’, does it extend to liability for procuring trading, or only to actual trading in financial products by a corporation?

As discussed earlier in this thesis, insider trading occurs where a person trades, or procures trading, in relevant financial products, or engages in tipping while in possession of inside information, and with knowledge that the information is inside information (or where the
person ought reasonably to have known that the information was inside information). The act or trading, or procuring of trading, or tipping, is the conduct which prohibited and is referred to in this thesis as the ‘trading element’. The manner in which a corporation engages in the trading element has been discussed in detail above.

The person who actually made ‘the decision to enter’ the transaction or agreement might not be the same person who actually engaged in the trading element on the corporation’s behalf. The specific conduct prohibited by s 1043A(1) is to:

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

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

It is also prohibited conduct under s 1043A(2) for an insider to:

directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

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

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

Clearly, a ‘decision to enter’ into a ‘transaction or agreement’ is not necessarily the same as the prohibited conduct set out in s 1043A(1) (c) and (d). It is certainly possible that a person
may ‘apply for, acquire, or dispose of relevant Division 3 financial products, or enter into an
agreement to apply for, acquire, or dispose of, relevant Division 3 financial products’ without
being a person who made ‘the decision to enter’ the relevant transaction or agreement. For
example, a trader in a merchant bank may possess inside information and may be directed
by a more senior employee to purchase certain shares in a corporation to which the inside
information relates. If the trader buys the shares on behalf of the corporation, he or she has
caus ed the corporation to acquire the financial products while he or she is in possession of
inside information. As a result of the application of s 769B(1) of the Corporations Act, the
trader has acquired financial products on behalf of the merchant bank, satisfying s 1043A(1)(c)
of the Corporations Act. However, since the decision to buy the shares was
actually made by a more senior employee who did not possess the inside information, the
more senior employee has actually made ‘the decision to enter’ the transaction. As that
more senior employee did not possess the inside information, s 1043F(a) of the
Corporations Act is able to be applied, so long as the other requirements of s 1043F are
met.

As a dominant theme of this thesis is that insider trading laws must be framed to reflect the
underlying legislative rationale, which is the protection and maintenance of market integrity, I
do consider that it is appropriate not to prohibit conduct, or to provide a defence or
exception, where the party who has engaged in the trading conduct has not obtained an
advantage for themselves at the expense of other market participants. However, the other
difficulties and uncertainties which arise in relation to Chinese Walls, which will be explored
throughout this chapter, result in a need to reform this defence.

The availability of the defence is restricted due to the use of the terms ‘employee or officer’
in s 1043F of the Corporations Act. As demonstrated above, s 769B(3) of the Corporations
Act or the general law may apply so that a corporation will be considered to possess
information which is the possession of an agent, who is not necessarily an officer or
employee of the corporation. However, the Chinese Wall defence will not be available if the
information was possessed by an agent who was not also an officer or employee, as s 1043G quite clearly states that:
A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of any officer or employee of the body corporate…

This creates a gap in the operation of the Chinese Wall defence, limiting its application to the possession of information by some persons associated with a corporation and not others. If the inside information was possessed by an agent of the corporation, such that s 769B(3) of the Corporations Act or the general law could apply and the corporation would be taken to possess the information, the Chinese Wall defence in s 1043F of the Corporations Act would not be applicable, even though it could apply if the inside information were possessed by an officer or employee. There is an absence of any available explanation, in either legislative history or commentary, for the different treatment of agents as opposed to officers and employees in this respect. This issue will be addressed in the proposals for reform described in this chapter and set out in full in chapter 7 of this thesis.

Some commentators have noted that the Chinese Wall defence only operates in relation to the trading limb of the insider trading offence, and not the procuring limb. This is because the defence only applies where ‘the decision to enter’ a transaction or agreement (being the decision to trade in relevant financial products) was taken ‘on its behalf’ by a person other than the person in possession of the inside information. The words ‘on its behalf’ make it clear that the decision must be made for the person or entity that is actually trading. A person who procures trading by another will not ordinarily be the person who makes the ultimate ‘decision to enter a transaction or agreement’ unless they are also a decision-maker for that other person (for example, if the other person is a corporation controlled by that person). A person who merely ‘encourages’ another person to trade in securities will be

26 Emphasis added.
regarded as procuring that other person to trade, but the ultimate decision is still made by that other person. Thus, the requirement that the relevant person makes a ‘decision to enter’ a transaction or agreement on a corporation’s ‘behalf’ prevents the defence from applying where the corporation procures another person to trade.

This is obviously a significant anomaly in the law as it applies to corporations, many of which operate in circumstances where trading recommendations may be made to clients by employees in one part of the organisation (which may amount to procuring) at times when others in the organisation possess inside information. Technically, such conduct is not protected by the existence of a sufficient Chinese Wall and may amount to insider trading. Why should a corporation be liable for insider trading for recommending that a client buy or sell certain securities when there would not be any such liability if bought or sold the same securities itself?

A corporation with a sufficient Chinese Wall will be protected from claims of insider trading where, for example, it engages in proprietary trading on its own behalf even though inside information is possessed elsewhere in the organisation, but not where it procures others to trade. Section 1043K of the Corporations Act provides a version of the Chinese Wall defence for the holders of financial services licences, but it only operates where the holder

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28 Section 1042F of the Corporations Act defines ‘procure’ as follows: For the purposes of this Division, but without limiting the meaning that the expression procure has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to procure the act or omission by the other person.

29 Section 1043K of the Corporations Act provides that:

- A person (the agent) does not contravene subsection 1043A(1) by applying for, acquiring, or disposing of, or entering into an agreement to apply for, acquire, or dispose of, financial products that are able to be traded on a licensed market if:
  - the agent is a financial services licensee or a representative of a financial services licensee; and
  - the agent entered into the transaction or agreement concerned on behalf of another person (the principal) under a specific instruction by the principal to enter into that transaction or agreement; and
of the licence or their representative acts as the agent of another party and where the other party gives specific instructions to the agent to trade on their behalf, rather than where the agent procures the other party to trade. So the defence in s 1043K does not fill this gap within the Chinese Wall defence in s 1043F of the Corporations Act.

When CAMAC undertook its review of Australian insider trading laws, this gap in the legislation was noted and in 2003 CAMAC recommended that the Chinese Wall defence be extended to include procuring as well as trading, as this omission was considered to be ‘the result of a legislative oversight’. While this recommendation was accepted by the Commonwealth Treasury in 2007 as an appropriate amendment to be made to Australian insider trading laws, despite the passing of a number of years, no action has yet been taken to give formal effect to this proposed reform. As there appears to be no sound basis for the exclusion of procuring of trading from the operation of the Chinese Wall defence, the reforms proposed in this thesis would operate so that no such gap would continue to exist, even though it is proposed that the Chinese Wall defence to insider trading be amended.

(c) the licensee had in operation, at the time when that transaction or agreement was entered into, arrangements that could reasonably be expected to ensure that any information in the possession of the licensee, or of any representative of the licensee, as a result of which the person in possession of the information would be prohibited by subsection 1043A(1) from entering into that transaction or agreement was not communicated to the agent and that no advice with respect to the transaction or agreement was given to the principal or to the agent by a person in possession of the information; and

(d) the information was not so communicated and no such advice was so given; and

(e) the principal is not an associate of the licensee or of any representative of the licensee; but nothing in this section affects the application of subsection 1043A(1) in relation to the principal.


31 CAMAC, Insider Trading Report, above n 7, 2 and 7.

A Sufficient Chinese Wall was in Place

Section 1043F(b) of the Corporations Act requires that a sufficient Chinese Wall be in place, as for a corporation to rely on the defence it must be shown that:

it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision [to enter the transaction or agreement] and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information.

Despite describing the nature of the arrangements that must be in place as arrangements ‘that could reasonably be expected to ensure' that information is not communicated or advice given by those who possess the inside information, the Corporations Act does not specify what is required to establish a sufficient Chinese Wall.

The phrase ‘could reasonably be expected to ensure’ was first used in connection with the Chinese Wall defence in s 1002M of the former Corporations Law, due to amendments resulting from the Corporations Legislation Amendment Act 1991 (Cth). This language was used instead of the previously proposed phrase, which would require arrangements ‘reasonably designed to ensure' that information was not communicated, which would have appeared to have created a higher standard. In Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft, it was determined that:

the correct approach to the interpretation of the phrase ‘could reasonably be expected to’... is that the words should be given their ordinary and natural meaning. They require a

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33 Emphasis added.
34 Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth), [355].
35 Austin and Ramsay, above n 7, [9.670].
Judgment to be made as to whether something is reasonable, as distinct from something that is irrational, absurd or ridiculous.\textsuperscript{37}

Finding an objective and appropriate yardstick for measuring the sufficiency of Chinese Walls, and whether they can be reasonably expected to ensure that information is not communicated and advice is not given, is challenging because the detection of insider trading is notoriously difficult.\textsuperscript{38} Without accurate empirical evidence, it is difficult to determine objectively whether Chinese Walls actually work, particularly as Chinese Walls are only likely to come under scrutiny if and when claims of insider trading, or other forms of misconduct, are brought.

However, in order to avoid liability for insider trading where appropriate, corporations must have confidence that their internal arrangements would withstand scrutiny to be considered sufficient. It is therefore necessary to look at other sources to determine what is needed to establish and maintain a sufficient Chinese Wall to protect a corporation from liability for insider trading, including: (i) cases interpreting s 1043F of the \textit{Corporations Act}; (ii) market rules and accepted industry practices in relation to Chinese Walls; and (iii) cases considering Chinese Walls in other contexts.

\textbf{Cases Concerning section 1043F of the \textit{Corporations Act}}

Although the Chinese Wall defence to insider trading is set out in the \textit{Corporations Act}, and has existed in legislative form in the former \textit{Companies Code} and the \textit{Corporations Law}, the requirements for a sufficient Chinese Wall as a defence to insider trading were untested judicially until the case of \textit{ASIC v Citigroup}.\textsuperscript{39} In this case, ASIC made two separate claims.

\textsuperscript{37} Ibid 190.


\textsuperscript{39} (2007) 160 FCR 35.
of insider trading against Citigroup: (i) ASIC alleged that the sale of Patrick shares by the proprietary trader, Mr Manchee, which occurred after he was told by his manager, Mr Darvall, to stop buying Patrick shares, amounted to insider trading attributable to Citigroup; and (ii) ASIC alleged that there was not a sufficient Chinese Wall in place, so that all buying and selling of Patrick shares by the proprietary trader amounted to insider trading, as at all relevant times executives in the Investment Banking Division of Citigroup possessed inside information about the proposed takeover of Patrick by Toll.

The case also gave rise to claims that Citigroup had failed to properly manage conflicts of interest and that it breached fiduciary duties it owed to its client, Toll.⁴⁰

As discussed in chapter 5, the first insider trading claim brought against Citigroup ultimately failed because the proprietary trader, Mr Manchee, was not found to be an ‘officer’ of Citigroup and Jacobson J determined that this meant that any information he possessed was not to be taken to be information possessed by Citigroup. Additionally, as a matter of fact, it was found that Mr Manchee had not made the necessary supposition alleged by ASIC - that Citigroup was acting for Toll on an imminent takeover of Patrick⁴¹ - and that such a supposition had not been conveyed to him by his manager.⁴²

Most relevant in the context of a review of the Chinese Wall defence, the second insider trading claim brought against Citigroup also failed, because Citigroup’s Chinese Wall was found to satisfy the necessary requirements. Although officers in the Investment Banking Division of Citigroup, who were advising Toll, were aware of relevant inside information concerning Patrick shares at a time when trading in those shares was occurring in another part of the organisation (that is, at the time the proprietary trader was trading in those shares on Citigroup’s behalf), the Chinese Wall in place between the Investment Banking Division

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⁴⁰ Jacobson J ultimately determined that there was no duty to avoid a conflict of interest because of the absence of a fiduciary relationship between Citigroup and Toll, but a discussion of those issues is unrelated to the topic of insider trading and therefore beyond the scope of this thesis.


⁴² Ibid 103-104.
(which was on the ‘private’ side of the Chinese Wall) and the proprietary trading group
(which was on the ‘public’ side of the Chinese Wall), was found to be sufficient.43

The existence of a sufficient Chinese Wall meant that there was no contravention of the
prohibition of insider trading. In this context, the most pertinent statements made by the
Court are those which describe the requirements for a sufficient Chinese Wall. Jacobson J
described the type of organisational arrangements which would ordinarily be sufficient as:

(a) the physical separation of departments to isolate them from each other;
(b) an educational program, normally recurring to emphasise the importance of not
improperly or inadvertently divulging confidential information;
(c) strict and carefully designed procedures for dealing with situations where it is
thought the Chinese Wall should be crossed, and the maintaining of proper
records where this occurs;
(d) monitoring of the effectiveness of the Chinese Wall by compliance officers; and
(e) disciplinary sanctions where there has been a breach of the Chinese Wall.44

It is clear from his judgment that Jacobson J considered that these characteristics would
usually be considered to give rise to a sufficient Chinese Wall, but also that each situation is
to be determined on its own merits, and he did not attempt to exhaustively describe how a
Chinese Wall should be established.

