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EDITORIAL

Now in its eighth year, the Journal of Law & Financial Management has achieved a number of important milestones including quality ratings by both The Australian Business Deans Council (ABDC) and the Australian Research Council (ARC) in their respective journal ranking lists. Another important development for the Journal of Law & Financial Management has been the partnering with the Social Science Research Network (SSRN) for the electronic distribution of each issue. Since 2006, the Journal of Law & Financial Management has been distrusted exclusively via SSRN to more than 130,000 subscribers worldwide through the SSRN eLibrary. This online international distribution has greatly increased the reach and impact of the journal.

This issue the Journal of Law & Financial Management looks at issues associated with business regulation, particularly in relation to taxation, accounting and market operation. In this issue, Juliette Overland examines the use of margin loans by directors of listed companies and important regulatory issues related to insider trading. In the wake of extreme volatility in capital markets and triggered margin loan sales, this article provides a timely commentary. Next, Les Nethercott and Tony Anamourlis examine the interface of taxation and accounting to investigate issues in relation to the treatment of intangible assets and their impairment. Finally, Eva Huang provides a commentary of the cross-regulatory arbitrage between accounting and taxation as it relates to leasing and examines the case of David Jones in a sales and lease back transaction.

Tyrone M Carlin & Guy Ford, Sydney

June 2009

The Insider Trading Implications of Directors' Margin Loans

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Abstract

The use of margin loans by directors of listed companies to acquire shares in their own companies raises a number of important issues, not least of which are the insider trading implications. This topic has been the subject of a significant focus this year, primarily due to the release of an Issues Paper and Report on Aspects of Market Integrity by the Corporations and Markets Advisory Committee in response to a ministerial request. This article discusses the relationship between insider trading and directors' margin loans, analyses the current state of the law in the context of relevant commentary and law reform proposals, and proposes alternative mechanisms to address the complex underlying issues in light of the current policy focus.

Key Words: Insider Trading, Margin Loans, Law Reform Proposals.

1. Introduction

Market integrity and investor confidence are considered to be essential for the proper and efficient functioning of Australia's securities markets. Insider trading is acknowledged as a significant threat to the efficiency and integrity of securities markets, with the potential to greatly reduce investor confidence and, as a result, participation. Indeed, this is the principal legislative rationale for the prohibition on insider trading in Australia.[1] Despite its status as a criminal offence, insider trading is generally viewed as under-detected and under-prosecuted, notwithstanding constantly improving surveillance mechanisms and techniques, and relatively recent review and amendment of insider trading laws in Australia and internationally. Even where unlawful insider trading cannot be proven to exist, the belief by investors and market participants that company insiders have an informational advantage and unfair opportunities to trade in company shares reduces investor confidence in the integrity of securities markets.[2]

On 10 February 2009, the Corporations and Markets Advisory Committee (CAMAC)[3] released an Issues Paper on the topic 'Aspects of Market Integrity'[4] in response to a request from the then Federal Minister for Superannuation and Corporate Law, the Hon Senator Nick Sherry[5], for advice on the effect that certain practices could have on the integrity of Australian financial markets. The relevant practices on which CAMAC's advice was sought were:

a. Directors' margin loans;

b. Share trading by directors during 'black-out' periods;

c. The spreading of false or misleading information; and

d. Private corporate briefing of analysts.

CAMAC sought submissions on these topics by 10 March 2009, having been asked to provide its advice by 30 June 2009.[6] Following the provision of that advice to the new Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, CAMAC publicly released its 'Aspects of Market Integrity Report' on 30 July 2009.[7]

As a result, it is timely to address the insider trading implications of the first of the four topics addressed in the Market Integrity Issues Paper and Report — that of directors entering into margin loans over shares in their own listed companies.[8] The topic of directors' margin loans will be addressed in the context of the application of Australian insider trading laws, including a critical analysis of the current commentary and recommendations relating to this topic, and a proposal for alternative mechanisms by which these issues can be more appropriately addressed.

2. The nature of insider trading

In essence, insider trading occurs when a person trades in financial products (including, but not limited to, shares and securities) whilst in possession of price-sensitive information which is not publicly available. The elements of insider trading, which are set out in detail in ss 1042A and 1043A of the *Corporations Act 2001* (Cth),[9] can be broadly summarised as follows:

a. a person possesses certain information;

b. the information is not generally available;

c. the person knows (or ought reasonably to know) that the information is not generally available;

d. if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of financial products;

e. the person knows (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 those financial products; and

f. whilst in possession of the information, the person trades in those financial products (that is, buys or sells those financial products) or procures another person to do so.

