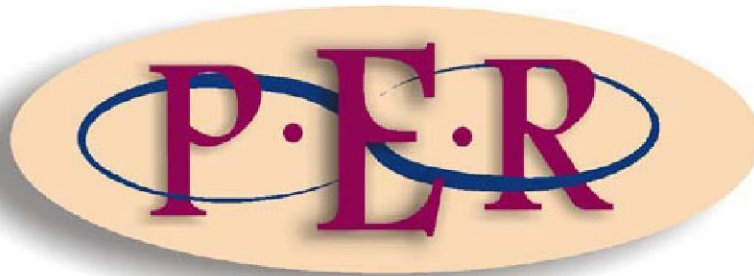


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THE REGULATION OF MARKET MANIPULATION IN AUSTRALIA: A HISTORICAL COMPARATIVE PERSPECTIVE

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1 Introduction

Notably, in Australia, market abuse practices¹ like market manipulation² and other market misconduct practices³ are expressly prohibited under the *Corporations Act*⁴ as amended by the *Financial Services Reform Act*.⁵ In the light of this, and for the purposes of this article, a brief historical analysis of the market manipulation prohibition will be undertaken first. Secondly, the available penalties and remedies for

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¹ For the purposes of this article, such practices include insider trading (which is the unlawful use of price-sensitive non-public inside information, to conclude transactions in securities to which that information relates by insiders or other persons to the detriment of innocent and other unwitting persons), market manipulation and other market misconduct activities. See related discussion on the regulation of these practices by Huang 2005 *Aust Jnl of Corp Law* 281-322; Huang 2005 *Sec Reg LJ* 130-146; Overland 2005 *Deakin LR* 708, 713-730; Steinberg 2001 *U Pa J Int'l Econ L* 635, 640-668; Gevurtz 2002 *Transnat'l Law* 63, 67-78; Gething 1998 *C & SLJ* 607-618; Goldwasser 1999 *ABLR* 482-513; Tomasic and Pentony 1989 *ANZJ Crim* 65-66; Loke 2006 *Am J Comp L* 123-172; Barnes *Stock Market Efficiency* 125; Lyon and Du Plessis *Law of Insider Trading* 159-168.

² In this article, market manipulation is defined as a practice that interferes or attempts to interfere with the free and fair operation of the financial markets by creating an artificial, false or misleading appearance with respect to the price of, or market for, a security, commodity or financial instrument. For the purposes of this article, such practices include the misuse of material information; the dissemination of false or misleading information; a practice which abnormally or artificially affects, or is likely to affect, the formation of prices or volumes of financial instruments or securities; dark pools and wash trades.

³ For the purposes of this article, such practices include false trading and market rigging, quote stuffing, front running, insider trading, and a failure to continuously disclose price-sensitive information that relates to the relevant financial instruments.

⁴ The *Corporations Act* 50 of 2001 (Cth) as amended, hereinafter referred to as the *Corporations Act*.

⁵ The *Financial Services Reform Act* 122 of 2001 (Cth) as amended, hereinafter referred to as the *Financial Services Reform Act*. Generally see the *Corporations Act*, s 1041A for market manipulation; s 1041B for false trading and market rigging, including the creation of a false or misleading appearance of active trading; s 1041C for false trading and market rigging, including artificially maintaining a trading price; s 1041D for the dissemination of information about illegal transactions; s 1041E for false or misleading statements; s 1041F for inducing other persons to a deal; s 1041G for dishonest conduct and s 1041H for misleading or deceptive conduct (civil liability only). For a detailed analysis of these provisions, see the discussion that will ensue later under the sub-headings in para 2 and also see Part 7.10 of the *Corporations Act*. See further Huang 2009 *C & SLJ* 8-22.

market manipulation will be discussed. Thereafter, possible recommendations and significant Australian anti-market abuse enforcement approaches that may be utilised in South Africa⁶ will be briefly presented.⁷ Lastly, concluding remarks are provided.

2 Historical overview of the prohibition of market manipulation

2.1 *The prohibition of market manipulation under the common law*

Australia, like many other jurisdictions,⁸ does not statutorily define the concept of "market abuse" and other related practices like market manipulation. However, it is generally accepted that market manipulation activities were outlawed under common law in the years prior to 1899⁹ and later codified in 1899 in Australia.¹⁰ Therefore, like the United Kingdom (UK),¹¹ Australia primarily prohibited market manipulation through common law principles.¹² Market manipulation is usually interpreted to include

⁶ Generally see ss 78; 80; 81 and 82 of the *Financial Markets Act* 19 of 2012, hereinafter referred to as the *Financial Markets Act*. See Benade *et al Entrepreneurial Law* 130; Van Deventer 2008 <http://www.fsb.co.za/public/marketabuse/FSBReport.pdf> 1-5; Myburgh and Davis 2004 <http://www.genesis-analytics.com/public/FSBReport.pdf> 8-13; also see Chitimira *Enforcement of Market Abuse Provisions* 354-420; Botha 1991 *SA Merc LJ* 1-18; Botha 1990 *SALJ* 504-508; Chitimira *Regulation of Insider Trading* 137-163; Osode 2000 *J Afr L* 239; Jooste 2006 *SALJ* 437, 441-460; Van Deventer 1999 *FSB Bulletin* 2-3; Luiz 1999 *SA Merc LJ* 136-151; Luiz 2011 *SA Merc LJ* 151-172; Beuthin and Luiz *Basic Company Law* 235-238; Henning and Du Toit 2000 *JJS* 155-165, for further related historical analysis on the regulation of market manipulation and insider trading in South Africa.

⁷ In relation to this, the historical analysis and recommendations will be mainly focused on the relevant provisions of the *Corporations Act* and the *Financial Markets Act* in Australia and South Africa respectively.

⁸ Such jurisdictions or countries include the United States of America (USA) and South Africa.

⁹ Put differently, the fact that the common law prohibition was codified in 1899 could also suggest that the prohibition under the common law pre-dates 1899.

¹⁰ See the codification of common law as undertaken in the Australian states of Queensland in 1899, Western Australia in 1902 and Tasmania in 1924. Accordingly, in Victoria and South Australia states, the common law crime principles discouraging *inter alia* market abuse practices are expressly retained under s 321F(2) of the *Crimes Act* 6231 of 1958 (Vic) and s 133(2) of the *Criminal Law Consolidation Act* 2252 of 1935 (SA). In relation to this, it is important to note that market manipulation was historically outlawed as a crime of conspiracy to defraud or deprive other persons of their securities or financial instruments which they own and which they are or might be entitled to own in Australia, the United Kingdom and the USA. Furthermore, in some instances the conspiracies to defraud through market manipulation were treated as a crime only if two or more individuals acted together to commit market manipulation under common law. See *R v Aspinall* (1876) 1 QBD 730; *R v Aspinall* (1876) 2 QBD 48 (Court of Appeal); *R v De Berenger* (1814) 3 M&S 67; *Wai Yu-Tsang v R* [1992] 1 AC 269; *Scott v Metropolitan Police Commissioner* [1975] AC 819; *Cooke* [1986] AC 909. See further Loke 2007 <http://goo.gl/YVBTGQ> 4-7.

¹¹ See *R v De Berenger* (1814) 3 M&S 67.

¹² See further *Fame Decorator Industries Pty Limited v Jeffries* (1998) 28 ACSR 58, 16 ACLC 1235.

activities that interfere with the natural forces of supply and demand of a particular security or financial product in Australia.¹³

2.2 The prohibition of market manipulation prior to 2001¹⁴

Market manipulation was initially prohibited by the *Securities Industry Act* 1970.¹⁵ This Act *inter alia* outlawed the creation of a false or misleading appearance of active trading with respect to listed securities or the market for and price of any securities.¹⁶ A similar prohibition was also retained in the statutes which were later enacted.¹⁷ The *Corporations Law* 1990 further prohibited market manipulation practices such as the making or publication of false or misleading statements,¹⁸ the manipulation of the futures contracts market and the artificial maintenance of securities trading prices in the relevant Australian¹⁹ markets.²⁰ The *Corporations Law* 1990 also prohibited any misleading or deceptive conduct on the part of all the relevant persons, especially the officers or employees of companies.²¹ It is stated that the *Corporations Law* 1990

¹³ Generally see *Fame Decorator Industries Pty Limited v Jeffries* (1998) 28 ACSR 58, 16 ACLC 1235; *Fenwick v Jeffries Industries Limited* (1995) 13 ACLC 1334. Also see *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724; Loke 2007 <http://goo.gl/YVBTGQ> 1-2.

¹⁴ The discussion will be focused mainly on the *Corporations Legislation Amendment Act* 110 of 1990 (Cth), hereinafter referred to as the *Corporations Law* 1990 and therefore the study of all related Australian securities statutes is beyond the scope of this sub-heading. Consequently, related legislation like the *Trade Practices Act* 51 of 1974 (Cth) (hereinafter referred to as the *Trade Practices Act*) as amended by the *Trade Practices Legislation Amendment Bill* 2005 (Cth), which was passed on 19 October 2006, will be referred to only where necessary.

