
Time is money: Insider trading from a globalisation perspective

Adam Jacobs*

This article analyses, from a globalisation perspective, the regime enforcing the prohibition on insider trading in Australia. It focuses first on the rationales said to underlie the prohibition on such conduct and traces the development of the legislative regime in this context. It goes on to review some of the proposed changes to the legislative regime contained in the Discussion paper, Proposals paper and Final Report into insider trading produced by the Corporations and Markets Advisory Committee (CAMAC). Specifically, the article examines the legislation and case law insofar as it relates to the concepts of “generally available information” contained in s 1042C(1)(C) of the Corporations Act 2001 (Cth) and “readily observable matter” in s 1042C(1)(a) contained within that definition. In this context the article evaluates the proposed legislative amendment contained in Recommendation 38 put by the CAMAC majority in the Final Report. It analyses the Recommendation’s likely efficacy in overcoming some of the problems with enforcement of the insider trading prohibition highlighted by the case law. The article concludes with an analysis of the Recommendation from a globalisation perspective. It endeavours to identify whether the elements of the Recommendation may be viewed as a response to the exigencies imposed in a globalised world. In this way it is hoped that some of the conceptual discordance in the rationales for the prohibition evident from the case law may be reconciled or perhaps subsumed within a greater imperative – a broader acuity that globalisation provides, indeed compels.

The New York Times columnist Thomas Friedman argues in his book, *The Lexus and the Olive Tree*,¹ that the profound “democratisations” of technology, finance and information the world first began to experience in the latter part of the last century are the indices of a developing system loosely termed “globalisation”. Globalisation, Friedman argues, has replaced the previous cold war relationship structure to become the dominant system prevailing in the world today. Illimitable, it has and will continue to have, an unprecedented global impact across the spectrum of human interaction: from domestic politics to foreign relations and extending, importantly, to the marketplace in all its milieus.

Australia’s insider trading laws were substantially amended by the *Corporations Legislation Amendment Act 1991* (Cth). This was only two years after the fall of the Berlin Wall, still a few years before the advent of the World Wide Web and before the term “globalisation” entered into common parlance. The timing was, perhaps, unfortunate, for since then, the financial and technological firmament across which the insider trading regime operates has undergone revolutionary change. Yet in terms of its operative and definitional provisions, the prohibition on insider trading has continued practically intact.²

* LLB(Hons), Solicitor, Moss Krouk and Associates, Sydney.

¹ Friedman TL, *The Lexus and the Olive Tree* (Harper Collins, London, 1999).

² The last round of the Corporations Law and Economic Reform Program (CLERP) continued the operative provisions of the insider trading prohibition in Pt 7.10, Div 3 of the Act, as introduced by the *Financial Services Reform Act 2001* (Cth) (FSR Act). The FSR Act commenced on 11 March 2002.

Acknowledging the need for reform, the Corporations and Markets Advisory Committee (CAMAC)³ undertook to review Australia's insider trading laws, establish a framework for debate and develop options for reform. In June 2001, the Companies and Securities Advisory Committee, as CAMAC was then known (all future references in this article will be to CAMAC), published its *Insider Trading Discussion Paper* (Discussion paper). This was followed in September 2002 by the publication of an *Insider Trading Proposals Paper* (Proposals paper). Finally in November 2003, CAMAC published its final *Insider Trading Report* (Final Report) which responded to all the substantial matters and policy options raised in the two previous papers.

This article will examine the principles and rationales said to underpin and inform the prohibition on insider trading. It will review the legislative regime and analyse how the regime has struggled to give effect to what appears to be discordant policy objectives. Specific attention will be directed to the legislation and related case law dealing with the concepts of *generally available information* now contained in s 1042C(1)(C) of the *Corporations Act 2001* (Cth) (Act)⁴ and *readily observable matter* in s 1042C(1)(a) contained within that definition. There is a dual purpose for so doing. Not only will it be shown that these terms are positioned at the confluence of policy currents, but the language in which they are cast throws into sharp relief the challenges to be met in an environment the regulation of which is so sensitive to technological change, primarily to advances in communication. It is an environment responsive, more than most others, to the dynamics of this new globalised climate.

The article will evaluate the proposed legislative amendment (Proposal) contained in Recommendation 38 put by the CAMAC majority in CAMAC's Final Report. The Proposal calls for the focusing of the insider trading prohibition so that it would only apply to *disclosable information* or *announceable information*. To facilitate this modification, a new test is proposed for when information may be said to be "generally available". The article will evaluate the Proposal's likely efficacy in overcoming some of the problems highlighted by the case law.

The article will conclude with an analysis of the Proposal from a globalisation perspective. It will attempt to articulate the way the requirements of the globalisation system drive change and identify whether the elements of the Proposal can be viewed as a response to these exigencies. In this way it may be that some of the conceptual discordance, which has made uncertain the application of the prohibition, can be resolved within a greater imperative – a broader acuity that globalisation provides, indeed compels.

POLICY JUSTIFICATIONS FOR PROHIBITING INSIDER TRADING

Insider trading may be understood as trading in securities by a person with information which is not publicly available and which is material to the price of those securities. Such information cannot be the product of analysis of information that is publicly available.⁵ It allows the holder of such information an advantage over others in that "it allows a guaranteed return in what is essentially a transaction without risk".⁶ Various policy justifications have been proffered for the prohibition.⁷ These justifications might loosely be classified into three or possibly four categories.

The first might be termed the fiduciary rationale. This requires the existence of a relationship between the insider and the issuer of the securities such that the insider owes an obligation to the issuer not to misuse information derived from being in that relationship. The obligation stems

³ A body constituted under Pt 9 of the *Australian Securities and Investments Commission Act 2001* (Cth) tasked with the functions set out under s 148 of that Act.

⁴ All following legislative citations are to the Act unless otherwise noted.

⁵ Baxt R, Black AJ and Hanrahan P, *Securities and Financial Services Law* (6th ed, 2003) p 503; Freeman M, Adams M, "Australian Insiders' Views on Insider Trading" (1999) 10 *AJCL* 148 at 148; Black AJ, "The Reform of Insider Trading Law in Australia" (1992) 15 *UNSW Law Journal* 214 at 214.

⁶ Rubenstein S, "The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading" (2002) 20 *C&SLJ* 89 at 91.

⁷ As reviewed in the report of the 1989 the House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffith Committee), *Fair Shares for All: Insider Trading in Australia* (Canberra, October 1989).

principally from the fiduciary's duty of confidentiality and the duty to avoid a conflict of interest.⁸ However, this approach narrows the classes of insiders coming within its purview. Absent a subsisting relationship of trust and confidence there is no fiduciary duty and no ensuing liability.⁹

A second justification known as the misappropriation of information theory focuses on the use of information. This theory sees information as analogous to property. The use of information belonging to a company is a wrong because it can be seen as equivalent to theft of that company's property. There are attractions to this theory as it widens the categories of persons who are caught by the prohibition. It would extend to persons who were not fiduciaries of a company but receive information from a fiduciary in circumstances where they were, or should have been, aware that the information was confidential.¹⁰

The theory has some serious conceptual shortcomings, chief amongst them that it seems implausible to permit what must be the concomitant ability of the subject company to be able to alienate these "private" property rights by agreement. And indeed in all jurisdictions which prohibit insider trading, the law retains harsh criminal sanctions within legislative regimes that are mandatory in nature.¹¹

Finally there is/are the market fairness (also known as equal access) and/or market efficiency approach(es). The dual phrasing is deliberate as there appears to be some doubt whether they are elements resolving into a unified theory or whether they are, correctly, two distinct rationales.

