CDPP

Commonwealth Director of Public Prosecutions

Robert Bromwich SC
Director

Senate Economics Reference Committee

Inquiry into the performance of ASIC

Response to Questions on Notice, 20.04.14

Introduction

1. I refer to the Senate Economics References Committee's written invitation to Mr Graeme Davidson of my Office to attend the committee's public hearing on Wednesday, 2 April 2014 (**Annexure 1**).

2. I note that earlier, at the Committee's invitation, the CDPP provided written submissions to the committee. These written submissions focussed on the workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies (TOR clause (c)) and were intended to assist the committee with its inquiry.

3. Mr Davidson attended the hearing on 2 April in his capacity as Deputy Director, Commercial, International & Counter-Terrorism and gave evidence. I have read the transcript of Mr Davidson's attendance. I have also read the transcript of Dr Fysh's attendance, which immediately preceded Mr Davidson's appearance.

4. In relation to Mr Davidson's evidence, I note the Chair's early remarks following Mr Davidson's introduction (Hansard transcript, 2 April, p11):

> *"Mate, we have been doing this stuff for 20 years. I regarded Dr Fysh's evidence as very significant, very important – critical. So you can do some responses off the top of your head if you like but I would strongly advise you to flick his evidence right up the chain of command and have detailed, written, considered responses. I am not going to cut you off. You are more than welcome to make off-the-cuff remark. But he ended up in jail for 7 ½ months. I have read the decision of the New South Wales Supreme Court, and it does not reflect favourably. So you can do off-the-cuff remarks if you like, but I also want – and the committee will want in due course – detailed, insightful, committed, considered responses to his evidence."*

5. I have considered the observations of the committee. I now provide the following responses to the matters raised by Dr Fysh and the committee.

Response

6. Dr Fysh provided two written submissions to the committee, the first dated 21 October 2013 and the second, a supplementary submission, dated 10 January 2014. Collectively these submissions are numbered 128. In the supplementary submission Dr Fysh makes two broad criticisms of the CDPP's prosecution of him, namely:

    - an allegation that the CDPP did not conduct adequate due diligence in assessing ASIC's findings and making the decision to prosecute him; and
    - an allegation that at times, the CDPP failed to exhibit a respect for natural justice in its prosecution of him.

7. These criticisms are expanded upon in Dr Fysh's supplementary submission and also in his evidence before the committee. I reject both criticisms.

8. To assist the committee I make the following observations about the prosecution of Dr Fysh and in so doing address Dr Fysh's criticisms.

Role of the CDPP

9. The role of the CDPP in the prosecution of Commonwealth criminal offences is set out in the CDPP's written submission (No. 384). Contrary to Dr Fysh's assertions, the actions of the CDPP are on constant public display and subject to constant public and judicial scrutiny. We are accountable for our actions in the courts and to Parliament on an ongoing basis.

10. Importantly, the CDPP does not have an investigative function. Consequently the ordinary course is for investigative agencies to identify and carry out investigations of suspected Commonwealth offences. It is then open to an investigative agency to refer a brief of evidence to the CDPP for the purpose of the CDPP assessing the brief in order to determine the availability of any criminal charges.

11. When assessing a brief of evidence, the CDPP is guided by the *Prosecution Policy of the Commonwealth*. Under the prosecution policy there is a two stage test that must be satisfied:

    - there must be sufficient evidence to establish both a prima facie case and a reasonable prospect of conviction; and
    - it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

    It is important to note that the second test is only ever resorted to if the first is established. That is public interest by itself will not justify a prosecution.

12. This was the exact process applied in Dr Fysh's case. ASIC investigated the alleged offences and provided a comprehensive brief of evidence to the CDPP. Experienced case officers within the CDPP, with specialist knowledge in the area of commercial prosecutions, assessed the brief and, with the benefit of the advice of two separate, independent senior counsel, concluded that there was sufficient evidence to prosecute the case and that the prosecution would be in the public interest. When arriving at this conclusion, the CDPP sought further information from ASIC about matters referred to in the brief (see Hansard transcript, 2 April, p16).

13. I am not aware of any specific request or representation from ASIC for the public interest to be considered in Dr Fysh's matter (see Hansard transcript, 2 April, p13). Rather, the predominant pubic interest factor taken into account for the purpose of assessing the brief was, as in many like cases, the seriousness of the alleged offending.

14. I do not propose to release to the committee any of the advices of counsel or reports of case officers involved in Dr Fysh's prosecution. I respect the committee's desire to access these documents (see Hansard transcript, 2 April, pp 11 and 15). However, both categories of documents are covered by Legal Professional Privilege (LPP) and I do not intend to waive LPP over them. To do so would set an unacceptable and dangerous precedent against the public interest by potentially impacting on the candour and completeness of future advice provided to me by counsel and case officers. Comprehensive and candid advice is essential for the proper exercise of my powers and functions, transcending the importance of any one case.

Jurisdiction and venue for trial

15. Initially, given the locality of some of the companies involved in the alleged offending and the nature and extent of the alleged conduct, consideration was given to prosecuting the matter in Queensland and proceedings under the *Proceeds of Crime Act 2002* (Cth) were commenced in that jurisdiction (the proceedings were not moved from NSW). Those POCA proceedings were commenced in Queensland with the benefit of advice from senior counsel. In the context of Commonwealth criminal prosecutions and particularly allegations of complex, trans-border corporate crime, questions of jurisdiction and the appropriate venue for trial can often be complex. Dr Fysh's matter was no exception. At the time it was observed that while Dr Fysh instructed his brokers to buy shares in both Arrow Energy N/L and Queensland Gas Company Ltd from overseas, both Arrow and QGC were Queensland companies with their share registries in Queensland. The reasons of her Honour Justice Wilson dated 21 June 2010 in the Supreme Court of Queensland in the proceeds of crime action highlight the complexities (**Annexure 2**).

16. In the event, the matter was prosecuted in New South Wales not Queensland. I reject Dr Fysh's criticism in his supplementary submission at p7 of the fairness of the CDPP's consideration of the question of jurisdiction and venue for trial. These issues are complex and in Dr Fysh's matter the CDPP always acted fairly in its consideration of them.

17. On 21 December 2011, in anticipation of Dr Fysh waiving his right to a committal hearing (which Dr Fysh did) the CDPP wrote to the Chief Justice of the Supreme Court of New South Wales to request an exemption under section 128 of the *Criminal Procedure Act 1986* (NSW) to present an indictment in the Supreme Court (**Annexure 3**). The request was made on the basis of the complexity of the legislation creating the insider trading offences alleged against Dr Fysh and the public significance of prosecution of this type of offence. Included in the letter was a brief summary of the charges and the allegations. The allegations contained in the letter were as follows:

> *"BG, a leading international energy company, had been looking for some time to establish a supply of liquefied natural gas in the Asia Pacific region. To that effect, in 2006, it established the Asia Pacific LNG business development team (the "Asia Pacific Team"). After much research and due diligence, the Asia Pacific Team had focussed its attention on a number of Australian companies, amongst whom were Arrow Energy NL ("Arrow") and Queensland Gas Company (QGC). Initially, around June 2007, it was thought that Arrow offered the best prospects in terms of availability and "doability". Later, around September – November 2007, after undertaking further research and obtaining further information, it was decided QGC was the better prospect. In early February 2008, after negotiations between the respective executives of the companies, it was announced on the Australian Stock Exchange that there was to be a joint venture between the BG and QGC.*
>
> *It is alleged that Fysh, who was at all material times the Executive Vice President and Managing Director responsible for the interests of BG in Africa, Middle East and Asia, by virtue of this position and his dealings with various senior people who worked on the Asia Pacific Team, possessed commercially sensitive information about the possible acquisition by BG of interests in Arrow and QGC. In June 2007, possessed with the knowledge that, at that time, the Asia Pacific Team believed Arrow to be the better prospect for acquisition, Fysh purchased, in two transactions, a total of 250,000 shares in Arrow. In December 2007, having information that the Asia Pacific Team had decided that QGC was a better prospect for acquisition, Fysh instructed his stockbroker to sell all his Arrow shares and use the proceeds of the sale to purchase, in two transactions, 250,000 shares in QGC."*

18. Dr Fysh's assertion that it was alleged that he got the information from people who reported to him is not correct (see Hansard, 2 April, p2).

19. Requesting an exemption for the matter to be heard in the Supreme Court of New South Wales rather than the District Court was a measure of the seriousness with which the CDPP viewed the alleged offending and of the CDPP's desire to ensure a fair trial of the allegations.

20. It is noted that Dr Fysh, as is his right, decided not to contest the committal proceedings. The traditional function of committal proceedings is to weed out cases which do not contain sufficient evidence or are inherently weak.

21. The committal process serves to inform the defendant of the case against him or her, to test that case if he or she wishes to do so, and to ensure that only cases with sufficient merit proceed to trial. The CDPP agreed to have the three main prosecution witnesses, Messrs Thompson, Seaton and Maxwell available for cross-examination at the committal. Dr Fysh chose not to avail himself of this opportunity.

The trial

22. Dr Fysh stood trial in the Supreme Court of New South Wales between 15 October 2012 and 14 November 2012 before a Supreme Court judge and jury. Dr Fysh faced four charges of insider trading. Both the prosecution (Crown) and Dr Fysh were represented by senior counsel.

23. At the conclusion of the prosecution case, Dr Fysh's legal representatives made a no case to answer submission, in which they invited the trial judge to direct the jury to return a verdict of not guilty on the basis that there was no evidence upon which the jury could convict. The trial judge considered the submission but rejected it, publishing two separate sets of reasons for the decision (**Annexure 4**: Reasons dated 7 November 2012, [2012] NSWSC 1340; **Annexure 5**: Reasons dated 22 November 2012, [2012] NSWSC 1390).

24. The trial judge found that on the evidence presented by the prosecution Dr Fysh did have a case to answer in relation to all four counts of insider trading alleged against him. The Trial Judge specifically rejected a submission that the expert evidence adduced by the Crown through Mr Dreyfus was so heavily qualified so as to render it of no utility whatsoever.

25. Dr Fysh gave evidence and was cross-examined. After addresses from counsel and a summing-up from the trial judge the jury considered and delivered its verdict. The jury acquitted Dr Fysh of two counts of insider trading but convicted Dr Fysh of the remaining two counts. Dr Fysh was sentenced to 2 years imprisonment, to be released upon recognisance after serving 12 months.

26. The prosecution bore the onus of proof in proving the charges against Dr Fysh. The fact that Dr Fysh was acquitted of two counts does not mean that those charges should never have been brought against him. It is entirely contrary to our entire system of criminal justice that an acquittal of itself means that a case should not have been commenced in the first place, and I reject such a proposition.

27. At all times the CDPP was of the view that there were reasonable prospects of success in relation to them. This view was confirmed by the decision of the trial judge to place them before the jury for its verdict. I reject the criticism in Dr Fysh's supplementary written submission (pp 6-7) of the CDPP's decision to prosecute these offences. The charges satisfied the test in the Prosecution Policy, even though the jury ultimately acquitted Dr Fysh of them. The CDPP accepts the verdict of the jury.

28. It is the function of a jury for Commonwealth offences tried on indictment to decide the facts of the case and to determine whether or not they are satisfied beyond reasonable doubt as to the guilt of the accused. The prosecution policy test (also applied by State and Territory DPPs throughout Australia and by similar prosecution authorities overseas) requires that there be a reasonable prospect of conviction, no more and no less. That test was satisfied in this case and indeed was borne out by the rulings of the trial judge. There was no challenge to the correctness of these rulings in relation to either Arrow or QGC.

The appeal

29. Dr Fysh appealed his conviction on the two insider trading counts of which he was found guilty. The appeal was heard in the NSW Court of Criminal Appeal in July 2013. The CCA allowed the appeal, quashed the conviction on the two counts of insider trading and entered a verdict of acquittal in relation to them.

30. It is acknowledged that by that time Dr Fysh had served around 7 ½ months of his sentence of imprisonment. I note Dr Fysh's evidence before the committee about the timing of the appeal (Hansard transcript, 2 April, p8):

> *"To be really honest, my lawyers could have started the appeal process on the get go. My poor wife could not get the money out of England because I had been moving all our money out of England and as soon as I went to jail she had all the trouble in the world getting it. The lawyers – they are good people, of course, but they do like to be paid first. We did not file for appeal until May. We were heard in July and I was out on that day."*

31. It is, of course, regretable that Dr Fysh served an extended period of imprisonment prior to being acquitted by the CCA. However the CDPP had no control over the timing of Dr Fysh's appeal. The appeal was heard expeditiously once it was filed.

32. Dr Fysh is critical in his supplementary written submission (at pp 7-8) and in his evidence before the committee of the CDPP's approach to the appeal and in particular complains that the CDPP tried to change its case on appeal.

33. Dr Fysh's criticism arises in the context of the CCA's written judgment delivered on 20 November 2013 (**Annexure 6**, [2013] NSWCCA 284). The judgment is detailed. Suffice to say that at no time was the CCA critical of the decision to bring insider trading charges against Dr Fysh. Rather, the CCA decided in relation to the two counts upon which Dr Fysh was convicted, that there was a reasonable doubt and that was a doubt which the jury should have had (see [185] and [213]). Further, because this was not a doubt that could be resolved by the jury's advantage in seeing and hearing the evidence, the CCA acquitted Dr Fysh rather than order a re-trial.

34. In the course of its judgment the CCA made the following observations:

> *[191] ... It is necessary to consider the point taken by the Crown on appeal that in accordance with her Honour's direction in relation to element 3 of the offence, a failure to prove that the applicant possessed the information in particular (f) did not affect proof of the offence, provided the jury considered that the particular (f) information "made no real difference". That argument depends upon the Crown establishing two matters: first, that it was open to the jury to decide for themselves whether the particular (f) information made no real difference and that the remaining information in MFI 4, absent particular (f), was sufficient in a price sensitive way to establish the offence.*

After dealing with the first matter the CCA continued:

> *[197] That still leaves for consideration the second matter, i.e. the Crown's submission that even without particular (f) the remaining information in MFI 4 was sufficient in itself to establish the necessary qualities which the information as a whole was required to have in order for the subject counts to be sustained. In that regard, it is important to note that no submission was made at trial by either side to the effect that the information in particular (f) was such as would make no real difference if it were omitted from the particulars of information in MFI 4. While it was argued by the applicant at trial that possession of the information in particular (f) had not been established against him, the Crown case at trial was always that the applicant was in possession of the substance of the whole of the information in MFI 4.*
>
> *[198] The problem for the Crown is that this proposition which was put for the first time on appeal was never in terms put to the jury at trial. The jury was never asked to consider whether the information in MFI 4, without that contained in particular (f), had the quality which the information as a whole was required to have in order to substantiate counts 3 and 4. There is a certain unreality in this proposition being raised by the Crown for the first time on appeal. In any event, the proposition should be rejected.*

Later the CCA noted:

> *[201] It is a fundamental proposition that the accused is entitled to know the case against him or her. Here it was that information in MFI 4 was in his possession and that it was material. In such circumstances, the accused was entitled to give evidence that he did not have part of the information in MFI 4 and that the information which he did not have was of real importance. The accused did not have to answer permutations of other information not included in MFI 4.*

> *[202] This was the effect of the Crown submission at [168 – 169] hereof. There, the Crown submitted that absent the particular (f) information, the remaining information in MFI 4 was to the effect that the "monolithic BG" was to enter into a co-operative arrangement or relationship with the "diminutive QGD" and that that of itself would be sufficient to permit a conclusion as to materiality and inside information.*
>
> *[203] Even if it were open to the Crown to put this submission on appeal, the submission is not made out ...*

35. I accept the decision of the CCA. It is important to note however that the CCA's observations about the Crown's submissions on appeal are not a criticism of the manner in which the prosecution ran its case at trial.

36. The issue referred to by CCA, was first raised in the context of oral argument before the CCA. By way of background the Trial judge in her direction to the jury had indicated:

> *If you accept, as Mr Walker put to you, that that is an important part of the information, then you would need to be satisfied of that inference beyond reasonable doubt. You will recall that you were told yesterday by both Mr Walker and by me that in assessing the significance of whether the accused did or did not have possession of that particular piece of information, unless you think that a particular piece of information made no real difference to the combined effect of the whole, you would need to be satisfied that the accused possessed all the information.*

37. The Crown had already addressed the jury and had not indicated that any particular piece of information in the particulars had more relative importance than another, that is, the Crown had not put particular emphasis on particular (f). The Crown did not address to the jury as to the effect should they fail to find one or more of the particulars as it was put to the jury that there was evidence that would establish each of the particulars. Further the Crown did not prioritise the particulars of the inside information in terms of importance as that was not the Crown case. The importance of particular (f) arose through both the way the defence proceeded and the grounds upon which the appeal was pursued.

38. In was in that context that the Crown indicated that the ruling of the Trial Judge might encompass that if the evidence failed to establish particular (f) the evidence taken as a whole might still be sufficient to establish possession of material information. The CCA held (at [197]) that no submission was made at trial by either side that the information in (f) would make no real difference and that the jury was never asked to consider the case on the basis absent particular (f). It was in this sense that the Court described the proposition as having a certain unreality as having being raised for the first time on appeal. But the point had not been raised earlier in light of the way the case proceeded at trial. Ultimately the Court decided for the reasons published that particular (f) did make a real difference to the substance of the information charged.

39. At no stage in either the POCA proceedings before the Queensland Supreme Court or in the criminal proceedings in NSW has any finding been made to the effect that Dr Fysh was denied natural justice. In respect of the criminal proceedings no court has held that the case against Dr Fysh was fundamentally misconceived or that there was no evidence of an element of the offences charged.

40. Dr Fysh has asserted that at the commencement of the appeal the CDPP filed a summary of the evidence that was "alarmingly prejudicial". If this was the opinion of Dr Fysh's legal team, it was not the subject of any adverse comment by either that team or the court. The CDPP maintains it was a fair and accurate summary of the evidence (**Annexure 7**).

Conclusion

41. I was made aware of the orders of the CCA on 17 July 2013 and provided with a copy of the judgement on the 20 November 2013, the date it was handed down. In addition I had the opportunity to speak to the experienced senior counsel briefed by the Office at trial and on the appeal. I am satisfied that the Office has conducted itself with propriety and fairness to Dr Fysh. Further, in the course of preparing for the Senate hearing a report was requested of the action officer. To the extent that report deals with matters raised by Dr Fysh and the Committee the responses are incorporated in this submission.

42. In this case, the Court of Criminal Appeal clarified the law and this will be carefully considered in the context of future matters. However, there is nothing in Dr Fysh's submission or oral arguments that presents a valid case that this matter should not have proceeded. To repeat a point made above, the fact of ultimate acquittal is not of itself generally a reason for not prosecuting in the first place, and is most definitely not a reason in this case.

Robert Bromwich SC
Director of Public Prosecutions

20 April 2014

SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Director of Public Prosecutions v Fysh* [2010] QSC
PARTIES:	**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (applicant) **v** **FYSH, Stuart Alfred** (respondent)
FILE NO/S:	SC No 13687 of 2009
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 January, 11 February 2010; written submissions
JUDGE:	Margaret Wilson J
ORDER:	
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – PECUNIARY PENALTY AND LIKE ORDERS – GENERALLY – FORFEITURE OR CONFISCATION – JURISDICTION – where the Commonwealth Director of Public Prosecutions seeks restraining orders and a pecuniary penalty order against respondent pursuant to the *Proceeds of Crime Act* 2002 (Cth) (*POCA*) – where restraining orders were made by consent at a time when respondent had not been charged with any offence – where orders were made on the basis there were reasonable grounds to suspect he had committed certain insider trading offences "at Brisbane in the State of Queensland and elsewhere" contrary to ss 1311(1) and 1043A(1) of the *Corporations Act* 2001 (Cth) – where pursuant to s 335 of the *POCA*, if all or part of the conduct constituting an offence to which the order would relate occurred in a particular State or is reasonably suspected of having occurred in that State, the courts that have proceeds jurisdiction for the order are those with jurisdiction to deal with criminal matters on indictment in that State – where DPP submits that respondent acquired/disposed of shares only upon his name being entered on/removed from the companies' share registers, that were located in Queensland –

where DPP and respondent agree some conduct occurred in New South Wales and where respondent alleges no conduct occurred in Queensland – whether any of the conduct constituting the offence took place in Queensland – whether Queensland has proceeds jurisdiction

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT – INSIDER TRADING – where respondent allegedly acquired and disposed of shares contrary to ss 1311(1) and 1043A(1) of the *Corporations Act* – where respondent, from outside Australia, instructed his broker to conduct transactions on the ASX in Sydney – where application proceeded on the basis of reasonable suspicion that information had by respondent when he acquired and disposed shares was "inside information" – whether any of the conduct constituting the offence occurred in Queensland

CORPORATIONS – SHARE CAPITAL – SHARES – TRANSFER – REGISTRATION – where the companies' share registries are maintained by Link Market Services in Brisbane – where by s 1070A of the *Corporations Act*, shares are transferable as provided by the operating rules of a prescribed CS facility – where a transfer of shares will be valid if the operating rules are complied with – where ASTC (ASX Settlement and Transfer Corporation Pty Ltd) is a subsidiary of the ASX and a "prescribed CS facility", ie a licensed clearing and settlement facility prescribed by the *Corporations Regulations* – where its operating rules are the *ASTC Settlement Rules* – where the computer system used by ASTC is the Clearing House Electronic Subregister System ("CHESS") – where pursuant to the *ASTC Settlement Rules* the transfers took effect when ASTC electronically deducted the shares from the source holdings – where three days later, the purchase moneys were transferred simultaneously with the change in ownership of the shares being recorded on the CHESS Subregister in Sydney – where subsequently an electronic message was sent by ASTC to Link Market Services in Brisbane, which updated the "principal register" – whether CHESS Subregister is part of the company's register required to be kept under ss 168 and 169 of the *Corporations Act* – whether the respondent acquired/disposed of legal title to the shares upon the transfers being recorded on CHESS Subregister – whether respondent acquired/disposed of the shares within the meaning of s 1043A when the transfers took effect – whether he acquired/disposed of them when his name/the name of the buyer of the shares he disposed of was entered on the companies' share registers upon entry on the CHESS Subregisters in Sydney

PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – CONCURRENT JURISDICTION OF

DIFFERENT COURTS – TRANSFER OF PROCEEDINGS UNDER CROSS-VESTING LEGISLATION – WHERE APPROPRIATE AND IN INTERESTS OF JUSTICE – GENERALLY – where if the Supreme Court of Queensland has proceeds jurisdiction, respondent seeks an order transferring the proceeding to the Supreme Court of New South Wales pursuant to s 5(2)(b)(iii) *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) – whether it is in the interests of justice that the proceeding be determined in New South Wales

Acts Interpretation Act 1901 (Cth), s15AA
Corporations Act 2001 (Cth), s 9, s 52, s 142(1), s 168, s 169, s 172, s 173, s 178, s 761A, s 761E(1), s 761E(7), s 769B, s 1042A, s 1043A(1), s1070A, s 1074A, s 1074C, s 1074D, s 1074E, s 1074G, s 1300, s 1301, s 1308A, s 1311(1)
Corporations Regulations 2001 (Cth), reg 1.0.02, reg 7.11.03, reg 7.11.24, reg 7.11.27, reg 7.11.36
Criminal Code Act 1995 (Cth), s 3.1, s 4.1, s 4.2(1), s 4.2(5), s 5
Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), s 5(2)(b)(iii)
Proceeds of Crime Act 2002 (Cth), s 11, s 18(1), s 116(1), s 335, s 338
Uniform Civil Procedure Rules 1999 (Qld), r 16(a)

Allina Pty Ltd v Commissioner of Taxation (1991) 28 FCR 203; [1990] FCA 78, cited
AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd [2007] QSC 238; [2007] QSC 238, cited
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353; [1949] HCA 26, cited
Bankinvest AG v Seabrook (1988) 14 NSWLR 711, cited
BHP Billiton Ltd v Schultz (2004) 221 CLR 400; [2004] HCA 61, cited
Dalgety Downs Pastoral Co Pty Ltd v Federal Commissioner of Taxation (1952) 86 CLR 335; [1952] HCA 54, cited
Federal Commissioner of Taxation v Wade (1951) 84 CLR 105; [1951] HCA 66, cited
Franklin's Selfserve Pty Ltd v Federal Commissioner of Taxation (1970) 125 CLR 52; [1970] HCA 33, cited
Kingston v Keprose Pty Ltd (1987) 12 ACLR 323, cited
Maddocks v DJE Constructions Pty Ltd (1982) 148 CLR 104; [1982] HCA 17, cited
Re Margart Pty Ltd (in liq); Hamilton v Westpac Banking Corporation (1984) 9 ACLR 269, cited
Roache v Mercantile Loan & Finance Co Ltd (No 2) [1968] 1 NSWR 384, cited
Rose v Federal Commissioner of Taxation (1951) 84 CLR 118; [1951] HCA 68, cited
Trade Practices Commission v Australian Iron & Steel Pty

Limited (1990) 22 FCR 305; [1990] FCA 23, cited

COUNSEL: R P Devlin SC, and G Del Villar, for the applicant.
N H Ferrett for the respondent.

SOLICITORS: Commonwealth Director of Prosecutions.
Gilbert & Tobin for the respondent.

[1] **MARGARET WILSON J**: By an originating application filed in this Court on 3 December 2009 the Commonwealth Director of Prosecutions ("the DPP") sought orders against Dr Fysh ("Fysh") pursuant to the *Proceeds of Crime Act* 2002 (Cth) (*"POCA"*) - restraining orders pursuant to s 18 and a pecuniary penalty order pursuant to s 116(1). On 10 December 2009 restraining orders were made by consent.

The application

[2] By an application filed on 18 December 2009 and amended on 11 February 2010 Fysh seeks:

(a) a declaration pursuant to *UCPR* r 16(a) that the proceeding has not been properly started because of want of jurisdiction;

(b) that the originating application be struck out;

(c) that the orders made on 10 December 2009 be vacated;

(d) in the alternative, that the proceeding be transferred to the Supreme Court of New South Wales pursuant to cross-vesting legislation.

The scheme of the *Proceeds of Crime Act* 2002 (Cth)

[3] The *POCA* establishes a scheme to confiscate the proceeds of crime. It provides various processes relating to confiscation, including restraining orders and pecuniary penalty orders requiring the payment of amounts based on benefits derived from committing offences.

[4] Under s 18(1) of the *POCA* "a court with proceeds jurisdiction" must make a restraining order:

> "if:
> (c) the DPP applies for the order; and
> (d) there are reasonable grounds to suspect that a person has committed a serious offence; and
> (e) any affidavit requirements in subsection (3) for the application have been met; and
> (f) the court is satisfied that the authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds."

[5] "Serious offence" is defined in s 338 as:

> "(a) an indictable offence punishable by imprisonment for 3 or more years, involving:

(i) unlawful conduct relating to a narcotic substance; or
(ia) unlawful conduct constituted by or relating to a breach of Part 9.1 of the *Criminal Code* (serious drug offences); or
(ii) unlawful conduct constituted by or relating to a breach of section 81 of the *Proceeds of Crime Act 1987* or Part 10.2 of the *Criminal Code* (money-laundering); or
(iii) unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least $10,000 for that person or another person; or
(iv) unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least $10,000; or ..."

[6] The insider trading in which Fysh is suspected of having engaged is within paragraph (a)(iii) of the definition of "serious offence".

[7] Under s 116(1) of the *POCA* "a court with proceeds jurisdiction" must make a pecuniary penalty order if:

"(a) the DPP applies for the order; and
(b) the court is satisfied of either or both of the following:
(i) the person has been convicted of an indictable offence, and has derived benefits from the commission of the offence;
(ii) subject to subsection (2), the person has committed a serious offence.

Note: The conviction for, or reasonable grounds for suspecting commission of, an indictable offence could be used as grounds for a restraining order under Part 2-1 covering all or some of the person's property."

Proceeds jurisdiction

[8] So far as presently relevant, s 335 of the *POCA* provides:

"**Proceeds jurisdiction**

(1) Whether a court has ***proceeds jurisdiction*** for an order depends on the circumstances of the offence or offences to which the order would relate.
General rules
(2) If all or part of the conduct constituting an offence to which the order would relate:
(a) occurred in a particular State or Territory; or
(b) is reasonably suspected of having occurred in that State or Territory;
the courts that have ***proceeds jurisdiction*** for the order are those with jurisdiction to deal with criminal matters on indictment in that State or Territory.
(3) If all of the conduct constituting an offence to which the order would relate:

(a) occurred outside Australia; or
(b) is reasonably suspected of having occurred outside Australia;

the courts that have ***proceeds jurisdiction*** for the order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment."

