

## The Consummation of Anti-Market Abuse Preventative Measures in Australia: Lessons for South Africa

Howard Chitimira

*Faculty of Law, North West University, South Africa, 2735  
E-mail: Howard.Chitimira@nwu.ac.za*

**KEYWORDS** Insider Trading. Regulatory Bodies. Co-operation. Courts. Market Manipulation

**ABSTRACT** The illicit trading activities such as insider trading, market manipulation and/or other market misconduct practices are expressly prohibited under the Corporations Act 50 of 2001(Cth), as amended by the Financial Services Reform Act 122 of 2001(Cth) in Australia. Notably, in light of this, the anti-market abuse ban is consummated through the various preventative enforcement methods that are fairly and consistently employed across the Australian financial markets. Given this background, selected anti-market abuse preventative enforcement methods that are employed in Australia will be briefly discussed to recommend where applicable, possible methods that could be integrated in the South African market abuse regulatory framework.

### INTRODUCTION

The illicit trading activities such as insider trading, market manipulation (Huang 2009) and/or other market misconduct practices are expressly prohibited under the Corporations Act 50 of 2001(Cth) (hereinafter referred to as the Corporations Act) as amended by the Financial Services Reform Act 122 of 2001(Cth) (hereinafter referred to as the Financial Services Reform Act) in Australia. Notably, in light of this, the anti-market abuse<sup>1</sup> ban is consummated through various preventative enforcement methods that are fairly and consistently employed across the Australian financial markets (Huang 2005, 2006; Overland 2005; Ziegelaar 1994; Gevurtz 2002; Gething 1998; Goldwasser 1999; Tomasic and Pentony; Loke 2006). Given this background, selected anti-market abuse preventative enforcement methods that are employed in Australia will be briefly discussed to recommend where applicable, possible methods that could be integrated in the South African market abuse regulatory framework (see ss 78; 80; 81 and 82 of the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act; also see Luiz 2011; Van Deventer 2008; Myburgh and Davis 2004; Botha 1990, 1991; Chitimira Osode 2000; Jooste 2006; Van Deventer 1999; Luiz 1999; Chitimira 2008, 2012, 2014 a, b, c, d, e, f, g, i, j for related analysis on the curbing of market abuse in South Africa).

### CO-OPERATION BETWEEN ENFORCEMENT AUTHORITIES AND THE ADOPTION OF ADEQUATE PREVENTATIVE MEASURES

#### **Co-operation between the Australian Securities and Investments Commission, the Commonwealth Director of Public Prosecutions and the Courts**

Although the Australian Securities and Investments Commission (ASIC) is mainly responsible for policing the regulation and enforcement of the securities and market misconduct provisions in Australia, it does not perform its functions alone. For instance, it works closely with other enforcement agencies such as the Commonwealth Director of Public Prosecutions (Commonwealth DPP), the federal police and the competent courts to combat market abuse activities in Australia.

The ASIC has the authority to hear, investigate and prosecute all matters relating to market abuse violations in Australia (see s 13 of the Australian Securities and Investments Commission Act 51 of 2001(Cth) as amended, hereinafter referred to as the Australian Securities and Investments Commission Act). Be that as it may, the ASIC is required in terms of its Memorandum of Understanding (MOU) with the Commonwealth DPP to refer all serious market abuse cases to the Commonwealth DPP for further investigations and/or prosecution (see the ASIC and the Commonwealth DPP 2006 and related

remarks by Austin 2009). While the existence of this MOU could be a *prima facie* indication of some good co-operation between the ASIC and the Commonwealth DPP, it has been criticised by some commentators for restricting the ASIC from fully utilising its powers to promptly settle or prosecute market abuse cases in Australia (for example, see DuPlessis 2003 and also see Chapter Seven in Lyon 2003). In other words, the aforementioned MOU has sometimes inadvertently resulted in unnecessary complexities and inexplicable delays, especially, in the criminal prosecution of market abuse cases by both the ASIC and the Commonwealth DPP in Australia (*R v Brown, MacDougall and Weston* [2002] VSCA 99, where it took about twelve months after the ASIC's referral, for the Commonwealth DPP to institute criminal proceedings against the accused persons; *R v Evans* [1998] VSC 488, where it took four years after the ASIC's referral, for the Commonwealth DPP to institute legal proceedings against the alleged offenders; also see generally Leaf 2002).

On the other hand, the ASIC has to date managed to utilise the advice and help from the competent courts to obtain a considerable number of settlements and convictions in market abuse cases in Australia (Chitimira 2012). Thus, notwithstanding some existing challenges such as the lack of sufficient experienced staff, especially in the courts, the ASIC and the competent courts have achieved commendable success in relation to the enforcement of the market abuse prohibition in Australia to date (see Austin 2009; Chitimira 2012). It has further been stated that the ASIC have in place some arrangements which allow it to have the relevant assistance from the federal police, especially with regard to the execution of a telephone interception warrant and search warrant and the conducting of market abuse investigations in Australia (see Austin 2009; Longo 1992; Chitimira 2012). Accordingly, this enables the ASIC to investigate and speedily summon any suspected market abuse offenders for interrogation and/or production of any other relevant documents.

