A Comparative Synopsis of the Enforcement of Market Abuse Prohibition in Australia and South Africa

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Abstract

In Australia, the market abuse prohibition is generally well accepted by the investing and non-investing public as well as by the government. This co-operative and coordinated approach on the part of all the relevant stakeholders has to date given rise to an increased awareness and commendable combating of market abuse activities in the Australian corporations, companies and securities markets. It is against this background that this article seeks to explore the general enforcement approaches that are employed to combat market abuse (insider trading and market manipulation) activity in Australia. In relation to this, the role of selected enforcement authorities and possible enforcement methods which may be learnt from the Australian experience will be isolated where necessary for consideration in the South African market abuse regulatory framework.

Keywords

enforcement approaches – insider trading – market abuse – financial markets – market manipulation

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Introduction

In Australia, the market abuse prohibition¹ is generally well accepted by the investing and non-investing public as well as by the government.² This co-operative and co-ordinated approach on the part of all the relevant stakeholders has to date given rise to an increased awareness and commendable combating of market abuse activities in the Australian corporations, companies and securities markets.³ It is against this background that this article seeks to comparatively explore the general enforcement approaches that are employed to combat market abuse (insider trading and market manipulation) activity in Australia⁴ and South Africa. In relation to this, the role of selected enforcement authorities and possible enforcement methods which may be learnt from both the Australian and South African experiences will be isolated

¹ Notably, insider trading and market manipulation practices are expressly prohibited under the Corporations Act 50 of 2001(Cth), hereinafter referred to as the Corporations Act, as amended by the Financial Services Reform Act 122 of 2001(Cth), hereinafter referred to as the Financial Services Reform Act.
³ Huang (note 2) 9–22.
where necessary for consideration by such authorities, especially, in the South African market abuse regulatory framework.

2 Detection, Protection and the Enforcement of the Market Abuse Prohibition

2.1 The Role of the Australian Securities and Investments Commission

The regulation of securities markets in Australia has come a long way. It was introduced at a federal level on 1 January 1991 and was administered by a single federal regulatory body, the Australian Securities Commission (ASC). This followed the failure of its predecessor, the National Companies and Securities Commission in the early 1980s to enforce the securities and market abuse laws consistently in Australia. The ASC was renamed the Australian Securities Commission.


and Investments Commission (ASIC) on 1 July 1998. As a result, apart from its main responsibility to oversee the regulation of companies and the futures markets, the ASIC assumed further responsibilities. For instance, the ASIC may investigate any criminal matters involving insider trading and market manipulation and prosecute such matters in terms of the Australian Securities and Investments Commission Act and the Corporations Act. The ASIC may further refer any serious criminal matters to the Commonwealth Director of Public Prosecutions (Commonwealth DPP) for prosecution in accordance with a Memorandum of Understanding (MOU) between itself and the Commonwealth DPP. Therefore, the ASIC may, after investigations and liaising with the Commonwealth DPP, institute criminal proceedings against any person accused of violating any market misconduct provisions, especially where it reasonably suspects that such violation actually occurred. Eventually, if such person is convicted, the ASIC and/or the courts may impose a maximum criminal fine of Aus $495,000, or three times the profit gained or loss avoided, whichever is the greater, or ten years imprisonment or both, for individuals. The maximum criminal penalties for a body corporate were increased to a fine of Aus $4,950,000, or three times the profit made or loss avoided, or ten per cent of the body corporate’s annual turnover during the relevant period in which the offence was committed, whichever is greater. However,

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9 S 49 of the Australian Securities and Investments Commission Act 51 of 2001 (Cth) as amended, hereinafter referred to as the Australian Securities and Investments Commission Act.
10 S 49.
11 S 1314.
12 See further related comments and analysis by R Tomasic, ‘Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalisation Solutions’ (1992) 2 Australian Journal of Corp Law 82 at 102–105. It is noteworthy that the ASIC signed a new MOU with the Commonwealth DPP on 01 March 2006 which replaced the former MOU of the ASIC and the Commonwealth DPP that was dated 22 April 1996, see the ASIC and the Commonwealth DPP, ‘2006 MOU’ (01 March 2006) <http://www.asic.gov.au> accessed 30 April 2014; also see P Constable, ‘Ferocious Beast or Toothless Tiger? The Regulation of Stock Market Manipulation in Australia’ (2011) 8 MqBL 54 at 93–110.
13 S 13 Australian Securities and Investments Commission Act. Also see Boys v ASIC (1998) 26 ACSR 464, where it was stated that the ASIC’s investigative powers are applicable if it has a ‘reason to suspect’ or reason to believe that the alleged contravention actually occurred.
relatively few successful prosecutions were obtained in criminal cases for market manipulation in Australia during the period from 1990 to 2011.15

Furthermore, the ASIC may commence civil proceedings against any person who engages in market abuse activities.16 Accordingly, the ASIC may in the public interest bring an action in the name of and for the benefit of the body corporate to recover its losses, pecuniary damages, property or other entitlements as contemplated in the Corporations Act.17 Therefore, the ASIC may institute a civil action for insider trading and/or other related offences without the consent of the affected persons or the issuer of the affected securities or financial products.18 Moreover, the ASIC may bring civil penalty proceedings and impose civil penalties of up to Aus $200 000 for individuals and Aus $1 million for corporations that contravene its Rules and/or indulge in illicit market abuse practices.19 The ASIC is further empowered to apply for a compensation order on behalf of any person who was affected by market abuse practices.20 Additionally, the ASIC may seek court orders such as restraint, investment, mandatory direction and cancellation orders to ensure timely compensation for the victims of insider trading21 and/or other related market abuse activities and is further empowered to apply for a civil penalty by way of a pecuniary penalty. A pecuniary penalty is a penalty imposed only after a declaration of contravention of a financial services penalty provision has been proved in a court of law.22

15 For instance, it is stated that only about five successful criminal prosecutions for market manipulation were obtained during the period from 1990 to 2000, while ten successful criminal prosecutions for market manipulation were obtained during the period from 2001 to 2011 by the ASIC. See Constable (note 12) 88–89 and Goldwasser (note 4) 484–485; 505–511.
16 S 50 Australian Securities and Investments Commission Act.
17 S 1043L(6) read with s 1043L(2) or (5); s 50 Australian Securities and Investments Commission Act.
20 Ss 1317J and 1325 read with ss 1043L(6); 1043L(3) and (4) of the Corporations Act.
21 S 1043O of the Corporations Act; also see ASIC v Petsas [2005] FCA 88.
declaration of contravention of market abuse provisions in Australia.\(^{23}\) It is nonetheless submitted that the ASIC has grappled to obtain more successful settlements in civil proceedings involving market manipulation.\(^{24}\)

Moreover, the ASIC has powers to disqualify any person convicted of committing market abuse offences from his managerial position in any corporation.\(^{25}\) Regarding this, the ASIC may impose an order against the offenders restricting, stopping or banning them from providing any financial services or exercising any voting or other rights attached to financial products,\(^ {26}\) or issuing,\(^ {27}\) acquiring or disposing of such financial products.\(^ {28}\) In relation this, the ASIC has so far managed to impose relatively more banning orders against the market abuse offenders.\(^ {29}\) The ASIC may also suspend or cancel the offenders’ Australian Financial Service Licences and/or impose varying conditions on such Licences. As earlier stated,\(^ {30}\) the ASIC may further seek court orders for the freezing of assets or injunctions against the offenders.\(^ {31}\) The ASIC may also take disciplinary action which \textit{inter alia} includes the cancellation of an agreement for the acquisition or disposal of financial products or imposing an order directing a person to do or refrain from doing a specified conduct.\(^ {32}\)

\(^{23}\) S 1317E(1) read with ss 1317HA; 1317J(1) and (2) and 1317J(3A) of the Corporations Act.

