THERE WAS MOVEMENT AT THE STATION FOR THE WORD HAD PASSED AROUND: HOW DOES A COMPANY POSSESS INSIDE INFORMATION UNDER AUSTRALIAN INSIDER TRADING LAWS?

JULIETTE OVERLAND*

Australian insider trading laws prohibit a person from trading in securities whilst in possession of non-public, price-sensitive information. One of the essential elements of the insider trading offence is that the alleged insider must possess certain ‘inside information’. If the alleged insider trader is a company, how does that company ‘possess’ information? Must there be ‘knowledge’ or ‘awareness’ of the inside information, or is mere physical possession sufficient? The Corporations Act contains deeming provisions which impute certain knowledge of a company’s officers and directors to the company itself. General corporate law principles of agency may also apply to deem certain information to be within a company’s possession. How do these provisions and principles operate in the context of insider trading? Legal complexities associated with all of these issues will be examined in this article.

I INTRODUCTION AND ELEMENTS OF THE INSIDER TRADING OFFENCE

The application of Australia’s insider trading laws to companies is in many respects ‘untested’. There has never been a successful prosecution of a company for insider trading in Australia and, if the civil penalty proceedings for insider trading which were recently instituted by the Australian Securities and Investments Commission against Citigroup Global Markets Australia Pty Limited are successful, it will be the first time a company has been found liable for insider trading in Australia. In this context, it is interesting to consider how elements of the insider trading offence apply to companies – this article will focus in particular on the element requiring ‘possession of inside information’.

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* Department of Business Law, Division of Law, Macquarie University.
1 To be referred to from now on as ASIC.
2 To be referred to from now on as Citigroup.
In general terms, a person engages in insider trading if they trade in shares or other financial products whilst they possess non-public, price-sensitive information. The elements of the insider trading offence, which are derived from s 1043A and s 1042A of the Corporations Act 2001 (Cth), can be summarised as follows:

(a) a person possesses certain information;
(b) the information is not generally available;
(c) the person knows, or ought reasonably to know, that the information is not generally available;
(d) if the information were generally available, a reasonable person would expect the information to be material (that is, to have a material effect on the price or value of certain securities);
(e) the person knows, or ought reasonably to know, that if the information were generally available, a reasonable person would expect it to be material; and
(f) whilst in possession of the information, the person trades in those securities (that is, buys or sells those securities) or procures another person to do so.

This article will consider legal issues relevant to the first of these elements – that a person must possess certain inside information – and their impact upon companies. This will include a review of the application of insider trading laws to companies, a consideration of whether knowledge or mere physical possession of information are required for possession, and an analysis of the application of the relevant deeming provisions in the Corporations Act and general agency principles which can impute knowledge to a company, in order to answer the following question – how does a company possess inside information?

II IS A COMPANY A ‘PERSON’ CAUGHT BY THE PROHIBITION ON INSIDER TRADING?

Section 1043A of the Corporations Act provides that it is an offence for a ‘person’ to engage in insider trading. The Corporations Act does not state whether the term ‘person’ is intended to include a company. However, s 22(a) of the Acts Interpretation Act 1901 (Cth) provides some assistance, as it states that in any Commonwealth statute:

expressions used to denote persons generally (such as ‘person’, ‘party’, ‘someone’, ‘anyone’, ‘no-one’, ‘one’, ‘another’ and ‘whoever’), include a body politic or corporate as well as an individual.

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3 To be referred to from now on as securities.
4 To be referred to from now on as the Corporations Act.
It is also clear from the nature of the relevant *Corporations Act* provisions that the prohibition on insider trading is intended to apply to companies as well as natural persons because:

(a) there are specific exceptions to the insider trading offence which are relevant only to companies: for example, s 1043F of the *Corporations Act* provides an exception for bodies corporate who enter into ‘Chinese wall’ arrangements, and s 1043I of the *Corporations Act* provides a specific exception for bodies corporate proposing to acquire or sell shares in another body corporate;

(b) section 1042G of the *Corporations Act* specifically sets out circumstances in which a company will be deemed to possess certain knowledge possessed by a company officer;⁵ and

(c) the maximum penalty which may be imposed for insider trading is different for companies than for natural persons – the maximum penalty for a body corporate is a fine of 10,000 penalty units (currently $1,100,000)⁶ whereas the maximum penalty for a natural person is a fine of 2,000 penalty units (currently $220,000) or imprisonment for 5 years or both.⁷

Thus it is clear that the prohibition on insider trading applies to companies, as it does to natural persons, and that it is an offence for a company to engage in insider trading.