Additionally, like the position in Australia (see further related analysis above), the requirement that the Financial Services Board (FSB) must refer all market abuse criminal cases to the Director of Public Prosecutions (DPP) could have somewhat limited the FSB's prospects of speedily instituting its own criminal proceedings

against the perpetrators of market abuse in South Africa (see 84(10) of the Financial Markets Act; also see related discussion by Chitimira and Lawack (2013); Chitimira (2014a).<sup>2</sup> In addition, in contrast to the position in Australia (see further related analysis above), the FSB and the DPP appears not to have concluded any binding MOU regarding the prevention of the market abuse activities in South Africa. This could imply that both the FSB and the DPP are not statutorily and expressly obliged to co-operate with each other to enforce the market abuse prohibition in South Africa. It is, therefore, hoped that the FSB and the DPP will conclude a binding co-operation and relevant information-sharing MOU to enhance their co-operation and enforcement of the market abuse prohibition in South Africa.

Furthermore, unlike the position in Australia (see earlier related analysis above), it is uncertain whether there are some binding and/or formal co-operation arrangements that were concluded by the FSB and the South African Police Services (SAPS), particularly in relation to the criminal investigation of market abuse activities in South Africa. Besides, although, it is generally expected that the SAPS would arrest any persons indicted by the either the FSB or the courts, there appears to be no formal MOU that was concluded between the FSB and the SAPS in relation to the investigation and prevention of market abuse activities in South Africa and elsewhere (cross-border market abuse activities).

### **Co-operation between the ASIC and the Local Self-Regulatory Organisations**

The ASIC has a number of MOU and/or co-operation arrangements in place with several self-regulatory organisations (SROs) for the purposes of ensuring that there are efficient channels for communication, increased mutual understanding, exchange of relevant information and other appropriate measures for the provision of assistance, particularly in relation to the detection and investigation of market abuse activities in Australia (Chitimira 2012). In this regard, it must be noted that for the purposes of this sub-heading, more attention will be paid to the co-operation between the ASIC and the SROs such as the Australian Stock Exchange (ASX), the Corporations and Market Advisory Committee (CAMAC), the Australian Competition and Consumer Commission (ACCC), the Australian

Financial Markets Association (AFMA), the Australian Institute of Company Directors (AICD), the International Banks and Securities Association of Australia (IBSA) and the Securities and Derivatives Industry Association (SADIA).

The ASX has concluded a MOU (see generally Chitimira 2012) with the ASIC which allows the ASX to assist the ASIC with regard to market abuse investigations and/or prosecution (see the ASX and the ASIC 2004; Austin 2009: 6). Additionally, such assistance and/or referrals of the ASX to the ASIC's Market Watch Department provides the details of the trading data, broker records, a report with the analysis, chronology, other relevant data and identification of the persons accused of committing the market abuse offences in question (Austin 2009; also see related comments by Lawrence 2008). Although more may still need to be done to increase the number of successful market abuse enforcement actions in Australia, the co-operative enforcement effort of the ASX and the ASIC has to date managed to achieve a commendable number of successful disciplinary actions and other appropriate sanctions, particularly in insider trading and market manipulation cases (see the ASX 2008).<sup>3</sup>

Similarly, the ASIC have some co-operation arrangements in place with the CAMAC regarding the general regulation and enforcement of the market misconduct provisions in Australia (see the ASIC 2009; also see generally Chitimira 2012). In relation to this, the CAMAC may, in terms of such co-operative arrangements, advise the ASIC on any matter relating to law reform or the operation of the market misconduct provisions and the administration or regulation of the securities and futures markets in Australia (ASIC 2009; see further Chitimira 2012). Accordingly, this has helped both the CAMAC and the ASIC to come up with useful submissions and recommendations that discourage market abuse activities and promote market integrity in Australia (ASIC 2009).

In addition, the ACCC and the ASIC have mutual measures which enable the ACCC, after referring a matter involving serious cartels or market abuse offences to the Australian Competition Tribunal (ACT), to further refer such matters to the Commonwealth DPP or the ASIC. This has been useful in providing some strategic ways of enforcing the market abuse prohibition

in Australia, in that where a matter is not satisfactorily dealt with by the ACT, it will eventually be settled or prosecuted by either the ASIC or the Commonwealth DPP (see the ACCC 2005; Samuel 2005).

The AFMA and the AICD may also advise the ASIC on any matter relating to the regulation of the securities laws in Australia (see further analysis by Chitimira 2012). Specifically, as earlier pointed out (see further analysis by Chitimira 2012), the AICD may assist the ASIC with any information relating to the directors who commit market abuse offences, while the AFMA may provide the ASIC with the relevant information regarding the market abuse violations in the Australian over the counter markets (Chitimira 2012). Additionally, both the AFMA and the AICD participate actively in the public consultation and law reform forums that sometimes recommend and advise the ASIC on matters relating to the enforcement of the market misconduct provisions in Australia (see further analysis by Chitimira 2012).

Moreover, the IBSA and the SADIA have in recent years successfully managed to draw some useful guidelines that complement the ASIC's anti-market abuse enforcement efforts (see related analysis by Chitimira 2012). For instance, in terms of such guidelines, the IBSA may assist the ASIC by stipulating, among other things, that its member organisations must not abuse price-sensitive information and must have Chinese walls to prevent insider trading and other related market abuse practices (see further Chitimira 2012). Similarly, the SADIA mandates its members to promote useful objective research and to have special and separate reporting requirements for the employees to combat the misuse of price-sensitive information by such employees through insider trading or market manipulation (see Chitimira 2012).

