THOSE WHO MAKE THE LAW MAY BREAK THE LAW? A COMPARATIVE REVIEW OF THE APPLICATION OF INSIDER TRADING LAWS TO LAWMAKERS IN THE UNITED STATES AND AUSTRALIA

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Allegations of insider trading by Members of Congress receive significant attention in the United States, yet in Australia, such allegations involving Members of Parliament are much less frequently made. In this article, we aim to understand this phenomenon by comparing the laws prohibiting insider trading and their application to lawmakers in both jurisdictions. Through this comparison, we conclude that the regulatory regimes in both countries may be theoretically adequate to prohibit lawmaker insider trading, but it appears that lawmakers may still engage in insider trading. We identify obstacles that prevent effective detection and enforcement of insider trading in both the United States and Australia, namely, lawmaker immunities and inadequate financial disclosure rules. To better prevent lawmaker insider trading and maintain trust and integrity in both securities markets and political probity, we propose reforms to financial disclosure obligations and the establishment of Parliamentary Privileges and Congressional Ethics Committees.

I INTRODUCTION

Allegations of insider trading by Members of Congress receive significant attention in the United States of America ('US'). Indeed, due to a belief that lawmakers may engage in insider trading, two exchange-traded funds have been created to mimic trading by certain Members of Congress and to share in the expected profits.[1] By contrast, in Australia, allegations of insider trading by Members of Parliament or other politicians have historically been rare. However,

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1 Amy Fontinelle and Rae Hartley Beck, 'Two New ETFs Let You Trade like a Washington Insider', *Forbes Advisor* (online, 8 August 2025) <https://www.forbes.com/advisor/investing/two-new-etfs-let-you-trade-like-a-washington-insider/>. See also Peter Molk and Frank Partnoy, 'Negative Trading in Congress' (2025) 100(3) *Indiana Law Journal* 1117, 1122 <https://doi.org/10.2139/ssrn.4895427>.

notable exceptions have emerged, such as the 2008 securities trades[2] by former Opposition leader Peter Dutton, which recently drew scrutiny from media and Australian parliamentarians, including Prime Minister Anthony Albanese.[3] Samantha Maiden reported that Dutton allegedly sold securities in BHP just two days before the company announced a 3,300-job cut, resulting in the securities' price plummeting by 8.5%.[4] In 2009, Dutton allegedly engaged in a 'share-buying blitz', purchasing securities in major banks the day before the Labor government unveiled a bailout package.[5] By 2010, he faced allegations of insider trading related to mining tax policies, as he opposed the tax while reportedly possessing inside knowledge of its impact.[6] Such accusations of lawmaker insider trading, whether substantiated or not, undermine confidence in Australian markets and democracy, highlighting the urgent need for enhanced transparency, monitoring, and enforcement of insider trading regulations.

In this article, we seek to understand this phenomenon by comparing the laws prohibiting insider trading and their application to lawmakers in both jurisdictions. Through this comparison, we determine that, although the theory, development, and objectives of the laws prohibiting insider trading in the US and Australia are quite different, in practice both countries prohibit any form of insider trading by lawmakers. The reforms proposed in this article, addressing financial disclosure obligations and establishing Parliamentary Privileges and Congressional Ethics Committees, aim to bolster trust in Australian and US securities markets and political probity.

In Part II, we begin by defining 'lawmaker insider trading' and explain why insider trading is more egregious when it is committed by those who have the power to make the law. Then, in Part III, we set out the rationales for prohibiting insider trading. In Part IV, we analyse the nature of the US and Australian laws and conclude that the regulatory regimes in both countries are adequate to prohibit lawmaker insider trading, at least in theory. We argue, in Part V, that despite the theoretical adequacy of these legal regimes, those who make the law may still engage in insider trading. We identify the obstacles to effective enforcement of lawmaker insider trading in Part VI, and conclude that inadequate financial disclosure requirements and the

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2 In this article, we use the term 'securities', rather than 'shares' or 'stock', except where those terms appear in direct quotations. We note that the term 'shares' is more common in Australia, and 'stock' in the US, and that usage of the term 'securities' reflects a broader and more inclusive understanding of financial products.

3 See, eg, Henry Belot and Josh Butler, 'Peter Dutton Denies Having Access to Sensitive Information as Labor Questions Personal Investments', *The Guardian* (online, 25 February 2025) <https://www.theguardian.com/australia-news/2025/feb/25/labor-questions-peter-dutton-bank-investments-commonwealth-nab-westpac-ntwnfb>; Tom McIlroy, 'Dutton Must Explain GFC Share Trades: PM', *The Australian Financial Review* (online, 25 February 2025) <https://www.afr.com/politics/federal/dutton-must-explain-gfc-share-trades-pm-20250225-p5levh>; Samantha Maiden, 'New Share-Trade Drama Ignites for Peter Dutton over BHP Shares Sell-Off', *news.com.au* (online, 16 April 2025) <https://www.news.com.au/national/federal-election/new-sharetrade-drama-ignites-for-peter-dutton-over-bhp-shares-selloff/news-story/cfa45437822163f4da7edd7a5e81edb3>.

4 Maiden (n 3).

5 Ibid.

6 Ibid.

immunities afforded to lawmakers increase the difficulty of detecting and prosecuting insider trading. In Part VII, we propose reforms to financial disclosure rules, and the privileges and immunities afforded to lawmakers, to improve regulators' abilities to detect and enforce lawmaker insider trading.[7]

II A PARTICULARLY EGREGIOUS OFFENCE

The design and scope of insider trading laws differs significantly between the US and Australia,[8] with Australian law contained within an express statutory prohibition,[9] whereas the US relies on a broad anti-fraud prohibition.[10] However, despite their differences, both jurisdictions prohibit insiders from trading in relevant financial products while in possession of inside information. The critical element that distinguishes lawmaker insider trading from other forms of insider trading is that it is committed by a person who obtained the inside information while carrying out congressional or parliamentary business.[11] In this article, we use the term 'lawmaker trading' to refer to trading in securities and other financial products by those elected to public office, whether Members of Congress in the US, or Members of Parliament in Australia.

Insider trading is particularly egregious when committed by lawmakers because:

(a) lawmakers have more opportunities to engage in insider trading than other people;
(b) insider trading is contrary to a lawmaker's obligation to act for the benefit of their constituents; and
(c) insider trading is likely to be more challenging to detect and enforce when committed by lawmakers.

The inherent conflicts of interest which arise for lawmakers when they hold securities in companies which may be impacted by their own legislative actions are compounded when opportunities for insider trading also arise.

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7 We do not suggest that any individuals named in this article, or otherwise, have engaged in insider trading. We have merely commented on publicly discussed conduct that may benefit from further investigation and do so for the purpose of demonstrating shortcomings in the application and enforcement of insider trading laws to lawmakers.

8 Donna M Nagy and Juliette Overland, 'Insider Trading Law in the United States and Australia: Fiduciary Breaches, Market Abuses, and the Harshness of Penalties' in Arthur B Laby (ed), *The Cambridge Handbook of Investor Protection* (Cambridge University Press, 1st ed, 2022) 332, 332 <https://doi.org/10.1017/9781108987622.023>.

9 Australia's express statutory prohibition is found in section 1043A of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

10 The US relies on rule 10b-5, promulgated under section 10(b) of the *Securities Exchange Act of 1934*, 15 USC §§ 78a–78rr (2025) ('*Securities Exchange Act*'), which prohibits fraud 'in connection with the purchase or sale of any security'.

11 Nicholas Gervasi, 'Blacking Out Congressional Insider Trading: Overlaying a Corporate Mechanism upon Members of Congress and Their Staff to Curtail Illegal Profiting' (2023) 28(1) *Fordham Journal of Corporate and Financial Law* 223, 223.