¹⁵ The *Securities Industry Act* 53 of 1970 (NSW), hereinafter referred to as the *Securities Industry Act* 1970. See s 70 read with s 72(2).

¹⁶ See s 70 read with s 72(2) of the *Securities Industry Act* 1970.

¹⁷ See further the relevant provisions of the *Securities Industry (Amendment) Act* 11 of 1971 (NSW), hereinafter referred to as the *Securities Industry Amendment Act*; s 109 of the *Securities Industry Act* 3 of 1975 (NSW), hereinafter referred to as the *Securities Industry Act* 1975; s 124 of the *Securities Industry Act* 66 of 1980 (Cth), hereinafter referred to as the *Securities Industry Act* 1980 and the *Securities Industry (Application of Laws) Act* 61 of 1981 (NSW), hereinafter referred to as the *Securities Industry Application of Laws Act*. Also see Constable 2011 *MqJBL* 54, 58; see further Armson 2009 <http://goo.gl/iDn85l> 4-7; Goldwasser 1999 *Aust J Leg Hist* 149, 166-172, 198; Hart 1979 *ABLR* 139-140.

¹⁸ Ss 999, 1261 of the *Corporations Law* 1990.

¹⁹ Ss 997; 998; 1259 and 1260 read with s 998 of the *Corporations Law* 1990; also see Huang 2009 *C & SLJ* 9-10; Baxt, Black and Hanrahan *Securities and Financial Services Law* 471-472.

²⁰ S 998(3) read with subss (5) and (7), 1260(2) and (3) of the *Corporations Law* 1990; also see further s 13.6 of the *Criminal Code Act* 12 of 1995 (Cth), hereinafter referred to as the *Criminal Code Act*.

²¹ Generally see s 995 of the *Corporations Law* 109 of 1989 (Cth), also known as the *Corporations Act* 1989, hereinafter referred to as the *Corporations Law* 1989; also see Black 1996 *ALJ* 987, 997; Trichardt 2003 *C & SLJ* 75, 83.

mainly prohibited stock (including securities) market manipulation and market rigging²² and its prohibition required proof of *mens rea* before any liability could be imputed to the accused persons. Consequently, the enforcement authorities struggled to obtain settlements and convictions in market manipulation cases.²³

2.3 The prohibition of market manipulation under the Corporations Act

Market manipulation and other related market misconduct activities are currently prohibited in the *Corporations Act*.²⁴ In addition, the scope of application of the market manipulation prohibition is now broadly extended to other related activities such as market rigging, front running,²⁵ insider trading and a failure to continuously disclose price-sensitive information that relates to the relevant financial instruments.²⁶ More importantly, among the major amendments made to the *Corporations Act* by the *Financial Services Reform Act* is the removal, on the part of the prosecution, of the explicit requirement of proving the existence of intent from the wording of the market manipulation and other related provisions before imputing any liability to the accused offenders.²⁷ Furthermore, all persons are prohibited from carrying out transactions

²² S 998 of the *Corporations Law* 1990; also see generally Goldwasser 1998 *Aust Jnl of Corp Law* 109; Meyer 1986 *C & SLJ* 92, 95; Armson 2009 *Armson* 2009 <http://goo.gl/iDn85l> 6-7; Goldwasser 1999a *C & SLJ* 44, 47.

²³ See s 5.6(1) read with subs (2) of the *Criminal Code Act*. Also see further Huang 2009 *C & SLJ* 9-10.

²⁴ See Part 7.10 of the *Corporations Act*.

²⁵ Front running is an illegal technique that is employed by market participants like brokers to anticipate the effect and impact of upcoming trading transactions on the price of certain securities in order to engage in market manipulation and other illicit trading activities. See Chitimira May 2014 *MJSS* 60, 61.

²⁶ These changes were introduced by the *Financial Services Reform Act*, which amended the *Corporations Act*'s market abuse provisions. See further the *Revised Explanatory Memorandum to the Financial Services Reform Bill* 2001 (Cth), hereinafter referred to as the *Revised Explanatory Memorandum*. Also see generally related remarks by Longo 2001 <https://goo.gl/31VrsC> 1-9. See further Huang 2009 *C & SLJ* 9.

²⁷ See s 1041A read with ss 1041B(1), 1041C, 1041D, 1041E, 1041F, 1041G and 1041H of the *Corporations Act*. The required fault elements for violating s 1041B(1) have now been established. Intention is the fault element for the physical element for doing or omitting to do an act as stated in that subsection and recklessness is the fault element for having or likely to have the effect of creating or causing the creation of a false or misleading appearance, as stated in that subsection. See s 1041B(1)(1A) of the *Corporations Act*. Also see generally the *Explanatory Memorandum of the Corporations Amendment (No 1) Bill* 2010 (Cth), hereinafter referred to as the *Corporations Amendment (No 1) Bill Explanatory Memorandum* 3.7 and 3.14. It is hoped that this will, in the long run, improve the enforcement of the market abuse prohibition in Australia. See Constable 2011 *MqJBL* 107; also see generally Huang 2009 *C & SLJ* 8-10, 16-17; Goldwasser 1999b *C & SLJ* 210; and further Armson 2009 <http://goo.gl/iDn85l> 2-4, 7-12, 16-17, 4-7.

which have or are likely to have the effect of creating an artificial price for trading in financial products or maintaining at an artificial level a price for trading in the products listed on a financial market in Australia.²⁸ As stated above, the current market manipulation provisions dispense with the requirement of proving the intention to induce others to sell, buy or subscribe to the affected securities or financial products before imputing any liability on the accused persons.²⁹ Put simply, the key issue now is whether the price of certain financial products is artificial or misleading. Thus, the focus is now on the effect of the market manipulative conduct in relation to the affected financial product rather than on the intention³⁰ of the trader or the person involved.

In addition, false trading,³¹ market rigging³² and the creation of a false or misleading appearance of active trading in a financial product or with respect to the market for or the price for trading in a financial product are expressly prohibited under the *Corporations Act*.³³ In addition, what may constitute a false or misleading appearance of active trading is outlined in the so-called deeming provisions concerning wash sales³⁴ and matched orders.³⁵ Likewise, the carrying out of fictitious transactions,

²⁸ Section 1041A of the *Corporations Act*.

²⁹ Section 1041A of the *Corporations Act*; compare with ss 997, 1259 of the *Corporations Law* 1990.

³⁰ Sections 5.4(4), 5.2 and 5.6(2) read with s 5.6(1) of the *Criminal Code Act*.

³¹ This occurs when a person negligently or intentionally employs a scheme, device or artifice which creates or might create and maintain a false or misleading appearance with respect to the market for or price of active trading in any securities or financial instruments on the relevant financial markets.

³² This is usually an unfair and illegal act or practice which is employed by a person or company to manipulate the sale or price of securities or financial instruments *inter alia* by raising or lowering the price of securities or financial instruments in order to create a false and misleading appearance of active trading in relation to such securities or financial instruments.

³³ Section 1041B(1) of the *Corporations Act*; also see s 1041B(1)(1A) of the same Act, which outlines the fault elements.

³⁴ A wash sale occurs where a person or an associate is both the buyer and seller in the same transaction (selling and repurchasing of the same or substantially the same financial product for the purpose of generating activity and increasing its price). S 1041B(2)(a) read with s 1041B(1) of the *Corporations Act*; s 1041B(3) of the *Corporations Act* sets out circumstances in which an acquisition or disposal of financial products does not involve a change in beneficial ownership and s 1041B(4) of the *Corporations Act* enumerates what a transaction of acquisition or disposal of financial products includes.

³⁵ A matched order occurs where a person and his associate place an order to buy or sell at the same time, for substantially the same number of securities or financial products at substantially the same price. S 1041B(2)(b) read with s 1041B(1) of the *Corporations Act*. Also see ss 5.2(2), 5.6(2) of the *Criminal Code Act*, where other physical elements are outlined which are taken into account by the courts or the prosecuting authorities in determining whether the market manipulation

which have the effect of maintaining, fluctuating, inflating or depressing the price for trading in the financial products on the relevant financial markets in Australia is prohibited.³⁶

The dissemination of information about illegal transactions is also prohibited in the *Corporations Act*.³⁷ In other words, all persons are prohibited from disseminating any statement or information to the effect that the price for trading in a financial product on the relevant markets will rise, fall or be maintained, or is likely to rise, fall or be maintained.³⁸ Similarly, the reckless or intentional³⁹ making or dissemination of a statement or information that is false or misleading materially and which is likely to induce other persons to deal in financial products or to affect the price of financial products is outlawed in Australia.⁴⁰

The *Corporations Act* further prohibits any person from inducing others to unlawfully deal in the relevant financial products.⁴¹ Moreover, this provision contains a definition of the term "dishonest".⁴² This prohibition on "inducing others" is now extended to conduct such as applying to become a standard employer sponsor of a superannuation entity and permitting a person to become a standard employer sponsor of a superannuation entity.⁴³ The *Corporations Act* prohibits any person, in the course of carrying on a financial services business in Australia, from engaging in dishonest

offences were committed by the accused persons in question. See paras 3.115, 15.15 of the *Supplementary Explanatory Memorandum to the Financial Services Reform Bill 2001* (Cth) (hereinafter referred to as the *Supplementary Explanatory Memorandum*) and the *Revised Explanatory Memorandum* respectively. See further Huang 2009 *C & SLJ* 10.