Rubenstein inclines to the latter view and refers to a theory of market fairness whereby "every participant in the securities market should have equal opportunity to access and evaluate information

⁸ Mannolini J, "Insider Trading – the Need for Conceptual Clarity" (1996) 14 C&SLJ at 152; cf Rubenstein, n 6 at 93; cf Baxt, Black and Hanrahan, n 5, p 504; cf Black, n 5 at 221. This rationale was developed by American authorities relating to the application of r 10b-5 made under s 10(b) of the *Securities Exchange Act 1934* (US). Rule 10b-5 provides that:

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.

In *Chiarella v United States* 445 US 222 (1980) the US Supreme Court stated that liability for insider trading is "premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction". The court followed its reasoning in the subsequent decision of *Dirks v Securities Exchange Commission* 463 US 464 at 657-659 (1983), although in that case the court found that the action of an employee in exposing a fraud perpetrated by the company did not constitute a breach of fiduciary duty; cf Loss L, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States" (1970) 33 Mod L Rev 34; cf Langevoort DC, "Insider Trading and the Fiduciary Principle: A Post Chiarella Restatement" (1982) 70 California L Review 1.

⁹ There are a number of additional limitations constraining the workability of this rationale in relation to which see Mannolini, n 8 at 152-153, Baxt, Black and Hanrahan, n 5, p 505, Whincop M, "Towards a Proprietary Rights and Market Microstructural Theory of Insider Trading Regulation – The Case of Primary Securities Markets Transactions" (1996) 7 JBFLP 212, Brudney V, "Insiders, Outsiders and Informational Advantages under the Federal Securities Laws (1979) 93 Harv L Rev 322 and *Fair Shares for All*, n 7, pp x-xvi.

The Australian legislative regime may have been based, in part, on this rationale in the past. Section 75A of the *Securities Industry Act 1970* (NSW) imposed liability for impugned trading by a person associated with a corporation (emphasis added). That prohibition eventually found its way into s 128 of the *Securities Industry Act 1980* (Cth) and, subsequently, into s 1002 of the *Corporations Law* in 1990. Even then the legislation caught classes of persons who could not traditionally be said to owe a fiduciary duty to the body corporate. Section 128(8) as of the *Securities Industry Act 1980* (Cth) as explained in Gething M, "Insider Trading Enforcement: Where are We Now and Where Do We Go from Here?" (1998) 16 C&SLJ 607 at 609. The Griffith Committee declared that "it was the use of information, rather than the connection between a person and a corporation, which should be the basis for determining whether insider trading has occurred": *Fair Shares For All*, n 7, p xv.

¹⁰ Duggan R, "The Insider Trading Laws – An Unsprung Trap" (1997) CLQ 7 at 8; cf Baxt, Black and Hanrahan, n 5, p 505, Mannolini, n 8 at 153.

¹¹ Mannolini, n 8 at 153; Gething, n 9 at 609; cf Whincop, n 9 at 216.

relating to trading decisions”.¹² Ranged against this, he describes a theory of market efficiency according to which:

insider trading is damaging to the integrity of security markets. It delays disclosure of information, erodes public confidence, reduces incentive for local and foreign investment, reduces market participation and has an adverse effect on the overall liquidity and fundraising functions of markets.¹³

Baxt, Black and Hanrahan similarly contrast the market efficiency theory with the access to information (or market fairness) rationale. They refer to the view originally espoused by Manne, that trading on inside information may actually bring about a better informed and efficient market.¹⁴ The authors provide a number of strong counter-arguments. Whilst the efficiency of insider trading may be a moot point, the arguments that it could be “fair” because it rewards an individual’s boldness and creativity are even harder to sustain.¹⁵ Conversely, it is possible to imagine a situation where the prohibition, if based on equal access to information, could be adjudged inefficient – even “unfair”.

Dirks v Securities Exchange Commission 463 US 646 (1983) is a case in point and illustrates the deficiencies of the market fairness/equal access to information theory. In that case Dirks, a stock analyst, had suspicions about the legality of conduct of an insurance company. As a result of intensive investigation, including interviews with company employees Dirks uncovered widespread fraud. He advised his clients to sell down their stock in the company. The company subsequently collapsed when the information became public knowledge and many investors lost their money.

Dirks was initially convicted of insider trading but successfully appealed to the United States Supreme Court. The court was able to evade the application of the prohibition on insider trading by holding that since the conduct of the employee in passing the information to Dirks to expose a fraud was not wrongful, Dirks’s conduct in passing that information on to others was not prohibited because it was not fraudulent or deceitful. The court noted (at 658) that:

imposing a duty to disclose or abstain solely because a person or persons knowingly receive material or non-public information from an insider could have an inhibiting influence on the role of market analysts.

However, had the market fairness theory prevailed, Dirks would likely have been found guilty. This is because the market fairness theory operates in an indiscriminate, majority-focused fashion that cannot look to the justice of the individual case. It operates in this manner because underpinning the theory is a benevolent concern for investor protection. The theory requires identification of an unfair advantage vis-à-vis an insider and the majority outsiders, and Dirks’s knowledge (even though he himself did not trade) placed him at an informational advantage over the majority of the investing public who were not his clients.¹⁶

¹² Rubenstein, n 6 at 93.

¹³ Rubenstein, n 6 at 93. Mannolini also refers to a discrete theory of market fairness which “regards [inside] information as a public good; essentially it ‘socialises’ the market for insider information”: Mannolini, n 8 at 154; cf *SEC v Texas Gulf Sulphur* 401 F 2d 833 (1968) where the theory was approved by the United States Court of Appeal in the following terms: “[t]he only regulatory objective is that access to material information be enjoyed equally.”

¹⁴ Baxt, Black and Hanrahan, n 5, p 506. They refer to the seminal work of Manne HLG, *Insider Trading and the Stock Market* (1966) who adopted a law and economics approach which postulated that a prohibition on insider trading delays the incorporation of information into a company’s share price increasing the spread of bidding in its shares and thereby increasing volatility. Furthermore, eliciting information in this manner reduces the costs to others to obtain the information and rewards innovation by company insiders. Cf Semaan L, Freeman M and Adams M, “Is Insider Trading a Necessary Evil for Efficient Markets? An International Comparative Analysis” (1999) 17 C&SLJ 220 at 224-226.