[9] When the restraining orders were made, Fysh had not been charged with any offence. The orders were made on the basis there were reasonable grounds to suspect he had committed certain insider trading offences "at Brisbane in the State of Queensland and elsewhere" contrary to ss 1311(1) and 1043A(1) of the *Corporations Act* (2001) (Cth).

[10] Fysh's acquisition and disposition of shares in Arrow Energy NL ("Arrow") and his acquisition of shares in Queensland Gas Company Limited ("QGC") is at the heart of the proceeding. The submissions on jurisdiction focussed principally on the circumstances in which he acquired the QGC shares. I understood those submissions to relate *mutatis mutandis* to his acquisition and disposal of the Arrow shares.

[11] The DPP's case is based on reasonable suspicion as to where conduct constituting the offences occurred. Its critical contention is that there is a reasonable suspicion Fysh engaged in conduct in Queensland in that he acquired/disposed of the shares only upon his name being entered on/removed from the companies' share registers, which were in Queensland.

[12] On 11 January 2010 counsel for Fysh submitted that all of the conduct constituting each offence occurred outside Australia.[1] But by 11 February 2010 it was common ground that at least some conduct occurred in New South Wales. Counsel for the DPP maintained the submission that some conduct had occurred in Queensland (or was reasonably suspected of having done so), and counsel for Fysh maintained his submission that none had occurred in this State.[2]

[13] Thus, the DPP's contention invokes subsection (2) of s 335 of the *POCA*, and its counsel have submitted that entry on the share register in Queensland was part of the conduct constituting the offence.

***Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth)**

[14] If this Court does have proceeds jurisdiction under the *POCA*, then Fysh seeks an order transferring the proceeding to the Supreme Court of New South Wales pursuant to s 5 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth). That section provides relevantly:

"Transfer of proceedings

(2) Where:

---

1 Transcript of Proceedings on 11 January 2010 at 1-4, 1-10 – 1-11, 1-12.

2 Transcript of Proceedings on 11 February 2010 at 1-11, 1-13, 1-14, 1-24 – 1-25; Director of Public Prosecutions' Supplementary Submissions (Court Document 15) at [10], Director of Public Prosecutions' Further Supplementary Submissions (Court Document 16) at [16]; Outline of Argument on Behalf of Dr Fysh (Court Document 17) at [18]; Further Submissions on Behalf of Dr Fysh (Court Document 19) at [9], [10] – [12].

(a) a proceeding (in this subsection referred to as the ***relevant proceeding***) is pending in the Supreme Court of a State or Territory (in this subsection referred to as the ***first court***); and

(b) it appears to the first court that:

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court;

(ii) having regard to:

(A) whether, in the opinion of the first court, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory;

(B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any law of a State relating to cross-vesting of jurisdiction; and

(C) the interests of justice;

it is more appropriate that the relevant proceeding be determined by that other Supreme Court; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or Territory;

the first court shall transfer the relevant proceeding to that other Supreme Court.

...

(9) Nothing in this section confers on a court jurisdiction that the court would not otherwise have." (Emphasis added)

[15] The determination whether to transfer a proceeding to another court under cross-vesting legislation has been said to call for "a 'nuts and bolts' management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute".[3]

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3 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 713-714; approved in *BHP Billiton Ltd v Schulz* (2004) 221 CLR 400 at 420-421.

Suspected insider trading offences

[16] Section 1043A of the *Corporations Act* provides:

> **"1043A Prohibited conduct by person in possession of inside information**
>
> (1) Subject to this Subdivision, if:
>
> (a) a person (the ***insider***) possesses inside information; and
>
> (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of ***inside information*** in section 1042A are satisfied in relation to the information;
>
> the insider must not (whether as principal or agent):
>
> (c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
>
> (d) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.
>
> Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.
>
> Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.
>
> (2) ...
>
> (3) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1) or (2):
>
> (a) paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(b)... "

[17] Contravention of s 1043A is an offence.[4] Subject to the *Corporations Act*, Chapter 2 of the *Criminal Code* (Cth), which contains general principles of criminal responsibility, applies to the offence.[5]

[18] The QGC and Arrow shares were "Division 3 financial products".[6]

[19] The application proceeded on the basis of reasonable suspicion that information had by Fysh when he acquired the Arrow shares, when he disposed of the Arrow shares, and when he acquired the QGC shares was "inside information" – that is:

> "information in relation to which the following paragraphs are satisfied:
>
> (a) the information is not generally available;

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4 *Corporations Act* s 1311.

5 *Corporations Act* s 1308A.

6 *Corporations Act* ss 1042A, 761A.

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products".[7]

The shares were "relevant Division 3 financial products" because, in relation to the information held by Fysh, they were Division 3 financial products within paragraph (b) of that definition.[8]

Share trades on the ASX

[20] Fysh instructed his broker, Mr Woodward of Goldman Sachs JB Were ("Woodward"), to conduct the transactions for him, communicating with the broker by email and telephone. The trades took place on the Australian Securities Exchange ("ASX") in Sydney.

[21] On 14 June 2007 Fysh telephoned Woodward and instructed him to buy 100,000 Arrow shares at $2.85 per share. That day Woodward placed an appropriate order in his firm's computer system to allow them to buy the shares on the ASX. Later that day Woodward emailed Fysh to advise him that the additional shares had been bought at an average price of $2.8257 per share. That transaction settled on 19 June 2007.

[22] On or about 18 June 2007 Woodward received an email from Fysh instructing him to buy a further 150,000 Arrow shares at up to $2.85 per share. That day Woodward placed an appropriate order in his firm's computer system to allow them to buy the shares on the ASX. About an hour later Woodward emailed Fysh advising him that the shares were trading at $2.91, that is, above his stated limit. In a subsequent telephone conversation Fysh instructed Woodward to amend the buy order to market price. Later that day he emailed Fysh to advise him that the additional shares had been bought for $3.06 per share. That transaction settled on 21 June 2007.

[23] On 3 December 2007 Fysh telephoned Woodward and instructed him to sell his entire holding in Arrow and certain other shares and to use the proceeds to buy 240,000 QGC shares at $3.20 per share. That day Woodward placed appropriate orders in his firm's computer system to allow them to conduct the trading on the ASX. Later that day he emailed Fysh to advise him that the trades had been completed for him. The Arrow shares had been sold at an average price of $3.03 and the QGC shares had been bought at an average price of $3.1839. Those transactions settled on 6 December 2007.

[24] On 4 December 2007 Woodward received an email from Fysh instructing him to buy a further 10,000 QGC shares at up to $3.25 per share. That day Woodward placed an appropriate order in his firm's computer system to allow them to buy the shares on the ASX. Later that day he emailed Fysh to advise him that the additional shares had been purchased for $3.25 per share. That transaction settled on 7 December 2007.

The inside information

[25] BG Group PLC ("BG") is an international gas company with business operations in 27 countries. At all material times Fysh was Executive Vice President and

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7 *Corporations Act* s 1042A.

8 *Corporations Act* s 1042A.

Managing Director for BG Africa, Middle East and Asia. In early/mid 2007 a development team within BG identified utilising coal seam gas to produce liquefied natural gas as a business opportunity. The leader of the team, Maxwell, had discussions with Fysh about the prospects of obtaining the resource in Australia, and four Australian companies (including Arrow and QGC) were identified as potential sources. Maxwell made a presentation of his group's strategic plan to the BG Group Executive Meeting on 12 June 2007 at which Fysh was present.

[26] Fysh acquired 250,000 shares in Arrow in June 2007.

[27] Allan James Scadden, an ASIC officer, has sworn:

> "19. From the investigations I have made and from the information I have obtained as detailed in the preceding paragraphs, I believe that, at the time of purchasing the Arrow shares, Dr Fysh was in possession of the following information, namely that:
> (i) The development team had presented to the GEC a strategic plan relating to a new business opportunity for BG with a company that had existing CSG interests in Australia;
> (ii) The development team had identified the process of using CSG to produce LNG as a business opportunity for BG;
> (iii) The GEC, of which Dr Fysh was a member, had shown interest in the concept;
> (iv) Arrow and QGC conducted pure CSG businesses in Australia; and
> (v) The development team had rated the 'availablity/doabilty' of Arrow as much higher than that of QGC.
> 20. I believe that at the time he purchased the Arrow shares, Dr Fysh knew the above information was not generally available. I believe from my extensive experience investigating matters relating to markets, that if the above information were generally available, it would have had a material effect on the price of Arrow shares."

[28] Maxwell's team continued to investigate the business opportunities. By the beginning of October 2007 they had concluded that:

> (i) Arrow had large acreage but not in the best CSG regions;
> (ii) QGC had a very significant resource position in the best CSG regions;
> (iii) Arrow's resource was of lower quality causing a higher gas cost than with QGC;
> (iv) QGC had successfully developed efficient extraction methods and techniques;
> (v) Arrow's ASX share price was trading at a premium to BG's assessment of its worth;
> (vi) QGC's ASX share price was trading at a discount to BG's assessment of its worth.[9]

Late that month representatives of the group met with Fysh, told him of their conclusions and received his advice on the further development of this business opportunity.

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9 Affidavit of Allan James Scadden sworn on 4 December 2009 at [27].

[29] Negotiations between Maxwell's group and QGC ensued. On 27 November 2007 Maxwell had dinner with Fysh in Singapore and informed him that:

(a) there was a world class CSG resource in Queensland;
(b) Origin, Santos and QGC held the best acreage;
(c) Arrow's holding was considered inferior;
(d) Maxwell was travelling to Australia the following week in relation to joint venture negotiations;
(e) negotiations were going very well with a company.[10]

Maxwell sent Fysh more information on 28 and 30 November and 2 December 2007.

[30] Fysh disposed of his shares in Arrow in December 2007.

[31] Mr Scadden has sworn:

> "43. I believe that, at the time of disposing of the Arrow shares, Dr Fysh was in possession of the following information:
> (a) BG had looked at Arrow as one of a number of potential companies with which to form a strategic alliance and BG had decided not to pursue a business opportunity with Arrow;
> (b) Arrow's shares were trading at a premium to BG's assessment of their worth;
> and I believe that Dr Fysh knew or ought reasonably to have known that if such information were generally available, a reasonable person would expect it to have a material effect on the price or value of Arrow shares. I believe from my extensive experience investigating matters relating to markets, that if the above information were generally available, it would have a material effect on the price of Arrow shares."

[32] Fysh applied the proceeds towards the acquisition of shares in QGC.

[33] Mr Scadden has sworn:

> "46. I believe that, at the time of acquiring the QGC shares, Dr Fysh was in receipt of the following information:
> (a) It was highly likely that BG would enter into a significant arrangement with QGC;
> (b) the size of the CSG reserves in Eastern Australia was significantly larger than was generally understood;
> (c) QGC had an excellent position in these reserves; and
> (d) QGC's shares were trading at a discount to BG's assessment of their worth;
> and I believe that Dr Fysh knew or ought reasonably have known that if such information were generally available, a reasonable person would expect it to have a material effect on the price of the QGC shares."

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10 Affidavit of Allan James Scadden sworn on 4 December 2009 at [36].

[34] On 4 February 2008 BG and QGC announced an AUD $ 870 million joint venture which included BG acquiring a 9.9% shareholding in QGC at $3.07 per share and a direct ownership interest of up to 30% of QGC's coal seam gas assets.

[35] On 28 October 2008 BG announced an on-market takeover of QGC at $5.75 per share. On 19 November 2008 Fysh sold his QGC shares for $5.75 per share.

Transfers effected through prescribed CS facility

[36] Section 1070A of the *Corporations Act* (which is in Chapter 7, Part 7.11 - Title and Transfer) provides:

> **"1070A Nature of shares and certain other interests in a company or registered scheme**
>
> (1) A share, other interest of a member in a company or interest of a person in a registered scheme:
> (a) is personal property; and
> (b) is transferable or transmissible as provided by:
> (i) the company's, or scheme's, constitution; or
> (ii) the operating rules of a prescribed CS facility if they are applicable; and
> (c) is capable of devolution by will or by operation of law.
> ... " (Emphasis Added)

[37] Chapter 7 Part 7.11 Division 4 of the *Corporations Act* (ss 1074A – 1074G) deals with the transfer of certain financial products through a prescribed CS facility. The shares were "Division 4 financial products" to which that division of the Act and Chapter 7 Part 7.11 Division 4 of the *Corporations Regulations* 2001 (Cth) (regulations 7.11.23 – 7.11.39) applied.[11]

[38] Under the relevant provisions of the Act, the operating rules of a prescribed CS facility may deal with the transfer of title,[12] and a transfer will be valid and effective if the operating rules are complied with.[13] Regulations may govern the transfer of financial products in accordance with the operating rules of a prescribed CS facility.[14] Section 1074G gives paramountcy to the relevant provisions of the regulations; it provides:

> "(1) This section deals with the effect of the provisions of:
> (a) this Division; and
> (b) the regulations made for the purposes of this Division.
> (2) The provisions apply in relation to a transfer of financial products despite anything to the contrary in:
> (a) this Act (other than this Division); or
> (b) another law, or instrument, relating to the transfer of the financial products.

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11 *Corporations Act* s 1074A; *Corporations Regulations* reg'ns 7.11.03(1), 1.0.02(1).
12 *Corporations Act* s 1074C.
13 *Corporations Act* s 1074D.
14 *Corporations Act* s 1074E.

(3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which financial products are sold.

(4) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(e)) affects any right of the issuer of a financial product to refuse:

(a) to acknowledge or register a person as the holder of a financial product; or

(b) to issue a financial product to a person;

on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is lodged with or sent to the issuer and purports to transfer the financial product to the person.

(5) The registration of a transfer, or the issue, of a financial product by means of a transfer effected in accordance with the operating rules of a prescribed CS facility does not breach any law, constitution, trust deed or other instrument relating to financial products.

(6) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(d)) prevents or affects the use of:

(a) any other form of transfer of financial products; or

(b) any other mode of executing a document transferring financial products;

that is otherwise permitted by law.

(7) A transfer of a financial product by or to a trustee or legal representative may be effected by means of a transfer in accordance with the operating rules of a prescribed CS facility despite any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.

(8) In subsection (7):

'legal representative' means:

(a) the executor, original or by representation, of a will of a dead person; or

(b) the administrator of the estate of a dead person."

ASTC

[39] ASTC (ASX Settlement and Transfer Corporation Pty Ltd) is a subsidiary of the ASX. It is a "prescribed CS facility", ie a licensed clearing and settlement facility prescribed by the *Corporations Regulations.*[15] Its operating rules are known as the *ASTC Settlement Rules.*[16]

***Corporations Regulations* 2001 (Cth)**

[40] The *Corporations Regulations* contain the following definitions of a "proper ASTC transfer" and an "ASTC-regulated transfer":

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15 *Corporations Act* ss 761A, 768A; *Corporations Regulations* reg'n 7.1.03.

16 For the content of operating rules and their effect as a contract under seal between licensees, issuers of financial products and participants in the facility, see *Corporations Act* ss 822A, 822B.

"***proper ASTC transfer*** means:

(a) an ASTC-regulated transfer of a Division 4 financial product effected:
  (i) through the prescribed CS facility operated by the ASTC; and
  (ii) in accordance with the operating rules of the ASTC; and
(b) an ASTC-regulated transfer that the ASTC, in accordance with its operating rules, determines:
  (i) to comply substantially with the applicable provisions of those operating rules; and
  (ii) to be taken to be, and always to have been, a proper ASTC transfer."

"***ASTC-regulated transfer*** means a transfer of a Division 4 financial product:

(a) within the meaning of :
  (i) Division 4 of Part 7.11 of the Act; and
  (ii) regulations relating to transfer made for sections 1074A and 1074E of the Act; and
(b) that is effected through ASTC; and
(c) that, according to the ASTC operating rules, is an ASTC-regulated transfer."[17]

[41] Regulation 7.11.24 provides:

"**7.11.24 Application of ASTC operating rules**

If the ASTC operating rules include provisions determining:
(a) ...
(b) when a proper ASTC transfer takes effect;
those provisions have effect for this Division."

[42] Regulation 7.11.27 provides:

"**7.11.27 Effect of proper ASTC transfer on transferee: Division 4 financial products other than rights**

(1) If a proper ASTC transfer of a Division 4 financial product (other than rights) takes effect at a particular time:
  (a) the transferee is taken to have agreed at that time to accept the Division 4 financial product subject to the terms and conditions on which the transferor held them immediately before that time; and
  (b) the terms and conditions are the terms and conditions applicable as between the issuer in relation to, and the holder for the time being of, the Division 4 financial product.
(2) If the Division 4 financial product is shares, the transferee is also taken to have agreed at that time:
  (a) to become a member of the issuer; and

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17 *Corporations Regulations* reg'n 1.0.02.

(b) to be bound by the issuer's constitution.

(3) ...

(4) ..."

[43] Under regulation 7.11.36 a company may not refuse to register a proper ASTC transfer of a share.

CHESS

[44] CHESS is an acronym for Clearing House Electronic Subregister System, the computer system used by ASTC. Under the *ASTC Settlement Rules* CHESS has two major functions: (a) it facilitates the clearing and settlement of trades in shares; and (b) it provides an electronic subregister for shares in companies listed on the ASX.

[45] Under the *ASTC Settlement Rules* transfers take effect when ASTC electronically deducts the financial products from the source holding pursuant to one of rr 9.4.3(a), 9.5.5(a) or 10.12.3 (whichever is applicable). Usually three days after a buyer and a seller agree to a trade, it is settled by the simultaneous transfer of the purchase moneys and the registration of the change in title on the CHESS subregister.

Company's share register

[46] Pursuant to s 168 of the *Corporations Act* a company must set up and maintain a register of members. The register must contain the information in s 169:

> **"169 Register of members**
> *General requirements*
> (1) The register of members must contain the following information about each member:
> (a) the member's name and address;
> (b) the date on which the entry of the member's name in the register is made.
> *Index to register*
> (2) If the company or scheme has more than 50 members, the company or scheme must include in the register an up-to-date index of members' names. The index must be convenient to use and allow a member's entry in the register to be readily found. A separate index need not be included if the register itself is kept in a form that operates effectively as an index.
> *Companies with share capital*
> (3) If the company has a share capital, the register must also show:
> (a) the date on which every allotment of shares takes place; and
> (b) the number of shares in each allotment; and
> (c) the shares held by each member; and
> (d) the class of shares; and
> (e) the share numbers (if any), or share certificate numbers (if any), of the shares; and
> (ea) the amount paid on the shares; and
> (eb) whether or not the shares are fully paid; and
> (f) the amount unpaid on the shares (if any).
>
> Note 1: Transfers of shares are entered in the register under section 1092.

Section 1091C deals with the registration of trustees etc. on the death, incapacity or bankruptcy of the shareholder.

Note 2: For the treatment of joint holders see subsection (8).

(4) The register does not have to show the amount unpaid on the shares (see paragraph (1)(f)) if:

(a) all of the company's shares were issued before 1 July 1998;

(b) the register continues to show the par values of the shares as they were immediately before 1 July 1998.

(5) The register does not have to show the amount unpaid on the shares (see paragraph (1)(f)) if:

(a) all of the company's shares were issued before 1 July 1998; and

(b) the company is not a listed company.

Non-beneficial ownership—companies other than listed companies

(5A) The register of a company that:

(a) has a share capital; and

(b) is neither a listed company (within the meaning of section 603) nor a company covered by an order under section 707;

must indicate any shares that a member does not hold beneficially.

Note: See also section 1072H (in particular, subsection 1072H(8) which contains relevant presumptions about beneficial ownership).

(6) In deciding for the purposes of subsection (5A) whether a member holds shares beneficially or non-beneficially, the company is to have regard only to information in notices given to the company under section 1072H, 672B or 672C.

Registered schemes

(6A) The register of a registered scheme must also show:

(a) the date on which every issue of interests takes place; and

(b) the number of interests in each issue; and

(c) the interests held by each member; and

(d) the class of interests; and

(e) the amount paid, or agreed to be considered as paid, on the interests.

Former members

(7) A register of members must also show:

(a) the name and details of each person who stopped being a member of the company or scheme within the last 7 years; and

(b) the date on which the person stopped being a member.

The company or scheme may keep these entries separately from the rest of the register.

Joint holders

(8) For the purposes of this section:

(a) 2 or more persons who jointly hold shares in the company or interests in the scheme are taken to be a single member of the company or scheme in relation to those shares or interests; and

(b) 2 or more persons who have given a guarantee jointly are taken to be a single member of the company.

They may also be members of the company or scheme because of shares or interests that they hold, or a guarantee that they have given, in their own right or jointly with others."

[47] Section 172 provides for the location of the register: so far as presently relevant, it must be kept at the company's registered office[18] or at a place in this jurisdiction[19] (whether of the company or someone else) where the work involved in maintaining the register is performed.[20]

[48] By s 1070A(4) a share entered on a register kept under s 169 is taken to be situated in the State or Territory where the register is kept.

[49] The company must allow anyone to inspect the register. If the register is kept on computer, a person inspects a hard copy of the information.[21]

[50] At all material times Arrow had its registered office at Level 19, AM60, 42-60 Albert Street, Brisbane, and QGC had its registered office at Level 11, 307 Queen Street, Brisbane. Link Market Services, which had offices at Level 12, 300 Queen Street, Brisbane, maintained share registries for the companies, recording all on-market and all off-market trades.

[51] Under r 8.1 of the *ASTC Settlement Rules* ASTC may approve a company as an "Issuer" in relation to a "class of Financial Products" and may approve that class of Financial Products (i.e. Division 4 financial products as defined in the *Corporations Regulations*).[22] The present proceeding was conducted on the basis QGC and Arrow were Issuers, and the shares bought and sold by Fysh were an approved class of Financial Products within r 8.1.

[52] Rule 5.2 provides:

> **"5.2 CHESS SUBREGISTER AND ISSUER OPERATED SUBREGISTER**
>
> **5.2.1 CHESS Subregister**
> When ASTC gives approval to a class of an Issuer's Financial Products under Rule 8.1, the Issuer:
> (a) irrevocably authorises ASTC to establish and administer a CHESS Subregister in respect of that class of Financial Products; and
> (b) acknowledges that ASTC acts as its agent in administering that CHESS Subregister in accordance with these Rules.
>
> **5.2.2 Issuer Operated Subregister**
> Unless otherwise agreed between an Issuer and ASTC, in addition to a CHESS Subregister established in accordance with Rule 5.2.1, the Issuer must administer an Issuer Operated Subregister."

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18 By s 142(1) of the *Corporations Act*, a company must have a registered office in this jurisdiction.

19 See the definition of "this jurisdiction" in *Corporations Act* s 9: in effect, the Australian States and Territories.

20 *Corporations Act* s 172(1) (a) and (c).

21 *Corporations Act* s 173.

22 *ASTC Settlement Rules* r 2.13.1; *Corporations Regulations* reg'n 7.11.03.

[53] The two subregisters together constitute the company's register of members for the purposes of the *Corporations Act.*

[54] The CHESS Subregister is part of the company's register which is maintained by ASTC as agent for the company.[23] ASTC must record and maintain on the CHESS Subregister the registration details and HIN (Holder Identification Number) of each person with a CHESS holding of a particular class of approved financial products and the number of those financial products he holds.[24]

[55] The company is responsible for maintaining the Issuer Operated Subregister,[25] and for reconciling the two subregisters.[26]

[56] The evidence does not deal expressly with the keeping of the Issuer Operated Subregisters of QGC and Arrow. I infer that they were maintained on behalf of the companies by Link Market Services.

[57] By s 1300 of the *Corporations Act* the company's (whole) share register must be available for inspection at the place where, in accordance with the Act, it is kept. This requirement is "subject to and in accordance with" the Act.

[58] The information maintained by ASTC on the CHESS Subregister is stored at ASTC's registered office, but the register is taken to be located at the "place of inspection" – ie where it is otherwise required to be kept. This is the effect of compliance with r 8.6.4 of the *ASTC Settlement Rules* and s 1301 of the *Corporations Act*, which provide:

> **"8.6.4 Notice of location of stored information**
> As soon as a class of an Issuer's Financial Products are Approved, the Issuer must:
> (a) give notice to the Commission in accordance with Section 1301(1) of the *Corporations Act* specifying (subject to Rule 8.6.5) the registered office of ASTC as the situation of the place of storage of the information maintained by ASTC on a CHESS Sub-register;
> (b) give a copy of that notice to ASTC; and
> (c) give a copy of that notice to the exempt or special stock market or exempt financial market where the Issuer's Financial Products are quoted."

> **"1301 Location of books on computers**
>
> (1) This section applies if:
> (a) a corporation records, otherwise than in writing, matters (***the stored matters***) this Act requires to be contained in a book; and
> (b) the record of the stored matters is kept at a place (***the place of storage***) other than the place (***the place of inspection***) where the book is, apart from this section, required to be kept; and

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23 *ASTC Settlement Rules* rr 2.13.1, 8.6.1.
24 *ASTC Settlement Rules* r 8.6.2.
25 also referred to as the "Issuer Sponsored Subregister": *ASTC Settlement Rules* r 2.13.1.
26 *ASTC Settlement Rules* r 5.13.1.

(c) at the place of inspection means are provided by which the stored matters are made available for inspection in written form; and

(d) the corporation has lodged a notice:

(i) stating that this section is to apply in respect of:

(A) except where sub-subparagraph (B) applies – the book; or

(B) if the stored matters are only some of the information that is required to be contained in the book—the book and matters that are of the same kind as the stored matters; and

(ii) specifying the situation of the place of storage and the place of inspection.

(2) Subject to subsection (4), the corporation is taken to have complied with the requirements of this Act as to the location of the book, but only in so far as the book is required to contain the stored matters.

(3) Subject to subsection (4), for the purposes of the application of subsection 1085(3) and section 1300 in relation to the corporation and the book, the book is taken to be kept at the place of inspection, even though the record of the stored matters is kept at the place of storage.

(4) If:

(a) the situation of the place of storage or the place of inspection changes; and

(b) the corporation does not lodge notice of the change within 14 days after the change;

this section, as it applies to the corporation because of the lodging of the notice referred to in paragraph (1)(d), ceases to so apply at the end of that period of 14 days."

[59] For the purposes of s 1300, the company's share register was taken to be kept at the offices of Link Market Services - "the place of inspection" referred to in s 1301. Thus, the whole share register had to be available for inspection (in hard copy) at Link Market Services in Brisbane.

[60] Link Market Services had offices in Sydney, as well as Brisbane. As the company's share register was computerised, presumably it could have provided a hard copy for inspection in Sydney, as well as in Brisbane. The implications of this were not fully explored in submissions.

[61] By s 172 each company's share register was required to be kept at the place where the work involved in maintaining it was performed. There were two places: Sydney were ASTC maintained the CHESS Subregister and Brisbane where Link Market Services maintained the Issuer Operated Subregister. Link Market Services attended to reconciliation of the subregisters, and provided a place of inspection of the whole register.

[62] Nicole Wren, an investigative officer in the Brisbane Office of ASIC has sworn:

"4. I am informed by Rachel Teo[27] and believe that:

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27 Client Relationship Manager, Client Relationship Group employed by Link Market Services.

a) the Register of Members for QGC held in accordance with section 169 of the *Corporations Act 2001* ("the Principal Register") records all share trades whether they are conducted on market through Chess or off market;
b) electronic messages are sent from the Chess sub-register to the Principal Register on a daily basis and the Principal Register is updated to include any on market transactions;
c) the Chess sub-register does not record off-market transactions and is merely a record of on market transactions.

5. I am informed by Rachel Teo and believe that the Principal Register maintained by Link records the dates on which Dr Fysh became the registered holder of shares in AGC..."

[63] Ms Teo's description of records maintained by Link Market Services cannot answer the question of whether the CHESS Subregister was part of the register kept under s 169 or something distinct from it.[28]

What took place in Queensland?

[64] The application proceeded on the assumption that all that happened in Queensland was the (electronic) entry of the share transfers on the companies' registers here.

[65] There is no evidence where Fysh was when the Arrow shares were acquired. According to an affidavit sworn by his solicitor:

(a) he was not in Australia between 27 November and 7 December 2007;
(b) he lived in the United Kingdom during that period and remains resident there;
(c) during that period he travelled between Singapore, Mumbai, Hyderabad and the United Kingdom;
(d) he was at his home in the United Kingdom from the evening of Saturday 1 December 2007 to the end of that period;
(e) the broker was located in Melbourne during that period.