Lastly, like the ASX (see related comments above), the Johannesburg Stock Exchange Limited (JSE) requires all the issuers of listed securities to disclose any trading activity which might result in market abuse promptly through the Securities Exchange News Service (see s 3.4 of the JSE Listing Requirements; also see generally Chitimira and Lawack 2013; Chitimira 2014a). Notably, there is some co-operative enforcement effort between the JSE and the FSB which has to date relatively given rise to the increased investigation and detection of market abuse practices

in South Africa (see generally Cassim 2008).<sup>4</sup> In addition, like the AFMA (see similar remarks above), the JSE (not the Bond Exchange of South Africa) now deals with the regulation of commodities and futures markets in South Africa. Nonetheless, it remains to be seen whether the JSE will be actively and consistently involved in the enforcement of the commodities-based market abuse prohibition in South Africa (see related analysis by Chitimira 2014a). Moreover, unlike the ACCC (see related remarks above), the Financial Markets Act (see s 99 and relevant provisions under Chapter X entitled Market Abuse; also see Luiz 2011) and the Financial Institutions (Protection of Funds) Act 28 of 2001 as amended (hereinafter referred to as the Protection of Funds Act; see ss 6A to 6I) does not expressly provide whether the Enforcement Committee (EC) has the powers to refer market abuse cases to the DPP for prosecution.<sup>5</sup> Nevertheless, as is the position with the AICD, the IBSA and the SADIA (see related comments above), the Takeover Regulation Panel (TRP) provides the FSB with the necessary support pertaining to the general regulation and enforcement of the relevant securities law prohibitions in South Africa (see generally the TRP General Guidelines on securities law enforcement; also see Chitimira 2014a, for related further related discussion).

#### **Co-operation between the ASIC and Similar International Regulatory Bodies**

The ASIC has entered into some co-operation agreements with other like-minded regulatory bodies in other jurisdictions. These co-operation agreements are mainly aimed at addressing the various challenges facing such regulatory bodies, particularly in relation to the effective enforcement of the market abuse prohibition in their respective jurisdictions (Austin 2009). For instance, in 2008 the ASIC and the United States Securities and Exchange Commission (SEC) concluded an Enforcement MOU which, among other things, seeks to provide greater and enhanced co-operation between the ASIC and the SEC (for further discussion and/or analysis on this MOU, see the ASIC 2008). This MOU further empowers both the ASIC and the SEC to share any relevant information, assist each other in relation to their enforcement mandates and to promote the establishment of a

more coordinated enforcement approach. Additionally, this MOU offers both the SEC and the ASIC a better platform to address and combat cross-border market abuse activities (see generally related remarks by the director of enforcement at the SEC, Thomsen 2008).

In addition, the ASIC concluded a MOU with the Financial Services Authority (FSA) on 24 June 2002 (for further analysis, see the ASIC and the FSA 2002; this MOU is also available at [http://www.fsa.gov/pubs/mou/mou\\_australias.pdf](http://www.fsa.gov/pubs/mou/mou_australias.pdf) (Retrieved 10 May 2014)). The main purpose of this MOU is to ensure that both the ASIC and the FSA are fully able to execute their enforcement duties more effectively by providing a proper framework for co-operation, including efficient channels for mutual communication and increased mutual understanding. This MOU further upholds certain principles which include the fact that both the ASIC and the FSA are obliged to provide the fullest mutual support to each other in any manner consistent with their MOU. The aforementioned MOU also maintains the principle that it does not abolish, modify or supersede any laws or regulatory requirements which are applicable to either Australia or the UK. Put differently, the MOU in question does not cancel or affect any other MOU that exists between the ASIC and other regulatory bodies, apart from the FSA (for further details and/or related comments, see the ASIC and the FSA 2002). More importantly, the ASIC and the FSA's MOU sets out the type of assistance which both the ASIC and the FSA are expected to provide to each other. For instance, both the ASIC and the FSA are required to provide each other with any relevant information in their possession; help each other in conducting inspections or examinations of the financial services providers; exchange or discuss information on matters of mutual interest, such as alternative dispute resolution; help each other to obtain any specific information and/or documents from the accused persons, and to permit, after a formal request, the representatives of the requesting authority to participate in the conduction of enquiries made by or on behalf of the requested authority as contemplated in their MOU (for further related comments, see the ASIC and the FSA 2002). This MOU further stipulates that both the ASIC and the FSA may provide each other with information, or arrange for information to be provided on a voluntary basis, even in instances where

no formal request has been made. Similarly, subject to secrecy and confidentiality issues, a joint investigation may be undertaken by the ASIC and the FSA, especially, where the suspected violation also breaches the relevant laws of both jurisdictions and where suspected cross-border market abuse practices are detected (for further details, see the ASIC and the FSA 2002).

In addition, the ASIC is a member of the International Organisation of Securities Commissions (IOSCO). This suggests that the ASIC, like other member regulators, is a signatory to the IOSCO Multilateral MOU which deals *inter alia* with the exchange and sharing of relevant information relating to fraud and market abuse violations (see the IOSCO 2002). Therefore, the ASIC is able, in terms of this Multilateral MOU, to rely on the surveillance or investigatory support from other member regulators to detect and combat cross-border market abuse activities (see Austin 2009).