³⁶ Section 1041C of the *Corporations Act*.

³⁷ Section 1041D of the *Corporations Act*.

³⁸ See s 1041D of the *Corporations Act*. Also see generally Hieronymus 1977 *Hofstra L Rev* 41, 45; Loke 2007 *Aust Jnl of Corp Law* 22-50; McCabe 1993 *Fordham L Rev* 207, 223, which comments on the circumstances that are considered necessary when determining if the activity in question should be deemed unlawful and manipulative.

³⁹ Section 1041E(1)(c) of the *Corporations Act*.

⁴⁰ Section 1041E of the *Corporations Act*, which repealed ss 999 and 1261 of the *Corporations Law* 1990; also see generally Ministry of Economic Development 2002 <https://goo.gl/jxUg0K>.

⁴¹ Section 1041F of the *Corporations Act*.

⁴² In this regard, dishonest means (a) dishonest according to the standards of ordinary people; and (b) known by the person to be dishonest according to the standards of ordinary people. Also see s 1041F(2) read with s 1041G(2) of the *Corporations Act*.

⁴³ Section 1041F(3) of the *Corporations Act*. Accordingly, the contravention s 1041F will lead to civil liability despite the fact that it is not necessarily a civil penalty provision; see further the *Supplementary Explanatory Memorandum* paragraph 3.116.

conduct in relation to a financial product or service.⁴⁴ Dishonest conduct is defined to mean dishonest according to the standards of ordinary people, including conduct known by any person to be dishonest according to the standards of ordinary people.⁴⁵ This definition seems to contain both subjective and objective elements which must be proved by the prosecution in determining if the conduct in question will be dishonest as contemplated above.⁴⁶

Moreover, conduct in relation to a financial product or service that is misleading or deceptive or likely to mislead or deceive other persons with respect to certain financial products is broadly prohibited.⁴⁷ However, this prohibition does not apply to misleading or deceptive takeover, compulsory acquisition and fund raising documents or disclosure documents or statements, as defined in the *Financial Services Reform Act*.⁴⁸ However, the prohibition on misleading or deceptive conduct may apply: (a) to applying to become a standard employer sponsor of a superannuation entity, (b) to permitting a person to become a standard employer sponsor of a superannuation entity, (c) to a trustee of a superannuation entity's dealing with the beneficiary of that entity as such beneficiary, and (d) to a trustee of a superannuation entity's dealing with a standard employer sponsor.⁴⁹

Other activities that are related to market manipulation such as short selling⁵⁰ and market stabilisation are also outlawed in the *Corporations Act*. Notwithstanding this

⁴⁴ Section 1041G(1) of the *Corporations Act*, which is treated as a civil penalty provision but nonetheless its contravention may further results in criminal liability on the part of the offenders. Also see the *Revised Explanatory Memorandum* para 15.19.

⁴⁵ Section 1041G(2) of the *Corporations Act*.

⁴⁶ This criterion was employed in *R v Ghosh* [1982] 3 WLR 110; *R v Ghosh* [1982] QB 1053 read with *Boggeln v Williams* [1978] 1 W LR 873; *R v Feely* [1973] QB 530; *R v Gilks* [1972] 1 WLR 1341; *R v McIvor* [1982] 1 WLR 409; [1982] 1 All ER 491 (CA); also see s 1041G(2) of the *Corporations Act*.

⁴⁷ Section 1041H(1) and (2) of the *Corporations Act*; also see the *Revised Explanatory Memorandum* paras 15.8-15.10, which stipulates that s 1041H repealed and replaced the former provisions of s 995 of the *Corporations Law*.

⁴⁸ See Parts 7.7 and 7.9 of the *Financial Services Reform Act*; also s 1041H(3) of the *Corporations Act*; the *Revised Explanatory Memorandum* para 15.10.

⁴⁹ See further the *Supplementary Explanatory Memorandum* paras 3.117, 3.118.

⁵⁰ Short selling is a practice which involves selling securities or assets such as derivatives by the seller without owning them at the time of the transactions, with the intention of buying them back at a later stage but at a much lower price. S 1020B of the *Corporations Act*. Also see Chitimira May 2014 *MJSS* 67-68.

general prohibition, short selling and market stabilisation may only be permitted under certain requirements as stipulated in the *Corporations Act*.⁵¹

2.4 Comparative evaluation and analysis of the market manipulation prohibition

Notably, market manipulation was discouraged under the common law in the preceding years prior to the 1960s⁵² and 1899⁵³ in both South Africa and Australia respectively. Nonetheless, market manipulation practices were statutorily prohibited in Australia only in the early 1970s,⁵⁴ while such practices were outlawed in the late 1980s in South Africa.⁵⁵ Prior to this, market manipulation was prohibited in South Africa mainly by the common law.⁵⁶ Moreover, as is the position in Australia,⁵⁷ the concept of and conduct amounting to market manipulation are not statutorily defined under the *Financial Markets Act*.⁵⁸

Furthermore, like the situation in Australia,⁵⁹ market manipulation practices are statutorily prohibited under the *Financial Markets Act*.⁶⁰ However, it is hoped that the *Financial Markets Act* will be amended to provide an adequate statutory definition of the concept of market manipulation involving all the elements of this offence (including

⁵¹ For example, short selling and market-stabilisation may be allowed where they are the subject of a declaration by a market operator (for example a stock exchange) as approved for such short selling or market stabilisation purposes. See Chitimira May 2014 *MJSS* 67-68.

⁵² Generally see Henning and Du Toit 2000 *JJS* 155-165.

⁵³ See earlier comments in para 2.1 above.

⁵⁴ See the related discussion under para 2.2 above.

⁵⁵ Also see the relevant provisions of the now repealed statutes, the *Stock Exchanges Control Act* 1 of 1985, hereinafter referred to as the *Stock Exchanges Control Act*. See s 40 and the *Financial Markets Control Act* 55 of 1989, hereinafter referred to as the *Financial Markets Control Act*, see ss 20 -23. Notably, s 1 of the *Stock Exchanges Control Act* prohibited the market manipulation of securities, which included stocks, shares and debentures, while the relevant provisions of the *Financial Markets Control Act* prohibited the market manipulation of financial instruments, as defined in s 1, including futures contracts, option contracts and loan stock on a financial market. Also see Cassim 2008 *SA Merc LJ* 34; Henning & Du Toit 2000 *JJS* 155-165 & Chitimira 2014 *PER Journal* 937-965.

⁵⁶ Under the common law, market manipulation is usually referred to as a crime of "rigging the market". Also see Cassim 2008 *SA Merc LJ* (Part 1) 34; 40-42; Henning and Du Toit 2000 *JJS* 155-165.

⁵⁷ See the related remarks in paras 2.1 and 2.3 above.

⁵⁸ See ss 78, 80, 81, 82 of the *Financial Markets Act* and other related provisions under Ch X of the same Act. Also see further Cassim 2008 *SA Merc LJ* (Part 1) 34-35; Chitimira 2014 *PER* 937-965.

⁵⁹ See para 2.3 above.

⁶⁰ Sections 80, 81 of the *Financial Markets Act*.

how it is committed) as well as the various types of market manipulation practices,⁶¹ to enhance the combating of such practices in South Africa.⁶² Like the position under the *Corporations Act*,⁶³ the *Financial Markets Act*⁶⁴ also discourages trade-based market manipulation.⁶⁵ It is important to note that the prohibition of trade-based market manipulation contained in the *Financial Markets Act* is relatively similar⁶⁶ to that of the *Corporations Act*.⁶⁷ Moreover, the *Financial Markets Act* prohibits directly or indirectly the making or publication of false, misleading or deceptive statements, promises or forecasts in respect of the listed securities that relate to the past or future performance of a public company.⁶⁸ However, there is no similar provision in the *Corporations Act*.⁶⁹ In this respect, the South African prohibition on disclosure-based market manipulation is commendably broader⁷⁰ than that of the *Corporations Act*.⁷¹

⁶¹ In relations to this, it is submitted that the aforesaid definition should expressly apply to all the types and related market manipulation practices such as high frequency trading (a manipulative practice that involves persons like brokers, issuers and financial analysts who act in a proprietary capacity to employ sophisticated computerised algorithmic decision-making systems in order to obtain advantage from some minute discrepancies in the financial markets stock prices and then quickly trade in such stocks in large quantities to gain profit), front running, naked short selling (which occurs when a seller agrees to short sell a security within a stipulated period without taking prior measures to repurchase it at a later stage) and quote stuffing (a manipulative tactic which involves the prompt entering and withdrawing of large stock orders by any person in order to flood the market with quotes that other persons have to process, thereby causing them to lose their fair competitive advantage in such stocks). See Chitimira May 2014 *MJSS* 61-62, 64, 67-68.