[66] The trades were conducted electronically on the ASX by Fysh's broker, in accordance with his instructions. By s 52 of the *Corporations Act*:

> **"52 Doing acts**
>
> A reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done."

Fysh's conduct in instructing the broker was a step taken in each of the share trades, and Fysh is responsible for the broker's actions pursuant to those instructions.[29] There is no suggestion that the broker did other than follow his instructions: he is not alleged to have had any part in the suspected insider trading aspects of the transactions.

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28 I note that the only reference to the "principal register" in the Act is in s 178, which is concerned with the keeping of an overseas branch register - which must be kept "in the same manner as this Act requires the company to keep the register kept under s 169 (the ***principal register***)". That does not throw any light on the status of the CHESS Subregister.

29 *Corporations Act* s 769B.

Prohibition on *acquiring* shares or *disposing of* shares

[67] Section 1043A provides that a person in possession of inside information must not "acquire, or dispose of" or "enter into an agreement to... acquire, or dispose of" relevant shares. Neither "acquire" nor "dispose of" in this context is defined.

[68] Section 761E(1)(a) provides that if a financial product is issued to a person, the person acquires the product from the issuer. But, as the note to the subsection explains, a financial product can also be acquired from someone other than the issuer (e.g. on secondary transfer), which is what occurred in the present case. Section 761E(7) provides that regulations may provide the meaning of "acquire" (and/or related parts of speech) in relation to a class of financial product for the purpose of chapter 7, but the *Corporations Regulations* do not define "acquire" in relation to shares for the purposes of chapter 7 of the Act.

[69] The law draws a distinction between legal and equitable ownership. It is clear that equitable ownership of shares does not make a person a shareholder: entry on the share register is necessary to constitute membership of a company.[30]

[70] The ordinary meaning of "acquire" includes to get or gain as one's own. For example, the *New Shorter Oxford English Dictionary on Historical Principles*[31] defines "acquire" as including "to get or gain as one's own, by one's own exertions or qualities; to come into possession of".[32]

[71] Pursuant to s 761A "dispose", in relation to a financial product, includes "terminate or close out the legal relationship that constitutes the financial product". That is not relevant to the sale of shares.

[72] The ordinary meaning of "dispose of" includes to get rid of or part with. The definitions in the *New Shorter Oxford English Dictionary*, for example, include "get rid of; deal conclusively with".

[73] "Dispose of" and "disposition" have been widely construed by Courts as covering all forms of alienation, or as connoting a change in the beneficial ownership of an asset.[33]

[74] Pursuant to the *ASTC Settlement Rules* the transfers took effect when ASTC electronically deducted the shares from the source holdings.[34] Fysh/the buyer of the Arrow shares he sold is taken to have thereupon agreed:

(a) to accept the shares on the terms and conditions on which the seller held them; and

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30 *Maddocks v DJE Constructions Pty Ltd* (1982) 148 CLR 104 at 117; *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353 at 363; *Dalgety Downs Pastoral Co Pty Ltd v FCT (Cth)* (1952) 86 CLR 335 at 342; *Franklin's Selfserve Pty Ltd v FCT* (1970) 125 CLR 52 at 71; *Kingston v Keprose Pty Ltd* (1987) 12 ACLR 323 at 329; *AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2007] QSC 238 at [55]-[66].

31 Oxford: Clarendon Press, 1993.

32 See also *Trade Practices Commission v Australian Iron & Steel Pty Limited* (1990) 22 FCR 305 at 314 – 315 per Lockhart J (where the legislation in question provided that a reference to the acquisition of shares should be construed as a reference "to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares"); and *Allina Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 203 at 209 – 211.

33 See, for example, *Rose v FCT* (1951) 84 CLR 118 at 123; *FCT v Wade* (1951) 84 CLR 105 at 110; *Re Margart Pty Ltd (in liq); Hamilton v Westpac Banking Corporation* (1984) 9 ACLR 269 at 272; *Roache v Mercantile Loan & Finance Co Ltd (No 2)* [1968] 1 NSWR 384 at 388.

34 Infra para [45].

(b) to become a member of the company and to be bound by its constitution.[35]

At that moment, equitable title to the shares was acquired. Three days later, the purchase moneys were transferred simultaneously with the change in ownership of the shares being recorded on the CHESS Subregister in Sydney. Subsequently an electronic message was sent by ASTC to Link Market Services in Brisbane, which updated the "principal register".

[75] If I am correct in holding that the CHESS Subregister was part of the company's register required to be kept under ss 168 and 169 of the Act, then Fysh acquired/disposed of legal title to the shares upon the transfers being recorded on that subregister.

[76] I am not persuaded that it is necessary to establish a transfer of legal title to shares in order to establish that those shares were acquired or disposed of within the meaning of s 1043A. The section is expressed in terms of acquiring/disposing of shares or agreeing to do so, rather than in terms of becoming/ceasing to be a shareholder or agreeing to do so. This seems a deliberate choice of words, wide enough to embrace conduct which is part of a sophisticated scheme whereby someone with inside information takes the benefit of share trading without ever becoming registered as the holder of shares.

[77] In my view Fysh acquired/disposed of the shares within the meaning of s 1043A when the transfers took effect according to the *ASTC Settlement Rules*. That occurred in Sydney.

[78] If I am wrong in that, and he acquired/disposed of them only when his name/the name of the buyer of the Arrow shares was entered on the companies' share registers, that occurred on entry on the CHESS Subregisters in Sydney.

Conduct constituting an offence – *POCA* s 335

[79] Under s 335 of *POCA* "proceeds jurisdiction" depends on where "all or part of the conduct constituting an offence" took place. "Conduct" is not defined in that legislation.

[80] Criminal offences usually contain physical elements (*actus reus*) and fault elements (*mens rea*) which must concur. This analytical division is reflected in chapter 2 of the *Criminal Code Act* 1995 (Cth).[36] Section 3.1 of the *Code* provides:

"3.1 Elements

(1) An offence consists of physical elements and fault elements.
(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.
(3) The law that creates the offence may provide different fault elements for different physical elements."

Physical elements are defined in s 4.1:

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35 *Corporations Regulations* reg'n 7.11.27.

36 See the discussion in Watson & Watson, *Australian Criminal Law: Federal Offences*: Sydney: Law Book, 1995 at [10.720]-[10.820].

"**4.1 Physical elements**

(1) A physical element of an offence may be:
  (a) conduct; or
  (b) a result of conduct; or
  (c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:
conduct means an act, an omission to perform an act or a state of affairs[37]
engage in conduct means:
  (a) do an act; or
  (b) omit to perform an act." (Emphasis Added)

By s 5.1 the fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

[81] Counsel for the DPP submitted:

(a) that the share transfers were not registered until they were entered on the register in Queensland; and
(b) that Fysh, by his acts, created a state of affairs in this State – namely, the registration of the share transfers.

I have already stated my reasons for rejecting the first proposition. I reject the second proposition, too. Section 4.2(1) provides that conduct "can only be a physical element if it is voluntary" and s 4.2(5) provides that a "state of affairs is only voluntary if it is one over which the person is capable of exercising control". Entry on the share registers in Queensland was something beyond Fysh's control once the transfers had taken effect under the *ASTC Settlement Rules.*

[82] Counsel for Fysh submitted:

(a) that at most the conduct constituting the offence was that of Fysh himself and the broker; and
(b) that what was done subsequently in registering the transfers:
  (i) was not done by either of them, and
  (ii) was the result of their conduct.

He submitted that "conduct" in the *POCA* does not have the same meaning as in the *Criminal Code* – in particular, that it does not include a state of affairs. Under s 15AA of the *Acts Interpretation Act* 1901 (Cth) the purposive approach to statutory interpretation is to be preferred. I agree with him that the object of s 335 is to ensure that confiscation proceedings take place in a court local to where things allegedly constituting the offence occurred (a reflection of the policy that crimes should where possible be dealt with locally). He submitted further that the absence of a definition of "conduct" in the dictionary in s 11 of *POCA*, is inconsistent with an intention to import a definition from the *Code*. Finally he sought to invoke the principle that in construing a provision interfering with property rights any ambiguity should be resolved in favour of the party whose rights are diminished.

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37 See Watson & Watson, *Australian Criminal Law: Federal Offences*: Sydney: Law Book, 1995 at [10.980].

[83] Having rejected counsel for the DPP's submission that Fysh created a state of affairs in Queensland, I do not find it necessary to determine whether "conduct" has the same meaning in the *POCA* and the *Criminal Code*. There was no conduct of either Fysh or his broker in Queensland.

[84] Therefore, I conclude that none of the conduct constituting the offences occurred in Queensland. Accordingly this Court does not have proceeds jurisdiction under the *POCA*.

Cross-vesting application

[85] If, contrary to my conclusion, this Court does have proceeds jurisdiction, it is necessary to consider the application to transfer the proceeding to the Supreme Court of New South Wales.

[86] The applicable provision of the *Jurisdiction of Courts (Cross-vesting) Act* (Cth) is s 5(2)(b)(iii). The Supreme Court of Queensland must transfer the proceeding to the Supreme Court of New South Wales if it is "in the interests of justice" that it be determined there.

[87] As I have said, this calls for a 'nuts and bolts' management decision as to which court is the more appropriate to hear and determine the dispute.[38] In my view the relevant considerations are as follows.

(a) In the substantive application, neither the applicant (the Commonwealth DPP) nor the respondent (Fysh) has a closer tie with one of these jurisdictions rather than the other. The applicant is a statutory authority with offices in both Brisbane and Sydney. Fysh is resident in the United Kingdom.

(b) The broker retained by Fysh was located in Melbourne. He caused the transactions to be conducted electronically on the ASX in Sydney.

(c) The companies had their registered offices in Queensland.

(d) After the share transfers were recorded on the CHESS subregisters in Sydney, information was transmitted electronically to Link Market Services in Brisbane.

(e) Before the substantive application was filed, ASIC conducted litigation against Fysh in the Supreme Court of New South Wales arising out of the same alleged insider trading. Fysh engaged Sydney solicitors and senior and junior counsel from the Sydney Bar to defend that litigation. Those lawyers invested much time in familiarising themselves with the facts and applicable law, and Fysh incurred considerable expense thereby. Those Sydney solicitors have acted for him in this proceeding in the Supreme Court of Queensland, and he wishes to have the same Sydney counsel represent him on the substantive application. Accordingly his legal expenses are likely to be higher if the substantive proceeding is conducted in Brisbane rather than in Sydney.

(f) While ASIC is a quite distinct statutory authority from the DPP, the DPP relies on investigations undertaken by Mr Scadden, an ASIC officer based in Sydney.

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38 Infra para 15.

(g) Mr Scadden referred to about ten potential witnesses apart from Fysh, the broker and himself. There is no evidence of the locations of most of them. In oral submissions counsel for the DPP identified four of them as being Brisbane based, the majority overseas, and one in Sydney.

[88] What took place in Queensland is within a very short compass, and proof of it is unlikely to be a protracted or costly aspect of the case. In most cases the location of the legal representatives selected by a litigant will have little, if any, bearing on which is the more appropriate Court to hear and determine a matter. But Fysh's reasons for retaining Sydney solicitors and counsel are objectively reasonable. Other factors seem to be evenly balanced, if not weighted in favour of Sydney. There is nothing to suggest that the DPP would be disadvantaged by the substantive dispute being litigated in Sydney: indeed litigating in Sydney may result in some logistic advantages for it.

[89] In all the circumstances I think the Supreme Court of New South Wales would be the more appropriate court for the hearing and determination of the substantive application, and that it would be in the interests of justice to transfer the proceeding to that court.

Orders

[90] I will hear counsel on the form of orders.

DPP

Commonwealth Director of Public Prosecutions

21 December 2011

Our Reference:
SC10101530A/1
John Davidson
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The Honourable T F Bathurst QC
Chief Justice of New South Wales
Supreme Court of New South Wales
Law Courts Building,
Queens Square
SYDNEY NSW 2000

Dear Chief Justice,

PROSECUTION OF STUART ALFRED FYSH
APPLICATION TO PRESENT AN INDICTMENT IN THE SUPREME COURT

The purpose of this letter is to request an exemption under section 128 of the *Criminal Procedure Act* 1986 in accordance with Practice Note SC CL 2.

The exemption relates to a possible indictment to be presented against Stuart Alfred Fysh ("Fysh") which will contain four Commonwealth offences of insider trading contrary to sections 1043A(1) and 1311(1) of the *Corporations Act* 2001. A Court Attendance Notice ("CAN") containing the four offences has issued and the matters are next before the Downing Centre Local Court on 24 January 2012. I am informed that Fysh will, on that date, apply to waive his right to a committal hearing and, if granted, he will be committed for trial in respect of these Commonwealth charges.

The charges

Details of the charges against Fysh are set out in the attached CAN.

The maximum penalty for an offence against section 1043A(1) was five years imprisonment and/or a fine of $220,000 up until 13 December 2010 on which date it was increased to ten years imprisonment and/or a fine of $495,000. I note that all four offences with which Fysh has been charged are alleged to have occurred before 13 December 2010.

The Crown Case

BG, a leading international energy company, had been looking for some time to establish a supply of liquefied natural gas in the Asia Pacific region. To that effect, in 2006, it established the Asia Pacific LNG business development team (the "Asia Pacific Team"). After much research and due diligence, the Asia Pacific Team had focussed its attention on a number of Australian companies, amongst whom were Arrow Energy NL ("Arrow") and Queensland Gas Company (QGC). Initially, around June 2007, it was thought that Arrow offered the best prospects in terms of availability and "doability". Later, around September – November 2007, after undertaking further research and obtaining further information, it was decided QGC was the better prospect. In early February 2008, after negotiations between the respective executives of the companies, it was announced on the Australian Stock Exchange that there was to be a joint venture between the BG and QGC.

It is alleged that Fysh, who was at all material times the Executive Vice President and Managing Director responsible for the interests of BG in Africa, Middle East and Asia, by virtue of this position and his dealings with various senior people who worked on the Asia Pacific Team, possessed commercially sensitive information about the possible acquisition by BG of interests in Arrow and QGC. In June 2007, possessed with the knowledge that, at that time, the Asia Pacific Team believed Arrow to be the better prospect for acquisition, Fysh purchased, in two transactions, a total of 250,000 shares in Arrow. In December 2007, having information that the Asia Pacific Team had decided that QGC was a better prospect for acquisition, Fysh instructed his stockbroker to sell all his Arrow shares and use the proceeds of the sale to purchase, in two transactions, 250,000 shares in QGC.

Basis for the Application

I request that an exemption under section 128 of the *Criminal Procedure Act* 1986, be granted on the bases of the complexity of the legislation creating the offences and the public significance of this type of prosecution. The trial of these matters will involve the application of complicated insider trading provisions of the Corporations Act to a complex factual scenario. Due primarily to the difficulty in detecting offences of this type, there have been relatively few trials in Australia under these insider trading provisions. However, such prosecutions are of public significance in that this type of offence has an impact on the integrity of share trading and thus on the Australian economy generally.

Should you require any further information please do not hesitate to contact me on 9321 1319 or John Davidson on 93211205.

Yours faithfully

Joanne Philipson
Acting Senior Assistant Director
Commercial Prosecutions Branch

cc: Rani John & Justine Cameron
Gilbert & Tobin Lawyers
2 Park Street
SYDNEY, NSW, 2000

Supreme Court
New South Wales
Common Law Division

Case Title:	Regina v Fysh (No 2)
Medium Neutral Citation:	[2012] NSWSC 1340
Hearing Date(s):	2,5 November 2012
Decision Date:	7 November 2012
Jurisdiction:	Common Law
Before:	McCallum J
Decision:	Application for directed verdicts refused
Catchwords:	CRIME – particular offences – insider trading – no case submission – whether Crown had adduced evidence upon which a jury could convict – possession of alleged inside information – whether particulars to be taken in combination – whether Crown required to prove possession of every component of alleged inside information – whether failure to prove any individual component fatal to Crown case – materiality of alleged inside information – whether evidence so lacking as to require jury to speculate
Legislation Cited:	Corporations Act 2001 (Cth)
Cases Cited:	Doney v R [1990] HCA 51; (1990) 171 CLR 207 EPA v Sydney Water Corporation [1997] 98 A Crim R 481 Hannes v DPP (No 2) [2006] NSWCCA 373 R v Hannes [2000] NSWCCA 503 R v Rivkin [2004] NSWCCA 7 R v Saffron (1988) 17 NSWLR 395
Texts Cited:	

Category:	Procedural and other rulings
Parties:	Regina Stuart Alfred Fysh
Representation	
- Counsel:	Counsel: D Staehli SC and J Single (Crown) B Walker SC and I Pike SC (accused)
- Solicitors:	Solicitors: Commonwealth Director of Public Prosecutions (Crown) Gilbert & Tobin Lawyers (accused)
File number(s):	2011/15688
Publication Restriction:	Decision not to be posted on the Internet until after the conclusion of the trial presently being heard by McCallum J with a jury

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JUDGMENT

1 **HER HONOUR:** Stuart Fysh stands trial on four counts of insider trading contrary to sections 1043A(1)(c) and 1311(1) of the *Corporations Act* 2001 (Cth). The trial began before me with a jury on 15 October 2012. After the Crown closed its case last Friday, 2 November 2012, the accused submitted that there was no case to answer. The submission invoked the undoubted duty of a trial judge to direct a jury to return a verdict of not guilty if there is no evidence upon which the jury could convict: *Doney v R* [1990] HCA 51; (1990) 171 CLR 207 at [11].

2 The submission was directed to two elements of the offence in particular, the element of possession of the alleged inside information and the element referred to in shorthand as the materiality of that information. Yesterday, I rejected the application, ruling that there was a case to answer. These are my reasons for making that ruling insofar as it was directed to the first aspect of the submission, in the interests of having the

following analysis available before the Crown's address. My reasons in respect of the second aspect of the submission will be published separately.

Basis for the application

3 In order to understand the basis for the application, it is necessary to explain the way in which the case has been brought forward by the Crown.

4 The four charges against the accused arise from his undisputed acquisition of two parcels of shares in Arrow Energy N/L (counts 1 and 2) and, six months later, his acquisition of two parcels of shares in Queensland Gas Company Ltd (counts 3 and 4). It is not in dispute that the accused instructed his broker to sell the Arrow shares on the date he acquired the QGC shares and to use the proceeds to buy those shares. However, the disposal of the Arrow shares is not the subject of any charge.

5 Section 1043A prohibits the acquisition of relevant shares if a person (referred to in the section as the insider) possesses "inside information". That term is defined, and the terms that define it are further defined, in the Act. It will be necessary to return to those definitions.

6 The indictment on which the accused was arraigned reflects the terms of the section, alleging simply that the accused acquired the relevant shares "whilst in possession of inside information".

7 In advance of the trial, the Crown provided particulars of the alleged inside information for each count. The particulars relied upon in respect of counts 1 and 2 (the Arrow counts) are the same. Those particulars are set out in a document now marked MFI 3. That document contains five separately numbered paragraphs. However, as submitted by Mr Walker on behalf of the accused, I do not think there is any significance in the formatting. Similarly, the particulars relied upon in respect of counts 3 and

4 (the QGC counts) are the same. Those particulars are set out in a document marked MFI 4, which contains nine separately numbered paragraphs.

8 Mr Walker submitted, as a premise of the application, that the particulars are, in each case, "a whole composed of everything set out in the particulars document", such that it is the combined effect of the matters set out which constitutes the alleged "inside information". The conclusion he submitted flows from that premise is that if, as to any single component of the particulars, the accused were successful in satisfying the test to be met on a no case submission, it would necessarily follow that there is no case to go to the jury on the two counts to which that information relates. Resting on that conclusion, Mr Walker submitted that the evidence falls short in that each of MFI3 and MFI4 includes a component as to which the jury could not be satisfied that the accused came into possession of that particular part of the information.

9 The starting point is to examine the premise. It is trite to observe that the Crown must prove, and has only to prove, the essential elements of the offence charged. It might be thought, on orthodox analysis, that the relevant element required to be proved in the present context is that the accused was in possession of "inside information" (as averred in the indictment) and that the particulars given separately by the Crown cannot expand or circumscribe the requirement to prove that element.

10 Support for that analysis may be found in the body of jurisprudence that rails against the proposition that the provision of separate particulars elevates the matters alleged in such particulars to the status of essential elements of the offence required to be proved by the Crown: see for example *R v Saffron* (1988) 17 NSWLR 395 at 448E to 449A per Hunt AJA; *EPA v Sydney Water Corporation* [1997] 98 A Crim R 481 per Gleeson CJ at 484-485. As those authorities reveal, however, the question as to what is essential to be proved turns critically on the nature of the offence in question.

11 The neatness of the term "inside information" in s 1043A belies the complexity of its treatment in the statute, which carves its role in the offence. A convoluted series of definitions reveals that the "information" comprehended within that term is the subject of four elements of the offence:

a. the accused must be shown to have possessed it;
b. it must be shown not to have been generally available;
c. it must be shown to have been information that would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether to acquire or dispose of the relevant shares (materiality);
d. it must be shown to have been known by the accused to be not generally available and material (in the sense expanded above).

12 As a matter of the plain construction of the statute, as well as of fairness and common sense, it must be the same body of information for the purpose of each element. So much is recognised, certainly implicitly, in the judgment of Spigelman CJ in *R v Hannes* [2000] NSWCCA 503 at [26] to [28]. I did not understand the Crown to contend otherwise.

13 The critical issue is to identify the extent to which the Crown's hand is tied, in that respect, by the particulars provided in the present case. Some assistance on that issue may be found in the decision of the Court of Criminal Appeal in *Hannes v DPP (No 2)* [2006] NSWCCA 373 at [573] to [580]. In that case, the Court rejected the proposition that, where the particulars had three separate "limbs", the jury had to be satisfied that each limb was not generally available and that each, if available, could have a material effect on the share price.

14 In considering that issue, the Court approved directions given to the jury by the trial judge in the following terms (set out at [576] and [577] of the appeal judgment):

> "I confirm the directions I gave you that in considering the third element you have to determine whether the information particularised in the indictment, considered as a combination, was not generally available.
>
> I confirm that it is not necessary for the Crown to prove that each part of the combination considered separately, by itself, in isolation from the rest of the information in the combination, was information which was not generally available."
>
> "You could, if you saw fit, be satisfied beyond reasonable doubt that the combination of the information particularised in the indictment would have influenced or would have been likely to have influenced investors in deciding whether to buy or sell $2 November 1996 TNT option contracts, even though it is reasonably possible that some part taken by itself, such as that securities in TNT had been placed on an embargo list, was information which was already generally available or information which would not have influenced or would not have been likely to have influenced investors."

15 Mr Walker submitted, and I accept, that the position cannot be different in respect of the element of possession. The "inside information" must be the same body of information for the purpose of all elements of the offence.

16 In the way in which the present charges have been brought forward by the Crown, the "inside information" is the body of information, taken in combination and as a whole, set out in MFI3 and MFI4 respectively.

17 It follows, in my view, that the premise of Mr Walker's submission is correct, so long as it is properly understood. The reasoning of the Court in *Hannes (No 2)* at [579] to [580] reveals two further important considerations. First, in approving the trial judge's directions to the jury, the Court emphasised that the critical consideration is the "particular flavour and likely effect" of the particularised information taken as a body of information. The Court noted in that context that "the relevant effect was not fairly assessed by dividing it into parts and assessing each separately" (at [579]). Similarly in the first appeal in *Hannes*, Spigelman CJ said at [28] that the information consisted of "the cumulative effect of four separate elements".

18 Secondly, the Court in *Hannes (No 2)* noted at [580] that it was a matter for the jury to identify the nature of the information particularised and the relationship between different components of the information.

19 Those considerations lead me to conclude that, although the premise of Mr Walker's submission (that the particulars must be taken in combination and regarded as a whole) is correct, it does not necessarily follow, as contended for the accused, that an absence of direct evidence as to his possession of any single individual component of those particulars is necessarily fatal to the Crown's case such as to require a directed verdict.

20 That is so for at least two reasons. First, the issue whether the accused possessed any individual part of the information is a matter of inference. The accused's submissions implicitly equated possessing a part of the information with having read or heard words in the terms of that part of the information. That is one way in which possession of the information may be proved, but it is not the only way. The jury would also be entitled to consider any deductions, conclusions or inferences taken from the information by the accused. That follows from the premise argued by Mr Walker, since the test of materiality has regard to such deductions, conclusions or inferences. Whealy J expressly directed the jury in those terms in directions approved by the Court of Criminal Appeal in *R v Rivkin* [2004] NSWCCA 7 at [227].

21 It follows that, although the words heard or read by the accused will be important, the issue whether any individual component of the information was possessed by the accused is not to be tested by those words alone. The task for the jury is an evaluative one which calls for consideration of all of the evidence to determine whether it conveyed to the accused the body of "inside information" particularised by the Crown, taken as a whole. That is a question of fact which will be informed by a multitude of considerations, including any inferences that may properly be drawn from other information found to be possessed by the accused. That is not to

say that a no case submission could never be made good on the approach contended for by Mr Walker, but it illustrates the difficulty of his application.

22 Secondly, the significance of any discrete component of the body of information relied upon by the Crown is a question of fact for the jury. In focussing on particular components of the information, the application implicitly assumed their several significance, but that is a matter for the jury.

23 In any event, even if that analysis is wrong, I have concluded that a jury could be satisfied that the accused possessed the parts of the particularised information focussed on by Mr Walker in the no case submission.

24 As to counts 1 and 2 relating to the acquisition of shares in Arrow, the application focused on two components of the particularised "inside information". The first is particular (b), as follows:

> The Team proposed that pursuing a merger and acquisition (M & A) or strategic alliance with a company that had already existing LNG interests in Australia would be the "best fit" to deliver a material supply.

25 The Crown case is that the information was derived from a presentation made by Mr Maxwell on 12 June 2007, the day before the accused acquired the first parcel of shares in Arrow.

26 The slides do not include words in the precise terms of particular (b). The slides are, in the main, not in narrative form, but present information in a variety of ways including graphs, annotated maps and tables.

27 It may be noted that particular (b) has the words "best fit" in quotation marks, indicating to that extent at least a direct quote from the slide presentation or something said by Mr Maxwell. Mr Maxwell did not use that expression. So far as the slides are concerned, the words "best fit"

appear in two places (pages 17 and 20 of exhibit B). Neither place precisely replicates the terms of particular (b).

28 In my view, however, the material contained in the slides, taken in the context of the whole of the evidence including the evidence of Mr Maxwell, is capable of being understood to convey information substantially in the terms specified in particular (b). I do not think it is necessary for the Crown to prove that the alleged "inside information" was communicated in the exact terms particularised. It is not the role of the particulars to replicate the evidence. The Crown has, in MFI3, distilled the relevant "information". A question of fact for the jury to determine is whether, on the evidence, the accused possessed that body of information. The differences between the terms of the evidence and the terms of the particulars raise issues of analysis, inference and nuance of meaning. It is not for the trial judge to arrogate that analysis in the determination of a no case submission. To do so would be to enlarge the powers of a trial judge at the expense of the traditional jury function: cf *Doney* at [18].

29 For those reasons, I am not satisfied that a jury could not find the accused knew the information in particular (b).

30 The next component of the particularised "inside information" focused on in the application was particular (d), as follows:

> The Team identified Arrow and QGC as the only companies that conducted pure CSG businesses in Australia and that, while the Team rated the "value proposition" and "portfolio fit" of both companies as "M & A opportunities" with BG Group to be substantially the same, it rated the "availability/doability" of Arrow much higher than that of QGC.

31 That component of the information is drawn primarily from a slide presented by Mr Maxwell which contains a considerable amount of information in addition to that purportedly summarised in the particular. Mr Walker submitted that, as a summary, it is inaccurate. He noted that,

whereas particular (d) notes that the Team rated the "value proposition" and "portfolio fit" of both companies as "M & A opportunities" with BG Group to be substantially the same, the rating it gave them was the lowest rating on the score, whereas other companies on the same slide had higher ratings on that score.

32 There is no doubt that particular (d) draws a refined proposition from a broader collection of information. That is the task of the Crown in distilling the alleged "inside information". The accused has been told, in particular (d), what it is alleged he drew from the broader body of information presented to him from a variety of sources.