A Opportunities for Insider Trading

Typically, people who engage in insider trading come into possession of inside information through their employment, gaining access to information about their company or its clients. However, lawmakers are likely to have access to a much wider array of inside information through classified reports, non-public meetings, and the inner workings of the legislature.[12] Lawmakers may also have more opportunities to engage in insider trading, with access to inside information that may affect the entire economy, whole industries, or specific companies, increasing their opportunities to exploit that information for their own benefit. It has been noted that lawmakers 'are often privy to inside information, and an unscrupulous person could profit off that knowledge'[13] and that lawmakers 'have access to potentially sensitive information about companies, economic activity, and other variables that is not available to the public'.[14]

B Contrary to Constituents' Interests

In *Re Day [No 2]*, the High Court of Australia recognised that 'parliamentarians have a duty as a representative of others to act in the public interest … [and] an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations'.[15] Kiefel CJ, Bell and Edelman JJ held that section 44(v) of the *Commonwealth Constitution* requires Members of Parliament not to 'put themselves in a position where their duty to the people they represent and their interests may conflict'.[16] Similarly, Members of Congress are prohibited from using their position for personal gain and engaging in any business, professional activity, or employment that conflicts with the conscientious performance of their official duties.[17]

In the US, there is much support for the banning of Members of Congress from direct ownership of securities altogether, because that ownership creates a conflict of interest between elected officials' duty and their financial position.[18] For example, as discussed in Part IV(A)(2) below, some find it difficult to believe

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12 DR Elder and PE Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 718–21; Congressional Research Service, *Hearings in the US Senate: A Guide for Preparation and Procedure* (Report No RL30548, 18 March 2010) 16–17 ('*Hearings in the US Senate*').

13 Brody Mullins, Tom McGinty and Jason Zweig, 'Congressional Staffers Gain from Trading in Stocks', *The Wall Street Journal* (online, 11 October 2010) <https://www.wsj.com/articles/SB10001424052748703431604575522434188603198>, quoted in Donna M Nagy, 'Insider Trading, Congressional Officials, and Duties of Entrustment' (2011) 91(3) *Boston University Law Review* 1105, 1106 ('Duties of Entrustment').

14 Molk and Partnoy (n 1) 1124.

15 (2017) 263 CLR 201, 221 [49] (Kiefel CJ, Bell and Edelman JJ), 252 [183] (Keane J).

16 Ibid 221 [48].

17 Jason A Smith, 'Constitution, Jefferson's Manual, Rules of the House of Representatives of the United States One Hundred Seventeenth Congress' (House Document No 116–177, 2021) 970 § 1095 r XXIII cl 3.

18 See, eg, Danielle Caputo, Delaney Marsco and Kedric Payne, 'Part 3: The *STOCK Act*', *Campaign Legal Center* (Web Page, 18 February 2022) <https://campaignlegal.org/update/part-3-stock-act-failed-effort-stop-insider-trading-congress>; Jon Ossoff, 'Sens. Ossoff, Kelly Introduce Bill Banning Stock Trading by Members of Congress' (Press Release, 12 September 2023) <https://www.ossoff.senate.gov/press-releases/sens-ossoff-kelly-introduce-bill-banning-stock-trading-by-members-of-Congress-2>.

that former US Speaker of the House of Representatives, Nancy Pelosi, could vote impartially on a Bill that is likely to positively affect the value of technology securities which she and her husband own.[19] Further, the practice of lawmakers engaging in 'negative trading' – exploiting inside information in order to engage in short selling activity, where profits are made as a result of declining securities prices – is thought by many to be widespread.[20]

C Detection and Enforcement Challenges

Generally, 'white-collar crime and misconduct is [regarded as being] difficult to detect and prove'[21] because the 'opaque and sophisticated nature of serious corporate crime can make it difficult to identify and relatively easy to conceal'.[22] Lawmaker insider trading is even harder to detect and enforce because of:

(a) the nature of the inside information that lawmakers possess; and
(b) privileges and immunities which exist to protect lawmakers from being compelled to answer questions about the non-public information they receive and to which they have access.

1 Nature of Inside Information

The nature of the inside information that lawmakers possess can make lawmaker insider trading more challenging to detect because the information may be price-sensitive for entire industries (such as the defence industry), or it may relate to macro-economic conditions (such as the effect of the COVID-19 pandemic on markets). Therefore, a lawmaker can profit by trading a specific company's securities, an industry-specific mutual fund, or an economy-wide index. This is much more difficult to identify, prove, and enforce than, for example, an employee of a company who generally only has access to inside information about their company or their company's clients.

For example, in *Re Gay*, it was suspicious for John Gay, as the chair of Gunns Ltd ('Gunns'), to sell a large number of Gunns securities shortly before a financial report was released that revealed Gunns had experienced a sharp decline in half-yearly profits.[23]

It was less suspicious for Richard Burr, as a Member of Congress, to sell various securities shortly before global markets crashed during the COVID-19 pandemic.[24] As discussed in Part V(A)(2) below, Burr's conduct only became suspicious after it was revealed that he possessed classified intelligence regarding

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19 Billy House and Anna Edgerton, 'Pelosi's Husband Locked in $5.3 Million from Alphabet Options', *Bloomberg* (online, 7 July 2021) <https://www.bloomberg.com/news/articles/2021-07-07/pelosi-s-husband-locked-in-5-3-million-from-alphabet-options>.

20 Molk and Partnoy (n 1) 1123.

21 Economics References Committee, Parliament of Australia, *'Lifting the Fear and Suppressing the Greed': Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia* (Report, March 2017) 48.

22 Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) 2 [2].

23 (2014) 26 Tas R 1, 7–8 (Pearce J).

24 Gervasi (n 11) 226.

the severity of the COVID-19 pandemic when he sold his securities. Sometimes, detecting and enforcing lawmaker insider trading may be close to impossible because, for example, classified intelligence reports which would reveal the nature of the relevant inside information may never be declassified.

2 Privileges and Immunities

Enforcing and detecting lawmaker insider trading is also difficult because lawmakers have certain rights and immunities that protect them from being questioned about their congressional or parliamentary business. For example, as discussed in Part V(B)(2) below, section 16 of the *Parliamentary Privileges Act 1987* (Cth) prohibits 'evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament … unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence'.[25]

As discussed in Part VI(A)(2) below, similarly broad protections are offered to Members of Congress under article I section 6(1) of the *United States Constitution*, which states that Members of Congress 'for any Speech or Debate in either House … shall not be questioned'.[26]

As will be discussed, the privileges and immunities afforded to Members of Congress and Members of Parliament may make it extremely difficult to detect or build a case against them for insider trading.

D Inherent Conflicts of Interest

Independently of claims of insider trading, there is significant potential for conflicts of interest to arise where lawmakers hold securities in companies which are 'directly impacted by legislative actions'.[27] Not surprisingly, public confidence may be eroded in lawmakers who are able to place their own interests above those of their constituents, and who may seek to use their privileged position for personal profit. In Australia, this issue is partially addressed, as discussed below, by the Ministerial Code of Conduct, which requires ministers to divest themselves of direct securities holdings, and the registrable interests regime, which requires Australian lawmakers to disclose any securities held by themselves or members of their immediate family. In the US, there are no such restrictions – indeed, despite the existence of ethical rules which purport to limit lawmakers deriving personal benefits from their public role, US lawmakers are allowed 'to work on and vote on legislation impacting their own personal investments'.[28] Such conflicts of interest are compounded and exacerbated when they also present opportunities to engage in insider trading.

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25 *Parliamentary Privileges Act 1987* (Cth) s 16 ('*Parliamentary Privileges Act*').

26 *United States Constitution* art I § 6(1).

27 Donna M Nagy, 'Owning Stock while Making Law: An Agency Problem and a Fiduciary Solution' (2013) 48(3) *Wake Forest Law Review* 567, 569.

28 Ibid.

III RATIONALES FOR PROHIBITING INSIDER TRADING

It is widely recognised, as set out in *R v Mansfield* and *R v Firns*,[29] that there are four primary rationales for prohibiting insider trading: market fairness, market efficiency, fiduciary duty, and misappropriation.[30] In Part IV below, these four rationales will be used to assess the efficacy of the laws regulating insider trading in Australia and the US.

A Market Fairness

The market fairness theory provides that allowing certain market participants to trade based on price-sensitive information is unfair if that information is not available to all potential investors.[31] All potential investors should have access to all material information and be exposed to the same trading risks and rewards.[32] Under this rationale, all investors, including insiders, should only be permitted to trade once price-sensitive information has been 'effectively disclosed in a manner sufficient to insure [sic] its availability to the investing public'.[33]

B Market Efficiency

There are two conflicting theories on market efficiency. The dominant theory of market efficiency is predicated on the basis that where the release of material information to the market is delayed, the price of financial products does not represent their true underlying value, thus creating market inefficiencies.[34] For markets to be efficient, insiders must be prohibited from engaging in insider trading, so that there is no incentive for them to delay the release of material information to allow themselves, or their 'tippees', time to trade. Like market fairness, market efficiency is critical for the maintenance and protection of market integrity.