¹⁵ Baxt, Black and Hanrahan, n 5, p 507. The arguments include that disclosure in such a manner is in fact slower in effecting movements in market prices than direct disclosure, that trading by one or a limited number of insiders is unlikely to have a significant effect or bring the information to light in an anonymous trading environment. It has also been argued that the transaction costs are higher when uninformed investors perform trades and that the rewards for successfully trading on insider information are disproportionate to the innovation exhibited; cf Gilson and Kraakman, “The Mechanisms of Market Efficiency” (1984) 70 *Virginia Law Review* 549 at 628-635. These arguments are supported by empirical research that has demonstrated that insider trading reduces liquidity and increases capital costs: Bahattacharya U and Daouk H, “The World Price of Insider Trading” (University of Indiana Working Paper) as cited by Rubenstein, n 6 at 91.

¹⁶ Baxt, Black and Hanrahan, n 5, p 508.

The market fairness/equal access and market efficiency rationales have at times been used interchangeably or merged together, seemingly without sufficient appreciation of their distinct conceptual bases.¹⁷ The foregoing discussion demonstrates the danger in attempting to unify these two ostensibly separate rationales. This packaging of principle has been said to be productive of legislative “astigmatism”.¹⁸

ELEMENTS OF THE OFFENCE OF INSIDER TRADING

The following elements must be proved beyond reasonable doubt in a prosecution for insider trading:

1. the accused possessed inside information;¹⁹
2. the accused knew or reasonably ought to have known that:
 - (a) the information was 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 the relevant securities; AND²⁰
3. entered into a securities transaction or agreement;²¹ OR
4. procured a person to enter into a securities transaction or agreement;²² OR
5. if a financial market operates for the relevant securities, communicated the information to a person if the accused knew, or reasonably ought to have known that the person would, or would be likely to:
 - (a) enter into a securities transaction or agreement; or
 - (b) procure a person to enter into a securities transaction or agreement.²³

GENERALLY AVAILABLE INFORMATION – SECTION 1042C(1)

A critical and unique element in the offence is the need to determine whether at the relevant time the information can be said to have been “generally available”. It is in attempting to define this concept of generally available information that the packaging of principle referred to above is best illustrated.

Section 1042C provides the following definition of the general availability of information.

- (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).

¹⁷ CAMAC’s Final Report states that “[t]he generally stated rationale for the prohibition of insider trading relates to market fairness and market efficiency”: p ii. The Explanatory Memorandum to the 1991 amendments at [307] stated that the policy objective pursued by the government was the control of insider trading “to protect investors and make it attractive for them to provide funds to the issuers of securities, for the greater and more efficient development of Australia”.

¹⁸ As put by Mason J in *R v Firms* (2001) 51 NSWLR 548 at 558.

¹⁹ Section 1043A(1)(a).

²⁰ Section 1043A(1)(b) referring to the definition of inside information in s 1042A.

²¹ Section 1043A(1)(c).

²² Section 1043A(1)(d).

²³ Section 1043A(2).

- (2) None of the paragraphs of subsection (1) limits the generality of any of the other paragraphs of that subsection.

The Explanatory Memorandum to the 1991 amendments explains that the test comprised in s 1042C(1)(a) was introduced because:

information directly observable in the public arena would not be regarded as generally available, as it had not been “made known”. It was considered that a person could be liable for insider trading where he/she traded in securities on the basis of, for example, an observation that the body corporate had excess stocks in a yard. This was not the intention of the provisions.²⁴

The reason for the inclusion of s 1042C(1)(c), as expressed by the Explanatory Memorandum, was that it was not the intention of the Griffith Committee that inside information would be regarded:

as such things as deductions and conclusions which investors, brokers or other market participants may make based on independent research of generally available information ... this intention was not reflected in the provisions.²⁵

Thus we see a packaging of the provision to encourage generation of some of the benefits associated with the market efficiency theory. It is a tacit acknowledgment that not all information need be “socialised” and that there needs to be maintained incentive for the diligent market analyst. The maintenance of incentive was a substantial factor in the United States Supreme Court’s rejection of the market fairness theory in *Dirks*.

However, establishing normative standards of judicial interpretation of a statutory regime is problematic when the principle upon which it is based is not clearly articulated. The result is often the adopting of a literal, as opposed to purposive approach, and a possible emasculation of the provision. This is all the more so when the statutory regime invokes serious sanctions for breach.²⁶

This may appear to be the result at a first glance of some of the Australian decisions in this area. It is submitted, however, that the adoption of a literal approach in the decisions to be reviewed below reflects the increasing credence given to the market efficiency paradigm as the most appropriate underpinning of the insider trading regime.

R v Kruse and R v Firms

R v Kruse (unreported, O’Reilly J, 2 December 1999, District Court of NSW, Criminal jurisdiction, No 98/11/0908) and *R v Firms* (2001) 51 NSWLR 548 provide a good illustration of the conflicting policy objectives behind the legislation and the diametric results that can be achieved in cases with similar factual matrices. However, in the ultimate resolution of the two is displayed the beginnings of a more nuanced understanding of the appropriate policy basis for the insider trading prohibition against an increasingly dynamic and responsive technological environment.

These two cases arose out of a common set of circumstances. Carpenter Pacific Resources NL (Carpenter) was at the relevant time, and remains, a company listed on the Australian Stock Exchange (ASX). Carpenter had a number of exploration interests in Papua New Guinea (PNG). In 1995 Carpenter, through one of its subsidiary companies, was involved in litigation over deep rock mining rights attached to one of its exploration leases. Mr James Kruse, then Carpenter’s temporary General Manager, was present in open court when, on 28 July 1995 at approximately 9.30am, the PNG

²⁴ Explanatory Memorandum at [326].

²⁵ Explanatory Memorandum at [327].

²⁶ Section 1311(1A) Sch 3 of the Act. This concern is evident in the vacillation of Young J in *Exicom Pty Ltd v Futuris Corporation* (1995) 18 ACSR 404 at 408 where his Honour observed: “The division is one which can be dealt with criminally by extremely harsh penalties ... Where a harsh criminal penalty is imposed on conduct consideration of the liberty of the subject requires one to construe provisions strictly. On the other hand, the division shows an intention to protect members of the public who are in the securities market, who are not “insiders”. Protective legislation of that nature should be construed beneficially.” The concern that courts would tend towards the “safer” option was also evident in the cautionary words of Rolfe J in *Ampolex v Perpetual Trustees Ltd* (1996) 20 ACSR 649 at 658. His Honour found it concerning that the provision provided: “not only difficulties of interpretation because of the language used, but because of apparent internal inconsistencies ... it is intended to have a beneficial commercial effect. It is unfortunate that [it] should be couched in language which is difficult of understanding and application. This may well have the consequence that the intended beneficial effect will not be forthcoming.”

Supreme Court handed down a decision favourable to Carpenter. At approximately 10.02am Mr Kruse telephoned his broker and placed an order for the purchase of Carpenter shares.