33 I am not satisfied that a jury could not find the accused knew the information in particular (b).

34 As to counts 3 and 4, the application focused on the following component of the particularised inside information (particular (f) in MFI4):

> The Team had prepared evaluations of QGC and Arrow in which the net asset valuation (NAV) of QGC was more than 2.5 times its then current share price on the ASX while the NAV for Arrow was about half its then current share price on the ASX.

35 That information is alleged to have been derived from two slides tabled at a meeting between the accused and two members of the Team, Gary Thompson and James Seaton. Mr Walker made two points in respect of their evidence. First, he submitted that the evidence did not go so high as to establish that the accused read the two slides. There was evidence to the effect that the slides were taken to the meeting by Mr Seaton but no evidence that he considered their contents so as to draw the conclusions identified in the particulars.

36 Secondly, Mr Walker submitted that the slides did not present information in the form identified in the particulars. The slides present the information in the following form (at pages 162 and 177 of exhibit B):

As to Arrow:

Net asset value A$mm 664	A$/share 1.24
Current share price A$mm1560	A$/share 2.43

As to QGC:

Net asset value A$mm 4357	A$/share 7.13
Current share price A$mm 0	A$/share 2.58

37 It may be seen that the mathematical conclusion articulated in the particulars does not appear in terms in the slides. That information is derived from an analysis of the graph and by doing the relevant calculations, and taking both slides together.

38 Those are matters which might be put forcefully to the jury. In my view, however, the slides, taken together, are capable of conveying the information alleged to have been in the possession of the accused.

39 As to whether the evidence is capable of establishing that the accused read or absorbed the contents of the slides, in my view, there is evidence on that issue capable of going to the jury. Mr Seaton recalled taking the slides to the meeting but did not recall saying anything in relation to the slides. However, Mr Thompson recalled that Mr Seaton took the two slides to the meeting and that, as to the Arrow slide, Mr Seaton "went through the slide". As to both slides, Mr Thompson gave evidence that Mr Seaton "showed them to the accused". In my view, that evidence is capable of sustaining an inference that the accused examined the slides sufficiently to enable him to draw the conclusion articulated in the particulars.

40 I am not satisfied that a jury could not find the accused knew the information in particular (b).

41 Those are my reasons for rejecting the application insofar as it related to the element of possession of the alleged "inside information".

****

I certify that this and the 11 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice McCallum.

Wednesday 7 November 2012.
Associate: N Sinclair

Supreme Court
New South Wales
Common Law Division

Case Title:	Regina v Fysh (No 3)
Medium Neutral Citation:	NSWSC [2012] 1390
Hearing Date(s):	2,5 November 2012
Decision Date:	22 November 2012
Jurisdiction:	Common Law
Before:	McCallum J
Decision:	Publication of reserved reasons for refusing application for directed verdicts
Catchwords:	CRIME – particular offences – insider trading – no case submission – whether Crown had adduced evidence upon which a jury could convict – materiality of alleged inside information – whether evidence so lacking as to require jury to speculate
Legislation Cited:	Corporations Act 2001 (Cth)
Cases Cited:	Doney v R [1990] HCA 51; (1990) 171 CLR 207 Hannes v DPP (No 2) [2006] NSWCCA 373 R v Fysh [2012] NSWSC 1266 R v Fysh (No 2) [2012] NSWSC 1340 R v Rivkin [2004] NSWCCA 7
Texts Cited:	
Category:	Procedural and other rulings
Parties:	Regina Stuart Alfred Fysh
Representation	

- Counsel:	Counsel: D Staehli SC and J Single (Crown) B Walker SC and I Pike SC (accused)
- Solicitors:	Solicitors: Commonwealth Director of Public Prosecutions (Crown) Gilbert & Tobin Lawyers (accused)
File number(s):	2011/15688
Publication Restriction:	None

JUDGMENT

1 **HER HONOUR:** Stuart Fysh stood trial before me with a jury on four counts of insider trading contrary to sections 1043A(1)(c) and 1311(1) of the *Corporations Act* 2001 (Cth). On 6 November 2012, I rejected a submission made on his behalf after the close of the Crown case that there was no case to answer. I reserved my reasons, so as not to detain the jury.

2 The no case submission was based on two discrete grounds. On 7 November 2012, I published my reasons for rejecting the application insofar as it was based on the first ground, which related to the element of the offence that requires the Crown to prove that the accused possessed the alleged inside information: see *R v Fysh (No 2)* [2012] NSWSC 1340. It was necessary to publish those reasons at that time, since they were required for the purpose of counsel's closing addresses.

3 These are my reserved reasons for rejecting the application insofar as it was based on the second ground, which related to the element of the offence often referred to in shorthand as "materiality". That element requires the Crown to prove that, if the information allegedly possessed by the accused were generally available, a reasonable person would expect it to have a material effect on the price or value of the relevant shares:

1042A of the *Corporations Act*. That test is satisfied if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the relevant shares: see s 1042D of the Act.

Basis for the application

4 For convenience, the description in my previous judgment of the basis for the application is partly repeated here.

5 The four charges against the accused arise from his undisputed acquisition of two parcels of shares in Arrow Energy N/L (counts 1 and 2) and, six months later, two parcels of shares in Queensland Gas Company Ltd (counts 3 and 4).

6 Section 1043A prohibits the acquisition of relevant shares if a person (referred to in the section as the insider) possesses "inside information". That term is defined, and the terms that define it are further defined, in the Act.

7 In advance of the trial, the Crown provided particulars of the alleged inside information for each count. The particulars relied upon in respect of counts 1 and 2 (the Arrow counts) are the same. Those particulars are set out in a document now marked MFI 3. Similarly, the particulars relied upon in respect of counts 3 and 4 (the QGC counts) are the same. Those particulars are set out in a document marked MFI 4.

8 In my earlier judgment I explained my reasons for accepting the accused's submission that those particulars are, in each case, to be taken as a whole and in combination, such that it is the combined effect of the matters set out which constitutes the alleged "inside information" (*Fysh* (No 2) at [9] to [22]). The significance of that determination for the purpose of the element of possession of the alleged inside information was the need to direct the jury that they had to be satisfied that the accused possessed all of the

information set out in the relevant particulars, taken in combination, except any part of the information that they considered made no real difference to the substance of that information.

9 As acknowledged on behalf of the accused, that determination has a corollary for the purpose of the element of the materiality of the alleged inside information. The accused's contentions acknowledged, and indeed drew support from, the proposition accepted by the Court of Criminal Appeal in *Hannes v DPP (No 2)* [2006] NSWCCA 373 at [573] to [580] that, where the alleged inside information has separate "limbs", the jury does not have to be satisfied that each individual limb would be likely to have a material effect on the share price. The test is whether, considered as a combination, that body of information was material. The present application must be determined in that context.

10 There were four grounds for the contention that there was no evidence to go to the jury on the element of materiality. First, as to MFI 3, it was submitted that the alleged "information" fundamentally misstates the information conveyed by the evidentiary material relied upon by the Crown. It was further submitted that, in any event, that material was derived from publicly available information already priced by the market.

11 As to the submission that MFI 3 fundamentally misstates the information conveyed by the Crown's evidence, the focus of the argument was on particular (d) of MFI 3, which states:

> The Team identified Arrow and QGC as the only companies that conducted pure CSG businesses in Australia and that, while the Team rated the "value proposition": and "Portfolio Fit" of both companies as "M&A opportunities" with BG Group to be substantially the same, it rated the "Availability/Doability" of Arrow much higher than that of QGC.

12 Mr Pike SC, who argued this ground on behalf of the accused, submitted that, properly characterised, the slide presentation on which counts 1 and 2 were based did not identify any particular opportunity, let alone any

particular target companies, whereas the alleged "inside information" relied upon by the Crown suggested that the opportunities presented to the board had been narrowed down to two, being Arrow and QGC. The question whether the material contained in the slides presented by Mr Maxwell should be understood to convey the information specified in MFI 3 raises issues of analysis, inference and nuance of meaning. As I stated in *Fysh (No 2)* at [28], these issues should be left to the jury.

13 Much of the argument that followed on this issue in effect invited me to determine the issue of materiality, notwithstanding the acceptance on behalf of the accused that that is an issue of fact for the jury.

14 Thus in a written outline of submissions in support of the no case application, the accused collected a series of references to places in the evidence in which it was established that it was known to the market that BG was interested in obtaining LNG in the Asia Pacific region; that as to opportunities in Australia in relation to CSG generally and CSG to LNG in particular, BG was playing "catch up" compared with its competitors; that the market for corporate activity in respect of Australian CSG companies was "hot", with Arrow having been publicly identified as a target and that the slide presentation was prepared from publicly available information.

15 The second ground for the application related to MFI 4, as to which a similar submission was put. It was submitted on that basis that there was no material on which the jury could rely to conclude that an announcement in early December 2007 of the possibility of a deal between QGC and BG (taking the information in MFI 4 at its highest) would or would be likely to influence in the relevant sense, given what the market already knew.

16 With great respect to Mr Pike, in my view the submission overlooked the principles which must be applied by a trial judge in determining a no case application. In particular, as stated by the High Court in *Doney v R* [1990] HCA 51; (1990) 171 CLR 207, if there is evidence, even if tenuous or inherently weak or vague, which can be taken into account by the jury and

that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. The submissions on behalf of the accused as to the element of materiality in the present case in my view focussed on aspects of weakness in the Crown case but did not establish to my satisfaction an absence of evidence capable of supporting a verdict of guilty.

17 Next it was submitted that the evidence in the Crown case as to the increase in the share price of QGC at the time of the announced deal in early February 2008 provided no basis for the jury to conclude materiality in relation to the earlier information set out in MFI 4. That submission must be assessed in the context that the evidence was not objected to as being irrelevant. It was admitted by consent.

18 In *Rivkin* [2004] NSWCCA 7, the Court of Criminal Appeal rejected a ground of appeal on the basis that evidence of a later share price increase had been wrongly admitted. The learned trial judge in that case admitted the evidence but gave careful directions as to the caution with which the jury should approach that issue. That approach was approved by the Court of Criminal Appeal: at [186] to [205].

19 It follows upon a proper analysis in my view that the evidence is relevant, and capable of being taken into account by the jury. The accused's submissions served to emphasise the importance of careful direction on that issue, but do not provide the foundation for a no case submission.

20 Finally, it was submitted that the expert opinion evidence of Mr Dreyfus provided no basis for conclusions as to the materiality of the alleged inside information. It was submitted that Mr Dreyfus's evidence was so heavily qualified by reference to matters that he either did not or could not consider as to render them of no utility whatsoever.

21 Even if that were so (which I do not accept) it would not follow that there is no evidence on materiality to go to the jury. The jury is not obliged to

accept the evidence of Mr Dreyfus. Further, there is no rule which says that the Crown cannot prove materiality without the evidence of an expert.

22 For the reasons explained in my first judgment in this trial, I consider that the test as to whether the alleged inside information would be likely to influence persons who commonly acquire division 3 financial products in deciding whether or not to acquire or dispose of shares in Arrow is one which draws on matters of common sense well within the province of the jury, albeit one as to which specialised knowledge might also be brought to bear: *R v Fysh* [2012] NSWSC 1266 at [8] – [11].

23 Ultimately, in my assessment, the submissions put as to the evidence of Mr Dreyfus amounted to matters that might be put with some force to the jury but which do not mandate the conclusion that there is no case for the accused to answer.

24 I was satisfied that there was evidence in the Crown case from which the jury could comfortably be satisfied beyond reasonable doubt as to the materiality of the alleged inside information in both MFI 3 and MFI 4. Accordingly, I rejected that ground of the application.

****

I certify that this and the 6 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice McCallum.

22/11/12 .....
DATED Associate

Supreme Court
New South Wales
Court of Criminal Appeal

Case Title:	Fysh v R
Medium Neutral Citation:	[2013] NSWCCA 284
Hearing Date(s):	17 July 2013
Decision Date:	20 November 2013
Jurisdiction:	Court of Criminal Appeal
Before:	Bathurst CJ at [1] Hoeben CJ at CL at [2] Schmidt J at [216]
Decision:	1. Leave to appeal granted. 2. Appeal allowed. 3. The conviction on the counts, the subject of the appeal, be quashed and a verdict of acquittal entered.
Catchwords:	CRIMINAL LAW – conviction appeal – two counts of insider trading – whether verdicts unreasonable having regard to the evidence – whether the Crown proved applicant possessed each item of information alleged – whether Crown proved that the information possessed by the applicant was material – limitations in Crown's expert evidence – failure by Crown to establish beyond reasonable doubt that important information possessed by applicant on relevant date – whether information not proved by Crown "made no real difference" – factual basis for Crown case not made out – conviction quashed and verdict of acquittal entered.
Legislation Cited:	*Corporations Act* 2001 (Cth) - ss 1043A(1)(c) and 1311(1) *Criminal Appeal Act* 1912 – s6(1)
Cases Cited:	*Libke v R* [2007] HCA 30; 230 CLR 559

	SKA v The Queen [2011] HCA 13; 243 CLR 400
Texts Cited:	
Category:	Principal judgment
Parties:	Stuart Alfred Fysh - Applicant Regina (Cth) – Respondent Crown
Representation	
	Counsel: Mr B Walker SC/Mr I Pike SC - Applicant Mr D Staehli SC – Respondent Crown
	Solicitors: Gilbert & Tobin - Applicant Commonwealth Director of Public Prosecutions – Respondent Crown
File number(s):	2011/15688
Decision Under Appeal	
- Court / Tribunal:	Supreme Court of NSW
- Before:	McCallum J
- Date of Decision:	14/11/2012 - Conviction 19/12/2012 - Sentence
- Citation:	
- Court File Number(s)	2011/15688
Publication Restriction:	

JUDGMENT

1 **BATHURST CJ:** I agree with Hoeben CJ at CL.

2 **HOEBEN CJ at CL:**

Trial and sentence

The applicant for leave to appeal stood trial between 15 October 2012 and 14 November 2012 before McCallum J and a jury with respect to four counts of insider trading under ss 1043A(1)(c) and 1311(1) of the *Corporations Act* 2001 (Cth). On 14 November 2012 the jury returned verdicts of not guilty on the first two counts and guilty with respect to the third and fourth counts.

3 Counts 3 and 4 alleged that in early December 2007, while in possession of inside information which was not generally available concerning Queensland Gas Company Ltd (QGC), the applicant purchased shares in QGC in the amount of 240,000 and 10,000 respectively.

4 On 19 December 2012 the applicant was sentenced to 2 years imprisonment with respect to count 3, to commence on 11 December 2012 and expire on 10 December 2014. On count 4 the applicant was sentenced to 18 months imprisonment, to commence on 11 December 2012 and expire on 10 June 2014. Her Honour ordered that the applicant was to be released on recognisance after serving 12 months of imprisonment.

5 The applicant sought leave to appeal from his conviction on the following grounds:

Ground 1: The verdicts were unreasonable or could not be supported having regard to the evidence, because it was not open to the jury to be satisfied that at the time that he purchased the QGC shares, item (f) of the information in MFI 4 was possessed by Mr Fysh.

Ground 2: The verdicts were unreasonable or could not be supported having regard to the evidence, because it was not open to the jury to be satisfied that at the time that he purchased the QGC shares, Mr Fysh possessed the substance of the information in MFI 4 taken as a whole or in combination, in that he did not possess the information in item (f) of MFI 4.

Ground 3: The verdicts were unreasonable or could not be supported having regard to the evidence, because it was not open to

the jury to be satisfied that the information in MFI 4 was material in the sense that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares.

6 The application for leave to appeal and the appeal were heard by this Court on 17 July 2013. At the conclusion of the appeal, the Court made the following orders:

1. Leave to appeal granted.

2. Appeal allowed.

3. The conviction on the counts, the subject of the appeal, be quashed and a verdict of acquittal entered.

7 The Court advised that it would provide reasons at a later date. These are the reasons.

Evidence at trial, the Crown and defence case

8 Count 3 was in the following terms:

> "3 Between about 2 December 2007 and 7 December 2007 at Sydney in the State of New South Wales and elsewhere Stuart Alfred Fysh acquired relevant Division 3 financial products, namely 240,000 shares in Queensland Gas Company Ltd, whilst in possession of inside information concerning Queensland Gas Company Ltd which was not generally available, being information which if it was generally available a reasonable person would expect it to have a material effect on the price or value of shares in Queensland Gas Company Ltd and being information which the defendant knew, or ought reasonably to have known:
>
> (i) Was not generally available, and
>
> (ii) If it were generally available, a reasonable person would expect it to have a material effect on the price or value of shares in Queensland Gas Company Ltd
>
> contrary to sections 1043A(1)(c) and 1311(1) of the *Corporations Act* 2001 (Cth)."

9 Count 4 was in the following terms:

> "4 Between about 3 December 2007 and 8 December 2007 at Sydney in the State of New South Wales and elsewhere Stuart Alfred Fysh acquired relevant Division 3 financial products, namely 10,000 shares in Queensland Gas Company Ltd, whilst in possession of inside information concerning Queensland Gas Company Ltd which was not generally available, being information which if it was generally available a reasonable person would expect it to have a material effect on the price or value of shares in Queensland Gas Company Ltd and being information which the defendant knew, or ought reasonably to have known:
>
> (i) Was not generally available, and
>
> (ii) If it were generally available, a reasonable person would expect it to have a material effect on the price or value of shares in Queensland Gas Company Ltd
>
> contrary to sections 1043A(1)(c) and 1311(1) of the *Corporations Act* 2001 (Cth)."

10 The relevant legislative provisions are as follows:

> **"1042A Definitions**
>
> In this Division:
>
> ...
>
> Division 3 Financial Products means:
>
> (a) Securities;
>
> Generally available, in relation to information, has the meaning given by section 1042C.
>
> Information includes:
>
> (a) Matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
>
> (b) Matters relating to the intentions, or likely intentions, of a person.
>
> Inside information means information in relation to which the following paragraphs are satisfied:

(a) The information is not generally available;

(b) If the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

A material effect, in relation to a reasonable person's expectations of the effect of information on the price or value of Division 3 financial products, has the meaning given by section 1042D ...

Relevant Division 3 financial products, in relation to particular inside information, means the Division 3 financial products referred to in paragraph (b) of the definition of inside information.

1042B Application of Division

This Division applies to:

(a) Acts and omissions within this jurisdiction in relation to Division 3 financial products (regardless of where the issuer of the products is formed, resides or located and of where the issuer carries on business); and

(b) Acts and omissions outside this jurisdiction (and whether in Australia or not) in relation to Division 3 financial products issued by:

(i) A person who carries on business in this jurisdiction; or

(ii) A body corporate that is formed in this jurisdiction;

1042C When information is generally available

(1) For the purposes of this Division, information is generally available if:

(a) It consists of readily observable matter; or

(b) Both of the following sub-paragraphs apply:

(i) It has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information; and

(ii) Since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or

(c) It consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(i) The information referred to in paragraph (1);

(ii) Information made known as mentioned in sub-paragraph (b)(i).

(2) None of the paragraphs of subsection (1) limits the generality of any of the other paragraphs of that subsection.

1042D When a reasonable person would take information to have a material effect on price or value of Division 3 financial products

For the purposes of this Division, a reasonable person would be taken to expect information to have a material effect on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first mentioned financial products.

...

Subdivision B – the prohibited conduct

1043A Prohibited conduct by a person in possession of inside information

(1) Subject to this Subdivision if:

(a) A person (the insider) possesses inside information; and

(b) The insider knows, or ought reasonably to know that the matters specified in paragraphs (a) and (b) of the definition of inside information in section 1042A are satisfied in relation to the information;

the insider must not (whether as principal or agent):

(c) Apply for, acquire, or dispose of, relevant Division 3 financial products or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or

(d) ...

Note 1: Failure to comply with subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 137E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

(2) ...

(3) For the purposes of the application of the Criminal Code in relation to an offence based on subsection (1) or (2):

(a) Paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(b); and

(b) Paragraph (2)(a) is a physical element, the fault element for which is as specified in paragraph (2)(b).

General Penalty Provisions

1311(1) A person who:

(a) Does an act or thing that the person is forbidden to do by or under a provision of this Act; or

(b) Does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or

(c) Otherwise contravenes a provision of this Act;

is guilty of an offence by virtue of this subsection, unless that other provision of this Act provides that the person:

(d) Is guilty of an offence; or

(e) Is not guilty of an offence.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

11 MFI 4, to which reference was made in the Grounds of Appeal, was in the following form:

"Counts 3 and 4 – QGC PARTICULARS OF INFORMATION

Purchase of shares in QGC between 2 and 8 December 2007.

The Information

(a) The Team had identified using CSG to produce LNG as a potentially economically viable means of providing BG Group with a source of LNG in the Asia Pacific region.

(b) The Team identified four companies, Origin Energy Ltd (Origin), Santos Ltd (Santos), QGC and Arrow as holding over 90 percent of the CSG resources in Eastern Australia and had clearly linked an entry position for BG Group into Eastern Australia to an M & A, a "farm-in" or "partnering" with one of these four.

(c) BG Group's Portfolio Development Committee had, in September 2007, approved funding for the Team to pursue its strategic plan to deliver a material CSG entry for BG Group into Eastern Australia within the next 12 months.

(d) BG Group had commissioned Advanced Resources International (ARI) to assess the size and quality of CSG resources in Eastern Australia. ARI's assessment was that Eastern Australia had two world class CSG plays which were comparable to the United States San Juan Basin CBM (Coal Bed Methane, another name for CSG), namely the areas of the Undulla Nose/Walloon Fairway in the Surat Basin and Comet Ridge in the Bowen Basin.

(e) The Team's assessment of the estimated ultimate recovery (EUR) of the holdings of Origin, Santos, QGC and Arrow in the Walloon Fairway and Comet Ridge areas was 28.2 trillion cubic feet (tcf) for Origin, 13.6 tcf for QGC, 10.2 tcf for Santos and 6.9 tcf for Arrow. Arrow's holdings were of significantly inferior quality to that of QGC.

(f) The Team had prepared evaluations of QGC and Arrow in which the Net Asset Valuation (NAV) of QGC was more than 2 ½ times its then current share price on the ASX while the NAV for Arrow was about half its then current share price on the ASX.

(g) The head of the Team, David Maxwell, had concluded that the successful companies in Queensland involved in CSG were those with acreage that had unlocked the science of converting CSG to LNG for that acreage and that Arrow appeared to be the poorest in that regard.

(h) Mr Maxwell had been working on a "Queensland opportunity" and from 2 December 2007 would be travelling to Australia and for the following two weeks would be locked into leading (and capturing) the Queensland opportunity involving an M & A, farm-in or strategic alliance.

(i) It was reasonable to conclude that the "Queensland opportunity" was in respect of such a proposed relationship between BG Group and QGC."

12 Much of the relevant law and facts were not in dispute at the hearing. In relation to the law, it was not in dispute that the Crown was required to prove beyond reasonable doubt four elements of the offence being relevantly for Count 3 (and applied in equivalent terms for Count 4, save for the dates and quantum of shares acquired).

1. Has the Crown established beyond reasonable doubt that, between 2 and 7 December 2007, the accused acquired 240,000 shares in Queensland Gas Company Ltd.

2. If so, has the Crown established beyond reasonable doubt that the accused did so intentionally.

3. Has the Crown established beyond reasonable doubt that, at the time he acquired the shares, the accused possessed inside information.

4. Has the Crown established beyond reasonable doubt that the accused knew or ought reasonably to have known that:

   (i) The information was not "generally available"; and

   (ii) If the information were generally available, a reasonable person would expect it to have a "material effect" on the price or value of shares in QGC?

13 The applicant and the Crown agreed upon a large number of the relevant facts which were set out in the Joint Statement of Agreed Facts, which was provided to the jury (Exhibit A). For example, it was not in dispute that the applicant had bought the shares at the times alleged. The applicant's defence focused on whether he possessed all of the information alleged in MFI 4 and whether the information that he did possess at the time of purchasing the QGC shares was "material" in the relevant sense so as to be "inside information".

14 Two of the critical issues at the hearing were:

(a) Whether the applicant was required to possess each and every item of the information set out in MFI 4 and whether the Crown had proved the necessary possession; and

(b) Whether the Crown had proved that the information possessed by the applicant was material in the sense that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of the QGC shares.

15 In relation to the first of these issues, her Honour determined that the Crown was required to prove that the applicant possessed the body of information, that is, all of the information set out in MFI 4, taken in combination. As her Honour directed the jury, the test was whether the applicant possessed the substance of that information taken as a whole, or in combination, except any part of the information that the jury considered made no real difference.

16 No complaint was made by either side in relation to her Honour's determination in this regard or the directions given to the jury by her Honour. The applicant's complaint was that the jury could not have been satisfied that he did possess the body of information set out in MFI 4 because they could not have been satisfied as to his possession of Item (f), which was an important part of the information.

Agreed Facts

17 Exhibit A was a Statement of Agreed Facts. In order to understand the applicant's submission, it is necessary to understand the factual background and what issues were in dispute. The following facts formed part of Exhibit A and were agreed.

18 The applicant held a Bachelor of Science and a PhD in physics from Monash University. He was employed by BHP in various capacities after leaving university and rose to the position of Commercial Manager Asia (CMA). In 1998 he joined the BG Group and was responsible for business development in Asia generally. He was a member of the Group Executive Committee of BG ("the GEC") which was the senior management group within BG.

19 BG was a large international energy company with a particular focus on gas, including liquefied natural gas (LNG). Its head office was in the United Kingdom at Thames Valley Park, Reading and it was listed on both the London Stock Exchange and the US Over-the-Counter Market. It was one of the top ten listed UK companies and for the year ending 31 December 2007 had a total revenue of over 8.3 billion pounds, a total operating profit of over 3.2 billion pounds and a market capitalisation of approximately 35 billion pounds. BG had business operations in 27 countries over five continents.

20 The GEC was responsible for the overall general management of BG's business and reported to the Board. In 2007 Sir Frank Chapman was the Chief Executive and Executive Director of BG. The GEC delegated functions to the Portfolio Development Committee and the Investment Committee. It approved major investments up to a certain value. Projects above that value had to be approved by BG's Board. A new business opportunity in BG became designated as a "Project" and had a project name allocated only once it reached the stage where BG had decided to

actively pursue it. Projects that needed to be kept confidential were given a coded project name.

21 For some years before 2006, it had been a goal of BG to enter the LNG business in the Asia Pacific region. In 2006 BG established an Asia Pacific LNG business development team (the Team) based in Singapore. David Maxwell (Mr Maxwell) was appointed to head the Team, which included two senior managers, Gary Thompson and Jim Seaton, each of whom had the title Vice President – Business Development. They both reported to Mr Maxwell.

22 In about mid 2007, the Team identified an emerging opinion within the market that coal seam gas (CSG) also known as Coal Bed Methane (CBM) and Coal Seam Methane (CSM) may be able to be used to produce LNG, although what was involved in the process was not completely understood within BG at that time. Mr Maxwell proposed that using CSG as feedstock for the production of LNG should be investigated further.

23 From its review of publicly available information, the Team identified Eastern Australia as a possible source of CSG, with four companies holding the majority of CSG resources – Arrow Energy NL (Arrow), Queensland Gas Company Ltd (QGC), Santos Ltd (Santos) and Origin Energy Ltd (Origin).

24 On 12 June 2007 BG held its annual strategic review at which Mr Maxwell gave a presentation which identified CSG to LNG as one of a number of ideas that could deliver BG an Asia Pacific source of supply of LNG. The applicant attended that presentation.

25 From 1997 the applicant operated an account with Goldman Sachs JB Were (GSJBW) stockbroking in Melbourne, through which he traded securities on the Australian Securities Exchange (ASX). Between 1997 and 2007 the applicant built up a portfolio of industrial and resources stocks listed on the ASX that he traded regularly through GSJBW. Without

setting out the various trades in detail, it would be fair to say that the applicant's share trading was substantial with large sums of money involved. His share trading during 2006 is illustrative. In January 2006 he held 1,100,000 shares in TYC worth $968,000. In May 2006 he held 400,000 in MCR worth $336,000 and 600,000 shares in INP worth $192,000. In May 2006 he sold his entire holding in TYC. In the same month, he purchased 500,000 shares in Elk Petroleum, an Australian oil company at a total purchase price of $325,000. He sold out of Elk in July and August 2006 with a loss of around $140,000. In September 2006 he sold his holdings in MCR for a total sum of $713,790 and purchased an additional 708,145 shares in INP at a cost of around of $493,000. Throughout 2007 the applicant gradually purchased an additional 2,591,855 shares in INP investing a further $1,250,121.

