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 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. 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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1 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.

2 See further H Huang, 'Redefining Market Manipulation in Australia: The Role of An Implied Intent Element' (2009) 27 *Company and Securities Law Journal* 8 at 9–22. This article is also available from <<http://www.clta.edu.au/professional/papers/conferences2009/HuangCLTA09.pdf>> accessed 13 April 2014.

3 Huang (note 2) 9–22.

4 H Huang, 'The Insider Trading "Possession versus Use" Debate: An International Analysis' (2005) 33(2) *Securities Regulation Law Journal* 130 at 131–146; MI Steinberg, 'Insider Trading, Selective Disclosure and Prompt Disclosure: A Comparative Analysis' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 635 at 668; J Overland, 'The Future of Insider Trading in Australia: What did Rene Rivkin Teach Us?' (2005) 10 *Deakin Law Review* 708 at 713–730; H Huang, 'The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform' (2005) 17(3) *Australian Journal of Corporate Law* 281 at 281–322; M Ziegelaar, 'Insider Trading Law in Australia' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland 1994) 677–678; FA Gevurtz, 'The Globalization of Insider Trading Prohibitions' (2002) 15 *Transnational Lawyer* 63 at 67–78; M Gething, 'Insider Trading Enforcement: Where are We Now and Where do We Go from Here?' (1998) 16 *Company and Securities Law Journal* 607 at 607–618; VR Goldwasser, 'The Enforcement Dilemma in Australian Securities Regulation' (1999) 27 *Australian B.L.R.* 482 at 482–513; R Tomasic and B Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian N.Z.J.C.* 65 at 65–66 and AF Loke, 'From the Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the UK, Australia and Singapore' (2006) 54 *American Journal of Comparative Law* 123 at 123–172.

where necessary for consideration by such authorities, especially, in the South African⁵ 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).⁶ 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.⁷ The ASC was renamed the Australian Securities

5 See ss 78; 80; 81 and 82 of the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act; also see H Chitimira, 'A Comparative Analysis of the Enforcement of Market Abuse Provisions', (LLD Thesis, Nelson Mandela Metropolitan University 2012) 354–420. See further SM Luiz, 'Market Abuse and the Enforcement Committee' (2011) 23 *SA Merc. LJ* 151 at 151–172; A Myburgh and B Davis, 'The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board' (25 March 2004) 8–33 <<http://www.genesis-analytics.com/public/FSBReport.pdf>> accessed 9 February 2014; D Botha, 'Control of Insider Trading in South Africa: A Comparative Analysis' (1991) 3 *SA Merc. LJ* 1 at 1–18; G Van Deventer, 'Anti-Market Abuse Legislation in South Africa' (10 June 2008) 1–5 <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> accessed 5 May 2014; D Botha, 'Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?' (1990) 107 *SALJ* 504 at 504–508; H Chitimira, 'The Regulation of Insider Trading in South Africa: A Roadmap for An Effective, Competitive and Adequate Regulatory Statutory Framework' (LLM Dissertation, University of Fort Hare 2008) 137–163; PC Osoke, 'The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?' (2000) 44 *Journal of African Law* 239 at 239–263; R Jooste, 'A Critique of the Insider Trading Provisions of the 2004 Securities Services Act' (2006) 123 *SALJ* 437 at 441–460; G Van Deventer, 'New Watchdog for Insider Trading' (1999) 1 *FSB Bulletin* 2 at 2–3 and SM Luiz, 'Insider Trading Regulation—If at First You Don't Succeed ...' (1999) 11 *SA Merc. LJ* 136 at 136–151, for further comparative analysis.

6 M Adams and M Freeman, 'The Securities Market in Australia' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland 1994) 141–145; also see the relevant provisions of the Corporations Legislation Amendment Act 110 of 1991 (Cth), hereinafter referred to as the Corporations Law 1991.