### III HOW DOES A PERSON POSSESS INSIDE INFORMATION?

As stated above, the first element of the insider trading offence is that a person must possess certain inside information.⁸ In order to consider how company can ‘possess’ inside information, it is important to first consider what is meant by the term ‘information’.

**A What is Information?**

The *Corporations Act* defines ‘information’ as including:

(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.⁹

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⁵ The application of this section is considered in detail below.

⁶ Each penalty unit equals $110: *Crimes Act 1914* (Cth) s 4AA.

⁷ *Corporations Act* s 1311, s 1312 and Schedule 3, item 311C.

⁸ *Corporations Act* s 1043A(a).

⁹ *Corporations Act* s 1042A.
This definition is not exhaustive and leaves much scope for interpretation as to what may amount to ‘information’. Various cases have demonstrated that information may come in many forms, such as:

(a) non-specific details about a proposed ‘merger’ of two companies, given verbally by the executive chairperson of one of the companies;\(^\text{10}\)

(b) a court decision presented in open court in a foreign country;\(^\text{11}\)

(c) details of a press release about the discovery of a high-grade nickel deposit;\(^\text{12}\)

(d) details of a proposed takeover, presumably gleaned from office documents and discussions with staff advising on the takeover;\(^\text{13}\)

(e) ‘factual knowledge of a concrete kind or that obtained by means of a hint or veiled suggestion from which one can impute other knowledge’;\(^\text{14}\) and

(f) ‘a rumour that something has happened with respect to a company which a person neither believes nor disbelieves.’\(^\text{15}\)

Whilst these different examples can be variously described as facts, details, data or gossip, all have been considered to amount to ‘information’. The manner in which they exist – whether in documentary form, electronic form or as a topic of conversation – has no bearing on their status as information. So long as there is sufficient ‘substance’ for information to have the potential to be price-sensitive, its ‘form’ is obviously of little consequence.

B How is Information Possessed?

As demonstrated by the examples listed above, information may come in a variety of forms. These forms of information could potentially be possessed in many different ways. For example:


\(^\text{13}\) Hooker Investments Pty Ltd v Baring Brothers Halkerston Securities Ltd (1986) 10 ACLR 462 463 (Young J).

\(^\text{14}\) Hooker Investments Pty Ltd v Baring Brothers Halkerston Securities Ltd (1986) 10 ACLR 462 463 (Young J).
(a) Information may be possessed in a *tangible, physical sense* – for example, information may be possessed by means of physical custody of the paper or documents on which the relevant information is contained in written form.

(b) Information may be possessed in an *intermediate physical sense* – for example, information may be possessed by means of physical custody of computer disks or equipment which enable the information to be accessed electronically, such as via email.

(c) Information may be possessed in *non-tangible, non-physical sense* – for example, information may be possessed by a person because they ‘know’ or are aware of the information, without any physical evidence of such possession.

In the examples given above, only the example in paragraph (c) requires any ‘knowledge’ by the person who appears to possess the information. In the other two examples, whilst the person may have physical custody or control of the information or the means by which the information can be accessed, it is possible for them to have that physical custody or control without necessarily being aware of the existence of the relevant information or its content. Of course, knowledge and physical custody may exist simultaneously, but that is not necessarily the case. Is knowledge, or physical custody and control, or both, necessary for there to be ‘possession’ of information for the purposes of Australian insider trading laws?