⁶² See related remarks by Chitimira 2014 *PER* 964-965.

⁶³ See para 2.3 above.

⁶⁴ Section 80 of the *Financial Markets Act*.

⁶⁵ Section 80(1)(a) and (b) read with subs (2), s 80(3)(a)-(g) read with subss (4) and (5) of the *Financial Markets Act*; also see Cassim 2008 *SA Merc LJ* (Part 1) 42-51, 52-60 and a generally related discussion by Chitimira 2014 *PER* 937-965.

⁶⁶ Notably, the same position was also enumerated in s 75 of the *Securities Services Act* 36 of 2004, hereinafter referred to as the *Securities Services Act*; clause 84 of the *Draft Financial Markets Bill*, 2011, hereinafter referred to as the *Draft Financial Markets Bill*, and clause 82 of the *Financial Markets Bill* [B12-2012], hereinafter referred to as the *Financial Markets Bill*, 2012 (I have employed the term "clause" to refer to the provisions of both the *Draft Financial Markets Bill* and the *Financial Markets Bill*, 2012. In relation to this and for the purposes of this article, the relevant provisions of the afore-said Bills and the now repealed *Securities Services Act* will be referred to only where necessary for historical comparative analysis).

⁶⁷ See para 2.3 above.

⁶⁸ See s 81(1) and (2) read with subs (3). The same *status quo* was also stipulated in s 76(1) and (2) of the *Securities Services Act*; clause 85(1) and (2) of the *Draft Financial Markets Bill* and clause 83 of the *Financial Markets Bill*, 2012.

⁶⁹ Section 1041E; also see para 2.3 above.

⁷⁰ Section 81 of the *Financial Markets Act*. Notably, a similar approach was also provided under s 76 of the *Securities Services Act*; clause 85 of the *Draft Financial Markets Bill*; clause 83 of the *Financial Markets Bill*, 2012. See further Cassim 2008 *SA Merc LJ* (Part 2) 178.

⁷¹ See para 2.3 above.

In addition, unlike the similar prohibition provided in the *Corporations Act*,⁷² the prohibition of disclosure-based market manipulation contained in the *Financial Markets Act*⁷³ does not expressly require the inducement of other persons to buy or sell any affected listed securities before any liability is imposed on the offenders.⁷⁴ In addition, the concealment or omission of a material fact which gives rise to or which may give rise to the making or publication of a statement, promise or forecast that is false or deceptive is prohibited under the *Financial Markets Act*.⁷⁵ The use of the term "material fact" in this prohibition could suggest that fault is required to determine whether the concealed or omitted fact could reasonably give rise to disclosure-based market manipulation in South Africa.⁷⁶ On the other hand, the *Corporations Act*⁷⁷ and the *Financial Markets Act*'s disclosure-based market manipulation prohibition⁷⁸ may give rise to liability on the part of the accused person only where such person knew or ought reasonably to have known that the statements he made or published were false or misleading. This could further suggest that a similar approach is to be adopted in the enforcement of the disclosure-based market manipulation prohibition in both Australia and South Africa.⁷⁹ Moreover, in contrast to the position in Australia⁸⁰ there is no specific provision in the *Financial Markets Act* which expressly prohibits, directly or indirectly, the dissemination of information about illegal transactions and dishonest conduct in relation to listed securities.⁸¹ In addition, market (price) stabilisation

⁷² See generally s 1041E read with s 1041F and also para 2.3 above.

⁷³ Section 81 of the *Financial Markets Act*.

⁷⁴ Seemingly, this approach was previously embedded in s 76 of the *Securities Services Act*; clause 85 of the *Draft Financial Markets Bill*; clause 83 of the *Financial Markets Bill*, 2012. See further Cassim 2008 *SA Merc LJ* (Part 2) 179-180.

⁷⁵ Section 81(1)(b) of the *Financial Markets Act*. This prohibition was initially provided in s 76(1)(b) of the *Securities Services Act*; clause 85(1)(b) of the *Draft Financial Markets Bill* and clause 83(1)(b) of the *Financial Markets Bill*, 2012.

⁷⁶ In other words, the fact that the concealed or omitted fact must be a "material fact" and not just merely any fact suggests that fault elements or an objective test will be established and employed by the relevant courts. S 81(1) of the *Financial Markets Act*.

⁷⁷ Section 1041E(1)(c)(ii) of the *Corporations Act*.

⁷⁸ Section 81(1) read with subss (2) and (3) of the *Financial Markets Act*. Likewise, this approach was previously employed in s 76(1)(a) read with (b) of the *Securities Services Act*; Cassim 2008 *SA Merc LJ* (Part 2) 181-182. See further clause 85(1)(a) read with (b) of the *Draft Financial Markets Bill* and clauses 83(1) of the *Financial Markets Bill*, 2012, which had related provisions.

⁷⁹ See further Huang 2009 *C & SLJ* 10; Cassim 2008 *SA Merc LJ* (Part 2) 181-182.

⁸⁰ Sections 1041D and 1041G of the *Corporations Act*. Also see para 2.3 above.

⁸¹ See ss 80 and 81 of the *Financial Markets Act*. This was also the position under ss 75 and 76 of the *Securities Services Act*; clauses 84 and 85 of the *Draft Financial Markets Bill* and clauses 82 and 83 of the *Financial Markets Bill*, 2012.

mechanisms are allowed in Australia when certain prescribed requirements are met,⁸² while such mechanisms are generally treated as a defence against some market manipulation offences in South Africa.⁸³ Nonetheless, in contrast to the situation in Australia,⁸⁴ there are relatively few defences apart from the price-stabilisation defence that are available to any person accused of committing market manipulation offences in South Africa.⁸⁵

3 Available penalties and remedies

The *Corporations Act* extends civil penalties, civil remedies⁸⁶ and criminal penalties to any person who violates its provisions on market manipulation.⁸⁷

3.1 Criminal penalties

Any person who engages in market manipulation activities is liable for a criminal offence and penalty.⁸⁸ The discretion to institute criminal proceedings rests primarily with the Commonwealth Director of Public Prosecutions (Commonwealth DPP). Nonetheless, the Australian Securities and Investments Commission (ASIC) may, after consultation with the Commonwealth DPP, bring criminal proceedings against any person accused of contravening the relevant market abuse provisions in Australia.⁸⁹

⁸² Cassim 2008 *SA Merc LJ* (Part 2) 184-185.

⁸³ See s 80(4) of the *Financial Markets Act*. Similar provisions were previously outlined in s 75(3)(i) of the *Securities Services Act*; clause 84(3)(i) of the *Draft Financial Markets Bill*; clause 82(3)(i) of the *Financial Markets Bill, 2012*; also see Cassim 2008 *SA Merc LJ* (Part 2) 184-185; the Johannesburg Stock Exchange Limited (the JSE) Listing Requirements, which outlines some obligations or requirements that must be complied with by the issuers of securities before engaging in price-stabilisation in South Africa. See further Rule 5.99 of the JSE Listing Requirements, which stipulates the various circumstances and conditions under which the price-stabilisation measures will be permitted by the JSE and the *Financial Markets Act*.

⁸⁴ Section 1317S of the *Corporations Act*. Also see Cassim 2008 *SA Merc LJ* (Part 2) 184-185, 189.

⁸⁵ See ss 80 and 81 of the *Financial Markets Act*. It appears that the same approach was previously employed in ss 75 and 76 of the *Securities Services Act*; clauses 84 and 85 of the *Draft Financial Markets Bill*; clauses 82 and 83 of the *Financial Markets Bill, 2012*; also see Cassim 2008 *SA Merc LJ* (Part 2) 198-199.

⁸⁶ Section 1041I provides for civil liability against any person who violates s 1041E to s 1041H of the *Corporations Act*.

⁸⁷ Comino 2006 *ABLR* 428, 430-446; Cassim 2008 *SA Merc LJ* (Part 2) 192; see further Ford, Austin and Ramsay *Ford's Principles* Looseleaf service update number 43, 9/2004 9406 [9.690] read with 9/2004 9338 [9.605].

⁸⁸ Section 1308A of the *Corporations Act*; also see Comino 2006 *ABLR* 430-446.

⁸⁹ Comino 2006 *ABLR* 429-446.