7 Adams and Freeman (note 6) 141–145; V Comino, 'National Regulation of Corporate Crime' (1997) 5 *Current Commercial Law* 84 at 84–97 and also see generally RA Tomasic, 'Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures' (1993) 3 *Australian Journal of Corp Law* 192 at 197–229.

and Investments Commission (ASIC) on 1 July 1998.⁸ As a result, apart from its main responsibility to oversee the regulation of companies and the futures markets, the ASIC assumed further responsibilities.⁹ 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 Act¹⁰ and the Corporations Act.¹¹ 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.¹² 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.¹³ 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.¹⁴ However,

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- 8 V Comino, 'High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance' (2005) 18 *Australian Journal of Corporate Law* 48 at 48–67.
- 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 *MqJBL* 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.
- 14 See s 1311 of the Corporations Act; also see J Austin, 'Government to the Rescue: ASIC Takes the Reins of the Stock Markets' (2010) 28 *C&SLJ* 444 at 444–446 and 451–456 and Constable (note 12) 86–92.

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 In relation to this, the ASIC may seek a court order for a

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- 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.
 - 18 GJ Lyon and JJ Du Plessis, *The Law of Insider Trading in Australia* (The Federation Press, Sydney 2005) 125; also see the ASIC, 'ASIC Commences Civil Proceedings Against former One.Tel Officers and Chairman' (12 December 2001) *ASIC Media Release 01/441* and the ASIC, 'Landmark Decision on Chairman's Duties' (24 February 2003) *ASIC Media Release 03/068*.
 - 19 See further analysis by J Austin, 'A Rapid Response to Questionable Trading—Moving Towards Better Enforcement of Australia's Securities Laws' (2009) 1–3 <<http://www.clta.edu.au/professional/papers/conference2009/AustinCLTA09.pdf>> accessed 28 April 2014.
 - 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.
 - 22 *ASIC v Adler* (2002) 42 ACSR 80 115 and *Rich v ASIC* (2004) 209 ALR 271. Also see Lyon and Du Plessis (note 18) 143.

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 *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 v Soust* [2010] FCA 68; *ASIC v Nomura International plc* (1998) 89 FCR 301; 29 ACSR 473, where the ASIC successfully imposed a civil penalty against *Nomura International plc* for manipulating share price index through its illicit Aus \$600 million securities scheme and Constable (note 12) 92–96.

25 *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 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 agencies⁴⁰ to apply for a telephone interception warrant in matters involving market abuse investigations. This is aimed at granting the ASIC an opportunity

33 *R v Hannes* (2002) 43 ACSR 508 at 519 and 529.

34 S 19 and ss 29 to 34 read with s 49 of the Australian Securities and Investments Commission Act.

35 Ss 19(2)(a) and 49 Australian Securities and Investments Commission Act and see further JP Longo, 'The Powers of Investigations of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State' (1992) 10 *C&SLJ* 237 at 237–242.

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.

39 S 5D; also see Constable (note 12) 106 and see further C Bowen, 'Strengthening of ASIC's Investigative Powers, Increased Penalties for Market Misconduct Offences' <<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2010/0007.htm&page1>> accessed 28 January 2014.

40 S 5(1) of the Telecommunications Act, which defines the term "interception agency".

to work with the AFP to obtain intercepted telephone material which could be used in the prosecution of market abuse offences.⁴¹

The ASIC is now responsible for the real-time surveillance of the Australian securities and futures markets to detect and prevent market abuse activities.⁴² This suggests that the ASIC's Market Surveillance Team now uses the same surveillance system which was initially used by the Australian Stock Exchange (ASX)'s Surveillance Department.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶

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,⁴⁷ for the purpose of enhancing

41 The telecommunications intercepted must, however, be obtained under a court issued warrant or court order.

42 The ASIC took over the supervision and surveillance of securities markets and market participants responsibility from the Australian Stock Exchange (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.

43 Constable (note 12) 108.

44 Constable (note 12) 108.

45 See the ASIC, 'ASIC: A Guide to How We Work' (2007–2009) 10 <[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/asic_guide_how_we_work.pdf/\\$file/asic_guidehow_we_work.pdf](http://www.asic.gov.au/asic/pdf/lib.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) *Report* 277, 2–19; the ASIC, 'ASIC Supervision of Markets and Participants: August to December 2010' (January 2011) *Report* 227, 8 and Constable (note 12) 107–108.