Professor Henry Manne posed an alternative theory of market efficiency. Manne has argued that insider trading is beneficial to market efficiency because trading by insiders 'sends signals' to the rest of the market, which helps move the price of financial products towards their true value – therefore creating a more informed and efficient market.[35] We find Manne's argument unconvincing, and take the view that the timely disclosure of material information is more likely to lead to accurate market prices than inferences drawn from the trading patterns of insiders.

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29 *R v Mansfield* (2011) 251 FLR 286, 296 [49] (Buss JA) ('*R v Mansfield*'); *R v Firns* (2001) 51 NSWLR 548, 556–7 [40]–[45] (Mason P, Hidden J agreeing at 566 [95]) ('*Firns*').

30 Juliette Overland, *Corporate Liability for Insider Trading* (Routledge, 1st ed, 2019) 6 <https://doi.org/10.4324/9781315098210-1> ('*Corporate Liability*'); Juliette Overland, 'How Important Is Market Integrity? Revisiting the Reasons Why We Prohibit Insider Trading' (2022) 38(1) *Australian Journal of Corporate Law* 132, 134 ('How Important Is Market Integrity?').

31 Overland, *Corporate Liability* (n 30) 6; Overland, 'How Important Is Market Integrity?' (n 30) 134–5.

32 Gervasi (n 11) 234; Overland, 'How Important Is Market Integrity?' (n 30) 135.

33 *Securities and Exchange Commission v Texas Gulf Sulphur Co*, 401 F 2d 833, 854 (Waterman J) (2nd Cir, 1968) ('*Texas Gulf Sulphur*').

34 Overland, *Corporate Liability* (n 30) 7.

35 Henry G Manne, 'In Defense of Insider Trading' (1966) 44(6) *Harvard Business Review* 113.

Notions of market fairness and market efficiency are often combined to give rise a rationale of 'market integrity'. As set out by Juliette Overland,[36] a notion of 'market integrity' was first used by the Campbell Inquiry,[37] and then subsequently by the High Court,[38] which, as Overland notes, combines the dual purposes of 'ensuring that the securities market operates freely and fairly, with all participants having equal access to relevant information'.[39]

Various commentators emphasise the importance of maintaining and protecting market integrity for the following reasons:

(a) Investor confidence and market integrity decline if certain investors are perceived to be trading based on material information that is not publicly available.[40]

(b) When investor confidence in market integrity declines, investors are more likely to seek alternative investment opportunities, causing market participation to decrease.[41]

(c) A decrease in market participation increases the cost of capital for companies due to lower liquidity and because investors demand higher risk premiums.[42]

(d) Promoting equal access and market efficiency protects the intrinsic value of 'fairness' in securities markets.[43]

C Misappropriation

Under the misappropriation rationale, insider trading is prohibited because trading based on confidential information owned by another person is inconsistent with the owner's proprietary rights and amounts to theft or misappropriation of the information.[44] For a breach to arise under the misappropriation rationale, there must be a relationship of trust and confidence between the trader and the owner of the information.[45] Relationships of trust and confidence may arise from both professional and personal relationships.[46] Tippees of inside information will

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36 Overland, 'How Important Is Market Integrity?' (n 30) 143.

37 Committee of Inquiry into the Australian Financial System, Parliament of Australia, *Australian Financial System: Final Report of the Committee of Inquiry* (Report, 29 September 1981) 382 ('*Campbell Inquiry*').

38 *Mansfield v The Queen* (2012) 247 CLR 86, 99 (Hayne, Crennan, Kiefel and Bell JJ) ('*Mansfield*').

39 Overland, 'How Important Is Market Integrity?' (n 30) 143, quoting *Campbell Inquiry* (n 37) 382.

40 Overland, *Corporate Liability* (n 30) 6–7.

41 See generally Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) *Journal of Finance* 383 <https://doi.org/10.2307/2325486>. See also Ashley Black, 'The Reform of Insider Trading Law in Australia' (1992) 15(1) *University of New South Wales Law Journal* 214, 220.

42 Black (n 41) 220.

43 Ibid.

44 Overland, *Corporate Liability* (n 30) 8.

45 Nagy and Overland (n 8) 336.

46 Lake J, 'Final Judgment as to Defendant Tyler Loudon', Trial Order in *Securities and Exchange Commission v Tyler Loudon* (SD Tex, No 4:24-cv-622, 28 May 2024) exemplifies a personal relationship of trust and confidence (between a husband and wife) and *United States v O'Hagan*, 521 US 642 (1997) ('*O'Hagan*') exemplifies a professional relationship of trust and confidence (owed by a partner in a law firm).

be prevented from trading where they are aware that the information has been misappropriated by the tipper.[47]

D Fiduciary Duty

Under the fiduciary duty rationale (also known as the classical theory rationale), trading based on inside information should only be prohibited where it would cause a breach of a fiduciary duty, for example:

(a) when a fiduciary duty is owed to the owner of the inside information, for example when a director trades based on information owned by the company; or

(b) when a fiduciary duty is owed to the trading counterparty, for example where the counterparties are a director and an existing securities holder.[48]

In the first example, a breach of fiduciary duty may arise where the fiduciary derives a personal benefit by using the beneficiary's confidential information to trade. In the second example, a breach may arise if the fiduciary fails to disclose material information to the beneficiary or trading counterparty.

IV REGULATION OF LAWMAKER INSIDER TRADING

In addition to having insider trading laws of different design and scope, the US and Australia each have different rationales underpinning the prohibition. In Australia, the High Court has endorsed market integrity as the rationale for prohibiting insider trading.[49] By contrast, the US Supreme Court has interpreted the applicable anti-fraud provisions based on a rationale reflecting both classical theory and misappropriation.[50]

A United States

The US Securities and Exchange Commission ('SEC') has stated that insider trading occurs when

> buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, based on material, non-public information about the security. Insider trading violations may also include 'tipping' such information, securities trading by the person 'tipped', and securities trading by those who misappropriate such information.[51]

Importantly, the insider must have known the information was non-public and price sensitive.

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47 *O'Hagan* (n 46) 675 (Ginsburg J for the Court).

48 Overland, 'How Important Is Market Integrity?' (n 30) 135.

49 *Mansfield* (n 38) 99 (Hayne, Crennan, Kiefel and Bell JJ).

50 Gervasi (n 11) 235–7; Nagy and Overland (n 8) 335, citing *Re Cady, Roberts & Co* 40 SEC 907 (1961) and *Texas Gulf Sulphur* (n 33) 848 (Waterman J); *Chiarella v United States*, 445 US 222, 230–6 (Powell J for the Court) (1980) ('*Chiarella*'); *Dirks v Securities and Exchange Commission*, 463 US 646 (1982) ('*Dirks*'); *O'Hagan* (n 46) 651–3 (Ginsburg J for the Court).

51 US Securities and Exchange Commission, 'Glossary', *Investor.gov* (Web Page) <https://www.investor.gov/introduction-investing/investing-basics/glossary/insider-trading>.

The prohibition of insider trading is predominantly derived from administrative and judicial interpretation of section 10(b) of the *Securities Exchange Act of 1934*, which prohibits using any 'manipulative or deceptive device or contrivance' in 'connection with the purchase or sale of any security'.[52]

1 Fiduciary Duty: Chiarella v United States

In *Chiarella v United States*, the Supreme Court rejected a market fairness rationale in favour of classical theory, which relies on the existence of a relevant fiduciary duty.[53] The defendant in this case had access to documents announcing corporate takeover bids through his work for a printing company. Although details of the parties to the takeover had been redacted from the documents, Chiarella managed to deduce the companies' names and purchased securities in the target companies.[54] The Court premised the prohibition of insider trading on the failure to disclose information that the counterparty was 'entitled to know because of a fiduciary or other similar relation of trust and confidence between them'.[55] Since Chiarella did not owe a fiduciary duty to the securities holders of the target companies, the Court found that he did not engage in insider trading. In *Dirks v Securities and Exchange Commission*, the Court held that tippees who know, or ought to know, that their tipper breached a fiduciary duty by sharing the confidential information for a personal benefit, also must abstain from trading the relevant securities based on that information.[56]

2 Misappropriation: United States v O'Hagan

In *United States v O'Hagan*, the Supreme Court also applied the misappropriation rationale to insider trading.[57] O'Hagan was a partner at a law firm that had been given material non-public information about a merger from its client.[58] O'Hagan profited by using that information, which was owned by the law firm, to trade in securities of the target company prior to the merger. O'Hagan's conduct was not a breach of rule 10b-5 under classical theory because he did not owe a duty to the securities holders in the target company. However, the Supreme Court held that O'Hagan's conduct breached a duty of trust and confidence that he owed to his law firm because he used the firm's confidential information for his personal benefit.

