HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) APPLICANT

AND

JM RESPONDENT

Director of Public Prosecutions (Cth) v JM
[2013] HCA 30
27 June 2013
M73/2012

ORDER

1. *Special leave to appeal granted.*

2. *Special leave to cross-appeal granted.*

3. *Appeal and cross-appeal each treated as instituted and heard instanter.*

4. *Appeal allowed and cross-appeal allowed in part.*

5. *Set aside paragraphs 1 and 2 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 14 June 2012 and the orders of the Court of Appeal of the Supreme Court of Victoria made on 28 June 2012, insofar as those orders answered the reformulated question reserved, and, in their place, order that the questions reserved by Weinberg JA on 21 October 2011 are answered as follows:*

   Question 1: For the purpose of s 1041A of the Corporations Act *2001 (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an "artificial price"?*

Answer: *Yes.*

Question 2: *Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an "artificial price" within the meaning [of] s 1041A(c) of the* Corporations Act *2001 (Cth)?*

Answer: *Yes.*

Question 3: *Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was "artificial" within the meaning of s 1041A(d) of the [*Corporations Act *2001 (Cth)]?*

Answer: *Yes.*

On appeal from the Supreme Court of Victoria

Representation

O P Holdenson QC with G A Hill and C J Winneke for the applicant (instructed by Director of Public Prosecutions (Commonwealth))

M K Moshinsky SC with M I Borsky for the respondent (instructed by Clayton Utz Lawyers)

S G E McLeish SC, Solicitor-General for the State of Victoria with P D Herzfeld for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

CATCHWORDS

Director of Public Prosecutions (Cth) v JM

Criminal law – Market manipulation – *Corporations Act* 2001 (Cth), s 1041A – Transactions alleged to have effect or likely effect of creating "artificial price" for shares on Australian Securities Exchange – Meaning of "artificial price" in s 1041A of the *Corporations Act* – Whether meaning of "artificial price" informed by United States of America conceptions of "cornering" and "squeezing".

Criminal procedure – Question of law arising before trial – Question of law referred to Court of Appeal – Case stated – Case stated set out facts which prosecution sought to prove at trial – Facts set out in case stated neither admitted nor proved – Whether question of law referred hypothetical.

Words and phrases – "artificial price", "case stated", "cornering", "genuine supply and demand", "market manipulation", "sole or dominant purpose", "squeezing".

Corporations Act 2001 (Cth), ss 1041A, 1338B, 1338C.
Criminal Procedure Act 2009 (Vic), ss 302, 305, 306.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ. Following the enactment of the *Financial Services Reform Act* 2001 (Cth), the relevant provisions of which took effect from 11 March 2002, Pt 7.10 of the *Corporations Act* 2001 (Cth) dealt with market misconduct and other prohibited conduct relating to financial products and financial services. Section 760A of the *Corporations Act* 2001 provided that the main object of Ch 7 (which dealt with the regulation of financial services and markets, and included the offence provisions of Pt 7.10) was to promote (among other things) "fair, orderly and transparent markets for financial products"[1].

2 Shares listed on the securities exchange operated by ASX Limited ("the ASX") were, and are, one form of "financial product"[2]. The ASX is and was a "financial market"[3]. Division 3 (ss 1042A-1043O) of Pt 7.10 dealt with insider trading of certain financial products[4] (including shares and other securities). Division 2 (ss 1041A-1041K) of Pt 7.10 dealt with other forms of prohibited conduct.

3 Section 1041A of the *Corporations Act* 2001 bore the heading "Market manipulation" and provided:

> "A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):
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> (a) a transaction that has or is likely to have; or
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> (b) 2 or more transactions that have or are likely to have;
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> the effect of:
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> (c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or

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1 s 760A(c).

2 s 761A, definitions of "financial product" and "security", ss 762A and 764A(1)(a).

3 s 767A(1).

4 s 1042A, definition of "Division 3 financial products".

(d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction."

Failure to comply with the provision was an offence[5] punishable[6], in the case of an individual, by imprisonment of up to five years[7], fine, or both imprisonment and fine.

The charges against JM

4 The respondent, JM, was presented in the County Court of Victoria on an indictment charging him with 39 counts of market manipulation contrary to s 1041A and two counts of conspiring with others to commit market manipulation. One count of conspiracy alleged that JM had conspired with his daughter, "T", and his son-in-law, "G", between May and October 2006; the other conspiracy count alleged that JM had conspired with T and another man between September and November 2006. The counts of market manipulation were all alleged to have occurred in September and October 2006.

5 On JM's application, the proceedings were transferred to the Supreme Court of Victoria and a new indictment alleging the same charges was filed in that Court.

6 The Commonwealth Director of Public Prosecutions ("the CDPP") alleged that an entity associated with JM had borrowed money to exercise a large number of call options for shares in a company (referred to in the proceedings in this Court as "X Ltd") whose shares were listed on the ASX. As explained later in these reasons, the CDPP alleged that, on 4 July 2006, JM's daughter, T, bought shares in X Ltd, on behalf of a company controlled by her husband, at a price and in circumstances that prevented the day's closing price for the shares falling

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5 s 1311(1).

6 s 1311(1A)(db) and (3), Sched 3, item 309B.

7 The maximum term of imprisonment for contraventions of s 1041A, occurring after the times at which the offences alleged against JM were said to have been committed, has since been increased. See *Corporations Amendment (No 1) Act* 2010 (Cth), Sched 1, item 20.

below the point at which the lender to JM would make a margin call requiring JM to provide additional collateral for the loan. The CDPP alleged that T made the purchase for the sole, or at least the dominant, purpose of ensuring that the price of the shares did not fall below the price at which the lender would be entitled to make a margin call on her father's loan, and that the transaction had the effect of creating an artificial price for the shares or maintaining the price at a level that was artificial. The CDPP alleged, and, in the Court of Appeal, JM did not deny, that JM took part in the transaction through the agency of his daughter.

7 JM pleaded not guilty to all charges.

Questions are reserved, amended and answered

8 After the plea had been made, but before a jury was empanelled, Weinberg JA, sitting in the Trial Division of the Supreme Court, stated a case and reserved three questions for determination by the Court of Appeal. The questions reserved by Weinberg JA ("the original questions") were:

> "1. For the purpose of s 1041A of the *Corporations Act* 2001 (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an 'artificial price'?
>
> 2. Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an 'artificial price' within the meaning [of] s 1041A(c) of the *Corporations Act* 2001 (Cth)?
>
> 3. Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was 'artificial' within the meaning of s 1041A(d) of the Act?"