The outcome of the court case was telephoned through to Mr Richard Hill, Carpenter's Chairman and Secretary, at his Sydney office at approximately 9.40am that morning. Mr Hill then telephoned Carpenter's directors, one of whom was Mr Ron Firms, the father of the accused, Mr Kenneth Firms. At about 10.08am Mr Firms senior telephoned the news to Mr Firms junior who was in Brisbane. Mr Firms junior then telephoned his Brisbane broker and placed an order for the purchase of Carpenter shares.

Messrs Kruse and Firms were prosecuted in separate trials for insider trading. Mr Kruse was acquitted; Mr Firms was found guilty at first instance²⁷ but acquitted by a majority decision of the New South Wales Court of Criminal Appeal.²⁸

A distinction which has been posited as a reason for, and a way to reconcile, the initially divergent results is the different geographic location of the two defendants. In *Kruse* the court found the information regarding Carpenter's victory was generally available in PNG where Mr Kruse was located, while in *Firms* the court at first instance found this information was not generally available in Australia where Mr Firms was located.

Dr Walker utilises the territorial jurisdiction applicable to the insider trading regime to establish a possible basis for the initially divergent results.²⁹ His analysis set out in part below should be understood as an attempt to reconcile two ostensibly inconsistent decisions without the benefit of the subsequent judgment of the majority of the Court of Appeal in *Firms*. Dr Walker first looked at the then equivalent section to the current s 1042B.³⁰

Section s 1042B states:

This Division applies to:

- (a) acts and omissions within this jurisdiction in relation to Division 3 financial products (regardless of where the issuer of the products is formed, resides or located and of where the issuer carries on business); and
- (b) acts and omissions outside this jurisdiction (and whether in Australia or not) in relation to Division 3 financial products issued by:
 - (i) a person who carries on business in this jurisdiction; or
 - (ii) a body corporate that is formed in this jurisdiction.

The equivalent predecessor to this section allowed an Australian court to assert jurisdiction in *Kruse*. Dr Walker suggested that:

If the jurisdictional reach of an Australian Court extends to acts and omissions in PNG, then it follows that the requisite elements of the criminal offence of insider trading will have to be established there also ... It follows that parts of the *actus reus* of the offence would have to be shown as occurring in PNG and, to this extent, the question must have been whether the information was "readily observable matter" in PNG ...

On this line of analysis, the question of the geographical location of the "readily observable matter" is explicable by reference to s 1002. This places the conclusion reached in *Kruse* (public arena can be offshore) on a sounder conceptual footing because it ties the geographical location of the generally available information to extraterritoriality and *actus reus*. If the relevant acts and omissions are alleged to occur outside Australia, the information must be "readily observable matter" in the offshore jurisdiction. The virtue of this reading is that it addresses the policy dilemma posed by the offshore investor who possesses information not generally available in Australia.³¹

²⁷ Unreported judgment of Sides J, delivered 4 November 1999 in the District Court of NSW, Criminal Jurisdiction, No 98/11/0895.

²⁸ *R v Firms* (2001) 51 NSWLR 548.

²⁹ Walker GR, "Insider Trading in Australia: When is Information Generally Available?" (2000) 18 C&SLJ 213 at 216.

³⁰ Formerly set out s 1002 of the Act to which section Dr Walker makes reference.

³¹ Walker, n 29 at 216-217. Note Dr Walker acknowledges that there are no references to this section in either *Kruse* or *Firms*.

Although the offshore investor may be protected, it is respectfully submitted that an inherent unfairness arises on such an analysis, premised as it is on a conception of information being available to differing extents in different areas. It must inevitably follow that investors in locales where the availability of the information has not reached the requisite standard must a priori be at an informational disadvantage vis-à-vis other investors. As long as this distinction is made a disparity will remain and unfairness will ensue.

The challenge to the insider trading regime posed by extra-territoriality can only be adequately addressed by dispensing with a bifurcated approach of assessing the general availability of information inside and outside the jurisdiction.

In *Kruse O'Reilly J* deftly avoided this conceptual conundrum. His Honour stated that:

the facts must be directly observable in a public arena, but that public arena need not be confined to this country or to any State in this country ... "public" is defined³² amongst other definitions as: "open to general observation, existing, done or made in public, manifest, not concealed". To my mind that gives the clue to the correct approach to the construction of the subsection.

The venue was the Supreme Court of Papua New Guinea at Port Moresby with knowledge on the preceding day that the matter was to be listed for judgment, and the fact was that it was announced in open court in a situation where there were plainly lawyers and journalists. There was reference also in the evidence to photographers, landowners et cetera. This is in marked contrast to the example I proposed to Counsel of a Mining Warden's court at Mount Hagen attended only by the immediate parties and their lawyers with no media presence and no reporting outside that little group. That example, to my mind, is not within the public arena. In my opinion what happened in the Supreme Court at 9.30am was in the public arena and therefore constituted readily observable matter.

Kruse (unreported, O'Reilly J, 2 December 1999, District Court of NSW, Criminal jurisdiction, No 98/11/0908) pp 4-5

His Honour's reliance on a dictionary definition of "public", inherently lacking in context, allowed him to dispense with reading into s 1042C(1)(a) any limitation that the information be generally available *in Australia*. It was in truth fundamentally just as purposive an interpretation as the court's at first instance in *Firns*. The essential difference is that in *Kruse O'Reilly J* boldly got it right in policy. Although declining to delve into any elaboration, his Honour's literal interpretation was an essential first step in reaching a more relevant policy footing for the insider trading prohibition based on the prevailing realities of the modern world.

Dispensing with this distinction yet retaining equity can be achieved by acknowledging two mutually supporting realities: that the increasing speed and diversity of information networks in the modern world has imbued the market efficiency rationale with a conceptual integrity which hitherto it has not had.

In delivering the majority judgment in *Firns* (2001) 51 NSWLR 548, Mason J did address the policy question head on and clearly acknowledged these realities. His Honour argued the market fairness/equal access paradigm could not be invoked as the sole basis for interpreting the provision. His Honour thought the inclusion of s 1042C(1)(a) evinced a legislative intention to "partially and indirectly" endorse "the economic-efficiency paradigm as one of the goals of insider trading prohibition" (at 561). The commitment to an efficient as well as a fair market reinforced his Honour's decision "to interpret [s 1042C(1)(a)] literally, without forcing its language into a predetermined purposive mould" (at 561). This commitment to efficiency may be contrasted with the dissenting judgment of Carruthers J who could not bring himself to derogate from the investor – particularly the Australian investor – protection rationale of the prohibition.

Mason J's approach allowed his Honour to take a more capacious and technologically-cognisant view of the prohibition. For example, his Honour accepted (at 564) that although:

It may be granted that the protection of fair trading in the Australian sharemarket is the primary focus of the legislative regime ... [n]on sequitur that the market is viewed as located solely in Australia or

³² His Honour was referring to the *Shorter Oxford Dictionary*.

that parties protected are those “*within Australia*” or “*in Australia*”. After all, a large proportion of investors in Australian corporations are non-Australians; and a considerable proportion of shares listed on the ASX are shares of foreign corporations. [The division] is not confined to protecting the interests of resident Australian investors or dealings in Australian shares ...