As is the position in Australia (see related remarks above), the FSB is reported to have concluded some separate mutual co-operation agreements with the SEC (notably, the MOU between the FSB and the SEC was signed in Pretoria on 01 April 1996) and the FSA (see similar remarks by Chitimira and Lawack 2013; Chitimira 2014a). Besides, although more may still need to be done by the FSB to increase the consistent enforcement of these co-operation agreements to improve its own detection, investigation and prosecution of cross-border market abuse cases in South Africa, it is encouraging that the FSB has at least taken the initiative to co-operate and/or seek the relevant enforcement support from other regulators at an international level (see s 84(2)(b) of the Financial Markets Act). In addition, like the ASIC (see related remarks above), the FSB is a signatory of the IOSCO Multilateral MOU. Thus, like the ASIC (see related remarks above), the FSB may also utilise surveillance, investigation and detection support from other IOSCO Multilateral MOU member regulators to combat cross-border market abuse practices in South Africa (generally see related comments by Chitimira and Lawack 2013). Nevertheless, in contrast to the ASIC (see related remarks above; also see Chitimira and Lawack 2013) the FSB has, in relatively few instances, reportedly managed to rely on other IOSCO' Multilateral MOU member regulators for some market abuse prohibition enforcement support (see related remarks

above; also see Chitimira and Lawack 2013). It is anticipated that the FSB will consider entering into more co-operation agreements with other renowned international regulators such as the Ontario Securities Commission and the ASIC to strengthen and improve its enforcement of the market abuse prohibition. This could potentially improve the FSB's investigation and detection of cross-border market abuse activities in South Africa and elsewhere.<sup>6</sup>

### **The Adoption of Adequate Preventative Measures**

Like several other jurisdictions, Australia has to date successfully developed and employed a number of enforcement approaches (including the use of appropriate definitions) to curb market abuse activities in its securities and financial markets. Although no express statutory definition for the concept of market abuse is provided under the Corporations Act, a number of practices which may give rise to market abuse offences are enumerated and outlawed under the said Act (generally see s 1042F read with s 1043L; s 1043L read with ss 1043A(1); 1317HA, 1317K and other relevant provisions of the Corporations Act). As a result, the Corporations Act's prohibition on market abuse has achieved some considerably more success in relation to the settlements and prosecution of market abuse offences than under its predecessors (see further s 1042F read with s 1043L; s 1043L read with ss 1043A(1); 1317HA, 1317K and other relevant provisions of the Corporations Act). However, for the purposes of this sub-heading, the enforcement approaches to be discussed include the use of civil penalties, civil remedies, criminal sanctions, private actions, administrative actions, SROs as well as investigation, surveillance and detection techniques.

Appropriate penalties and sanctions are further employed in Australia to prevent and deter all persons from engaging in market abuse activities. Notably, separate criminal penalties for individuals and corporate bodies may be imposed by the ASIC or the Commonwealth DPP on any market abuse offenders in Australia. Apart from criminal penalties, the ASIC and/or the relevant courts may levy separate civil penalties against individuals or corporations that are found guilty of violating insider trading and other market misconduct provisions of the Corporations Act (see s 1042F read with s 1043L; s

1043L read with ss 1043A(1); 1317HA; 1317K and other relevant provisions of the Corporations Act, for further details regarding the actual amount of, and/or types of civil penalty actions that can be brought against the market abuse offenders in Australia under the Corporations Act).

In addition, the Australian market abuse regime further relies on civil remedies to combat market abuse practices. For instance, actions for civil remedies such as compensation orders, pecuniary monetary penalties and orders for any damages suffered by the prejudiced persons can be instituted by the ASIC against the individuals or entities that commit market abuse offences (see s 1042F read with s 1043L; s 1043L read with ss 1043A(1); 1317HA; 1317K and other relevant provisions of the Corporations Act). The ASIC and the ASX may also take appropriate administrative action against any person who is reasonably believed to have contravened the market abuse provisions of the Corporations Act (generally see s 1042F read with s 1043L; s 1043L read with ss 1043A(1); 1317HA; 1317K and other relevant provisions of the Corporations Act for further analysis). For instance, the ASIC may make a declaration of contravention once it is certain that the accused person has committed the market abuse contravention in question. Additionally, the ASIC can seek court orders for injunction relief during prosecutions, disqualification or banning a certain person from performing his managerial duties in the corporations and orders to stop or restrict a person from continuing to indulge in certain market abuse conduct. Similarly, the ASX has the powers to make a public censure, impose disciplinary fines and suspend the market abuse offenders from admission to trading at the ASX (see related remarks above; also see s 792B read with ss 792C and 792D of the Corporations Act and Austin 2009: 4, for further analysis on the role of the ASX).

Apart from the appropriate penalties and sanctions, the Australian market abuse regime employs private rights of action for the issuers of securities and any other persons who are prejudiced by market abuse activities to seek compensation orders from the courts against the offenders (see ss 1041I; 1043L(2) to (5); 1317HA; 1317J(3A) read with ss 1324A; 1324B and ss 1325(2) and 1317S of the Corporations Act, for further details regarding the enforcement of the private right of action for market abuse in Aus-

tralia). These private rights of action have to date usefully enabled the affected issuers and other prejudiced persons to claim their compensatory damages and civil pecuniary penalties promptly and directly from the perpetrators of market abuse practices in Australia (generally see ss 1041I; 1043L(2) to (5); 1317HA; 1317J(3A) read with ss 1324A; 1324B and ss 1325(2) and 1317S of the Corporations Act).