It was noted by Jacobson J that a Chinese Wall arrangement ‘[does] not require a standard
of absolute perfection. The test stated…is an objective one.’45 Indeed, the ‘practical
impossibility of ensuring that every conceivable risk is covered by written procedures and
followed by employees’46 was also noted.

43 Ibid 110-112.
44 Ibid 82, citing with approval statements of Lord Millett in Prince Jefri Bolkiah v KPMG [1999] 2 AC 222, 238.
46 Ibid 112.
Thus, ASIC v Citigroup usefully describes the very general characteristics a sufficient Chinese Wall might be expected to have, with a recognition that each case will need to be determined objectively on its facts. However, it is clearly not a detailed or exhaustive list of the ways in which a sufficient Chinese Wall can be established and maintained.

**Market Rules and Accepted Industry Practices**

As noted by Lyon and du Plessis, the financial sector has had significant input into the requirements for Chinese Walls, and there are a variety of industry practices and rules which relate to these sorts of arrangements. Independent of the prohibition of insider trading, s 912A(1)(aa) of the Corporations Act provides, as noted above, that a financial services licensee must have in place ‘adequate arrangements for the management of conflicts of interest’. ASIC has produced *Regulatory Guide 181 Licensing: Managing Conflicts of Interest* (RG 181) to assist financial services licensees meet their obligations under this section, which is supplemented by *Regulatory Guide 79 Managing Conflicts of Interest: A Guide for Research Report Providers* (RG 79). RG 181 sets out ASIC’s ‘general approach to compliance with the statutory obligation.’ While the regulatory guide is not prescriptive, ASIC takes the view that ‘licensees whose conflict of interest management arrangements are not consistent with the guidelines and expectations ... are less likely to be complying with their obligations ... and will be exposed to greater risk of regulatory action.’ RG 181 does not explicitly set out requirements for Chinese Walls (or information barriers, as they are described in the regulatory guide) but it does emphasise the role of monitoring procedures, internal structures – including ‘organisational structure, physical layout and reporting processes’ – and documentation and record-keeping. It also states that:

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47 Lyon and du Plessis, above n 3, 86-87.
49 Ibid 4.
50 Ibid 10.
51 Ibid 11.
robust information barriers may help a licensee manage their conflicts of interest. They may allow a licensee to insulate one group of staff from the information... To be effective, such barriers must actually prevent information being passed to the relevant group of staff.53

RG 79 contains a more definitive statement about Chinese Walls:54

We expect research report providers55 to ensure that research staff are structurally and physically separated from (and not supervised by) any staff who are performing an investment banking, corporate advisory or dealing function.56

The ASX previously had in place a set of Market Rules that set out requirements for Chinese Walls for market participants in connection with the provision of advice to clients. Market Rule 7.18.3 provided that:

A Market Participant will not be regarded as having possession of inside information that is not generally available in relation to a Financial Product where that Market Participant has Chinese Walls in place and the person advising the client is not in possession of that information.

Market Rule 7.18.1 of the ASX Market Rules then defined a ‘Chinese Wall’ as an arrangement:

whereby information known to persons included in one part of the business of the Market Participant is not available (directly or indirectly) to those involved in another part of the business of the Market Participant and it is accepted that in each of the parts of the business of the Market Participant so divided decisions will be taken without reference to

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53 Ibid 11.
55 That is, ‘public’ side employees.
56 That is, ‘private’ side employees.
any interest which any other such part or person in any other such part of the business of the Market Participant may have in the matter.

Additionally, the ASX Market Rules required further measures such as advising the ASX of the creation, alteration or removal of Chinese Walls before any action could be taken by the market participant.\textsuperscript{57} However, ASIC has now taken over the supervision of financial markets, and adopted the ASIC Market Integrity Rules (ASX Market) 2010. Rule 3.6.3 of the new ASIC Market Integrity Rules has similar content to the ASX Market Rules in relation to Chinese Walls, but market participants are no longer required to advise ASIC of the creation of a Chinese Wall.\textsuperscript{58}

Under the old ASX Market Rules, Guidance Note 13 was released by the ASX, which set out certain procedures to be adopted by market participants in connection with Chinese Wall arrangements. Guidance Note 13 specifically stated that it did ‘not deal with the provisions... of the Corporations Act which provides the statutory basis of the regulation of insider trading.’\textsuperscript{59} Guidance Note 13 required market participants to have: (i) a written policy statement and restricted communication flows; (ii) a personal acknowledgement completed by staff on commencement of employment; (iii) physical access restrictions; (iv) separate supervision of each department or work unit; (v) physical separation; (vi) limits on transfer of staff between departments or work units; (vii) continuing education; and (viii) monitoring and detection of breaches.\textsuperscript{60}

Although these concepts have some similarity and overlap with those outlined by the Court in ASIC v Citigroup, they are not identical and the Guidance Note 13 requirements were more expansive than those already identified. While the adoption of such further arrangements would not necessarily ensure that a Chinese Wall would pass judicial scrutiny when considering whether the elements of s 1043F are satisfied, Guidance Note 13

\begin{itemize}
\item \textsuperscript{57} ASX Market Rules (2004) r 7.18.1-17.18.2.
\item \textsuperscript{58} ASIC, Regulatory Guide 214, Guidance on ASIC Market Integrity Rule for ASX and ASX 24 Markets (August 2010) RG 214.78.
\item \textsuperscript{59} ASX Market Rules, Guidance Note 13 (2004) 1.
\item \textsuperscript{60} Ibid 2-4.
\end{itemize}
provided helpful guidance on how a regulator considers that Chinese Walls are to be managed and interpreted. However, these requirements were not considered by the Court in ASIC v Citigroup when determining what is necessary for a sufficient Chinese Wall.

As noted above, while Chinese Walls are maintained in order to avoid liability for offences such as insider trading, by restricting the flow of information, such arrangements also serve to minimise opportunities for insider trading which might otherwise exist within organisations – whether such trading might be undertaken on behalf of a corporation or by an officer, employee or agent of the corporation on their own account. Accordingly, while amendments are proposed to the Chinese Wall defence to remedy the various problems with the application of insider trading laws to corporations, as identified throughout this thesis, it is recognised that Chinese Wall arrangements serve more than one purpose, and that it would not be appropriate to remove the Chinese Wall defence in its entirety.

Cases Concerning Chinese Walls in Other Contexts

Chinese Wall arrangements may be used by professional service firms, such as law firms and accounting firms, in circumstances where there is a conflict of interest – for example, if a law firm wishes to act for more than one party to a dispute, or to act against a current or former client of the firm. This has resulted in much judicial consideration of the effectiveness and operation of Chinese Walls in this context.

Such arrangements commonly involve the use of a Chinese Wall to separate the relevant sections of the firm in order to avoid a breach of fiduciary duty and the inappropriate disclosure of confidential client information. Where a firm acting for one client seeks to act for another client in circumstances where a conflict of interest would arise, the firm may deal with the conflict by implementing a Chinese Wall. This means that the relevant employees who act for each client are separated from each other so that an employee who acts for one of those clients cannot act for the other, or have access to information

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61 For example, if the firm were to take instructions from one client to act against another client of the firm.
concerning the other client.62 Where a conflict of interest arises because a firm seeks to act against a former client of the firm, the firm may also implement a Chinese Wall. This generally means that an employee who has previously acted for the former client will not be permitted to act against them, and that employees acting against the former client will not be permitted to have access to the files or confidential information concerning the former client.63 It is also common for these arrangements to be supported by appropriate undertakings - for example undertakings given to the court by individual employees that they will not seek or obtain access to documents, act for a particular party, or discuss any relevant issues with other identified employees within the firm.64

An analysis of the cases which have considered what is necessary for a sufficient Chinese Wall in those circumstances reveals that courts are willing to accept such arrangements as a means of quarantining information within a firm,65 but it will be a question of fact in each case as to whether a particular Chinese Wall is sufficient.66 The primary issue on which a court needs to be satisfied is that the arrangements have no real risk of disclosure.67 Mere physical segregation of particular employees is not enough68 - there also need to be ‘sensible and safe systems in place’.69 Due to the fiduciary duties owed by lawyers to their

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62 See, for example, Blackwell v Barroile Pty Limited (1994) 51 FCR 347, 359; Wan v McDonald (1992) 33 FCR 491, 511; Spincde Pty Ltd v Look Software Pty Ltd [2001] VSC 287.
63 See, for example, British American Tobacco Australian Services Ltd v Blanch [2004] NSWSC 7; Spincde Pty Ltd v Look Software Pty Ltd [2001] VSC 287; Asia Pacific Communications Limited v Optus Networks Pty Limited [2007] NSWSC 350.
64 For example, undertakings of this type were given to the court in Photocure ASA v Queen’s University At Kingston [2002] FCA 905.
67 McDonald Estate v Martin (1991) 77 DLR (4th) 249, 269.
clients, the relevant clients must also expressly consent to the Chinese Wall arrangements.

A Chinese Wall which is 'an established part of the organisational' structure, rather than one created 'ad hoc' to deal with a particular conflict, is likely to be preferred by the courts. Additionally, a consideration of the adequacy of Chinese Walls in law firms requires an appreciation that ‘it is not part of everyday legal practice for a lawyer to have his or her knowledge from a case quarantined from another lawyer within the same section of the firm.’ It is considered unrealistic ‘to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expressions, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.’ Accordingly, there needs to be awareness that ‘there will always be an element of some risk of disclosure where its prevention depends upon human contact because people make mistakes. The lack of a real risk of disclosure or misuse will depend on the design of the information barrier.’

Thus, the key principles relevant to the sufficiency of Chinese Walls within law firms can be summarised as follows: (i) each case must be assessed on an independent basis to determine if there is a real risk of disclosure of confidential information; (ii) the physical separation of relevant employees must also be supported by appropriate systems and practices as well as undertakings; and (iii) established structures will be preferred to ‘ad hoc’ arrangements because they are more likely to be effective.

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70 Which are not ordinarily owed by investment banks to their clients, and are customarily excluded by contract, as noted in ASIC v Citigroup (2007) 160 FCR 35, 75.
71 Hollander and Salzedo, above n 10, 98.
73 Asia Pacific Communications Limited v Optus Networks Pty Limited [2007] NSWSC 350, [35].
74 As stated by Bryson J in D & J Constructions Pty Limited v Head & Ors Trading as Clayton Utz (1987) 9 NSWLR 118, 123.
75 Asia Pacific Communications Limited v Optus Networks Pty Limited [2007] NSWSC 350 [14].
Tomasic has suggested that the problems identified in relation to the use of Chinese Walls within law firms could apply equally to the securities industry and that therefore ‘...the Chinese Wall defence to insider trading should logically also be abandoned.’\textsuperscript{76} However, when comparing investment banks and financial services organisations to law firms and accounting firms, it is worth noting that Chinese Walls in corporations such as investment banks are more likely to be well-established structures. As noted above, lawyers are not used to being quarantined from sharing knowledge with other lawyers within the same firm, but corporate organisations such as investment banks with established Chinese Walls have employees who are used to working within a section of the organisation where information sharing with others in other parts of the organisation is prohibited. Employees within those organisations will always be on either the ‘public’ or ‘private’ side of the Chinese Wall and become used to that position. In law firms, employees may be on one side of a Chinese Wall in respect of certain cases and not others, on a true ‘case by case’ basis. As the arrangements have differing functions, purposes and degrees of permanence in the various forms of organisations, those in corporations such as investment banks or financial services organisations are more likely to have the degree of permanence necessary to be regarded as sufficient structures for the purposes of s 1043F of the \textit{Corporations Act}. Thus, it can be argued that Chinese Wall structures within corporations in the securities industry are less likely to suffer from the same problems as those within law firms.

Although there are certain basic characteristics which would generally need to be present in order for a Chinese Wall to be regarded as sufficient to provide a defence against a claim of insider trading, there is an absence of a clear objective measure against which such sufficiency can be measured. This does create an inherent lack of certainty in connection with the Chinese Wall defence.

Since insider trading is prohibited in Australia in order to protect market integrity, the available exceptions and defences to the prohibition should also be grounded in the same

rationale. The principles of market fairness, market efficiency and maintenance of investor confidence are fundamental pillars of the legislation, pursuant to which the securities markets is intended to operate ‘freely and fairly, with all participants having equal access to relevant information’. While Chinese Walls themselves may not always prevent insider trading, the presence of such a mechanism should nevertheless provide a degree of security, as their existence can serve to reassure market participants that all parties are ‘playing by the same rules’. However, in order for market participants, investors, regulators and the corporations that maintain Chinese Walls to have confidence that those walls are both likely to prevent confidential information from being communicated and that they can be relied upon as a potential defence to a claim of insider trading, there must be a clear understanding by all parties as to the basic requirements that will generally be necessary for these arrangements to be considered sufficient.