\(^{24}\) Also see the ASIC, ‘ASIC Obtains Pecuniary Penalty and Disqualification Order against former Select Vaccines Director’ (27 April 2010) ASIC Media Release 10–88; ASIC \textit{v} Soust [2010] FCA 68; ASIC \textit{v} Nomura International \textit{plc} (1998) 89 FCR 301; 29 ACSR 473, where the ASIC successfully imposed a civil penalty against \textit{Nomura International plc} for manipulating share price index through its illicit Aus $600 million securities scheme and Constable (note 12) 92–96.

\(^{25}\) \textit{R v Rivkin} (2003) 198 ALR 400, at 406, where one Rivkin was disqualified from managing any corporation or company for five years and fined Aus $30 000. Also see further s 1317E to s 1317HA and s 206C of the Corporations Act.

\(^{26}\) S 1043O(a) of the Corporations Act.

\(^{27}\) S 1043O(b) of the Corporations Act.

\(^{28}\) S 1043O(c) of the Corporations Act. It is stated that the length of the banning orders ranges from one year to ten years and any person aggrieved with such orders may lodge their complaints with the Administrative Appeals Tribunal (AAT). See Constable (note 12) 98.

\(^{29}\) ASIC \textit{v} Kippe (1996) 137 ALR 423 at 431; also see Constable (note 12) 97–99, where it is stated that the ASIC successfully obtained banned orders against several persons, including Clive Henry, Rocco Musumeci, Richard Wade and Newton Chan.

\(^{30}\) See Constable (note 12) 96–99.

\(^{31}\) Ss 1323; 1324 read with s 1325 of the Corporations Act.

\(^{32}\) Ss 1043O(f); (g) and (h); 1323; 1324 and 920B(3) of the Corporations Act; also see Constable (note 12) 96.
The ASIC has additional powers to search and seize any proceeds in relation to any benefits that may result from market abuse activities in Australia.\(^{33}\) Therefore, the ASIC may issue notices to the accused persons in order to inspect their premises and, after obtaining a search warrant, to compel such persons to appear before it for the purposes of answering questions and/or providing it with any other relevant information.\(^{34}\) Additionally, the ASIC has powers to investigate any market abuse violations. Like other enforcement agencies such as the Federal Police, the State and territory, the ASIC may collect statements and evidence from the available witnesses. The ASIC can further request any relevant person to give it reasonable assistance in relation to an ongoing investigation and/or any subsequent prosecution.\(^{35}\) Most recently, the ASIC's investigatory powers were significantly increased.\(^{36}\) Accordingly, the ASIC will no longer be required to issue a notice before applying to a magistrate for a search warrant.\(^{37}\) This will reduce the risk of the accused persons destroying market abuse evidential material before the search warrant is obtained.\(^{38}\) Furthermore, market manipulation and insider trading offences are now listed as serious offences under the Telecommunications Act,\(^{39}\) thereby empowering the Australian Federal Police (AFP) and/or other interception agencies\(^{40}\) to apply for a telephone interception warrant in matters involving market abuse investigations. This is aimed at granting the ASIC an opportunity

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34 S 19 and ss 29 to 34 read with s 49 of the Australian Securities and Investments Commission Act.
36 These new powers were introduced by the Corporations Amendment (No 1) Act 131 of 2010 (Cth), hereinafter referred to as the Corporations Amendment (No 1) Act which amended Australian Securities and Investments Commission Act and the Telecommunications (Interception and Access) Act 114 of 1979 (Cth) as amended, hereinafter referred to as the Telecommunications Act.
37 Constable (note 12) 106.
38 Constable (note 12) 106; also see s 19 and ss 30 to 33 the Australian Securities and Investments Commission Act.
40 S 5(1) of the Telecommunications Act, which defines the term “interception agency”.

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to work with the AFP to obtain intercepted telephone material which could be used in the prosecution of market abuse offences.\footnote{\text{The telecommunications intercepted must, however, be obtained under a court issued warrant or court order.}}

The ASIC is now responsible for the real-time surveillance of the Australian securities and futures markets to detect and prevent market abuse activities.\footnote{\text{The ASIC took over the supervision and surveillance of securities markets and market participants responsibility from the Australian Stock Exchange (\text{ASX}) on 01 August 2010. This change was introduced by the amendments which were brought to the Corporations Act by the Corporations Amendment (Financial Market Supervision) Act 26 of 2010 (Cth), hereinafter referred to as the Corporations Amendment Act, in order to enable new market operators to come to Australia and compete with the Australian Stock Exchange. See Austin (note 14) 444–446 and 451–459 and Constable (note 12) 101; 107–110.}} This suggests that the ASIC’s Market Surveillance Team now uses the same surveillance system which was initially used by the Australian Stock Exchange (\text{ASX})’s Surveillance Department.\footnote{\text{Constable (note 12) 108.}} Moreover, the ASIC’s Market Surveillance Team is also made up of a number of former employees of the ASX’s Surveillance Department with extensive market experience.\footnote{\text{Constable (note 12) 108.}} Consequently, the ASIC may further detect market abuse activities from the surveillance it undertakes, complaints from the public, media and the assistance it receives from other enforcement agencies like the ASX.\footnote{\text{Constable (note 12) 107–108; also see \text{R v Chan [2010] VSC 312.}}} It is hoped that the delays which used to inhibit the ASIC’s investigations and preliminary enquiries into the ASX’s market abuse referrals will now be removed.\footnote{\text{See the ASIC, ‘ASIC: A Guide to How We Work’ (2007–2009) 10 <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/asic_guide_how_we_work.pdf/$file/asic_guidehow_we_work.pdf> accessed 09 January 2014, for more details on the ASIC’s investigatory roles; also see the ASIC, ‘ASIC Supervision of Markets and Participants: July to December 2011’ (February 2012) \text{Report 277}, 2–39; the ASIC, ‘ASIC Supervision of Markets and Participants: August to December 2010’ (January 2011) \text{Report 227}, 8 and Constable (note 12) 107–108.}}

In addition, the ASIC is also responsible for maintaining confidence of investors in securities markets and futures markets by obtaining orders that direct the disposal of financial products or vests such products under its control to ensure adequate protection of such investors,\footnote{\text{S 1043O(d) and (e) of the Corporations Act. Also see generally A Shaw and P Von Nessen, ‘The Legal Role of the Australian Securities Commission and The Australian Stock Exchange’ in G Walker, I Ramsay and B Fisse (eds), \text{Securities Regulation in Australia and New Zealand} (LBC Information Services, Sydney Australia 1998) 163–164; PM De Marzo, MJ Fishman and MH Kathleen, ‘The Optimal Enforcement of Insider Regulations’ (1998) \text{40 Duke University Law Review 1135} at 1153–1176.}} for the purpose of enhancing
commercial stability, efficiency, the development of the economy and generally reducing business costs. The ASIC may further employ enforceable undertakings against the market abuse offenders. These undertakings have enabled the ASIC to obtain timely and cost-effective administrative settlements flexibly in market abuse cases. The ASIC may also administer and ensure compliance with its new Market Integrity Rules. Put differently, the market participants in licensed markets are obliged to comply with the Market Integrity Rules. Market participants are therefore prohibited from engaging in insider trading, market manipulation and/or any unprofessional conduct. The ASIC may impose a civil penalty of up to Aus $1 million on any person who violates its Market Integrity Rules. Moreover, where a person failed to comply with the Market Integrity Rules, the court may order such person to compensate the affected persons (including corporations) for any damages they incurred. The ASIC may also issue an infringement notice which mandates any offender to pay a penalty of not more than Aus $600,000 or undertake remedial

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48 These enforceable undertakings were introduced by the Financial Sector Reform (Amendments and Transitional Provisions) Act 54 of 1998 (Cth), hereinafter referred to as the Financial Sector Reform Act, which amended the Australian Securities and Investments Commission Act 90 of 1989 (Cth) as amended, hereinafter referred to as the Australian Securities and Investments Commission Act 1989; see Schedule 1, paragraph 11 of the Financial Sector Reform Act.