9 The Court of Appeal (Nettle and Hansen JJA, Warren CJ dissenting) concluded[8] that it was inappropriate to decide any of the original questions. In particular, that Court concluded[9] that the first of the original questions reserved

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8 *Director of Public Prosecutions (Cth) v JM* (2012) 267 FLR 238.

9 (2012) 267 FLR 238 at 305 [303].

was a "mixed question of fact and law dependent upon the assumed but as yet unfound fact of sole or dominant purpose". The Court of Appeal remitted the case stated to Weinberg JA for amendment of the first question reserved to read:

> "(a) Is the expression 'artificial price' in s 1041A of the *Corporations Act* 2001 (Cth) used in the sense of a term having a legal signification (as opposed to its sense in ordinary English or some non-legal technical sense); and
>
> (b) If so, what is its legal signification?"

It is convenient to refer to this as "the reformulated question".

10 Weinberg JA amended the question as directed. The Court of Appeal answered the reformulated question:

> "The expression 'artificial price' in s 1041A of the *Corporations Act* 2001 (Cth) is used in the sense of a term having legal signification (as opposed to its ordinary English or some non-legal technical sense) and its legal signification is of market manipulation by conduct of the kind typified by American jurisprudential conceptions of 'cornering' and 'squeezing'."

Proceedings in this Court

11 The CDPP seeks special leave to appeal against the orders made by the Court of Appeal to allege that the answer given to the reformulated question was founded on a misconstruction of s 1041A of the *Corporations Act* 2001. JM seeks special leave to cross-appeal to allege that the reformulated question was not a question that would arise at his trial and was no more than a hypothetical question which could not be answered in the valid exercise of the judicial power of the Commonwealth, and to submit that the Court of Appeal was correct to conclude that the original questions were inappropriate to answer.

12 The applications for special leave to appeal and cross-appeal were referred to an enlarged Bench for argument as on appeal. The Attorney-General for the State of Victoria intervened to submit that there was no constitutional bar precluding reference of either the original questions or the reformulated question to the Court of Appeal.

13 Both applications for special leave should be granted. No constitutional issue is reached. The original questions were not hypothetical questions[10]. They were questions of law which arose before JM's trial and should have been answered by the Court of Appeal. The reformulated question did not arise before the trial and would not arise during the trial. The reformulated question should not have been asked or answered. The construction of s 1041A of the *Corporations Act* 2001 adopted by the majority in the Court of Appeal was not right.

Questions reserved under the *Criminal Procedure Act* 2009 (Vic)

14 It is convenient to deal first with the issues which JM raises by cross-appeal about the form of the questions reserved for determination by the Court of Appeal. Those issues require consideration of the *Criminal Procedure Act* 2009 (Vic) ("the CP Act"). The provisions of the CP Act which governed the reservation of questions for the opinion of the Court of Appeal were picked up and applied by s 1338C(1) of the *Corporations Act* 2001 to the Supreme Court's exercise of federal jurisdiction (conferred by s 1338B) in hearing and determining the charges laid against JM (as a matter arising under a law made by the federal Parliament[11] and in which the Commonwealth or a person suing on behalf of the Commonwealth was a party[12]).

15 Weinberg JA reserved the original questions for determination by the Court of Appeal pursuant to s 302 of the CP Act. That section provided:

> "(1) This section applies to a proceeding in the County Court or the Trial Division of the Supreme Court for the prosecution of an indictable offence.
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> (2) In a proceeding referred to in subsection (1), if a question of law arises before or during the trial, the court may reserve the question

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10 cf *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 244-245, 258-259, 279-285, 301-302; [1991] HCA 14.

11 Constitution, s 76(ii).

12 Constitution, s 75(iii).

for determination by the Court of Appeal if the court is satisfied that it is in the interests of justice to do so, having regard to—

(a) the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; and

(b) whether the determination of the question of law may—

(i) render the trial unnecessary; or

(ii) substantially reduce the time required for the trial; or

(iii) resolve a novel question of law that is necessary for the proper conduct of the trial; or

(iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.

(3) The court must not reserve a question of law after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial."

16 Section 306 of the CP Act gave the Court of Appeal powers, on a case stated under s 302, to "hear and finally determine"[13] the question of law or to remit the question and the determination of the Court of Appeal back to the court which reserved the question[14]. In addition, s 305(3) provided that the Court of Appeal might return a case stated for amendment and, if the Court of Appeal did that, "the court that stated the case must amend it as required".

17 Section 305(1) of the CP Act provided (so far as now relevant) that "[i]f a court reserves a question of law under section 302 ... it must state a case, setting out the question and the circumstances in which the question has arisen". Accordingly, Weinberg JA set out, in the form of a case stated, the facts and circumstances giving rise to the questions reserved.

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13 s 306(1).

14 s 306(2).

18 It is necessary to say a little more about the contents of the case stated.

The case stated

19 After reciting the charges against JM, his arraignment and his plea of not guilty, the case stated said that the questions reserved raised "for the consideration of the [Court of Appeal] the meaning of the term 'artificial price' *in the context of the facts of this particular prosecution*" (emphasis added). The case stated then set out a number of "facts".

20 In reasons for judgment published only to the parties[15], Weinberg JA described the facts set out in the case stated as "factual *assertions* ... established for the purpose of the Court of Appeal determining the reserved questions of law" (emphasis added). But Weinberg JA said that he made "each of these findings, or assume[d] each of these facts, for the limited purpose of the case stated" and "upon the understanding that any such findings of fact, or any such assumptions of fact, do not, and cannot, give rise to any estoppel" against JM.

21 At least some of the "facts" set out in the case stated may not be disputed at JM's trial. So, for example, it may be doubted that there would be any dispute at trial about the way in which trading occurred on the ASX at the relevant times, or the way in which the closing price for a listed share was then determined by the operation of the Closing Single Price Auction conducted by the ASX through its Stock Exchange Automated Trading System.