The Inside Information Was Not Communicated and No Advice Was Given

Section 1042F(c) of the Corporations Act requires that the relevant inside information must not have been communicated to the person or persons who made the decision to enter a transaction or agreement – that is, to the person who made the decision to trade in certain financial products – and that no advice relating to the transaction or agreement was given to them by a person in possession of inside information.

In ASIC v Citigroup, when determining whether any inside information was communicated or ‘advice given with regard to the transaction’, the Court recognised that the communications which took place between the Investment Banking Division executives and the proprietary trader’s manager did ‘reveal the potential fragility of Chinese Walls.’ However, those particular discussions, because of their equivocal nature, did not amount to the

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77 Standing Committee on Legal and Constitutional Affairs, House of Representatives, Fair Shares for All: Insider Trading in Australia (1989), [3.34]-[3.36].
communication of any inside information or advice, primarily because the proprietary trader's manager was 'astute to ensure that confidential information should remain quarantined,' but the Court did note that, due to the pressured nature of the investment banking environment, such a result might not always prevail.

It is widely recognised that there is a risk that Chinese Walls are not effective at preventing the transfer of information and that they can be porous or 'leak'. Anecdotal evidence suggests that many who work within the securities industry may doubt the effectiveness of Chinese Walls. Indeed, Tomasic quotes market participants who have such a view, with one stating that 'I've never seen a Chinese Wall without a grapevine growing over it.' In ASIC v Citigroup, Jacobson J noted the 'practical impossibility of ensuring that every conceivable risk is covered by written procedures and followed by employees', and in the Asia Pacific Communications Limited v Optus Networks Pty Limited, Bergin J stated that 'there will always be an element of some risk of disclosure where its prevention depends upon human contact because people make mistakes.' It is also recognised that Chinese Walls are more difficult to utilise within small corporations, so that there may then be an increased risk of disclosure.

This element of the Chinese Wall defence requires a consideration as to whether advice was given to a person who made a decision to trade in financial products ('the decision-maker') by a person who was in possession of inside information ('the insider') rather than merely whether the insider communicated the inside information to the decision-maker. This is

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80 Ibid.
81 Ibid.
82 See, for example, Philip Anisman, Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives (National Companies and Securities Commission, 1986) 85-86.
83 Tomasic, above n 19, 79.
85 Asia Pacific Communications Limited v Optus Networks Pty Limited [2007] NSW SC 350, [14].
86 Goldwasser, above n 7, 237.
necessary to ensure that the insider does not indicate, either expressly or impliedly, to the decision-maker matters that might influence their decision to trade, even if they do not actually pass on the inside information. Such matters might include a suggestion or intimation that the trade is a ‘good idea’ (or a ‘bad idea’) or that it might be better to wait to conduct the trading at a future time. In such circumstances, the Chinese Wall defence would be unlikely to apply. This would be the case regardless of whether the decision-maker was aware that the insider possessed inside information. This is an appropriate restriction as, for market integrity to be protected and maintained, those who possess inside information must not be able to benefit from it at the expense of other investors and participants in the market. If those who make decisions to trade in securities on behalf of corporations are able to do so with the advice of those who possess inside information, the corporation does receive an unfair advantage and should be unable to avoid any resulting liability for insider trading. This principle is reflected in the proposals for reform described in this chapter and set out in full in chapter 7 of this thesis.

International Comparisons

Several jurisdictions specifically provide for a Chinese Wall defence under statute: the United Kingdom, New Zealand, Hong Kong, Singapore and the USA. However, a number of jurisdictions have no specific provision for a Chinese Wall defence for insider trading: the European Union, Germany and South Africa.

In Germany, the Securities Trading Act (WpHG) does not specifically provide for a Chinese Wall defence to insider trading. However, it seems that it is still common practice for merchant banks in Germany to utilise Chinese Walls to quarantine information.88 Similarly, Lehar, Alfred and Otto Randl, ‘Chinese Walls in German Banks’ (2006) 10 Review of Finance 301. Indeed, Part 6 of the Securities Trading Act (WpHG) provides for the ‘Rules of Conduct for Investment Enterprises’ which include obligations on organisations providing ‘investment services’ to: endeavour to avoid conflicts of interest (s 31(1)2); be organised in such a way that, in the provision of investment services, conflicts of interest are kept to an unavoidable minimum (s 33(1)2); and have adequate internal control procedures capable of countering infringements (s 33(1)3). While these provisions are not specifically related to the prohibition of insider trading,
in South Africa, the Financial Markets Act 2012 (South Africa) does not contain a Chinese Wall defence. Notwithstanding this, Chinese Walls are still used by merchant banks in South Africa to manage conflicts of interest and control the transfer of information. There is no specific Chinese Wall defence provided for in the Market Abuse Directive or the Market Abuse Regulation of the European Union. In the absence of any guidance in the and there is no specific reference to Chinese Walls, these obligations indicate that merchant banks have the option to determine their own methods for managing conflicts of interest, which could include the use of information barriers such as Chinese Walls: European Commission, ‘Best Practices in an Integrated European Financial Market – Recommendations from the Forum Group to the European Commission Services’, Annexure 3, (September 2003) 21.


90 In the superseded Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Abuse, OJ 2003 L 96/16, Chinese Walls were referred to in recital (24) as a measure to ‘contribute to market integrity’, and there was an obligation in article 6(6) to ensure that ‘market operators adopt structural provisions aimed at preventing and detecting market manipulation practices.’ However, such provisions have not been incorporated into the current Market Abuse Directive or Market Abuse Regulation, and no reason has been proffered for the removal of these provisions.


93 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments (the Markets in Financial Instruments Directive) does set out, amongst other things, organisational requirements for ‘investments firms’. It provides, in Article 13(3), that ‘an investment firm must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest … from adversely affecting the interests of its clients.’ Whilst not explicitly referred to, information barriers such as Chinese Walls could certainly form part of such arrangements. However, the Markets in Financial Instruments Directive primarily requires such arrangements for the protection of clients, rather than to protect the market generally or to prevent market abuse such as insider trading, as evidenced by the recitals to this Directive. It is also clear that the use of arrangements such as Chinese Walls is considered necessary under applicable codes of conduct. For example, the Market Conduct Standards developed by the Forum of European Securities Commissions require participants in an offering to have Chinese Walls in place to restrict the flow of information between business areas to prevent the misuse of material information: The Forum of European Securities Commissions, ‘Market Conduct Standards’ 99-FESCO-B (December 1999) 14-18.
Market Abuse Directive, or related legislative instruments, the availability of a Chinese Wall defence for insider trading will depend on the content of local laws of each Member State of the European Union, which does give rise to the potential for inconsistent positions in the different Member States.

In those jurisdictions which do specifically provide for a statutory Chinese Wall defence to insider trading, there are certain similarities with the Australian position but, as will be shown below, there are two primary differences – not all jurisdictions require that the relevant Chinese Wall arrangements must be 'reasonably expected to ensure' that inside information is not communicated, and not all jurisdictions expressly provide that, for the defence to apply, advice must not be given by a person in possession of inside information to a person making the relevant decision to trade. Unlike Australia, some jurisdictions also apply the Chinese Wall defence to the procuring of trading, as well as trading, in relevant financial products.

In the United Kingdom, which applies civil liability for insider trading to corporations under the Financial Services and Markets Act 2000 (UK) c 8, there is no specific provision for a Chinese Wall defence in that Act. However, s 147 gives the Financial Conduct Authority (formerly the Financial Services Authority) the power to make rules about the disclosure and use of information, and it does so in the Financial Conduct Authority Handbook, which provides in SYSC 10.2.2R that a Chinese Wall is:

> an arrangement that requires information held by a person, in the course of carrying on one part of the business, to be withheld from, or not to be used for, persons with or for whom it acts in the course of carrying on another part of its business.

SYSC 10.2.3R of the Financial Conduct Authority Handbook then provides that acting in conformity with SYSC 10.2.2R does not amount to market abuse, thereby providing a

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94 Known as ‘control of information rules’: Financial Services and Market Act 2000 (United Kingdom), s 147.

95 SYSC 10.2.2R is specifically stated to be a ‘control of information rule’ made under s 147 of the Financial Services and Markets Act (UK) c 8.
defence to a civil action against a corporation for insider trading. Additionally, SYSC 10.2.4R of the Financial Conduct Authority Handbook specifically provides that where an organisation has in place such arrangements, it ‘will not be taken to act with knowledge…if none of the relevant individuals involved on behalf of the firm acts with that knowledge’. SYSC 10.2.5R of the Financial Conduct Authority Handbook then provides that ‘Individuals on the other side of the wall will not be taken to possess information denied to them as a result of [a] Chinese Wall’.

Unlike the Australian Chinese Wall defence, the Chinese Wall defence available in the United Kingdom does not require that the relevant arrangements be ‘reasonably expected to ensure’ that the relevant inside information was not communicated. Additionally, there is no express requirement in the United Kingdom that no advice be given by a person in possession of the inside information to the person making the decision to trade.

As noted above, the use of Chinese Walls as a defence to insider trading claims made against corporations first occurred in the USA. This defence is now contained in statutory form in SEC Rule 10b5-1(c)(2) made pursuant to the Securities Exchange Act of 1934, 15 USC § 78a (1934) and it provides that:

A person other than a natural person also may demonstrate that a purchase or sale of securities is not “on the basis of” material nonpublic information if the person demonstrates that:

(i) The individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of the information; and

(ii) The person had implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale
of any security as to which the person has material nonpublic information, or those that prevent such individuals from becoming aware of such information.

While this defence is similar in substance to the Australian Chinese Wall defence found in s 1043F of the Corporations Act, it does not require that the relevant arrangements be ‘reasonably expected to ensure’ that inside information was not communicated, instead mandating that the corporation must have ‘implemented reasonable policies and procedures … to ensure that’ the prohibition of insider trading is not violated, and there is no express requirement that advice not be given by a person in possession of the inside information to the person making the decision to trade in relevant financial products.

In New Zealand, a Chinese Wall defence is contained in s 261 of the Financial Markets Conduct Act 2013 (NZ), which is in very similar terms to the Australian Chinese Wall defence. It provides that it is a defence to any proceedings for insider trading if:

(a) A [the relevant corporation] had in place arrangements that could reasonably be expected to ensure that no individual who took part in the decision to trade the financial products or to advise or encourage (as the case may be) received or had access to, the inside information or was influenced, in relation to that decision, by an individual who had the information; and

(b) no individual who took part in the decision received, or had access to, the inside information, or was influenced, in relation to that decision, by an individual who had the information; and

(c) every individual who had the information and every individual who took part in that decision acted in accordance with the arrangements referred to in paragraph (a).

The Chinese Wall defence in New Zealand expressly covers both trading and the procuring of trading – being ‘advising or encouraging’. As in Australia, the arrangements must be ‘reasonably expected to ensure’ that the relevant inside information is not communicated
and while there is no prohibition of the ‘giving of advice’ by a person in possession of inside information, such persons must not ‘influence’ any individual making a trading decision.

In Hong Kong, s 271(2) of the Securities and Futures Ordinance (Hong Kong) cap 571 provides for a Chinese Wall defence for corporations – it is also very similar to that contained in s 1043F of the Corporations Act. It provides that a corporation shall not be regarded as having engaged in insider dealing if it establishes that:

(a) although one or more of its directors or employees had the inside information in relation to the corporation the listed securities of which were, or the derivatives of the listed securities of which were, the listed securities or derivatives in question, each person who took the decision for it to deal in or counsel or procure the other person to deal in such listed securities or derivatives (as the case may be) did not have the inside information up to (and including) the time when it dealt in or counseled or procured the other person to deal in such listed securities or derivatives (as the case may be);

(b) arrangements then existed to secure that –

(i) the inside information was up to (and including) the time when it dealt in or counseled or procured the other person to deal in listed securities or derivatives (as the case may be), not communicated to any person who took the decision; and

(ii) none of its directors or employees who had the inside information gave advice concerning the decision to any person who took the decision at any time before it dealt in counseled or procured the other person to deal in such listed securities or derivatives (as the case may be); and

(c) the inside information was in fact not so communicated to any person who took the decision and none of its directors or employees who had the inside information in fact so gave advice to any person who took the decision.
Rather than being ‘reasonably expected to ensure’ that inside information was not communicated, the laws of Hong Kong require instead that ‘arrangements then existed to secure that’ inside information was not communicated. There is an express prohibition of the giving of advice by a person in possession of inside information and this Chinese Wall defence does apply to both trading and the procuring of trading.

In Singapore, s 226(2) of the Securities and Futures Act 2001 sets out a Chinese Wall defence, in almost identical terms to that contained in s1043F of the Corporations Act. It provides that a corporation does not contravene the prohibition of insider trading in s 218(2) of the Act (which prohibits both trading and the procuring of trading) by entering into a transaction or agreement at any time merely because of information in the possession of an officer of the corporation if:

(a) the decision to enter into the transaction or agreement was taken on its behalf by a person other than that officer;

(b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person who made the decision and that no advice with respect to the transaction or agreement was given to that person by a person in possession of the information; and

(c) the information was not so communicated and no such advice was so given.