3 The Stop Trading on Congressional Knowledge Act of 2012

Under the *Stop Trading on Congressional Knowledge Act of 2012* ('*STOCK Act*'), a fiduciary duty was expressly established for Members of Congress and

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52 *Securities Exchange Act* (n 10) § 78j(b); John P Anderson, Jeremy L Kidd and George A Mocsary, 'Public Perceptions of Insider Trading' (2021) 51(4) *Seton Hall Law Review* 1035, 1042 <https://doi.org/10.2139/ssrn.3645579>.

53 *Chiarella* (n 50) 235 (Powell J for the Court).

54 Ibid 224.

55 Ibid 228, quoting American Law Institute, *Restatement (Second) of Torts* (1977) § 551(2)(a).

56 *Dirks* (n 50) 659–61 (Powell J for the Court). See also Nagy and Overland (n 8) 336.

57 *O'Hagan* (n 46).

58 Ibid 647–8 (Ginsburg J for the Court).

their employees (together 'congresspeople') to prohibit insider trading based on material non-public information they obtained as a part of their official duties. The Act's purpose was '[t]o prohibit Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit'.[59]

Section 4 of the *STOCK Act* amended section 21A of the *Securities Exchange Act of 1934* to include the following:

> [F]or purposes of the insider trading prohibitions arising under this Act, including section 10(b) and Rule 10b–5 thereunder, each Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.

Section 6 of the *STOCK Act* also amended section 103 of the *Ethics in Government Act of 1978* to require congresspeople to disclose transactions in stocks, bonds, commodity futures, and other forms of securities within 45 days after the transaction occurred.[60]

Prior to the enactment of the *STOCK Act* in 2012, some commentators considered it possible for congresspeople to trade based on inside information they obtained while carrying out congressional business, due to an arguable absence of a fiduciary duty to securities issuers or their securities holders, and uncertainty as to who owned information obtained as part of congressional business.[61] While Stephen M Bainbridge contended at the time that 'quirks of the relevant laws almost certainly would prevent members of Congress from being successfully prosecuted',[62] Donna M Nagy asserted that congresspeople owed the federal government fiduciary-like duties, and that congressional insider trading would still have amounted to insider trading, despite popular claims to the contrary.[63]

B Australia

In Australia, insider trading, including tipping, is expressly prohibited under section 1043A of the *Corporations Act 2001* (Cth) .[64] It is widely accepted that

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59 *Stop Trading on Congressional Knowledge Act of 2012*, Pub L No 112-105, Preamble, 126 Stat 291, 291 (2012) ('*STOCK Act*').

60 5 USC § 13105 (2025); ibid § 6.

61 See Gervasi (n 11) 248–59 for arguments as to how congresspeople might be able to trade based on material non-public information they possessed as a result of closed congressional meetings or hearings, but not be in breach of rule 10b-5 under the classical theory and misappropriation theory approaches to insider trading.

62 Stephen M Bainbridge, 'Insider Trading inside the Beltway' (2011) 36(2) *Journal of Corporate Law* 281, 285 <https://doi.org/10.4337/9781784713973>.

63 Nagy, 'Duties of Entrustment' (n 13).

64 *Corporations Act* (n 9) s 1043A.

the dominant purpose of prohibiting insider trading in Australia is to protect and maintain market integrity,[65] and in *Mansfield v The Queen* the High Court stated:

> The *Corporations Act 2001* (Cth) prohibits trading in securities by persons who possess information that is not generally available and know, or ought reasonably to know, 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 securities.[66]

Unlike the US, there is not a specific prohibition of insider trading relating to Members of Parliament; however, with its application to 'any person', section 1043A is sufficiently broad to prohibit insider trading based on material non-public information obtained by a Member of Parliament – whether the information is obtained as part of their official duties or not.

In June 2022, the Australian Government introduced a new Code of Conduct for Ministers, which, if breached, can lead to a loss of the person's role as minister.[67] This Code requires that ministers divest themselves of investments and other interests in any public or private company or business, other than public superannuation funds or publicly listed managed funds or trust arrangements where:

> (i) the investments are broadly diversified, and the Minister has no influence over investment decisions of the fund or trust; and
> (ii) the fund or trust does not invest to any significant extent in a business sector that could give rise to a conflict of interest with the Minister's public duty.[68]

Members of Parliament must disclose registrable interests held by themselves, their spouse or partner, and any dependent children. Senators must also disclose changes to their registrable interests within 35 days of the change occurring.[69] Concerningly, Members of the House of Representatives must only disclose changes in ownership of real estate, which must be done within 28 days of settlement.[70] Registrable interests include securities holdings, real estate, bonds, debentures and like investments, and other financial interests.[71]

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65 See, eg, Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Fair Shares for All: Insider Trading in Australia* (Parliamentary Paper No 288, October 1989) 17 [3.3.4]–[3.3.6]; Explanatory Memorandum, Corporations Legislation Amendment Bill 1991 (Cth) 84 [307]; *R v Mansfield* (n 29) 296 [49] (Buss JA); *Firns* (n 29) 556–7 [40]–[45] (Mason P, Hidden J agreeing at 566 [95]); Overland, 'How Important Is Market Integrity?' (n 30) 134, 136.

66 *Mansfield* (n 38) 90 (Hayne, Crennan, Kiefel and Bell JJ).

67 Australian Government, 'Code of Conduct for Ministers' (Code of Conduct, June 2022) 10 <https://www.pmc.gov.au/sites/default/files/resource/download/code-of-conduct-for-ministers.pdf>; Amy Remeikis and Paul Karp, 'Labor's New Ministerial Code of Conduct Bans Blind Trusts like Christian Porter Used', *The Guardian* (online, 7 July 2022) <https://www.theguardian.com/australia-news/2022/jul/07/labors-new-ministerial-code-of-conduct-bans-blind-trusts-like-christian-porter-used>.

68 'Code of Conduct for Ministers' (n 67) 6 [3.11].

69 Australian Senate, 'Explanatory Notes for Statements of Registrable Interests' (Explanatory Note, June 2019) 2 <https://www.aph.gov.au/-/media/Committees/Senate/committee/interests_ctte/explanatory_notes.pdf> ('Senate Explanatory Note').

70 House of Representatives, 'Statement of Registrable Interests' (Explanatory Note, 2022) 4 <https://www.aph.gov.au/-/media/03_Senators_and_Members/32_Members/Register/Explanatory_notes/Explanatory_Notes___Booklet_1.pdf?la=en&hash=A75DB1609F02B13E47E7D4730638E21950D5DABE> ('House Explanatory Note').

71 'Senate Explanatory Note' (n 69); 'House Explanatory Note' (n 70).

V INADEQUATE DETECTION AND ENFORCEMENT

Here, we argue that lawmaker insider trading may still be occurring despite the existence of laws in Australia and the US clearly prohibiting all forms of lawmaker insider trading.

A United States

The significant degree of press coverage on insider trading by Members of Congress indicates there is a broad awareness of this issue in the US. However, there have not been any cases brought under the *STOCK Act*, which may indicate an issue with non-enforcement. The Campaign Legal Centre ('CLC') has stated that the *STOCK Act* has 'failed to achieve its goal of penalizing members for insider trading, as no member of Congress has ever been prosecuted under the *STOCK Act*, despite persistent credible allegations'.[72] The following factors may indicate that lawmaker insider trading is occurring:

(a) there are examples of Members of Congress committing insider trading based on information obtained outside of their official duties – this may demonstrate that Members of Congress are willing to breach the prohibition on insider trading for their own personal gain; and

(b) there are many available examples of suspicious trading by Members of Congress.