Further, the Australian authorities also rely on the SROs to complement the ASIC's market abuse enforcement efforts. Thus, in contrast to the so-called single regulator model which is mainly employed in the UK (see Chitimira 2014h *Mediterranean Journal of Social Sciences*, for further analysis on the UK's single regulator model), Australia seems to be using the multi-functional regulatory approach similar to the one adopted in the United States of America (USA). This approach allows the ASIC as well as other SROs to enforce the market abuse prohibition in Australia (see related comments above). As a result, the relevant Australian enforcement authorities have to date achieved some considerable success in the enforcement of the market abuse prohibition in Australia and other relevant jurisdictions (cross-border market abuse practices; see Austin 2009).

Investigation and information gathering is another weapon used by the ASIC to prevent market abuse practices in the relevant Australian financial markets. For instance, the ASIC may apply to the relevant courts for a search warrant to search any person or premises suspected of having the documents, evidence or other information necessary for a current market abuse case trial (see s 3E of the Crimes Act 12 of 1914 (Cth) as amended, hereinafter referred to as the Crimes Act and s 530C of the Corporations Act; also see Middleton 2004 and generally related remarks by Austin 2009). It is further reported that the ASIC can rely on the Administrative Appeals Tribunal members to get the required search warrant and all the intercepted telephonic communications in relation to its market abuse investigations (Austin 2009). The ASIC and the ASX have further powers to summon any person accused of committing market abuse offences for interrogatory interviews to obtain the relevant facts and/or information (see Constable 2011; Austin 2010 for further related analysis).

Surveillance is another method used by the ASIC to detect and prevent market abuse practices in the Australian financial markets. For instance, the ASIC now operates some computer surveillance techniques such as the Securities Market Automated Research Trading and Surveillance system to isolate and detect all possible market abuse activities in the Australian financial markets (see Austin 2009; Constable 2011; Austin 2010, for further related analysis).

Chinese walls are employed in Australia as another method which promotes a culture among all the companies, of developing their own internal principles, policies and structures that reduce the occurrence of market abuse practices such as insider trading between the different departments of such companies. Therefore, although the Chinese walls are often used as defences, they are also used as preventative measures against market abuse practices in Australia. Additionally, with regard to insider trading prevention, listed public entities and directors of such entities are required to disclose their interests in securities of those entities and/or to comply with both the structured (periodic) and continuous disclosure requirements of the ASX (see generally s 205G of the Corporations Act; also see Lyon and Du Plessis 2005). Accordingly, listed entities are obliged to complete their regular periodic financial reports, half-yearly and annual reports and accounts (see generally s 205G of the Corporations Act; also see Lyon and Du Plessis 2005). More importantly, compliance with the structured (periodic) reporting requirement does not cancel the listed entities' duty of continuous disclosure. In other words, listed entities will still be required, under the continuous disclosure requirements, to notify the ASX and other market participants regarding any information which is required by other disclosing entities for them to further notify the ASIC (see generally ss 674(1) and (2); 675; 1311(1) and 1317E of the Corporations Act; also see the ASX Listing Rule 3.1). This is primarily aimed at combating insider trading and market manipulation. The ASX further recommends the adoption by the listed entities of some best practices principles that ensure that there is no private briefing which is done by such entities during blackout periods or which is inconsistent with the continuous disclosure requirements. Furthermore, both the ASX and the ASIC may investigate any suspicious trading at, or before the time of sig-

nificant announcements to the markets by the issuers, whether or not such announcements occurred during a blackout period (it is submitted that this provision should also apply to the Australian Clearing House Pty Limited (ACH) and the ASX Settlement and Transfer Corporation Pty Limited (ASTC). See the ASIC 2009). This is targeted at identifying all potential illegal trading activity by the employees of the listed entities during blackout periods.

As indicated before (see related remarks above, for further details), the Australian authorities, especially the ASIC, also rely on international co-operation arrangements to tackle and prevent cross-border market abuse activities. Additionally, whistle-blower immunity is another preventative measure used in Australia, especially by the ACCC, to encourage all persons to freely report to it any incidences of cartels and/or other serious market abuse offences (for more information on the ACCC's whistle-blower immunity policy, see the ACCC 2005).

Furthermore, like the ASIC (see related remarks above), the FSB employs the investigation and information gathering method to prevent market abuse activity in South Africa (see s 84 of the Financial Markets Act; also see related analysis by Luiz 2011; Chitimira and Lawack 2013; Chitimira 2014g). However, it is not clear whether the FSB has measures in place to enable it to work closely with the SAPS when conducting its market abuse investigations. Additionally, in contrast to the ASX and the ASIC's position (see related comments above), the FSB does not have statutory authority to declare any contravention of market abuse provisions in South Africa whenever such contravention occurs (thus, unlike the position in Australia, the FSB may only publicise the details and outcome of any market abuse investigation if such disclosure is in the public interest; see s 84(2)(e) of the Financial Markets Act; see further Chitimira and Lawack 2013). In this regard, it is hoped that South Africa will follow the position in Australia (see related comments above) and empower the FSB to declare any contravention of market abuse provisions in South Africa for deterrence purposes whenever such contravention occurs (see s 84(2)(e) of the Financial Markets Act; see further Chitimira and Lawack 2013). In relation to this, it is submitted that the FSB should be empowered to carefully and timeously publish its market abuse investigations at any time to

increase deterrence and not be merely restricted or allowed to publish the status and outcome of such investigations when the publication is in the public interest.