50 See the ASIC Market Integrity Rules (ASX Market) 2010, hereinafter referred to as the Market Integrity Rules which were introduced by the Corporations Amendment Act. These Rules are modeled after the former ASX Market Rules which were administered by the ASX. See Constable (note 12) 101–104.

51 S 798H of the Corporations Act; also see Constable (note 12) 101.

52 Rules 2.1.5 and 5.7.1 of the Market Integrity Rules.

53 Rule 1.4.3 of the Market Integrity Rules; also see Constable (note 12) 101.

54 S 798G(2) of the Corporations Act; also see Constable (note 12) 102 and Austin (note 14) 452.

55 S 1317HB of the Corporations Act; Constable (note 12) 102.
measures such as education programmes. Notably, the ASIC delegates the power to issue infringement notices and/or accept enforceable undertakings to an independent peer review tribunal called the Markets Disciplinary Panel. It is anticipated that many market abuse offenders will elect to comply with the ASIC’s infringement notices and/or enforceable undertakings rather than the costly civil penalty proceedings. It is also expected that the ASIC will develop adequate technological mechanisms for cross-market surveillance to detect and combat market abuse practices across different markets in Australia.

Although the role of the ASIC as a corporate watchdog against market abuse practices has been criticised by some commentators for being relatively ineffective, a considerable number of persons have to date been investigated and prosecuted for various market abuse offences as a result of the functioning of the ASIC and the relevant courts in Australia. In other words, the ASIC has played and continues to play a significant role in the entire enforcement of securities laws and the market abuse prohibition in Australia.

56 S 798K of the Corporations Act; also see Constable (note 12) 102.
58 Constable (note 12) 102 and Austin (note 14) 453.
59 Austin (note 14) 454–455.
60 Comino (note 7) 84–97; A Ferguson, ‘The Watchdog No one Fears’ (2000) 22 BRW 58 at 58–64.
62 Austin (note 19) 1–3 and 6–18; also see ASIC v Vizard (note 61) 1037, where about Aus $390 000 and a five year banning order was obtained by the ASIC against the offenders; ASIC v Vines (note 47) 1222; ASIC v Loiterton (note 47) 897; ASIC v Adler (2002) 20 ACLC
It is evident that, in spite of the relatively few market abuse settlements and convictions obtained by the ASIC in the late 1990s, the ASIC has in recent years successfully increased its settlements and prosecutions of market abuse cases in Australia. This has been attributed to several factors which include, *inter alia*, the ASIC’s ability to devote more resources specifically to deal with the enforcement of the market abuse prohibition in Australia. This may further indicate that the ASIC takes the enforcement of market abuse as one of its top priorities. For example, the ASIC operates a system for the Electronic Document Lodgment. This system enables lodgment agents such as accountants, lawyers and brokers to transfer relevant documents promptly to the ASIC electronically and free of charge in order to effect disclosure of inside information. Therefore, although the ASIC could still be facing some challenges in relation to the enforcement of the market abuse prohibition in the bull markets and hedge funds, one can conclude that the ASIC enforcement has to date significantly reduced market abuse activity in the Australian financial markets.

### 2.1.1 Comparative Evaluation and Analysis

On the other hand, like the ASIC, in South Africa, the Financial Services Board (FSB) has ostensibly broad powers in order to ensure the proper supervision, regulation and enforcement of the financial markets and the market abuse prohibition. For instance, the FSB may institute criminal proceedings to

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576, where about Aus $7 million was recovered by the ASIC from the offenders and *ASIC v Plymin & others [2003] VSC 123*, where the ASIC obtained banning orders, pecuniary and civil compensation orders against all the market abuse offenders (defendants).

63 See Austin (note 19) 7–10.


66 See related analysis in paragraph 2.1. above.

67 See s 84 of the Financial Markets Act and also see further related remarks by H Chitimira and VA Lawack, ‘Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa’ (2013) 34(2) *Obiter* 200 at
prosecute any alleged market abuse offences especially where the Director of Public Prosecutions (DPP) in South Africa has for whatever reasons neglected or declined to do so as contemplated in the Financial Markets Act. However, this could imply, in contrast to the ASIC, that the FSB does not have authority to institute such criminal proceedings at any time, regardless of whether the DPP in South Africa has neglected or declined to prosecute them. In relation to this, unlike the ASIC, the FSB is not statutorily empowered to impose its own criminal penalties on the market abuse offenders in South Africa as this is primarily done by the DPP. With regard to civil and/or administrative proceedings, like the ASIC, the FSB is statutorily empowered to administer proof of claims on behalf of the affected persons and to distribute any payments or the recovered damages to such persons. Nonetheless, in contrast to the ASIC, the FSB is not statutorily and expressly empowered to impose any fixed administrative amount that exceeds R1 million against the market abuse offenders under the Financial Markets Act. In other words, the FSB and/or the Enforcement Committee (EC) may impose an administrative sanction upon the market abuse offenders, as regards any amount as determined by the EC but not exceeding three times the amount of profit gained or loss avoided by the offenders concerned. Furthermore, in contrast to the position with the ASIC, the FSB does not seem to be statutorily authorised to make a declaration or to seek a court order for a declaration of contravention of market abuse provisions in South Africa under the Financial Markets Act. Additionally,

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69 S 84(10).
70 See earlier remarks in paragraph 2.1. above.
71 See earlier remarks in paragraph 2.1. above.
72 S 84 of the Financial Markets Act; also see related analysis by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 108–124.
73 See earlier remarks in paragraph 2, 1, above.
74 See s 84(2)(d) read with s 82 of the Financial Markets Act and also see related analysis by Chitimira and Lawack (note 68) 200–217.
75 See earlier remarks in paragraph 2.1. above.
76 S 82 read with s 84.
77 S 82 of the Financial Markets Act; also see generally Luiz (note 5) 151–172 and ss 6A to 6I of the Financial Institutions (Protection of Funds) Act 28 of 2001 as amended, hereinafter referred to as the Protection of Funds Act.
78 See earlier remarks in paragraph 2.1. above.
79 Ss 78; 80; 81 and 82 read with s 84. Also see similar remarks in Chitimira and Lawack (note 68) 200–217.
notwithstanding its enforcement authority, the FSB does not appear to have statutory powers to disqualify and/or impose banning orders on the market abuse offenders to restrict or stop them from assuming any managerial position in the affected companies for a certain period under the Financial Markets Act.\(^80\) Unlike the ASIC,\(^81\) the FSB is not statutorily and expressly empowered to institute administrative actions such as freezing orders, injunctions, restraint orders and other appropriate sanctions against the market abuse offenders in South Africa under the Financial Markets Act.\(^82\) Additionally, unlike the ASIC,\(^83\) it appears that the FSB does not employ infringement notices and enforceable undertakings to discourage market abuse activities in South Africa under the Financial Markets Act.\(^84\) However, like the ASIC,\(^85\) the FSB has the power to investigate, summon and interrogate any person in respect of any market abuse violations.\(^86\) Furthermore, the FSB also has the discretion, subject to the conditions that it may determine, to delegate its power to any fit person to investigate, summon, interrogate or search the premises and/or persons accused of contravening the market abuse provisions.\(^87\) Nevertheless, such fit persons may search the accused person's premises only in matters regarding market abuse after obtaining a search warrant from a judge or magistrate who has jurisdiction in the area where such premises are located.\(^88\)

Additionally, in contrast to the ASIC,\(^89\) the FSB is not responsible for the real-time surveillance of the South African securities and financial markets to detect and prevent market abuse practices under the Financial Markets Act.\(^90\) Moreover, unlike the ASIC,\(^91\) neither the South African Police Services (SAPS) nor the FSB is statutorily and expressly empowered to intercept telephonic