1 Convictions for Insider Trading

The following Members of Congress have been found guilty of insider trading based on information not obtained in their official duties:

(a) In 2020, Christopher Collins (a former Member of Congress) was convicted and sentenced to 26 months' imprisonment for participating in a scheme to commit insider trading, and making false statements about his conduct to law enforcement.[73] Collins obtained the inside information due to his position as a director of the relevant company, not in the course of his duties as a Member of Congress.

(b) In 2022, Stephen Buyer (a former Member of Congress) was charged with insider trading in relation to trades he had made based on inside information he obtained in his role as a consultant.[74] It was alleged that, in 2018, Buyer had obtained the information from a client, who was proposing to acquire another company. Buyer allegedly purchased securities in the target

72 Danielle Caputo, Delaney Marsco and Kedric Payne, 'Part 2: The *STOCK Act*', *Campaign Legal Centre* (Web Page, 18 February 2022) <https://campaignlegal.org/update/part-2-stock-act-failed-effort-stop-insider-trading-congress>.

73 United States Attorney's Office, 'Former Congressman Christopher Collins Sentenced for Insider Trading Scheme and Lying to Federal Law Enforcement Agents' (Press Release 20-023, 17 January 2020) <https://www.justice.gov/usao-sdny/pr/former-Congressman-christopher-collins-sentenced-insider-trading-scheme-and-lying>.

74 US Securities and Exchange Commission, 'SEC Charges Former Indiana Congressman with Insider Trading' (Press Release, 25 July 2022) <https://www.sec.gov/news/press-release/2022-128>.

company the next day and, once the transaction was announced, made a profit of over $107,000. In 2019, it was also alleged that Buyer bought $1 million worth of securities in a company based on inside information that a client of his would acquire that target company.

If Members of Congress have engaged in insider trading based on information not obtained in their official duties, do Members of Congress also engage in insider trading based on the information they obtain as lawmakers? While, as noted by the CLC, no Members of Congress have been convicted of insider trading under the *STOCK Act*, examples exist of suspicious trading by Members of Congress.

2 Alleged Insider Trading

(a) Nancy Pelosi and Paul Pelosi

Nancy Pelosi was Speaker of the House until 3 January 2023 – in that position, she did not sit on any committees. However, she was privy to current committee debates, and she had significant influence over which Bills were tabled. In 2021, her husband Paul Pelosi placed several trades in Amazon.com, Alphabet, and Apple in the weeks before the House Judiciary Committee voted on antitrust Bills that significantly affected these companies. Mr Pelosi made a $5.3 million profit from these trades.[75] In June 2022, Mr Pelosi exercised call options to purchase up to $5 million in Nvidia (an American semiconductor manufacturer) just a few weeks before the House considered a Bill to provide over $50 billion in subsidies to domestic semiconductor producers.[76] In March 2022, Mr Pelosi also purchased securities in Tesla while Mrs Pelosi was campaigning for the *Inflation Reduction Act 2022*, which, amongst other things, introduced the Clean Vehicle Credit of up to USD7,500 per vehicle to incentivise and accelerate the adoption of electric vehicles.[77] Neither Nancy nor Paul Pelosi have been charged with any offence in relation to this trading activity.

(b) Richard Burr

Richard Burr, a former US Senator, was in possession of classified intelligence regarding the severity of the COVID-19 pandemic, but simultaneously downplayed the significance of the pandemic and sold $1 million worth of securities.[78] Shortly

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75 House and Edgerton (n 19).

76 Caroline Vakil, 'Pelosi's Husband Sells Off up to $5 Million Worth of Chipmaker Stock Ahead of Semiconductor Bill Vote', *The Hill* (online, 27 July 2022) <https://thehill.com/business/3577326-pelosis-husband-sells-off-up-to-5-million-worth-of-chipmaker-stock-ahead-of-semiconductor-bill-vote/>; Noel Randewich, 'Pelosi's Husband Dumps Nvidia Stock as House Eyes Chip Bill', *Reuters* (online, 28 July 2022) <https://www.reuters.com/markets/us/pelosis-husband-dumps-nvidia-stock-house-eyes-chip-bill-2022-07-27/>.

77 Camila DeChalus, 'Nancy Pelosi's Husband Just Bought $2.2 Million Worth of Tesla Stock', *Business Insider* (online, 24 March 2022) <https://www.businessinsider.com/nancy-pelosi-tesla-stock-congress-2022-3>; International Energy Agency, '*Inflation Reduction Act 2022*: Sec. 13401 Clean Vehicle Credit', *IEA* (Web Page, 29 October 2024) <https://www.iea.org/policies/16277-inflation-reduction-act-2022-sec-13401-clean-vehicle-credit>.

78 Gervasi (n 11) 226.

after Burr sold his securities, he called his brother-in-law, Gerald Fauth. Following that call, Fauth also sold several securities. Just a few weeks after Burr sold his securities, global markets crashed in response to the pandemic. Burr has never been charged with any offence in relation to this trading activity.

(c) John Rutherford and Marjorie Taylor Greene

John Rutherford and Marjorie Taylor Greene (both current Members of Congress) purchased securities in weapons manufacturers Lockheed Martin and Raytheon Technologies, in the days before Russia's invasion of Ukraine. These companies stood to profit from the multi-billion-dollar aid packages that the US Congress approved to send to Ukraine. In particular, Rutherford held positions on the Homeland Security and Construction, Veterans Affairs, and Related Agencies subcommittees, which allocated federal funding.[79] Nicholas Gervasi argues that a 'reasonable inference from the timing of these stock purchases and the enacted legislation is that these members of Congress were privy to information on the impact of the legislation on boosting the share prices'.[80]

B Australia

Assuming that lawmaker insider trading is taking place in the US, and acknowledging that Australian and US laws prohibiting insider trading make such conduct unlawful, there are two plausible explanations for the varying levels of attention on alleged lawmaker insider trading:

(a) Members of Parliament in Australia take their legal obligations more seriously and comply with the prohibitions of insider trading more than their US counterparts; or
(b) Members of Parliament in Australia and Members of Congress in the US are both committing insider trading, but it is not being detected or enforced in Australia.

We argue that the second explanation is more probable than the first because:

(a) there have been numerous convictions of Australian lawmakers for illegally using their positions for their own personal gain, which may indicate that they are not less likely to break the law than their US counterparts; and
(b) there are a few instances where Members of Parliament's conduct raises suspicions of insider trading, but no action has been taken, which may suggest there may be an issue of non-detection or non-enforcement in Australia.

1 Convictions for Corruption

A survey of Victorian Members of Parliament by the Independent Broad-based Anti-corruption Commission found that 61% of Members of Parliament surveyed

79 Kimberly Leonard, '20 Members of Congress Personally Invest in Top Weapons Contractors That'll Profit from the Just-Passed $40 Billion Ukraine Aid Package', *Business Insider* (online, 20 May 2022) <https://www.businessinsider.com/congress-war-profiteers-stock-lockheed-martin-raytheon-investment-2022-3>.

80 Gervasi (n 11) 232.

agreed that corruption is a problem amongst elected officials, while only 11% strongly disagreed.[81] Indeed, several Australian politicians have been convicted of illegally using their position for their own personal gain, for example:

(a) In *R v Macdonald [No 18]*,[82] Edward Obeid and Ian Macdonald, both former New South Wales ('NSW') resources ministers, were convicted of conspiring to commit the common law offence of wilful misconduct in public office. Macdonald issued a coal exploration licence and manipulated the tender process to ensure the license was granted to Obeid's preferred mining company. $30 million was paid to Obeid, and if the plan were successful, Obeid would have made a total of $60 million.[83]

(b) In *Ellis v The King*,[84] Fraser Ellis, a South Australian Member of Parliament, was charged with 23 counts of deception contrary to section 139 of the *Criminal Law Consolidation Act 1935* (SA). The Independent Commission Against Corruption ('ICAC') for South Australia alleged that between 13 May 2018 and 12 June 2020, Ellis made 78 fraudulent claims for the Country Members Accommodation Allowance, from which he derived a personal benefit of more than $18,000.[85]

(c) The ICAC for NSW has found Daryl Maguire (former Member of Parliament for Wagga Wagga) guilty of corruption for misusing his position for his own financial benefit.[86] Maguire engaged in several property deals with an education organisation providing fraudulent student visas. The ICAC found that the former Premier of NSW, Gladys Berejiklian, engaged in 'serious corrupt conduct' for her role in a cabinet committee that approved over $15 million in grants to projects in Wagga Wagga while Maguire was in office.

