

# Butterworths Corporation Law Bulletin

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## FEATURE

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### [122] Proposed increased corporate regulation targeting market misconduct

By Andrew Silberberg, Partner, Arnold Bloch Leibler and Richard Hewett, Solicitor, Arnold Bloch Leibler

#### Introduction

*On 28 January 2010, Chris Bowen, the Minister for Financial Services, Superannuation and Corporate Law announced two significant changes to corporate regulation in Australia.*

The first set of changes involves a marked increase in penalties for market misconduct offences including insider trading, market manipulation, false trading, market rigging, and making false and misleading statements. The second set encompasses a vast expansion of the investigative powers of the Australian Securities and Investments Commission (ASIC) by demarcating a number of market misconduct offences as serious offences, thereby enabling ASIC to obtain warrants to intercept telecommunications potentially related to some form of market misconduct.

The purpose of these changes, according to the Minister, is to “ensure the Australian Securities and Investments Commission is properly equipped to investigate and prosecute serious corporate misconduct [that] has the potential to cause significant harm to the economy and investors”.

#### The proposed changes

No specific details of the proposals have been released by the Minister other than in a media release of 28 January 2010, where the Minister outlined the following changes for market misconduct offences under the Corporations Act 2001:

- (a) for individuals the current maximum fine of \$22,000 (or \$220,000 for insider trading) would be increased to \$500,000 or three times the profit made or loss avoided by the conduct that constitutes the offence;
- (b) for corporations the current maximum fine of \$1 million would be increased to \$5 million, three times the profit made or

loss avoided, or 10 per cent of the annual turnover of the corporation in the relevant period; and

- (c) also for individuals, the current maximum term of imprisonment will be increased from five to 10 years.

The second set of changes comprises a meaningful expansion of the investigative powers of ASIC. The proposal is to define market misconduct offences as ‘serious offences’ thus enabling the issuing of telecommunication interception warrants under the Telecommunications (Interception and Access) Act 1979 (Cth) (TIA Act). Warrants will be executed by telecommunications interception agencies such as the Australian Federal Police, who—according to the Minister— will work together with ASIC to investigate any potential market misconduct offences. The removal of the requirement to issue a notice to produce before a warrant is enforced will further assist ASIC with its investigative powers.

#### The purpose of the changes

While the announcement of these increased powers came soon after three significant court losses, where ASIC attempted to penalise the Fortescue Metals Group, One.Tel executives Jodee Rich, Mark Silbermann and Brad Keeling, and the Australian Wheat Board’s former managing director, Andrew Lindberg, these proposals do not seem to be a response to these losses. Rather, as the Minister has stated, the proposals are an attempt remedy ASIC’s relatively limited powers, described as being for ASIC akin to “fighting with one hand tied behind their back”. In particular, the Minister highlighted a “noticeable trend” toward share prices increasing before market sensitive announcements are made, as evidenced by the number of referrals from the ASX to ASIC, as

well as significant potential to high profits to be made compared to relatively minor pecuniary penalties.

### Penalty increases

Accordingly, the Minister has argued that the current penalty regime has an insufficient deterrent effect given the potential for quite significant profits to be made from some market misconduct offences, most notably insider trading. However, the quantified penalty for insider trading has just over doubled to a maximum of \$500,000, while penalties for some other market misconduct offences have gone up almost 23-fold from \$22,000 to \$500,000. This has produced a curious result where arguably the most profitable offence, insider trading, has sustained the most moderate increase in the stated maximum pecuniary penalty, whereas other market misconduct offences penalties have increased exponentially. In spite of this peculiarity, a fine of up to three times the profit made or the loss avoided can still be imposed. Only with more detail of the specific provisions and with a few cases will the true power of these penalties be revealed, given that courts only impose the maximum penalty for the worst category of offender of a specific offence. Indeed, it will quite a challenge for courts to determine whether to impose the stated limit or to go into the uncharted waters of profit made or loss avoided.

### Telecommunications intercepts

As to telecommunication intercepts, they are certainly not unheard of for the investigation of market misconduct offences. For instance, such powers are bestowed upon the Federal Bureau of Investigation in the United States to investigate insider trading (although paradoxically the United States Securities and Exchange Commission has no such powers). These telecommunication intercept powers are proving pivotal in what

the FBI touts as the “the largest hedge fund insider trading case in history” whereby six individuals are alleged to have engaged in insider trading earning at least US\$20.6 million over three years in the Galleon Group insider trading matter.

Undoubtedly, the ability of ASIC to obtain telecommunication intercepts will exponentially enhance its ability to obtain direct evidence of market misconduct offences. Adding to the detrimental effect of committing such offences, the new powers are likely to lead to more solid prosecutions by ASIC given the credibility of evidence that an intercept is likely to produce, as compared to circumstantial evidence arising out of the mere fact of a communication taking place.

Nevertheless, the devil is in the detail. Only broad outlines of the proposed changes have been made through a media release. This is not much of a problem regarding the increased penalties for market misconduct offences. However, details of the expansion of the investigative powers of ASIC regarding telecommunication intercepts are necessary for a thorough analysis of their potential impact. The scope and ease with which ASIC can obtain such warrants is unclear. The Minister has only broadly stated that a court must be satisfied “that appropriate evidentiary and procedural requirements” have been met and that any interception would be “subject to stringent record keeping and reporting obligations”. Nevertheless, such intercepts are subject to the current proscribed uses under the TIA Act. The Minister’s words “appropriate evidentiary and procedural requirements” sheds no light on how expansive these powers could potentially be or the frequency with which ASIC is likely to be able to use them. Details of the amendments will be released during the year.