There is a further difficulty with the direction [put to the jury by the judge at first instance] that ready observability is to be tested from the stance of a hypothetical person “*within Australia*” ... The direction suggests or infers that the **readiness** of perceptibility is also to be judged from the viewpoint of individuals located in Australia using their natural senses but without regard to modern methods of telecommunication. The unelaborated direction referring to “*those in Australia*” carries the seeds of miscarriage when it is recognised that television, the internet (including e-mail) and other means of telecommunication such as the phone and fax are part and parcel of how Australians generally and investors in particular readily perceive events.

In contrast Carruthers J argued (at 569) that:

In my view, the words *readily observable matter* cannot be allowed to operate in a vacuum. In most cases the question must be asked: *to what class of persons must the information consist of “readily observable matter” ...*

Mr Game SC for the Crown on this appeal submitted (correctly in my view) that the matter must be *readily observable* by the public at large as that is the group of persons who are capable of trading on the sharemarket in Australia, or in shares of corporations which are formed or carry on business in Australia. The public at large in that sense must, at least, include the Australian public, as the provisions contained in the *Corporations Law* are clearly designed principally to protect Australian investors by promoting equal access to information for investors. For information to be generally available on the basis that it consists of *readily observable matter*, it must at least, be *readily observable* by members of the Australian public.

It appears Carruthers J was substantially adopting a market fairness/equal access approach. His Honour comprehended protection of the investor as encompassing the broad spectrum of the Australian investing public with its varying degrees of power, access to resources and competence. Taken as a whole it could not be required that they should have to “search meticulously” for information that could have a likely material effect on the price of securities.

A GLOBALISATION PERSPECTIVE ON THE CASE LAW

The globalisation system is characterised by fundamental changes in the conduct of nation states, peoples and their affairs brought about by rapid technological advancements, primarily the development of new methods of, and improvements in, communications. The environment in which stock trading takes place is particularly sensitive and adaptive to technological change. In this environment the dynamics of this new globalised climate are quickly understood and harnessed by participants. It is a dynamism to which regulators must remain alert and responsive.

Understanding the elemental forces in this globalised climate may provide a useful perspective and context in which to make predictions as to which view expressed in *Firns* may be more pertinent in the future.

Globalisation has been defined as:

the increasing freedom and ability of individuals and firms to undertake voluntary economic transactions with residents of other countries, a process entailing a growing contestability of national markets by foreign suppliers.³³

³³ Brahmabhatt M, “Measuring Global Economic Integration: A Review of the Literature and Recent Evidence” (The World Bank, Incomplete Draft, November, 1998 at <http://www1.worldbank.org/economicpolicy/globalization/documents/measuring.pdf> viewed 9 March 2005). The cross-border transactions can be divided into 4 main groups: international trade – the exchange of goods and services across national boundaries; foreign direct investment – the establishment and operation of a business in one country that is substantially controlled by residents of another; financial integration – the purchase and sale of financial assets either through portfolio investment or lending and borrowing; labour migration – the offer of labour services in one country by residents of another country.

Treasury, in its submission to the House of Representatives Standing Committee on Economics, Finance and Public Administration (Hawker Committee), noted that globalisation was a term used loosely to describe the fact that:

The driving elements of economic activity – capital markets, technical innovation, corporate organisation, and trends in consumer demand – are increasingly crossing national boundaries as governments, societies, firms and individuals strive to maximise the advantages presented to them by economic integration.³⁴

Globalisation, Friedman argues, has been made possible by the “democratisations” of technology, finance and information. The democratisation of technology is the multi-faceted modes of communication devolving increasingly to individuals. The democratisation of finance is the multitude of new ways, means and places to invest; and the democratisation of information is the way we look at the world, and specifically the way, through modern technology, increasing numbers of people are able to “see through, hear through and look through almost every conceivable wall” to see things as they really are.³⁵

These democratisations have many and varied effects. They tend towards homogenisation and integration. Friedman believes that whereas “the defining perspective of the Cold War was ‘division’, the defining perspective of globalisation is ‘integration’”. And “while the defining measurement of the Cold War was weight ... the defining measurement of the globalisation system is speed – speed of commerce, travel, communication and innovation.”³⁶

These developments have seeded the international marketplace to allow the competitive forces of free-market capitalism to flourish. According to Friedman:

the more you let market forces rule and the more you open your economy to free trade and competition, the more efficient and flourishing your economy will be. Globalization means the spread of free-market capitalism to virtually every country in the world. Globalization also has its own set of economic rules – rules that revolve around opening, deregulating and privatising your economy.³⁷

The essence of globalisation is increasingly intensified competition brought about by speed and by the sheer numbers able to participate. The cycle of “creative destruction” which is the essence of capitalism³⁸ happens in a globalised world at breakneck speed because it is self-perpetuating and self-energising. Barriers to entry in almost any business are broken down, allowing individuals, with minimal financial resources, to enter and to compete. With distance increasingly irrelevant in the cyber-economy, the costs and obstacles to consumer comparison of products are greatly reduced. Globalisation compels the replacement of tradition with innovation; and from innovation to commoditisation.³⁹

Efficiency is critical in order to be able to compete in the globalised world. However, in a world with so much competition there is an attendant and continual need to demonstrate that efficiency to the market. Transparency and openness are therefore paramount.⁴⁰ The Australian Stock Exchange has expressed the view very simply: “information is critical to the function of international financial markets.”⁴¹

³⁴ As cited in the report entitled *International Financial Markets – Friends or Foes?* (House of Representatives Standing Committee on Economics, Finance and Public Administration, Canberra, March 2001) at [3.2].

³⁵ Friedman, n 1, pp 41, 47, 54.

³⁶ Friedman, n 1, pp 8-9.

³⁷ Friedman, n 1, pp 8.

³⁸ Schumpeter J, “Capitalism, Socialism and Democracy” as cited in Friedman, n 1, pp 9.

³⁹ Friedman, n 1, pp 65.

⁴⁰ “Openness can stimulate financial deepening, the creation and strengthening of institutions and the building of a viable regulatory infrastructure”: Yusuf S, “Globalization and the Challenge for Developing Countries” (The World Bank, June 2001).

⁴¹ Submission 6 to the Hawker Committee, n 34 at [4.4].

In its report entitled *Making Transparency Transparent* the Commonwealth Treasury highlighted the benefits of transparency:

Improved transparency contributes to a more efficient allocation of resources by: ensuring market participants have sufficient information to identify risks; informing market expectations; contributing to the effectiveness of announced policies; and ultimately enhancing the stability of financial markets by assisting in the prevention of a build up of financial and economic imbalances.⁴²

It has even been ventured that the concept of the static nation state competing against other nation states and pursuing its own state-orientated policies is, at least in the economic sphere, under challenge in a globalised world. The Hawker Committee stated that “in today’s globalised financial system no country can truly operate independently”.⁴³ In evidence before that Committee, Dr John Edwards commented that the trend was towards major economic decisions being taken by “shifting coalitions of nation states, regulators [and] global institutions”. Dr Edwards speculated that in the long term economic globalisation “is really about creating a single global economy in which, over time, nation states are deprived of former functions”. He thought the debate over what nation states are and what they should do, could be under way within a decade. He argued that “the only economic power of successful globalisation is achieved by merging your economy with others”.⁴⁴

To reconcile the foregoing in terms of the competing views offered by Mason and Carruthers JJ in *Firms*, it is submitted that the market efficiency theory espoused by Mason J is indeed prescient, more reflective of the requirements of the globalised environment and the one which, in time, will be favoured as the principal underlying rationale for the prohibition.