Moreover, the prosecution of market manipulation and other market misconduct offences may be instituted within five years after the commission of the offence in question or at any time as stipulated by the Minister of Justice.⁹⁰ Any person who engages in manipulation or other market misconduct offences⁹¹ will be liable for a maximum criminal penalty fine of Aus \$22, 000 for individuals or Aus \$110, 000 for a body corporate, or imprisonment for a period not exceeding five years, or both such fine and imprisonment.⁹² These penalties were recently increased by the *Corporations Amendment (No 1) Act*,⁹³ to a maximum pecuniary fine of Aus \$495, 000 or three times the profit gained or loss avoided, whichever is the greater,⁹⁴ or ten years imprisonment,⁹⁵ or both such fine and imprisonment, 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 10% of the body corporate's annual turnover during the relevant period in which the offence was committed, whichever is greater.⁹⁶ This clearly suggests that market manipulation and other related market misconduct offences are all treated as criminal offences, as they carry the same penalty.⁹⁷ In relation to this, the ASIC may further bring such criminal proceedings even after civil penalty proceedings for the same conduct have been instituted.⁹⁸ However, where a person has been convicted of a criminal offence for the same conduct, no civil penalty action will be additionally instituted against such person.⁹⁹

⁹⁰ Section 1316 of the *Corporations Act*.

⁹¹ Section 1041A to s 1041G read with s 1311 of the *Corporations Act*.

⁹² Sections 1311; 1312 and Schedule 3 item 309C of the *Corporations Act*. Also see s 4AA of the *Crimes Act 12 of 1914 (Cth)* as amended, hereinafter referred to as the *Crimes Act*.

⁹³ *Corporations Amendment (No 1) Act 131 of 2010 (Cth)*, hereinafter referred to as the *Corporations Amendment (No 1) Act*.

⁹⁴ See the *Corporations Amendment (No 1) Bill Explanatory Memorandum 3.11*.

⁹⁵ Generally see the *Corporations Amendment (No 1) Bill Explanatory Memorandum 3.11*; also see Bowen 2010 <http://goo.gl/bLM7eN>; Constable 2011 *MqJBL* 107, for further details regarding these penalties.

⁹⁶ See Bowen 2010 <http://goo.gl/7WXkYS>; also see further the *Corporations Amendment (No 1) Bill Explanatory Memorandum 3.11* and see further analysis on these new sanctions by Ewart and Tobias 2010 <http://goo.gl/mJBDdj>; Bowen 2010 <http://goo.gl/bLM7eN>.

⁹⁷ Austin 2009 <http://goo.gl/3t76k5>; also see a generally related article by Austin 2008 <http://www.ssrn.com/abstract=1288970>.

⁹⁸ Austin 2009 <http://goo.gl/3t76k5>.

⁹⁹ Section 1317N-s 1317P read with ss 1041I, 1317E-1317HA and 206C of the *Corporations Act*.

Likewise, as is the position under the *Corporations Act* in Australia,¹⁰⁰ the *Financial Markets Act* provides criminal sanctions for market manipulation offences.¹⁰¹ Nonetheless, in contrast to the position in Australia,¹⁰² the *Financial Markets Act's* criminal penalties for market manipulation¹⁰³ might be less deterrent, particularly with regard to some unscrupulous big business persons, or companies which may easily afford to pay the R50 million fine and commit other market manipulation offences in the future.¹⁰⁴ In this regard it is hoped that the *Financial Markets Act* will be amended in line with the Australian position¹⁰⁵ to introduce sufficient and more deterrent maximum criminal penalties for individuals¹⁰⁶ and juristic persons,¹⁰⁷ with much higher maximum penalties being imposed on such juristic persons.¹⁰⁸ Like its Australian counterpart,¹⁰⁹ the Director of Public Prosecutions (DPP) in South Africa has the main prerogative to institute criminal proceedings against the perpetrators of market manipulation.¹¹⁰ Furthermore, in South Africa the DPP may institute such proceedings only after referrals from the Financial Services Board (FSB).¹¹¹ Nevertheless, unlike

¹⁰⁰ See related discussion above.

¹⁰¹ See s 109(a) read with ss 80 and 81 of the *Financial Markets Act*, which directly outlaws any conduct which constitutes a market manipulation offence or which may constitute such an offence in South Africa. Also see similar comments in Chitimira 2014 *Speculum Juris* 108, 119-124; Cassim 2008 *SA Merc LJ* (Part 2) 193-195.

¹⁰² See the related comments above.

¹⁰³ See s 109(a) of the *Financial Markets Act*.

¹⁰⁴ See Chitimira March 2014 *MJSS* 47, 53-54; Cassim 2008 *SA Merc LJ* (Part 2) 194.

¹⁰⁵ See the related comments above.

¹⁰⁶ In the light of this it is submitted that the *Financial Markets Act* should be amended to enact a specific provision which stipulates that an individual who is convicted of an offence relating to insider trading or market manipulation will be liable to a fine of up to R85 million, or to imprisonment for a period of not more than 25 years, or to both such a fine and imprisonment.

¹⁰⁷ It is further submitted that the *Financial Markets Act* should be amended to enact a specific provision which stipulates that a juristic person or company that is convicted of an offence relating to insider trading or market manipulation will be liable to a maximum fine of R750 million, or to six times the profit made or loss avoided, or 20% of the company or juristic person's annual turnover during the period in which the offence was committed, whichever is greater.

¹⁰⁸ See the related remarks by Chitimira 2014 *Speculum Juris* 119-124; Chitimira and Lawack 2012 *Obiter* 549-553.

¹⁰⁹ See the related remarks on the powers of the Commonwealth DPP above.

¹¹⁰ See s 84(10) of the *Financial Markets Act*. Also see similar comments by Chitimira 2014 *Speculum Juris* 119-124; Luiz 2011 *SA Merc LJ* 151-172; Cassim 2008 *SA Merc LJ* (Part 2) 193-195.

¹¹¹ Generally see s 84(10) of the *Financial Markets Act*. It appears that this approach was directly borrowed from previous provisions such as s 82(9) of the *Securities Services Act*; clause 91(9) of the *Draft Financial Markets Bill* and clause 86(10) of the *Financial Markets Bill*, 2012. See further Luiz 2011 *SA Merc LJ* 151-172; Chitimira 2014 *Speculum Juris* 119-124; Cassim 2008 *SA Merc LJ* (Part 2) 193-195, for related discussions on the enforcement of the market abuse ban by the FSB and the DPP.

the situation in Australia,¹¹² the *Financial Markets Act* does not specifically provide whether the FSB may, in addition to administrative proceedings,¹¹³ bring its own criminal proceedings against the market manipulation offenders without initially referring such proceedings to the DPP and the relevant courts in South Africa.¹¹⁴ It is important to note, however, that the enforcement of the criminal sanctions for market manipulation and other related offences has to some extent been impeded by the insurmountable difficulties relating to the high evidentiary burden of proof required in the prosecution of such offences in both South Africa¹¹⁵ and Australia.¹¹⁶ In addition, the implementation of the criminal sanctions for market manipulation has so far been relatively more successful in Australia¹¹⁷ than in South Africa.¹¹⁸ This could in part be because of the considerable number of cases that have come before the courts in Australia.¹¹⁹ In contrast, relatively few cases involving market manipulation offences have been successfully investigated and prosecuted in South Africa to date.¹²⁰

¹¹² See the similar comments above.

¹¹³ See s 82 of the *Financial Markets Act*.

¹¹⁴ Apparently, such proceedings may be instituted by the FSB only if the DPP refuses to prosecute the market manipulation cases in question. See s 84(10) of the *Financial Markets Act*.

¹¹⁵ See the related comments in Chitimira March 2014 *MJSS* 52-54; Chitimira 2014 *Speculum Juris* 119-124; Chitimira and Lawack 2012 *Obiter* 549-553.

¹¹⁶ Samuel 2005 http://www.accc.gov.au/Samuel_Paper_2005.htm; Constable 2011 *MqJBL* 107-110.

¹¹⁷ Generally see some related comments above and see further Samuel 2005 http://www.accc.gov.au/Samuel_Paper_2005.htm; Constable 2011 *MqJBL* 107-110.

¹¹⁸ See the relevant market manipulation enforcement statistics by the FSB 2014 <https://goo.gl/RPpjMC>, which show that from the period between 2006 and 2014, relatively few criminal cases of market manipulation were successfully investigated and prosecuted by both the FSB and the relevant courts. Also see the related comments on the enforcement of the market abuse ban by Chanetsa *Business Report* page number unknown; Blincoe 2001 <http://goo.gl/A4Wje7>, where two Datatec directors, Jens Montanana and Robin Rindel were reportedly fined about R1 million each for insider trading by the FSB; Barron 2014 <http://goo.gl/RPqhWq>, where Greg Blank was reportedly sentenced to eight years imprisonment for stock market-related fraud and front running in 1992. See further the related comments by Chitimira March 2014 *MJSS* 52-54; Chitimira 2014 *Speculum Juris* 119-124; generally see Chitimira and Lawack 2012 *Obiter* 549-553.

¹¹⁹ *R v Adler* [2005] NSWSC 274; *R v Adler* [2005] 53 ACSR 471; *Adler v R* (2006) 57 ACSR 675; *R v Williams* [2005] NSWSC 315; *R v Williams* (2005) 216 ALR 113; also see Comino 2006 *ABLR* 440-446.