This defence does require that the arrangements be ‘reasonably expected to ensure’ that inside information was not communicated and there is an express prohibition of the giving of advice by a person in possession of inside information to the person making the relevant trading decision. However, unlike the position in Australia, the Chinese Wall defence in Singapore expressly applies to both trading and the procuring of trading in relevant financial products.

Thus it can be seen that some jurisdictions have no statutory Chinese Wall defence for insider trading – such as Germany, South Africa and the European Union - and in those jurisdictions in which there is a statutory Chinese wall defence, it is generally similar to the
Australian Chinese Wall defence, but with a few significant points of departure. The Chinese Wall defences available in the United Kingdom and the USA do not require that the relevant arrangements be ‘reasonably expected to ensure’ that inside information is not communicated, focusing instead upon whether the information is actually communicated to those who make trading decisions, whereas in Hong Kong the arrangements must exist to ‘secure’ that inside information is not communicated. In the United Kingdom and the USA the inside information must not be communicated to a person making a trading decision but there is no express requirement that no advice be given by a person in possession of inside information, whereas such a prohibition of the giving of advice or exerting ‘influence’ applies in New Zealand, Hong Kong and Singapore. The Chinese Wall defence also specifically applies to the procuring of trading as well as trading in New Zealand, Hong Kong and Singapore.

Looking at the differences between the positions adopted in these jurisdictions in relation to the Chinese Wall defence to insider trading, the only point of difference with Australian law which I recommend be adopted is to extend the operation of the Chinese Wall defence to the procuring of trading in relevant financial products as well as trading. As noted above, s 1043F of the Corporations Act only extends the Chinese Wall defence to the trading limb of the insider trading offence and not the procuring limb, since it only applies where ‘the decision to enter’ a transaction or agreement (being the decision to trade in relevant financial products) was taken ‘on [a corporation’s] behalf’ by a person other than a person in possession of the inside information. As has previously been recommended by CAMAC\textsuperscript{96} and accepted by the Commonwealth Treasury,\textsuperscript{97} without a sound basis for excluding the procuring of trading from the operation of the Chinese Wall defence, I propose, along with other amendments to the Chinese Wall defence, to also extend it to the procuring of trading.

I do not recommend the adoption of the next point of difference – the absence of a requirement that the Chinese Wall arrangements be ‘reasonably expected to ensure’ that information is not communicated. The existence of such a requirement is more likely to lead

\textsuperscript{96} CAMAC, Insider Trading Report, above n 7, 2 and 7.

\textsuperscript{97} Commonwealth Treasury, Insider Trading Position and Consultation Paper, above n 32, 5.
to corporations maintaining appropriate arrangements at all times, thereby limiting opportunities for insider trading to occur within the corporation, which might not exist if corporations merely had to prove that a particular person did not possess inside information at a certain point in time. If opportunities for insider trading within corporations are limited, there is less likely to be any impact on market integrity, which is consistent with the rationale for the prohibition of insider trading in Australia.

The absence of an express requirement in some jurisdictions for there to be no advice given to persons making trading decisions by those who possess inside information is also not a position that I would recommend be adopted in Australia. If this were to occur, advice about a transaction could be given without the need to actually communicate the relevant inside information to those making trading decisions. As noted above, it is appropriate to restrict the giving of advice by persons in possession of inside information as, if those who make decisions to trade in securities on behalf of corporations are able to do so with the advice of those who possess inside information, the corporation receives an unfair advantage and thus should be subject to possible liability for insider trading. To allow otherwise would enable those within corporations to circumvent the operation of the prohibition of insider trading in a manner inconsistent with the need to maintain and protect market integrity.

**Preliminary Conclusions and Recommended Reforms**

As a potential defence to a claim of insider trading against a corporation, the greatest limitation of the Chinese Wall defence is the absence of certainty. There is a lack of clarity as to the requirements for a sufficient Chinese Wall, as the only real guidance is contained in fairly general judicial comments supplemented by regulatory guidelines and market practice principles. As a result, there is a lack of certainty as to whether insider trading is actually occurring and whether corporations are exposed to liability for insider trading. This uncertainty is compounded by the application of the differing general law and statutory mechanisms which can be used to determine when a corporation engages in certain conduct, possesses information and has relevant knowledge. In its current form, the Chinese Wall defence is not available where information is possessed by an agent who is
not also an officer or employee of the corporation. Additionally, the defence applies only where the corporation itself engages in trading, and not where it procures trading, although there is no logical explanation for this gap in its application. In order to respond to the limitations and uncertainty in the application of the Chinese Wall defence, legislative reform is clearly needed. The interests of market integrity are not served by statutory exceptions and defences which are unclear, imprecise and uncertain, and which may operate in limited but vague circumstances.

The reforms that I recommend be made to Australian insider trading laws would remedy the difficulties identified in this chapter. As has been noted, I propose that the operation of the general law be expressly excluded from the statutory regime applying insider trading laws to corporations, and that a new set of provisions be adopted to provide for a model of direct liability as the exclusive means for determining when a corporation possesses inside information, has knowledge that the information is inside information, and engages in the necessary trading conduct in relation to relevant financial products, and an amended version of the Chinese Wall defence for corporations would be incorporated into the Corporations Act.

The proposed reforms would specifically provide that the only means by which a body corporate would be liable for the insider trading prohibitions in s 1043A are those set out in what would be a new s 1042G of the Corporations Act, to be entitled ‘Liability of Bodies Corporate’. As well as excluding the operation of the general law, and the operation of s 769B of the Corporations Act and Part 2.5 of the Criminal Code, a new s 1042G would specifically provide that a corporation would only be regarded as having engaged in insider trading if the person who possessed the information also had the requisite knowledge that it was inside information and engaged in, or authorised the prohibited trading conduct within the actual or apparent scope of their authority, or received advice from a person in possession of inside information. However, there should be no liability for insider trading where a person who possesses inside information engages in the trading conduct if another person who did not possess the inside information was the person who made the decision that the trading should occur, so long as a person possessing the inside information did not
pass on that information or give advice about the transaction. The new provisions would
apply where an officer, employee or agent of a corporation possesses information, has the
requisite knowledge and engages in the trading conduct on behalf of a corporation.
Accordingly, the amended Chinese Wall defence would extend to agents, as well as to
officers and employees, and would be a defence to all the forms of the prohibited conduct,
not just trading in relevant financial products.

In the final chapter of this thesis which follows, I set out in full the proposed reforms to better
apply Australian insider trading laws to corporations.
CHAPTER 7
THE CRIMINAL LIABILITY OF CORPORATIONS FOR INSIDER TRADING IN AUSTRALIA:
REFORM PROPOSALS

In this thesis I have undertaken a review of the current system of the regulation of insider trading in Australia, including the rationale for the prohibition of insider trading, with a thorough consideration of the relevant principles of corporate criminal liability, and the application of insider trading laws to corporations. I have undertaken a detailed analysis of the manner in which the elements of the insider trading offence are attributed to corporations, and the availability of the Chinese Wall defence for corporations, and described the resulting difficulties and problems which arise. This chapter sets out in full my recommendations and proposals for the reform of Australia's insider trading laws.

Throughout this thesis I have demonstrated that Australia's current insider trading laws are significantly flawed due to uncertainty in their application to corporations which arises in a number of ways - there is uncertainty as to which mechanisms, statutory or general law, are to be applied to determine when corporations possess information, have knowledge, and engage in the relevant conduct; the potential availability of several different attribution mechanisms applying a variety of tests results in significant uncertainty as to when the elements of the offence will be satisfied in relation to corporations; and there is also uncertainty in the manner and extent of the application of the Chinese Wall defence for corporations. Since insider trading laws are intended to maintain and protect market integrity, which clearly requires certainty in the application of the insider trading offence to corporations, the law should be reformed in order to give better effect to this aim.

As a result of the identified flaws in the current system of regulation, I propose three key reforms to Australian insider trading laws: that the operation of the general law be expressly excluded from the statutory regime applying insider trading laws to corporations; that a revised set of provisions be adopted to provide for a new model of direct liability as the exclusive means for determining when the elements of insider trading apply to a corporation;
and that an amended version of the Chinese Wall defence for corporations be adopted. The new statutory provisions would provide greater clarity, be more consistent with the market integrity rationale for the prohibition of insider trading, and offer increased certainty for all affected and interested parties as to the intended operation of the law.

In this concluding chapter, I will summarise the flaws in the current legislative regime which have been analysed and discussed in detail throughout this thesis. I will then set out in full my suggested amendments to the Corporations Act which are aimed at overcoming the identified flaws in the current regulatory regime. Finally, I will explain in detail the nature of the reforms which I propose, providing reasons for the suggested amendments to the law, and discuss the ways in which they will address the identified problems with the current regime. I will conclude this thesis with my thoughts on the potential impact of the adoption of the suggested amendments and the outcomes from the research undertaken in connection with this thesis.

Flaws in the Current Regime

As noted above, throughout this thesis I have identified three significant flaws in the application of Australian insider trading laws to corporations: (i) there is confusion as to which mechanisms are to be used to determine how the elements of the insider trading offence are applied to corporations; (ii) the different mechanisms which are available to apply the elements of the insider trading offence to corporations have conflicting and varying tests; and (iii) there are uncertainties and difficulties associated with the application of the Chinese Wall defence for corporations to insider trading.

In chapter 5 of this thesis, I discussed the manner in which the key elements of the insider trading offence – the possession of information, the requisite knowledge and the necessary conduct – are applied to corporations. One of the main flaws identified was the confusion as to the manner in which these elements are actually to be applied to corporations. A careful review of these elements leads to the necessary conclusion that both the statutory provisions and general law rules operate concurrently to provide a variety of mechanisms
which can be used to establish that a corporation possesses inside information, has knowledge that the information is not generally available and is likely to be material, and has traded or procured trading in relevant financial products, or tipped. The Corporations Act is silent on the application of the general law to the statutory offence of insider trading, but the operation of the general law is not excluded when determining how the insider trading laws apply to corporations. Cases interpreting other pieces of legislation which use the same or very similar provisions make it clear that the general law is not intended to be excluded and, in order to make sense of other provisions of the Corporations Act, it is necessary to infer that the general law is also intended to apply. However, there is widespread confusion as to whether and how this is to occur. In ASIC v Citigroup, Jacobson J considered only one of the potentially applicable statutory provisions of the Corporations Act when determining whether the information allegedly possessed by a proprietary trader acting on behalf of Citigroup was possessed by the corporation, and did not consider the potential application of the general law at all.1 Meanwhile, some commentators do regard the general law as relevant, but suggest that it is to be used to rebut statutory presumptions which might otherwise apply elements of the offence to a corporation.2

Even when considering the statutory tests alone, there is confusion as to which of those tests relate to the possession of information and which relate to the requisite knowledge. Some commentators3 consider s 1042G(1)(b) of the Corporations Act to apply when attempting to determine whether a corporation had the requisite knowledge rather than the

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possession of information, whereas others regard it as applicable to both the possession of information and the requisite knowledge. This uncertainty needs to be resolved.

I have demonstrated in this thesis that a wide variety of mechanisms, both statutory and general law, are potentially available to apply the elements of the insider trading offence to a corporation. As discussed in chapter 5, each of the various available statutory mechanisms applies a different set of tests - some require that, for the possession of information, knowledge or conduct of a natural person to be applied to a corporation, the natural person must be an officer of that corporation, whereas others will operate in respect of any employee or agent who is able to act on the corporation's behalf. Some require that there be a link or nexus with the person's role within the corporation. Some require that the possession of information or knowledge must be linked to the relevant conduct, while others do not. Significant uncertainty is created by having many overlapping statutory mechanisms with a variety of different requirements. This uncertainty is further compounded when the general law mechanisms are also considered, as the principles of the identification doctrine require only that the relevant person who possesses the information, has the requisite knowledge or engages in the relevant conduct be the 'directing mind and will' of the corporation, with no necessary connection with their role or other elements of the offence. This gives rise to additional uncertainty as to the circumstances in which the elements of the insider trading offence are to be applied to a corporation, and that uncertainty needs to be resolved.