Section 86 of the *Corporations Act* provides some guidance on the meaning of the term possession, as it states that:

> A *thing* that is in a person’s custody or under a person’s control is in the person’s possession.16

However, this definition is not particularly helpful in interpreting the elements of the insider trading offence, as ‘information’ is not necessarily a ‘thing’. Whilst s 1042A of the *Corporations Act*,17 which defines ‘information’, makes it clear that certain ‘matters’ can amount to information, it is not clear whether information should be considered to be a ‘thing. Section 1042G of the *Corporations Act* contains certain presumptions, and sets out certain circumstances in which information or knowledge will be imputed to a company.18 Section 1042G provides:

(a) a body corporate is taken to *possess any information* which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer;19 and

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16 Emphasis added.
17 This section is set out in full above.
18 These presumptions are considered in detail below.
19 Emphasis added.
(b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing.\(^{20}\)

It can be seen that s 1042G makes a clear distinction between ‘possession of information’ and ‘knowledge of any matter or thing’: paragraph (a) refers to the ‘possession’ of information, whereas paragraph (b) refers to ‘knowledge’ of a matter or thing. This appears to indicate that information is not regarded as being a matter or a thing. Accordingly, the definition of ‘possession’ in s 86 is likely to be of little assistance when considering what is necessary in order to ‘possess’ information.

C Does ‘Possession’ require Knowledge or Awareness of Information?

In \(R\ v\ Hannes\)\(^{21}\), the only Australian case to consider the meaning of ‘possession’ of inside information, Spigelman J stated that the concept of ‘possession’ of information contains an element of ‘awareness’ of the relevant information.\(^{22}\) This means that mere physical possession of documents or the means to access information electronically would not be sufficient to constitute possession without an awareness or ‘knowledge’ of the content of the relevant information. In the case of \(R\ v\ Hannes\), following a conviction for insider trading in the New South Wales Supreme Court, Mr Simon Hannes appealed to the New South Wales Court of Criminal Appeal: one of the numerous grounds of the appeal was that the trial judge erred when giving directions to the jury in relation to the requirement that the defendant ‘possess’ information. The defendant alleged that there was an error of law in failing to distinguish between physical possession and awareness of information. Although the appeal was ultimately allowed and a direction given for a retrial, this ground of the appeal was rejected. Spigelman J stated that, in order for information to be ‘possessed’, there must be ‘…actual knowledge of the … [relevant] information…’\(^{23}\) and that there is a significant difference between ‘… the mere existence of … [i]nformation and the … possession of it’.\(^{24}\)

However, in the New Zealand case of \(Colonial\ Mutual\ Life\ Assurance\ Society\ Limited\ v\ Wilson\ Neill\ Ltd\)\(^{25}\), the New Zealand Court of Appeal determined that information is possessed where there is ‘objective possession’ and that there is no requirement for ‘subjective knowledge’, otherwise the ‘… purpose of the legislation could be thwarted by difficulties of proof’.\(^{26}\) In that case, directors of a company were considered to ‘possess’ information contained in board papers of which they had custody and control, even though they were not shown to have analysed the relevant material. The legislation in question was the \(Securities\ Markets\ Act\ 1988\).\(^{25}\)

\(^{20}\) Emphasis added.

\(^{21}\) \(R\ v\ Hannes\) (2000) 158 FLR 359.

\(^{22}\) [228].

\(^{23}\) [232].

\(^{24}\) [227].

\(^{25}\) \(Colonial\ Mutual\ Life\ Assurance\ Society\ Limited\ v\ Wilson\ Neill\ Ltd\) (1994) 7 NZLR 152.

\(^{26}\) [30].
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(NZ), which provides for civil proceedings for insider trading, but not criminal prosecutions.

These two decisions appear to be in conflict – the Australian authority requiring ‘awareness’ of information, and the New Zealand authority requiring only custody and control, in order for there to be ‘possession’ of information. Ordinarily, jurisdictional considerations would require that the Australian authority be preferred. But which is the better view? Unfortunately, neither case contains any detailed analysis or considered reasoning of the issue. Instead, the statements are made simply without a description of the underlying legal principles. Accordingly, it is necessary to consider this issue by reference to cases concerning the general law of ‘possession’.