\(^{80}\) S 84; also see related discussion by Chitimira and Lawack (note 68) 200–217.
\(^{81}\) See earlier remarks in paragraph 2.1. above.
\(^{82}\) S 84.
\(^{83}\) See earlier remarks in paragraph 2.1. above.
\(^{84}\) S 84; also see related discussion by Chitimira and Lawack (note 68) 200–217. It is hoped that the FSB will also introduce its own infringement notices and enforceable undertakings to discourage market abuse activities in South Africa.
\(^{85}\) See earlier remarks in paragraph 2.1. above.
\(^{86}\) S 84(2)(a); (b) and (e); read with s 84(3); (4) and (5) of the Financial Markets Act. See further analysis by Chitimira and Lawack (note 68) 200–217.
\(^{87}\) S 84(5) of the Financial Markets Act.
\(^{88}\) S 84(4)(b) of the Financial Markets Act.
\(^{89}\) See earlier remarks in paragraph 2.1. above.
\(^{90}\) S 84 & related discussion by Chitimira and Lawack (note 68) 200–217.
\(^{91}\) See earlier remarks in paragraph 2.1. above.
data\textsuperscript{92} from any suspected offenders in matters involving market abuse investigations in South Africa under the Financial Markets Act. It is submitted that this flaw should be adequately addressed in the near future to avoid possible anti-market abuse enforcement challenges such as the current paucity of, and/or delays associated with the market abuse cases that have been prosecuted or settled with the FSB in South Africa to date.\textsuperscript{93} With regard to this, apart from solely imposing the main responsibility of enforcing the market abuse prohibition on the FSB, enacting a statutory private right of action for the issuers of securities or the affected persons should be seriously considered to improve the curbing of market abuse activities in South Africa.\textsuperscript{94}

\subsection{2.2 The Role of the ASX}

The establishment and statutory recognition of the ASX commenced in the early 1970s.\textsuperscript{95} This follows the adoption of the recommendations that were enshrined in the report of the Senate Select Committee on Securities and Exchange which was chaired by Senator Rae in 1974.\textsuperscript{96} In April 1987, the ASX

\textsuperscript{92} S 84 of the Financial Markets Act. However, it is submitted, notwithstanding possible constitutional violations, that such interception should be undertaken in accordance with the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002, hereinafter referred to as the Regulation of Interception of Communications Act, although this Act does not expressly provide for market abuse-related interceptions in South Africa.

\textsuperscript{93} See generally related evidence by the EC, ‘Enforcement Actions’ (2014) <https://www.fsb.co.za/enforcementCommittee/Pages/enforcementActions.aspx> accessed 11 August 2014, which indicates that during the period between 2006 and 2014, relatively few administrative penalties were obtained against the market abuse offenders by both the EC and/or the FSB in South Africa; also see further the Directorate of Market Abuse (DMA), ‘Report by the Directorate of Market Abuse’ (24 June 2014) FSB Press Release, which is currently available online at <https://www.fsb.co.za/Departments/marketAbuse/Documents/Press%20DMA%202014-06-24.pdf> accessed 11 August 2014, which indicates that only seventeen cases of insider trading were successfully investigated during the period between 2007 and 2014. This report also shows that relatively few settlements were obtained in most of the aforesaid cases. It also reveals that during the same period, only six cases of trade-based market manipulation and one case of disclosure-based market manipulation were investigated but no settlements were obtained in these cases. See further related discussion by Luiz (note 5) 151–172; Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 108–124.

\textsuperscript{94} Jooste (note 5) 458–459.

\textsuperscript{95} Shaw and Von Nessen (note 47) 161.

\textsuperscript{96} See the Senate Select Committee on Securities and Exchange, Parliament of Australia, ‘Australian Securities Markets and their Regulation’ (1974) 2.110. This Committee is
was created to replace the Australian Associated Stock Exchange to consolidate six former state Exchanges and to formulate a national exchange which has since been the only operating stock exchange in Australia.97 In 1998 the ASX was demutualised and became a public company incorporated under the Corporations Act. Its shares were eventually listed on the exchange that it operates.98 In other words, the ASX is fully licensed to operate the Australian Stock Exchange.99 This license stipulates, among other things, that the ASX must ensure that the market is fair, orderly and transparent. Moreover, the ASX is further required to have adequate arrangements for supervising the market, including the necessary arrangements to oversee and monitor the conduct of all the market participants and to enforce compliance with the market's operating rules.100 In terms of this licence, the ASX is additionally obliged to give any appropriate and reasonable assistance to the ASIC, like furnishing it with a written notice as soon as possible, if it has an objective reason to suspect that a person has committed, is committing or is about to commit a material contravention of the market misconduct provisions, stipulating the accused person's name, the type of contravention and its reasons for suspecting that there has or will be a market abuse violation.101

Furthermore, under its market licence, the ASX is mandated to develop and maintain operating rules dealing with any matter as prescribed in its regulations.102 Such rules have a contractual effect upon the ASX and market participants and between a market participant and another market participant hereinafter referred to as the Rae Committee and its report as the Rae Report. See the Rae Report, 129.


98 R Baxt, A Black and PF Hanrahan, Securities and Financial Services Law (Lexis Nexis Butterworths, Chatswood Australia 2008) 382; also see Austin (note 19) 4.


100 S 792A of the Corporations Act.

101 S 792B read with ss 792C and 792D of the Corporations Act; also see Austin (note 19) 4.

102 S 793A of the Corporations Act. For example, in one of its operating rules, the ASX has prescribed Market Rules which contain rules relating to how a participant can gain access to trade or execute orders on the Australian Stock Exchange and other relevant information regarding the obligations of such participants. See the ASX’s Market Rules, ‘A Guide to Becoming an ASX Market Participant’ <http://www.asxonline.com/intradoccgilgroups/
participant.103 For example, one of the obligations for market participants en-
shrined in the former ASX Market Rules is that they must not engage in market
manipulation or any “unprofessional conduct”.104 Where a market participant
or an executive of a market participant violates any of the ASX’s Market Rules
or engages in unprofessional conduct, the ASX has the authority to take ap-
propriate disciplinary action and/or refer that matter to the ASX Disciplinary
Tribunal.105 Consequently, the ASX Disciplinary Tribunal has wider discre-
tionary powers to make a public censure, impose a disciplinary fine of up to
Aus $1 million and suspend the market participant in question and/or to ter-
minate such participant’s admission to the Australian Stock Exchange.106 The
ASX has further powers to require the production of documents and to inspect
the premises of any market participant who is suspected to have violated its
Market Rules and/or the market misconduct provisions.107 Additionally, the
ASX has the authority to summon market participants and their employees to
attend its interviews and to furnish it with any other relevant information per-
taining to an ongoing investigation.108 However, it is stated that some of these
functions are now vested in the ASIC.109

Moreover, the ASX offers a number of services to the markets such as fair
trading systems, control of market integrity, guarantees of trade completion
and supplying relevant information pertaining to securities trading, settle-
ment and transfer systems.110 More specifically, such services include the
Company Announcements Platform (the CAP). The CAP was introduced
by the ASX in August 1995 to assist companies to lodge announcements by
facsimile to the ASX from any place in Australia at a reasonably cheap cost. This service was introduced to encourage companies to comply with prompt disclosure requirements of any inside information that relates to securities or financial products in Australia. Another service offered by the ASX is the Stock Exchange Automated Training System (SEATS) which was established in 1987 and became fully operative in 1990.\footnote{See the ASX Annual Report (1996) 8.} Its main role is to enable the ASX member organisations with recognised orders to buy and sell securities or financial products that are traded on a market conducted by the ASX. It also provides its member organisations with adequate information pertaining to securities or financial markets trading such as any changes in the market. This avoids the abuse of non-public price-sensitive information relating to the financial products by any person who might have access to such information.\footnote{See generally AF Simpson, ‘Securities Regulation for the Information Age’ in G Walker, I Ramsay and B Fisse (eds), Securities Regulation in Australia and New Zealand (LBC Information Services, Sydney Australia 1998) 37.}

Furthermore, in order to complement and supplement the SEATS, the Clearing House Electronic Sub-register System was put in place in September 1994 by the Australian Stock Exchange Settlement and Transfer Corporation, a wholly owned subsidiary of the ASX, for expedient electronic settlement in Australia of share transfers of both domestic and foreign issuers.\footnote{Simpson (note 112) 39–40.}