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5 See, for example, Corporations Act, ss 1042G(1)(b) and 1042G(1)(c).
6 See, for example, Corporations Act, ss 769B(1) and 769B(3).
7 See, for example, Corporations Act, ss 1042G(1)(b) and 1042G(1)(c); Corporations Act, ss 769B(3) and 769B(1).
8 See, for example, Corporations Act, ss 769B(3).
9 See, for example, Corporations Act, ss 1042G(1)(b), 1042G(1)(c) and 769B(1).
The adoption of a new set of provisions which would provide the only mechanism for applying insider trading laws to corporations would resolve the existing uncertainties and would also implement the following changes to the application of those trading laws: (i) there would no longer be any requirement for a nexus between a natural person’s role or position for information they come to possess or knowledge they have to be attributed to a corporation; (ii) a corporation could have liability for insider trading as a result of information possessed, knowledge held and conduct engaged in by any officer, employee or agent of the corporation; (iii) the trading element would continue to require that the conduct occur within the scope of a person’s authority, or was undertaken with the authorisation of a person with authority, on behalf of the corporation; and (iv) there would be a new requirement for a link between the possession of information, knowledge and conduct, as it would be necessary that the same natural person possess the inside information, have the requisite knowledge and engage in the relevant conduct for it to be attributed to a corporation, removing the possibility of aggregation.

The uncertainties concerning the manner in which the elements of the insider trading offence are applied to corporations are further exacerbated by the fact that the primary defence to insider trading for corporations - the Chinese Wall defence – is expressed in vague terms which appear to have inconsistencies with the statutory provisions. As discussed in chapter 6, s 1043F of the Corporations Act, which sets out the Chinese Wall defence for corporations, refers to ‘information in the possession of an officer or an employee’ even though s 1042G(1)(a) of the Corporations Act, which sets out the circumstances in which a corporation is taken to possess information, refers only to information in possession of an officer of a body corporate. Although this inconsistency may be overcome by either inferring that s 1042G does not provide an exclusive mechanism for attributing the possession of information, and that other statutory provisions and the general law might apply where an employee and not an office of a corporation possesses information, or by assuming that the discrepancy results from a drafting error, the uncertainty created requires clarification and resolution.

The reference to ‘an officer or an employee’ in s 1043F of the Corporations Act also creates a further gap in the application of the defence, because though s 769B(3) of the
Corporations Act can apply so that a corporation may have liability for insider trading where information is possessed by an agent, the Chinese Wall defence will not be available if that agent is not also an officer or employee of the corporation.

There is additional uncertainty created by the fact that the Chinese Wall defence does not extend to the procuring of trading, but only the actual act of trading. This occurs because the Chinese Wall defence only applies to a corporation’s ‘decision to enter a transaction or agreement’ made ‘on its behalf’ by an employee or officer. A person who procures trading by another is not necessarily the person who makes the ultimate ‘decision to enter a transaction or agreement’ on that other person’s behalf unless they are also the ultimate decision-maker for that other person (for example, if the other person is a corporation controlled by that person). A person who merely ‘encourages’ another person to trade in securities will be regarded as procuring that other person to trade,\(^{10}\) but the ultimate decision is still made by that other person. As there appears to be no rationale for applying the Chinese Wall defence to trading only, and not the procuring of trading, and the gap appears to be ‘the result of a legislative oversight’,\(^{11}\) this inconsistency, along with the other uncertainties in the application of the Chinese Wall defence, needs to be corrected.

The uncertainty resulting from the confusion as to which mechanisms are to be used to apply the elements of the insider trading offence to corporations, the differing nature of the tests applied by those various mechanisms, and the lack of clarity as to the application and availability of the Chinese Wall defence, is detrimental to the accepted rationale for the prohibition of insider trading, being the protection and maintenance of market integrity. The uncertainty that these various factors create is problematic, not only for those corporations which may be accused of having engaged in insider trading, but also for regulators responsible for supervising securities markets and taking action against market misconduct, as well as the many participants in the securities market who are entitled to have confidence.

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\(^{10}\) Section 1042F of the Corporations Act defines ‘procure’ as follows: For the purposes of this Division, but without limiting the meaning that the expression procure has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to procure the act or omission by the other person.

in the integrity of that market. As noted earlier in this thesis, insider trading damages market integrity because it prevents the market from operating freely and fairly, with ‘all parties having equal access to relevant information.’\textsuperscript{12} A belief by potential investors and market participants that insiders have an informational advantage and unfair opportunities to trade in securities reduces investor confidence in market integrity, and therefore may also reduce investor participation in securities markets.\textsuperscript{13} Thus, the particular statutory provisions which regulate insider trading and apply the prohibition to corporations should also be directed to the aim of protecting and maintaining market integrity. This requires that there be certainty for all affected and interested parties as to the manner in which insider trading laws apply to corporations. Unfortunately, this is not currently the case. As has been noted by CAMAC:

> Insider trading laws also need to be clear and workable, so that all parties know where they stand. For instance, corporate managers, financial services providers and legal advisers should not be subject to undue uncertainty in their ability to deal in securities in conformity with the law, or advise on that law. Lack of clarity may result in reduced compliance as well as unproductive uncertainty for the market.\textsuperscript{14}

While CAMAC was referring to the general operation of Australian insider trading laws, these comments are particularly relevant to the application of those laws to corporations, which has been demonstrated to be unclear and uncertain. Additionally, in order for there to be appropriate oversight of securities markets, and to enable the detection and prosecution of unlawful conduct, regulators must also have certainty as to the application of insider trading laws to corporations. The protection and maintenance of market integrity will also ensure that Australia’s securities markets remain internationally competitive.


\textsuperscript{14} CAMAC, Insider Trading Discussion Paper (2001) [0.5].
Accordingly, I propose that the current regulatory regime prohibiting insider trading be amended so that it applies to corporations in the following ways: (i) the operation of the general law should be expressly excluded; (ii) new statutory provisions which apply the elements of insider trading - the possession of information, the requisite knowledge and the necessary conduct - to corporations are to replace the current provisions of the Corporations Act; and (iii) the Chinese Wall defence to insider trading should be redrafted.

Proposed New Provisions of the Corporations Act

In order to address the identified flaws in the current regulatory regime relating to corporate criminal liability for insider trading, I propose that the following amendments be made to the Corporations Act:

(a) Section 1042G of the Corporations Act, entitled ‘Information in possession of a body corporate’, should be amended by deleting paragraphs (a), (b) and (c). Paragraph (d) relates only to s 1043M(2)(b), so this paragraph should be moved to become a new paragraph (4) of s 1043M, with some amendments.\(^{15}\)

(b) Section 1042G of the Corporations Act should be renamed ‘Liability of Bodies Corporate’, the existing paragraphs should be deleted, and new paragraphs should be inserted.

\(^{15}\) As noted earlier in this thesis, s 1043M of the Corporations Act sets out several defences to a prosecution for insider trading and s 1043M(2) provides that:

In a prosecution brought against a person for an offence based on subsection 1043A(1) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first mentioned person’s possession:

...(b) it is a defence if the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.
(c) Section 1043F of the Corporations Act, entitled 'Chinese Wall arrangements by bodies corporate' should be amended by deleting the existing paragraphs and inserting new paragraphs.

To the maximum extent possible, for the purposes of consistency and ease of reference, I have used language similar to that already employed within the Corporations Act. It is proposed that the new amendments would read as follows:

**Section 1043M:**

(4) *For the purposes of subsection (2)(b), a body corporate is taken to have known, or to ought reasonably to have known, of the relevant information if an officer, employee or agent of the body corporate who was aware of the body corporate’s entry into the transaction or agreement knew or ought reasonably to have known of the relevant information.*

**Section 1042G:**

*Liability of Bodies Corporate*

(1) *This section sets out the only means by which a body corporate will be liable for the purposes of the prohibitions in section 1043A. For the avoidance of doubt, section 769B of this Act and Part 2.5 of the Criminal Code do not apply in relation to the prohibitions in section 1043A.*

(2) *A body corporate is taken to possess information for the purposes of section 1043A(1) and (2) if an officer, employee or agent of the body corporate possesses the information.*

(3) *A body corporate is taken to know, or to ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of inside information in*
section 1042A are satisfied in relation to the information if an officer, employee or agent of the body corporate knows, or ought reasonably to know, those matters.

(4) A body corporate is taken to engage in the conduct set out in section 1043A(1)(c) or (d), or section 1043A(2)(c) or (d), if:

(a) an officer, employee or agent of the body corporate engages in the conduct on behalf of the body corporate within the scope of his or her actual or apparent authority; or

(b) any person engages in the conduct on behalf of the body corporate with the authorisation of an officer, employee or agent of the body corporate.

(5) For the purposes of paragraph (4), conduct is taken to be authorised by an officer, employee or agent of a body corporate if the conduct is undertaken at that person’s direction, or with that person’s consent or agreement (whether express or implied) where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of that person.

(6) A body corporate will only be in breach of a prohibition in section 1043A if a person who possesses inside information which the body corporate is taken to possess pursuant to paragraph (2) also:

(a) knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of inside information in section 1042A are satisfied in relation to the information so that the body corporate would be taken to know, or to ought reasonably to know, those matters in accordance with paragraph (3); and

(b) either:
(i) engages in the conduct on behalf of the body corporate in accordance with paragraph (4)(a);

(ii) authorises another person to engage in the conduct on behalf of the body corporate in accordance with paragraph (4)(b); or

(iii) gives advice about the conduct to a person:

   (A) who engages in the conduct on behalf of the body corporate in accordance with paragraph (4)(a); or

   (B) authorises another person to engage in the conduct on behalf of the body corporate in accordance with paragraph (4)(b).

Section 1043F
Chinese Wall Arrangements by Bodies Corporate

A body corporate does not contravene subsection 1043A(1) or (2) by engaging in the conduct set out in section 1043A(1)(c) or (d), or section 1043A(2)(c) or (d) at a time when inside information is possessed by an officer, employee or agent of the body corporate if:

(a) the decision to engage in the conduct was made by a person who did not possess the inside information;

(b) it had in operation at the time arrangements that could reasonably be expected to ensure that the inside information was not communicated to the person who decided to engage in the conduct; and

(c) no advice about the conduct was given to the person who decided to engage in the conduct by a person who possessed the inside information.
Nature of the Proposed Reforms

A detailed explanation of the nature of each of the proposed amendments follows, including a description of the relevant statutory provision, the ways in which it will change the state of the current law and the reasons why the amendment is necessary.

Exclusion of the General Law

Some of the current confusion regarding which mechanisms are to be used to apply the elements of the insider trading offence to corporations would be alleviated by excluding the application of the general law. This would be done by codifying the insider trading offence in relation to corporations, to make it clear that only particular statutory provisions of the Corporations Act apply in relation to corporate liability for insider trading. While this might initially appear to narrow the scope of the application of the insider trading laws, it is also proposed to redraft the statutory provisions to widen their current application. Thus, greater certainty would be provided without reducing the potential to apply the law to corporations where appropriate. In particular, it would be clear that general law principles of agency and the identification doctrine would not be available to be utilised as separate mechanisms for determining when a corporation has engaged in insider trading, and the demonstrated difficulties in attempting to apply those general law rules would therefore be avoided.

Even though there are other areas of the law which do not exclude the general law and allow the statutory and general law rules to operate concurrently – as has been indicated by a review of other pieces of legislation which use the same or similar wording as the current provisions of the Corporations Act – this does not mean that the insider trading regime must continue to allow the general law to apply. While it would not necessarily be desirable for insider trading laws to exclude the general law when other pieces of legislation which use the same statutory provisions allow the general law to apply, clear language would avoid any difficulties of interpretation and, in the interests of clarity and certainty, a more definitive regime is required for corporate criminal liability for insider trading.
The proposed amendments would result in only one set of statutory provisions to be used to apply the elements of the insider trading offence to corporations. Currently there are multiple statutory provisions which may apply, which causes significant confusion and uncertainty. The general principles of corporate criminal responsibility contained in the Criminal Code are currently excluded and therefore do not apply to the operation of the present insider trading provisions. Under the proposed new provisions, the Criminal Code provisions relating to corporate criminal liability would continue to be excluded and the provisions in s 769B of the Corporations Act would also be excluded.

Continued Exclusion of the Criminal Code

I argue that it is not appropriate to adopt the currently excluded provisions of Part 2.5 of the Criminal Code relating to corporate criminal liability for insider trading. As has been noted earlier in this thesis, in relation to physical elements - with the physical element for the insider trading offence being the possession of information - the Criminal Code provides that:

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

This provision, while it differs from the other mechanisms available to determine when a corporation is in possession of inside information, would still import some concepts which have been identified as causing uncertainty – for example, that the relevant employee, agent or officer must come into possession of the information within the scope of his or her employment or within his or her actual authority.

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16 Corporations Act, s 1043A(3).
17 Criminal Code, s 12.2.
In relation to fault elements - with the fault element for the insider trading offence being the knowledge that certain information is inside information\textsuperscript{18} - the \textit{Criminal Code} provides that:

If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.\textsuperscript{19}

It then sets out a variety of ways in which such authorisation or permission might occur.\textsuperscript{20} However, as with the physical element, the adoption of such provisions for insider trading would not improve the position of uncertainty which currently exists, as it is not clear how it would be demonstrated, for example, that a corporate culture existed that ‘directed, encouraged, tolerated or led to’ insider trading. Instead, my proposed model specifically sets out the way in which the fault element would be proved for insider trading. As the insider trading laws are intended to maintain and protect market integrity, it is most appropriate to utilise a particular set of provisions focused on achieving that rationale, rather than relying on the general statutory provisions applicable to the majority of Commonwealth criminal offences, which do not necessarily have similar aims or appropriate application to the insider trading offence.