¹²⁰ Generally see the related enforcement actions by the FSB in 2014 (FSB 2014 <https://goo.gl/RPpjMC>), which shows that from the period between 2006 and 2014 relatively few criminal cases of market manipulation were successfully investigated and prosecuted by the FSB and the relevant courts. Also see the related analysis by Chitimira March 2014 *MJSS* 52-54; Chitimira 2014 *Speculum Juris* 119-124; generally see Chitimira and Lawack 2012 *Obiter* 549-553.

3.2 *Civil penalties*

Civil penalties may also be imposed upon any person who violates market manipulation¹²¹ and other market misconduct provisions.¹²² Currently, such penalties may be imposed only under the civil penalty provisions.¹²³ Put differently, the civil penalty provisions are now applicable to both the market misconduct and continuous disclosure provisions.¹²⁴ Consequently, civil penalties may be brought against the offenders, either as financial services civil penalties or as corporation or scheme civil penalties.¹²⁵

The ASIC is statutorily empowered to institute any relevant civil action against the offenders.¹²⁶ For example, the ASIC may impose civil pecuniary penalties of up to Aus \$200, 000 on individuals and Aus \$1million on a body corporate, and the recovered money will be utilised to compensate all the prejudiced persons.¹²⁷ It is noteworthy that these pecuniary penalties were recently increased to enhance the combating of market manipulation and similar practices in Australia.¹²⁸ In addition, the ASIC may disqualify the perpetrators of market manipulation and other market misconduct offences from the management of any company or corporation for a certain period.¹²⁹ The ASIC or the courts may declare (publicise) the existence of a violation, when satisfied that a particular person was involved in market manipulation or other related market misconduct offences.¹³⁰ This publication is employed *inter alia* to discourage

¹²¹ Sections 1041A-1041E of the *Corporations Act*.

¹²² Sections 1041F-1041H of the *Corporations Act*. The civil penalty provisions were first introduced in 1993 and are now contained in Part 9.4B of the *Corporations Act*.

¹²³ Sections 1317E-1317HA read with s 206C of the *Corporations Act*.

¹²⁴ Sections 674-675 of the *Corporations Act*, which relates to continuous disclosure requirements in Australia; also see Longo 2001 <https://goo.gl/31VrsC>.

¹²⁵ The financial services civil penalties apply to any person who violates the market misconduct provisions while the corporation or scheme civil penalties apply to any contravention in relation to the continuous disclosure provisions. See ss 1317E(1)(ja), 1317J(3A) and 1041I of the *Corporations Act*.

¹²⁶ Sections 1317E-1317HA read with ss 206C, 1317J(1) and (2) of the *Corporations Act*.

¹²⁷ Sections 1317E-1317HA, s 206C of the *Corporations Act*. Also see related analysis by Austin 2009 <http://goo.gl/3t76k5> 3; and further comments on the recently introduced new market abuse penalties by Bowen 2010 <http://goo.gl/bLM7eN>.

¹²⁸ Constable 2011 *MqJBL* 107 & generally see paragraph 3.1 above.

¹²⁹ See s 1317E to s 1317HA & s 206C of the *Corporations Act*. Also see Bowen 2010 <http://goo.gl/bLM7eN>.

¹³⁰ Section 1317E(1) of the *Corporations Act*. Also see further Cassim 2008 *SA Merc LJ* (Part 2) 192.

unscrupulous persons from engaging in market manipulation.¹³¹ The ASIC may further impose orders for civil penalties for punitive purposes against market manipulation offenders.¹³² Notably, the ASIC has a discretion regarding the actual amount to be imposed as punitive or pecuniary civil penalties against such offenders.¹³³ In addition, further civil action against the offenders can be brought by the actual prejudiced person (a private right of action)¹³⁴ and the relevant courts. For example, a court may, after it is satisfied that the contravention in question will materially prejudice the issuers of the financial products to which it relates,¹³⁵ impose a civil compensatory action against the offenders to recover any damages incurred by the affected persons.¹³⁶

The financial services civil penalties have relatively improved the enforcement of the market manipulation and other market misconduct provisions in Australia to date.¹³⁷ Put differently, despite the fact that the lower standard of proof required in civil cases has not been quite utilised by both the ASIC and the courts to obtain settlements in market manipulation cases, the general enforcement of the market manipulation prohibition has been relatively successful in Australia.¹³⁸

¹³¹ See Welsh 2004 *Aust Jnl of Corp Law* 175, 187; Mann 1992 *Yale LJ* 1795, 1845.

¹³² *ASIC v Plymin* [2003] VSC 123; *ASIC v Plymin* (2003) 46 ACSR 126; *ASIC v Plymin* (2003) 21 ACLC 700, where the ASIC obtained banning orders, pecuniary penalties and compensation orders against Bernard Plymin, John Elliot and William Harrison in relation to their contravention of the market misconduct provisions, as directors of Water Wheel and its subsidiary Water Wheel Mills Pty Limited. Also see Comino 2005 *Aust Jnl of Corp Law* 48-67.

¹³³ However, where any financial services civil provision was violated, the courts or the ASIC may impose pecuniary penalties up to Aus \$200 000 on the perpetrators of such offences. S 1317EA of the *Corporations Act* read with s 1317FA of the same Act.

¹³⁴ Section 1317J(3A) of the *Corporations Act*.

¹³⁵ Section 1317E(1) of the *Corporations Act*.

¹³⁶ Section 1041I of the *Corporations Act* read with s 1317S of the same Act. The Commonwealth DPP usually consults with the ASIC to determine whether to bring civil penalty actions or criminal proceedings in relation to any market abuse violations.

¹³⁷ Middleton 2003 *C & SLJ* 507-529.

¹³⁸ Constable 2011 *MqJBL* 92-96; Longo 2001 *Keeping Good Companies* 635; Andrews 2003 *Am J Comp L* 137, 146; Huang 2009 *C & SLJ* 12-15; Gilligan, Bird and Ramsay 1999 *UNSWLJ* 417, 424; Goldwasser 1998 *Aust Jnl of Corp Law* 111. See further *Donald v ASIC* (2001) 38 ACSR 10; *Donald v ASIC* [2001] AATA 366, the accused was found guilty of market manipulating the price relating to the affected shares (financial products). For further discussion on the theory, history and application of civil penalties in Australia, see Gething 1996 *ABLR* 375-390; Bird 1996 *C & SLJ* 405-427.

On the contrary, apart from the provisions of s 6D of the *Financial Institutions (Protection of Funds) Act*,¹³⁹ the *Financial Markets Act*'s market manipulation provisions do not expressly give rise to civil or administrative¹⁴⁰ liability on the part of the offenders in spite of the fact that they are relatively comparable and commendable internationally,¹⁴¹ especially with regard to the nature and scope of their application.¹⁴² Consequently, it is hoped that South Africa will follow the example of Australia¹⁴³ and other relevant jurisdictions on derivative civil penalties for market manipulation, to promptly introduce specific provisions for such penalties in the *Financial Markets Act*.¹⁴⁴ In addition, apart from the provisions of s 6D of the *Protection of Funds Act* and the available common law remedies, it appears that the affected persons are not statutorily empowered to recover their losses through their own private civil litigation proceedings for market manipulation under the *Financial Markets Act*.¹⁴⁵ Therefore, notwithstanding the fact that private persons do not have resources and investigatory powers similar to those of the FSB to institute the relevant actions against the

¹³⁹ *Financial Institutions (Protection of Funds) Act* 28 of 2001 as amended, hereinafter referred to as the *Protection of Funds Act*.

¹⁴⁰ For instance, see s 82 of the *Financial Markets Act*, which provides that administrative sanctions as determined by the Enforcement Committee (EC) will be paid to prejudiced persons only in cases of insider trading, and there are no other provisions under Ch X entitled "Market Abuse" which expressly empower the courts to impose administrative sanctions against the market manipulation offenders. It appears that a civil remedy which was mainly enforced by the FSB under s 77 read with s 82 of the *Securities Services Act* has now been replaced by administrative sanctions. In relation to this, the *Financial Markets Act* now mainly provides for an administrative sanction that may be imposed on the market abuse offenders by the EC. See s 82 read with s 84 of the *Financial Markets Act*. This could suggest that the EC may now impose administrative sanctions upon the market manipulation offenders after referrals in terms of s 99 of the *Financial Markets Act* read with s 6A(2) of the *Protection of Funds Act*, subject to appeals in terms of s 6F read with s 6B to s 6I of the same Act. See further Luiz 2011 *SA Merc LJ* 151-172; Chitimira 2014 *Speculum Juris* 119-124.

¹⁴¹ The author submits that the *Financial Markets Act*'s market manipulation provisions are relatively comparable to similar provisions in other jurisdictions such as the USA, the UK and the European Union (EU).

¹⁴² Ss 80 and 81 read with s 109(a) of the *Financial Markets Act*. Also see generally Cassim 2008 *SA Merc LJ* (Part 1) 33-36; Chitimira 2014 *Speculum Juris* 119-124; Chitimira March 2014 *MJSS* 53-54.

¹⁴³ See the related Australian discussion above.

¹⁴⁴ See ss 80 and 81 of the *Financial Markets Act*, which do not provide for any civil penalties for market manipulation.