(d) In 2016, the NSW ICAC released a report about alleged illegal developer donations to the NSW Liberal Party.[87] The ICAC found that Andrew Cornwell (former Member for Charlestown) had been offered $10,000 in a

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81 Independent Broad-based Anti-corruption Commission, 'Perceptions of Corruption 2023: Members of Parliament (MPs)' (Research Report, 29 August 2023) <https://www.ibac.vic.gov.au/perceptions-corruption-2023-members-Parliament-mps>.

82 (2021) 394 ALR 125.

83 Anne Davies, 'Four State Scandals That Show What a Federal Anti-corruption Commission Could Uncover', *The Guardian* (online, 2 October 2022) <https://www.theguardian.com/australia-news/2022/oct/02/four-state-scandals-that-show-what-a-federal-anti-corruption-commission-could-uncover>.

84 (2023) 206 A Crim R 404.

85 Ann Vanstone, 'Charges Laid against MP' (Public Statement, Independent Commission Against Corruption (SA), 19 February 2021) <https://www.icac.sa.gov.au/__data/assets/pdf_file/0005/370733/ICAC_Public_Statement_19_Feb.pdf>.

86 Independent Commission Against Corruption (NSW), 'ICAC Finds Former Premier and Then Member for Wagga Wagga Corrupt' (Media Release, 29 June 2023) <https://www.icac.nsw.gov.au/media-centre/media-releases/2023-media-releases/icac-finds-former-premier-and-then-member-for-wagga-wagga-corrupt>.

87 Independent Commission Against Corruption (NSW), 'Prohibited Donations, Fund Channelling and Non-disclosures Exposed in NSW Liberal Party 2011 State Election Campaign' (Media Release, 30 August 2016) <https://www.icac.nsw.gov.au/media-centre/media-releases/2016-media-releases/prohibited-donations-fund-channelling-and-non-disclosures-exposed-in-nsw-liberal-party-2011-state-election-campaign>.

brown paper bag by Jeff McCloy (Newcastle Mayor and developer) while sitting in the mayor's Bentley. Cornwell, his wife, and Hilton Grugeon (a property developer) entered an agreement that a payment of $10,120 from Grugeon was for a painting, when in fact, the $10,120 was a political donation to fund Cornwell's 2011 NSW state election campaign.

2 Alleged Insider Trading

Here, we discuss three instances of potential lawmaker insider trading that received little (or at least very belated) attention from both the media and regulators. We do not suggest that insider trading actually occurred in these instances, instead the point of highlighting these examples is to argue: (1) there should be greater regulatory and media scrutiny of lawmakers trading; and (2) in circumstances suspicious of insider trading, the financial disclosure regime is inadequate because it does not provide enough information to determine whether insider trading actually occurred.

(a) Barnaby Joyce and Electro Optic Systems

Barnaby Joyce was the Chair of the Parliamentary Committee for Industry, Innovation, Science and Resources, which was conducting an inquiry into developing Australia's space industry and how the government could support and encourage the industry.[88] In that role, the following has been reported:

(a) On 26 February 2021, Joyce attended a public hearing where he asked executives from Electro Optic Systems ('EOS') about how many Australians owned securities in the company, how it protected its strategic advantage, and the skillsets of its workforce. At the closing of the hearing, Joyce stated the following:

> I invite you to give us further information if you wish, even if you don't want to make it formally … [o]r if you want to say something and you don't want it on the Hansard or anywhere – 'I'm not going to give you too many details, but I want to give you some guidance on what I think is an area you possibly should pay more attention to' – I'm only too happy to get that.[89]

(b) On 16 March 2021, Joyce updated the register of interests to indicate that he had bought his son securities in EOS.

(c) On 9 April 2021, EOS announced that it had made a major technological breakthrough.

The conduct outlined above is certainly not proof that insider trading occurred. According to a spokesperson for EOS, the public hearing was the entirety of their engagement with Joyce; there were no private meetings with him or his office,

88 Daniel Hurst, 'Barnaby Joyce Says Purchase of Shares for Son in Company He Quizzed at Public Inquiry "Was Reasonable"', *The Guardian* (online, 10 April 2021) <https://www.theguardian.com/australia-news/2021/apr/10/barnaby-joyce-says-purchase-of-shares-for-son-in-company-he-quizzed-at-public-inquiry-was-reasonable>.

89 Ibid.

and no information about their technological breakthrough was provided to the committee.[90]

However, this conduct, which may be considered suspicious, received minimal media attention. As discussed at Part VI(B)(2) below, parliamentary privilege makes it very difficult to further investigate Joyce and EOS's conduct. Consequently, the statement from the EOS spokesperson must be accepted at face value.

(b) Peter Dutton

Peter Dutton's securities trading in the period between 2008 and 2010 has recently drawn some scrutiny for potential insider trading.[91] It has been reported that, in 2008, Dutton sold his BHP securities just two days before the company announced a cut of 3,300 jobs, which led to an 8.5% drop in BHP's securities price.[92] In 2009, Dutton allegedly engaged in a 'share-buying blitz', purchasing securities in major banks, including Commonwealth Bank, NAB, and Westpac, the day before the Labor Government announced a bailout package.[93] In 2010, Dutton reportedly bought securities in BHP shortly before the Liberal Party announced it would oppose the mining tax.[94] If true, this information does not definitively demonstrate the occurrence of insider trading, however the timing of Dutton's reported trades – particularly their proximity to significant market-moving announcements – raises suspicion.

There has been no indication from the Australian Securities & Investments Commission ('ASIC') or other regulatory bodies that there will be a formal investigation of Dutton's trades.[95] As with the Barnaby Joyce example, parliamentary privilege likely hinders any potential investigation into whether Dutton received non-public information while undertaking his parliamentary duties. Further, the register of interests does not collect or publish the information necessary to assess whether insider trading is likely to have actually occurred. This example further illustrates the challenges in detecting and addressing lawmaker insider trading in Australia, reinforcing the need for greater oversight and transparency concerning Members of Parliament's financial dealings. Indeed, the inadequacies of insider trading scrutiny, detection, and enforcement are particularly acute in these circumstances because media scrutiny only arose 15 to 17 years later after the alleged breaches occurred, when the statute of limitations for:

(a) commencing criminal proceedings is five years after the act or omission occurred or, with the Minister's consent, at any later time;[96] and

90 Ibid.
91 See, eg, Belot and Butler (n 3); McIlroy (n 3); Maiden (n 3).
92 Maiden (n 3).
93 Belot and Butler (n 3); McIlroy (n 3).
94 Maiden (n 3).
95 A Google search for 'Peter Dutton insider trading' yields only a handful of relevant articles, underscoring the limited scrutiny of this case.
96 *Corporations Act* (n 9) s 1316.

(b) commencing proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.[97]

(c) 2017 Budget Leak

In May 2017, the federal budget introduced a $6.2 billion bank levy.[98] Before the levy was officially announced to the media, trading wiped out $14 billion in bank securities. Former Senator Derryn Hinch reported this trading to the Australian Federal Police ('AFP') because he suspected federal government employees or Members of Parliament were tipping off investors. In May 2017, the Sydney Morning Herald ('SMH') and Australian Financial Review ('AFR') paid significant media attention to the alleged insider trading.[99] According to the AFR, ASIC launched a preliminary investigation into the alleged insider trading. The AFR and SMH did not publish any further articles on insider trading in connection with the 2017 budget after May 2017.[100]

Serious allegations of lawmaker insider trading, such as this one, should be thoroughly investigated. The investigation's findings should be reported, even if no wrongdoing is found to have occurred, to maintain public confidence. The minimal media coverage and communication from ASIC and the AFP reinforces the argument that there is an issue with the detection and enforcement of lawmaker insider trading.