D The Relevance of the Possession of Physical Objects

Although judicial consideration of the meaning of ‘possession of information’ is rare, there are many Australian cases which address the interpretation of ‘possession’ of physical objects. The High Court decision in *He Kaw Teh v R* provides a detailed analysis of the legal nature of ‘possession’ of physical objects, in this case narcotic drugs, and is considered to be a landmark judgment on this issue. Dawson J considered that the concept of possession necessarily contains a mental element, and cited the well-known statement of Griffith CJ in the High Court decision of *Irving v Nishimura*:

> If a man has something put into his pocket without his knowledge, he cannot be charged with having it unlawfully in his possession, if that fact appears.

Academic commentators do not agree on how these principles should be applied to the insider trading offence. Ford states that it is possible to have possession, within the meaning of s 1043A of the *Corporations Act*, of information which a person has temporarily forgotten or has not read. However, Lyon & du Plessis argue that the principles enunciated in *He Kaw Teh’s case* apply directly to the ‘possession’ elements of the insider trading office, so that an insider cannot be considered to possess information without proof that they know or are aware of the information.

The writer respectfully disagrees with the approach suggested by Lyon & du Plessis. The statements made in *He Kaw Teh’s case* are not expressed to apply universally to all criminal offences which import an element of possession. The principles set out in *He Kaw Teh’s case* are primarily of application only to

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27 *He Kaw Teh v R* (1985) 157 CLR 523; to be referred to from now on as *He Kaw Teh’s case*.
28 *Irving v Nishimura* (1907) 5 CLR 233.
29 *Irving v Nishimura* (1907) 5 CLR 233, 237.
31 Ibid [9.650].
33 Ibid 23.
offences which relate to ‘physical’ possession of objects, not all conceivable types of ‘possession’. Whilst it may be that the principles described in He Kaw Teh’s case apply to the element of the insider trading offence concerned with the possession of information, this cannot be assumed without further analysis of the issue.

The position taken by Ford is also a curious one. Ford offers no authority for the proposition that one can have possession of information which has not been read, of which there is therefore no ‘awareness’ or ‘knowledge’, relying on the ‘ordinary’ construction of the legislation.

In He Kaw Teh’s case, even though Dawson J stated that the concept of possession ordinarily imports a notion of awareness, his Honour also acknowledged that whilst knowledge may be ‘… intrinsic to possession … the degree of knowledge required may vary according to context’.

There is no universal definition of possession applicable to all criminal offences. It has also been generally stated that to interpret the meaning of terms such as ‘ possess’ or ‘ possession’, it is necessary to consider the relevant statutory policy. An examination of the policy underlying the relevant legislative provision may therefore assist in determining whether an element of ‘awareness’ or ‘knowledge’ is actually required before information can be considered to be ‘possessed’.

It is generally accepted that, in Australia, insider trading is prohibited on the combined basis of the ‘market fairness’ and ‘market efficiency’ rationales. That is, insider trading laws are intended to:

(a) ensure all participants in securities markets have equal access to relevant information – in other words, to create a ‘level playing field’; and

(b) maintain public confidence in the integrity of securities market.

This is in contrast to other jurisdictions, which rely on other bases as the rationale for prohibiting insider trading. Australian law essentially operates on the premise that those with inside information, regardless of how they have acquired it, should not be permitted to take advantage of those without the benefit of such information.

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34 He Kaw Teh v R (1985) 157 CLR 523, [29], emphasis added.
37 See for example, the United States of America bases its prohibition on insider trading on ‘fiduciary duty’ and ‘misappropriation’ rationales, which focus on the misuse of information by persons who have a connection with the relevant company: Chiarella v United States of America 445 US 222 (1980); United States of America v O’Hagan 117 S Ct 2199, 521 US 642 (1997).
Applying this principle to the issue of ‘possession’, it is difficult to understand how a person could be considered to take an unfair informational advantage over another person or to diminish public confidence in the integrity of the securities market, if they had no actual ‘knowledge’ of the relevant information. Mere physical possession of information, or the means to access information, does not create an advantage which can be readily exploited, unless the person uses those means to acquire actual knowledge of the relevant information. This leads to a conclusion that ‘possession’ of inside information imports a mental element of ‘knowledge’ of the relevant information, greater than mere physical custody or control of that information.