46 Constable (note 12) 107–108; also see *R v Chan* [2010] VSC 312.

47 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), *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)

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.⁴⁸ These undertakings have enabled the ASIC to obtain timely and cost-effective administrative settlements flexibly in market abuse cases.⁴⁹ The ASIC may also administer and ensure compliance with its new Market Integrity Rules.⁵⁰ Put differently, the market participants in licensed markets are obliged to comply with the Market Integrity Rules.⁵¹ Market participants are therefore prohibited from engaging in insider trading, market manipulation⁵² and/or any unprofessional conduct.⁵³ The ASIC may impose a civil penalty of up to Aus \$1 million on any person who violates its Market Integrity Rules.⁵⁴ 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.⁵⁵ 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

106 *The Journal of Political Economy* 602 at 606–632; T Middleton, ‘ASIC’s Investigation and Enforcement Powers—Current Issues and Suggested Reforms’ (2004) 22 *C&SLJ* 503 at 504–530. See further related comments on ASIC’s investigatory roles in *ASIC v Vines* [2002] NSWSC 1222; *ASIC v Loiterton* [2004] NSWSC 172.

- 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.
- 49 S 93AA of the Australian Securities and Investments Commission Act 1989; also see the ASIC, ‘Regulatory Guide 100: Enforceable Undertakings’ (March 2007) 2; 4–5 and 17; the Australian Law Reform Commission, ‘Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation’ (2002) *Discussion Paper* 65, 7.171; the ASIC, ‘ASIC Accepts Enforceable Undertaking from former Victorian Stockbroker’ (January 2009) *ASIC Media Release* 09–01, 7 and Constable (note 12) 99–101.
- 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.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹

Although the role of the ASIC as a corporate watchdog against market abuse practices has been criticised by some commentators for being relatively ineffective,⁶⁰ 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.⁶¹ 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.⁶²

56 S 798K of the Corporations Act; also see Constable (note 12) 102.

57 The ASIC, 'Regulatory Guide 216: Markets Disciplinary Panel' (July 2010) 4; the ASIC, 'Regulatory Guide 225: Markets Disciplinary Panel Practices and Procedures' (May 2011) and 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.

61 See ASIC, 'Steve Vizard Banned for 10 Years and Fined Aus \$390 000' (28 July 2005) *ASIC Media Release 05–215*; Gale Group, 'Citigroup's Chinese Walls Withstand ASIC Onslaught' (2007) *Law and Financial Markets Review* 1.5 <http://www.galegroup.com/o-find.galegroup.com_citigroup.2007.pdf.htm> accessed 22 April 2010; the ASIC, 'Antony Quates Pleads Guilty to Criminal Charges' (18 July 2005) *ASIC Media Release 05–201*; the ASIC, 'HIH Insurance Investigation' (16 May 2001) *ASIC Media Release 01–152*; the ASIC, 'Former HIH Managing Director Jailed' (29 April 2005) *ASIC Media Release 05–108*; the ASIC, 'Brad Keeling Settles in ASIC One. Tel Proceeds' (21 March 2003) *ASIC Media Release 03/099*; Lyon and Du Plessis (note 18) 199, for the appendix 1 and table of Australian insider trading cases. Also see *ASIC v Adler* (note 22) 97–99; *ASIC v Rich* [2003] NSWSC 186; *ASIC v Loiterton* (note 47) 897; *ASIC v Petsas* (note 21) 88; *ASIC v Vizard* [2005] FCA 1037; *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58 at 59–63; *ASIC v Soust* (note 24) 68; *ASIC v Nomura International plc* (note 24) 301; *Endresz v Whitehouse* (1997) 24 ACSR 208; *Manasseh v R* (2002) 40 ACSR 593; *R v Lloyd* (1996) 19 ACSR 528; *R v Chan* [2010] VSC 312; *Braysich v R* [2011] HCA 14 and see further Constable (note 12) 66–110.

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,⁶³ 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.⁶⁴ This may further indicate that the ASIC takes the enforcement of market abuse as one of its top priorities.⁶⁵ 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,⁶⁶ 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,⁶⁷ 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.⁶⁸ For instance, the FSB may institute criminal proceedings to

576, where about Aus \$7 million was recovered by the ASIC from the offenders and *ASIC v Phymmin & 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.

64 See generally T D'Aloisio, 'Securities Markets, Participants and ASIC' (2008) 3; 5 and 19 *Securities and Derivatives Industry Association Conference Paper*, Melbourne (22 May 2008) <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Securities%20%markets,%20participantsand%20ASIC.pdf/\\$file/Securities%20markets,%20participants%and%20ASIC.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Securities%20%markets,%20participantsand%20ASIC.pdf/$file/Securities%20markets,%20participants%and%20ASIC.pdf)> accessed 13 May 2014, for a related analysis and discussion of the role and functions of the ASIC; Austin (note 19) 7; also see Constable (note 12) 107–110.