Probably, one of the major services offered by the ASX is its assistance in electronic market surveillance, which is inter alia employed to investigate and detect market abuse practices. This electronic surveillance has been utilised by the ASX as early as the 1990s to detect any incidences of market abuse practices in the Australian financial markets.\footnote{See further Ali v Hartley Poynton [2002] VSC 113, where the expert evidence was given in relation to the ASX’s surveillance techniques, namely the Surveillance of Market Activity (SOMA) and the SEATS.} Notably, the ASX’s detection and investigation functions were vested in the ASX Market Supervision Private Limited.\footnote{The ASX’s Market Supervision Private Limited (ASXMS) is a separate company to the ASX in spite of the fact it is a wholly owned subsidiary of the ASX, which is also funded by the ASX. Also see the ASX, ‘Australian Stock Exchange’ (2008) 109 <http://www.asx.com.au/about/pdf/annual_report_2008.pdf> accessed 16 April 2014; the ASXMS is also manned by a board comprising five directors, three of whom are also ASX directors and two of whom are independent directors, see E Mayne, ‘ASX Markets Supervision–Looking Forward’ (2007) 2, SDIA Conference Paper, Sydney, Australia, <http://www.asx.com.au/supervision/pdf/sdia_conference_speech_mayne-June01.pdf> accessed 16 April 2014.}

The surveillance is usually done by way of monitoring market activity and
trading patterns through a computerised and sophisticated system called the SOMA. Moreover, the SOMA system is programmed to detect abnormal trading sequences by looking at the electronic signal of the SEATS which contains the details of trading and some programmed parameters in order to alert persons such as financial analysts for consideration. For example, specific transactions conducted in relation to a nominated security can be isolated and analysed by the SEATS as regards to the time, offer, bids, sales and purchases. The SOMA system will then compare the electronic signal containing all the details of trading against a series of parameters. These parameters are programmed to ignore normal trading activity but to record and report any abnormal or irregular trading activity immediately when such parameters are violated.116 Thereafter, such transactions will be discussed with the broker or representative concerned and coded for historical sequencing.117 This enables the ASX to assess and monitor price movements and share trading volumes, through matching the representative’s coded transaction number with the transaction contracts held by brokers, to identify the affected clients.118 In some instances, these trading alerts were admissible as evidence against the perpetrators of market abuse offences.119 In the recent years, the Securities Market Automated Research Trading and Surveillance system has been successfully employed to monitor all real-time trading information and highlights unusual trading patterns and volume movements in order to detect market abuse activity in Australia.120

Moreover, the ASX has the power, especially where a suspected trading has been detected, to refer such matters to the ASIC in accordance with their MOU.121 Specifically, any such referrals are directly transferred to the Market Watch Division of the ASIC for more investigation and preliminary analysis. If the Market Watch Division is satisfied that some market abuse offences were

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117 Consequently, such information will be continuously viewed or frozen, by a single screen or split screen which isolates certain facets of the transactions and their sequence for further analysis. See Ali v Hartley Poynton (2001) VSC 7439–7441.
118 This detection method is commonly employed by a number of broking firms that tape and digitally record all the telephonic orders from the client to the representatives.
119 As was held in R v Evans [1998] VSC 488.
120 Austin (note 19) 6.
committed, then the matter will be passed on to the Enforcement Division of the ASIC, which will eventually commence with the legal proceedings against the offenders concerned. Notably, these surveillance systems are now operated by the ASIC to execute its duties in relation to the real-time surveillance of the Australian securities and financial markets. Put differently, Australia used to impose the responsibility to enforce the market abuse ban squarely on the ASIC as a government national regulator and the ASX as an independent self-regulatory organisation. Consequently, the ASX played a key role in the real-time monitoring of market participants and the surveillance of market abuse activities in the Australian securities and financial markets. Nonetheless, these powers have now been transferred to the ASIC.

2.2.1 Comparative Evaluation and Analysis
On the other hand, unlike the Australian approach discussed above, it appears that the FSB is not statutorily and expressly empowered to take over the real-time surveillance of the South African securities and financial markets, to intercept telephonic data from the suspected market abuse offenders and to develop its own technological mechanisms for market abuse cross-market surveillance for the purposes of combating market abuse activities in such markets under the Financial Markets Act. In relation to this, it is important to note that the JSE bears the responsibility to operate the Stock Exchange in South Africa. Additionally, like the ASX, the JSE is involved in the

122 Austin (note 19) 6.
123 Constable (note 12) 101–102; 108 and Austin (note 14) 444–446 and 452–453; also see related comments above.
124 The similar enforcement approach is also employed in countries such as the United States of America (USA), France, Canada, New Zealand, Hong Kong, Japan, Germany and the United Kingdom (UK). See S Gadinis and H E Jackson, ‘Markets as Regulators: A Survey’ (2007) <http://www.ssrn.com/abstract=960168> accessed 29 April 2014.
126 See related remarks in paragraph 2.1. above.
127 See earlier related remarks in paragraph 2.2. above.
128 This role is currently performed by the Johannesburg Stock Exchange Limited, hereinafter referred to as the JSE. See related analysis by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68)109–114 and related remarks in paragraph 2.1.1. above.
129 S 84; also see related analysis by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68)109–114 and related discussion in paragraph 2.1.1. above.
131 See earlier remarks in paragraph 2.2. above.
general regulation and enforcement of securities laws in South Africa in order to prevent, among other things, the occurrence of market abuse and/or other illicit trading activities in the relevant regulated financial markets. Moreover, although the Financial Markets Act does not expressly provide whether the JSE is statutorily obliged to give reasonable assistance to the FSB, the JSE has, however, played a very significant role in the detection, investigation and prevention of market abuse practices in South Africa to date. Therefore, like the ASX, the JSE is primarily responsible for the promotion of market integrity and market fairness in the South African financial markets and companies. Nevertheless, unlike the position in Australia, the JSE (not the FSB) is responsible for the real-time monitoring of market participants and the surveillance of market abuse activities in the South Africa financial Markets.

In relation to this, the JSE’s Surveillance Division is reportedly equipped with sophisticated proprietary surveillance systems that are designed to detect abnormal movements and trading volumes which usually point to market abuse activity. These surveillance systems are controlled by the Market Practices Department and the Surveillance Division of the JSE and are reportedly capable of isolating the names, addresses, telephone numbers and other details of the parties involved in the affected transactions. Consequently, unlike the

134 See earlier comments in paragraph 2.2. above.
135 See earlier comments in paragraphs 2.1. and 2.2. above.
138 This is now also known as the Market Regulation Division. See the JSE (note 133) 23; 24–25 and Chitimira (note 68) 109–114.
139 See generally Loubser (note 133) 24; 25–26; also see related remarks by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.
current position in Australia, where suspicious or irregular trading activity is detected in South Africa, the JSE’s Surveillance Division may contact the affected persons or refer such matters to the DMA for further investigation. Nonetheless, in contrast to the position in Australia, there seems to be no statutory or formal binding MOU that has been brokered between the FSB and the JSE regarding the detection and referral of suspected market abuse practices in South Africa.