As there are many circumstances in which information may conceivably enter a person’s possession, the fact that the ‘possession’ element of the insider trading offence is not exhaustively defined could conceivably provide necessary flexibility. Whilst possession of information may potentially occur without actual knowledge of the existence of the information, due to the requirements of other elements of the offence, it is unlikely to be proved without some form of actual knowledge of the information and its importance. Clearly, it must be demonstrated that a person had knowledge of the relevant information in order to satisfy the other elements of insider trading, as the prosecution must show, among other things, that:

(a) the person knew, or ought reasonably to have known, that the information was not generally available;\(^{38}\) and

(b) the person knew, or ought reasonably to have known, that the information was likely to be material.\(^{39}\)

Even if it can be demonstrated that a person ‘possessed’ certain information, due to having physical custody or control of it despite being unaware of the nature or contents of the information, it would not be possible to prove these other elements of the insider trading offence if it could not be shown that the person ‘knew’ of the information. Thus, the need to prove other elements of the insider trading offence will generally mean that the offence will only be made out where there is actual knowledge of the relevant inside information.

However, whilst this proposition may be true for natural persons, it does not necessarily apply for legal persons, such as companies. It is certainly possible that a company may be considered to be ‘guilty’ of insider trading where the person who possesses the information is not the person who trades, or procures the trading, in the relevant securities. Therefore they may not be the person who must ‘have knowledge’ that the information is price-sensitive and not generally available. Thus,

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\(^{38}\) Section 1043A(1)(b) of the Corporations Act and paragraph (a) of the definition of ‘inside information’ contained in s1042A of the Corporations Act.

\(^{39}\) Section 1043A(1)(b) of the Corporations Act and paragraph (b) of the definition of ‘inside information’ contained in s1042A of the Corporations Act.
the issues of proof which may apply where the accused insider trader is a natural person do not necessarily apply to corporate insider traders.

As the only Australian authority on the point, the statement made by Spigelman J in *R v Hannes*,⁴⁰ that the ‘possession’ of information requires knowledge or awareness of the information, must be seen to represent the legal position in Australia. Legislative reform of the insider trading positions of the *Corporations Act* has occurred since this judicial pronouncement, and so it must be assumed that if such a pronouncement did not represent the intended state of the law, appropriate legislative clarifications or amendments would have been made. Additionally, no amendment has been suggested to this element of the insider trading offence by the Corporations and Markets Advisory Committee in its recent comprehensive review of Australian insider trading laws.⁴¹

IV HOW DOES A COMPANY POSSESS INFORMATION?

Having determined that the possession of inside information necessitates a mental element, requiring actual ‘knowledge’ or ‘awareness’ of the relevant information, it must now be determined how a company can be considered to have such knowledge or awareness. A company, being an artificial legal person, relies on natural persons to act as the company itself, and on its behalf. What must occur for a company to be considered to possess ‘inside information’?

A What is the Position at Common Law?

At common law, there are three alternative ways in which a company can be considered to possess information:

(a) when the information is known by the board of directors;

(b) when the information is known by a person who is the ‘directing mind and will’ of the company; and

(c) when the information is known by an agent of the company.

1 Knowledge of the Board

As the board of directors is responsible for the day-to-day management of a company, information which is known to the board should clearly be automatically imputed to the company. However, must information be known to all directors or a majority of directors, or will knowledge by a minority of directors be sufficient?

If there must be ‘knowledge’ or ‘awareness’ of information in order for there to be possession, it could not be considered that it would be sufficient if less than a majority of the board members had such knowledge or awareness. Conversely, it should not be necessary for all members of the board to have knowledge or awareness of the information. The writer suggests that if a majority of the directors of a company have knowledge or awareness of certain information, the company can be considered to possess the information.