VI OBSTACLES TO ENFORCEMENT AND DETECTION

In Australia and the US, insider trading laws appear to be hamstrung when it comes to lawmakers by inadequate financial disclosure regimes, congressional immunity, and parliamentary privilege, which prevent regulators from investigating and prosecuting lawmaker insider trading effectively. The impact of the differing periodic and continuous disclosure obligations for publicly listed companies is also relevant to consider in this context.

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97 Ibid s 1317K.

98 Patrick Durkin, 'ASIC to Probe Budget 2017 Bank Levy Leak', *The Australian Financial Review* (online, 10 May 2017) <https://www.afr.com/policy/economy/asic-to-probe-budget-2017-bank-levy-leak-20170510-gw1wy2>.

99 See, eg, ibid; Patrick Hatch and Eryk Bagshaw, 'Budget 2017: Senator Calls on AFP to Investigate Leak after $14b Bank Share Wipe-Out', *The Sydney Morning Herald* (online, 10 May 2017) <https://www.smh.com.au/national/budget-2017-senator-calls-on-australian-federal-police-to-investigate-budget-leak-after-14b-wipeout-20170510-gw1u0f.html>; Patrick Hatch, 'Budget 2017: Insider Trading Fears Grow Over Bank Levy Leak', *The Sydney Morning Herald* (online, 14 May 2017) <https://www.smh.com.au/business/budget-2017-insider-trading-fears-grow-over-bank-levy-leak-20170511-gw265d.html>.

100 Further, a search on the ASIC and AFP websites for '2017 bank levy' or '2017 budget' reveals no relevant results.

A United States

1 Financial Disclosure

Dave Levinthal and Madison Hall identified 78 Members of Congress who failed to comply with their reporting obligations under the *STOCK Act*.[101] While there is a USD200 penalty for late filing of a transaction report,[102] no public information is available regarding whether Members of Congress are actually being fined for their non-compliance.

Gervasi convincingly argues that the reporting and penalty structure of the *STOCK Act* disincentivises investigation and enforcement of non-compliance because the costs and effort required to track a Member of Congress' financial transactions and submit the paperwork exceed the value of the penalty.[103] Despite widespread non-compliance with reporting obligations,[104] there have been no prosecutions of congresspeople for breaching the *STOCK Act*, even for repeat offenders.[105]

2 Congressional Immunity

The 'speech and debate' clause makes it almost impossible to investigate and prosecute lawmakers for insider trading. Regulators are prohibited from obtaining evidence about information received by Members of Congress in performing their official duties. Article I section 6(1) of the *United States Constitution* states that 'for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place'.[106] The US Supreme Court has read this clause broadly to bar questioning, subpoenas, and search warrants related to congressional business.[107]

For example, in *United States v Rayburn House Office Building, Room 2113, Washington, DC 20515*,[108] the Court found that a search of a congressperson's office violated the *United States Constitution* because the office contained legislative material.[109] This case concerned a bribery investigation, but the same principles would apply to a lawmaker insider trading case.

The speech and debate clause makes it extremely difficult to collate evidence and prove that a Member of Congress was in possession of inside information obtained from 'congressional business'. Without proving that a Member of Congress possessed inside information obtained during the performance of their official duties, it is not possible to convict a lawmaker for insider trading.

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101 Dave Levinthal and Madison Hall, '78 Members of Congress Have Violated a Law Designed to Prevent Insider Trading and Stop Conflicts-of-Interest', *Business Insider* (online, 4 January 2023) <https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9>.

102 Ibid.

103 Gervasi (n 11) 261.

104 Ibid 260, 266; Levinthal and Hall (n 101).

105 Gervasi (n 11) 260.

106 *United States Constitution* art I § 6(1).

107 *Eastland v United States Servicemen's Fund*, 421 US 491, 501 (Burger CJ for the Court) (1975).

108 497 F 3d 654, 659 (Rogers J for the Court) (DC Cir, 2007).

109 Robert Anello, 'How Senators May Have Avoided Insider Trading Charges', *Forbes* (online, 26 May 2020) <https://www.forbes.com/sites/insider/2020/05/26/how-senators-may-have-avoided-insider-trading-charges>.

3 Periodic and Continuous Disclosure Obligations

While public companies in the US are subject to periodic disclosure obligations – primarily the obligation to make annual and quarterly disclosure filings – there is no general obligation for those companies to disclose all material information of which they are aware.[110] As a result of amendments made by the *Sarbanes-Oxley Act of 2002*, certain 'real-time' disclosures are required, but such disclosures relate to 'material changes in the financial condition or operations' of the relevant company, rather than 'material information' in general.[111] As a result, public companies in the US are often able to retain the confidentiality of material information in between the relevant disclosure periods. Where lawmakers also have access to this information, this may provide them with an opportunity to trade prior to its public disclosure.[112] Further, lawmakers may have access to inside information that may affect whole industries or the entire economy, rather than specific companies, or they may become aware of inside information prior to those within affected companies, placing that information outside the scope or application of corporate disclosure obligations.

B Australia

1 Financial Disclosure

The registrable interests reporting regime is inadequate to assist regulators in detecting lawmaker insider trading for two reasons:

(a) Members of Parliament appear to regularly breach their financial disclosure obligations; and
(b) Members of Parliament are not required to disclose the date when a registrable interest changes.

(a) Breaches of Financial Disclosure Obligations

It is unclear whether a penalty exists for non-compliance with Members of Parliament's financial disclosure obligations. If there is a penalty, it appears to not be enforced. The resolution that sets out the requirements of the House of Representatives pertaining to the registration of interests of Members of Parliament states that a member who:

(a) knowingly fails to provide a statement of registrable interests to the Registrar of Members' Interests by the due date;
(b) knowingly fails to notify any alteration of those interests to the Registrar of Members' Interests within 28 days of the change occurring; or

110 Stephen J Choi and AC Pritchard, *Securities Regulation: Cases and Analysis* (Foundation Press, 5th ed, 2019) 50; Chiara Mosca and Chiara Picciau, 'Regulating Issuer's Disclosure of Inside Information: The Diverging Approaches in the European Union and the United States' in Iris H-Y Chiu and Iain G MacNeil (eds), *Research Handbook on Global Capital Markets Law* (Edward Elgar Publishing, 2023) 172 <https://doi.org/10.4337/9781800379305>.

111 *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, § 409, 116 Stat 745, 791.

112 Elder and Fowler (n 12) 718–21; *Hearings in the US Senate* (n 12) 16–17.

(c) knowingly provides false or misleading information to the Registrar of Members' Interests,

shall be guilty of a serious contempt of the House of Representatives and shall be dealt with by the House accordingly.[113]

However, the resolution does not explain what 'dealt with accordingly' means, nor does it set out a penalty for 'serious contempt'. There are no identified reports in the media or elsewhere concerning Members of Parliament being fined or otherwise penalised for non-compliance with their financial disclosure obligations, yet there are several instances of non-compliance, such as:

(a) Former Senator Hollie Hughes, who allegedly failed to disclose her securities holding and role as a director of SLN Services Limited until she was questioned about it by Open Politics a few weeks later.[114]
(b) The Federal Member for Fairfax, Ted O'Brien, who allegedly failed to declare trades in ten different securities holdings.[115]
(c) Senator Matt Canavan, who allegedly declared he had 'nil' interests in real estate when, in fact, he had two properties valued at more than $1 million.[116]
(d) The former Federal Member for Hughes, Craig Kelly, who allegedly bought a home for $1.3 million but did not update the Register of Members' Interests until the SMH inquired eight months later.[117]
(e) The Federal Member for Kennedy, Bob Katter, who is reported to have produced meaningless and vague disclosures, stating, 'I may have some interest in cattle operations in the gulf' and 'some members of my family have interests in cattle'. In relation to his wife's registrable interests, 'she does not provide me with this information – regards this as personal business and I respect her wishes in these matters'.[118]

The requirement to disclose registrable interests is critical for regulators and the media to identify potential instances of insider trading and other forms of misconduct. The examples of non-compliance above, particularly the statement made by Katter, do not appear consistent with the aims of Australia's registrable interest regime. Non-compliance with these rules severely hampers the enforcement of Australia's insider trading laws.

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113 House of Representatives, 'Registration of Members' Interests: Requirements of the House of Representatives' (Resolution, 19 September 2019) 2 <https://www.aph.gov.au/-/media/05_About_Parliament/53_HoR/532_PPP/Resolutions/9Oct1984.pdf>.