Insider trading has a reputation as a notoriously difficult offence to successfully prosecute. It has been the subject of law reform debate since it was first prohibited by statute in Australia.[10]

3. The nature of margin loans

A margin loan is a facility which allows an investor to borrow money to acquire financial products, such as listed company shares, against the security of the shares acquired. Margin loans are generally conditional on the shares retaining an agreed 'loan-to-value' ratio. If market value of the relevant shares drops so that the loan-to-value ratio falls below the agreed level, the investor becomes subject to a 'margin call'. This requires the investor to take action to restore the loan-to-value ratio to the agreed level, which can be done by paying extra cash, selling some of the secured assets, or giving the lender additional security. If the investor fails to take this action, or there is otherwise a default under the loan, the lender has the right to take recourse to the secured shares, and may sell them to recoup or partially recoup the monies owed to the lender by the investor.[11]

In the context of the current focus on market integrity issues, the practice of listed company directors using margin loans to acquire shares in their own companies has come under increased scrutiny. There are a variety of reasons why a director might use a margin loan for this purpose. Margin loans are a popular investment tool used by many shareholders (not just directors) to finance share acquisitions. The use of margin loans can enable an investor to acquire a larger parcel of shares, shares in a greater number of companies, or a wider variety of total investments, than might otherwise be possible if such purchases needed to be funded solely from the investor's own funds.

From the outset, it needs to be acknowledged that it is commonly accepted that, when a listed company director holds shares in that company, the interests of the director and the company's shareholders are considered to be aligned.[12] Accordingly, the introduction of provisions or requirements which would make the holding of shares in a listed company less attractive to, or more onerous for, its directors should be approached with caution. However, this clearly does not avoid the need to amend the law (where appropriate) to ensure certain company insiders are not placed into a privileged position compared to other investors and market participants.

4. The implications for directors' margin loans under insider trading laws

As can be seen above, insider trading laws prohibit any person, whether a director or not, from trading in shares whilst in possession of price-sensitive information which is not publicly available. This prohibition obviously applies regardless of whether shares are owned outright, purchased through the use of a margin loan facility, or subject to any other financing arrangements. However, a fundamental concern which arises over the use of directors' margin loans is the impact of a forced sale of the underlying shares following a margin call. A forced sale by the lender in those circumstances could potentially result in a breach of the prohibition on insider trading if inside information is possessed at the relevant time. This concern is further exacerbated by the perception that a director may choose not to pay a margin call, or may choose not to make alternative arrangements to avoid the forced sale of the underlying shares, if the director possesses inside information which indicates that it would actually be advantageous to dispose of the shares. These issues have received particular scrutiny in light of recent international economic events and the 'global financial crisis', which has not only seen the price of many listed company shares fall in value significantly, but the directors of many listed companies placed under financial stress and subject to margin calls.

Thus, whilst directors and other company insiders must be particularly aware of the insider trading prohibition at any time when trading in company shares, the issue of directors' margin loans gives rise to several important questions:

a. Can a director with a margin loan be liable for insider trading as a result of the forced sale of shares by the lender after a margin call? Do any exceptions apply to avoid any such potential liability?

b. Can the lender be liable for insider trading as a result of the forced sale of shares by the lender after a margin call? Do any exceptions apply to avoid any such potential liability?

c. Is this state of the law satisfactory?

5. Potential liability for insider trading as the result of sale of shares following a margin call

CAMAC has stated that a forced sale of shares subject to a director's margin loan could result in a breach of Australian insider trading laws by that director, if the director possesses inside information at the relevant time.[13] In such circumstances, the six essential elements of insider trading may be satisfied. However, the final element — that the director trades in the relevant financial products, or procures such trading — requires some further consideration. If the lender sells the shares, the director has not actually traded — but has the director procured trading, if shares which he or she holds subject to a margin loan are sold by the lender after a margin call?

In the author's view, this result is actually unlikely under the existing law, due to the operation of regulation 9.12.01(e) of the *Corporations Regulations* and the definition of 'procure' under the *Corporations Act*.