It is submitted that South Africa should adopt the Australian approach and introduce a statutory or formal binding MOU between the JSE and the FSB in order to enhance the detection and combating of market abuse practices in South Africa. It is further hoped that the responsibility for the real-time monitoring of market participants and the surveillance of the South African financial markets will be moved from the JSE to the FSB to eradicate the delays which usually hamper the FSB’s investigations into the JSE’s market abuse referrals. Like the ASX, the JSE has also developed its own Listing Requirements aimed at preventing market abuse activities. For example, the JSE requires all the listed companies to disclose promptly any price-sensitive information relating to the listed securities. This general obligation of disclosure on the part of the issuers of securities is commonly utilised through the JSE’s Securities Exchange News Service to curb and prevent insider trading in South Africa. Nevertheless, in contrast to the ASX, the JSE does not seem to have its own Disciplinary Tribunal which specifically deals with any violations of its Listing Requirements and/or market abuse cases in South Africa. As a result, apart from some disciplinary action such as suspension,

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140 The ASIC no longer rely on the ASX’s referrals to detect market abuse activities in the Australian securities markets. See related remarks above.
141 See Loubser (note 133) 24; 25–26; also see related remarks by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.
142 See earlier remarks in paragraph 2.2. above.
143 See related analysis by Chitimira (note 68) 109–114.
144 See earlier remarks in paragraph 2.2. above.
145 See earlier remarks in paragraph 2.2. above.
146 S 3 of the JSE Listing Requirements that relate to the disclosure of price-sensitive information.
147 S 3.4 of the JSE Listing Requirements.
148 See earlier remarks in paragraph 2.2. above.
149 Although the JSE has a Market Regulation Division, Compliance Forum and various Equities Rules, it does not have a Market Abuse Disciplinary Tribunal. See generally the JSE Equities Rules 7.10, at <https://www.jse.co.za/services/market-regulation> accessed 12 August 2014.
termination of operating licences and stopping or delaying the trading of the offender’s securities on the JSE, the JSE does not seem to have the statutory authority to impose fixed or specified disciplinary monetary fines on such offenders. In this regard, the JSE’s enforcement powers appear to be more restricted than those of the ASX.\textsuperscript{150} Moreover, unlike the position in Australia,\textsuperscript{151} the JSE is not statutorily empowered to search the premises of the accused persons who are suspected of engaging in market abuse practices and/or to summon any such persons to furnish it with other relevant information relating to ongoing market abuse cases.

2.3 \textit{The Role of Other Self-Regulatory Organisations}

For the purposes of this sub-heading, the self-regulatory organisations (SROs) include the Corporations and Market Advisory Committee (CAMAC), the International Banks and Securities Association of Australia (IBSA), the Securities and Derivatives Industry Association (SADIA), the Australian Financial Markets Association (AFMA) and the Australian Institute of Company Directors (AICD). Moreover, notwithstanding the fact that the Australian Competition and Consumer Commission (ACCC) is not an SRO \textit{per se}, but an independent body that oversees the enforcement of competition and consumer-related laws in Australia, its functions will be carefully discussed under this sub-heading. In other words, although this article is more focused on securities and financial markets, the ACCC is discussed here to explore its role in relation to the combating of market abuse-related practices involving trades in goods and services in Australia.

The CAMAC has also contributed significantly to the general regulation and enforcement of the securities laws in Australia.\textsuperscript{152} Specifically, the CAMAC was established in terms of Part 9 of the Australian Securities and Investments Commission Act 1989 as an advisory body to the government, which is responsible for monitoring the occurrence of illicit trading activities and the enforcement of market abuse provisions in Australia. Some commentators agree that the CAMAC has to date made a number of useful proposals for the reform of the Australian market abuse regulatory framework.\textsuperscript{153} Moreover, the CAMAC

\textsuperscript{150} See earlier related remarks in paragraph 2.2. above.

\textsuperscript{151} See earlier related remarks in paragraph 2.2. above.

\textsuperscript{152} Lyon and Du Plessis (note 18) 10. Prior to 11 March 2002 the CAMAC was known as the Companies and Securities Advisory Committee (CASAC), see more information at <http://www.camac.gov.au> accessed 08 March 2014.

\textsuperscript{153} See generally R Baxt, A Black and FP Hanrahan, \textit{Securities and Financial Services Law} (Lexis Nexis Butterworths, Chatswood Australia 2003) 546–547; also see K Mann,
has to date managed to consistently participate in the reviewing of market abuse laws, especially with regard to insider trading, and has on a number of occasions formulated proposals for reforms aimed at promoting investor confidence and the integrity of the Australian securities and futures markets. In addition, the CAMAC has, to a fair extent, managed to isolate potentially serious flaws that are sometimes embedded in the securities legislation and recommended possible solutions to combat market abuse practices in Australia to date. Put differently, the CAMAC may make recommendations on any matter relating to the operation or administration of the corporations or securities legislation, or companies or a segment of the financial products and financial services industry, or law reform with regard to the corporations or securities legislation and/or proposals for improving the efficiency of the financial markets in Australia.

The ACCC is equally involved in the regulation of the securities legislation and the enforcement of the anti-market abuse prohibition in Australia. For example, the ACCC was empowered under the Trade Practices Act to intercept all electronic communications based on a suspicious trading which could be as a result of market manipulation or insider trading. Notably, similar functions are now provided under the Competition and Consumer Act which repealed and replaced the Trade Practices Act. Additionally, the ACCC

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155 See generally Baxt, Black and Hanrahan (note 153) 546–547.


157 See further Austin (note 19) 11.


159 100 of 2010 (Cth), hereinafter referred to as the Competition and Consumer Act; see schedule 2; Part XIB; Part XIC and other relevant provisions of this Act.
prohibits the formulation of cartels by discouraging contracts, arrangements or understandings which have the effect or are likely to have the effect of substantially lessening competition or containing an exclusionary provision.\textsuperscript{160} As a result, the ACCC may impose civil pecuniary penalties of up to Aus $10 million per contravention on corporations and Aus $500 000 per contravention on individuals (or company executives) who indulge in cartels.\textsuperscript{161} In 2006, a new regime of criminal sanctions was introduced to enable the ACCC to curb serious cartel conduct and market abuse activities.\textsuperscript{162} In addition, the ACCC has further concluded a MOU with the Commonwealth DPP to seek criminal prosecutions and jail terms for individuals who systematically engage in the violation of market misconduct provisions or who misled it in relation to its market abuse investigations.\textsuperscript{163}

Additionally, the IBSA has to date formulated some business rules and guidelines that do not only represent the interests of merchant and investment banks in Australia, but that have also played a crucial role in dispute resolution.\textsuperscript{164} The IBSA has further managed to promote and protect the interest of its members in Australia and other foreign-owned institutions. Moreover, the IBSA rules and guidelines require all its member organisations to ensure that their employees acknowledge in writing that they are aware of such rules or guidelines and that they are not going to violate the market misconduct provisions and/or engage

\begin{itemize}
\item \textsuperscript{160} S 45(2) of the Trade Practices Act; see further schedule 2; Part XIB and Part XIC of the Competition and Consumer Act.
\item \textsuperscript{161} S 76(1A) and (1B) of the Trade Practices Act; also see schedule 2; Part XIB and Part XIC of the Competition and Consumer Act.
\item \textsuperscript{162} Under the new regime, a fine for corporations that is the greater of Aus $10 million or three times the gain from the contravention or 10\% of the annual turnover of the body corporate and all its subsidiary bodies, will now be levied against those individuals or corporations that engage in cartel conduct or other market misconduct offences. In relation to this, see generally related remarks and analysis by Austin (note 19) 11–13.
\end{itemize}
in transactions involving conflicts of interests. The IBSA guidelines also require the member organisations to summarise the relevant statutory provisions and examples of situations which highlight an alert of any contravention of the market misconduct provisions (especially insider trading). The IBSA guidelines stipulate that price-sensitive information which is in the possession of an employee should only be given to the other employees in the normal course of executing their professional duties. In addition, the IBSA guidelines recommend the physical separation of the underwriting and corporate advisory developments as well as the employees from other member organisations. This could have aimed at discouraging insider trading and market manipulation. Moreover, the IBSA guidelines require its member companies to develop and maintain lists of embargoed or restricted securities in which employees or any persons related to them cannot deal in or encourage other clients to deal in, until the stipulated embargo is lifted.