\textsuperscript{18} \textit{Corporations Act}, s 1043A(3).
\textsuperscript{19} \textit{Criminal Code}, s 12.3(1).
\textsuperscript{20} Section 12.3(2) of the \textit{Criminal Code} provides as follows:

The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
Exclusion of section 769B of the Corporations Act

The provisions of s 769B will be excluded in order to allow for a single set of mechanisms within the Corporations Act to apply liability for insider trading to corporations. It has been noted throughout this thesis that the operation of multiple different mechanisms for attributing liability for insider trading liability to corporations causes significant uncertainty and confusion. Instead of continuing to allow the provisions in s 769B to operate in addition to those contained in the current s 1042G of the Corporations Act, relevant aspects of s 769B would be incorporated into the new provisions to be contained in the new amended s 1042G.

No Requirement for Nexus with Role or Position for Information or Knowledge

A link or nexus with the person's role within the corporation would not be required in relation to the possession of information or knowledge. It is consistent with the protection and maintenance of market integrity that the new statutory provisions for corporate criminal liability for insider trading should not contain any requirement for a link or nexus with the role or responsibilities of the natural person within a corporation whose information or knowledge is being attributed to the corporation. If an officer, employee or agent of a corporation possesses inside information, the corporation should not be able to benefit from the use of that information, regardless of the manner in which they came to possess it. It is irrelevant whether they acquired the information in a private or professional capacity if the corporation is to potentially receive an advantage. Natural persons who come to possess inside information cannot use it for their own benefit, or that of another person, if they came to possess the information in a personal rather than professional capacity, and corporations should be placed in the same position for consistency and clarity.

Attribution is Possible for all Officers, Employees and Agents of a Corporation

The new rules would apply to all officers, employees and agents of a corporation, and would not be limited to executives or senior management within a corporation. This is a significant
extension from the current provisions of s 1042G of the Corporations Act, which currently only provides that a corporation will possess information if it is possessed by an officer. However, s 769B of the Corporations Act attributes a 'state of mind' to a corporation under s 769B(3) if an officer, employee or agent had the state of mind and engaged in the relevant conduct. Similarly, s 769B(1) applies the conduct of an officer, employee or agent acting with authority or authorisation to a corporation.

The new statutory provisions would make no distinction between the different positions that a person might hold within an organisation. This is to ensure that the operation of the law is not avoided by ensuring that certain activities are only carried out by junior employees or agents of a corporation, or by the altering of position descriptions or job titles. Since the intent of the law is to maintain and protect market integrity, the relevant consideration is whether a corporation obtains an informational advantage, to which the position that a person within the organisation might hold is irrelevant. Corporations would be protected from liability for the actions of 'rogue' employees, or those who might carry out activities beyond their limits of authority by a requirement that the relevant trading conduct occur within the scope of a person's authority (regardless of whether they are an officer, employee or agent of the corporation) or with the authorisation of another person who is acting with appropriate authority.

**Conduct Must Occur within the Scope of Authority or with Authorisation of a Person with Authority, on Behalf of Corporation**

Although information possessed by an officer, employee or agent of a corporation would no longer need to have been acquired in circumstances which have a nexus with the position or role of that person, the trading element would maintain a requirement that the conduct occurred within the scope of the authority of the relevant officer, employee or agent (or was undertaken with the authorisation of a person with authority) on behalf of the corporation. This mirrors the conduct requirements which currently exist in s 769B(1) of the Corporations Act which, for the sake of clarity and certainty, will be excluded from the operation of the insider trading provisions as a result of the proposed reforms. As noted above, this
requirement would ensure that corporations would be protected from liability for the actions of ‘rogue’ employees, or those acting without authority or authorisation, while still ensuring that a corporation has liability where it would obtain an unfair informational advantage. As with the other proposed amendments, this requirement is consistent with the maintenance and protection of market integrity.

**Link Between the Possession of Information, Knowledge and Conduct**

The new provisions would require a link between possession of information, knowledge and conduct – there would only be liability for insider trading by a corporation where the same officer, employee or agent who possesses inside information also knows, or ought reasonably to know, that it is inside information and either carries out or authorises the relevant conduct. If one person within a corporation possesses inside information but does not use it, and another person elsewhere in the corporation does not possess or know about the inside information but does trade in affected securities on the corporation’s behalf, neither person has sought to obtain an unfair advantage for the corporation, and the corporation cannot be said to have obtained such an advantage. If a natural person who trades (or decides to trade) on a corporation’s behalf has no inside information, and therefore no unfair informational advantage, the rationale for the prohibition of insider trading is not infringed. However, if a person who possesses inside information gives advice to a person who trades (or decides to trade) on a corporation’s behalf, the corporation receives the benefit of the information and there is a loss of market fairness – accordingly, this would also be regarded as conduct which should be caught by the application of insider trading laws to corporations.

**Direct Model of Corporate Criminal Liability for Insider Trading**

The codified and clearer tests described above which would be used to attribute the possession of information, knowledge and conduct to corporations under the proposed amendments would make it easier to determine when that attribution is likely to occur and therefore when a corporation would be in breach of the insider trading prohibition. A direct
model of corporate criminal liability would be utilised, so that the possession of information, knowledge and conduct of the relevant officer, employee or agent would be taken to be that of the corporation. A direct model of liability has been chosen because it is consistent with the underlying rationale for the insider trading prohibition, being the protection and maintenance of market integrity, rather than a model reliant on principles of vicarious liability or aggregation.

Under the direct model proposed, a corporation would have liability for insider trading where it is regarded as having engaged in the prohibited conduct itself through the information, knowledge and conduct of an authorised officer, employee or agent. It is only in these circumstances that a corporation can be considered to obtain an unfair advantage over other participants in securities markets. The resulting amendments would give much greater certainty in the application of the insider trading laws to corporations.

*Redrafting of the Chinese Wall Defence*

The identified problems with the Chinese Wall defence in s 1043F of the *Corporations Act* require a redrafting of this provision.

The redrafted s 1043F would apply as a defence to both trading and the procuring of trading, if the relevant requirements are satisfied, closing the previous loophole which did not extend the application of the defence to the procuring of trading. Having proposed amendments to s 1042G of the *Corporations Act* in relation to the liability of bodies corporate for insider trading, the previous problem of s 1042G referring to information in the possession of ‘officers and employees’ and s 1043F referring only to information in the possession of ‘officers’ would be resolved, as the new provisions will apply to information in the possession of officers, employee or agents, so long as they also have the requisite knowledge and are carrying out the relevant conduct within his or her authority, or with authorisation from a person with authority.
The Chinese Wall defence would apply so long as the person who made the decision to engage in the conduct (that is, the decision that the corporation engage in the relevant trading conduct) did not possess inside information; sufficient Chinese Wall arrangements were in place; and no advice about the conduct was given to the person who made that decision by a person who possessed inside information. The defence provides an additional protection to corporations where a person within a corporation may possess information which they know to be inside information and may trade or procure trading in relevant financial products on a corporation’s behalf, but do so only at the direction of another person who does not possess the information. Even if they engage in trading at the direction of another person who does not possess the inside information, there would be no liability for the corporation if appropriate Chinese Wall arrangements are in place and no advice is given by the person who possesses the inside information. This is consistent with the market integrity rationale for the prohibition of insider trading, because the corporation is receiving no benefit or unfair advantage as a result of the person possessing the information.

Amendments concerning section 1043M of the Corporations Act

A final amendment is needed in relation to s 1043M of the Corporations Act, which provides a defence to insider trading where the other party to a trade was also aware of the relevant inside information. It has been noted in this thesis that it is very difficult to demonstrate that a person ‘ought reasonably to know’ something because of their position. Consistent with the amendments already described, it should not be relevant how a person comes to know certain inside information, but the person who knows or ought reasonably to know of the inside information should also have to be aware of the corporation’s entry into the relevant transaction or agreement, in order for such a defence to apply. Accordingly, it is proposed that the new s 1043M(2) be adopted to incorporate the concepts previously contained in s 1042G(1)(d) but to provide that a corporation will be taken to know or to ought reasonably to know of the relevant inside information if an officer, employee or agent who was aware of the corporation’s entry into the relevant transaction or agreement knew or ought reasonably to have known of the relevant information. This will make the various statutory provisions
relating to corporate criminal liability for insider trading and the applicable defences consistent.

Conclusion

The detailed study of the application of Australian insider trading laws to corporations undertaken throughout this thesis has revealed a number of flaws in the current regime, in the form of inconsistencies, issues of uncertainty, difficulties of interpretation and unnecessary complexities. Australia’s insider trading laws are generally considered to be overly complex and legalistic, and the application of those laws to corporations is equally difficult, if not more so. It has been demonstrated in this thesis that the insider trading laws of Australia, and those of a number of other jurisdictions, are intended to safeguard market integrity, but the uncertainty which exists under the current application of insider trading laws to corporations makes it difficult to have the necessary confidence that such laws are serving their purpose, particularly in light of the absence of a successful set of insider trading proceedings against a corporation.

The primary flaws of the current regime have been shown to be the uncertainty as to which of the various statutory and general law mechanisms are to be applied in respect of the various elements of the insider trading offence, and the widely varying tests which are used for each of the different mechanisms, making it difficult to determine when a corporation engages in insider trading, compounded by the lack of clarity as to the availability of the Chinese Wall defence for corporations. This chapter has set out my proposals for the reform of Australia’s insider trading laws, to improve their application to corporations in a manner that is consistent with the market integrity rationale for the prohibition of insider trading. The three key reforms which I have proposed – the exclusion of the general law, the implementation of a new set of exclusive statutory mechanisms for applying insider trading laws to corporations, and the adoption of an amended Chinese Wall defence – remove the existing uncertainty and create a new model of applying insider trading laws that is more certain, but less complex, than the current provisions.
As well as applying the elements of the insider trading offence to corporations more effectively and appropriately, the reforms proposed in this thesis have the potential to bring additional benefits. Despite the fact that 42 individuals have been convicted of insider trading, there have been no successful proceedings brought against a corporation in Australia. Worldwide, there has been no corporation convicted of insider trading. While there may be various reasons for the absence of any such conviction, it is unlikely that it is due to a lack of any criminal conduct by or within corporations. It is more likely that uncertainties as to the operation and effect of insider trading laws deter prosecutors and regulators from bringing such actions, and instead choose to focus their enforcement activities on individual offenders. While the proposed reforms are not intended to lead to a greater number of insider trading prosecutions against corporations for their own sake, the resulting improvements in the clarity and certainty of the content of insider trading laws as they apply to corporations will better enable regulators to contemplate bringing enforcement action against corporations where appropriate. If corporations are seen to be the subject of insider trading enforcement action, the deterrent effect for all potential offenders, whether natural persons or legal persons, is more likely to be increased.

If the reforms proposed in this thesis were adopted, it would also result in Australia having a model system of insider trading laws for corporations of international significance and relevance which would demonstrate ‘best practice’ in insider trading regulation. In an increasingly globalised world, in which trans-national corporations are able to conduct businesses across many countries, insider trading is not necessarily limited to national borders or conducted locally. As almost all jurisdictions with established securities exchanges prohibit insider trading, and apply that prohibition to corporations, Australia’s new regime could serve as a best practice example for other jurisdictions. Additionally, as the new laws have been developed with the objective of maintaining and protecting market integrity, Australia’s securities markets would be better safeguarded, enabling Australia to remain competitive in the global economy.

The impact of the possible adoption of the proposed reforms on corporations themselves should not be forgotten. All who operate within our securities markets are entitled to the
benefit of market integrity and certainty as to the operation and application of the relevant laws, including corporate participants. Corporations will be better placed to take action to ensure that their officers, employees and agents comply with the law, and do not engage in any conduct which would result in the corporation committing an offence, if the operation and application of the law is made more certain.

While completing this thesis, it became increasingly clear to me that the flaws in Australia’s system of insider trading regulation are not limited to the application of those laws to corporations. Indeed, there are a number of issues identified in this thesis that were beyond the scope of the topic considered, but which would lend themselves to future research and law reform proposals – the nature of the ‘possession’ of inside information; the divergence between the concept of ‘awareness’ under insider trading laws and continuous disclosure obligations; and the determination of the ‘materiality’ of information.

The current legislative provisions state that insider trading occurs when a person ‘possesses’ inside information, yet it is clear from relevant case law that an ‘element of awareness’ is necessary before an offence is committed. As ordinary criminal law concepts of possession do not necessarily import a notion of awareness, should the legislation continue to be framed in terms of the ‘possession’ of information, or is it time to recraft this element of the offence?

It is clear that insider trading laws and continuous disclosure obligations are both intended to contribute to the integrity of securities markets. However, the two systems of regulation do differ in their treatment of the concept of ‘awareness’. Under the ASX Listing Rules, a corporation is regarded as being ‘aware’ of information where an officer of the corporation ‘ought reasonably to have come into possession of the information’ but the insider trading laws require there to be actual awareness of the information. Should both sets of rules be reviewed with a view to achieving greater consistency of application as well as purpose?