22 Some "facts" recorded in the case stated may be disputed at trial, or at least not admitted. Count 1 of the indictment charged JM with conspiring with his daughter, T, and son-in-law, G, between on or about 16 May 2006 and about 31 October 2006, to take part in transactions which were likely to have the effect of creating an artificial price, or maintaining at a level that is artificial a price, for trading in the securities of X Ltd on the ASX. The case stated recorded the course of trading on the ASX on 4 July 2006 in shares in X Ltd. In particular, it recorded how an offer to buy shares in X Ltd, made by T, on behalf of a company controlled by her husband, on 4 July 2006, took part in that day's Closing Share Price Auction of shares in X Ltd and resulted in the closing price for shares in X Ltd being fixed at 35 cents per share. The case stated described

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15 Presumably for the avoidance of prejudice to the trial.

the terms on which an entity associated with JM had borrowed money to exercise some options issued by X Ltd and thus acquire shares in the company which were used as security for the loan. The course of trading on 4 July 2006 and the state of affairs between the lender, JM and entities associated with him may or may not be disputed at trial.

23 Other "facts" set out in the case stated, such as T's purpose for buying shares on 4 July 2006, and the connection between that purchase and avoiding a margin call on the loan, were disputed. And, of course, the parties led no evidence before Weinberg JA that permitted final resolution of that, or any other, dispute about the matters that were set out in the case stated.

24 In these circumstances, it must follow that all of the "findings" and "factual assertions" recorded by Weinberg JA in the case stated, including what was said about T's purpose for buying shares on 4 July 2006, must be understood as recording no more than those matters which the CDPP would seek to prove at trial. Understood in this way, it is evident that the case stated by Weinberg JA set out both some facts which the parties did not, or at trial would not, dispute, and some assertions of (disputed) fact which the CDPP would seek to make good at trial. But contrary to the conclusion reached by the majority in the Court of Appeal[16], and JM's submissions in this Court, stating the facts which the CDPP sought to establish at trial (when some of those facts were not agreed) did not make the original questions hypothetical or inappropriate to answer. To explain why the original questions were neither hypothetical nor inappropriate to answer, it is necessary to begin by considering when and how a question of law arises before trial.

A question of law arising before trial?

25 The power, given by s 302(2) of the CP Act, to reserve a question of law for determination by the Court of Appeal, with the accompanying obligation under s 305(1) of stating a case setting out the question and the circumstances in which the question has arisen, was predicated upon the question of law arising "before or during the trial" of an indictable offence. The court reserving the question of law had to be satisfied that it was in the interests of justice to do so, having regard to the specific matters stated in s 302(2)(a) and (b). Those matters

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16 (2012) 267 FLR 238 at 302-304 [290]-[299].

included whether determination of the question reserved may render the trial unnecessary or substantially reduce the time required for the trial.

26 There may be several, even many, different ways in which a question of law may arise before or during the trial of an indictable offence. It is neither necessary nor desirable to attempt to give some comprehensive description, let alone definition, of the circumstances in which a question of law may arise. It is, however, important to understand those provisions of the CP Act which dealt with the reservation of questions of law in the context provided by other provisions of the CP Act which governed the trial of indictable offences.

27 First, the temporal question presented by the reference in s 302 of the CP Act to a question arising before *or* during the trial may be noted[17]. But it is a question readily answered by reference to s 210(1) of the CP Act, which provided, in effect, that a trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel. JM had not been arraigned in the presence of the jury panel and his trial had not begun when Weinberg JA decided to reserve the original questions for determination by the Court of Appeal. Accordingly, s 302 was engaged in this case only if a question of law had arisen *before* JM's trial.

28 Section 199(1) of the CP Act provided for the trial court, "[a]t any time before trial", to "hear and decide any issue with respect to the trial that the court considers appropriate" including, among other things, "an issue of law ... that arises or is anticipated to arise in the trial". At the end of every trial of an indictable offence the judge is obliged to decide what are the real issues in the case and to tell the jury, "in the light of the law, what those issues are"[18]. As this Court held in *Alford v Magee*[19], "in accordance with Sir Leo Cussen's great guiding rule", the judge will be obliged to direct the jury about the law "not merely with reference to the facts of the particular case but with an explanation

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17 cf *Criminal Law Consolidation Act* 1935 (SA), s 350(1a), considered in *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566; [1998] HCA 45.

18 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3. See also *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]; 295 ALR 624 at 631-632; [2013] HCA 6; CP Act, s 238.

19 (1952) 85 CLR 437 at 466.

of how it applied to the facts of the particular case". It follows that, if there is any issue between the parties, before the trial begins, about what is the law which will apply to what the prosecution alleges are the facts of the case, the trial court may, pursuant to s 199(1)(a) of the CP Act, "[a]t any time before trial" hear and decide that issue as "an issue of law ... that arises or is anticipated to arise in the trial". But consonant with what was held in *Alford v Magee*, the issue of law that may be anticipated to arise in the trial is the issue of how the law applies to the facts of the particular case.

29 Before a trial begins, few, if any, of the relevant facts may have been admitted or agreed. But the case which the prosecution seeks to make at trial should be clear. The prosecution case will be identified not only from the statement of the charge laid, and any particulars that have been given of that charge, but also, in a case governed by the CP Act, from the processes of pretrial disclosure required by Div 2 of Pt 5.5 of that Act. In particular, s 182(1)(a) of the CP Act obliged the prosecution, before the day on which the trial of the accused was listed to commence, to serve on the accused and file in court a summary of the prosecution opening which outlined not only the manner in which the prosecution would put the case against the accused, but also the acts, facts, matters and circumstances relied on to support a finding of guilt. Section 183(1)(a) of the CP Act obliged the accused, before the day on which the trial was listed to commence, to serve on the prosecution and file in court a written response to the summary of the prosecution opening that identified the acts, facts, matters and circumstances with which issue was taken and the basis on which issue was taken. Other provisions of Div 2 of Pt 5.5 of the CP Act required the parties to give notice of intention to depart substantially at trial from any matter set out in the documents that had been filed and served[20], and imposed[21] continuing obligations of disclosure on the prosecution.

30 It follows that before a trial governed by the CP Act begins, it will be possible to decide whether there is any issue between the parties about how the law applies to the acts, facts, matters and circumstances on which the prosecution intends to rely to support a finding of guilt. The question which thus arises may

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20 s 184.

21 s 185.

be said to be contingent upon the prosecution establishing the relevant facts to the requisite standard of proof. But the question is not hypothetical.

31 That the question is not hypothetical may be demonstrated by reference to the reasons for reserving questions which are set out in s 302(2) of the CP Act. Determination of a question reserved may render the trial unnecessary[22]. Determination of the question would do so if the matters relied on by the prosecution were held not to establish the offence charged. Similarly, determination of a question reserved may substantially reduce the time required for the trial[23] if some matters upon which the prosecution proposed to rely were held not to be necessary to establish the offence charged.