The SADIA has further contributed significantly to the securities regulation in Australia, especially with regard to conflict resolution. For example, the SADIA has developed its best practice guidelines regarding research integrity, which among other things, encourage both the securities industry and the financial services industry to promote a culture of self-compliance in order to reduce as much as possible the occurrence of conflicts of interests. Although the SADIA guidelines are neither a comprehensive prescription nor a mandatory method for combating conflicts of interests, they provide useful ways of enforcing Chinese walls and the general combating of market abuse activities in Australia. For instance, the SADIA guidelines include measures for encouraging its member organisations to put the interests of the investors first by engaging in independent and objective research and/or financial advice and establishing specific and separate reporting structures to ensure that analysts

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165 The IBSA mandate its member organisation to list or summarise the examples of price-sensitive information such as profit forecasts, mergers or reconstructions, impending takeovers, financial liquidity problems, proposed share issues and significant changes in operations. See the IBSA (note 164) 2.

166 See the IBSA Rule 3.5.

167 See general R v Hannes (2000) 36 ACSR 72 115, where similar embargo lists were employed by the financial institutions, for example Macquirie Corporate Financial advised TNT Limited regarding a proposed takeover. However, Macquirie Corporate Finance placed TNT Limited on its embargo list to prevent the employees of Macquirie Corporate Finance from dealing in TNT Limited shares.

report only to the head of research and not to the corporate or trading units for approval.\textsuperscript{169} Such guidelines also encourage member organisations to have Chinese walls to prevent the improper dissemination of price-sensitive information. Additionally, the SADIA guidelines encourage member organisations to discourage market abuse by implementing a written statement of a corporation’s policies and procedures for managing conflicts of interests, restricting trading by analysts in the subject of research during the research or for a reasonable period after its completion or from trading in a manner inconsistent with the research in question and/or by monitoring the public’s compliance with a corporation’s policies and procedures.\textsuperscript{170}

The AFMA and the AICD have additionally played a key role in the regulation and enforcement of securities legislation in Australia. They have specifically formulated various guidelines for the persons involved in the securities business such as brokers and other market participants like financial analysts. Particularly, the AICD has devised certain rules and guidelines to promote market integrity and investor confidence by discouraging corporation directors from abusing their office or price-sensitive information to engage \textit{inter alia} in market abuse activities. Likewise, the AICD has some rules and regulations that prohibit any person from engaging in market manipulation, especially with regard to the transactions that are conducted privately or bilaterally on the over the counter financial markets and on the Australian offshore licenced markets.\textsuperscript{171} In other words, the AFMA regulates the over the counter financial markets and ensures that the parties to the over the counter transactions include terms in their contracts which prohibit the misuse of material non-public price-sensitive information. In addition, the AFMA has further positively contributed to the review and reform of various securities and financial laws in Australia.\textsuperscript{172}

\subsection*{2.3.1 Comparative Evaluation and Analysis}
On the contrary, the role of the SROs in South Africa is not as widely recognised as it is in Australia.\textsuperscript{173} For instance, in contrast to the Australian SROs

\begin{itemize}
\item \textsuperscript{170} See further Chapter Five in Lyon (note 169) 195.
\item \textsuperscript{171} See the AFMA, ‘AFMA Response to the CAMAC Insider Trading Proposal Paper’ (2002) 2–10 \textit{Press Release 01}.
\item \textsuperscript{172} See the AFMA (note 171) 2–10.
\item \textsuperscript{173} See earlier remarks in paragraph 2.3. above.
\end{itemize}
and the ASX, the JSE does not seem to have the powers to impose monetary pecuniary penalties against the market abuse offenders in South Africa. It is therefore hoped, as is the position in Australia, that the Takeover Regulation Panel (the TRP) and the JSE will continue to participate more in matters regarding the enforcement of the market abuse prohibition in South Africa. However, like the CAMAC, the DMA has the powers to advise and perform some investigatory functions on the behalf of the FSB. Nevertheless, unlike the CAMAC, the DMA is not statutorily authorised to make recommendations to the South African legislature on matters regarding the securities law reform, operation of securities and financial markets and the general regulation of such markets. Moreover, in contrast to the CAMAC, the DMA is yet to engage more in the public consultation and making of proposals to the legislature and/or other relevant authorities regarding the general regulation and enforcement of the market abuse prohibition in South Africa.

Moreover, unlike the ASX, it is uncertain whether the EC has the powers to take an administrative action like suspending or banning the market abuse offenders from managing any company for a stipulated period in South Africa. In addition, in contrast to the ASX, the EC does not seem to have additional powers to summon any suspected offenders to produce evidence or documents necessary for any particular ongoing market abuse case trial or to search any premises or persons who are suspected to have such documents. Furthermore, unlike the SROs in Australia, as already stated above, the SROs

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174 See earlier remarks in paragraphs 2.2. and 2.3. above.
176 See earlier related comments in paragraphs 2.2. and 2.3. above.
177 See related analysis by Chitimira (note 68) 109–114.
178 See earlier remarks in paragraph 2.3. above.
179 S 85(1)(c) and (d) of the Financial Markets Act.
180 See earlier remarks in paragraph 2.3. above.
181 See s 85 of the Financial Markets Act. This status quo is probably justifiable since the DMA is merely a committee of the FSB and not an independent administrative body.
182 See earlier remarks in paragraph 2.3. above.
183 See related comments in paragraph 2.2. above.
184 See further analysis by Chitimira (note 68) 109–114 and Chitimira and Lawack (note 68) 200–217.
185 See related comments in paragraph 2.2. above.
186 See further ss 6A to 6l of the Protection of Funds Act; Chitimira and Lawack (note 68) 200–217 and Luiz (note 5) 151–172.
187 See earlier remarks in paragraph 2.3. above.
in South Africa seem to have restricted authority, especially with regard to the making of their own market abuse rules,\textsuperscript{188} decisions, regulations and other appropriate disciplinary or administrative actions on matters involving market abuse offences.\textsuperscript{189} In relation to this, it is hoped, as is the position in Australia,\textsuperscript{190} that more SROs will be statutorily empowered and introduced in South Africa in the near future to complement the FSB’s efforts to combat market abuse activities.

2.4  \textit{The Role of the Courts}

The Commonwealth DPP and the courts have a crucial role in the enforcement of the securities and market abuse legislation in Australia.\textsuperscript{191} Therefore, all the competent courts\textsuperscript{192} have inherent powers to impose sanctions on any person who contravenes insider trading and/or other market misconduct provisions in Australia.\textsuperscript{193} These powers include the making of: (a) orders restraining any accused persons from exercising rights attached to Division 3 financial products, (b) orders to restrain the acquisition, issue or disposal of such products, (c) orders for the vesting of such products in the ASIC and/or to direct the disposal of such products, or (d) orders for the cancellation of the Australian financial services licences.\textsuperscript{194} The competent courts in Australia further have powers to make orders that direct any person to do or refrain from doing specified acts, for the purposes of ensuring compliance with any other order they may make in this regard.\textsuperscript{195} Additionally, the competent courts in Australia have the discretion to make a declaration of contravention of the market manipulation and/or other market misconduct provisions, particularly when they

\begin{itemize}
  \item \textsuperscript{188} See s 84(2)(f) of the Financial Markets Act.
  \item \textsuperscript{189} See ss 6A to 6I of the Protection of Funds Act; Chitimira and Lawack (note 68) 200–217 and Luiz (note 5) 151–172.
  \item \textsuperscript{190} See earlier remarks in paragraph 2.3. above.
  \item \textsuperscript{192} Such competent courts include district courts, courts of appeal, federal courts, High Courts and Supreme Courts of Australia.
  \item \textsuperscript{193} S 1043O of the Corporations Act.
  \item \textsuperscript{194} S 1043O of the Corporations Act; also see generally related comments by Baxt, Black and Hanrahan (note 153) 546; Mann (note 153) 1845. Also see ASIC, ‘ASIC Obtains Court Undertakings Freezing Assets of Former One. Tel Managers’ (2001) \textit{ASIC Media Release} 01/343.
  \item \textsuperscript{195} S 1043O(h) of the Corporations Act; also see further the CAMAC Report (note 154) 27–48.
\end{itemize}
are certain that such contravention actually occurred.\footnote{196} In relation to this, the Australian courts advocates that market abuse practices should be regulated and outlawed at all costs in order to maintain open and transparent financial markets which promote investor confidence and market integrity.\footnote{197}

Moreover, the success achieved by the Australian courts in relation to the effective enforcement of the market abuse provisions is clearly reflected in the number of reported settlements and prosecutions achieved in both civil and criminal cases to date.\footnote{198} The Australian courts have in fact been commended for radically achieving more settlements and prosecutions in relation to market abuse cases, particularly with regard to insider trading.\footnote{199} They do not rely on circumstantial evidence to impute liability on the accused persons, but they nonetheless take cognisance of other relevant factors, such as the actual abuse of material non-public price-sensitive inside information by an insider or any other person for personal benefit or for the benefit of another.\footnote{200} The

\footnote{196} S 1317E(1) of the Corporations Act; also see further Cassim (note 137) 192.