The tests for determining when a person would expect information to have a ‘material’ effect are clumsy and convoluted. How is a person to know, or to ought reasonably to know, what
a reasonable person would expect the effect of certain information to be on the price or value of financial products? With the knowledge element of the offence acknowledged as one of the key difficulties in prosecuting insider trading, would a reconsideration of the concept of a ‘reasonable investor’ be timely?

The adoption of the reforms proposed in this thesis would not resolve the further questions posed, but would create an opportunity and impetus for additional reform of insider trading laws. It is hoped that the ideas expounded in this thesis will lead to a renewed interest in corporate criminal liability for insider trading, and the regulation of insider trading in general, and stimulate further academic discussion and research on a significant, but challenging and complex topic.
Section 1042A - Definitions

In this Division:

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

"Division 3 financial products" means:
(a) securities; or
(b) derivatives; or
(c) interests in a managed investment scheme; or
(ca) debentures, stocks or bonds issued or proposed to be issued by a government; or
(d) superannuation products, other than those prescribed by regulations made for the purposes of this paragraph; or
(e) any other financial products that are able to be traded on a financial market.

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

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

"inside information" means information in relation to which the following paragraphs are satisfied:
(a) the information is not generally available;
(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

"material effect", in relation to a reasonable person’s expectations of the effect of information on the price or value of Division 3 financial products, has the meaning given by section 1042D.
“procure” has a meaning affected by section 1042F.

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

Section 1042C - When information is generally available

(1) For the purposes of this Division, information is generally available if:

(a) it consists of readily observable matter; or

(b) both of the following subparagraphs apply:

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

(ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or

(c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(i) information referred to in paragraph (a);

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

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

Section 1042D - When a reasonable person would take information to have a material effect on price or value of Division 3 financial products

For the purposes of this Division, a reasonable person would be taken to expect information to have a material effect on the price or value of particular Division 3 financial products 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 first-mentioned financial products.

Section 1042F - Inciting, inducing or encouraging an act or omission constitutes procuring the omission

(1) For the purposes of this Division, but without limiting the meaning that the expression *procure* has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to *procure* the act or omission by the other person.

(2) Subsection (1) does not limit the application in relation to provisions in this Division of:
(a) section 6 of the *Crimes Act 1914*; or
(b) section 11.1, 11.2, 11.2A, 11.4 or 11.5 of the *Criminal Code*.

Section 1042G - Information in possession of officer of body corporate

(1) For the purposes of this Division:

(a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and

(b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing; and

(c) if an officer of a body corporate, in that capacity, is reckless as to a circumstance or result, it is to be presumed that the body corporate is reckless as to that circumstance or result; and

(d) for the purposes of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he
or she is an officer of the body corporate, it is to be presumed that
the body corporate ought reasonably to know that matter or thing.

(2) This section does not limit the application of section 769B in relation to this Division.

Section 1043A - Prohibited conduct by person in possession of inside information

(1) Subject to this Subdivision, if:

(a) a person (the insider) possesses inside information; and

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

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

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

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

(2) Subject to this Subdivision, if:

(a) a person (the insider) possesses inside information; and

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

(c) relevant Division 3 financial products are able to be traded on a financial market
operated in this jurisdiction;
the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

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

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

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

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

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

Section 1043F - Chinese Wall arrangements by bodies corporate

A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of an officer or employee of the body corporate if:

(a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee; and

(b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made
the decision and that no advice with respect to the transaction or agreement was given to
that person or any of those persons by a person in possession of the information; and

(c) the information was not so communicated and no such advice was so given.

Section 1043M – Defences to prosecution for an offence

(1) In a prosecution of a person for an offence based on subsection 1043A(1) or (2), it is not
necessary for the prosecution to prove the non-existence of facts or circumstances which,
if they existed, would, by virtue of section 1043B, 1043C, 1043D, 1043E, 1043F, 1043G,
1043H, 1043I, 1043J or 1043K, preclude the act or omission from constituting a
contravention of subsection 1043A(1) or (2), as the case may be, but it is a defence if the
facts or circumstances existed.

(2) In a prosecution brought against a person for an offence based on subsection 1043A(1)
because the person entered into, or procured another person to enter into, a transaction
or agreement at a time when certain information was in the first-mentioned person's
possession:

(a) it is a defence if the information came into the first-mentioned person's
possession solely as a result of the information having been made known as
mentioned in subparagraph 1042C(1)(b)(i); and

(b) it is a defence if the other party to the transaction or agreement knew, or ought
reasonably to have known, of the information before entering into the transaction
or agreement.

(3) In a prosecution against a person for an offence based on subsection 1043A(2) because the
person communicated information, or caused information to be communicated, to another
person:

(a) it is a defence if the information came into the first-mentioned person's
possession solely as a result of the information having been made known as
mentioned in subparagraph 1042C(1)(b)(i); and
(b) it is a defence if the other person knew, or ought reasonably to have known, of
the information before the information was communicated.
APPENDIX 2

INSIDER TRADING LAWS OF OTHER JURISDICTIONS

EXTRACTS FROM RELEVANT STATUTES AND LEGISLATIVE INSTRUMENTS

THE EUROPEAN UNION


Article 7 - Inside Information

1. For the purposes of this regulation, inside information shall include the following types of information:

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

2. For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.
Article 8 - Insider dealing

1. For the purposes of this Regulation, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010, the use of inside information shall also comprise submitting, modifying or withdrawing a bid by a person for its own account or for the account of a third party.


Recital (18):

In order to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in this Regulation (EU) No 596/2014, Member States should extend liability for the offences provided for in this Directive to legal persons through the imposition of criminal or non-criminal sanctions or other measures which are effective, proportionate and dissuasive, for example those provided for in Regulation (EU) No 596.2014. Such sanctions or other measures may include the publication of a final decision on a sanction, including the identity of the liable legal person, taking into account fundamental rights, the principle of proportionality and the risks to the stability of the financial markets and ongoing investigations. Members States should, where appropriate and where national law provides for criminal liability of legal persons, extend such criminal alibility, in accordance with national law, to the offences provided for in this Directive. This Directive should not prevent Members States from publishing final decisions on liability or sanctions.
GERMANY

WERTPAPIERHANDELSGESETZ [SECURITIES TRADING ACT] (WpHG).

Section 13 - Inside Information

(1) Inside information is any specific information about circumstances which are not public knowledge relating to one or more issuers of insider securities, or to the insider securities themselves, which, if it became publicly known, would likely have a significant effect on the stock exchange or market price of the insider security. Such a likelihood is deemed to exist if a reasonable investor would take the information into account for investment decisions. The circumstances within the meaning of sentence 1 also apply to cases which may reasonably be expected to come into existence in the future. Specifically, inside information refers to information about circumstances which are not public knowledge within the meaning of sentence 1, which:

1. is related to orders by third parties for the purchase or sale of financial instruments or
2. is related to derivatives within the meaning of section 2 (2) no. 2 relating to commodities and which market participants would expect to receive in accordance with the accepted practice of the markets in question.

(2) A valuation based solely on information about publicly known circumstances is not inside information, even if it could have a significant effect on the price of insider securities.

Section 14 - Prohibition of Insider Dealing

(1) It is prohibited:

1. to make use of inside information to acquire or dispose of insider securities for own account or for the account or on behalf of a third party;
2. to disclose or make available inside information to a third party without the authority to do so; or
3. to recommend, on the basis of inside information, that a third party acquire or dispose of insider securities, or to otherwise induce a third party to do so.
(2) Trading with own shares within the framework of a buy-back programme and price stabilisation measures for financial instruments shall in no case constitute a contravention of the prohibition pursuant to subsection (1), provided that this is performed in compliance with the provisions of Commission Regulation no. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and the Council - as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJ EC No. L 336 p. 33). For financial instruments included in the regulated unofficial market or regulated market, the provisions of Commission Regulation no. 2273/2003 apply mutatis mutandis.
Section 245 – Interpretation

“inside information”, in relation to a corporation, means specific information that –

(a) is about –

(i) the corporation;
(ii) a shareholder of the corporation; or
(iii) the listed securities of the corporation or their derivatives; and

(b) is not generally known to the persons who are accustomed to or would be likely to deal in the listed securities of the corporation but would if generally known to them be likely to materially affect the price of the listed securities.

Section 247 – Connected with a Corporation (Insider Dealing)

(1) For the purposes of Division 4, a person shall be regarded as connected with a corporation if, being an individual –

(a) he is a director or employee of the corporation or a related corporation of the corporation;

(b) he is a substantial shareholder of the corporation or a related corporation of the corporation;

(c) he occupies a position which may reasonably be expected to give him access to inside information in relation to the corporation by reason of –

(i) a professional or business relationship existing between –
(A) himself, or his employer, or a corporation of which he is a director, or a firm of which he is a partner;

(B) the corporation, a related corporation of the corporation, or an officer or substantial shareholder of either corporation; or

(ii) his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation of the corporation;

(d) he has access to inside information in relation to the corporation and –

(i) he has such access by reason of his being in such a position that he would be regarded as connected with another corporation by virtue of paragraph (a), (b) or (c); and

(ii) the inside information relates to a transaction (actual or contemplated) involving both those corporations or involving one of them and the listed securities of the other or their derivatives, or to the fact that the transaction is no longer contemplated; or

(e) he was, at any time within the 6 months preceding any insider dealing in relation to the corporation, a person who would be regarded as connected with the corporation by virtue of paragraph (a), (b), (c) or (d).

(2) For the purposes of Division 4, a corporation shall be regarded as a person connected with another corporation so long as any of its directors or employees is a person who would be regarded as connected with that other corporation by virtue of subsection (1).

Section 270 – Insider Dealing

(1) Insider dealing in relation to a listed corporation takes place:

(a) when a person connected with the corporation and having information which he knows is inside information in relation to the corporation -
(i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation or their derivatives; or

(ii) counsels or procures another person to deal in such listed securities or derivatives, knowing or having reasonable cause to believe that the other person will deal in them;

(b) when a person who is contemplating or has contemplated making, whether with or without another person, a take-over offer for the corporation and who knows that the information that the offer is contemplated or is no longer contemplated is inside information in relation to a corporation –

(i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation or their derivatives, otherwise than for the purpose of the take-over; or

(ii) counsels or procures another person to deal in such listed securities or derivatives, knowing or having reasonable cause to believe that the other person will deal in them, otherwise than for the purpose of the take-over;

(c) when a person connected with the corporation and knowing that any information is inside information in relation to the corporation, discloses the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing, or of counseling or procuring another person to deal, in the listed securities of the corporation or their derivatives, or in the listed securities of a relation corporation or their derivatives;

(d) when a person who is contemplating or has contemplated making, whether with or without another person, a take-over offer for the corporation and who knows that the information that the offer is contemplated or is no longer contemplated is inside information in relation to a corporation discloses the information, directly or indirectly, to another person, knowing or having reasonable cause to believe that
the other person will make use of the information for the purpose of dealing, or of
counseling or procuring another person to deal, in the listed securities of the
corporation or their derivatives, or in the listed securities of a relation corporation
or their derivatives;

(e) when a person has information which he knows is inside information in relation to
the corporation and which he received, directly or indirectly, from a person whom
he knows is connected with the corporation and whom he knows or has
reasonable cause to believe held the information as a result of being connected
with the corporation –

(i) deals in the listed securities of the corporation or their derivatives, or in
the listed securities of a related corporation or their derivatives; or

(ii) counsels or procures another person to deal in such listed securities or
derivatives;

(f) when a person having received, directly or indirectly, from a person whom he
knows or has reasonable cause to believe is contemplating or is no longer
contemplating making a take-over for the corporation, information to that effect
which he knows is inside information in relation to the corporation –

(i) deals in the listed securities of the corporation or their derivatives, or in
the listed securities of a related corporation or their derivatives; or

(ii) counsels or procures another person to deal in such listed securities or
derivatives.

Section 271 – Insider Dealing: Certain Persons not to be Regarded As Having Engaged in
Market Misconduct

(2) A corporation shall not be regarded as having engaged in market misconduct by reason of
an insider dealing taking place through its dealing in or counseling or procuring another
person to deal in listed securities or derivatives if it establishes that –
(a) although one or more of its directors or employees had the inside information in
relation to the corporation the listed securities of which were, or the derivatives of
the listed securities or which were, the listed securities or derivatives in question,
each person who took the decision for it to deal in or counsel or procure the other
person to deal in such listed securities or derivatives (as the case may be) did
not have the inside information up to (and including) the time when it dealt in or
counseled or procured the other person to deal in such listed securities or
derivatives (as the case may be);

(b) arrangements then existed to secure that –

(i) the inside information was up to (and including) the time when it dealt in
or counseled or procured the other person to deal in listed securities or
derivatives (as the case may be), not communicated to any person who
took the decision; and

(ii) none of its directors or employees who had the inside information gave
advice concerning the decision to any person who took the decision at
any time before it dealt in counselled or procured the other person to
deal in such listed securities or derivatives (as the case may be); and

(c) the inside information was in fact not so communicated to any person who took
the decision and none of its directors or employees who had the inside
information in fact so gave the advice to any person who took the decision.
NEW ZEALAND

FINANCIAL MARKETS CONDUCT ACT 2013 (NZ)

Section 234 – Meaning of Information Insider, Inside Information and Adviser

(1) In this Part, a person is an information insider of a listed issuer if that person –

   (a) has material information relating to the listed issuer that is not generally available to the market;

   (b) knows or ought reasonably to know that the information is material information; and

   (c) knows or ought reasonably to know that the information is not generally available to the market.