It will be recognised that, as could never have been said as surely before, efficiency conveys fairness. It will become increasingly accepted that the protection of the investor – including the Australian investor – will best be served by making Australia as efficient as possible to be competitive in the global market place.

Transparency is one of the keys to efficiency. It is crucial for the continued flow of funds and investment from the world’s financial markets – what Friedman terms the “electronic herd” – that the emphasis in the Australian sharemarket should be on the transparency of information.

If Carruthers J’s view prevailed, a potential investor in securities on the Australian Stock Exchange who was resident overseas might be more hesitant to invest if unsure that the information was generally available “in Australia”. The Asian economic crisis in 1997-1998 showed that uncertainty about the economic fundamentals of a country brought about by a lack of transparency can have disastrous effects on the wellbeing of the country as a whole.

Perceptions of the insider trading regime will be increasingly macroeconomic in nature dovetailing with Mason J’s outlook and the apparent dichotomy will resolve itself over time. Carruthers J’s view, with its focus on investor protection, may be subsumed within a broader perspective which will comprehend that the protection of the global investor equates not only to the protection of the Australian-resident investor, but operates to the benefit of all Australians.

It is submitted that the same result in *Dirks* 463 US 646 (1983) could have been achieved had a market efficiency rationale been employed. That is to say that the fraud being perpetuated by the company in writing fictitious policies and showing inflated balance sheet figures was deleterious to market efficiency. The non-disclosure of that information meant that the information could not be assimilated by the market in order to establish a true value for the company’s share price. Repeated failures would appear systemic and raise fears of endemic weaknesses in the integrity of the market thereby adversely affecting its liquidity and reducing participation in it. It is submitted that Dirks’s actions in bringing to light the true state of the company’s affairs contributed to, and did not detract from, the market’s efficiency.

⁴² The Treasury, *Making Transparency transparent: An Australian Assessment* (AGPS, Canberra, March 1999).

⁴³ Hawker Committee, n 34 at [3.1].

⁴⁴ Hawker Committee, n 34 at [3.4].

THE CAMAC PAPERS

The CAMAC inquiry was initiated, in part, by the policy discordance apparent in the two competing views in *Firns*. But in a more fundamental way it can be viewed as response to the demands of globalisation.

In the Discussion paper, CAMAC distinguishes between “informed” and “uninformed” persons and the time period, if any, that such persons must wait after the release of information before they can trade. According to CAMAC, the test in s 1042C(1)(b) applies differently to persons who become aware of price-sensitive information solely as a result of the information having been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in that type of securities (described as the “publishable information” test), and persons who in some way found the information out earlier or by some different means. The former are “uninformed” persons and can trade immediately they become aware of the information; the latter are “informed” persons and they must abide by s 1042C(1)(b)(ii) by waiting a reasonable period for the dissemination of the information to occur.

CAMAC states that the distinction operates because of the effect of s 1043M(2)(a).⁴⁵ This section provides a defence where persons become aware of information “solely” as a result of the information having been made known as elucidated in s 1042C(1)(b)(i). This defence does not require a dissemination period.

It is evident in making these distinctions that the fact situation in *Kruse* and *Firns* was exercising the minds of the Committee. CAMAC wanted to be able to prevent someone in the position of *Kruse* or *Firns* from acting immediately the court judgment was delivered, yet protect “a previously uninformed diligent investor or market analyst who responds immediately to information that is in the process of being publicly disseminated”.⁴⁶

Creating a distinction on this basis has been criticised on a number of grounds. First, that there is nothing in the Griffith Committee report, Part 7.10 or in the Explanatory Memorandum referring to informed and uninformed persons for the purpose of dissemination; and second, that the distinction is in fact specious, arising indirectly by virtue of a legislative oversight which allowed a later provision to contain a defence which does not refer to a dissemination period.⁴⁷

It is submitted that these arguments, though not without substance, are not fatal. Whatever may have been its legislative origin, on a quite literal reading of the interaction of the provisions, there is structural integrity. The defence is a complete one: if a person learns of the information in the ordinary course (for want of a better term) the defence requires no dissemination period.

It could also be argued that it is unlikely the drafters would have made this oversight as the test in s 1042C(1)(b) requires satisfying two discrete sub-tests. Moreover, the notion is indeed compatible if one looks at the overall aim which was articulated in the Griffith Report:

it is clearly incompatible with the intent of the legislation if an [informed person] gains an advantage from the dissemination of information before the market has had a reasonable time to absorb that information.⁴⁸

Finally, and perhaps most importantly for future reform, the notion is a necessary precursor to lay the foundations for a move away from reliance on the “readily observable matter” test, towards an emphasis on the “published information” test. The “readily observable matter” test has no dissemination period requirement and suffers from the inherent imprecision referred to in the preceding examination of the case law.

Shifting the emphasis in this way is a tacit vindication of Mason J’s approach in *Firns*. The Discussion paper states that the reason for the inclusion of the test was the concern that the

⁴⁵ This was formerly s 1002T(2)(a).

⁴⁶ CAMAC Discussion paper at [2.5].

⁴⁷ Qu CZ, “The Efficacy of Insider Trading Civil Liability Regime in the Corporations Act” (2002) 14 AJCL 1 at 8.

⁴⁸ *Fair Shares for All*, n 7 at [4.5.7].

“publishable information” test would not cover “matters that, of themselves, are not means of propagating information”.⁴⁹

However, the modern world is growing increasingly smaller and communication technologies are binding us closer, not only to each other, but also to events. As Mason J recognised, these technological agents are increasingly “part and parcel of how Australians generally and investors in particular perceive events” (at 564).

It is submitted that in 1991 the patent, as opposed to latent, disclosure of information distinction was one of greater delimitation. Then information needed to be more “patently” brought to the attention of the public. Now in a globalising world, information is more quickly and directly available. It is “latently” stored in the repositories of information networks and is capable of discrete, direct and mass access by individuals. Now, and increasingly in the future, this distinction will fall away as even the least sophisticated sections of the investing public move to tap into that information flow. The task of “meticulously searching” for information which Carruthers J argued the investing public should not have to undertake will, in ways not yet thought of, be increasingly straightforward and passive in nature.