¹⁴⁵ Sections 80 and 81 of the *Financial Markets Act*. This flaw was also present in ss 75 and 76 of the *Securities Services Act*,. Also see Cassim 2008 *SA Merc LJ* (Part 2) 191-193. The author submits that the *Financial Markets Act* should have considered the Australians' *Corporations Act* approach, of not relying on criminal and administrative penalties alone for market manipulation. See further Cassim 2008 *SA Merc LJ* (Part 2) 191-195; 198-199.

offenders on their own, it is hoped that the *Financial Markets Act* will be amended in line with the position in Australia¹⁴⁶ to provide a private right of action for the affected persons to claim their own civil or administrative damages directly from the market manipulation offenders. Moreover, in contrast to the Australian position,¹⁴⁷ the civil remedies and civil penalties for market manipulation are not statutorily classified differently under the *Financial Markets Act*.¹⁴⁸

3.3 Civil remedies

Civil remedies are also available to all the persons prejudiced by market manipulation¹⁴⁹ and other related market misconduct offences.¹⁵⁰ For instance, the ASIC may institute civil compensation orders against any person who contravenes the market manipulation and other market misconduct provisions.¹⁵¹ The ASIC has further discretion and authority to determine the actual appropriate civil compensatory remedies that will be granted to any persons affected by market manipulation and other related offences.¹⁵²

In addition, a private right of action is expressly provided for any persons who incurred losses as a result of market manipulation and other market misconduct violations by way of application for a compensation order.¹⁵³ This enables the affected persons to claim their civil compensatory damages timeously and directly from the perpetrators of market manipulation and other related offences.¹⁵⁴ As stated earlier,¹⁵⁵ the relevant

¹⁴⁶ See the earlier Australian discussion above.

¹⁴⁷ Section 1041I of the *Corporations Act*. Also see the earlier Australian discussion above and the related comments in para 3.3 below.

¹⁴⁸ See ss 80 and 81 of the *Financial Markets Act*, which do not classify or provide any distinct civil remedies and civil penalties for market manipulation. Also see the related comments by Chitimira March 2014 *MJSS* 53-54.

¹⁴⁹ Section 1041A-1041E of the *Corporations Act*.

¹⁵⁰ Section 1041F-1041H of the *Corporations Act*.

¹⁵¹ Section 1317E-1317HA, 206C read with s 1325 of the *Corporations Act*.

¹⁵² Section 1317J(1) and (2) of the *Corporations Act* read with s 1317E(1)(ja) of the same Act. Also see Austin 2009 <http://goo.gl/3t76k5> 3.

¹⁵³ Section 1317J(3A) of the *Corporations Act* read with ss 1324A, 1324B, 1325(2) of the same Act, which deals with injunctive relief during prosecutions, orders for the disclosure of relevant information, and compensatory orders.

¹⁵⁴ Sections 1041I and 1317HA of the *Corporations Act*. This is usually referred to as a private right of action or piggy-back civil rights against the offenders, who are then required to compensate the claimants or the affected investors.

¹⁵⁵ See the related comments in para 3.2 above.

courts or the ASIC may make a declaration that certain conduct constituted a market manipulation violation.¹⁵⁶ Importantly, the ASIC or any other applicant in a civil action for remedies may rely on such a declaration without being required to further prove the actual occurrence of market manipulation or other related contravention in question.¹⁵⁷ A declaration of the contravention of market manipulation or other market misconduct provisions is therefore a useful tool to expedite actions for civil remedies by both the courts and the ASIC.¹⁵⁸

Furthermore, the ASIC may seek civil or administrative freezing orders or injunctions from the courts against the perpetrators of market manipulation and other market misconduct offences.¹⁵⁹ This remedy is, among other things, aimed at directly preventing or stopping the offenders from continuing with a particular illicit conduct or their market manipulation and market misconduct violations.¹⁶⁰ In addition, the ASIC or the Australian Securities Exchange (ASX) may take disciplinary action against a market participant or any person who committed market manipulation and other related offences. In essence, this implies that such matters will be brought to the ASX Disciplinary Tribunal, which will then decide on the appropriate civil remedy to be imposed against such offenders.¹⁶¹

Any prejudiced person or the ASIC¹⁶² may seek banning orders or disqualification orders from the courts against those who violate market manipulation or other market misconduct provisions.¹⁶³ Notably, the banning or disqualification orders may be implemented against the offenders permanently or for a specified period.¹⁶⁴ Therefore,

¹⁵⁶ Section 1317E(1) read with s 1041I of the *Corporations Act*. Also see Cassim 2008 *SA Merc LJ* (Part 2) 192.

¹⁵⁷ Cassim 2008 *SA Merc LJ* (Part 2) 192; see further the related comments and analysis by Morrell 2006 http://www.takeovers.govnt.nz/speeches/km_290506.pdf 11-12.

¹⁵⁸ Morrell 2006 http://www.takeovers.govnt.nz/speeches/km_290506.pdf 12.

¹⁵⁹ Sections 1323, 1324 of the *Corporations Act*.

¹⁶⁰ See generally s 1325 read with ss 1323 and 1324 of the *Corporations Act*. Also see Austin 2009 <http://goo.gl/3t76k5> 3.

¹⁶¹ For more details regarding the role of the ASX Disciplinary Tribunal, see ASX 2010 <http://goo.gl/6DP709>; also see generally the ASX 2010 <http://goo.gl/sOR5t4> Rule 28.3.1, for related analysis regarding the ASX Rules relating to the functions of the ASX Disciplinary Tribunal and further related remarks by Austin 2009 <http://goo.gl/3t76k5> 5, 7.

¹⁶² Section 920B of the *Corporations Act*.

¹⁶³ Section 1041A-1041H of the *Corporations Act*; Constable 2011 *MqJBL* 96-99.

¹⁶⁴ Section 920B(2) of the *Corporations Act*.

the courts and the ASIC have discretionary powers to determine the exact period under which the accused persons will be banned or disqualified from executing their managerial duties in the affected corporations.¹⁶⁵ Moreover, any person who can show or prove that he suffered a loss as a result of the contravention of continuous disclosure provisions will recover his damages from the offenders concerned.¹⁶⁶

In a nutshell, although it may be argued that the civil remedies are at the bottom of the Australian securities law enforcement pyramid, which has civil penalties in the middle and criminal penalties at the top, such remedies have to date relatively enhanced the general combating of market manipulation and other related offences in Australia.¹⁶⁷

On the other hand, as stated above,¹⁶⁸ apart from the available common law remedies and the provisions of s 6D of the *Protection of Funds Act*, the *Financial Markets Act* does not have specific civil remedies for market manipulation.¹⁶⁹ This could imply that the *Financial Markets Act* treats and interprets market manipulation simply as a wrong against the financial markets rather than as a wrong against all the affected persons.¹⁷⁰ This may further suggest that its market manipulation prohibition is directed only at the public good and not necessarily at the individual or affected person's protection.¹⁷¹ It is argued, however, that such affected persons are not statutorily precluded from seeking their own additional civil remedies, apart from

¹⁶⁵ Section 920A(1) of the *Corporations Act*; *ASIC v Adler* [2003] NSWCA 131; *ASIC v Adler* (2003) 46 ACSR 504; *ASIC v Adler* (2003) 21 ACLC 1810, where Adler was disqualified for 20 years and ordered to pay approximately Aus \$7million compensation jointly with Adler Corporation Pty Limited and Williams. In addition, Adler was further ordered to pay Aus \$450 000 pecuniary penalties. See further the related articles by Main *AFR* 6; Johnston *AFR* 1, where the ASIC successfully requested and imposed on Vizard, a five-year ban on managing companies and about Aus \$390 000 compensatory and pecuniary penalties.

¹⁶⁶ Section 1317J(3A) read with ss 1317J(1) and (2) of the *Corporations Act*; Goldwasser 1999b *C & SLJ* 210; Longo 2001 <https://goo.gl/31VrsC> 41.

¹⁶⁷ Longo 2001 <https://goo.gl/31VrsC> 21, 23; Goldwasser 1999b *C & SLJ* 210.

¹⁶⁸ See the related remarks in para 3.2 above.

¹⁶⁹ Sections 80 and 81 read with s 109(a) of the *Financial Markets Act*. Conspicuously, this flaw was previously enshrined in ss 75 and 77 read with s 115(a) of the *Securities Services Act*. See further Cassim 2008 *SA Merc LJ* (Part 1) 33-36; Chitimira 2014 *Speculum Juris* 119-124; Chitimira March 2014 *MJSS* 53-54.

¹⁷⁰ See the related discussions by Luiz 2002 *JBL* 183; Henning and Du Toit 2000 *Company Lawyer* 29-36; Cassim 2008 *SA Merc LJ* (Part 2) 192. Also see Chitimira March 2014 *MJSS* 53-54, for further related analysis.