26 On 14 June 2007 the applicant instructed GSJBW to purchase 100,000 Arrow shares at up to $2.85 per share. 100,000 Arrow shares were transferred to the applicant on 19 October 2007. On 18 June 2007 the applicant placed an order to buy a further 150,000 Arrow shares. This trade was completed on 21 June 2007.

27 On or about 1 August 2007 Mr Maxwell spoke to the applicant by telephone about how to get BG interested in business development opportunities. After the meeting, Mr Maxwell sent the applicant an email attaching a Macquarie report on the Gladstone LNG facility and referring to "the big four (Santos, Origin, QGC and Arrow)" and noted that they held "90 percent of the 2P of 5178PJ (bcf)". On 9 August 2007 the applicant sent an email to the BG GEC containing an article about Australian CSM which referred in particular to Arrow and QGC and copied it to Mr Maxwell. In August 2007 Mr Maxwell and the Team prepared a "Traffic Light Paper" (TLP) to seek approval and funding to assess the potential for converting CSG to LNG and also to review and identify opportunities for BG to enter the CSG business in Eastern Australia.

28 On 17 August 2007 Mr Maxwell emailed his draft TLP to the applicant. The applicant emailed back comments about the draft proposal and on 19 August 2007 Mr Maxwell thanked him for the comments and told him that the TLP had been amended to pick up most of them. The Portfolio Development Committee approved the recommendation in the TLP and agreed that Mr Maxwell should define the strategy and business case for CSM in Eastern Australia "and identify mature BE options to deliver a material business which should be presented to the Committee for consideration in due course".

29 The applicant was one of five people who received an email from Mr Maxwell on 11 September 2007 advising that the Australia CSM work was approved by the Portfolio Development Committee. In the email Mr Maxwell said that he saw Origin as a potential feedstock supplier to a CSM LNG project but that the other three (Santos, QGC and Arrow) had a higher proportion of their gas uncontracted. In due course Mr Maxwell was authorised to engage Advanced Resources International (ARI) to assess the size and quality of the CSG resource in Eastern Australia and to rank the acreage held by the companies with material CSG positions. Core Collaborative (Core) was engaged to review the market and provide economic modelling.

30 On 26 and 27 September 2007 Messrs Seaton and Thompson met with representatives of ARI and Core in Singapore to receive the interim results provided by ARI, which they passed onto Mr Maxwell the next day. On 18 October 2007 Mr Maxwell emailed the applicant to request a meeting between the applicant, Mr Thompson and Mr Seaton. In the email Mr Maxwell told the applicant that Messrs Thompson and Seaton "are in Thames Valley Park next week for internal reviews on the CSG work which is going very well. Some very interesting insights are emerging from the technical work and we have identified a valuable opportunity which we are now moving quickly on. I have suggested to Gary and Jim that they spend some time with you sharing the work and insight/results".

31 On 23 October 2007 at BG's head office in the United Kingdom, Messrs Thompson and Seaton met with the applicant.

32 On 14 November 2007 BG's Mergers and Acquisitions Group assigned a confidential code name "Project Honey" to the negotiations with QGC. On 27 November 2007 Mr Maxwell had dinner with the applicant in Singapore at Mr Maxwell's request. From 27 November 2007 to 2 December 2007 Mr Maxwell and the applicant exchanged a number of emails.

33 Relevant emails were:

28 November 2007 - Mr Maxwell (from Singapore) to the applicant with the subject "Queensland CSG Resources" attaching three Powerpoint slides.

29 November 2007 - Applicant (from India) to Mr Maxwell (in Singapore) with the subject "Queensland CSG Resources" replying to Mr Maxwell's email of 28 November 2007.

30 November 2007 – Applicant (from India) to Mr Maxwell (in Singapore) with the subject "A couple of things".

2 December 2007 – Mr Maxwell (from Singapore) to the applicant (in the UK) in response to the applicant's email of 30 November 2007.

2 December 2007 – Mr Maxwell (from Singapore) to the applicant (in the UK) attaching a copy of the presentation entitled "Eastern Australia Coal Seam Gas (CSG) – ARI Technical Overview Presentation 25/26 October 2007".

2 December 2007 – Mr Maxwell (from Singapore) to the applicant (in the UK) with the subject "Re Queensland CSG Resources" in response to the applicant's email of 29 November 2007.

2 December 2007 – Applicant (from the UK) to Mr Maxwell with the subject "CBM".

34 On 2 December 2007 at approximately 11.22pm (GMT) (10.22am, 3 December 2007 Australian Eastern Daylight Time), the applicant's stockbroker received a telephone call from him (in the UK) which instructed him to buy 240,000 QGC shares at $3.20 per share. 240,000

QGC shares were bought on the ASX the same day and the applicant was notified. Settlement of the QGC share purchase took place on 6 December 2007.

35 On 3 December 2007 at approximately 10.39pm (GMT) (9.40am on 4 December 2007 Australian Eastern Daylight Time), the applicant's stockbroker received an email from him in the UK giving instructions to acquire a further 10,000 QGC shares at up to $3.25 per share. Settlement of the QGC share purchase occurred on 7 December 2007.

36 On 3 December 2007 negotiations commenced between BG representatives (Mr Maxwell, Mr Seaton and Mr Allen) and QGC representatives (Mr Cottee and others) regarding a proposal that (among other things) BG take an equity position in QGC of around 9.9 percent. The negotiations continued over some weeks.

37 On 8 December 2007 the Chairman of the Investment Committee sent an email to certain members of the GEC, including the applicant, attaching amongst other things a "Project Honey" Board pre-read for discussion. On 13 December 2007 the BG Board discussed "Project Honey" and referred it to the Investment Committee. On 16 January 2008 the Investment Committee resolved to recommend the deal between BG and QGC to the Chairman's Committee. On 21 January 2008 the applicant was added to BG's project list for "Project Honey". On 29 January 2008 the Chairman's Committee approved the deal and authorised the Investment Committee to approve the final terms.

38 At some stage before the end of January 2008, the applicant informed Graham Vinter, BG's general counsel, that he held QGC shares.

39 On 1 February 2008 at 10.30am (Australian Eastern Daylight Time) the ASX announced a trading halt for shares of QGC at the request of the company pending a company announcement. The last traded price of QGC shares on the ASX before the closure was $3.42.

40 Three announcements were released to the Australian market; one on 1 February 2008 by QGC, another on 3 February 2008 by QGC and an Investor Briefing by BG on 4 February 2008 prior to the Australian market opening. The announcement by BG and QGC to the ASX concerned:

(a) An $870 million strategic alliance or joint venture which included BG acquiring a 9.9 percent shareholding in QGC at $3.07 per share and a direct ownership interest of up to 30 percent of QGC's CSG assets, some of which was contingent on the construction of an LNG facility or the certification of 7000 petajoules of proven and probable (2P) gas reserves; and

(b) A report that QGC currently had more than 7,255 petajoules in reserves and contingent resources as assessed by independent certifiers Netherland Sewell & Associates Inc.

41 When the market opened on the ASX at 10am on 4 February 2008 following the release of the three announcements, the QGC share price rose. QGC commenced trading at $3.90 and went as high as $4.14 during the day. On 28 October 2008 BG announced to the market an on-market takeover of QGC at $5.75 per share effective 15 December 2008. On 19 November 2008 the applicant sold his entire holding in QGC on the ASX (295,000 shares at $5.75 per share) accepting BG's on-market offer at a time when it was clear that BG would proceed to compulsory acquisition of QGC.

Evidence at trial

42 Mr Maxwell gave evidence in the Crown case. He said that he had been recruited by BG in order to grow the BG gas and LNG business with a particular focus on LNG in the Asia Pacific region. The applicant was a

senior executive in BG. Mr Maxwell viewed him as a colleague and while he had no direct reporting relationship with him, the applicant was always supportive of what the Team were trying to do. Other senior executives in BG encouraged Mr Maxwell and team members to speak with the applicant because he was probably the person sitting around the GEC table that had the best understanding of Australia.

43 Mr Maxwell explained how the thinking of the Team developed in September and October 2007. He said that ARI was engaged to "interpret the technical results that were, the technical information that was publicly available on the resources we were looking at and their techniques and own experience and that allowed them to interpret those results and to then determine in their view what the size of the resources might be and quality of the resources might be and separately we, as a result of the confidentiality agreement we put in place with QGC, ARI were able to access some technical data that QGC had made available to ARI for ARI to then analyse." (AB 2 T219.37)

44 With respect to Santos, Mr Maxwell said:

> "The interest in Project Corn was declining for two reasons; one was the liability issues associated with the Indonesian mudslide and secondly, the more we looked at the resources that QGC, Origin and Arrow had in addition to the resources that Santos had we started to learn that some of those resources were better than we had previously expected them to be and some were not as good as we might otherwise have expected them to be." (AB2, T221.34)

And further:

> "I think it became clear to us, or it did become clear to us, that Origin and QGC and Santos had the best quality resources and Arrow resources in terms of quality were not as good as the resources that the other three companies had."

45 In September 2007 BG head office asked the Team to do an evaluation of Arrow as the possibility of a 17 percent shareholding in that company had

arisen. In response, on 2 October 2007 Mr Maxwell sent the Arrow Overview Presentation Pack. On 18 October 2007 Mr Maxwell sent an email to BG head office indicating that the Team felt that the best fit and most doable option was QGC. The team had prepared a Queensland Opportunity Pack (the QGC Pack). Mr Maxwell described the QGC Pack:

> "A document setting out in a summary form the current thinking of the team on the QGC opportunity and flagging up or identifying the value proposition that we felt QGC could represent for the company and identifying some of the issues that would need to be addressed if we were to pursue that opportunity." (AB2, T258.22)

46 In late October 2007, the Team received the final ARI report. As a result of ARI's findings, the team concluded:

> "The opportunity that we were or that we had identified in QGC was firming as the best opportunity for the company." (AB2, T258.20)

47 Mr Maxwell and the Team summarised ARI's findings in the "ARI Technical Overview Presentation 25/26 October 2007".

48 Mr Maxwell arranged for Messrs Thompson and Seaton to meet with the applicant at the BG head office and share their insights and results. Mr Maxwell said:

> "I had been encouraged by other members of the Group Executive and people to whom I had reported to work with, to seek the support and work with Mr Fysh because of his business development expertise and his Australian background and understanding of the Australian economic and oil gas circumstances." (AB2, T260.47)

49 He said:

> "I always found Mr Fysh to be very helpful and that is the reason why I continued to communicate with Mr Fysh. And at the appropriate time when we were coming up to key milestones seek, seek his view." (AB2, T261.09)

50 Mr Maxwell gave evidence regarding a meeting that took place in November 2007 between BG senior management and Mr Cottee of QGC at BG's head office in the United Kingdom. Mr Maxwell facilitated the meeting:

> "The BG team management that met with Mr Cottee, after the meeting, encouraged us to continue to progress as quickly as we could, the negotiations with Mr Cottee and his team. With a view to establishing a set of agreements which we could take back to BG Group for BG Group – or recommend to BG Group senior management, the board, for approval. Approval to acquire an interest in Queensland Gas and an approval to acquire from Queensland Gas interest in certain assets that they held." (AB2, T270.11)

51 Mr Maxwell said that the email chain between himself and the applicant on 23 November 2007 was indicative of a meeting he was trying to arrange with the applicant because:

> "It had been announced that we were going – my line of reporting was to move from Mr Friedrich to Mr Martin Heuston and there was a situation which I saw emerging where Mr Fysh had responsibility for the geographic region of South-East Asia, my team had responsibility for the business development aspects in South-East Asia around gas and LNG, which reported in through a different senior executive and I wanted to have a conversation with Stuart around that. That was the main reason for my wanting to meet with him." (AB1 p 285, AB2 T70.39)

52 In late November Mr Maxwell met with the applicant in Singapore. Amongst other things, they talked about:

> "... the business that we were pursuing in LNG and coal seam gas in Queensland, but we didn't talk about the intimate details of that, that business ... We talked more about why QGC was the right opportunity for us to pursue, given the context – given the analysis that we had been undertaking, but we didn't talk about the details of that analysis. It was just that QGC was the better opportunity for us of the four that we had contemplated back in the middle of the year." (AB2, T272.14)

53 On 27 November 2007 Mr Maxwell emailed the applicant regarding their discussion the evening before. In that email Mr Maxwell wrote "We'll send you a slide or two on the CSG resources ownership allocation for info". Mr

Maxwell gave evidence that he was making "a reference to the share of CSG resources held by the four main companies in Queensland and I would send some information on that to Stuart Fysh" (AB2, T274.20). Mr Maxwell said that he sent the email to the applicant because "it was an element of the conversation that we had the night before and I was just sending information in support of comments that I had made to Mr Fysh at the time". This was at a time when the emails which formed part of the agreed facts were passing between Mr Maxwell and the applicant. In relation to the dinner in Singapore, Mr Maxwell said:

> "There was discussion at the dinner in Singapore of QGC versus the other opportunities that we had, sorry, there was discussion in Singapore of QGC relative to the other coal seam gas companies ... Why QGC was a good opportunity for BG Group or why that was the opportunity we were pursuing but I can't recall at this point in time any further details of the QGC opportunities at the dinner, at the meeting in Singapore on that evening." (AB2, T278.15)

54 Under cross-examination Mr Maxwell said that there were some members of the GEC who knew about "Project Honey" who were not on the distribution list. He agreed that the applicant's name was not on the distribution list. (AB2, T295.49)

55 Mr Maxwell agreed that in August 2007 the team was still looking at "Project Corn" (Santos) as one of the options. At that time the team was also meeting with a company called "LNG Limited", a mid/small scale LNG company looking at a CSM to LNG project in Australia. Nothing came of that contact.

56 Mr Maxwell agreed that the TLP did not particularly focus upon Arrow and QGC. At that time, the team were pretty much at the beginning of the five stages towards possible approval of the project (AB2, T351.20, 353.47). As of that time (September 2007), he agreed that the team was still conducting a scoping exercise as to whether CSG to LNG was worth doing. He explained that the reason he was asked to look at the possibility of BG purchasing a stake in Arrow in September 2007 was that this was

offered by a company that had a large shareholding in Arrow. He agreed that by the end of November 2007 he needed to be conscious of the confidentiality arrangements regarding "Project Honey".

57 Mr Maxwell agreed that when questioned in December 2008 about the meeting with the applicant in Singapore in November 2007, he could have said "It can't have been very eventful because I can't remember the dinner". In relation to the apparent discrepancy between what he had said in December 2008 and what he said at trial, Mr Maxwell said:

> "If that is what the transcript says I guess that is what I said. I think memories get jolted at times and other things come into your mind and you suddenly remember other aspects." (AB2, T363.13)

58 Mr Maxwell accepted that in December 2008, when asked by ASIC examiners about whether anything was said about QGC in the course of the Singapore meeting, he responded:

> "I can't, I can't recall and this came up in an internal meeting, an internal discussion last Friday."

Mr Maxwell agreed that he was on oath to tell the truth when questioned by ASIC and had been doing his best to recall the matter (AB2, T366.45, 367.10).

59 Mr Maxwell agreed that when he was questioned by ASIC on 10 December 2008, it was much closer in time to the Singapore meeting with the applicant and that he did not claim to have a better recollection at trial than in December 2008. Mr Maxwell said that he did not have a better memory of the meeting but that what he had done was review his notes and his calendar. When questioned about these notes, Mr Maxwell agreed that he could not remember whether he ever had such notes [about the meeting with the applicant in Singapore] (AB2, T368.44).

60 Mr Maxwell agreed that when questioned by ASIC about the Singapore dinner with the applicant, the thing he recalled about their conversation was organisational changes in BG.

61 Mr Thompson gave evidence in the Crown case. He said that the team headed by Mr Maxwell were looking at new business developments for BG in the Asia-Pacific region with a particular focus on Australian coal and gas. During the first half of 2007, the focus was upon "Project Corn" (Santos) but that this opportunity began to fall away by mid 2007.

62 He said that on 21 August 2007 he and Mr Maxwell met with Mr Cottee (QGC) in Brisbane. The purpose of the meeting was to introduce BG and explore whether QGC might be interested in exploring CSG opportunities with BG. After this meeting, the team began preparation of the TLP into which Mr Thompson had input.

63 He said that Mr Maxwell presented the TLP on 10 September 2007 and as a result, BG expressed its support for the team to continue looking at CSG in Eastern Australia. He and Mr Seaton met with ARI and Core to discuss their work. The ARI consultants presented their initial assessment of the resource positions in the key places. An Arrow shareholding was becoming a potential option and BG requested that an assessment of Arrow be done to consider whether they should take a shareholding in it.

64 On 2 October 2007 the Team, including Mr Thompson, finalised the Arrow Pack, which consisted of ARI's findings. It was intended that the Arrow Pack would be conveyed to BG head office. ARI's findings indicated that there were four major resource holders being Santos, Origin, QGC and Arrow, who had a lot more gas than the team had initially thought existed. The Team put together a similar summary for QGC called the "QGC Pack".

65 In the last week of October 2007, he and Mr Seaton and ARI prepared the Arrow Overview Presentation based on ARI's final report. Mr Maxwell

emailed that PowerPoint presentation to the applicant on 2 December 2007.

66 On 18 October 2007 Mr Maxwell arranged a meeting via email between Mr Seaton, Mr Thompson and the applicant. The email said:

> "Next week Gary and Jim are in TVP for internal reviews of the CSG work which is going very well ... We feel we have identified a valuable opportunity .... I have suggested to Gary and Jim that they spend some time with you sharing the work and insights/results."

The applicant had responded:

> "Looking forward to it, we will sort out a time."

67 Mr Thompson said that on 22 or 23 October 2007 he and Mr Seaton met with the applicant in his office at BG head office. The subject matter of the discussion was CSG in Eastern Australia. Messrs Thompson and Seaton briefed the applicant on the team's work. Slides from both the QGC and Arrow Packs were presented to the applicant by placing the slides in their paper form on the table for discussion.

68 The evidence of what happened at that meeting is of importance. Mr Thompson's evidence concerning the meeting was:

> "Q. What do you recall the subject matter of your discussion was?
> A. Yes, we were briefing him on our work on coal seam gas in Eastern Australia and we presented some slides from both the QGC pack and the Arrow pack in our discussion.
>
> Q. By "presented" what do you mean?
> A. Just had them on the table for discussion points.
>
> Q. In a paper form like they are in the bundle?
> A. In a paper form, yes.
>
> Q. Did you say you had some slides?
> A. Yes we did have a few, like when we present it to other members of the Group Executive ... When we went through the

entire presentation we had some loose slides on the table for referring to in conversation.

...

Q. I appreciate that you were relating background, in effect?
A. Yes and I provided an overview of the ARI work and I said words to the effect that it shows that Santos, Origin and QGC have the better acreage of the four main players.

Q. Which four?
A. Santos, Origin, QGC and Arrow. That Arrow's acreage was on the margin of the play.

Q. On the what?
A. On the edge of the play, on the edge of the fairway. Not in the sweet spots of the fairway. And that there is considerably more gas than we had originally thought was there.

...

A. Yes. I also believe I made the comment when the two valuation slides were on the table, which Jim mainly spoke to, that QGC looked like a better opportunity than Arrow.

...

Q. Are you saying that one of the documents, I think you referred to as the valuation page, is contained in that pack?
A. Yes, slide 9 of that pack, which is page 162. (This was a slide relating to Arrow.)

Q. Page 162?
A. That's correct. ... I don't believe I specifically spoke to this slide, as in terms of referring to numbers or figures on this particular slide.

Q. What about anyone else?
A. Jim went through the slide.

Q. By "went through" do you mean he said things about them?
A. I believe so. It is some time ago.

HER HONOUR: Five years to be precise, or four years and 364 days.

CROWN: Q: And then you also, I think, referred a little while ago to the valuation sheet or page from the QGC pack; is that right?
A. That's correct.

Q. Look at the pages which you've previously examined, starting at page 175, please?
A. I have the papers in question.

Q. Can you see in the bundle, following page 175, the page which you described as a valuation page or sheet, the slide?
A. 177 (This was a QGC slide).

Q. What happened, if anything, in relation to that page or slide during the meeting you've described?
A. Again, it was referred to in the meeting by Mr Seaton as one of the slides that he had brought with him and in front of him, yes I didn't specifically talk to the slide myself.

Q. You?
A. I did not specifically talk to this slide myself.

Q. Thankyou. Do you remember anything else that took place during that meeting?
A. Stuart offered some views on how we could, sorry, Mr Fysh put some views on how we could sell the opportunity internally." (AB 2, T386.24-389.50)

...

"Q. Do you recall whether or not any other slides or pages from these packs were referred to during that meeting?
A. I don't specifically recall any other slides.

Q. Do you recall anything else about what was said during the meeting?
A. In the dialogue on the size of the resource, I recall Mr Fysh questioning is there really that much gas there? I recall him being enthusiastic and supportive of the opportunity for BG.

Q. Which opportunity was that?
A. Coal seam gas in Eastern Australia." (AB 2, T391.3)

69 Mr Thompson said that on 25 and 26 October 2007 he, Mr Seaton and Mr Kuskra (of ARI) went to BG head office to brief the executive members on CSG and gain general support to pursue the opportunity of CSG in Eastern Australia. Mr Kuskra presented ARI's findings to the BG

executive. He said that around November 2007 a transaction team was specifically set up (called "Project Honey") to look at a targeted entry into CSG. He said that in 2007, he was asked to conduct a due diligence on Project Honey in Brisbane and out in the field and to assess their operational practice in anticipation of a potential future transaction (AB 2, T414).

70 In cross-examination, Mr Thompson said that the Arrow pack was a quick estimate of the opportunity. "It was done very quickly and it wasn't, it was a very preliminary assessment" (AB 2, T419.8). He agreed that ARI did its own independent drilling and went underground and collated publicly available information. The same applied to the Core consultants.

71 Mr Thompson agreed that he did not remember which ARI slides he had on his person going into the meeting with the applicant, but recalled that he had some slides. He acknowledged that he had previously indicated on oath that he was not sure which slides were shown to the applicant at the meeting. Referring to the ASIC questioning, he said:

> "I answered the questions put to me on the day, which is some time ago, to the best of my recollection." (AB 2, T242.30)

He said that although they talked more broadly than just Arrow and QGC, he had a general recollection of Arrow and QGC being discussed by Mr Seaton, but he could not recall specific details. He agreed that his notes did not actually reflect the applicant being shown a slide.

72 Mr Thompson agreed that he was involved in a discussion on 17 December 2007 within the BG Executive concerning Eastern Australia CSG to LNG in terms that included the "recommendation" and "Executive summary" in the briefing note of 17 December 2007 (Exhibit 2 – AB 1, p493-4). Mr Thompson confirmed that the document was a paper, basically concluding the end of "create phase" work and recommending going into the "assess phase" work, seeking funding for the "assess

phase" work and it followed readiness reviews which were held on 30 November upon completion of the "create phase" work (AB 2, T428.10).

73 Mr Seaton gave evidence at trial. He was part of the team under Mr Maxwell in 2006-2007. He recalled that it became apparent that a shareholder in Arrow wanted to sell its shareholding to BG. As a result, an evaluation was conducted as to whether BG would be interested in acquiring that package of shares. He said that he was involved in the preparation of the evaluation, i.e. the Arrow pack. He confirmed that the team specifically put the valuation figures together on slide 9 "High Level Valuation".

74 Mr Seaton said he was also involved in the preparation of a QGC pack because they were "evaluating suitable entry opportunities to progress CSG to LNG. We had evaluated the Arrow opportunity and QGC was the next in the sequence to evaluate". He said that both the Arrow and the QGC packs were strictly internal documents.

75 Mr Seaton said that he adopted the habit of keeping a copy of the QGC slide pack inside the back of his ring bound notebook, because he was referring to the slide pack on a regular basis and it was very handy to have a hard copy around. He could not recall whether he also kept the Arrow pack on him.

76 Mr Seaton said that on 23 October 2007 he and Mr Thompson met with the applicant at BG's head office in Reading. Mr Seaton had with him the QGC pack in his ring bound notebook. Mr Seaton recalled that they discussed CSG business opportunities generally, but he could not recall the specifics of the conversation.

77 In relation to this meeting, Mr Seaton said:

> "Q. You and Thompson went to head office?
> A. Yes we did.

Q. What happened in relation to your custom about carrying the QGC Pack around with you?
A. I still had it in the back of my notebook.

Q. Did you meet at Reading in the BG head office with Mr Fysh?
A. Yes we did on 23 October.

Q. And was Mr Thompson also there with you?
A. Yes he was.

Q. What did you talk about?
A. We talked about business opportunities in Australia. We also talked about the CSG opportunity. I can't recall any specifics of the conversation.

Q. Was there any attitude that Mr Fysh made plain in relation to what you were talking about?
A. My recollection is that Mr Fysh was very supportive, generally, of pursuing business developments in Australia and pursuing CSG to LNG opportunities.

...

Q. Are you able to recall whether or not anything was shown to Mr Fysh when you met him?
A. I can't recall anything specifically in relation to Mr Fysh." (AB 2, T454.43-455.27)

"Q. Was there any discussion about graphs in the meeting?
A. I can't recall a discussion about graphs. I made the note.

Q. Was there any discussion about any particular companies?
A. I can't recall any specific discussions.

Q. All right. Insofar as you can recall the general subject matter, what was it that you were seeking from Mr Fysh if anything?
A. We were seeking his view on how best to present the CSG or LNG opportunity and potential questions that might be asked by the Executive.

...

Q. And what was it that was presented?
A. It was the ARI Pack that was presented.

...

> Q. As suggesting that you had updated Mr Fysh in that regard; had you done that?
> A. I can't recall specifically discussing QGC with Mr Fysh." (AB 2, T456.41-458.4)

78 Mr Seaton was also involved in putting together the slide pack for the ARI Overview Presentation on 25 – 26 October 2007. The purpose of the meeting was an internal technical review to enable BG (both executive and technical people) to have exposure to the ARI work.

79 Mr Vinter gave evidence. He was a member of the GEC and headed the legal function at BG. He said that some time before the end of January 2008 or earlier, the applicant informed him that he held QGC shares. His evidence was:

> "I have been an investor for sometime in Australian Stocks." He may have said "Energy Stocks", and he made a joke that actually he probably earned more from his investment activity than he had through being employed by BG Group. I remember that quite clearly. He said that he had been following the no, he said actually that he had actually seen the prospects of a coal seam gas project providing gas to export project before BG had and had, as a result, acquired shares in QGC. So at this stage we, he had been aware, that we were proposing a transaction with QGC and I said that we needed to just stop and consider about whether there might be an issue here in relation to insider dealing." (AB 2, T500.35)

80 In relation to the applicant's knowledge of Project Honey, Mr Vinter said:

> "A. Yes, there was [a conversation], I don't think we went into any great detail but I do remember in response to a question I put to him that Stuart volunteered something along the lines of, yes, I think I probably asked him, "What did you know in relation to Project Honey", and Stuart replied, "I knew the guys were doing something but not this"." (AB 2, T502.20)

81 Mr Vinter said that he did not act any further in relation to the information which the applicant had given him. He said:

> "The bald answer to that question is that's correct. I did not act any further. We concluded the conversation with words to the

effect of "I think you are the right side of the line" and Stuart replied along the lines of "That is what I think too"." (AB 2, T502.50)

82 Under cross-examination, Mr Vinter agreed that he did not take notes of his conversation with the applicant in late January 2008 when the applicant disclosed his ownership of QGC shares. As a member of the GEC, Mr Vinter could recall the investment committee meeting on 16 January 2008, but could not recall whether Sir Frank informed the GEC of Project Honey. "I don't specifically recall that. I was already aware of the Project ... I don't specifically recall the resolution, but I do definitely recall that the Chairman's Committee was empowered to basically give us the final go ahead to sign documentation" (AB 2, T508.40).

83 Sir Frank Chapman gave evidence. He said that the proposal about Project Honey was put before the Board at BG on 13 December 2007. He received a CSG pre-read before the board meeting. The applicant was copied into that email. Having approved the concept, the Investment Committee were then responsible for completing and delivering the deal. During December and January, negotiations about the form of the deal were proceeding. In mid-January 2008, a meeting of the GEC took place. The purpose of the meeting was to inform those GEC members who were not on the Project Honey list, what was shortly to happen between BG and QGC. The applicant was present at that meeting.