\footnote{197} See North v Marra Developments Limited (1981) 148 CLR 42; 59 (High Court Australia), where the High Court held that the securities markets must be free from market manipulation or other market abuse activities in order to promote the interests of both the investors and the community at large by ensuring that such markets allows the true forces of genuine supply and demand to be operative in them. Also see R Cassim, ‘An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (part 1)’ (2008) 20 SA Merc LJ 33 at 37–39; N Toross, ‘Double–Click on this: Keeping Pace with Online Market Manipulation’ (1999) 32 Loyola of Los Angeles Law Review 1399 at 1413, where market manipulation practices like the so-called auction process and/or pre-opening session were discussed and strongly recommended to be prohibited because they had the effect of interfering with the actual price of the securities traded in the financial markets.


\footnote{200} Glandon Pty Ltd v Strata Consolidated Pty Ltd (1998) 1 ACLC 895, where Mahoney JA submitted that a fiduciary duty may exist when a director purchases a shareholder’s shares...
Australian courts have further provided useful interpretation and guidelines regarding the enforcement of some key market abuse provisions. For example, in the *Firns* case, the Court of Appeal held that information was readily observable if it was disseminated to a financial market in Australia as stipulated in the Corporations Act. Additionally, the Australian courts have also managed, in some instances, to provide meaningful recommendations regarding the enforcement of penalties, remedies and other related actions against the market abuse offenders. Precisely, the Australian courts advise the ASIC and other relevant authorities regarding whether a criminal as opposed to civil action should be instituted against any market abuse offenders.

As highlighted above, the Commonwealth DPP and the relevant courts have also contributed immensely to the market abuse enforcement in Australia. For example, the courts may, upon the request from the ASIC, the Commonwealth

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201 *R v Firns* (2001) 51 NSWLR 548 and *R v Firns* [2001] NSWCCA 191, where Mr Firns was consequently convicted to an imprisonment term of which he appealed but was unsuccessful. Also see *R v Kruse* [2001] NSWCA 59 and *Kruise v DPP (Cth)* [2001] NSWCA 59, where in the same vein of interpreting the readily observable principle, the District Court held that the decision of the Supreme Court of PNG was delivered while Mr Kruse and others were present and hence it was accordingly readily observable and generally available and Mr Kruse was therefore acquitted. However, in *R v Hannes* (2000) 36 ACSR 72 at 115–116, the Court of Appeal held that the term ‘readily observable’ meant that the matter had to be able to be easily perceived by the senses in some way and/or was available in the relevant markets and that such words were plain English which required no further explanation.

202 S 1042C(1)(a).

203 See generally *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90(25) were a reasonable investor test was employed by the court against the offenders concerned.

204 *R v Hannes* (note 33) 508, were Mr Hannes was convicted for insider trading and sentenced to two years and two months imprisonment plus a fine of Aus $100 000; also see *ASIC v Petsas & Miot* (2005) 23 ACLC 269, where the first civil penalty proceedings for insider trading were instituted in the courts and all the defendants pleaded guilty; *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963, where the a civil penalty action against Citigroup Global Markets Australia Pty Ltd was, however, unsuccessful; *Donald v ASIC* (2001) 38 ACSR 10; *Donald v ASIC* [2001] AATA 366 where the accused was convicted of market manipulation. Also see generally see Coffey (note 191) 45–48; 52–53.
DPP or the affected persons, grant orders for compensation, injunctive relief, restitution orders, seize and desist orders, banning orders, freezing orders and other appropriate sanctions against the offenders in Australia.\textsuperscript{205} Moreover, the courts have helped the ASIC to interpret certain key principles regarding market abuse prohibition in Australia. This has in a way helped to increase the number of market abuse prosecutions which are executed by both the courts and the ASIC in Australia. Additionally, the Supreme Courts and the Courts of Appeal have quite usefully provided their support to the ASX, the ASX Disciplinary Tribunal and the AAT to resolve market abuse related appeals from the aggrieved persons.

2.4.1 Comparative Evaluation and Analysis

Like the position in Australia,\textsuperscript{206} competent courts in South Africa have the powers to hear market abuse cases and the discretion to impose appropriate sanctions and penalties against the market abuse offenders.\textsuperscript{207} In particular, such discretionary powers usually relates to the actual amount of the fines to be imposed on the market abuse offenders and the nature of proceedings (that is civil, criminal or administrative proceedings) to be instituted against such offenders.\textsuperscript{208} However, other commentators\textsuperscript{209} have alluded to the fact that the paucity of settlements and prosecutions of market abuse cases in South Africa could have been ameliorated if the legislature had not rigidly adopted some of the American contemporaneous principles,\textsuperscript{210} especially with regard to the insider trading prohibition. In addition, it is submitted that the legislature should consider statutorily engaging additional regulatory agencies and empowering more specialised courts that deal with market abuse offences in South Africa. In line with this, it is hoped that relevant aspects of the Australian approach\textsuperscript{211} will be adopted in South Africa to empower the competent courts to have the discretion to make a declaration of contravention of the market

\textsuperscript{205} For example, see Donald v ASIC (note 204) 366; North v Marra Developments Limited (note 197) 42; ASIC v Petsas & Miot (note 204) 269 and Glandon Pty Ltd v Strata Consolidated Pty Ltd (note 200) 895.

\textsuperscript{206} See earlier analysis in paragraph 2.4. above.

\textsuperscript{207} This usually occurs on a referral basis from either the EC or the FSB. See ss 78; 80; 81; 82; 84; 85; 105 and other relevant provisions under Chapter X entitled ‘Market Abuse’ of the Financial Markets Act.

\textsuperscript{208} See Chitimira (note 68) 119–124.

\textsuperscript{209} For example see Jooste’s summary and concluding remarks in Jooste (note 5) 460.

\textsuperscript{210} The so-called USA approach.

\textsuperscript{211} See related analysis above.
abuse provisions whenever they are certain that such contravention actually occurred in order to increase deterrence on the part of the offenders.

3 Concluding Remarks

The article has revealed that the enforcement authorities in both Australia and South Africa have to date contributed significantly to the combating of market abuse in their respective jurisdictions. However, it is submitted that more may still need to be done to increase the timeous criminal prosecution of market abuse cases in both Australia and South Africa. Consequently, the relevant stakeholders in South Africa and Australia should be encouraged to consider some of the recommendations below.

4 Recommendations

It is suggested that the ASIC should carefully utilise its powers to obtain intercepted telephone material which could be used in the prosecution of market abuse offences without unlawfully encroaching on the alleged offenders’ rights to privacy and dignity. It is further submitted that South Africa should consider following the developments in Australia and empowering the FSB to develop its own adequate technological mechanisms for market abuse cross-market surveillance, in both the regulated and unregulated financial markets in South Africa. This could enable the FSB to detect, investigate and prevent market abuse practices in South Africa effectively and timeously by eradicating the delays that might be associated with the FSB’s investigations into the JSE’s market abuse referrals. It is also suggested that the FSB should be statutorily empowered (like the ASIC) to enable it to make a declaration of contravention of market abuse provisions and/or to seek a court order for such declaration in South Africa whenever such contravention occurs, for deterrence purposes.