114 'Hollie Hughes', *Open Politics* (Web Page, 19 February 2024) <https://openpolitics.au/47/hollie-hughes>.

115 'Ted O'Brien MP', *Open Politics* (Web Page, 20 December 2024) <https://openpolitics.au/47/ted-obrien>.

116 Paul Karp and Amy Remeikis, 'Matt Canavan Leaves Two Properties Worth More than $1m off 2019 Declaration of Interests', *The Guardian* (online, 11 February 2020) <https://www.theguardian.com/australia-news/2020/feb/11/matt-canavan-leaves-two-properties-worth-more-than-1m-off-2019-declaration-of-interests>.

117 Lucy Macken, 'Craig Kelly Buys $1.3 Million Family Home 100km North of Electorate', *The Sydney Morning Herald* (online, 20 December 2021) <https://www.smh.com.au/property/news/craig-kelly-buys-1-3-million-family-home-100km-north-of-electorate-20211220-p59j1q.html>.

118 Paul Karp and Josh Butler, 'Rare Metals, Racehorses and Vintage Cars: The Peculiars of Pecuniary Interests in Canberra', *The Guardian* (online, 28 August 2022) <https://www.theguardian.com/australia-news/2022/aug/28/rare-metals-racehorses-and-vintage-cars-the-peculiars-of-pecuniary-interests-in-canberra>.

(b) Inadequate Disclosure Obligations

Unlike in the US, Members of Parliament are not required to disclose the date that a registrable interest changed, which creates difficulties in detecting insider trading. This may partly explain why there is much less media attention on lawmaker insider trading in Australia. The following hypothetical scenario demonstrates the importance of disclosing the specific date a Member of Parliament placed a trade:

> (a) On 1 July, Member Joe Bloggs attended a closed committee hearing in which executives of a large listed public company ('LPC') provided inside information about their company.
> (b) On 6 July, that information was made public by LPC.
> (c) On 9 July, Mr Bloggs updated his registrable interests to reflect that he bought securities in LPC.
>
> Based on this information, it is not clear whether Mr Bloggs engaged in insider trading because he could have executed the trade:
> (a) prior to 1 July, when Mr Bloggs did not have inside information;
> (b) between 1 July and 6 July, when Mr Bloggs was in possession of inside information; or
> (c) between 6 July and 9 July once the information became publicly available.

Requiring Members of Parliament to specify the date trades were placed would significantly help the media and regulators detect insider trading.

2 Parliamentary Privilege

The most significant challenge to enforcing and prosecuting lawmaker insider trading in Australia is parliamentary privilege. Section 16 of the *Parliamentary Privileges Act 1987* (Cth) provides:

> (4) A court or tribunal shall not:
> (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission and submitted to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera or admit evidence relating to such a document; or
> (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;
>
> unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.[119]

These protections would make it almost impossible to prosecute a Member of Parliament for lawmaker insider trading because the courts and regulators cannot compel the production of any information presented in camera to a house or committee.

3 Periodic and Continuous Disclosure Obligations

Publicly listed companies in Australia are subject to both periodic and continuous disclosure obligations. In addition to regular quarterly, half-yearly, and annual disclosures,[120] continuous disclosure obligations require a publicly listed

119 *Parliamentary Privileges Act* (n 25) s 16(4).
120 ASX, *Listing Rules* (at 1 December 2019) ch 4.

company to immediately release 'material information' as soon as the company becomes aware of it.[121] Indeed, these continuous obligations are intended to limit opportunities for insider trading,[122] and may result in significantly reduced availability of inside information in Australia compared to the US, which may also reduce the availability of that information to lawmakers, at least in relation to information which concerns specific corporations. However, as noted above, lawmakers may have access to inside information affecting whole industries or the entire economy, rather than specific companies, or they may become aware of inside information prior to those within affected companies, placing it outside the scope and application of corporate disclosure obligations.

VII REFORMS

We advocate for the introduction of two reforms. First, financial disclosure regulations should be amended to increase penalties for non-compliance. Additionally, in Australia, Members of Parliament should be required to specify the date a security was traded. Second, lawmakers and their immediate family members should be required to seek approval from the Parliamentary Privileges Committee or Congressional Ethics Committee before trading any security. Importantly, the Committees should be granted limited power to pierce parliamentary privilege or the speech and debate clause (collectively referred to as 'lawmaker immunities') solely for the purpose of investigating and prosecuting insider trading. These proposed reforms are explained in more detail below.

A Financial Disclosure Reforms

We argue that Members of Parliament should be required to disclose the date a trade was made. As discussed in Part VI(B)(1) above, this measure would help regulators identify possible instances of insider trading. We also advocate for increasing penalties for non-compliance with financial disclosure obligations to the greater of:

(a) 10% of the value of the investment; or
(b) three times the value of any profit made or loss avoided between the date the trade was executed and the date the trade was disclosed.

These proposed penalties would ensure that lawmakers cannot profit from undisclosed trades and would face significant consequences for non-compliance. However, for these reforms to be effective, they must be enforced. The SEC and ASIC respectively must prioritise monitoring and penalising non-compliance with lawmaker financial disclosures, as non-compliance may be concealing insider trading.

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121 Ibid ch 3.

122 *James Hardie Industries NV v ASIC* (2010) 274 ALR 85, 162 [355] (Spigelman CJ, Beazley and Giles JJA), quoted in Australian Securities Exchange, 'Continuous Disclosure: Listing Rules 3.1 – 3.1B' (Guidance Note No 8, 27 May 2024) 6–7. See also Overland, *Corporate Liability* (n 30) 148–9.

B Parliamentary Privileges and Congressional Ethics Committees

Pre-approval of trades would permit lawmakers to trade securities on the condition that they obtain advance permission from the relevant Committee. To receive approval from the Committee, a lawmaker would be required to disclose:

(a) the nature of the trade (buy or sell);
(b) the approximate value of the trade;
(c) details of the security being traded; and
(d) any possible conflicts of interest or existence of inside information currently in their possession.

Similar systems are common in the private sector, including under securities trading policies of publicly listed corporations.

The Committee would investigate whether the lawmaker is likely to possess or have access to any inside information, for example by considering Bills that are currently being discussed by Parliament/Congress and any committees the lawmaker sits on. If the Committee determines there is a reasonable possibility that the lawmaker possesses relevant inside information, the lawmaker will not be granted permission to trade. Alternatively, if the Committee does not identify any material risk of insider trading, the lawmaker will be permitted to trade for a short window of time.

After a trade has occurred, if the Committee retrospectively forms a reasonable suspicion that the lawmaker may have had inside information at the time of making the trade, the Committee would be empowered to apply to compel the lawmaker to answer questions, and to report their suspicions to the relevant regulator.

The Committee's power would be an exception to lawmaker immunities, and could only be used in connection with the investigation of lawmaker insider trading, in order that the primary purpose of lawmaker immunities not be hindered. The main objective of these immunities is to protect lawmakers' ability to inquire, debate, and legislate without interference.[123]

VIII CONCLUSION

Based on reporting by the US media, the public seem acutely aware that lawmaker insider trading is occurring. The same cannot be said for Australia. We argue that the absence of attention and action on potential insider trading by lawmakers is more likely due to non-detection, rather than non-occurrence, of insider trading by Australian lawmakers.

Although the insider trading regimes in the US and Australia are based on different underlying theories and rationales, they both prohibit lawmaker insider trading. While issues of non-compliance and detection may exist, lawmaker

123 Parliament of Australia, 'Parliamentary Privilege' (Guide to Senate Procedure No 20, June 2025) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_20>; *United States v Johnson*, 383 US 169, 182 (Harlan J for the Court) (1966).

immunities increase the difficulty of investigating and prosecuting lawmaker insider trading. Consequently, we advocate for the following reforms:

(a) The introduction of harsher penalties for breaches of financial disclosure obligations.
(b) An increase in monitoring and enforcement by the SEC and ASIC of financial disclosures by lawmakers.
(c) A requirement for Members of Parliament to specify the date a security was traded (Australia only).
(d) A requirement for lawmakers and their direct family members to seek approval before trading securities.
(e) The creation of an exception to lawmaker immunities for the limited purpose of investigating and prosecuting insider trading.