84 Mark Greenwood was an Equities Analyst at JP Morgan and gave evidence at the trial. His function at JP Morgan was to evaluate oil and gas stocks in Australia and to forecast future earnings, estimate the value of those companies and provide investors with recommendations about whether they should effectively buy, sell or hold these stocks. He said that in order to form opinions, analysts relied on publicly available information such as financial reports the companies had published historically, information available in the public arena and some data sources, including Bloombergs. Analysts would synthesise information and put together forecasts of earnings to come up with a view on the stock.

85 If the analysts saw a valuation that was significantly in excess of the share price, they would have a positive view of the stock, what they would call an "overweight" recommendation, but if the price of the stock was significantly greater than their inherent value, they would recommend that the clients sell the stock. During the period January 2007 to February 2008, Mr Greenwood was responsible for following all publicly available information that would influence companies Woodside, Santos, Oil Search, AWE, Roc Oil and QGC. Mr Greenwood would form views on the valuation and future earnings for those companies.

86 In mid-2007, JP Morgan looked at QGC closely and regular reports were produced. From then until January 2008, Mr Greenwood was not aware of information of BG having an interest in dealing with or going into some sort of joint venture with QGC. When QGC announced its alliance with BG to commercialise CSG via LNG, Mr Greenwood produced a report dated 4 February 2008.

87 Under cross-examination Mr Greenwood agreed that in a report dated 1 August 2007 he valued the QGC stock as "underweight". By September 2007 his recommendation changed to "overweight" because from the material he analysed it could now be seen as a "buy" recommendation. Mr Greenwood explained that JP Morgan's system was more of a relative recommendation than an absolute recommendation system, i.e. if the target price was more above the share price than it was below, that it would be considered relatively "overweight".

88 When shown a JP Morgan document, Mr Greenwood agreed that as early as October 2006 it was known that there was growth of the CSG industry in Australia. It was impressive and it was apparent that people had underestimated its impressive growth. Mr Greenwood agreed that JP Morgan in the report compared the Australian CSG industry favourably to the US market.

89 Mr Greenwood agreed that the 2006 JP Morgan document indicated that the enormous reserves potential, combined with reasonable economics would ensure CSM would fill the gaps between supply and demand. Mr Greenwood explained that predicting a "favourable future" for CSG stock would depend upon the valuation of the stock, what share they had of reserves and what those reserves proved to be, their access to technology necessary to exploit the reserves and whether they had customers lined up and access to funding.

90 Daniel Dreyfus was a private client investment advisor at RBS Morgans. He gave expert evidence on behalf of the Crown on the issue of the "materiality" of the information in MFI 4, i.e. that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares.

91 Mr Dreyfus gave evidence that his clientele ranged from very conservative people who had retired and were living off the earnings of particular investments, business people who were still working and in the accumulation phase of their savings, some younger people at the starting point of their investing careers and active traders who followed the market all day and traded off the market for gain and invested in shares and fixed income securities.

92 Mr Dreyfus had a Bachelor of Commerce from the University of NSW, an MBA from a UK management course called "Cranfield" and since 2004 had been a Master Stockbroker with the Strong Brokers Association in Australia. Mr Dreyfus explained that the status of a Master Stockbroker is ascribed to people who have worked in the industry for a long time. His clients included institutional clients, who were themselves professional fund managers, dealers who had orders to buy and sell shares to people like himself, active traders who were far more active in selling and buying and perhaps made riskier investments and conservative investors for whom capital preservation was very important and who relied heavily on Mr Dreyfus's advice.

93 Mr Dreyfus indicated that he had never encountered information about companies that was not publicly available and discussed it with his clients. He agreed that over the years he had cause to discuss the possibility of corporate activity with his clients. He said:

> "There's a variety of issues that need to be considered but there is not necessarily definitive answers in assessing whether a corporate action may or may not occur and as a financial advisor we try to make those assessments and then from that basis make recommendations to clients." (AB 3, T 811.41)

94 Mr Dreyfus was asked to consider whether the information contained in MFI 4 would be likely to influence his clients. He gave the following evidence in relation to MFI 4:

(a) Conservative low risk private clients: were unlikely to be interested in this type of information because of the assessment of the risk return trade off. (AB 3, T816.43)

(b) Large institutional investors: He agreed that the information in MFI 4 would be unlikely to influence such investors (AB 3, T818.10).

(c) Small and mid-cap investors: Yes, the information would influence such investors because "they specialise in small and mid-cap investments and QGC was a small or mid-cap company. If they had investments anywhere in that sector, then this is information that is likely to influence them in making a decision about those investments. (AB 3, T818.24)

(d) Active traders: Yes, they had a higher tolerance for riskier investments, and those for whom shorter term capital gain could be more important than dividend income, those able to make quick decisions about whether or not to invest or those who had a good understanding about the energy sector would be likely to be influenced by MFI 4 (AB 3, T819.1).

(e) Hedge Fund clients: Yes, if they believed the risk return parameters made a profitable outcome likely, they would be influenced in the decision about whether or not to acquire QGC shares. Those investors were likely to conduct their own research before deciding whether or not to invest, in a shorter timeframe than large institutional funds (AB 3, T819.22).

95 Mr Dreyfus said that there were a number of qualifications that might operate on the likelihood of the information in MFI 4 influencing investors to invest in QGC shares. They included: The age of the information, reliability and credibility of the source of the information, the question of how much BG was willing to spend, whether Santos or Origin would be targets if the QGC bid failed and whether BG could afford either of these, whether ARI was a reputable group, whether anyone had seen the ARI report, whether the Teams' assumptions about gas reserves matched that of other analysts, what other analysts thought of the Teams' valuation of Arrow and QGC, whether such valuations had implications for other companies, whether the valuations might tempt other companies to enter the market, what type of deal might be done between the companies, what the information might mean to AGL as a major QGC shareholder, whether AGL might block any deal, whether the market had already factored in the information and the likely impact on the QGC share price (AB 3, T822.31-823.46).

96 In cross-examination Mr Dreyfus said that when forming his opinions he drew upon his experience of advising clients on listed securities across all sectors. He agreed that he was not a specialist in advising on gas sector shares (AB 3, T825.31).

97 Mr Dreyfus accepted that with respect to MFI 4, the position that the Team at BG had reached was that QGC was very much more favourable, in terms of worth and market price than Arrow. He agreed that he had not done any analysis of the trading records or history of either Arrow or QGC before June or December 2007, to look for comparative events or releases of information to see what could be gauged from such a comparison. He

was referred to an ASX release, dated 5 December 2006, announcing that AGL had taken a significant stake in QGC and agreed that it was the sort of information that might cause a price increase in QGC. He also agreed that this occurrence played no part in his opinion expressed about the QGC information that he had given, but denied that there was a resemblance between the 2006 occurrence and the happenings with BG and QGC in December 2007.

98 Mr Dreyfus agreed that before a corporate announcement was made, there was always a level of uncertainty about whether it would succeed, and agreed that MFI 4 contained no announcement of any deal or bid and that added "another layer of uncertainty" (AB 3, T870.21).

99 Mr Dreyfus was referred to MFI 4 and to particular (e) and agreed that if the information there set out had been obtained from publicly available material it would have made a big difference to his opinion. He was not prepared to make the same concession with regard to particular (f) of MFI 4. In relation to particular (f), he said:

> "Q. It wouldn't make any difference?
> A. No, I'm not saying that. I am, I'm saying it didn't have the basis to assess how they arrived at those figures." (AB 3, T897.47)

100 Mr Dreyfus agreed that in order to assess the significance of the fact that the BG Team had prepared an evaluation of QGC and Arrow, something would need to be known about the Team. Further, he agreed that it would be relevant to know whether or not BG was playing catch-up in the field of CSG to LNG in Eastern Australia. He stated that what he took into account was the material presented to him in order to arrive at his conclusions (AB 3, T898.40).

101 Mr Dreyfus referred to particular (d) of MFI 4 and said that he made no assumptions about whether the ARI resource figures referred to there, were being made known for the first time. He would want to talk with analysts about whether such information had been priced in by the market

and did not give consideration to that factor when forming his opinion. He agreed that he did not do any independent research into the reliability of ARI's assessments (AB 3, T900.11).

102 The applicant gave evidence. He described his knowledge of LNG as quite extensive and deep and his knowledge of CSG as reasonable. He was referred to the Agreed Facts and said that the share transactions there identified were a representative sample of his share portfolio between July 1997 and August 2007. He said that he initially tended to rely upon the advice of his broker and his own reading of the Financial Review. He focused mainly on buying things you could buy in floats and the banks and such like. He borrowed money to buy shares and deducted interest from his income tax.

103 When he moved from Singapore, his practice changed after he lost a quarter of a million dollars on HIH, a company that his broker recommended. That gave him a sour taste for advice from other people and it gave him a sour taste for investing in things he did not really understand. As a result, he moved into resources because he knew about the resource business. The mining and petroleum industries were industries in which he was comfortable.

104 He said that he had been attracted to the Eastern Australian gas market because at that time Australian gas prices were extremely low by world standards. He knew that as soon as Australia linked its gas prices to exports, they would rise. He considered investing in five or six CSG companies being Origin, Santos, Arrow, QGC, Sunshine Gas and a little bit later, a company called ESG (Eastern Star Gas). His interest in investing in CSG was to be an owner of a company that owned gas when gas prices rose on the East Coast to meet export standards.

105 He said that in mid-June 2007, he attended an annual BG strategy presentation in the UK. The purpose of these meetings was to put in front of the BG Group Executives as a whole, some of the opportunities that lay

before the group or, some of the problems that lay before the group. It was the only time that the Group Executives as a whole sat down with the Asset General Managers that ran BG's 30 assets and "It was an opportunity to assess them and see how they handled pressure and so on. It had an HR function as well" (AB 3, T1011.14). On the evening of 13 June 2007 he gave instructions to his broker at JB Ware to buy 100,000 Arrow shares and on 18 June 2007, he instructed the same broker to buy a further 150,000 shares. Around 26 June 2007, the applicant recalled having a telephone conversation with Gary Thompson of BG. He was interested in the potential for their work as it had been discussed a week or two earlier at the strategy session primarily, around small scale LNG and there was also talk about CSM.

106 In July 2007 he had a meeting with Mr Maxwell and Mr Thompson in which the topic of discussion was him trying to answer a question from Mr Maxwell about how to get a business development project going and supported in BG. Mr Maxwell was pretty frustrated and was picking the applicant's brains about it. The applicant recalled receiving an email from Mr Maxwell, dated 1 August 2007. The applicant said that the figures cited [for the reserves of gas held by Santos, Origin, QGC and Arrow] were not news to him and he knew roughly what the figures were (AB 3, T1021.28).

107 The applicant recalled receiving an email from Tim Hargraves, dated 2 August 2007, in respect of Arrow's likely potential to be able to succeed in places like China and so forth. He thought that what Tim was really saying was "How is Arrow going to do it?" He took this as a cautionary note that it was going to be hard for a company which had about 120 or 130 people in it to handle such a big issue. Around 2 August 2007, he bought 100,000 shares in Sunshine Gas because Tim Hargraves had said that they were good value and he had a lot of regard for his judgment.

108 In August 2007 he received an email from Mr Maxwell, attached to which was a copy of the TLP, being a business development plan for Eastern Australia. The applicant had previously commented upon the document

and saw his role as trying to see if there was anything he could suggest that would improve the quality of the paper, or the effectiveness of the paper.

109 The applicant recalled a meeting in late October 2007 between himself, Messrs Thompson and Seaton in his office at Thames Valley in the UK around lunchtime. He recalled that the meeting was arranged by Mr Maxwell and identified an email from Mr Maxwell, dated 18 October 2007, in which Mr Maxwell suggested that Messrs Thompson and Seaton should spend some time sharing their work and insights regarding CSG with the applicant while they were in the UK.

110 The applicant said that the meeting lasted about 45 minutes and they talked about LNG in Australia in general. They then talked about CSG in Eastern Australia and about how a coal seam project in Australia should be structured, or could be structured, or could be put together and how, particularly, it could be shaped to sell it within each group. Other than Woodside, he could not recall any other company names being mentioned.

111 The applicant could not recall any documents or slides being before him at the meeting. When referred to the Arrow Opportunity Pack and asked whether he recalled seeing any of the slides in 2008, he responded "No, I did not. I do recall I did not see them" (AB3, T1032.23). The applicant was then asked if he could recall seeing the slides at any time before 2008, to which he responded "No". To the best of his recollection, he first saw the valuation slide in September 2009 in a meeting with ASIC.

112 The applicant said that he did not recall seeing any of the slides indicated in AB 1, p213-223 [the QGC Opportunity Pack] before 2008 and that the first time that he saw AB 1, p215 [the QGC valuation slide] was in the same meeting with ASIC in September 2009.

113 The applicant said that he recalled a meeting with Mr Maxwell in Singapore in November 2007. He recalled that Mr Maxwell had arranged

the meeting and that they had dinner at a restaurant at the Boat Quay. The meeting lasted about an hour and a quarter. They talked about the reorganisation going on at BG and also a number of topics including CSG in NSW and Arrow. They also discussed the Chief Executive of Arrow. The applicant said that a number of companies were discussed but QGC was not mentioned. The applicant said that the only CSM they discussed was in relation to NSW.

114 The applicant was directed to emails between himself and Mr Maxwell and said that it was unlikely that he had opened the attachments to an email from Mr Maxwell on 28 November 2007. The applicant was directed to further emails between himself and Mr Maxwell to which he said that he would have opened the attachment to the email from Mr Maxwell dated 2 December 2007 when he returned to the UK on that date (the attachment is the ARI technical presentation on CSG presented to BG in London on 25 – 26 October 2007).

115 The applicant agreed that on his return to the UK on the evening of 2 December 2007, he gave instructions to his stockbroker in Australia to sell Arrow and purchase QGC. He said that he made that decision on that evening. He said that before making his decision to sell Arrow and buy QGC, he had looked at some materials, including a report from Eastern Star Gas, the Arrow AGM 2007 publication and the Arrow 2006 AGM publication. After reading these materials, he said, "One of the items that really distinguished Arrow when I purchased them, was their access to very significant funding for exploration, a much bigger funding pot for exploration than any other Australian CSG company had fallen away" (AB 3, T1043.30).

116 The applicant also recalled that before his sale of Arrow and his purchase of QGC, he had a number of conversations with people who had influenced his decision to sell Arrow shares and purchase QGC on 2 December 2007. These included the talk with Mr Maxwell in Singapore, a conversation with the Director General of Hydrocarbons while he was in

India and a telephone conversation with his friend Tim Hargraves on 1 December 2007.

117 The applicant was shown MFI 4 and directed to each particular in turn. In relation to each particular, except (f) and (i), he claimed to have had some knowledge before 2 December 2007.

118 When directed to an email, dated 8 December 2007, from Ashley Almanza of BG to him, amongst others, the applicant said that before receiving the email he had not been aware of "Project Honey". He said that it was at that time, 8 December 2007, that he linked the project with QGC and became aware that this was the project that Mr Maxwell had been working on. Before that, he had not been aware that the project that Mr Maxwell had been working on involved QGC (AB 3, T1056.2).

119 The applicant recalled a meeting he had with Mr Vinter on 16 or 17 January 2008 in Mr Vinter's office. He recalled the meeting because on 16 January "Project Honey" came before the Group Investment Committee for approval and he was at that meeting. He went to Mr Vinter after the meeting to discuss his concerns about holding QGC shares and participating in the approval of the BG opportunity with QGC.

120 Under cross-examination the applicant said that he did not tell Mr Vinter when he had acquired the shares because he did not think that it was relevant. He said that when he spoke to Mr Maxwell in Singapore (26 November 2007), Mr Maxwell did not talk about what his team was doing. He was not particularly interested in knowing what Mr Maxwell and his team were doing as he had enough on his plate.

121 The applicant said that in the emails from Mr Maxwell, after their meeting in Singapore, Mr Maxwell had referred to the project he was working on in a roundabout way. When the applicant was referred to an email from Mr Maxwell to him on 2 December 2007, the applicant said that the email did

not give him a clue as to the identity of the Queensland opportunity, nor did he think it appropriate to ask. He also did not want to know.

122 When the applicant was referred to an email he sent to Mr Maxwell on 2 December 2007 he said that he knew that Mr Maxwell "was pursuing some sort of partnership or something in Australia". The applicant said that most of the thinking he did about his decision to sell Arrow and buy QGC was done on the overnight flight back to England from India. It had nothing to do with what was happening at BG. The applicant said that he did not think it was inappropriate to buy QGC shares because he did not have knowledge of what Mr Maxwell was doing. If he had known, he would not have done so.

123 The applicant denied that Mr Maxwell mentioned QGC or Queensland Gas during their Singapore meeting. The applicant agreed that at the time of the purchase of the QGC shares in December 2007, he held around 3 million shares in Innamincka, a small shareholding in Tattersalls, and several million dollars in a stockbroker's account.

124 The applicant denied that two valuation slides, with respect to Arrow and QGC, were on the table when the meeting took place between himself, Mr Thompson and Mr Seaton on 23 October 2007. He also denied that he and Mr Seaton went through the slides. He denied that Mr Thompson had said that QGC looked like a better opportunity than Arrow for BG. The applicant said that he did not recall Arrow or QGC being mentioned at the meeting.

125 The applicant agreed that the QGC opportunity had moved very quickly from the time that he had seen Messrs Thompson and Seaton to the time when BG decided to act on the relationship with QGC. He denied that he was aware that Mr Maxwell's team thought QGC a better opportunity than Arrow at the time he met Messrs Thompson and Seaton. He said that he was not aware that QGC was a target for BG, until after he bought his QGC shares.

126 The applicant said that on 15 January 2008 he received an email from Kim Howell of BG with a very detailed briefing pack about QGC for the Investment Committee Meeting, which was to take place the next day. After the applicant attended the meeting, he went to see Mr Vinter. He said that he did not know at the time of the meeting with Mr Maxwell in Singapore on 27 November 2007 that the Maxwell team did not regard Arrow as an opportunity.

127 The applicant said that when he sold his Arrow shares to buy QGC shares, he believed that he was lucky to get his money back. He said that he sold Arrow shares rather than bought QGC shares. He further added that he would not have bought the QGC shares if he had not decided to sell Arrow – he substituted the QGC investment for the Arrow investment. When it was suggested to the applicant that the reason he sold Arrow and bought QGC was because he wanted to take advantage of what he knew about BG's intended corporate action with respect to QGC, he said "I could not do that Mr Crown, I didn't have that information. I wouldn't do that Mr Crown" (AB 3, T1115.26).

128 When the applicant was shown MFI 4, he agreed that he had knowledge of the information contained in particulars (a) and (b) [when he purchased the QGC shares]. The applicant agreed that he was aware of particular (c) but drew a distinction between what he knew and what he believed the position was and the details in particular (c). He agreed that he was aware of particular (d), but had no recollection of opening the report [ARI Technical Presentation] when it was sent to him by Mr Maxwell on 2 December 2007. He simply could not remember. The applicant agreed that he was aware of particular (e). He denied that he had seen particular (f) and denied discussing valuations at the meeting with Messrs Thompson and Seaton on 23 October 2007. He said that his memory was crystal clear on this issue.

129 The applicant agreed that he possessed the information in particulars (g) and (h). He reiterated that during the meeting with Mr Maxwell in Singapore (27 November 2007) there was no discussion about what Mr Maxwell was going to be doing in Australia.

130 The applicant was directed to an email from him to Mr Vinter, dated 21 November 2008, in particular, the words "we [the applicant and Mr Maxwell at the Singapore meeting] talked about Arrow". The applicant was asked whether Mr Maxwell mentioned QGC to which the applicant responded "I am pretty sure he didn't, well, yes, I am clear that he did not mention QGC" (AB 3, T1126.13).

Submissions

131 The parties accepted that the directions as to the elements of the offence of insider trading given by the trial judge were correct. By reference to counts 3 and 4 those directions were:

> **"ELEMENTS OF THE OFFENCE OF INSIDER TRADING**
>
> There are four elements of the offence. They are (for counts 3 and 4):
>
> 1. that, between 2 December and 8 December 2007, the accused acquired 250,000 shares in Queensland Gas Company Ltd;
>
> 2. that he did so intentionally;
>
> 3. that, at the time he acquired the shares, the accused possessed inside information;
>
> *inside information* means information in relation to which the following paragraphs are satisfied:
>
> (a) the information is not generally available;
>
> (b) if the information were generally available, a reasonable person would expect it to have a

material effect on the price or value of particular Division 3 financial products

4. that, at the time he acquired the shares, the accused knew or ought reasonably to have known:

(i) that the information was not generally available; and

(ii) that, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares."

132 Elements 1 and 2 of the offence played no part in the appeal and need not be further considered. In relation to element 3, the written direction provided by her Honour was:

"ELEMENT 3 – POSSESSION OF INSIDE INFORMATION

3. Has the Crown established beyond reasonable doubt that, at the time he acquired the shares, the accused possessed inside information?

The "inside information" relied upon by the Crown for counts 3 and 4 is the information set out in MFI 4.

You must be satisfied that the accused possessed that body of information, that is, all of the information set out in MFI 4, taken in combination.

However, you do not have to be satisfied that the information was conveyed to the accused in the precise terms in which it is set out in MFI 4. The test is whether the accused possessed the substance of that information, taken as a whole or in combination, except any part of the information that you consider makes no real difference.

Information: is not confined to the statements of fact. It includes matters of supposition or assumption, and other matters that would not be sufficiently definite to warrant being made known to the public. It also includes matters relating to the intentions or likely intentions of a person.

Inside information: means information that:

(a) is not generally available; and

(b) is such that, if it were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares.

In order to be "inside information", the information relied upon by the Crown must satisfy both limbs of that definition.

Each limb of that definition includes a term that is further defined in the Act. You must determine this issue having regard to those further definitions.

"Generally available"

The first limb is that the information is not generally available.

Information is "generally available" if it is readily observable. That includes any deductions, conclusions or inferences from such information.

Information is also generally available if it has been made known in a way that is likely to bring it to the attention of investors (persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information) AND a reasonable time has passed for the information to be disseminated among such investors. Again, that includes any deductions, conclusions or inferences from such information.

"Division 3 financial products" means financial products that can be traded on a financial market including securities (including shares), derivatives, interests in a managed investment scheme, debentures, stocks or bonds and superannuation products.

This test tells you when information is "generally available". In order to establish that the information in MFI 4 was "inside information", the first limb the Crown has to prove is that the information was not generally available. In order to be satisfied that the information was not generally available, you must be satisfied that it does not satisfy this test.

You have to determine whether the information particularised in MFI 4, considered as a combination, was not generally available.

It is not necessary for the Crown to prove that each part of the combination considered separately, by itself, in isolation from the rest of the information in the combination, was information which was not generally available.

"Material effect":

The second limb of "inside information" is that, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares.

A reasonable person would expect the information in MFI 4 to have a material effect on the price or value of shares in QGC if (and only if) that information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of shares in QGC.

You are asked to measure the materiality of the information from the standpoint of a reasonable person and on the basis that you are assessing its likely influence not on just any person in society but on persons with some experience of the stock market.

You have to determine the information particularised in MFI 4, considered as a combination.

It is not necessary for the Crown to prove that each part of the combination, considered separately and in isolation from the rest of the information in the combination, was information which would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of shares in QGC.

"Possessed inside Information":

The Crown must establish that the accused had the information in his mind, that is, that he knew that information.

133 Given the complexity of Element 3, her Honour provided to the jury a summary. The parties accepted the correctness of that summary.

"SUMMARY AS TO ELEMENT 3

3. Has the Crown established beyond reasonable doubt that, at the time he acquired the shares, the accused possessed inside information?

   (a) Has the Crown established beyond reasonable doubt that the accused possessed the information?

(b) Has the Crown established beyond reasonable doubt that the information was not generally available?

(c) Has the Crown established beyond reasonable doubt that, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares. This test is satisfied if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of shares in QGC."

134 As with Element 3, the parties accepted as correct the trial judge's written direction to the jury in relation to Element 4 of the offence of insider trading.

"ELEMENT 4 – KNOWLEDGE THAT THE INFORMATION WAS INSIDE INFORMATION

4. Has the Crown established beyond reasonable doubt that the accused knew or ought reasonably to have known that:

(i) the information was not "generally available"; and

(ii) if the information were generally available, a reasonable person would expect it to have a "material effect" on the price or value of particular Division 3 financial products (here, shares in QGC)?

In determining whether the accused ought reasonably to have known that the information had those two qualities, you must consider all of the relevant circumstances of the accused, including his mental state at the time."

Applicant's submissions

135 The applicant submitted that the information in particulars (a) – (c) of MFI 4 did not constitute "inside information". He submitted that a general investigation of the kind which BG carried out in relation to CSG on the eastern coast of Australia did no more than elicit matters of general knowledge within the relevant market. He noted that in relation to (d), the

Crown had accepted that the information which ARI assembled was all sourced from material which was publicly available. He submitted that it was no part of the Crown case that what ARI reported to BG derived from material other than that which was publicly available.

136 The applicant made the same submission in relation to particular of information (e) in MFI 4. He accepted that particular (e) involved quantitative information, as opposed to qualitative information, but as with particular (d) he submitted that it was based on information which was readily available to persons in the industry who chose to inquire about it.

137 The applicant accepted that the information, in particular (g), was obviously private in that it related to a conclusion of Mr Maxwell. Nevertheless, he submitted that this conclusion was on its face quite unremarkable in that Arrow appeared to be the poorest in relation to that consideration. The applicant submitted that this was a conclusion which was obvious from information which was publicly available and was a conclusion which had been arrived at by others who had considered that publicly available information.

138 In relation to particular (h), the applicant accepted that Mr Maxwell had been working on something called a "Queensland opportunity" and that after they spoke in Singapore in November 2007, Mr Maxwell was going to Queensland to further investigate that matter. The applicant submitted, however, that there were at this stage four companies still under consideration, i.e., Santos, Origin, QGC and Arrow. He submitted that the investigation of the "opportunity" was still in the first phase of investigation, i.e., the "create phase". There was no agreement, but rather there was a range of things which had yet to be agreed. There was at most the possibility or hope of some deal or agreement in the offing. The applicant submitted that this could not be regarded as inside information, in the relevant sense, and that the Crown had not made submissions to that effect at trial or on appeal.

139 The applicant submitted that this analysis of the MFI 4 particulars placed into context the importance of particular (f). Particular (f) was private in the sense that a calculation had been made and a conclusion had been reached based on publicly available information. To achieve the information contained in particular (f) involved a process which included the application of judgment. The applicant accepted that the information in particular (f) could satisfy elements 3 and 4 of the offence of insider trading. The applicant submitted that it was particular (f) which tied the other particulars together to bring about the conclusion in particular (i).

140 The applicant noted that no submission had been made at trial by either side to the effect that particular (f) was one which would make no real difference if it were omitted from the particulars of information in MFI 4.

141 The applicant acknowledged that the test for element 3 of the offence included "whether the accused possessed the substance of that information, taken as a whole in combination, except any part of the information that you consider makes no real difference". In the appeal, that qualification was described as the "proviso". While acknowledging the correctness of that test and of that statement of the proviso, the applicant submitted that the importance of the information in particular (f), both on its own and in its relation to the other particulars of information in MFI 4, made it unreasonable for a jury to treat it as something the omission of which would make no real difference. He submitted that the information in particular (f) went to the very heart of value buying.

142 It was the Crown case that the information in particular (f) was conveyed by Messrs Seaton and Thompson to the applicant at the meeting on 23 October 2007. It was not suggested that words to the effect of particular (f) were spoken to the applicant. The inference sought to be drawn was that the information was conveyed to him by what was said and an examination and comparison of two groups of documents – the Arrow opportunity pack and the QGC opportunity pack. The documents

particularly relied on were slide 9 of the Arrow pack and slide 2 of the QGC pack which were known as the "valuation slides".

143 The applicant submitted that there was no evidence which would enable a jury to be satisfied beyond reasonable doubt that the information in particular (f) was conveyed to him on this occasion. He submitted that the evidence of Messrs Seaton and Thompson did not reach that standard. The applicant submitted that an analysis of their evidence validated that submission.

144 In his evidence in chief, Mr Thompson said about the slides - "just had them on the table for discussion points" and "when the two valuation slides were on the table, which Jim [Seaton] mainly spoke to, that QGC looked like a better opportunity than Arrow". Mr Thompson said that it was Mr Seaton who went through the slides and that he "believed" that Mr Seaton "said things about them".