The need for there to be ‘knowledge’ or ‘awareness’ of information in order for there to be possession means that board members will not be considered to ‘possess’ inside information merely because it may be found in board papers and material of which they have custody or access, unless it can be shown that they have actually read and understood the relevant information. This position is to be contrasted with the decision of the New Zealand Court of Appeal in Colonial Mutual Life Assurance Society Limited v Wilson Neill Ltd,\(^{42}\) discussed in some detail above.

Accordingly, if the majority of a company’s board possesses certain inside information, the company will also be considered to possess that information.

2 Knowledge of a Person who is the Directing Mind and Will of the Company

Corporate ‘organic theory’ provides that certain people can act not just as agents of a company, but as the company itself, especially in relation to acts and offences which contain a mental element. When a person is given power to act independently, with full discretion to make decisions without needing to rely on instructions from superiors, such a person can be regarded as being the ‘directing mind and will’ of the company.\(^{43}\) As such, any knowledge they have is attributed to the company.

It is relatively easy to see that a managing director of chief executive officer could be regarded as the ‘directing mind and will’ of a company, so that any information which they have knowledge of or are aware of, will be attributed to the company. Depending on the circumstances, other senior executives and employees may also be considered to be the ‘directing mind and will’ of a company at other times, as it


\(^{43}\) Tesco Supermarkets Ltd v Nattrass [1972] AC 153.
is clearly possible for more than one person to be regarded as a company’s ‘directing mind and will’.

Accordingly, if a person who is the ‘directing mind and will’ of a company possesses certain inside information, the company will also be considered to possess that information.

3 Knowledge of an Agent of the Company

Knowledge can also be imputed to a company where it is possessed by an agent, but only if the following conditions are satisfied:

(a) the information is acquired by the agent in their capacity as a representative of the company;45

(b) the agent has authority to receive information on the company’s behalf and a duty to disclose the information to the company;46

(c) the agent is not under a duty to another person to refrain from communicating the information to the company.47

An agent of a company may be a director or other officer, but that is not necessarily the case. General rules of agency will apply to determine whether a particular person is to be considered to be a company’s agent (whether by express actual authority, implied actual authority or ostensible authority). Importantly, although the agent must have a duty to disclose the information to the company, in order for knowledge to be imputed to the company, a failure to actually make such a disclosure will not prevent the company from being considered to possess the information. Accordingly, if an agent of company satisfying these criteria, possesses certain inside information, the company will also be considered to possess that information.

B What are the Statutory Deeming Provisions?

The Corporations Act sets out certain ‘deeming’ provisions, which attribute knowledge to companies in certain circumstances. Section 1042G of the Corporations Act provides that:

(a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and

44 Brambles Holdings v Carey (1976) 2 ACLR 126.
45 Societe Generale de Paris v Tramways Union Co Ltd (1884) 14 QBD 424.
46 Beach Petroleum NL and Claremont Petroleum NL v Johnson (1993) 115 ALR 411 at [561].
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(b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing.

These deeming provisions are somewhat of a departure from the common law principles providing for corporate knowledge. The deeming provisions appear much easier to satisfy than the common law rules, because the information need only be known by one person – not the majority of the board – and that person does not need to be the ‘directing mind and will of the company’.

There is similarity between the deeming provisions and the agency principles of the common law, but the Corporations Act only requires that information must have come into the officer’s possession in the course of performance of their duties. The common law is more prescriptive, requiring the agent to have authority to receive the information, a duty to disclose it, and no duty to refrain from disclosure. However, the Corporations Act provides that information will only be deemed to be possessed by a company where it is acquired by an ‘officer’, which will generally require that the person be a director, company secretary or senior executive. The common law rules operate so that information acquired by any agent of the company, regardless of their status, can be attributed to the company, so long as the relevant conditions are satisfied.

C In the Course of Performance of their Duties

As is noted above, s 1042G(a) of the Corporations Act provides that, for a company to be deemed to possess information, the relevant officer who possesses the information must have acquired it in the course of the performance of their duties. This gives rise to an issue which must be considered: what is the position if information could potentially be considered to have been acquired in two or more different capacities, only one of which relates to the performance of the officer’s duties? For example:

(a) What is the status of information which could have been acquired in either a private or a professional capacity?