65 See generally the survey conducted by the Allen Consulting Group, 'ASIC Stakeholder Survey' (April 2008) 8 <[http://www.asic.gov/asic/pdflib.nsfLookupByfileName/stakeholder_survey_2008.pdf/\\$file/stakeholder_survey_2008.pdf](http://www.asic.gov/asic/pdflib.nsfLookupByfileName/stakeholder_survey_2008.pdf/$file/stakeholder_survey_2008.pdf)> accessed 13 May 2014.

66 Generally see Comino (note 7) 84–97; Ferguson (note 60) 58–64 and Constable (note 12) 81–110.

67 See related analysis in paragraph 2.1. above.

68 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.⁶⁹ However, this could imply, in contrast to the ASIC,⁷⁰ 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,⁷¹ 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.⁷² With regard to civil and/or administrative proceedings, like the ASIC,⁷³ 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.⁷⁴ Nonetheless, in contrast to the ASIC,⁷⁵ 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.⁷⁶ 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.⁷⁷ Furthermore, in contrast to the position with the ASIC,⁷⁸ 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.⁷⁹ Additionally,

200–217; H Chitimira, 'Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa' (2014) 28(1) *Speculum Juris* 108 at 108–124.

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.

data⁹² 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.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.⁹⁴

2.2 *The Role of the ASX*

The establishment and statutory recognition of the ASX commenced in the early 1970s.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 1974.⁹⁶ In April 1987, the ASX

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.

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.

94 Jooste (note 5) 458–459.

95 Shaw and Von Nessen (note 47) 161.

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

hereinafter referred to as the Rae Committee and its report as the *Rae Report*. See the *Rae Report*, 129.

97 See Part IIA of the Australian Stock Exchange and National Guarantee Fund Act 6 of 1987. Also see Shaw and Von Nessen (note 47) 174–175; Anonymous, 'History of the Market' <<http://www.asx.com.au/about/asx/history/index.htm>> accessed 17 May 2014 and PLR Mitchell, *Insider Dealing and Directors' Duties* (Butterworths, London 1989) 232–260, for further comparative reading.

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.

99 S 795B read with s 792A of the Corporations Act; also see related comments by the ASX, 'ASX's Regulatory Licences' <http://www.asx.com.au/supervision/supervisory_role/regulatory_licences.htm> accessed 04 May 2014.

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 enshrined 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 appropriate disciplinary action and/or refer that matter to the ASX Disciplinary Tribunal.¹⁰⁵ Consequently, the ASX Disciplinary Tribunal has wider discretionary 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 terminate 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 pertaining 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, settlement 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

participant_services/documents/information/asx.pdf> accessed 04 May 2014, for more information.

103 S 793C of the Corporations Act.

104 See the ASX Market Rule 2.10; see further ASX Market Rules 13.4; 13.5 and 28.3.1 <http://www.asx.com.au/supervision/rules_guidance/market_rules.htm> accessed 05 May 2014.

105 For more details regarding the role and functions of the ASX Disciplinary Tribunal, see the ASX, ‘Disciplinary Processes and Appeals Rulebook’ <http://www.asx.com.au/supervision/rules_guidance/disciplinary_rules.htm> accessed 30 April 2014; also see generally related comments and analysis by Austin (note 19) 5.

106 Austin (note 19) 5.

107 ASX Market Rule 28.1.1, <http://www.asx.com.au/supervision/rules_guidance/market_rules.htm> accessed 26 April 2014.

108 ASX Market Rule 28.1.3, <http://www.asx.com.au/supervision/rules_guidance/market_rules.htm> accessed 26 April 2014.

109 Constable (note 12) 101–102 and Austin (note 14) 452–453; also see earlier related comments above.

110 See the ASX *Annual Report* (1996) 2–3; 8–9; 15–16; 20 and 31.

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 Trading System (SEATS) which was established in 1987 and became fully operative in 1990.¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ Notably, the ASX's detection and investigation functions were vested in the ASX Market Supervision Private Limited.¹¹⁵ The surveillance is usually done by way of monitoring market activity and

111 See the ASX *Annual Report* (1996) 8.

112 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.