5.1 Regulation 9.12.01(e) of the Corporations Regulations — the 'lenders' exemption'

Regulation 9.12.01 of the *Corporations Regulations 2001* (Cth)[14] currently provides:

> Subsection 1043A(1) of the *[Corporations] Act* does not have effect in relation to the following:
>
> …(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.

This means that where a listed company director (or indeed any investor) acquires shares through margin lending arrangements and offers the shares as security for the loan, any resulting sale of those shares by the lender will fall within this exemption, and thus avoid the application of the insider trading prohibition. The protection offered by this regulation is not expressed to apply only to the lender, and arguably also protects the owner of the financial products — in the given circumstances, the director with shares held under the margin lending arrangements — from liability for insider trading under s 1043A of the *Corporations Act*.

5.2 The definition of 'procure' under the Corporations Act

Pursuant to the terms of s 1043A(1) of the *Corporations Act,* the prohibited action is to, as principal or agent:

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

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

CAMAC has stated that when listed company shares which are the subject of a margin loan are sold by the lender because the director has failed to honour a margin call, the director can be argued to have 'procured' the disposal of the securities.[15] It is noted that s 9 of the *Corporations Act* provides that 'procure' includes 'cause' and it has been suggested by CAMAC that a director causes securities to be sold by not honouring a margin call (by failing to repay part of the loan, provide additional security or take other action) since the sale of the securities could have been avoided if such action were taken.[16]

The author respectfully disagrees. 'Causation' sufficient to amount to an act of procuring requires an active step to be taken, and does not result from inaction. In addition to the general definition in s 9, s 1042F of the *Corporations Act* now provides a more extensive definition of 'procure', which states that if a person '… incites, induces or encourages an act or omission by another person, the first person is taken to procure the act or omission by the other person.' Whilst this definition is expressed to be without limitation, the positive acts expressed by the terms '*incite, induce and encourage'* connote the taking of active steps and do convey a meaning unlikely to be satisfied by mere inaction (such as the failure to take other steps). Accordingly, this must mean that there is no procuring of trading, and therefore no insider trading, merely because a director fails to honour a margin call and, as a result, the lender elects to sell the shares subject to margin lending arrangements, even if the director possessed inside information at the relevant time.

Thus, under the current state of the law, directors with margin loans would not be liable for insider trading as a result of a forced sale of the underlying shares by a lender after a margin call. Additionally, lenders have no liability for insider trading in those circumstances either.

6. Current proposals to amend insider trading laws

6.1 Regulation 9.12.01(e) of the Corporations Regulations — the 'lenders' exemption

CAMAC supports a submission by the Australian Securities and Investments Commission (ASIC) that the lenders' exemption be removed on the basis that borrowers and lenders should not be in a privileged position when compared to other market participants.[17] Whilst CAMAC states that lenders can '… take the implications of insider trading laws into account…' when entering margin loans and may '… employ Chinese walls to ensure they do not breach the insider trading provisions…'[18] this may have a less than desirable effect in practice. With the removal of the lenders' exemption, lenders are likely to be less willing to enter into margin loan arrangements with directors due to greater potential exposure if they were to exercise their security, or may do so on terms which are more onerous to the relevant director. Both causes of action have the potential to reduce the willingness or ability of directors of listed companies to acquire shares in those companies. Thus the potential public policy implications of this result should be carefully considered before further action is taken.

Additionally, when considering the operation of the insider trading laws to forced share sales under margin loans, it is important to remember that, under Australian law, it is not necessary to prove that an alleged insider trader 'used' the relevant information — it is enough that the alleged insider trader merely possessed the information when they traded (or procured another to trade) in the relevant financial products. Likewise, it is no defence under Australian law that an alleged insider trader did not rely on the inside information because, for example, they had already planned to trade prior to coming into possession of that information, or that they based their decision to trade on alternative information which was not inside information. This also means that liability could arise if the exemption were removed and the shares securing a margin loan were disposed of by a lender in a forced sale following a margin call, even where the inside information possessed by the relevant director was information which would favour retaining the shares (or buying more shares) — that is, price-sensitive information which would be likely to cause a rise in the price of the shares if it were generally available. In those circumstances, neither the director nor the lender is placed in an advantageous position compared to other investors or markets participants.