145 In cross-examination Mr Thompson said that he could not remember specifically speaking to any slide. Mr Thompson did, however, recollect that the two valuation slides were on the table and were shown by Mr Seaton to the applicant. Mr Thompson agreed that when examined under oath, he said that he could not recall which specific slide or slides Mr Seaton had shown. Mr Thompson agreed that the ASIC examination was much closer in time to the events in question and that he did not claim to have a better recollection at trial than he did when questioned by ASIC.

146 The applicant relied upon the following evidence:

> "Q. It is fair to say isn't it, that you can't possibly now say what it is, if anything, that Mr Seaton went through, that he said, about any of the contents of that slide, do you agree?
> A. I just have a general recollection of both Arrow and QGC being discussed by Mr Seaton but I can't recall specific details.
>
> Q. You don't mean by that, do you, that they were the only companies whose plays were mentioned do you?

A. We talked more broadly than just Arrow and QGC." (AB 2, T426.20)

147 The applicant submitted that the evidence of Mr Thompson depended upon Mr Seaton filling in the gaps, i.e. giving evidence as to what in fact he said concerning the two slides and to what extent he directed the applicant's attention to them. There was nothing in Mr Thompson's evidence to the effect that he observed the applicant examining or comparing the slides. In that regard, the applicant submitted that the information in particular (f) was not set out in terms on the slides, but required some analysis of the slides themselves. The applicant submitted that the evidence of Mr Thompson at trial, which represented the high point of the Crown case in relation to particular of information (f), was significantly undermined by its inconsistency with the evidence given to ASIC some three and a half years previously.

148 The applicant submitted that the evidence of Mr Seaton failed to fill in any of the gaps in Mr Thompson's evidence. While Mr Seaton had a copy of the QGC pack, he could not recall having the Arrow pack at that time. Mr Seaton could not remember saying anything in relation to the Arrow pack at the meeting, he could not recall whether anything was shown to the applicant at the meeting, be that slides or graphs, nor could he recall any specific discussion about any particular companies, in particular QGC, at the meeting.

149 The applicant submitted that because the information in particular (f) was not in terms set out in the slides but required some analysis and explanation, there needed to be evidence that some such analysis or explanation took place at the meeting. The applicant submitted that there was no such evidence. The applicant submitted that there was no evidence of any net asset value (NAV) discussion, or any discussion of share price. The applicant submitted that this evidence could not have satisfied the jury beyond reasonable doubt that he possessed the information in item (f) at the relevant time.

150 The applicant relied upon a separate and independent basis upon which the verdicts against him should be set aside and the convictions quashed – namely, that it was not open to the jury to be satisfied beyond reasonable doubt that the information contained in MFI 4 was material in the sense that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares.

151 In accordance with the directions of the trial judge, the applicant submitted that in order to satisfy this element of the offence, the jury had to be satisfied beyond reasonable doubt that:

(a) If the information in MFI 4 possessed by the applicant (being all of the information in MFI 4 taken in combination) were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares; and

(b) A reasonable person would expect the information in MFI 4 to have a material effect on the price or value of shares in QGC if (and only if) that information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of shares in QGC.

152 The applicant submitted that the jury could not have been satisfied that the information possessed by him was material on the evidence adduced by the Crown.

153 The Crown sought to prove materiality primarily through an "expert", Mr Dreyfus. The Crown also relied on the fact that, in early February 2008, when a deal between QGC and BG was finalised and announced, the QGC share price increased. The applicant submitted that neither of these matters provided a safe basis for the jury to be satisfied to the relevant standard on the issue of materiality.

154 The applicant submitted that Mr Dreyfus had no expertise in the LNG and CSG sector. The applicant was critical of the way in which the evidence was given by Mr Dreyfus. The evidence was given "through the prism of what he would be telling his clients". By reference to the information in MFI 4, he was asked "would this be something that you'd consider and use in giving advice?" The questions were not put in terms of "if you were advising your client and after the event were given the information in MFI 4, being something you didn't know before, would it make any difference?" This process was followed in relation to each class of client. The applicant submitted that the relevance of such a process of questioning was problematic when the issue was whether the relevant information would have an effect on the price and value of a security.

155 The applicant submitted that the statements of opinion by Mr Dreyfus as to whether or not the information in MFI 4 would be likely to influence certain classes of investors, were on his own admission, so heavily qualified by reference to matters that he was not able to consider or did not consider, as to render them of no utility.

156 The applicant submitted that the matters of qualification, which Mr Dreyfus was not able to consider, went to matters that were fundamental in the sense that they made the difference between whether the information could possibly influence a person in deciding to acquire or dispose of shares, or not (those qualifications were set out at AB 3, T820.11–823.46). With specific reference to QGC, these qualifications raised the following issues - the age of the information, its reliability and credibility, its source, how much BG was willing to spend, whether Santos or Origin could be targets if an attempt to strike a deal with QGC failed and whether BG could afford to deal with either Santos or Origin.

157 The applicant noted that the qualifications included such rudimentary matters as what was already priced into the QGC share price by the market at the time of the putative announcement of the information

contained in MFI 4. Mr Dreyfus did not undertake any analysis of what in fact was already priced in. The applicant submitted that this was a significant issue, and it was not in dispute at trial that much of the information contained in MFI 4 was, as at early December 2007, already in the public domain.

158 In relation to the increase in QGC's share price, the applicant submitted that the rise in February 2008 provided no safe basis for the jury to find that the information in MFI 4 was material. There were a number of reasons for this. There were other factors which could account for such an increase, in particular the announcement of substantial gas reserves. The applicant submitted that the information in fact announced by BG and QGC in February 2008 was not properly comparable with the information in MFI 4. He submitted that to do so involved an apples and oranges comparison. The applicant submitted that not only was the information different but that Mr Dreyfus, because he had not made the preparatory inquiries, could not express an opinion concerning the likely impact of the MFI 4 information on the QGC share price.

159 The applicant submitted that taken at its highest, the effect of the information in MFI 4 was that as at early December 2007 there was a "possibility" of a "deal" between BG and QGC and that discussions were to be had to see if a deal could be done. By contrast, what was announced in 2008 was an actual finalised deal between BG and QGC of a particular scope and magnitude. The applicant submitted that relevant to the question of materiality of the information contained in MFI 4, as at December 2007, was an understanding of the possibility of a deal being done, the scope of that deal and what the market had already priced into QGC's share price as at that date on account of the possibility of a deal being done. The applicant submitted that none of these matters were dealt with by the Crown. The applicant submitted that the Crown did not provide the jury with any basis whereby it could reason back from the price increase as a result of the announcement in February 2008 to the question of materiality in December 2007. Without such a basis, any link between

the increase in the share price of QGC in February 2008 and the information in MFI 4, would involve speculation.

160 The applicant noted that the announcement in February 2008 did not relate only to the "deal" between BG and QGC but also that QGC had significantly more gas in reserves and in contingent resources than the market had previously understood. In accordance with the evidence of Cottee, the applicant submitted that this was a significant and positive matter in terms of the future prospects of QGC and thus would likely have had a positive impact on QGC's share price. The applicant submitted that the jury was not given any means by which it could disentangle for itself the obvious effect this positive component would have had on the market in February 2008 from the news of the deal which had been entered into. The applicant submitted that absent any such means, it would have been dangerous for the jury to speculate for itself as to the existence and extent of any connection.

161 In summary, the applicant submitted that the Crown did not attempt through Mr Dreyfus or otherwise, to show the jury how, if at all, it could adjust for the obvious differences between the position of BG in early December 2007 and that which was announced in February 2008, e.g., the possibility of a deal with QGC, the details of which were unknown, and an actual deal with clear terms and conditions and an announcement of substantial reserves. The applicant submitted that without providing a methodology for such an adjustment, there was no safe or reasonable way for the jury to treat the price move in February 2008 when working out the materiality of the information in MFI 4 as to price sensitivity. The applicant submitted that the evidence before the jury was insufficient to enable the jury to properly use the QGC share price rise on the issue of materiality.

162 In relation to materiality generally, the applicant relied upon an annotated copy of MFI 4 which contained references to and extracts from Exhibit 4 to illustrate that the important parts of the information in MFI 4 were already relevantly available in the public domain. Those extracts from Exhibit 4

were collected in a separate volume, which was provided to the court by the applicant. In doing so, the applicant noted that he was not undertaking the onus of establishing that fact. Rather, he submitted, the extracted parts of Exhibit 4 made clear the extent to which the Crown had failed to establish materiality with respect to the information in MFI 4 and the consequent unreasonableness of the jury's verdict.

Crown's submissions

163 The Crown submitted that each of the particulars of information in MFI 4 constituted a part of a "pathway" towards the issue of materiality, i.e. price sensitivity. By reference to that analogy, the Crown posed the question whether if a paving stone were missing in that pathway, could the jury still get to price sensitivity?

164 While not conceding that there was insufficient evidence to establish particular of information (f) in MFI 4, the Crown submitted that its absence was not fatal to the Crown case. This was because the significance of any discrete component of the body of information in MFI 4 was a question of fact for the jury. This was in accord with the direction by the trial judge in relation to element 3 which both sides had accepted as correct. The Crown submitted that even without particular (f), the information in MFI 4 was sufficient to establish the offence.

165 The Crown relied on her Honour's written direction as to element 3 of the offence (par [132] hereof) and on the following oral direction in the summing up:

> "92 You do not have to be satisfied that the information was conveyed to the accused in the precise terms in which it is set out in MFI 4. The test is whether the accused possessed the substance of that information taken as a whole or in combination, except any part of the information that you consider makes no real difference." (AB 3, T1318)

166 The Crown submitted that the effect of that part of the summing up and of the written direction was that the significance of any discrete part of the information in MFI 4 was a question of fact for the jury. The Crown submitted that these directions left the jury in a position of deciding for themselves whether any part of the information made no real difference.

167 The Crown submitted that it was left open to the jury to find in respect of particular (f), as with any other particular, that a failure to prove it in part or in whole made no real difference, especially in the context of proof of the other particulars. In that regard, the Crown noted that the applicant did not argue a lack of proof of possession of the information in the other particulars. It also noted that the jury were not directed that proof of any individual particular was essential to their verdict or that any one particular was more important than any other.

168 The Crown put the same submission in a slightly different way. The Crown submitted that it was open to the jury to find that any individual particular was of no real importance and to act on the rest. By way of example, the Crown submitted that it could be argued that the content of particulars (h) and (i) relating to the imminent BG activity aimed at "capturing the Queensland opportunity", taken in the context of particulars (a) – (e) and (g), was sufficient in itself to establish the necessary qualities which the information as a whole was required to have, in order for the subject counts to be sustained. The Crown submitted that in such circumstances it followed that the information in particular (f) could satisfy the description of making "no real difference".

169 In oral submissions, the Crown submitted that even without the information in particular (f), the other information in MFI 4 was to the effect that the monolithic BG was to enter into a co-operative arrangement, or relationship, with the diminutive QGC and that that of itself would be sufficient to permit a conclusion as to materiality and inside information (Appeal T34.4 - .36). In support of that submission, the Crown relied upon the meeting between the applicant and Mr Maxwell in Singapore on 27

November 2007 and the exchange of emails which took place between the applicant and Mr Maxwell between 28 November and 2 December 2007 when the applicant first acquired QGC shares. The Crown submitted that the inevitable inference to be drawn from the meeting, those emails and the purchase of QGC shares was that the applicant had such information which of its nature was price sensitive.

170 The Crown submitted that for the applicant to succeed, the Court would have to be satisfied as to two things:

(a) That it had been established by the applicant that it was not open to the jury to find that he possessed the information in particular (f); and

(b) If so, that part of the information not found to be possessed by the applicant did not satisfy the requirement of making "no real difference" to the whole of the information as particularised in MFI 4.

171 The Crown did not accept the proposition that it was not open to the jury to find that the applicant was in possession of the information in particular (f) of MFI 4. The Crown submitted that it was open to the jury to accept the evidence in chief of Mr Thompson, which of itself was sufficient to allow an inference to be drawn that the information in particular (f) was conveyed to the applicant. The Crown relied upon Mr Thompson's evidence identifying "two valuation slides which were on the table", that Mr Seaton "went through the slides" and that "QGC looked like a better opportunity than Arrow". The Crown relied on Mr Thompson's evidence that the applicant had suggested modifications to another slide (but not one of the two valuation slides). The Crown relied upon the circumstances leading up to the meeting between the applicant and Messrs Thompson and Seaton, i.e. the email from Mr Maxwell of 18 October 2007 advising the applicant that the two men were coming to head office:

> "... for internal reviews on the CSG work which is going very well. Some very interesting insights are emerging from the technical work and we have identified a valuable opportunity which we are now moving quickly on. I have suggested to Gary and Jim that they spend some time with you sharing the work and insights/results." (AB 1, p 224)

172 The Crown relied upon the applicant's admitted interest in Australian oil and gas shares and his substantial shareholding in Arrow. The Crown noted the applicant's prior assistance to Mr Maxwell with the work of the Team and his support for pursuing business developments in Australia.

173 The Crown submitted that those matters were available to be taken into account by the jury, so as to enable them to conclude that the information in particular (f) had come into the possession of the applicant at the meeting. The Crown submitted that Mr Seaton's failure to recall relevant detail did not undermine the evidence of Mr Thompson. It simply added nothing to it. The Crown submitted that it was open to the jury to discard the applicant's version of the meeting, leaving it open to accept Mr Thompson's account in chief, when coupled with the surrounding circumstances.

174 In relation to Ground 3, i.e. that the evidence in the Crown case could not have satisfied the jury that the information possessed by the applicant was material in the sense of s1042D of the Act, the Crown relied upon the evidence of Mr Dreyfus but not only on that evidence. The Crown adopted as part of its submission the following statement of principle by the trial judge from her judgment as to the admissibility of the evidence of Mr Dreyfus.

> "11 The intention of the Legislature appears to have been that materiality must be measured against both reasonableness and some knowledge of the market. The expectations of a reasonable person are quintessentially within the province of the jury. That is an issue that need not, and should not, be informed by any subjective opinion or assessment whether or not based on specialised knowledge. However, in expressly confining materiality to the likely influence of the information on "persons who commonly acquire Division 3 financial products", the statute

> requires the jury to apply that test by reference to a reasonable person armed with some knowledge of the matters likely to influence the trading decisions of persons who commonly trade in the market. That is an issue which draws in part on matters of common sense well within the province of the jury, but one as to which specialised knowledge might also be brought to bear." (AB 3, p 1413)

175 The Crown submitted that the evidence of Mr Dreyfus went directly to the issue of the materiality of the information in MFI 4 in that the information was likely to influence certain categories of investors in the relevant way. In relation to some of the qualifications which he expressed when giving that evidence, the Crown submitted that these were answered by other evidence in the case. The Crown referred particularly to the age of the information, the reliability and credibility of the information, the reputability of ARI and whether anyone had seen the ARI report which were all answered in that way.

176 The Crown submitted that the evidence of Mr Dreyfus assisted its case in two ways. The first and principal way was his expression of opinion about the significance of the particulars of information in MFI 4. In addition, his evidence had the effect of vesting the jury members with additional knowledge which could be combined with their own common sense in the way referred to by her Honour. This was the secondary effect of his evidence, i.e., to identify the factors which in his view were worthy of consideration when the jury came to consider what should be considered, or might be considered, in relation to the materiality question.

177 The Crown submitted that even if the evidence of Mr Dreyfus was significantly discounted so as to reduce its utility, this would not lead to the conclusion that it was not open to the jury to find that the MFI 4 information was material since its members were still able to act on their own common sense. The Crown submitted that the information about the imminent potential involvement of BG with QGC, as contained in MFI 4 and as specifically set out in particulars (h) and (i), left it open to the jury to conclude that materiality had been established.

178 On that issue, the Crown relied specifically upon the following directions by the trial judge (which were not challenged by the applicant):

> "51 Conversely, if you don't accept Mr Dreyfus's evidence, just because you do not accept it does not mean of itself that the Crown has failed to prove materiality. There is no rule that says that the Crown has to have an expert witness to prove that issue. Ultimately, whether you accept Mr Dreyfus's evidence is entirely a matter for you.
>
> ...
>
> 123 So this question of whether a reasonable person would expect the information to have a material effect is a question of fact but it is one which calls on your collective common sense and your experience of the world and it is also one in respect of which you might be assisted by expert evidence. You were asked to measure the materiality of the information from the standpoint of a reasonable person ...
>
> 124 The question whether information is likely to influence investors and the expectations of a reasonable person on that issue are quintessentially within your province, ladies and gentlemen. That is the very kind of issue for which juries are brought together and considered the appropriate decision makers about questions of fact." (AB 3, p 1305 ff)

179 The Crown submitted that its case was consistent with these directions but did in addition call in aid the evidence of Mr Dreyfus. The Crown emphasised the significance of the impact of the proposed alliance between BG and QGC based in part on evidence such as that of Mr Cottee, that the deal with BG "opened the world as a place where we can sell gas". On this issue, the Crown also relied upon the disproportion in size between BG and QGC as relevant to the question of materiality.

180 The Crown relied on the increase in the share price of QGC in February 2008 as relevant to the materiality of the information in MFI 4. In that regard, the Crown noted that her Honour had cautioned the jury in an extensive direction about reasoning back from the information in the announcement to the effect of the available information as it stood at the

time of the applicant's acquisition of QGC shares. The Crown submitted that even though there might be an absence of consideration of or knowledge of the effect of other information on the increase in the QGC share price, the question was still for a person in the position of a juror to consider whether or not a person who commonly acquired shares would, in the circumstances of the information contained in MFI 4, be influenced in deciding whether or not to acquire QGC shares.

Consideration

181 For the applicant to succeed in this appeal, he has to bring himself within s6(1) of the *Criminal Appeal Act* 1912 which states that the Court of Criminal Appeal "shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence". The evidence and the competing submissions based on them have already been reviewed. It is, however, necessary to take account of what the authorities say as to how this Court should determine whether or not the applicant has satisfied that requirement.

182 Guidance on this issue was most recently provided by the High Court in *SKA v The Queen* [2011] HCA 13; 243 CLR 400. There the majority said:

> "The task of the Court of Criminal Appeal
>
> 11 It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v The Queen* by Mason CJ, Deane, Dawson and Toohey JJ:
>
> > "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".

12 This test has been restated to reflect the terms of s 6(1) of the *Criminal Appeal Act*. In *MFA v The Queen* McHugh, Gummow and Kirby JJ stated that the reference to "unsafe or unsatisfactory" in *M* is to be taken as "equivalent to the statutory formula referring to the impugned verdict as 'unreasonable' or such as 'cannot be supported, having regard to the evidence'."

13 The starting point in the application of s6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses. However, the joint judgment in *M* went on to say:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."

Save as to the issue whether the Court of Criminal Appeal erred in not viewing a videotape of the complainant's police interview, to which reference will be made later in these reasons, this qualification is not relevant to the present matter.

14 In determining an appeal pursuant to s6(1) of the *Criminal Appeal Act*, by applying the test set down in *M* and restated in *MFA*, the Court is to make "an independent assessment of the evidence, both as to its sufficiency and its quality". In *M*, Mason CJ, Deane, Dawson and Toohey JJ stated:

> "In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'.""

183 By way of further guidance, the majority said in *SKA:*

> "20 The reasoning of the Court of Criminal Appeal exposes a fundamental problem with its approach to its task. The Court concerned itself with whether, as a question of law, there was evidence to support the verdicts, rather than making its own independent assessment of the evidence. ...
>
> 21 To determine satisfactorily the applicant's appeal, the Court of Criminal Appeal was required to determine whether the

> evidence was such that it was open to a jury to conclude beyond reasonable doubt that the applicant was guilty of the offences with which he was charged."

184 An explanation of what is meant by the phrase "open to the jury" was provided by Hayne J (with whom Gleeson CJ and Heydon J agreed) in *Libke v R* [2007] HCA 30; 230 CLR 559 at [113]:

> "113 It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. ..."

Grounds of Appeal 1 and 2

185 Fundamental to the success of Grounds 1 and 2 is the proposition that it was not open to the jury to find beyond reasonable doubt that the information in particular (f) of MFI 4 was possessed by the applicant on 2 December 2007 because such a finding could not be made on the evidence. The applicant's case was that the jury having properly examined the evidence on this issue must have had a reasonable doubt. In my opinion, the applicant has established this proposition. Having reviewed the whole of the evidence, I am left with a reasonable doubt on this issue and that is a doubt which the jury should have had. It is not a doubt which can be resolved by the jury's advantage in seeing and hearing the evidence.

186 Even if it be accepted that the information in particular (f) of MFI 4 could have been deduced on a relatively brief evaluation of the valuation slides in question, evidence concerning the slides leaves reasonable doubt as to whether the applicant was in a position to conduct such an examination much less that he had done so. I have set out the evidence of Mr Thompson in pars [144] - [146] above. That evidence even taken at its

highest, does not go so far as to suggest that the applicant examined the slides. Further, to the extent that the evidence went further than the sworn evidence of Mr Thompson at his ASIC examination that he could not recall which slides had been shown to the applicant, the evidence at the trial must be considered in the context of the concession by Mr Thompson that he did not have a better recollection at the trial than when questioned by ASIC.

187 The evidence of Mr Seaton does not dispel the reasonable doubt. He could not recall (see par [148]) what was shown to the applicant.

188 The information in particular (f) of MFI 4 said to be possessed by the applicant, was information of a precise kind. It did not emerge obviously from either the Arrow valuation slide or the QGC valuation slide. It required some analysis of the slides to adduce that information. The information was specifically related to share price. There was nothing in the evidence in chief of Mr Thompson which even remotely referred to that topic. When he said that Mr Seaton "spoke to" the slides, there was no further evidence as to what was said other than "QGC looked like a better opportunity than Arrow". There was no elaboration as to the basis for that observation. Such an observation could refer to a number of considerations besides share price and the undervalue of the QGC share price.

189 That deficiency in the evidence was not overcome by the contextual evidence of the email from Mr Maxwell which set out the purpose of the meeting.

190 By reference to the evidence of Mr Thompson in chief and the contextual evidence, a jury could not be satisfied beyond reasonable doubt that any discussion of the share price of Arrow and QGC took place, let alone a discussion which included a conclusion that the share price of QGC was significantly undervalued. When one adds to that equation the absence of any confirmatory evidence from Mr Seaton, and the unexplained

discrepancy between the evidence at trial and the statement made under oath by Mr Thompson to ASIC over three and a half years before, the difficulty in the jury drawing the necessary inference beyond reasonable doubt was compounded.

191 This does not end the matter. It is necessary to consider the point taken by the Crown on appeal that in accordance with her Honour's direction in relation to element 3 of the offence, a failure to prove that the applicant possessed the information in particular (f) did not affect proof of the offence, provided the jury considered that the particular (f) information "made no real difference". That argument depends upon the Crown establishing two matters: first, that it was open to the jury to decide for themselves whether the particular (f) information made no real difference and that the remaining information in MFI 4, absent particular (f), was sufficient in a price sensitive way to establish the offence.

192 In considering the first matter, it was the position of the Crown on appeal that the effect of her Honour's summing up and written direction as to element 3 of the offence was that the significance of any discrete part of the information in MFI 4 was a question of fact for the jury. In my opinion, that proposition is too broadly stated.

193 The direction by the trial judge which was not disputed by the parties was:

> "The test is whether the accused possessed the substance of that information taken as a whole or in combination except any part of the information that you consider makes no real difference."

194 The submission by the Crown fails to consider the subject matter of the "proviso", i.e. makes no real difference to what. This can only be a reference to "that information" which is the charged information. It cannot refer to a difference to "materiality". Something is either material or it is not. The question was whether it made a difference to the substance of the information as charged, to omit particular (f).

195 Particular (f) added a significant consideration which was not elsewhere dealt with in MFI 4 and it was directly related to the asserted unlawful purpose of the decision to acquire the shares in QGC. It would not only be unrealistic for the jury to have ignored or left out of consideration particular (f), it would have been unreasonable. In other words, it would have been quite unreasonable for the jury to have concluded that the information in particular (f) made no real difference to the substance of the information in MFI 4. As was submitted by the applicant, it was the information in particular (f) which tied the other particulars together to bring about the conclusion in particular (i).

196 In oral submissions, the applicant put the proposition in this way:

> "That's why one can say that the proviso ... is something which tells the jury to contemplate whether the omission of an item would make any real difference to the substance of ... the charged information. The charged information is and is only that which is found in the particulars, that's why the metaphor pathway really doesn't help. It's not something that you can step on or off as you please so long as you get to the destination, it is the definition of the destination." (AT 66.28)

197 That still leaves for consideration the second matter, i.e. the Crown's submission that even without particular (f) the remaining information in MFI 4 was sufficient in itself to establish the necessary qualities which the information as a whole was required to have in order for the subject counts to be sustained. In that regard, it is important to note that no submission was made at trial by either side to the effect that the information in particular (f) was such as would make no real difference if it were omitted from the particulars of information in MFI 4. While it was argued by the applicant at trial that possession of the information in particular (f) had not been established against him, the Crown case at trial was always that the applicant was in possession of the substance of the whole of the information in MFI 4.

198 The problem for the Crown is that this proposition which was put for the first time on appeal was never in terms put to the jury at trial. The jury was

never asked to consider whether the information in MFI 4, without that contained in particular (f), had the quality which the information as a whole was required to have in order to substantiate counts 3 and 4. There is a certain unreality in this proposition being raised by the Crown for the first time on appeal. In any event, the proposition should be rejected.

199 The particular (f) information made a real difference to the substance of the information as charged. The share price value comparison in (f) gave the more general information in MFI 4 a particular focus. It gave to the other information in MFI 4 a real commercial flavour. It converted general information as to CSG and its reserves in Queensland being valuable into a particular focus upon QGC shares, their undervalue and the implicit advantage in acquiring them before the true value was realised. That was in the context of identifying the "Queensland opportunity" and the likelihood of entering into some relationship with QGC.

200 The case put by the Crown on appeal to the effect that in the absence of the particular (f) information, the remaining information in MFI 4 was sufficient to establish counts 3 and 4, significantly departed from the way in which the case was run at trial. It was not open to the Crown on appeal to make out another case, different to that put at trial, as to matters which might be material. The question remained that posed by the trial judge "whether the accused possessed the substance of that information taken as a whole or in combination except any part of the information that you consider makes no real difference". For the reasons indicated, that referred to MFI 4 and included the particular (f) information. That is a very different inquiry to one which says "can you put together some other combination of information drawing on parts of MFI 4 which might satisfy the counts which have been charged".

201 It is a fundamental proposition that an accused is entitled to know the case against him or her. Here it was that the information in MFI 4 was in his possession and that it was material. In such circumstances, the accused was entitled to give evidence that he did not have part of the information in

MFI 4 and that the information which he did not have was of real importance. The accused did not have to answer permutations of other information not included in MFI 4.

202 This was the effect of the Crown submission at [168 - 169] hereof. There, the Crown submitted that absent the particular (f) information, the remaining information in MFI 4 was to the effect that the "monolithic BG" was to enter into a co-operative arrangement or relationship with the "diminutive QGC" and that that of itself would be sufficient to permit a conclusion as to materiality and inside information.

203 Even if it were open to the Crown to put this submission on appeal, the submission is not made out. The Crown relied upon the meeting between the applicant and Mr Maxwell in Singapore on 27 November, together with the sequence of events preceding and following the meeting, to provide the factual basis for the submission. Even though "Project Honey" was in contemplation at this time, it was not put by the Crown that the applicant knew what "Project Honey" meant before the QGC shares were acquired. The evidence from Mr Maxwell at trial as to what was said at the dinner was very general. It was also somewhat undermined by its inconsistency with what he said to ASIC in December 2008. In December 2008 he denied any recollection of what was said.

204 The emails to which the Court was taken between Mr Maxwell and the applicant following the meeting were also expressed in general terms. Significantly, nowhere do those emails show QGC as having been singled out as a target for some kind of co-operative arrangement or relationship. On the contrary, the emails start with the four target companies (AB 1, p 289) and there was nothing in the subsequent emails to show that QGC had in any way been singled out. Arrow was not put forward as the least attractive of the four companies but was put forward as one of the four. There was nothing in the emails to show that any one of the four companies had been discarded.

205 The emails and internal documents of BG at this time, i.e. up to and including 2 December 2007, made it clear that insofar as Mr Maxwell and the team were concerned they were in the "create phase" to use the terminology current within BG. It was common ground that the "create phase" was the first phase of the five phases which had to be completed before a project was entered into. Each one of those phases required the persuasion and approval of the relevant decision makers within BG. Mr Maxwell was not a relevant decision maker.