¹⁷¹ See further Henning and Du Toit 2000 *Company Lawyer* 29-36, for a related discussion.

private rights of action, directly from the market manipulation offenders through the provisions of the *Protection of Funds Act*¹⁷² or any other relevant legislation. In addition, unlike the situation in Australia,¹⁷³ no provision was made in the *Financial Markets Act* for the competent courts or the FSB to make a declaration of contravention of the market manipulation provisions whenever such contravention occurs.¹⁷⁴ As a result, the preventive and deterrent effect attached to the declaration of contravention by the courts in Australia is obviously absent in South Africa.¹⁷⁵ Moreover, in contrast to the position in Australia,¹⁷⁶ and as already stated above, apart from relying on the relevant provisions of the *Protection of Funds Act*,¹⁷⁷ the EC may seek an administrative compensatory monetary remedy payable to the FSB for later reimbursement to the affected persons only with regard to insider trading violations under section 82 of the *Financial Markets Act*.¹⁷⁸

¹⁷² See s 6D read with ss 6A, 6B, 6C, 6E, 6F and 6G of the *Protection of Funds Act*; see further Cassim 2008 *SA Merc LJ* (Part 2) 192, 195; also see Chitimira 2014 *Speculum Juris* 119-124; Chitimira March 2014 *MJSS* 52-56.

¹⁷³ See the related comments above.

¹⁷⁴ Put differently, it is merely stated that the FSB may, by notice on its official website or by means of other appropriate public media, publish any outcome, status or details of market abuse investigations if such publication is in the public interest. See s 84(2)(e) read with ss 78, 80, 81 and 82 of the *Financial Markets Act*. Also see similar remarks in Chitimira and Lawack 2013 *Obiter* 200-217; Chitimira 2014 *Speculum Juris* 108-124.

¹⁷⁵ This could have contributed in part to the inconsistent enforcement of the market manipulation ban in South Africa. See the FSB *Annual Report 2011* 99-101 and the FSB *Annual Report 2013* 128-130, for related comments on the new and completed investigations, related issues on administrative penalties and appeals of market abuse cases in 2011 and 2013 respectively. In relation to this, it is also stated that the Directorate of Market Abuse (DMA) is currently investigating 21 listed companies for market manipulation and other market abuse activities. However, notwithstanding all these commendable efforts to combat market manipulation and other illicit market abuse practices, only 337 cases of market abuse have been investigated in South Africa from 1999 to date. Moreover, about 259 of these cases were closed because there was insufficient or no evidence that the relevant market abuse provisions had been contravened. Consequently, about R95 million damages and penalties were recovered from the offenders in only 72 cases of market abuse which were successfully investigated and settled through the FSB during the same period. See the DMA 2014 *FSB Bulletin* 8.

¹⁷⁶ See the related comments above and a similar discussion in para 3.2 above.

¹⁷⁷ See s 6D read with ss 6A, 6B, 6C, 6E; 6F and 6G of the *Protection of Funds Act*; see further Cassim 2008 *SA Merc LJ* (Part 2) 192, 195; also see Chitimira 2014 *Speculum Juris* 119-124; Chitimira March 2014 *MJSS* 52-56.

¹⁷⁸ S 82 read with s 99 of the *Financial Markets Act*; s 6A(2) of the *Protection of Funds Act*. See further related analysis by Cassim 2008 *SA Merc LJ* (Part 2) 195; Luiz 2011 *SA Merc LJ* 151-172; Chitimira 2014 *Speculum Juris* 119-124. Also see similar remarks in para 3.2 above.

4 Concluding remarks

As highlighted above,¹⁷⁹ it is noteworthy that the prohibition of market manipulation was introduced relatively early in both South Africa and Australia. For instance, market manipulation has been discouraged under common law in both South Africa¹⁸⁰ and Australia.¹⁸¹ It is also interesting to note that relatively similar enforcement approaches¹⁸² are employed to combat market manipulation in both South Africa and Australia.¹⁸³ Moreover, relatively similar types of market manipulation are statutorily prohibited in both jurisdictions.¹⁸⁴ However, notwithstanding these commendable efforts, some flaws are still present in the current South African and Australian market manipulation prohibition. For example, the available criminal penalties for market manipulation are still not sufficient of a deterrent for the purposes of increasing the curbing of market manipulation activities in Australia and South Africa.¹⁸⁵ Consequently, it is submitted that the *Corporations Act* and the *Financial Markets Act* should be amended in order to enact higher separate and distinct maximum market manipulation criminal penalties for both individuals and juristic persons.¹⁸⁶ It is further recommended that the Commonwealth DPP and the DPP should continue to cooperate with the ASIC and the FSB respectively in order to consistently enhance the criminal prosecution of market manipulation cases in Australia and South Africa.¹⁸⁷ It is also submitted, notwithstanding the purported paradigm shift from the old civil penalty regime¹⁸⁸ to administrative penalties for market abuse in South Africa, that

¹⁷⁹ See the historical analysis and other relevant discussions in the sub-headings under para 2 above.

¹⁸⁰ Generally see Henning and Du Toit 2000 *JJS* 155-165.

¹⁸¹ See the earlier comments in paras 2.1 and 2.4 above.

¹⁸² For instance, criminal and administrative penalties are used to discourage market manipulation in both South Africa and Australia. Moreover, the Commonwealth DPP and the DPP have the main prerogative to institute criminal proceedings against market manipulation offenders in Australia and South Africa respectively. See the related discussions in paras 3.1-3.3 above.

¹⁸³ See the related discussions in paras 2.1-2.4, 3.1-3.3 above.

¹⁸⁴ See the related comments in paras 2.3 and 2.4 above.

¹⁸⁵ See the related remarks in para 3.1 above.

¹⁸⁶ See the discussion in para 3.1 above and similar remarks by Chitimira March 2014 *MJSS* 53-56; Chitimira 2014 *Speculum Juris* 119-124; Chitimira & Lawack 2012 *Obiter* 548-553.

¹⁸⁷ See the related discussion in para 3.1 above.

¹⁸⁸ See s 77 of the *Securities Services Act*.

civil, criminal and administrative penalties should be expressly extended to both insider trading and market manipulation under the *Financial Markets Act*.¹⁸⁹

It is also submitted that the *Financial Markets Act* should be amended in line with the Australian approach¹⁹⁰ in order to enact provisions that expressly extend the scope of application of its market manipulation prohibition to other related dishonest conduct such as high frequency trading, front running, short selling and market rigging. In addition, it is hoped that the *Financial Markets Act* will be amended to provide an adequate statutory definition of the concept of market manipulation involving all the elements of this offence as well as the various types of market manipulation practices, to enhance the combating of such practices in South Africa.¹⁹¹ Lastly, it is recommended that market manipulation should be statutorily treated as an indictable offence for deterrence purposes and to enhance its prosecution in South Africa.

¹⁸⁹ See the related discussions in paras 3.1-3.3 above.

¹⁹⁰ See Part 7.10 of the *Corporations Act*. Also see para 2.3 for further analysis of the prohibition on market manipulation and other market misconduct practices under the *Corporations Act*.

¹⁹¹ See the related comments in para 2.4 above.

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LIST OF ABBREVIATIONS

ABLR	Australian Business Law Review
AFR	Australian Financial Review
ALJ	Australian Law Journal
Am J Comp L	American Journal of Comparative Law
ANZJ Crim	Australian and New Zealand Journal of Criminology
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
Aust J Leg Hist	Australian Journal of Legal History
Aust Jnl of Corp Law	Australian Journal of Corporate Law
C & SLJ	Company and Securities Law Journal
Deakin LR	Deakin Law Review
DMA	Directorate of Market Abuse
DPP	Director of Public Prosecutions
EC	Enforcement Committee
EU	European Union
Fordham L Rev	Fordham Law Review
FSB	Financial Services Board
Hofstra L Rev	Hofstra Law Review
J Afr L	Journal of African Law
JBL	Juta's Business Law

JJS	Journal for Juridical Sciences / Tydskrif vir Regswetenskap
JSE	Johannesburg Stock Exchange
MJSS	Mediterranean Journal of Social Sciences
MqJBL	Macquarie Journal of Business Law
PER	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
Sec Reg LJ	Securities Regulation Law Journal
Transnat'l Law	Transnational Lawyer
UNSWLJ	University of New South Wales Law Journal
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
Yale LJ	Yale Law Journal

THE REGULATION OF MARKET MANIPULATION IN AUSTRALIA: A HISTORICAL COMPARATIVE PERSPECTIVE

H Chitimira*

SUMMARY

Notably, in Australia, market abuse practices like market manipulation and other market misconduct practices are expressly prohibited under the *Corporations Act* as amended by the *Financial Services Reform Act*. In the light of this, and for the purposes of this article, a brief historical analysis of the market manipulation prohibition will be presented first. Secondly, the available penalties and remedies for market manipulation are discussed. Thereafter, possible recommendations and significant Australian anti-market abuse enforcement approaches that may be utilised in South Africa are briefly stated. Lastly, concluding remarks are provided.

KEYWORDS: Enforcement, market abuse, regulation, financial markets, market manipulation.

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