32 Further, to read s 302 of the CP Act as permitting reservation of questions arising before trial, by reference to the facts which the prosecution *asserts* it will prove at trial, does not differ in principle or effect from the demurrer procedure which has been used by this Court throughout its history[24]. In cases in which a pleading "is drawn so as to allege with distinctness and clearness the constituent facts of the cause of action or defence set up"[25], demurrer to the pleading determines whether those facts are legally sufficient to establish the claim made or defence set up. As may be seen most clearly when a party both pleads and demurs, the issue presented by the demurrer may be contingent upon proof of disputed facts. But it has never been suggested that there is any constitutional impediment to a court exercising the judicial power of the Commonwealth deciding whether facts asserted by one party would, if proved, establish a claim made, or defence advanced, by that party.

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22 s 302(2)(b)(i).

23 s 302(2)(b)(ii).

24 See, for example, *Bond v The Commonwealth* (1903) 1 CLR 13; [1903] HCA 2.

25 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142; [1962] HCA 10. See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368-369 [119]-[121]; [2009] HCA 2.

33 As six members of the Court pointed out in *Bass v Permanent Trustee Co Ltd*[26], demurrer is "a form of procedure which assumes the truth of a particular set of facts". As the joint judgment continued[27], "a demurrer assumes that the pleadings exhaust the universe of relevant factual material". On that assumption, the answer provided on demurrer has utility for the parties, if no other evidence could add to or qualify the facts asserted in the relevant pleading, because "the parties' rights will be determined when the evidence finally determines the existence or non-existence of those 'facts'"[28]. Likewise, when a case is stated under s 302(2) of the CP Act, by reference to the assertions of fact which the prosecution will seek to make good at trial, "the parties' rights will be determined [by the jury] when the evidence finally determines the existence or non-existence of those 'facts'"[29].

34 When, as here, the question is one which arises before trial, the facts which give rise to the question are those which the prosecution will seek to establish at trial. Those facts, or at least some of them, may be disputed, but they are confined by the way in which the prosecution has said it will open its case. They are thus confined because it must be assumed that the summary of the prosecution opening "exhaust[s] the universe of relevant factual material"[30] upon which it will rely to establish the accused's guilt of the charges laid. That is, unlike in *Bass*, the "facts ... determinative of the legal issue" presented by the question reserved are stated in such a way that they are identified with precision[31]. It is those facts from which the relevant question of law arises and to which the answer to that question must be applied.

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26 (1999) 198 CLR 334 at 357 [50] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9.

27 (1999) 198 CLR 334 at 357 [50].

28 (1999) 198 CLR 334 at 357 [50].

29 (1999) 198 CLR 334 at 357 [50].

30 (1999) 198 CLR 334 at 357 [50].

31 (1999) 198 CLR 334 at 357 [49]. Cf *R v Assange* [1997] 2 VR 247 at 254.

Identifying questions of law in this case

35 It will be recalled that the first of the original questions reserved by Weinberg JA asked whether, for the purpose of s 1041A of the *Corporations Act* 2001, the price of a share on the ASX "which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share" is an "artificial price". The terms in which this first question was expressed depended upon, and evidently referred to, aspects of the case stated to which reference has already been made. The case stated said that, on 4 July 2006, JM's daughter, T, had bought shares in X Ltd for the sole, or "at the very least ... dominant", purpose of ensuring that the price of shares in X Ltd was not less than 35 cents at the close of trade on the ASX on that day. More fundamentally, the first of the original questions reserved reflected the critical element of the CDPP's case against JM: that, *because* the impugned transactions were made with the purpose described, they either created an "artificial price" or maintained the price at a level which was "artificial".

36 The second and third original questions asked whether the closing price of shares in X Ltd on 4 July 2006 was an "artificial price" within the meaning of s 1041A, and whether the price of the shares was "maintained at a level that was 'artificial'" within the meaning of that section. In their terms, both the second and the third questions depended upon the facts and circumstances that were set out in the case stated. The second question was more factually confined than the first of the original questions, but it raised the same legal issue. The third question, about "maintaining" a price, arose out of the course of transactions in the shares of X Ltd during the day in question as that course of trading was described in the case stated. During that day, shares in X Ltd had been traded at prices of 35 or 35.5 cents. The case stated further recorded that, had T not offered to buy, and bought, shares at 35 cents in the closing trades of the day, the closing price of the shares would have been 34 cents. But again, the third question was founded on the CDPP's allegation that T bought the shares she did on 4 July 2006 with the sole, or at the least dominant, purpose of ensuring that the closing price for shares in X Ltd was not less than 35 cents and that, because this was her intention, the price was maintained at a level that was "artificial".

37 By contrast, the reformulated question, asking whether the expression "artificial price" is used in s 1041A "in the sense of a term having a legal signification (as opposed to its sense in ordinary English or some non-legal technical sense)", was cast in abstract terms. The question was evidently

intended[32] to be answered without reference to disputed facts and, in particular, without reference to whether T had the purpose alleged. Necessarily, then, the reformulated question was disconnected from the way in which the CDPP sought to prove its case. This disconnection was made by asking generally about the meaning of "artificial price" in s 1041A.

38 The distinction drawn in the reformulated question, between "legal signification" and "ordinary English or some non-legal technical sense", was derived[33] from the reasons of Kitto J in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation*[34]. There, Kitto J had identified the question whether particular operations were "mining operations upon a mining property" for the purposes of an Act with respect to taxation as one of mixed law and fact. As Kitto J said[35], whether the Act used the expressions "mining operations" and "mining property" in any other sense than that which they had in ordinary language was a question of law. If the Act used these expressions in their ordinary meaning, the common understanding of the words then had to be determined, and that was a question of fact.

39 No doubt, it is important to recognise that s 302(2) of the CP Act permits reservation of only questions of law for determination by the Court of Appeal. As cases like *Blue-Metal Quarries*, *Federal Commissioner of Taxation v Broken Hill South Ltd*[36] and *Collector of Customs v Agfa-Gevaert Ltd*[37] all show, it may therefore be necessary to distinguish between questions of law and questions of fact. And drawing that distinction may not be easy. As this Court said in *Agfa-Gevaert*[38], "no satisfactory test of universal application has yet been

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32 (2012) 267 FLR 238 at 304 [300].

33 (2012) 267 FLR 238 at 304-305 [302].

34 (1955) 94 CLR 509 at 511; [1956] HCA 80. See also *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 394-396; [1996] HCA 36.