Not only is this the reason, it is argued, that CAMAC saw fit to give prominence to the “published information” test, but it is precisely the reason behind the reformulation of that test in the Discussion paper so that the “made known” requirement covers:

any information, matter or *event* whose existence or price-sensitive implications will, or will be likely to, come to the attention of the investing public *either of itself or through some other means*.
(emphases added)⁵⁰

Two further points in relation to this reformulation bear scrutiny. First, the definition refers to the information, matter or event coming to the attention of the “investing public”. The adoption of this term of wider ambit, rather than referring to those persons who commonly invest in the type of securities which would be price-sensitive to that information, would result in increasing the length of the dissemination period. The information may be quite security specific (as it was in the cases of *Kruse* and *Firns*).

On the current approach, such information would be likely to come more rapidly to the attention of people who commonly invest in that class of securities and would take longer to disseminate amongst the investing public. The obligations for the would-be-trader would therefore be made more onerous under this formulation.

Second, the reformulation on its own could not accommodate the situation where people who, having a connection to the issuer of securities, might contend that notwithstanding their association, they still fell into the category of those persons to whom the defence in s 1043M(2)(a) is applicable. CAMAC sought to introduce the concept of “connected persons” to address this concern. The dissemination period in the “publishable information” test would be extended beyond informed persons to:

- any director or executive officer of the company or a related company; or
- any other person whose relationship with the company may reasonably be expected to provide that person with access to any undisclosed price-sensitive information about the company.⁵¹

It is submitted that the adding of connected persons to the formulation is problematic. Unwittingly, to do so is also to fall prey to legislative “astigmatism”, as eloquently put by Mason J in *Firns*, whereby it is attempted to converge essentially incompatible policy goals. It is in part a return to the market fairness/equal access paradigm at the expense of market efficiency and incentive rationales.

Such a formulation would be of concern to market analysts as in many cases their research and analysis is drawn from a combination of generally available information, non-public information and

⁴⁹ CAMAC Discussion paper at [2.28].

⁵⁰ CAMAC Discussion paper at [2.32].

⁵¹ CAMAC Discussion paper at [2.39].

nuanced personal relationships.⁵² There would be a question as to what level of abstraction would be sufficient to make an analyst a “connected person”. Furthermore, such an approach, whether intended or not, may be conducive of uncertainty by recalling the fiduciary relationship rationale – a rationale discredited as having application in Australian law.⁵³

The introduction of the connected person concept was an attempt to overcome what is, in essence, an evidentiary problem associated with meeting the burden of proof in criminal prosecutions. It would be better resolved by amending those rules relating to the requirements of proof in such prosecutions. This has been accomplished to some extent by the application of the Act’s civil penalty regime to insider trading by the *Financial Services Reform Act 2001* (Cth).⁵⁴

The Discussion paper reviewed the problems with the “readily observable matter” test but did not, it should be noted, attempt to endorse at that stage any options for reform.⁵⁵ It may be assumed that this is because CAMAC concentrated more on the “publishable information” test with a view to it covering the field. However, it may also be an acknowledgment that in an ever-changing world what may be readily observable matter is a question without an immutable answer – a misconceived “jury issue par excellence”.⁵⁶

There was an apparent evolution in CAMAC’s thinking between the Discussion paper on the one hand and the Proposal and Final Report on the other. It is submitted that the revised “publishable information” test in the Discussion paper was in part an attempt by CAMAC to conceive of factual situations (no doubt influenced by those in cases such as *Kruse* and *Firns*) and to tailor the language of the provision to accommodate them. The starting point was still the nature and character of the information, matter or event which would then have to be adjudged as likely to come to the attention of the public. This is evident in the following summing up:

Applying the revised “made known” requirement, a catastrophe, as well as a court judgment, would be publishable information. By contrast, the excess stock example in the Explanatory Memorandum would not be publishable information, if that fact, alone, would not be likely to come to the attention of the investing public.⁵⁷

This conception is nevertheless cognate with, and appears to suffer from the same flaws identified in, the previous approach. As times, technology and practices change, new and unique situations arise that are incapable of reconciliation, making abstraction from precedent difficult.

The better conceptual approach is to make the starting point the identification of the type of information about which a class of persons (however that class is to be delineated) would reasonably expect to be informed. In this way at least a certain standard of objectivity is reached, thereby adding another filtering mechanism to further refine and delimit the prohibition’s scope.

And this is the approach which now appears to be favoured in both the Proposals paper and the Final Report. The Proposals paper states:

The information must relate to matters that a regular user would reasonably expect to be disclosed to other users of the market on an equal basis, whether at the time in question or in the future [disclosable information element].⁵⁸

According to the Proposals paper, “disclosable information” would include all information:

- coming within the ASX continuous disclosure requirements including information that would have to be disclosed in the future;

⁵² See Bollen R, “Research Analysts and the Australian Insider Trading and Misleading or Deceptive Conduct Regimes” (2003) 21 C&SLJ 431 at 439.

⁵³ See Mannolini, n 8 at 155 and the Griffith Committee’s comprehensive rejection of insider trading liability based either on a concept of fiduciary duty or misappropriation, n 7 at [3.3.5].

⁵⁴ Item 437 of Sch 1, Pt 2 of the FSR Act. See the discussion in Rubenstein, n 6 at 109-113.

⁵⁵ Discussion paper at [2.41] – [2.50].

⁵⁶ Per Mason J in *Firns* (2001) 51 NSWLR 548 at 565.

⁵⁷ Discussion paper at [2.33].

⁵⁸ Proposals paper at [1.22].

- about market transactions that, either now or in the future, must be disclosed to the market either under the Act or the ASX Rules; and
- that is routinely the subject of a public announcement, though not subject to any formal disclosure requirement.⁵⁹

In the Final Report, the majority of the Committee favoured utilising the disclosure concept to focus the prohibition and introducing a new test of generally available information.⁶⁰ The prohibition would apply to all currently regulated financial markets and financial products in respect of disclosable or announceable information only.

The proposed legislative amendment (Proposal) contained in Recommendation 38 of the Report is set out below:

Majority Proposal

Section 1043A should be amended by adding new paragraphs (1)(ba) and (2)(ba) as follows:

‘(ba) the inside information is disclosable information or announceable information;’.

The following definitions should be added to s 1042A:

‘**disclosable information**’ means information that:

- (a) has to be disclosed either now or in the future pursuant to any legal or regulatory requirement (other than a requirement for disclosure only to a counterparty), whether or not that obligation is complied with, or
- (b) would come within paragraph (a) were any person subject to the legal or regulatory requirement to be aware of the information, or
- (c) would come within paragraph (a) or paragraph (b) if the subject matter of the information came to fruition (whether or not it does so);

‘**announceable information**’ means information, other than disclosable information, that:

- (a) will become the subject of a public announcement, or
- (b) would come within paragraph (a) if the subject matter of the information came to fruition (whether or not it does so).

The current s 1042C(1) should be replaced with the following provisions:

1042C(1) For the purposes of this Division, information ‘is generally available’ only 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
- (b) consists of deductions, conclusions or inferences made or drawn from any information referred to in paragraph (a).

1042C(1A) Information is deemed to satisfy paragraph (1)(a) if it is disclosed pursuant to any prescribed disclosure procedure.

The defence in s 1043M(2)(a), which is part of the published information test, should be repealed.