Market surveillance is also used to detect and prevent market abuse activity in South Africa. Nonetheless, unlike the position in Australia (see related comments above), the JSE (not the FSB) operates some computerised surveillance systems which detect suspected market abuse activities in relation to listed securities in South Africa (see related comments above; also see related analysis by Chitimira and Lawack 2013; Chitimira 2014a). Additionally, the JSE Equities Rules do not impose a mandatory duty on the issuers of listed securities to notify either the FSB or the JSE of any detected or suspected market abuse violations (see the JSE Equities Rule 8.10.7; also see Cassim 2008). Furthermore, in contrast to the situation in Australia (see related remarks above), the Financial Markets Act does not expressly provide for a continuous disclosure requirement on the part of the issuers of listed securities for the purposes of preventing market abuse activity in the South African financial markets (see ss 78; 80; 81; 82 and other relevant provisions under Chapter X of the Financial Markets Act). In relation to this, it is hoped that South Africa will consider adopting the Australian approach (see related remarks above) and introduce both the structured (periodic) and continuous disclosure requirements to enable the JSE and/or the FSB to oblige all the listed public entities and directors of such entities to disclose their interests in securities of those entities promptly and consistently to prevent market abuse practices in South Africa. Additionally, the Financial Markets Act does not specifically provide for the Chinese walls and their use in preventing market abuse activities between the different departments of the companies (see ss 78; 80; 81; 82 and other relevant provisions under Chapter X of the Financial Markets Act). In relation to this, it is hoped that South Africa will consider adopting the Australian approach (see earlier related remarks above) and enact adequate statutory provisions to deal with Chinese walls and private right of actions for the affected persons to reduce and/or discourage market abuse practices in South Africa. Like the current position in Australia (see earlier related comments above), some SROs are also involved in the enforcement of the market abuse

prohibition in South Africa (see related comments by Chitimira and Lawack 2013; Chitimira 2014a). However, both the South African and Australian (see Austin 2009, for a further related analysis on the Australian position) market abuse regimes do not use bounty rewards to encourage more persons to provide both the FSB and the ASIC with the relevant information that can lead to the recovery of civil remedies from the market abuse offenders. It is hoped that specific provisions for bounty rewards will be introduced in South Africa in the near future to prevent market abuse activities.

### CONCLUDING REMARKS

As discussed, it is evident that both the South African and Australian market abuse regimes are, *inter alia*, aimed at promoting market integrity and public investor confidence through the effective prevention of market abuse activities in their respective financial markets. To attain this goal, both the Australian and South African legislature adopted a number of statutes, policies, recommendations and other necessary measures to combat market abuse activities in their respective financial markets. Be that as it may, it is hoped that the policy makers in both South Africa and Australia will carefully utilise some of the recommendations enumerated below.

### RECOMMENDATIONS

It is submitted that the policy makers in both South Africa and Australia should consider amending their market abuse legislations to introduce bounty rewards for the purposes of encouraging more persons to freely provide the FSB and the ASIC respectively and/or other enforcement authorities with the relevant information that can lead to the timeous recovery of administrative or civil remedies from the market abuse offenders. If this bounty rewards method is carefully and effectively enforced it will increase awareness on the part of all the relevant stakeholders in both Australia and South Africa and more persons will freely report instances of suspected market abuse activities without fear of reprisals.

It is further submitted, as is the position in Australia, that the FSB and the SAPS should consider concluding a binding MOU relating to

market abuse investigations to enhance the prevention of market abuse activities in South Africa and elsewhere (cross-border market abuse activities). Additionally, it is suggested that the JSE and the FSB should follow the Australian position and conclude a binding MOU to enhance their co-operation in relation to the detection and combating of market abuse practices in South Africa. Furthermore, it is submitted that South Africa should consider adopting the Australian approach and enacting adequate statutory provisions to deal with the Chinese walls to reduce and/or discourage market abuse practices in South Africa. It also recommended that the FSB and/or its committees should be statutorily authorised to independently make recommendations to the legislature in relation to any matter dealing with the securities law reform and the general regulation of market abuse in South Africa. Lastly, as is the position in Australia, the FSB should consider concluding a binding MOU with the DPP to enhance their co-operation and enforcement of the market abuse prohibition in South Africa.

### NOTES

- 1 For the purposes of this article, the term "market abuse" refers to insider trading, market manipulation and other related market misconduct practices.
- 2 Put differently, the fact that the FSB may only prosecute market abuse cases if the DPP declines to do so could, if not properly enforced, have a negative, restrictive and/or delaying effect on the enforcement of the anti-market abuse preventative measures by the FSB.
- 3 This Annual Report outlined that in 2008 alone the number of cases which were settled by the ASX Disciplinary Tribunal increased to 28 in contrast to only 24 which were obtained in 2007 and accordingly the fines were increased by 137% to about Aus \$1.1 million, more than Aus \$175 000 fines which were obtained in 2007 for market manipulation. In addition, the number of enforcement actions in relation to the ASX's market abuse cases which were referred to the ASIC further increased in 2008 compared to those in 2007.
- 4 It is reported that during the period from 2005 to 2008 alone, the JSE substantially increased the number of market abuse cases which were later referred to the FSB. However, only about seven of such cases relating to market manipulation were later investigated and prosecuted by the FSB during the same period.
- 5 On the contrary, the ACCC has signed a MOU with the Commonwealth DPP in Australia which allows it to refer serious cartels and market abuse cases to the Commonwealth DPP for prosecution.
- 6 Nevertheless, it is encouraging that the FSB has reportedly entered into a co-operation MOU with the Emirates Securities and Commodities Authority (ESCA) of the United Arab Emirates in April 2007.