35 (1955) 94 CLR 509 at 511-512.

36 (1941) 65 CLR 150; [1941] HCA 33.

37 (1996) 186 CLR 389.

38 (1996) 186 CLR 389 at 394.

formulated" for doing so. But the majority in the Court of Appeal did not direct the reformulation of the original questions reserved in this case to ensure that the question reserved was one of law and not one of fact. At no point in this matter (whether before Weinberg JA, in the Court of Appeal, or in argument in this Court) has it been suggested that any of the original questions was only a question of fact and not a question of law. Rather, the question was reformulated to divorce it from any disputed question of fact. In that context, drawing a distinction between questions of law and questions of fact was not useful and served only to distract attention from the imperatives of identifying whether a question of law had arisen before trial and, if it had, what was that question.

40 The answer given by the majority in the Court of Appeal to the reformulated question served only to emphasise the question's disconnection from the facts and circumstances of the particular case. It will be recalled that the majority answered the reformulated question by saying that the expression "artificial price" is used in s 1041A "in the sense of a term having legal signification ... *typified* by American jurisprudential conceptions of 'cornering' and 'squeezing'" (emphasis added). Neither that answer, nor the reasons given by the majority in the Court of Appeal, said directly whether the share transactions described in the case stated were within the "legal signification" of "artificial price". Neither the answer, nor the reasons, stated expressly whether those share transactions were of a kind that could be described as "cornering" or "squeezing", although it may be inferred from material to which the majority referred in their joint reasons that the impugned transactions were not of that character. But because the answer given to the reformulated question was as abstract as the question itself, the answer did not expressly provide the judge reserving the question with guidance about how s 1041A, on its true construction, intersected with, and applied to, the facts and circumstances described in the case stated.

41 The particular legal question which arose in the prosecution of JM, before his trial began, was defined by what the judge would have to tell the jury at the end of the trial about the law and its application to the particular facts of the case. The abstract generality of the reformulated question severed that question from any issue which had arisen before the trial of JM, or would later arise during his trial. The answer given to the question did not tell the trial judge how to instruct the jury at JM's trial about what is the law which applies to the facts of the case. The reformulated question sought to ask generally how "artificial price" should be understood in s 1041A. Questions about how s 1041A generally, or the

particular expression "artificial price", might apply to *other* facts and circumstances did not arise[39] in the proceedings brought against JM, and would not arise at any stage of those proceedings. And because those wider questions did not, and would not, arise before or during JM's trial, there was no power under s 302(2) of the CP Act to reserve them for determination by the Court of Appeal.

42 The Court of Appeal was wrong to order that the reformulated question be substituted for the original questions reserved by Weinberg JA. To that extent, JM's cross-appeal should be allowed and the order of the Court of Appeal directing that substitution should be set aside. The Court of Appeal was wrong to decline to answer the original questions reserved.

43 How, then, should the original questions have been answered?

Regulating securities markets

44 In the argument in this Court about the proper construction of s 1041A, emphasis was given to the legislative history of the provision. It is necessary, therefore, to say something about not only the particular legislative history of s 1041A but also the history of the regulation of securities markets in Australia.

45 For many years, transactions on Australian stock exchanges were chiefly regulated by the relevant exchange or exchanges. In 1970, *Securities Industry Acts* were passed in New South Wales[40], Victoria[41] and Western Australia[42] and, in the following year, in Queensland[43]. All of those Acts prohibited various forms of misconduct in connection with trading in securities. Three relevant types of misconduct were identified in the Acts of New South Wales, Victoria

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39 cf *R v Assange* [1997] 2 VR 247 at 254.

40 *Securities Industry Act* 1970 (NSW).

41 *Securities Industry Act* 1970 (Vic).

42 *Securities Industry Act* 1970 (WA).

43 *Securities Industry Act* 1971 (Q).

and Queensland: false trading and markets[44], market rigging transactions[45], and "affecting" or "effecting" "market price by fictions"[46]. In particular, s 70 of the New South Wales Act proscribed "false trading and markets", and provided that:

> "A person shall not create or cause to be created or do anything which is calculated to create, a false or misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any securities."

46 In *North v Marra Developments Ltd*[47], this Court considered the construction and application of this section. Mason J, with whose reasons in this respect all other members of the Court agreed, held[48] that there was a breach of the section "[w]hen purchases have been made of shares in a company at or about a particular level *for the purpose of setting and maintaining a market price* for those shares" (emphasis added).

47 In 1974, the Governments of New South Wales, Victoria and Queensland made an intergovernmental agreement providing for "uniformity in administration and reciprocal arrangements within those States" with respect, among other things, to the "regulation of the securities industry and trading in securities"[49]. And in 1975, New South Wales, Victoria, Queensland and Western

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44 *Securities Industry Act* 1970 (NSW), s 70; *Securities Industry Act* 1970 (Vic), s 70; *Securities Industry Act* 1971 (Q), s 91.

45 *Securities Industry Act* 1970 (NSW), s 71; *Securities Industry Act* 1970 (Vic), s 71; *Securities Industry Act* 1971 (Q), s 92.

46 *Securities Industry Act* 1970 (NSW), s 72; *Securities Industry Act* 1970 (Vic), s 72; *Securities Industry Act* 1971 (Q), s 93. See also *Securities Industry Act* 1970 (WA), s 79.

47 (1981) 148 CLR 42; [1981] HCA 68.

48 (1981) 148 CLR 42 at 59.

49 *Companies (Interstate Corporate Affairs Commission) Act* 1974 (Vic), Sched 1, cl 2(1)(b).

Australia all passed new, substantially uniform, *Securities Industry Acts* regulating the conduct of securities business and trading in securities. These 1975 Acts contained[50] a prohibition of false trading and markets which was substantially identical with the false trading and markets provision considered in *North v Marra*.

48 Subsequent Acts regulating the securities industry, made first in accordance with the 1978 Agreement between the Commonwealth and the States[51] about co-operative companies and securities regulation[52], and later to implement, in accordance with the Corporations Agreement[53], the national scheme based on the *Corporations Act* 1989 (Cth), all contained[54] false trading and markets prohibitions of generally similar effect to the provision considered in *North v Marra*.