This position can be contrasted with that of a number of overseas jurisdictions, which have insider trading laws containing either a 'use' requirement or a defence of 'non-use' of the relevant information. For example:

a. in Germany, it must be shown that an alleged insider trader 'made use' of the inside information;[19]

b. in the European Union, it must be shown that an alleged insider trader 'used' the inside information;[20]

c. in the United Kingdom, insider trading only occurs where it is 'on the basis of' the relevant inside information;[21] and

d. in South Africa, there is a specific defence available to a claim of insider trading, if the alleged insider trader can show that they did not 'use' the inside information in their possession.[22]

It is also no defence under Australian law that shares were sold out of financial necessity, or because there were no alternative means available to avoid a forced sale following a margin call.[23]

6.2 The definition of 'procure' under the Corporations Act

In relation to the definition of the term 'procuring', CAMAC has not directly addressed this issue, but has opaquely suggested that '… it may be desirable to clarify the insider trading laws… to overcome any uncertainty about whether a borrower could be said to have 'procured' transactions by the lender'.[24] As the author maintains that the better interpretation must be that a director does not trade or procure trading when shares held under margin lending arrangements are sold by the lender after a margin call, some amendment to the law is clearly necessary if directors are not to be placed in a privileged position when compared to other market participants. Directors should not be placed in a position of advantage if they choose not to respond to a margin call, knowing it is likely that the lender will sell the underlying shares, if the director possesses inside information at that time which indicates that it would be beneficial to sell the shares.

7. An alternative proposal for amendments to insider trading laws

7.1 Regulation 9.12.01(e) of the *Corporations Regulations* — the 'lenders' exemption'

If the lenders' exemption was removed in its entirety, as suggested by ASIC and CAMAC, lenders taking security over listed company shares under margin loan arrangements would obviously become fully subject to the insider trading prohibition. Whilst it is agreed that lenders should not receive preferential treatment, they should not be placed in a less favourable position than other market participants. Lenders would risk being unable to exercise any security taken if the director with legal title to the underlying shares was in possession of inside information, even if such information had not actually been communicated to the lender, as it is also possible that, without the existing lenders' exemption, the director's knowledge could be imputed to the lender.

Imputation of knowledge may occur under statutory provisions, such as s 1042G of the *Corporations Act* which imputes knowledge or information to a company if it is possessed or known by an officer because of their position or as a result of performing their duties.[25] Obviously, a borrowing director will not generally be an officer of the relevant lender, rendering this provision inapplicable to directors' margin loans.

Imputation of knowledge can also occur through common law agency principles. As it appears to be standard practice under margin loans for a lender to be automatically appointed as the agent or 'attorney' of the borrower in order to enable them to sell the underlying shares (or take other action) following a margin call, the lender may be regarded as the borrower's agent for that purpose. Whilst common law agency principles generally operate to impute the knowledge of an agent to their principal,[26] in certain circumstances they may also operate to impute the knowledge of the principal to the agent. Whilst the extent of such attribution is not clear under Australian law, it generally occurs in circumstances where the regulatory purpose of a statute would otherwise be undermined.[27]

It is therefore possible that, without the application of the existing lenders' exemption, a lender (as agent of the borrower) may be deemed to possess information known only by the borrower — including inside information. The lender may then be regarded as having engaged in insider trading when selling a borrower's shares as a result of an unpaid margin call, despite the fact that the lender did not actually possess the inside information. In addition, it needs to be acknowledged that lenders are more likely to come into actual possession of price-sensitive information at times of financial stress.[28]

Accordingly, the author recommends that rather than remove the lenders' exemption in its entirety, it should instead be amended to clarify the position of lenders. The author suggests that the exemption be amended to read instead:

> Subsection 1043A(1) of the *[Corporations] Act* does not have effect in relation to the following:
>
> …(e) the liability of the holder of a mortgage, charge, pledge or lien of documents of title to financial products in relation to the 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,
>
> where:
>
> (iii) the sale is effected by the relevant holder of the mortgage, charge, pledge or lien; and
>
> (iv) the holder of the relevant mortgage, charge, pledge or lien does not possess inside information as defined in s 1042A of the Act.