(2) A listed issuer may be an information insider of itself.

(3) In this Part, a person is an information insider in relation to quoted derivatives if that person –

   (a) has material information in relation to any of the following that is not generally available to the market:

      (i) the derivatives;

      (ii) the underlying financial product;

      (iii) the issuer of a financial product underlying the derivatives; and

   (b) knows or ought reasonably to know that the information is material information; and

   (c) knows or ought reasonably to know that the information is not generally available to the market.
In this Part, inside information means –

(a) the information in respect of which a person is an information insider of the listed issuer in question;

(b) in the case of quoted derivatives, the information in respect of which a person is an information insider in relation to the derivatives in question.

Section 241 – Information Insider Must Not Trade

(1) An information insider of a listed issuer must not trade quoted financial products of the listed issuer.

(2) An information insider in relation to quoted derivatives must not trade the derivatives.

Section 243 – Information Insider Must Not Advise or Encourage Trading

(1) An information insider (A) of a listed issuer must not –

(a) advise or encourage another person (B) to trade or hold quoted financial products of the listed issuer; or

(b) advise or encourage B to advise or encourage another person (C) to trade or hold those financial products.

(2) An information insider (A) in relation to quoted derivatives must not –

(a) advise or encourage another person (B) to trade or hold the derivatives; or

(b) advise or encourage B to advise or encourage another person (C) to trade or hold those derivatives.
Section 261 - Chinese Wall defence

(1) In any proceedings against a person (A) for contravention of section 241 or 243, it is a defence if –

(a) A had in place arrangements that could reasonably be expected to ensure that no individual who took part in the decision to trade the financial products or to advise or encourage (as the case may be) received or had access to, the inside information or was influenced, in relation to that decision, by an individual who had the information; and

(b) no individual who took part in the decision received, or had access to, the inside information, or was influenced, in relation to that decision, by an individual who had the information; and

(c) every individual who had the information and every individual who took part in that decision acted in accordance with the arrangements referred to in paragraph (a).
Section 218 - Prohibited conduct by connected person in possession of inside information

(1) Subject to this Division, where —

(a) a person who is connected to a corporation possesses information concerning that corporation that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of that corporation; and

(b) the connected person knows or ought reasonably to know that —

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities of that corporation,

subsections (2), (3), (4), (5) and (6) shall apply.

(1A) Subject to this Division, where —

(a) a person who is connected to any corporation, where such corporation —

(i) in relation to a business trust, acts as its trustee or manages or operates the business trust; or

(ii) in relation to a collective investment scheme that invests primarily in real estate and real estate-related assets specified by the Authority in the Code on Collective Investment Schemes and all or any units of which are listed on a securities exchange, is the trustee or manager of the scheme, possesses information concerning that corporation, business trust or scheme, as the case may be, that is not generally available but, if the information were generally available, a reasonable
person would expect it to have a material effect on the price or value of securities of that corporation, of securities of that business trust or of units in that scheme, as the case may be; and

(b) the connected person knows or ought reasonably to know that —

(i) the information is not generally available; and
(ii) if it were generally available, it might have a material effect on the price or value of those securities of that corporation, of those securities of that business trust or of those units in that scheme, as the case may be,

subsections (2), (3), (4A), (5) and (6) shall apply.

(2) The connected person must not (whether as principal or agent) —

(a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities referred to in subsection (1) or (1A), as the case may be; or

(b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities referred to in subsection (1) or (1A), as the case may be.

(3) Where trading in the securities referred to in subsection (1) or (1A) is permitted on the securities market of a securities exchange or futures market of a futures exchange, the connected person must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the connected person knows, or ought reasonably to know, that the other person would or would be likely to —

(a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

(b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.
(4) In any proceedings for a contravention of subsection (2) or (3) against a person connected to a corporation referred to in subsection (1), where the prosecution or plaintiff proves that the connected person was at the material time —

(a) in possession of information concerning the corporation to which he was connected; and

(b) the information was not generally available,

it shall be presumed, until the contrary is proved, that the connected person knew at the material time that —

(i) the information was not generally available; and

(ii) if the information were generally available, it might have a material effect on the price or value of securities of that corporation.

(4A) In any proceedings for a contravention of subsection (2) or (3) against a person connected to a corporation which —

(a) in relation to a business trust, acts as its trustee or manages or operates the business trust; or

(b) in relation to a collective investment scheme, is the trustee or manager of the scheme,

as the case may be, referred to in subsection (1A), where the prosecution or plaintiff proves that the connected person was at the material time —

(i) in possession of information concerning the corporation, business trust or scheme, as the case may be; and

(ii) the information was not generally available,
it shall be presumed, until the contrary is proved, that the connected person knew at the material time that —

(A) the information was not generally available; and
(B) if the information were generally available, it might have a material effect on the price or value of securities of that corporation, of securities of that business trust or of units in the scheme, as the case may be.

(5) In this Division —

(a) “connected person” means a person referred to in subsection (1) or (1A) who is connected to a corporation; and

(b) a person is connected to a corporation if —

(i) he is an officer of that corporation or of a related corporation;
(ii) he is a substantial shareholder in that corporation or in a related corporation; or
(iii) he occupies a position that may reasonably be expected to give him access to information of a kind to which this section applies by virtue of —

(A) any professional or business relationship existing between himself (or his employer or a corporation of which he is an officer) and that corporation or a related corporation; or
(B) being an officer of a substantial shareholder in that corporation or in a related corporation.

(6) In subsection (5), “officer”, in relation to a corporation, includes —

(a) a director, secretary or employee of the corporation;
(b) a receiver, or receiver and manager, of property of the corporation;
(c) a judicial manager of the corporation;

(d) a liquidator of the corporation; and

(e) a trustee or other person administering a compromise or arrangement made between the corporation and another person.

Section 226 - Attribution of knowledge within corporations

(1) For the purposes of this Division -

(a) a corporation is taken to possess any information which an officer of the corporation possesses and which came into his possession in the course of the performance of duties as such an officer; and

(b) if an officer of a corporation knows or ought reasonably to know any matter or thing because he is an officer of the corporation, it is to be presumed, until the contrary is proved, that the corporation knows or ought reasonably to know that matter or thing.

(2) A corporation does not contravene section 218(2) or 219(2) by entering into a transaction or agreement at any time merely because of information in the possession of an officer of the corporation if —

(a) the decision to enter into the transaction or agreement was taken on its behalf by a person other than that officer;

(b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person who made the decision and that no advice with respect to the transaction or agreement was given to that person by a person in possession of the information; and

(c) the information was not so communicated and no such advice was so given.
Section 236B - Liability of corporation when employee or officer commits contravention with consent or connivance of corporation

(1) Where an offence of contravening any provision in this Part is proved to have been committed by an employee or an officer of a corporation (referred to in this section as the contravening person) —

(a) with the consent or connivance of the corporation; and
(b) for the benefit of the corporation,

the corporation shall be guilty of that offence as if the corporation had committed the contravention, and shall be liable to be proceeded against and punished accordingly.
“inside information” means specific or precise information, which has not been made public and which –

(a) is obtained or learned as an insider; and

(b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.

“insider” means a person who has inside information –

(a) through –

(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or

(ii) having access to such information by virtue of employment, office or profession; or

(b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a).

“person” includes a partnership and any trust, and any body of persons corporate or unincorporated.
Section 78 – Insider Trading

(1)(a) An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

(2)(a) An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

(3)(a) Any person who deals for an insider directly or indirectly through an agent in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such a person was an insider, commits an offence.

(4)(a) Any insider who knows that he or she has inside information and who discloses the inside information to another person, commits an offence.

(5)(a) Any insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in securities listed on a regulated markets to which the information relates or which are likely to be affected by it, commits an offence.

Section 82 – Liability Resulting from Insider Trading

(8) The common law principles of vicarious liability apply to the liability established by this section.
THE UNITED KINGDOM

CRIMINAL JUSTICE ACT 1993 (UK) c 36

Section 52 - The Offence

(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.

(2) An individual who has information as an insider is also guilty of insider dealing if -

(a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or

(b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

Section 53 - Defences

(1) An individual is not guilty of insider dealing by virtue of dealing in securities if he shows—

(a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities, or
(b) that at the time he believed on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information, or

(c) that he would have done what he did even if he had not had the information.

Section 56- Inside information

(1) For the purposes of this section and section 57, “inside information” means information which –

(a) relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally;

(b) is specific or precise;

(c) has not been made public; and

(d) if it were made public would be likely to have a significant effect on the price of any securities.

(2) For the purposes of this Part, securities are “price-affected securities” in relation to inside information, and inside information is “price-sensitive information” in relation to securities, if and only if the information would, if made public, be likely to have a significant effect on the price of the securities.

(3) For the purposes of this section “price” includes value.
Section 118 - Market Abuse

(1) For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which -

(a) occurs in relation to -

(i) qualifying investments admitted to trading on a prescribed market,

(ii) qualifying investments in respect of which a request for admission to trading on such a market has been made, or

(iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and

(b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).

(2) The first type of behaviour is where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.

Section 118B - Insiders

For the purposes of this Part an insider is any person who has inside information -

(a) as a result of his membership of an administrative, management or supervisory body of an issuer of qualifying investments,

(b) as a result of his holding in the capital of an issuer of qualifying investments,
(c) as a result of having access to the information through the exercise of his employment, profession or duties,

(d) as a result of his criminal activities, or

(e) which he has obtained by other means and which he knows, or could reasonably be expected to know, is inside information.

Section 118C - Inside information

(1) This section defines “inside information” for the purposes of this Part.

(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which -

(a) is not generally available,

(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and

(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.

(3) In relation to qualifying investments or related investments which are commodity derivatives, inside information is information of a precise nature which -

(a) is not generally available,

(b) relates, directly or indirectly, to one or more such derivatives, and

(c) users of markets on which the derivatives are traded would expect to receive in accordance with any accepted market practices on those markets.
(4) In relation to a person charged with the execution of orders concerning any qualifying investments or related investments, inside information includes information conveyed by a client and related to the client's pending orders which -

(a) is of a precise nature,

(b) is not generally available,

(c) relates, directly or indirectly, to one or more issuers of qualifying investments or to one or more qualifying investments, and

(d) would, if generally available, be likely to have a significant effect on the price of those qualifying investments or the price of related investments.

(5) Information is precise if it -

(a) 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

(b) 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.

(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

(7) For the purposes of subsection (3)(c), users of markets on which investments in commodity derivatives are traded are to be treated as expecting to receive information relating directly or indirectly to one or more such derivatives in accordance with any accepted market practices, which is -

(a) routinely made available to the users of those markets, or
(b) required to be disclosed in accordance with any statutory provision, market rules, or contracts or customs on the relevant underlying commodity market or commodity derivatives market.

(8) Information which can be obtained by research or analysis conducted by, or on behalf of, users of a market is to be regarded, for the purposes of this Part, as being generally available to them.

**Section 147 - Control of information rules**

(1) The Authority may make rules ("control of information rules") about the disclosure and use of information held by an authorised person ("A").

(2) Control of information rules may -

(a) require the withholding of information which A would otherwise have to disclose to a person ("B") for or with whom A does business in the course of carrying on any regulated or other activity;

(b) specify circumstances in which A may withhold information which he would otherwise have to disclose to B;

(c) require A not to use for the benefit of B information A holds which A would otherwise have to use in that way;

(d) specify circumstances in which A may decide not to use for the benefit of B information A holds which A would otherwise have to use in that way.
SECURITIES EXCHANGE ACT OF 1934, 15 USC § 78a (1934).

Section 10 – Regulation of the Use of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b5-1 - Employment of Manipulative and Deceptive Practices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.
SEC Rule 10b5-1(c)(2) - Trading “on the basis of” material nonpublic information in insider trading cases

A person other than a natural person also may demonstrate that a purchase or sale of securities is not “on the basis of” material nonpublic information if the person demonstrates that:

(i) The individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of the information; and

(ii) The person had implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale of any security as to which the person has material nonpublic information, or those that prevent such individuals from becoming aware of such information.
APPENDIX 3
JOURNAL ARTICLES PUBLISHED DURING MY CANDIDATURE


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