49 Meanwhile, however, futures trading became more prominent in Australia. The Sydney Greasy Wool Futures Exchange Limited, established in 1960, had changed its name, in 1972, to the Sydney Futures Exchange[55], and the markets provided by that Exchange expanded. The federal Parliament enacted the *Futures Industry Act* 1986 (Cth) and that Act was taken up and applied by State *Futures Industry (Application of Laws) Acts* enacted in accordance with the 1978 intergovernmental agreement providing for the co-operative scheme of companies and securities regulation.

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50 See, for example, *Securities Industry Act* 1975 (NSW), s 109(1).

51 *National Companies and Securities Commission Act* 1979 (Cth), s 3(1), definition of "Agreement".

52 *Securities Industry Act* 1980 (Cth) and the several State *Securities Industry Codes*.

53 Being the agreement made on 23 September 1997 between the Commonwealth, the States and the Northern Territory.

54 See, for example, *Securities Industry (New South Wales) Code*, s 124, Corporations Law, s 998.

55 Baxt, Black and Hanrahan, *Securities and Financial Services Law*, 8th ed (2012) at 33 [1.44].

50 The *Futures Industry Act* 1986 prohibited various forms of market misconduct. In particular, it prohibited[56] what was described in the heading to the section as "[f]utures market manipulation": transactions intended to have, or likely to have, the effect of "creating an artificial price for dealing in futures contracts on a futures market" or "maintaining at a level that is artificial (whether or not that level was previously artificial) a price for dealing in futures contracts on a futures market". In the Explanatory Memorandum for the Bill that became the *Futures Industry Act* 1986, it was said[57], of what became the futures market manipulation offence created by s 130, that:

> "The two main forms of manipulation are 'squeezing' and 'cornering' which involve attempts to manipulate futures prices by manipulating supply and demand for the physical commodities that are deliverable under futures contracts so that available supply is exceeded and artificial prices are created."

51 The Corporations Law set out in the *Corporations Act* 1989, which formed the foundation for the national scheme of corporations and securities regulation, contained separate provisions regulating the securities market and the futures market. Division 2 (ss 995-1002) of Pt 7.11 provided for offences relating to securities. Section 997 (headed "Stock market manipulation") identified three kinds of market manipulation effected by persons entering into, or carrying out, two or more transactions in securities of a corporation. Section 997(1) proscribed such transactions that had, or were likely to have, the effect of increasing the price of securities on a stock market with intent to induce others to buy or subscribe for the securities of the corporation or a related body corporate; s 997(4) proscribed such transactions that had, or were likely to have, the effect of reducing the price of securities with intent to induce others to sell the securities of the corporation or a related body corporate; and s 997(7) proscribed such transactions that had, or were likely to have, the effect of maintaining or stabilising the price of securities with intent to induce others to sell, buy or subscribe for the securities of the corporation or a related body corporate.

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56 s 130.

57 Australia, House of Representatives, Futures Industry Bill 1986, Explanatory Memorandum at [285].

52 Part 8.7 (ss 1251-1267) of the Corporations Law set out in the *Corporations Act* 1989 provided for offences relating to a "futures contract". In particular, s 1259 proscribed futures market manipulation in terms not substantially different from those originally used in s 130 of the *Futures Industry Act* 1986.

53 The *Corporations Act* 2001, which replaced the former national scheme legislation, re-enacted the provisions of the Corporations Law set out in the *Corporations Act* 1989. It thus re-enacted the offence provisions relating to securities markets that were contained in Div 2 of Pt 7.11, including the several offences of stock market manipulation created by s 997, and the provisions relating to the futures industry set out in Pt 8.7, including the offence of futures market manipulation created by s 1259.

54 With effect from 2002, however, the *Financial Services Reform Act* 2001 repealed the whole of Chs 7 and 8 of the *Corporations Act* 2001 (including Pts 7.11 and 8.7) and enacted a new Ch 7, including Pt 7.10 dealing with market misconduct and other prohibited conduct relating to financial products and financial services. The offences for which the new Pt 7.10 provided applied to all forms of "financial product" and thus did not, in terms, distinguish between shares and futures contracts. In particular, with effect from 11 March 2002, s 1041A of the *Corporations Act* 2001 created an offence of market manipulation that was expressed in terms evidently drawn from the former provisions dealing with futures markets that had first been enacted as s 130 of the *Futures Industry Act* 1986.

The arguments about "artificial price"

55 It will be recalled that the CDPP submitted that, if it was proved at trial that T had bought shares in X Ltd at the price she did, for the sole, or at the least dominant, purpose of creating or maintaining the price for the shares in the company at a price above the price at which the lender could make a margin call on her father's loan, the price was an "artificial price".

56 By contrast, JM submitted that, having regard to the legislative history that has been described, the references in s 1041A to "artificial price" should be construed as having the meaning given to that expression by the United States

Court of Appeals, Eighth Circuit, in *Cargill Inc v Hardin*[58] and taken up and repeated in the Explanatory Memorandum for the Futures Industry Bill 1986. That is, JM submitted that the majority in the Court of Appeal were right to conclude that the expression "artificial price" referred to market prices resulting from practices of a kind "typified" by the practices of "cornering" and "squeezing".

57 In *Cargill*, the Court of Appeals said[59] that a "corner", in its most extreme form, amounted:

> "to nearly a monopoly of a cash commodity, coupled with the ownership of long futures contracts in excess of the amount of that commodity, so that shorts – who because of the monopoly cannot obtain the cash commodity to deliver on their contracts – are forced to offset their contract with the long at a price which he dictates, which of course is as high as he can prudently make it". (footnote omitted)

And in *Cargill*, the Court of Appeals described[60] a "squeeze" as "a less extreme situation than a corner" in which "there may not be an actual monopoly of the cash commodity", but deliverable supplies of the commodity in the delivery month were low.

58 It is convenient to approach consideration of the competing submissions about "artificial price" by first considering the reasons of the majority in the Court of Appeal in this case, and then looking at the decision in *Cargill*. It is important, however, to emphasise that this case concerns on-market transactions in shares listed on the ASX, and that the discussion which follows is confined to transactions of that kind.

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58 452 F 2d 1154 (1971).

59 452 F 2d 1154 at 1162 (1971).

60 452 F 2d 1154 at 1162 (1971).

The reasoning of the majority in the Court of Appeal

59 The majority gave great emphasis to "the chain of statutory development"[61] and, in particular, the close similarities between the drafting of s 1041A of the *Corporations Act* 2001 and what had been s 130 of the *Futures Industry Act* 1986. As already noted, "cornering" and "squeezing" had been identified in extrinsic material relating to the *Futures Industry Act* 1986 as the main forms of market manipulation against which s 130 was directed.