The concept of disclosable or announceable information negates the need for a “readily observable matter” test and this is dispensed with in the new test in s 1042C(1).⁶¹

The CAMAC majority states that the purpose of paragraph (b) of the definition of disclosable information to be added to s 1042A is to make clear that the person with the information need not be the person who has to disclose it and that it is disclosable information even where the person with the obligation to disclose may not yet be aware of the information.⁶²

⁵⁹ Discussion paper at [1.24].

⁶⁰ As opposed to two other options: returning the legislation to the pre-March 2002 position; retaining the current law but including specific defences or carve outs for particular markets or categories of transactions which justify exemptions, per the Final Report at [4.4].

⁶¹ Final Report at [4.7.4].

⁶² Final Report at [4.7.3].

A GLOBALISATION PERSPECTIVE ON THE CAMAC PAPERS

Generally the Proposal provides a much needed revamping of the insider trading prohibition and is a step in the right direction. It is better based in principle, structurally more germane to the way information is, and will be, obtained in the current and future share markets, and thus likely to be more efficacious. Its limiting of the prohibition means that some of the vagaries evident from the case law, particularly in relation to the “readily observable matter” test, will be ameliorated by the displacement of that test.

It is interesting to note the evolution of the “publishable information” test by reference to the orientation of information delivery. First, in the Discussion paper information is said to be generally available if it is made known in a way that is likely to bring it to the attention of the investing public. This seems to connote a more active mode of delivery. In the Proposals paper one observes a degree of diffusiveness implicit in its reasoning that information is generally available if it comes into the public domain without the need for any further or intermediate steps. In the Final Report, information is argued to be generally available if it is *accessible to most persons* who commonly invest in the type of products whose price might be affected. The word “accessible” is defined as “within reach, obtainable”.⁶³ It seems to encompass a degree of extra-territoriality, connoting that notion of information stored on, and discretely retrievable from, repositories of inter-connected networks.

It is apposite that the CAMAC majority chose to use the phrase “information is ‘generally available’ only if it is accessible to most persons who commonly invest” as opposed to “only if it is accessible by most persons who commonly invest”. It is recognition of the fact that the world is becoming more and more integrated and individuals are increasingly wiring into this world. It demonstrates an awareness that the delivery of information can be more suffuse than the manner perhaps contemplated in the judgment of Carruthers J in *Firns*. In this sense the proposed new terminology sits more comfortably with Mason J’s view. It is more in accord with Mason J’s conception of the range of what can be considered obtainable across the spectrum of the investing public.

Given the experience in *Firns* and *Kruse* it is also to be noted that CAMAC did not seek to impose any territorial constraints. There is no “accessible in Australia” element to the test. Assuming the information was disclosable or announceable, application of the proposed test to the facts both in *Firns* and particularly in *Kruse* would be likely to result in a similar outcome to that obtained by the majority decision in the former case.

It is also worth noting that the Proposal provides that the information must be accessible only to “most” people in the given class. This is to be contrasted with the current provision which does not use the word “most”. The CAMAC majority suggest that a note should be included in the Explanatory Memorandum or legislation to the effect that (apart from information that comes within subs (1A), that is, information disclosed pursuant to any prescribed disclosure procedure), information only satisfies the test if it “can at that time be obtained by most investors without resort to technical assistance beyond that likely to be used by those investors”.⁶⁴

This acknowledges that across the spectrum of the investing public there are differing degrees of integration. It is perhaps again an example of the intervention of the market fairness/equal access paradigm, although in this case it functions as modifying an element in the test, rather than as the basis of a stand-alone element. In this way it helps establish a normative standard. It assists to reinforce the expectation of at least a level playing field, notwithstanding the players on that field may be of different strengths and abilities and may have varying degrees of access to resources. However, if a prediction might be ventured, it is that the word “most” may some time in the future be jettisoned as superfluous.

Additional mechanisms to even out the playing field are comprised in the additional notes the Report says could be inserted in the Explanatory Memorandum or legislation to the effect that:

- lists could be made of examples of the type of information that satisfies para (1)(a); and

⁶³ *Chambers’s Twentieth Century Dictionary* (W & R Chambers Ltd, London, 1961).

⁶⁴ Final Report, at [4.7.4].

- posting information on the internet will not make the information accessible unless it has been disclosed through a prescribed internet disclosure procedure under subs (1A).⁶⁵

The Proposal's employment of the concept of disclosable and announceable information is an indirect acknowledgment of the significance transparency plays in a globalised world. Its use of the words "accessible to" also reflects a better understanding of the way information is obtained by ever increasing numbers of investors in a globalising, integrating world.

The Proposal's endorsement of the developing of standards and prescribed disclosure procedures is suited to the integrated, globalised context. As the Hawker Committee noted:

As globalisation progresses, the need for the application of international standards and cooperation in addressing problems grow.⁶⁶

The development of uniform standards is important for both economic development and the expansion of world trade. Standards help to solve crucial informational problems and facilitate transparency.⁶⁷ They are also more conducive to modification as circumstances change. They can be augmented as communication technology develops or as different markets provide new methods of disseminating information to their participants.⁶⁸

Application of the Proposal would, in most of the cases reviewed, provide a more consistent, just result. However, the case of *Dirks* remains problematic even under the Proposal, the application of which would still be likely to find him guilty. It is unlikely that a similar fact situation to that in *Dirks* would be able to escape Australia's insider trading regime unless it underwent a massive conceptual overhaul. It would likely require the importation of the American concept of a fraud on the market.⁶⁹ It is something the Proposal does not attempt to do and such an overhaul appears unlikely.

The Proposal may, however, still prove useful in its indirect endorsement of the market efficiency paradigm. As such, one can perhaps see its interpretation increasingly evolving so that it may be possible in the future for a judge facing a *Dirks*-type scenario to incorporate (in much the same way as Mason J did in *Firns*) more decisively that paradigm into the prohibition and adopt a purposive approach.

It is submitted that the real value of the Proposal is in its tacit acceptance of, and underlying shift towards, a market efficiency rationale driven by the imperatives of globalisation. Over time the requirements of globalisation will compel the fashioning of a regime that has greater conceptual clarity by incorporating what were previously considered quite disparate and discordant rationales. Time may still be money, but in the form of increased efficiency, it brings other benefits too.

⁶⁵ Final Report, at [4.7.4].

⁶⁶ Hawker Committee, n 34 at [41].

⁶⁷ "Standards serve to communicate information to consumers in a consistent and reliable manner which lowers the transaction cost for both buyer and seller, since the buyer is spared the effort of having to find out for himself about the characteristics of the product. Standards permit the comparison of products on a common basis": per Stephenson SM, *Standards and Conformity Assessments as Nontariff Barriers to Trade*, World Bank Development Research Group, Policy Research Working Paper 1876, September 1996 as quoted by Brahmhatt, n 33 at 6.

⁶⁸ Per the Final Report at [4.7.4].

⁶⁹ Developed by the United States Supreme Court in *Basic Inc v Levinson* 485 US 224 (1988) in the context of a legislative prohibition in terms similar to r 10b-5.