48 ‘Officer’ of a corporation is defined in section 9 of the Corporations Act to mean: (a) a director or secretary of the corporation; or (b) a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to significantly affect the corporation’s financial standing; or (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation); or (c) a receiver, or receiver and manager, of the property of the corporation; or (d) an administrator of the corporation; or (e) an administrator of a deed of company arrangement executed by the corporation; or (f) a liquidator of the corporation; or (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.
(b) What is the status of information which could have arisen in one of two different professional capacities, one of which is unrelated to the performance of the officer’s duties?

1 Information Acquired in a Private Capacity

Information which is acquired in a private capacity is necessarily excluded from the operation of the deeming provisions, because it falls outside the performance of the officer’s duties. For example, if a director is informed of some ‘inside information’ by a close friend at a party, the director will not have received the information ‘in the course of performing his or her duties’, and therefore the information will not be imputed to the company pursuant to the deeming provisions. By contrast, if the director was informed of the inside information by a client of the company at a formal business meeting, the director would ordinarily be regarded as acquiring the information ‘in the course of performing his or her duties’ and so the information would also be considered to be possessed by the company pursuant to the deeming provisions.

However, the distinction between information acquired in a private capacity and information acquired in a professional capacity may not always be so easily drawn. What would be the result if the director acquired the information in a context which had both private and professional aspects? How are such issues to be determined? These questions have not been the subject of any detailed academic consideration.

The difficulties associated with this question can be demonstrated by the following example: A director may, over time, become very friendly with an executive from one of the company’s corporate clients, so that they sometimes socialise together. Both the director and the executive may regularly, as part of their professional activities, attend industry functions for networking and marketing purposes. If the director and executive were to run into each other at such a function and then, when the function ended, moved onto a bar for a post-function drink where they discussed both professional and social topics, would information passed on to the director by the executive be information acquired in the course of the director’s performance of his or her duties? The attendance at the industry function suggests a professional capacity, but the post-function drinks are more likely to be described as a mere social occasion, giving the event a more private capacity. How can this issue be resolved?

The writer suggests that in such circumstances, where it is not clear whether information was obtained in the course of the performance of a director’s duties, the information itself should be examined. A consideration of the nature and content of the information will generally allow a characterization to be made as to whether it was acquired in the course of the relevant director’s duties. For example, using the scenario described above, if the relevant information passed on by the client executive related to an issue relevant to the company’s operations or business, the information might more easily be characterized as having been acquired in the
performance of the director’s duties – such as if the information related to the affairs of the client company. However, if the information which was acquired was completely unrelated to the company’s operation – for example, if the information passed on was a rumour that certain companies in an unrelated field were about to merge – the information could more easily be characterized as being acquired in a private capacity.

Is it the intention of the statute that the nature of the information itself be considered when attempting to determine whether the information was acquired ‘in the course of the performance of an officer’s duties’? Unlike many overseas jurisdictions,\(^\text{49}\) Australian insider trading laws maintain an ‘information-connection’, rather than a ‘person-connection’. That is, there is no requirement for any relationship to exist between the alleged insider trader and the company or entity in whose securities the alleged insider trader is suspected of trading (or procuring the trading of shares). It is irrelevant if the alleged insider trader has no connection with the relevant entity – the fact that they trade in such shares whilst possessing inside information is the only connection required.

Although a consideration of the nature of the relevant information and whether it has any relationship to the company in question appears to be inconsistent with an ‘information-connection’ rather than a ‘person-connection’ approach, the two positions can be reconciled. The important distinction to be made is the role of the company in each case. The ‘information-connection’ issue relates to the company in whose shares the unlawful trading allegedly occurs – Australian insider trading laws are predicated on the basis that there is no requirement for any connection between the alleged insider trader and the company in whose shares he or she trades.