206 It follows that the factual basis for the Crown's alternative submission on the appeal, if the information in particular (f) was disregarded, has not been made out.

Ground of Appeal 3

207 In the course of argument on the appeal, the Crown accepted that if the Court found that the applicant did not possess the information in particular (f) of MFI 4 at the time when the QGC shares were acquired it would be difficult for the Crown to rely upon the evidence of Mr Dreyfus. This is because the opinion of Mr Dreyfus was based upon possession of the whole of the information in MFI 4 without any differentiation.

208 That, however, does not end the matter. As the parties accepted, the question of materiality must be measured against both reasonableness and some knowledge of the market. The reasonableness test was one well within the province of the jury and did not necessarily need to be based on expert evidence such as that of Mr Dreyfus. This is despite the fact that the statute refers to "persons who commonly acquire Division 3 financial products" which requires the reasonableness test to be applied by reference to a reasonable person armed with some knowledge of matters likely to influence the trading decisions of such persons. The parties accepted that this was an issue which drew in part upon matters of common sense but which could also be the subject of specialised knowledge.

209 In this case, I have found that the applicant did not possess the information in particular (f). The question is therefore whether it was open to the jury to find materiality by reference to matters of common sense.

210 Reliance upon common sense alone without some expert evidence would create a very difficult task for the jury on the facts of this case. There were two significant confounding considerations militating against a finding of materiality. The first was that the material extracted by the applicant from Exhibit 4 made it clear that the fact that QGC was undervalued was known by some in the market and had been published in articles which were readily available to the public. It was also generally known that BG was interested in and was making inquiries about, an involvement in CSG production in Queensland. In those circumstances, a reasonable person would not have expected that information to have a material effect on the price or value of the QGC shares. This is particularly so if the particular (f) information was not taken into account.

211 The second consideration is the very general nature of the information in MFI 4, especially when particular (f) is left out of the account. Much more would need to be known about BG's intentions in relation to CSG in Queensland. MFI 4, absent particular (f), does no more than to indicate such an interest. The evidence in relation to that interest showed that four CSG companies were under consideration. This was not one of those cases where the intention of a large company such as BG towards a smaller company such as QGC was so clear that an inference based on common sense could be drawn.

212 None of the information in MFI 4 was directed to the terms of any possible relationship between BG and QGC or any of the other three companies. It is difficult to identify anything in the information in MFI 4 absent particular (f), which would influence, or be likely to influence relevantly, the decision to acquire securities in QGC. For that circumstance to exist, one would

need to have some knowledge of the nature of the proposed arrangement and its terms.

213 It follows that I am left with a reasonable doubt that if the information in MFI 4 (absent particular (f)) were generally available, a reasonable person would expect it to have a material effect on the price or value of QGC shares or would be likely to influence persons who commonly acquire such shares in deciding whether or not to do so in the case of QGC. That being a doubt which I have, the jury should have had the same doubt. This is not a doubt which can be resolved by the jury's advantage in seeing and hearing the evidence.

214 The fact that the QGC share price increased after the announcement in February 2008 does not remove the doubt which I have. This is because of the more or less contemporaneous announcement of substantial additional gas reserves held by QGC and because the terms of the arrangement between BG and QGC were known at that time, rather than being in the inchoate state which they were in on 2 December. The submissions of the applicant at [159] – [160] hereof are compelling.

215 It is for these reasons that the Court made the orders which it did on 17 July 2013 (see par [6] hereof).

216 **SCHMIDT J:** I agree with Hoeben CJ at CL.

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I CERTIFY THAT THIS AND THE 73 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE JUSTICE HOEBEN CHIEF JUDGE AT COMMON LAW

of the court.

Associate M.Lyon Date 20:7:2013

Annexure to Respondent Crown's written submissions

Fysh v R

Outline of the Crown case

1. BG Group plc (BG) was a large international energy company with a particular focus on gas, including liquefied natural gas (LNG). Its head office was at Thames Valley Park, Reading in England but it had operations in many different countries. In 2007 it had total revenue of over £8.3 billion, a total operating profit of over £3.2 billion and a market capitalisation of approximately £35 billion (Agreed Facts [1], AB1 p21).

2. In 2007, Frank Chapman was the Chief Executive and Executive Director. In 2007, Sir Frank and the other senior executives of BG, including the appellant, occupied the same floor of BG's head office in Reading (Agreed Facts [2]).

3. In June 2007, the appellant, who was considered one of BG's best business developers, was Executive Vice President and Managing Director responsible for BG's interest in the Mediterranean basin and Africa. His role expanded to include Africa, the Middle East and Asia in January 2008 (Agreed Facts [3]).

4. At BG there were a series of executive committees which approved company strategy and new business development opportunities and investment. (Agreed Facts [4], [5])

5. During the time relevant to the charges, BG was examining entry into the supply of LNG in the Asia Pacific region. In 2006 it had set up an Asia Pacific LNG business development team ("the team") in Singapore led by David Maxwell. Gary Thompson and Jim Seaton came to work for the team (Agreed Facts [7]).

6. In about mid-2007, the team was looking at the concept of using coal seam gas (CSG; also called coal seam methane: CSM; or coal bed methane: CBM) to produce LNG and at the idea of strategic alliance with a company that had already existing LNG interests in Australia to order to deliver the means of a supply of natural gas with the object of access and control over a southern hemisphere source of supply which could be the basis of opening up markets in the sale of LNG as an energy source in Asia (Agreed Facts [9]).

7. Maxwell's team had identified that eastern Australia had large CSG fields and set about rating the companies in Australia who were involved in CSG. On the Crown case, they had identified Arrow Limited (Arrow) and Queensland Gas Company Limited (QGC) as the only companies that conducted pure CSG businesses in Australia, "pure" in that the business of those companies was in CSG. Certain other companies, such as Santos and Origin, had much more diverse businesses which were not rated as highly by the team as targets for partial acquisition or other investment of the kind that Maxwell wanted to put forward to the management of BG (AB2/T140, 155).

8. Maxwell went to BG head office to present a strategy paper on 12 June 2007 to the Group Executive Committee of BG which each year had a strategic review of where the company was headed (AB2/T146). The information conveyed at the meeting, attended by the appellant, grounded the Arrow charges on the indictment. Maxwell told the meeting what he and his team had found out and where he was proposing that BG would head with the information. His presentation contained material about both QGC and Arrow (AB2/T 159; presentation at JB12-27, AB1 50-65). The meeting endorsed what was proposed in the strategic plan and encouraged Maxwell to pursue the development of the opportunities he was suggesting (AB2/T155).

9. The information applicable to the Arrow charges which the Crown alleged Maxwell conveyed and the approval of his plan was identified in MFI 3 (AB1 p6), the particulars for the Arrow two charges.

10. Earlier in 2007, Thompson and the appellant had exchanged emails about Arrow as an investment opportunity, most recently on 31 May 2007 (JB 6-7, AB1 pp44-45). On 13 June 2007 the appellant contacted his stockbroker in Australia, Andrew Woodward, and asked whether Woodward's stockbroking firm had a view on Arrow. Later that day the appellant instructed Woodward to purchase 100,000 Arrow shares. This acquisition grounded the first Arrow charge (count 1 on the indictment). On 18 June 2007, the appellant placed another order with Woodward by email to buy a further 150,000 Arrow shares. This acquisition grounded the second Arrow charge (count 2). The total cost of the shares, including brokerage, was $750,975.15 (JB39/AB1 p77; JB66/AB1 p104)

11. After the presentation to the GEC at the strategic review on 12 June 2007, Maxwell moved on with the proposed CSG to LNG opportunity and met with Nick Davies, the managing director of Arrow, and Richard Cottee, the managing director of QGC (AB2/T 161).

12. On 26 June 2007, the appellant contacted Thompson regarding the potential for converting CSG to LNG and said he thought it was a very good opportunity. The appellant told Thompson that he knew Davies, the managing director of Arrow and asked Thompson if he would like him to contact Davies. He asked Thompson to provide any information to him that the team had on CSG to LNG conversion (AB2/T380).

13. On 2 July 2007, Maxwell and Thompson met with the appellant in his office in Reading. Maxwell and the appellant talked about the next step in what had been discussed in the strategy session in June, looking at the appellant's views on those opportunities and exchanging views on those subjects (T163.33), with the benefit of the appellant's experience with BG in Egypt (T 164.15).

14. On about 1 August 2007, Maxwell again spoke to the appellant about what the team was doing (see AB2 T164-6). Maxwell's notes of the meeting (including his thoughts or actions) which were part of the Jury bundle (see AB1 p114) included a reference to *"acquiring Corn* (i.e. Santos) *or Arrow or QGC gets us this*

much", which Maxwell said was a topic discussed in that conversation (AB2/ T166.39). The same day Maxwell emailed the appellant with (public) information about LNG and CSG and the Australian companies involved in it, including Arrow and QGC (JB78, AB1 p116) . By this time, Maxwell wanted to get funding for the team to further assess the potential for converting CSG to LNG and the best opportunities for BG to enter the CSG business in eastern Australia. He and the team started to prepare a "Traffic Light Paper" to go to BG's Portfolio Development Committee (see AB2 T181-2).

15. On 17 August 2007, Maxwell emailed (JB89, AB1 p127) his draft "Traffic Light Paper" (JB91-101, AB1 pp129-139) to the appellant who provided comments and assistance (AB2/T183). The paper, amongst other things, identified the public fact that four companies, Origin, Santos, QGC and Arrow held over 90% of the CSG resource in eastern Australia and linked an entry position for BG into eastern Australia to one of these four (see JB 95.8/AB1 p133). It also said that introductory discussions with Arrow, QGC and Santos had been positive and each expressed willingness to explore opportunities with BG (JB 90.4. AB1 p128.4). In the paper, the team sought funding of £360,000 to define the strategy and business case for pursuing CSG in Eastern Australia and to identify business development options to deliver a material CSM/CSG entry for BG in later 2007/early 2008 (JB 92.1, AB1 p130.1).

16. The appellant emailed comments to Maxwell about the draft paper on 17 and 18 August 2007. On 19 August 2007, Maxwell emailed the appellant, thanking him and telling him that the Traffic Light Paper had been amended to pick up most of his comments (JB 102-3, AB1 pp140-141; revised paper at JB 136-146, AB1 pp174-184).

17. Before 10 September 2007, Maxwell met again with Richard Cottee from QGC to introduce BG to QG to "try to get a feel for where QGC was going". This led to a confidentiality agreement about sharing information between QGC and BG (AB2/ T216-7); JB125-134, AB1 pp162-172).

18. On 10 September 2007 Maxwell put forward the finalised written "Traffic Light Paper" to the Portfolio Development Committee at BG (Agreed Facts [25], [26], AB1 p25; minutes JB 148-150, AB1 p186-188); AB2/T211ff). The Portfolio Development Committee approved Maxwell's proposal and Maxwell told the appellant and others by email on 11 September 2007 that the Asia Pacific Team's proposal had been accepted by the Portfolio Development Committee (JB151, AB1 p189). As a result, Maxwell organised two consultant firms (ARI and Core Collaborative). ARI was to assess the technical data that was publicly available and some QGC data and interpret same to determine the size and quality of the available resources of CSG in eastern Australia. Core Collaborative was engaged to produce an economic model of CSG opportunities (AB2/T219-220).

19. During this period, Maxwell and Seaton gave a presentation to the QGC directors with the object of presenting BG as a good partner for them (AB1/T 220). There was a similar meeting with Origin (AB1, T221). At around this time, it became clear to Maxwell that Origin, Santos and QGC had the best quality

resources and Arrow's were not as good (AB1/T221.44). As well, the interest at BG in Santos was declining (AB1/T 221.34).

20. In September 2007, an opportunity arose for BG to acquire a 17% shareholding in Arrow when an Arrow shareholder considered selling out. BG wanted Maxwell's team to assess Arrow's value as a potential entry point for BG into CSG in eastern Australia. The assessment (as prepared in a slide format or "pack") included that: although Arrow had the largest acreage of CSG resource, a lot of it was outside the best CSG regions; the Arrow resource was of a lower quality and involved higher cost gas than QGC's resource; the Arrow share price exceeded the estimate of the true worth of the company; the team's valuation of the net assets of Arrow was about half its then current share price (JB 154-171; AB1 pp192-209, see especially JB 162, AB1 200; Maxwell AB1/T227-228). The proposition that this valuation was shown to the appellant on 23 October 2007 informed the second part of particular (f) in MFI 4.

21. On 2 October 2007, Maxwell emailed (JB 152-3, AB1 pp190-1) the Arrow pack to various BG personnel, not including the appellant. In the email, he noted that while Arrow held the largest overall acreage most of it was outside the best areas, resulting in break-even production costs for Arrow being significantly higher than QGC, Origin and Santos. He noted that the *"Way Forward"* was *"acquiring QGC and/or farming into the quality Walloon (Undulla Nose in particular)/Comet Ridge (Fairview) acreage held by QGC, Origin and Santos to establish a lower cost quality CSG position is the preferred approach"*. He enclosed a slide *"which summarises at a high level the difference between Arrow & QGC & highlights why we prefer QGC over Arrow"*.

22. By this time, on the Crown case, QGC was the preferred entry option into eastern Australia CSG for BG. The final report from ARI was delivered in October 2007.

23. On 18 October 2007, Maxwell emailed an assessment of QGC to Chapman and others, not including the appellant. In his email, he said that *"we have quickly reviewed the best entry CSG opportunities. The best fit and most doable we feel is Queensland Gas Co. The entry options are farm in or acquisition. Acquisition provides more opportunities earlier for BG... Therefore, whether we want to pursue acquisition is an initial and pressing decision for us"* (email at JB174, AB1 p212; assessment at JB 175ff, AB1 p213ff). The QGC "opportunity summary" or pack identified inter alia, that QGC's resource position was of excellent quality in the best CSG area and that QGC had quality technical management. The pack also contained the team's valuation of the net assets of QGC showing the valuation of NAV was more than 2½ times QGC's then current share price (JB 177, AB1 p215), although the assessment of that was in dollars. The proposition that this valuation was shown to the appellant on 23 October 2007 informed the first part of particular (f) in MFI 4. The pack urged BG should pursue acquisition of QGC *"asap"* (JB185, AB1 p223).

24. In the meantime, Thompson and Seaton prepared a presentation about the ARI report which included the conclusions that Origin, QGC and Santos had

the best quality acreage of that reviewed by ARI, in the best area in Queensland, with Arrow's holdings being less attractive (JB 195-221, AB1 pp233-259).

25. On 18 October 2007, Maxwell emailed (JB 186, AB1 224) the appellant to arrange a meeting between the appellant, Thompson and Seaton, telling him that the two men were coming to head office for *internal reviews on the CSG work which is going very well. Some very interesting insights are emerging from the technical work & we have identified a valuable opportunity which we are now moving quickly on. I have suggested to Gary & Jim that they spend some time with you sharing the work and insights/results.* Maxwell suggested to Thompson and Seaton that they meet with the appellant. Maxwell had been encouraged by other senior executives of BG to seek the support of and work with the appellant because of the latter's business development background and his understanding of Australian economic and oil and gas circumstances (AB2/T 260-1).

26. On 23 October 2007, at BG's head office in the United Kingdom, Thompson and Seaton met with the appellant. They were at head office, Thompson said, to brief the executive of BG on CSG as an opportunity for BG to pursue and to present the ARI work (AB2/T 385.37). According to Thompson in evidence-in-chief, he and Seaton briefed the appellant on the team's work on CSG in eastern Australia and presented or had the slides from both the QGC pack and the Arrow pack on the table in paper form as discussion points during the meeting (AB2/ T 386.25ff). During the meeting, Thompson said, he told the appellant that Santos, Origin and QGC had the better acreage of the four main players, that Arrow's acreage was on the edge of the "play" and that there was considerably more gas than the team had originally thought was there (AB2/T 387.15ff). He said that he "believed" that when the "two valuation slides were on the table, which Jim mainly spoke to, (he (Thompson) told the appellant) that QGC looked like a better opportunity than Arrow" (AB2/T 387.32). He remembered that Seaton had two valuation slides, one being from the Arrow pack (JB 162, AB1p 192), which Seaton "went through" (AB2/T 387.50-389.21). He said the QGC valuation slide was referred to by Seaton as one "brought with him and in front of him" (AB2/T 389.40). He also remembered the appellant offering some views on "how we could sell the opportunity internally" and described those views (AB2/ T389.49-390.11). He said that the appellant suggested modifications to some slides, one of which was identified by Thompson in evidence (JB 179, AB1 p 217; AB2/T390.35). He recalled the appellant as being enthusiastic and supportive of the opportunity for BG, being CSG in eastern Australia (AB2/T 391.10ff). His notes of the meeting appear in the jury bundle (JB 190-191,AB1 p228-230).

27. In cross-examination, Thompson agreed with the description of the estimate of the Arrow opportunity conveyed in the Arrow pack referred to above as "quick and dirty" and a very preliminary assessment, expressions he agreed also applied to the QGC pack (AB2/T 418.49-420). He agreed that he had previously sworn on 24 February 2009 that he could not specifically recall which slides Seaton had shown to the appellant (AB2/T 424). It was not put to him that the slides were not in fact on the table at the meeting. When asked about what Seaton said, if anything about the Arrow slide (JB162/AB1p192), he said he had

a general recollection of both Arrow and QGC being discussed by Seaton but he could not recall specific details (AB2/T426).

28. In re-examination, Thompson explained "quick and dirty" as meaning a short, sharp assessment summarising the opportunity as understood at the time (AB2/T436.13). As to the differences between his evidence and what he may have said previously, he said that to the best of his recollection, "those slides (the ones he had identified in chief) were on the table" (AB2/ T437.13).

29. Seaton said that at the time he was carrying the QGC pack in the back of his notebook (AB2/T454.48). He recalled the three men had talked about business opportunities in Australia and about the CSG opportunity but said that he could not recall any specifics of the conversation (AB2/T455.10). He could not recall whether anything was shown to the appellant when they met with him at the meeting (AB2/T455.27). He could not recall any discussion about particular companies (AB2/T456.45). He was able to recall that he and Thompson were seeking the appellant's views on how to best present the CSG or LNG opportunity (to the executive) and potential questions that might be asked by the executive but could not recall any specifics of those views (AB2/T456.49ff).

30. In his evidence on the subject of this meeting, the appellant said he could not recall any companies being mentioned at the meeting other than Innamincka (in which he held shares) and Woodside (AB2/T1031.46) and that he could not recall any documents or slides being before him at the meeting (AB2/T1031.50). He then said he did recall that he did not see any of the Arrow pack slides at the meeting (AB2/T1032.23). He then said the first time that he saw either of the valuation slides was at a meeting with ASIC in September 2009 (AB2/T 1032-1033).

31. In cross-examination, he denied being shown the slides and said that he did not recall any mention of QGC or Arrow at the meeting (AB2/T1096.34ff). He denied Mr Thompson had told him that QGC was a better opportunity than Arrow. He described the tenor of the meeting as one for which he ran late, in which he did most of the talking and which he wanted over so he could have his lunch in his office (AB2/T1100.9ff).

32. Critical to this appeal, it was from that meeting between the three men, as mentioned above, that the content of particular (f) in MFI 4, the Crown's particulars of the information applicable to counts 3 and 4 on the indictment, arose (see MFI 4 at AB1 p7). The relevant particular read:

(f) *The team had prepared evaluations of QGC and Arrow in which the Net Asset Valuation (NAV) of QGC was more than 2 1/2 times its then current share price while the NAV for Arrow was about half its then current share price on the ASX.*

33. At the reviews which followed at BG head office on 25 and 26 October 2007, Seaton and Thompson presented the results of the ARI work to senior management of BG. They received general support to pursue the opportunity of

CSG in eastern Australia (Thompson AB2/T 412-3). Maxwell characterised the support as "strong encouragement" leading to a firming-up of the opportunity to pursue the acquisition of or participation in QGC (AB2/T261.33). Another pack was prepared by the team (JB224-239, AB1 pp262-277) to again review the opportunities and talk in more detail about the QGC opportunity (AB2/T262.4). The pack was sent by Maxwell on 2 November 2007 to senior management, recommending moving quickly to enter a relationship with QGC (email at JB 222, AB1 pp260), which led to approval for the actions proposed (AB2/T 265.27).

34. After this, discussions took place between Maxwell and Seaton and QGC leading to the negotiation of terms by which BG could acquire a stake in QGC and acquire a portion of their oil and gas interests (AB2/T265.30).

35. On 15 November 2007, Maxwell emailed a summary of the meetings to Almanza, Friedrich and Howell (JB 245-6, AB1 pp283-4).

36. By this time the negotiations had progressed to the point where BG Mergers and Acquisitions Group assigned a confidential code name "Project Honey" to the negotiations with QGC (JB 242, AB1 pp280-2).

37. In late November 2007, Cottee met with Chapman at BG in Reading. It was resolved that the two companies would progress the proposed relationship, if possible by Christmas (Chapman AB2/T547) and Maxwell was encouraged to progress negotiations as quickly as he could (AB2/T270.22ff).

38. On 26 November 2007, Maxwell met with the appellant in Singapore, during which they briefly discussed the work that the team had been doing on the CSG to LNG opportunity in Queensland (AB2/T272). Maxwell was about to go to Australia to negotiate with QGC, and did so on 3 December 2007 (AB2/T281.11). The two men also discussed QGC, according to Maxwell. He said they talked about why QGC was the right opportunity to pursue, that is, of the four companies contemplated earlier in the year (AB2/T272.14, 274.20, T278.10ff).

39. On 28 November 2007 in Singapore Maxwell sent the appellant (who was also in Singapore) an email saying he appreciated his "thoughts and reflections" the previous evening. He also said that he would send the appellant "*a slide or 2 on the CSG resources ownership allocation for info*" (JB 248, AB1 p286).

40. On 28 November 2007, Howell, head of BG's Mergers, Acquisitions & Disposals emailed to a group of senior management which included the appellant, a confidential report of his department's activities (JB 249-50, AB1 pp287-8). It included as "Top" priority the Asia Pacific LNG/CBM position with its status noted as "Working options & value". It also indicated the project name was "Honey" and that it was due to be considered by "IC/EC/PDC or Board" in December/January.

41. On 28 November 2007 at 12.23 pm Maxwell (in Singapore) sent the appellant an email subject "*Queensland CSG Resources*" attaching 3 PowerPoint

slides regarding the main Queensland coal seam gas resources *"as per our discussion last evening"*. In this email Maxwell summarised the estimated ultimate recovery (EUR) of the holdings of Santos, Origin, QGC and Arrow which came from the ARI consultancy's work (JB 251-4, AB1 pp289-92).

42. On 30 November 2007 at 3:42pm Singapore time the appellant sent Maxwell an email asking whether *"the arrangements you are working on with your new northern friends include any consideration of (i) working with BG outside Australia? (ii) gaining for BG access to their technology? (iii) training BG staff? (iv) BG ownership in technology enhancements developed as part of our (joint?) future appraisal activity in Australia, and our freedom to apply this technology elsewhere?"* (JB 256-7, AB1 pp294-5).

43. On 2 December 2007 at 5:33 pm in Singapore Maxwell sent an email to the appellant, saying in part *"My thinking is once we get a beach head in Australia (hopefully very soon) ..." "The successful companies in Qld are those with the acreage that have unlocked this science for their acreage. Arrow seem to be the poorest here..." "The next two weeks I am locked into leading (& capturing) the opportunity before us"* (JB 256, AB1 p294).

44. On 2 December 2007, Maxwell sent an email to the appellant (subject *"Re: Queensland CSG Resources)"* which said: *"A Queensland opportunity we are working right now includes (at their request) working together in 1 other country and coincidentally India has been discussed as a priority target. The Australian company has very good CSG sub surface and development/technical capability. So they would be a natural partner for us. Assuming success with entry into Australia CSG in the next month or 2 we will also then be seeking 1 or 2 very good technical people to work CSG in Australia."* Maxwell also wrote *"I am travelling from tonight..."* (JB 286, AB1 p324).

45. On 2 December 2007 at 1.56 pm (UK time) the appellant (who was in the UK) sent an email to Maxwell with the subject *"CBM"*. In the email he said amongst other things: *"It all sounds brilliant – if your friends are targeting India, make sure they understand we own the biggest private sector gas distribution businesses there, and have several offers of CBM acreage on the go." "I am sure that this is only a minor aspect of your deal, but looking good in India may help get you some extra leverage elsewhere." "I also agree that we need a centre of CBM technical expertise, and clearly the JV you're creating will house that. I hadn't appreciated that your new friends wanted us for international leverage – that's brilliant. But it also puts the onus very much on you to get decent agreements for bg to access 'their' technology." "...why not invite their CEO to visit Idku and BG India..."."...whatever it takes to get the deal done!! Good luck next week!!"* (JB 288, AB1 326).

46. Maxwell came to Australia to negotiate on behalf of BG on 3 December, with the object of acquiring interests in QGC assets, a QGC shareholding and arranging a joint pursuit of an LNG project based on the CSG resources of QGC (AB2/T281.26, Agreed Fact [38]/ AB1 p27).

47. On 3 December 2007 (Australian time) the appellant rang his stockbroker, Woodward, in Melbourne. He instructed Woodward to sell his entire shareholding in Arrow (252,156 shares at $3.00) and to use the proceeds (together with the proceeds from the sale of some other shares) to buy 240,000 QGC shares at up to $3.20 per share. All the Arrow shares were sold on the ASX on 3 December 2007 and 240,000 QGC shares were bought on the ASX the same day. The appellant was also notified of these transactions that day. The shares cost $764,142 including brokerage (AB2/T476, JB 290-305, AB1 pp328-341). This transaction was the basis of the first QGC charge (Count 3 on the indictment).

48. On 4 December 2007 (Australian time), Woodward received an email from the appellant instructing him to acquire a further 10,000 QGC shares at up to $3.25 per share. The shares were acquired on the next day. The shares cost $32,500 plus commission (AB2/T476, JB306-311, AB1 pp344-9). This transaction was the basis of the second QGC charge (Count 4 on the indictment).

49. The information alleged to have been in the possession of the appellant at the time of these offences was particularised in MFI 4 (AB1/p 7). It included (inter alia) information alleged to have been conveyed to the appellant at the meeting at Reading between the appellant and Thompson and Seaton on 23 October 2007 (particular (f)). It also included a conclusion alleged to arise from the communications between the appellant and Maxwell arising from their meeting in Singapore on 27 November 2007 and thereafter concerning the QGC opportunity (particular (i)).

50. On 13 December 2007, the BG Board discussed "Project Honey" and referred it for decision to the BG Investment Committee. On 16 January 2008, the BG Investment Committee resolved to recommend the deal between BG and QGC (Agreed Facts [43] and [44], AB1 p27), which subsequently was finalised.

51. On 1 February 2008, at 10.38am, a trading halt in the shares of QGC preceded the announcement of the deal between it and BG. Before the halt in trading, the last price of QGC shares had been $3.42 (Agreed Fact [46], AB1 p28).

52. A set of announcements followed about the alliance between BG and QGC which had been negotiated over the preceding two months. The A$870 million strategic alliance or joint venture included BG acquiring a 9.9% shareholding in QGC at $3.07 per share and a direct ownership interest of up to 30% of QGC's CSG assets (Agreed Fact [47], AB1 p28).

53. When the market re-opened for QGC shares on 4 February 2008, following the release of the 3 announcements, QGC shares commenced trading at $3.90, and went as high as $4.14 during the day and remained higher for some time (Agreed Fact [48], AB1 p28).

54. Later in 2008, BG announced to the market an on-market takeover of QGC at $5.75 per share effective to 15 December 2008 which meant that they eventually took over QGC. On 19 November 2008, the appellant sold his entire

holding in QGC on the ASX (295,000 shares at $5.75 per share) which he had bought in 2007, that price being one which BG had offered to all QGC shareholders (Agreed Fact [50], AB1 p28).

55. Subsequently, the appellant was the subject of an internal investigation at BG, although the subject was raised in the evidence in neutral terms. The parties at trial agreed that an edited record of the notes of one of the attendees (Mr Booker) at the meeting might be read to the jury, and her Honour did so during the Crown case. As it turned out, the transcript of that reading was imperfect and so a revised transcript of the reading was prepared, which became MFI 32 (AB3/p 1396ff) and was made available to the jury.