This will ensure lenders are not unfairly prejudiced in the exercise of security if they do not actually possess inside information, but will also maintain the application of the insider trading prohibition if they do. Additionally, it would not afford the protection of the lenders' exemption to the borrower, so that directors who hold shares under margin lending arrangements would be exposed to the application of ordinary insider trading laws if they do possess inside information — which is appropriate in those circumstances, subject to further suggested clarification of the agency relationship between lender and investor, as discussed below.

7.2 The definition of 'procure' under the Corporations Act

Instead of seeking to amend the definition of 'procure', which would have a wider effect than merely an application to margin lending arrangements, it would be more appropriate to address perceived problems with the operation of margin lending arrangements by imputing the actions of a lender to the borrowing director, so that the lender is deemed to be acting as the director's agent for these purposes as well. As noted above, s 1043A(1) of the *Corporations Act* prohibits a person from engaging in a variety of acts, <u>as either principal or agent</u>. An additional clarification could be inserted into the *Corporations Act,* or the *Corporations Regulations*, to provide that:

> the sale of financial products under a mortgage, charge, pledge or lien of documents of title to financial products by the holder of the mortgage, charge, pledge or lien is

> also deemed, for the purposes of s 1043A(1), to be an act undertaken on behalf of the mortgagor, chargor, or grantor of the pledge or lien as principal.

This means that where a lender undertakes a forced sale of secured shares following a margin call the investor who owns those shares will also be deemed to have engaged in the trading. Thus, the combined operation of this deeming provision and the amended lenders' exemption will mean that lenders selling shares after a margin call will only be exposed to liability for insider trading if they actually possess inside information, and that a director (or any investor) who holds shares under margin lending arrangements will be liable for insider trading if he or she possesses inside information at the time a forced sale occurs. Directors entering into margin lending arrangements will clearly need to be aware of such a potential result when structuring their affairs, as to provide otherwise would lead to inappropriately lenient treatment for those in a special relationship with the relevant company.

8. Status of insider trading law reform

Insider trading laws have long been the subject of debate, both within Australia and internationally. As noted earlier in this article, insider trading is generally viewed as under-detected and under-prosecuted. It is also regarded as a particularly difficult offence to identify and successfully prosecute.[29] In addition, Australian insider trading laws have been considered by judges and academics alike to be overly complex, legalistic and unclear,[30] as well as being '… couched in language which is difficult of understanding and application'.[31]

Indeed, insider trading has been the subject of legislative and policy debate for many years, as evidenced by many different reviews of insider trading laws — including the 'Griffiths Report',[32] the Anisman Review,[33] and a recent Insider Trading Report[34] (a review which was, coincidentally, also undertaken by CAMAC) and many sets of resulting legislative amendments. Once much vaunted amendment to insider trading laws was the relatively recent introduction of civil penalty proceedings under the *Financial Services Reform Act 2001* (Cth). 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. However there have been very few civil penalty proceedings for insider trading undertaken since they became available — most notably the unsuccessful civil proceedings which led to the case of *ASIC v Citigroup Global Markets Pty Ltd,*[35] which was a crushing defeat for ASIC, and the case of *ASIC v Petsas*[36], in which the respondents admitted liability. Thus civil penalty proceedings have hardly provided the fillip which may have been expected. Many other insider trading cases have also been controversial, including the successful criminal prosecution in *R v Rivkin*[37] and the civil proceedings brought in the case of *ASIC v Vizard*[38] for breaches of directors' duties, not insider trading.

Thus, the current focus on market integrity, which is resulting in insider trading laws again receiving significant legislative, policy and media scrutiny, can be viewed cynically. Indeed, whilst CAMAC's Advice on Aspects of Market Integrity was actively sought by the then responsible Minister and, it must be assumed, will receive an appropriate degree of attention from the new Minister and the Federal Government, the status of previous CAMAC recommendations relating to proposed amendment to Australia's insider trading laws is of significant concern. In November 2003, acting on its own initiative and having sought public submissions through a Discussion Paper and subsequent Proposals Paper, CAMAC released a Report on Insider Trading, which detailed a variety of recommendations for insider trading law reform.

No action was taken in relation to the amendments described in the CAMAC Insider Trading Report until March 2007, when the Commonwealth Treasury released its own Insider Trading Position and Consultation Paper seeking further public input. However, apart from the receipt of public submissions, no further action was taken by the former Federal Government. With the change of Federal Government in November 2007, there then appeared to be a loss of momentum on this topic and none of the recommendations in the CAMAC Insider Trading Report have been implemented, despite the passage of six years since the release of that report. In this context, sceptics may wonder whether any substantive or meaningful amendment to insider trading laws can be expected.