Undertaking an analysis of the inside information and considering whether it relates in any way to the operation of the company’s business when seeking to determine if the relevant company officer received the information in the course of performing their duties, is in essence a consideration as to whether that company could be regarded as a potential insider trader. It is an exercise necessary to determine if that company could be considered to possess inside information – one of the element of the insider trading offence. Thus, there is in actuality no inconsistency in adopting this approach and maintaining an ‘information-connection’ approach under Australian insider trading laws.

\(^{49}\) See for example, the United Kingdom (Criminal Justice Act 1993 s 57); South Africa (Insider Trading Act 1998, s1(viii)(a) (b)); Germany (Securities Trading Act 1994 s 13(1)); Canada (Securities Act 1990 (Ontario) s 76(5)); United States of America (SEC Rule 10b 5-2; Dirks v SEC 463 US 646 (1983); Shaw v Digital Equipment Corp 82F 3d 1194 (1996); United States of America v O’Hagan 117 SCt 2199, 521 US 642 (1997); SEC v Falbou 14 F Supp 2d 508 (1998).
2 Information Acquired in another Professional Capacity

It is not uncommon for company officers to have other professional roles and responsibilities outside their ‘primary’ corporate role. For example, a director may be on the board of more than one company. Where such a director acquires ‘inside information’, how is it to be determined in which capacity he or she was acting when they acquired it?

In some circumstances, the answer may be obvious – for example, if the director was engaged in a particular business activity for one company at the time they came upon the information and it related to that business activity, it would appear to have been acquired in the performance of the director’s duties for that company. However, when it is not immediately obvious which role the officer is undertaking at the time of acquiring the information, the writer again suggests that the nature and content of the inside information be examined. The question to be asked is ‘does the information relate in any way to the operations or affairs of the company in question?’ It is of course possible that the information may relate to the affairs of both companies with which the director has a role, in which case both companies may be considered to possess the information.

It should be remembered that information need only be acquired ‘in the performance of an officer’s duties’ in order for the provisions of s 1042G of the Corporations Act to apply, so that the company is deemed to also possess the information. Where a person is considered to be the ‘directing mind and will’ of the company, or a majority of board members are aware of certain information, the manner in which they came across the information is not relevant. Such persons can possess information in circumstances in which the company will also be deemed to possess it, even if the information was originally acquired in a private capacity or an alternative professional capacity. This position can be justified on the basis that the majority of board members, and also the person who is the ‘directing mind and will’ of the company, are essentially considered to be acting as the company itself, not merely as its agents.

V Propositions Concerning Corporate Possession of Inside Information and Concluding Remarks

If the civil penalty proceedings for insider trading recently instituted by ASIC against Citigroup lead to a trial and ultimate judgment, it is possible that there may be judicial pronouncements on some of the issues raised in this article. As has been noted above, if ASIC is successful in those proceedings, it will be the first on which a company has been found liable for insider trading in Australia. The outcome of those proceedings is likely to be keenly anticipated. In the interim, the writer suggests that the analysis undertaken in this article leads to the following conclusions in relation to the possession of inside information by a company:
(a) the concept of possession of information necessitates a mental element, requiring actual knowledge or awareness of the information, not mere physical custody or control;

(b) a company will be considered to possess inside information:

I. pursuant to the Corporations Act deeming provisions, if an officer of the company has knowledge or awareness of the information, which they acquired in the course of the performance of their duties; or

II. pursuant to common law principles if:

   a. the majority of the board of directors has knowledge or awareness of the information;

   b. the person who is the ‘directing mind and will’ of the company has knowledge or awareness of the information; or

   c. an agent of the company has knowledge or awareness of the information and:

      i. the agent acquired the information in their capacity as a representative of the company;

      ii. the agent has authority to receive information on the company’s behalf and a duty to disclose the information to the company; and

      iii. the agent is not under a duty to another person to refrain from communicating the information to the company.

(c) Where it is not clear in the circumstances whether a company officer has acquired information in the course of performing their duties for a company, the nature and content of the information acquired should be examined to determine if it has any relationship to that company’s business or affairs.