113 Simpson (note 112) 39–40.

114 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.

115 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.

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

116 See Australian Stock Exchange, 'ASX Surveillance: Helping to Protect the Australian Share Market for all Participants' *Undated pamphlet* and see further Simpson (note 112) 41–42 and B Hannigan, *Insider Dealing* (Longman Group Ltd, London 1994) 20–46, for a comparative analysis on the detection and surveillance of market abuse activities.

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.

121 See the MOU between the ASX and the ASIC which was concluded on 30 June 2004, <<http://www.asx.com.au/about/pdf/ASICMOU.pdf>> accessed 03 March 2014.

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.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵ Nonetheless, these powers have now been transferred to the ASIC.¹²⁶

2.2.1 Comparative Evaluation and Analysis

On the other hand, unlike the Australian approach discussed above,¹²⁷ 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,¹²⁸ 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.¹²⁹ In relation to this, it is important to note that the JSE bears the responsibility to operate the Stock Exchange in South Africa.¹³⁰ Additionally, like the ASX,¹³¹ 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.

¹²⁵ W Koeck, 'Just What is Insider Trading? Beware of Overkill in the New Trading Laws' (1990) 3 *Journal of the Australian Society of Security Analysts* 2 at 2–3.

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.

¹³⁰ See related analysis by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.

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.¹³² 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.¹³³ Therefore, like the ASX,¹³⁴ 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,¹³⁵ 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.¹³⁶ 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.¹³⁷ These surveillance systems are controlled by the Market Practices Department and the Surveillance Division¹³⁸ 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.¹³⁹ Consequently, unlike the

132 See similar remarks by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.

133 See the JSE, 'Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)' in *The Insider Trading Booklet* (2013) 23; 24–25 <http://www.jse.co.za/Libraries/JSE_Regulatory_Environment/Insider_Trading/InsiderTrading_Booklet.sflb.ashx> accessed 03 March 2014; R Loubser, 'Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)' in *The Insider Trading Booklet* (2006) 24; 25–26, <<http://www.jse.co.za/public/insider/JSEbooklet.pdf>> accessed 27 August 2014; also see related remarks by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.

134 See earlier comments in paragraph 2.2. above.

135 See earlier comments in paragraphs 2.1. and 2.2. above.

136 See similar remarks by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.

137 Also see further Loubser (note 133) 24; 25–26; see R Cassim, 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)' (2008) 20 *SA Merc LJ* 177 at 196–198 and related remarks by Chitimira and Lawack (note 68) 200–217 and Chitimira (note 68) 109–114.

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,¹⁴⁰ 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.¹⁴¹ Nonetheless, in contrast to the position in Australia,¹⁴² 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.¹⁴³

It is submitted that South Africa should adopt the Australian approach¹⁴⁴ 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,¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ Nevertheless, in contrast to the ASX,¹⁴⁸ 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.¹⁴⁹ As a result, apart from some disciplinary action such as suspension,

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.¹⁵⁰ Moreover, unlike the position in Australia,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 *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 *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.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.¹⁵³ Moreover, the CAMAC

¹⁵⁰ See earlier related remarks in paragraph 2.2. above.

¹⁵¹ See earlier related remarks in paragraph 2.2. above.

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.

¹⁵³ See generally R Baxt, A Black and FP Hanrahan, *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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

The ACCC is equally involved in the regulation of the securities legislation and the enforcement of the anti-market abuse prohibition in Australia.¹⁵⁷ For example, the ACCC was empowered under the Trade Practices Act¹⁵⁸ 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 Act¹⁵⁹ which repealed and replaced the Trade Practices Act. Additionally, the ACCC

'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) 101 *The Yale Law Journal* 1795 at 1845; the ASIC, 'ASIC Restrains Rich Assets' (8 June 2001) *ASIC Media Release*, 01/199; the ASIC, 'Jodee and Maxine Rich Asset Transfer Agreement' (13 November 2003) *ASIC Media Release*, 03/362.