9. Concluding remarks

It is useful to return to the key issues raised earlier in this article, namely:

a. Can a director with a margin loan be liable for insider trading as a result of the forced sale of shares by the lender after a margin call? Do any exceptions apply to avoid any such potential liability?

b. Can a lender be liable for insider trading as a result of the forced sale of shares by the lender after a margin call? Do any exceptions apply to avoid any such potential liability?

c. Is this state of the law satisfactory?

It can now be seen that:

e. Under the current state of the law, a director with a margin loan is unlikely to be liable for insider trading, due to the protection offered to both borrowers and lenders under the operation of the 'lenders' exemption' in Regulation 9.12.01(e) of the *Corporations Regulations* and the requirement in s 1043A of the *Corporations Act* that trading be 'procured'. The current operation of the lenders' exemption also protects a lender providing a margin loan from liability for insider trading as a result of a forced sale.

e. There is currently a proposal by ASIC, which is supported by CAMAC, that the lenders' exemption should be removed in its entirety and a recommendation by CAMAC that the definition of 'procure' be reviewed. The removal of the lenders' exemption would expose lenders to liability for insider trading in circumstances where lenders may be deemed to possess inside information known only by the borrowing director. This has significant potential to affect the availability of directors' margin loans. However, lenders and directors in possession of inside information should not be protected from the prohibition on insider trading in circumstances where to provide such protection affords them preferential treatment compared with other market participants. Accordingly, the author proposes an alternative proposal for law reform, suggesting an amended lenders' exemption rather than removing it in its entirety and a statutory clarification of the agent and principal relationship which exists between the lender and borrower when financial products are sold by the lender, in order that the acts of the lender are attributed to the borrower.

It is suggested that the author's proposals should be the preferred model for law reform in this area as they more clearly recognise the true spirit of insider trading laws — these proposals will better ensure that certain participants in the market do not receive an unfair informational advantage over others, and, as a result, are better aimed at achieving market integrity and efficiency. However, as is noted above, the status of insider trading law reform in Australia remains uncertain. It remains to be seen whether, despite recent world economic events focusing attention on market integrity issues, substantive or meaningful amendment to insider trading laws is likely to occur in the near future.

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Notes

1 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Fair Shares for All: Insider Trading in Australia*, (11 October 1990) [3.34] to [3.36]; Corporations and Markets Advisory Committee, *Insider Trading Discussion Paper* (June 2001) [0.20].

2 See, for example, ASIC Consultation Paper 68, 'Competition for Market Services — Trading in Listed Securities and Related Data' (July 2007); U Bhattacharya and H Daouk, 'The World Price of Insider Trading' (2002) 57(1) *Journal of Finance* 75; L Beny, 'Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate' (2007) 32(2) *Journal of Corporation Law* 237.

3 To be referred to from now on as 'CAMAC'.

4 CAMAC, *Aspects of Market Integrity Issues Paper* (February 2009) — to be referred to from now on as the *Market Integrity Issues Paper*.

5 As a result of a Federal Cabinet reshuffle announced on 7 June 2009, the Hon Senator Nick Sherry was promoted to the position of Assistant Treasurer, and the Hon Chris Bowen MP became the Minister for Financial Services, Superannuation and Corporate Law.

6 Submissions made to CAMAC on the Market Integrity Issues Paper are publicly available on the CAMAC website: http://www.camac.gov.au

7 CAMAC, *Aspects of Market Integrity Report* (June 2009) — to be referred to from now on as the *Market Integrity Report*.

8 The *Market Integrity Issues Paper and Report* address issues of directors' margin loans in a variety of circumstances, including disclosure, reporting and corporate governance issues which are beyond the scope of this paper. This paper focuses exclusively on the implications under insider trading laws.

9 To be referred to from now on as the *Corporations Act*.

10 Insider trading was first prohibited by statute in Australia under the uniform Securities Industry Acts adopted by four States: *Securities Industry Act 1975* (Qld); *Securities Industry Act 1975* (NSW); *Securities Industry Act 1975* (WA); *Securities Industry Act 1975* (Vic).

11 Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) [5] to [11].