### REFERENCES

- ACCC 21 December 2005. *Media Release* 327/05.
- ACCC 26 August 2005. ACCC Immunity Policy for Cartel Conduct. From <<http://www.accc.gov/content/index.phtml/itemId/708758>> (Retrieved on 11 May 2014).
- ASIC 2009. ASIC's Submission on CAMAC's Issues Paper: Aspects of Market Integrity. From <[http://www.asic.gov.au/asic/pdf.camac\\_paper\\_March09.pdf](http://www.asic.gov.au/asic/pdf.camac_paper_March09.pdf)> (Retrieved on 9 May 2014).
- ASIC 26 August 2008. SEC, Australian Authorities Sign Mutual Recognition Agreement. Press Release, From <<http://www.asic.gov.au/asic/asic.nsf/byheadline08-193+SEC+ Australian+ authorities+sign+ mutual+ recognition+agreement?openDocument>> (Retrieved on 10 May 2014).
- ASIC and Commonwealth DPP 01 March 2006. 2006 MOU. From <<http://www.asic.gov.au>> (Retrieved on 30 April 2014).
- ASIC and the FSA MOU 24 June 2002. Memorandum of Understanding between the Australian Securities and Investments Commission (ASIC) and the Financial Services Authority (FSA). From <[http://www.asic.gov.au/asic.nsf/MOU\\_June\\_2002.openDocument.pdf](http://www.asic.gov.au/asic.nsf/MOU_June_2002.openDocument.pdf)> (Retrieved on 10 May 2014).
- ASX 2008. Annual Report. From <[http://www.asx.com.au/about/pdf/annual\\_report\\_2008.pdf](http://www.asx.com.au/about/pdf/annual_report_2008.pdf)> (Retrieved on 9 May 2014).
- ASX and the ASIC 30 June 2004. The MOU between ASX and the ASIC. From <<http://www.asx.com.au/about/pdf/ASICMOU.pdf>> (Retrieved on 3 March 2014).
- Austin J 2010. Government to the rescue: ASIC takes the reins of the stock markets. *C and SLJ*, 28: 444-459.
- Austin J 2009. A Rapid Response to Questionable Trading—Moving Towards Better Enforcement of Australia's Securities Laws. From <<http://www.clta.edu.au/professional/papers/conference2009/AustinCLTA09.pdf>> (Retrieved on 28 April 2014).
- Australian Securities and Investments Commission Act 51 of 2001(Cth)*.
- Botha D 1991. Control of insider trading in South Africa: A comparative analysis. *SA Merc LJ*, 3: 1-18.
- Botha D 1990. Increased maximum fine for insider trading: A realistic and effective deterrent? *SALJ*, 107: 504-508.
- Cassim R 2008. An analysis of market manipulation under the Securities Services Act 36 of 2004 (Part 2). *SA Merc LJ*, 20(2): 177-199.
- Cassim R 2008. An analysis of market manipulation under the Securities Services Act 36 of 2004 (Part 1). *SA Merc LJ*, 20(1): 33-60.
- Chitimira H 2008. *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework*. LLM Dissertation, Unpublished. Alice: University of Fort Hare.