154 See the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Report on Fair Shares for All: Insider Trading in Australia' (1989) 9, this Committee is hereinafter referred to as the Griffiths Committee and its report as the Griffiths Report. See the Griffiths Report paragraph 3.3.6. See further the Australian government, 'Report on Corporations and Markets Advisory Committee Insider Trading' (2003) 27–48 <[http://www.camac.gov.au/camac.nsf/PDFDiscussion+Papers/\\$file/Insider_Trading_DP_11_2003.pdf](http://www.camac.gov.au/camac.nsf/PDFDiscussion+Papers/$file/Insider_Trading_DP_11_2003.pdf)> accessed 22 February 2014. Hereinafter referred to as the CAMAC Report.

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

156 See CAMAC Report (note 154) vi; 27–48 and also see related remarks by CAMAC, 'Insider Trading Discussion Paper' (2001) 87 <[http://www.camac.gov.au/camac.nsf/PDFDiscussion+Papers/\\$file/Insider_Trading_DP_06_2001.pdf](http://www.camac.gov.au/camac.nsf/PDFDiscussion+Papers/$file/Insider_Trading_DP_06_2001.pdf)> accessed 22 May 2014.

157 See further Austin (note 19) 11.

158 51 of 1974 (Cth) (hereinafter referred to as the Trade Practices Act) as amended by the Trade Practices Legislation Amendment Bill 2005 (Cth).

159 100 of 2010 (Cth), hereinafter referred to as the Competition and Consumer Act; see schedule 2; Part XI B; Part XI C 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.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.¹⁶¹ In 2006, a new regime of criminal sanctions was introduced to enable the ACCC to curb serious cartel conduct and market abuse activities.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.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.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

160 S 45(2) of the Trade Practices Act; see further schedule 2; Part XIB and Part XIC of the Competition and Consumer Act.

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.

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.

163 See the ACCC, 'Proceedings Instituted Against Visy Group, Senior Executives for Alleged Cartel in the Corrugated Fibrebroad Container Market' (2005) *ACCC Media Release*, 327/05, where Visy Industries Holdings Pty Ltd, its subsidiary bodies corporate and respondents incurred about Aus \$427 million fines for engaging in price-fixing and other unconscionable market conduct; also see further details and analysis by Anonymous, 'Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct' (2008) <<http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>> accessed 19 May 2014.

164 See the IBSA, 'Avoiding Conflicts of Interest: A Guide for the Financial Services Industry' (1989) 2 <<http://www.securities.edu.au/cms/data/live/files/89i.pdf>> accessed 22 February 2014, for further analysis.

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).¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

The SADIA has further contributed significantly to the securities regulation in Australia, especially with regard to conflict resolution.¹⁶⁸ 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

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 Macquarie Corporate Finance advised TNT Limited regarding a proposed takeover. However, Macquarie Corporate Finance placed TNT Limited on its embargo list to prevent the employees of Macquarie Corporate Finance from dealing in TNT Limited shares.

168 For a more detailed analysis, see the SADIA, 'Best Practice Guidelines for Research Integrity' (2001) <<http://www.securities.edu.au/cms/data/live/files/891.pdf>> accessed 22 February 2014.

report only to the head of research and not to the corporate or trading units for approval.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.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 *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.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.¹⁷²

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.¹⁷³ For instance, in contrast to the Australian SROs

169 See further Chapter Five in G Lyon, 'An Examination of Australia's Insider Trading Laws', (SJD Thesis, Deakin University 2003) 195.

170 See further Chapter Five in Lyon (note 169) 195.

171 See the AFMA, 'AFMA Response to the CAMAC Insider Trading Proposal Paper' (2002) 2–10 *Press Release 01*.

172 See the AFMA (note 171) 2–10.

173 See earlier remarks in paragraph 2.3. above.

and the ASX,¹⁷⁴ the JSE does not seem to have the powers to impose monetary pecuniary penalties against the market abuse offenders in South Africa.¹⁷⁵ It is therefore hoped, as is the position in Australia,¹⁷⁶ 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.¹⁷⁷ However, like the CAMAC,¹⁷⁸ the DMA has the powers to advise and perform some investigatory functions on the behalf of the FSB.¹⁷⁹ Nevertheless, unlike the CAMAC,¹⁸⁰ 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.¹⁸¹ Moreover, in contrast to the CAMAC,¹⁸² 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,¹⁸³ 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.¹⁸⁴ In addition, in contrast to the ASX,¹⁸⁵ 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.¹⁸⁶ Furthermore, unlike the SROs in Australia,¹⁸⁷ as already stated above, the SROs