60 In this case, the majority in the Court of Appeal described[62] these kinds of market manipulation as "the misuse of monopoly or dominant market power". It followed[63], in their Honours' opinion, that:

> "For the purposes of s 130 [of the *Futures Industry Act* 1986], the concept of 'artificial price' is one of a price which in truth reflects market forces of supply and demand in a free and informed market but which is the result of a monopolist or party otherwise in a position of market dominance taking unfair advantage of market power in order to extract a price different to that which would apply in times of adequate supply."

61 The majority contrasted transactions of this kind with what they identified[64] as:

> "the kind of market rigging activity, of which Mason J spoke in [*North v Marra*], that is calculated, in the sense of adapted, to set or maintain prices at a level which does not truly reflect the forces of supply and demand in a free and informed market (whether monopolistic or informed by pure competition)".

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61 (2012) 267 FLR 238 at 314 [328].

62 (2012) 267 FLR 238 at 315 [331].

63 (2012) 267 FLR 238 at 315 [332].

64 (2012) 267 FLR 238 at 315 [332]. See also *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58 at 62-63 per Gleeson CJ.

The majority saw transactions of this latter kind as having been dealt with, separately from market manipulation, by the false trading and market rigging provision of the *Futures Industry Act* 1986. In particular, the majority saw[65] "the kind of market rigging activity ... of which Mason J spoke" as being the province of s 131(2) of that Act, which dealt with "fictitious or artificial transactions or devices" used to "maintain, inflate, depress or cause fluctuations in, the price for dealing in futures contracts", though why the transactions at issue in *North v Marra* could be said to have been "fictitious or artificial" was not explained.

62 The majority did say[66] that they did not "overlook the possibility" that "artificial price" might be used in s 1041A "in a sense sufficiently protean to cover both market manipulation of the kind typified by 'cornering' and 'squeezing' and also one or more of the kinds of false trading, market rigging and artificial setting and maintenance of prices" dealt with in other provisions of the successive versions of securities and futures industry legislation. But their Honours rejected[67] this as a "realistic possibility" on the basis that s 1041A should be read as directed to activities different from those which were dealt with expressly by other provisions of earlier forms of securities and futures industry legislation and, since the *Financial Services Reform Act* 2001, have been dealt with expressly by other market misconduct provisions of the *Corporations Act* 2001.

63 This view of the relationship between s 1041A and other provisions of Div 2 of Pt 7.10 of the *Corporations Act* 2001 dealing with market misconduct cannot be accepted. There are at least two separate reasons to reject it.

64 First, when read as a whole, Div 2 of Pt 7.10 does not suggest that the offences prescribed in it were to be understood as operating in separate watertight compartments where any given set of facts could constitute only one of the offences prescribed. And the matter was put beyond doubt by s 1041J, which provided that, subject to any express provision to the contrary, the various sections in Div 2 of Pt 7.10 "have effect independently of each other", and that

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65 (2012) 267 FLR 238 at 315 [332].

66 (2012) 267 FLR 238 at 315 [334].

67 (2012) 267 FLR 238 at 315 [334].

"nothing in any of the sections limits the scope or application of any of the other sections".

65 Second, to read s 1041A as concerned only with transactions effected from a position of monopoly or dominant market power would give the provision little work to do in respect of shares listed on the ASX. The takeover provisions of Ch 6 of the *Corporations Act* 2001 proceed from the premise that monopoly of, or dominance over, the market on the ASX for shares in a particular listed company can be achieved only by making a successful takeover for that company. (And the provisions of Ch 6 are both informed by, and directed to, the need to maintain an efficient, competitive and informed market[68].) Given the provisions of Ch 6, it may be unlikely that any buyer or seller can, in any practical sense, "corner" or "squeeze" the market for listed shares.

66 The terms "cornering" and "squeezing" refer to, and depend for their application upon, the separation between the futures market and the market for the commodity which is the subject of the futures contract. There is no separate market for the future delivery or sale of particular shares. Other than by transactions of a kind regulated by Ch 6, it is to be doubted that a person could acquire monopoly or dominant market power in the market for listed shares in a particular company. No doubt, as JM submitted, it is necessary to recognise that there can be short-selling of shares. It is also necessary to recognise that a short-seller may be commercially vulnerable if the market moves in what, for that short-seller, is the wrong direction. But even if s 1041A may have some particular application to circumstances of the kind just described, nothing in the text, context or purpose of the provision suggests that its application should be confined to those circumstances, or should be confined to circumstances[69] in which the buyer or seller accused of market manipulation had monopoly of, or dominant power over, the market for those shares.

Cargill

67 *Cargill* was a case about market manipulation in a futures market. As has been explained, "cornering" and "squeezing" were terms used in that case (and in the Explanatory Memorandum for the Futures Industry Bill 1986) to refer to

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68 s 602(a).

69 cf Avgouleas, *The Mechanics and Regulation of Market Abuse*, (2005) at 131-154.

attempts to manipulate futures prices by manipulating supply and demand for the physical commodities that were deliverable under the futures contracts. For the reasons that have been given, those terms can have no direct application to the market for listed shares and, on that basis alone, the discussion of those terms by the Court of Appeals in *Cargill* has no direct application to the issues which arise in this case. But the Court of Appeals did make some points in *Cargill* which are of immediate relevance to this case.

68 In *Cargill*, the Court of Appeals rightly noted[70] that "[t]he methods and techniques of [market] manipulation are limited only by the ingenuity of man". And it is evident that the Court of Appeals did not intend to restrict the notion of market manipulation in the futures market to "cornering" or "squeezing". Rather, the Court of Appeals said[71] of the legislation under consideration in *Cargill* that "[t]he aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand".

69 On the face of it, "cornering" and "squeezing" in a futures market are each intended to, and will each, result in prices which reflect the forces of supply and demand, but in a market distorted by one participant having achieved dominance in the market and setting prices accordingly. It is neither necessary nor profitable, however, to examine further what was meant in *Cargill* by the notion of "basic forces of supply and demand", or how that notion relates to "cornering" and "squeezing" in a futures market.

70 The fundamental point that should be taken from the decision in *Cargill* is that market manipulation is centrally concerned with conduct, intentionally engaged in, which has resulted in a price which does not reflect the forces of supply and demand. And it is the same proposition which underpinned the decision of this Court in *North v Marra*, in relation to s 70 of the *Securities Industry Act* 1970 (NSW). Of that section, Mason J, with whose reasons in this respect all other members of the Court agreed, said[72]:

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70 452 F 2d 1154 at 1163 (1971).