- Chitimira H 2012. *A Comparative Analysis of the Enforcement of Market Abuse Provisions*. LLD Thesis, Unpublished. Port Elizabeth: Nelson Mandela Metropolitan University.
- Chitimira H, Lawack VA 2013. Overview of the role-players in the investigation, prevention and enforcement of market abuse provisions in South Africa. *Obiter*, 34(2): 200-217.
- Chitimira H 2014a. Overview of selected role-players in the detection and enforcement of market abuse cases and appeals in South Africa. *Speculum Juris*, 28(1): 108-124.
- Chitimira H 2014b. Overview of problems associated with ineffective enforcement of market abuse provisions in South Africa. *Mediterranean Journal of Social Sciences*, 5(4): 47-58.
- Chitimira H 2014c. A historical overview of the regulation of markets abuse in South Africa. *PER*, 17(3): 937-971.
- Chitimira H 2014d. The gaps and flaws in the current South African anti-market abuse enforcement framework in relation to selected aspects of the financial markets. *Mediterranean Journal of Social Sciences*, 5(4): 236-253.
- Chitimira H 2014e. Overview of the available remedies for market abuse victims under the Financial Markets Act 19 of 2012. *Mediterranean Journal of Social Sciences*, 5(8): 124-135.
- Chitimira H 2014f. Aspects of the establishment and enforcement of anti-market abuse preventative measures in the United States of America. *Mediterranean Journal of Social Sciences*, 5(7): 253-262.
- Chitimira H 2014g. An analysis of the establishment and enforcement of anti-market abuse preventative measures in the United Kingdom. *Mediterranean Journal of Social Sciences*, 5(20): 529-541.
- Chitimira H 2014h. Overview of the Enforcement of the Market Abuse Prohibition in the United Kingdom. *Mediterranean Journal of Social Sciences*, 5(20): 272 at 272-280
- Chitimira H 2014i. Selected challenges in the South African anti-market abuse enforcement framework in relation to some aspects of the financial markets. *Obiter*, 35(3): 584-601.
- Chitimira H 2014j. Overview of the market abuse regulation under the financial markets Act 19 of 2012. *Obiter*, 35(2): 254-271.
- Constable P 2011. Ferocious beast or toothless tiger? The regulation of stock market manipulation in Australia. *MqJBL*, 8: 54-110. *Corporations Act 50 of 2001(Cth)*. *Crimes Act 12 of 1914(Cth)*.
- DuPlessis JJ 2003. Reverberations after the HIH and other recent Australian corporate collapses: The role of ASIC. *Australian Journal of Corporate Law*, 15: 225-245. *Financial Markets Act 19 of 2012*. *Financial Services Reform Act 122 of 2001(Cth)*.
- Gething M 1998. Insider trading enforcement: Where are we now and where do we go from here? *Company and Securities Law Journal*, 16: 607-618.
- Gevurtz FA 2002. The globalization of insider trading prohibitions. *Transnational Lawyer*, 15: 63-97.
- Goldwasser VR 1999. The enforcement dilemma in Australian securities regulation. *Australian BLR*, 27(6): 482-513.
- Huang H 2009. Redefining market manipulation in Australia: The role of an implied intent element. *Company and Securities Law Journal*, 27: 8-22.
- Huang H 2006. The insider trading 'possession versus use' debate: An international analysis. *Securities Regulation Law Journal*, 33(2): 130-151.
- Huang H 2005. The regulation of insider trading in China: A critical review and proposals for reform. *Australian Journal of Corporate Law*, 17(3): 281-322.
- International Organisation of Securities Commissions MOU 2002. Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information. From <[http://www.iosco.org/library/pubdocs/pdf/IOSCO\\_PD126.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCO_PD126.pdf)> (Retrieved on 10 May 2014).
- Jooste R 2006. A critique of the insider trading provisions of the 2004 Securities Services Act. *SALJ*, 123(3): 437-460.
- Lawrence D 2008. ASX Markets Supervision. SDIA Annual Conference. From <[http://www.asx.com.au/supervision/pdf/sdia\\_speech\\_melb\\_may08\\_mayne\\_lawrence.pdf](http://www.asx.com.au/supervision/pdf/sdia_speech_melb_may08_mayne_lawrence.pdf)> (Retrieved on 09 June 2014).
- Leaf C 2002. Enough is Enough. *Fortune Magazine*, March 18, pp. 30-37.
- Loke AF 2006. From the Fiduciary Theory to Information Abuse: The changing fabric of insider trading law in the UK, Australia and Singapore. *American Journal of Comparative Law*, 54: 123-172.
- Longo JP 1992. The powers of investigations of the Australian Securities Commission: Balancing the interests of persons and companies under investigation with the interests of the State. *C and SLJ*, 10: 237-242.
- Luiz SM 2011. Market abuse and the enforcement committee. *SA Merc LJ*, 23(2): 151-172.
- Luiz SM 1999. Insider trading regulation – If at first you don't succeed...*SA Merc LJ*, 11: 136-151.
- Lyon GJ, Du Plessis JJ 2005. *The Law of Insider Trading in Australia*. Sydney: The Federation Press.
- Lyon G 2003. *An Examination of Australia's Insider Trading Laws*. SJD Thesis, Unpublished. Australia: Deakin University.
- Middleton T 2004. ASIC's Investigation and enforcement powers-Current issues and suggested reforms. *C and SLJ*, 22: 503-530.
- Myburgh A, Davis B 2004. The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board. 25 March. From <<http://www.genesis-analytics.com/public/FSBReport.pdf>> (Retrieved on 09 February 2014).
- Osode PC 2000. The new South African Insider Trading Act: Sound law reform or legislative overkill? *Journal of African Law*, 44(2): 239-263.
- Overland J 2005. The future of insider trading in Australia: What did Rene Rivkin teach us? *Deakin Law Review*, 10: 708-730.
- R v Brown, MacDougall and Weston* [2002] VSCA 99.
- R v Evans* [1998] VSC 488.
- Samuel G 2005. Cartels, Criminal Penalties and The Leniency Policy. Paper presented at the International Competition Enforcement Conference. Tokyo, on 21 April 2005. From <[http://www.accc.gov.au/Samuel\\_Paper\\_2005.htm](http://www.accc.gov.au/Samuel_Paper_2005.htm)> (Retrieved on 12 March 2014).

- Thomsen LC 2008. US Experience of Insider Trading Enforcement Actions. *Paper presented at the ASIC Summer School*. ASIC, Australia, 19 February 2008.
- Tomasic R, Pentony B 1989. The prosecution of insider trading: Obstacles to enforcement. *Australian and New Zealand Journal of Criminology*, 22: 65-81.
- Van Deventer G 10 June 2008. Anti-Market Abuse Legislation in South Africa. From <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> (Retrieved on 05 May 2014).
- Van Deventer G 1999. New watchdog for insider trading. *FSB Bulletin*, 1: 2-3.
- Ziegelaar M 1994. Insider Trading Law in Australia. In: G Walker, B Fisse (Eds.): *Securities Regulation in Australia and New Zealand*. 1<sup>st</sup> Edition. Auckland: Oxford University Press, pp. 677-678.