174 See earlier remarks in paragraphs 2.2. and 2.3. above.

175 See further the JSE Equities Rules 7.10, <<https://www.jse.co.za/services/market-regulation>> accessed 12 August 2014 and related remarks 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 6I 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,¹⁸⁸ decisions, regulations and other appropriate disciplinary or administrative actions on matters involving market abuse offences.¹⁸⁹ In relation to this, it is hoped, as is the position in Australia,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 *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.¹⁹¹ Therefore, all the competent courts¹⁹² have inherent powers to impose sanctions on any person who contravenes insider trading and/or other market misconduct provisions in Australia.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.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.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

188 See s 84(2)(f) of the Financial Markets Act.

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.

190 See earlier remarks in paragraph 2.3. above.

191 For a general comparative discussion on the role of the courts in Australia, see J Coffey, 'The Reasonable Investor Test across Two Continents' (2008) 1 *Journal of the Australasian Law Teachers Association* 45 at 45–53, also available at <<http://www.austlii.com/au/journals/JIALawTA/2008/6.pdf>> accessed 07 May 2014.

192 Such competent courts include district courts, courts of appeal, federal courts, High Courts and Supreme Courts of Australia.

193 S 1043O of the Corporations Act.

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) *ASIC Media Release* 01/343.

195 S 1043O(h) of the Corporations Act; also see further the CAMAC Report (note 154) 27–48.

are certain that such contravention actually occurred.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.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.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.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.²⁰⁰ The

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

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.

198 See for example *Exicom v Futuris* (1995) 13 ACLC 1758; *ASIC v Kippe* (1996) 67 FCR 449; *Ampolex v Perpetual Trustee Company [No 2]* (1996) 14 ACLC 1514 at 1524; *ASIC v Donovan* (1998) 28 ACSR 583 at 608; *ASIC v Roussi* [1999] FCA 618; *R v Hannes* (note 167) 120; *ASIC v Hutchings* (2001) 38 ACSR 387; *R v Firms* (2001) 51 NSWLR 548; *ASIC v Adler* 115; *ASIC v Rich* (2003) 45 ACSR 305; *R v Rivkin* [2004] NSWCCA 7 at 17; *ASIC v Petsas* (note 21) 88. Also see related comparative analysis by R Tomasic, 'Corporate Crime and Corporations Law Enforcement Strategies in Australia' (1993) *Center for National Corporate Law Research Discussion Paper* 1/93, 70; JD Cox, 'An Economic and American Perspective of Insider-trading Regulation in Australia and New Zealand' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland 1994) 621–637.

199 See the Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties in Australia' (2002) *Report No 95*, 113 and related evidence by Lyon and Du Plessis (note 18) 110–153 and 163–167; Comino (note 7) 84–97.

200 *Glandon Pty Ltd v Strata Consolidated Pty Ltd* (1998) 11 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 *Firms* case,²⁰¹ 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.²⁰² 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.²⁰³ 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 in question.²⁰⁴

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

as a result of an informational advantage which he usually has at the expense of the shareholder(s) concerned and consequently, such director would have committed insider trading if he dealt in the shares in question on the basis of the price-sensitive information which he had; also see *Brunninghausen* case (1999) 46 NSWLR 538 at 549; *Glavanics v Brunninghausen* (1996) 14 ACLC 345 at 549, where the plaintiff's reliance on the breach of a fiduciary duty was overturned by the Court of Appeal and in essence acquitting the defendant of all the charges that were brought against him, namely fraud, engaging in misleading and deceptive conduct, negligence and breach of a fiduciary duty.

201 *R v Firms* (2001) 51 NSWLR 548 and *R v Firms* [2001] NSWCCA 191, where Mr Firms 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, where 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.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,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.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.²⁰⁸ However, other commentators²⁰⁹ 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,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 approach²¹¹ will be adopted in South Africa to empower the competent courts to have the discretion to make a declaration of contravention of the market

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.

206 See earlier analysis in paragraph 2.4. above.

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.

208 See Chitimira (note 68) 119–124.

209 For example see Jooste's summary and concluding remarks in Jooste (note 5) 460.

210 The so-called USA approach.

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.