12 See, for example, Investment and Financial Services Association Limited, *Blue Book — Corporate Governance: A Guide for Fund Managers and Corporations*, Guideline 11 — Equity Participation by Non-Executive Directors; Investment and Financial Services Association Ltd, *Executive Equity Plan Guidelines*, Principle 3.1; Australian Securities Exchange, *ASX Corporate Governance Guidelines*, 3. Equity-based remuneration; Australian Council of Super Investors Inc, *Corporate Governance Guidelines*, 14.1 — Remuneration Practices, 14.8 — Other Aspects of Long-term Incentive Schemes, 14.14 – Director Remuneration and Share Ownership.

This principle was accepted by CAMAC in the *Market Integrity Report*, above n 7, 55.

13 CAMAC, *Market Integrity Issues Paper*, above n 4, 21.

14 To be referred to from now on as the 'lenders' exemption'.

15 CAMAC, above n 4, 6.

16 CAMAC, above n 4, 6.

17 CAMAC, above n 7, 61.

18 CAMAC, above n 7, 61.

19 *Securities Trading Act 2004* (Germany), s 14(1).

20 Article 1(1) of the 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, commonly referred to as the Market Abuse Directive.

21 *Criminal Justice Act 1993* (UK) c 36, s 53.

22 *Insider Trading Act 1988* (South Africa), s 4.

23 See, for example, CAMAC, *Insider Trading Discussion Paper* (June 2001) [2.142] to [2.158] and CAMAC, *Insider Trading Report* (November 2009) [3.8] to [3.9].

24 CAMAC, above n 7, 62.

25 See, for example, *Australian Securities & Investments Commission v Citigroup Global Markets Australia Pty Ltd* (2007) 160 FCR 35.

26 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] FCA 283; *Re Marseilles Extension Railway Company* (1971) LR 7 Ch App 161. The operation of these common law principles in relation to the possession of inside information are discussed in detail in 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.

27 See, for example, Deborah De Mott, 'When is a Principal Charged with an Agent's Knowledge' (2003) *Duke Journal of Comparative and International Law* 291, 302.

28 CAMAC, above n 7, 55.

29 See, for example, Lori Semaan, Mark Freeman and Michael Adams, 'Is Insider Trading A Necessary Evil for Efficient Markets? An International Comparative Analysis' (1999) 17 *Company and Securities Law Journal* 220; Ashley Black, 'The Reform Of Insider Trading Law in Australia' (1992) 15(1) *University of New South Wales Law Journal* 214; Vivien Goldwassser, 'The Enforcement Dilemma in Australian Securities Regulation' (1999) 27 *Australian Business Law Review* 482; Roman Tomasic and Brendan Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian and New Zealand Journal of Criminology* 65 (1989).

30 See, for example, Michael Whincop, 'Towards a Proprietary Rights and Market Micro-structural Theory of Insider Trading Regulation — The Case of Primary Securities Markets Transactions' (1996) 7 *Journal of Banking and Finance Law and Practice* 212; Roman Tomasic, 'Corporate Crime: Making the Law More Credible' (1990) 8 *Company and Securities Law Journal* 369 at 380.

31 See, for example, *Ampolex Ltd v Perpetual Trustee Trading Co (Canberra) Ltd* (1996) 20 ACSR 649, per Rolfe J at 658.

32 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Fair Shares for All: Insider Trading in Australia*, 11 October 1990, commonly referred to as the 'Griffiths Report'.

33 P Anisman, 'Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives' 1986.

34 CAMAC, *Insider Trading Report* (2003).

35 *Australian Securities & Investments Commission v Citigroup Global Markets Australia Pty Ltd* (2007) 160 FCR 35, to be referred to from now on as the 'Citigroup case'.

36 *Australian Securities & Investments Commission v Petsas* (2005) 23 ACLC 269.

37 *R v Rivkin* (2004) 59 NSWLR 284.

38 *Australian Securities & Investments Commission v Vizard* [2005] 145 FCR 57. In controversial and well-publicised circumstances, Mr Vizard was not prosecuted for insider trading. On 28 July 2005 he pleaded guilty to a breach of directors' duties (primarily for misuse of confidential information and failing to avoid a conflict of interest) and was fined $390,000, ordered to pay ASIC's costs and disqualified from managing a company for 10 years.