71 452 F 2d 1154 at 1163 (1971).

72 (1981) 148 CLR 42 at 59.

> "The section seeks to ensure that the market reflects the forces of genuine supply and demand. *By 'genuine supply and demand' I exclude buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting or maintaining the market price*." (emphasis added)

As Mason J explained[73]:

> "Transactions which are real and genuine but only in the sense that they are intended to operate according to their terms, like fictitious or colourable transactions, are capable of creating quite a false or misleading impression as to the market or the price. *This is because they would not have been entered into but for the object on the part of the buyer or of the seller of setting and maintaining the price*, yet in the absence of revelation of their true character they are seen as transactions reflecting genuine supply and demand and having as such an impact on the market." (emphasis added)

"Genuine supply and demand"

71 The forces of "genuine supply and demand" are those forces which are created in a market by buyers whose purpose is to acquire at the lowest available price and sellers whose purpose is to sell at the highest realisable price. The references in s 1041A to a transaction which has, or is likely to have, the effect of creating an "artificial price", or maintaining the price at a level which is "artificial", should be construed as including a transaction where the on-market buyer or seller of listed shares undertook it for the sole or dominant purpose of setting or maintaining the price at a particular level. It is, however, important to emphasise that whether there are *other* kinds of transaction which have the effect of creating or maintaining an artificial price in a market for listed shares[74] is not, and, given the terms of the case stated, should not be, decided.

72 The price that results from a transaction in which one party has the sole or dominant purpose of setting or maintaining the price at a particular level is not a price which reflects the forces of genuine supply and demand in an open,

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73 (1981) 148 CLR 42 at 59.

74 See Avgouleas, *The Mechanics and Regulation of Market Abuse*, (2005) at 131-154.

informed and efficient market. It is, within the meaning of s 1041A, an "artificial price". The offer to supply or acquire of the kind described is made at a price which is determined by the offeror's purpose of setting or maintaining the price. It is not determined by the offeror's purpose, if buying, to minimise, or, if selling, to maximise, the price paid, and it is not determined by the competition between other buyers whose purpose is to minimise the price and other sellers whose purpose is to maximise the price[75]. If the offer results in a transaction, that is a transaction which can be characterised as at least *likely* to have the effect of creating or maintaining an artificial price for trading in the shares.

73 Because s 1041A prohibits transactions which are likely to have that effect, it is not necessary to demonstrate, whether by some counterfactual analysis or otherwise, that the impugned transactions *did* create or maintain an artificial price. It is sufficient to show that the buyer or seller set the price with the sole or dominant purpose described.

74 Further, if a transaction is made for the sole or dominant purpose of setting or maintaining a price for listed shares, it is not necessary to proffer some additional proof that the impugned transactions "went on to affect the behaviour of genuine buyers and sellers in the market"[76] in order to demonstrate that the transactions had, or were likely to have, the effect of creating or maintaining an artificial price. On-market transactions on the ASX (like the impugned transactions in this case) are made openly. Participants in the market can be (and are) informed of the transactions which occur. Participants in the market are entitled to assume that the transactions which are made are made between genuine buyers and sellers and are *not* made for the purpose of setting or maintaining a particular price. Hence, as Mason J explained in *North v Marra*[77], "in the absence of revelation of their true character [as transactions to set or maintain a particular price] they are seen as transactions reflecting genuine supply and demand and having as such an impact on the market". They have, or

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75 See also *Australian Securities and Investments Commission v Soust* (2010) 183 FCR 21 at 43 [90]; *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2010) 187 FCR 334 at 349 [47].

76 (2012) 267 FLR 238 at 295 [260] per Warren CJ.

77 (1981) 148 CLR 42 at 59.

at least are likely to have, the effect of setting or maintaining an artificial price for the shares in question.

Sole or dominant purpose?

75 JM did not submit in this Court that, if the CDPP's construction of s 1041A were to be adopted, it would be necessary for the CDPP to show that the person making the impugned transaction acted with the sole, as distinct from dominant, purpose of setting or maintaining a price for the relevant financial product. In applying s 1041A, no distinction can or should be drawn according to whether the purpose of setting or maintaining a price was the sole or dominant purpose of the person concerned. Proof of a dominant, as distinct from sole, purpose of setting or maintaining a price would establish that the relevant transaction established or maintained an artificial price.

76 To recognise that this is so is not to suggest that proof of a sole or dominant purpose is some separate element of the offence of market manipulation. Rather, proof of a sole or dominant purpose of setting or maintaining a price is one way of demonstrating that the impugned transaction was at least likely to have the effect of setting or maintaining an artificial price. It is neither necessary nor appropriate, in these reasons, to consider by what other ways that effect or likely effect might be established.

Conclusion and orders

77 For these reasons, the majority in the Court of Appeal was wrong to conclude that s 1041A should be construed as directed to "market manipulation by conduct of the kind typified by American jurisprudential conceptions of 'cornering' and 'squeezing'". Contrary to the conclusions of the majority in the Court of Appeal, s 1041A is not confined in its application to the creation or maintenance of an artificial price by a dominant market participant exercising that participant's market power. A purchase of listed shares made on the ASX for the sole, or at the least dominant, purpose of ensuring that the price of the shares was not less than the price paid for that purchase is a transaction which has or is likely to have the effect of creating an artificial price for trading in those shares, or maintaining at a level that is artificial a price for trading in those shares.

78 The CDPP's appeal to this Court should be allowed. JM's cross-appeal should be allowed in part. Paragraphs 1 and 2 of the orders of the Court of Appeal made on 14 June 2012 (answering the original questions reserved by

Weinberg JA on 21 October 2011 as "inappropriate to decide", and remitting the case stated to Weinberg JA to amend the first of the original questions reserved) should be set aside. The further orders of the Court of Appeal made on 28 June 2012, insofar as those orders answered the reformulated question reserved, should also be set aside. In their place, there should be orders that the questions reserved by Weinberg JA on 21 October 2011 are answered as follows:

1. For the purpose of s 1041A of the *Corporations Act* 2001 (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an "artificial price"?

Answer: Yes.

2. Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an "artificial price" within the meaning [of] s 1041A(c) of the *Corporations Act* 2001 (Cth)?

Answer: Yes.

3. Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was "artificial" within the meaning of s 1041A(d) of the [*Corporations Act* 2001 (Cth)]?

Answer: Yes.