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THE SECURITIES REGULATOR IN CIVIL PURSUIT: *QUAERE* A NEW ENFORCEMENT OPTION

Singapore has embarked on an introspective review of its securities market and the legal and regulatory regime which complements it. The resultant recommendations embrace a disclosure based philosophy. In a predominantly disclosure based regulatory regime, emphasis is placed on fostering and maintaining a fair and transparent market by the establishment of comprehensive disclosure obligations. The legal and regulatory framework must then provide for effective sanctions and remedies when breaches of such obligations occur, and the regulator's role in enforcing disclosure standards takes on added importance. In this vein, it is proposed that the securities regulator be empowered to take civil action against misfeasors where it is in the public interest to do so. This article discusses the recommended role and potential power of the securities regulator as a new enforcement option.

I. INTRODUCTION

"DO not be overrighteous, neither be overwise – why destroy yourself?" *Ecclesiastes 7:16*

With the ever-increasing economic importance and international relevance of a nation's financial markets, Singapore has embarked on an introspection of its securities market[1] and the complementary legal and regulatory framework. The Corporate Finance Committee[2] (the "CFC") was formed in December 1997 by the Financial Sector Review Group[3] to make recommendations regarding corporate finance activities, with a view to making Singapore a key financial centre for international corporate fundraising activity. The CFC has since published its recommendations in a Report (the "Report") dated 29 October 1998.

Singapore's regulatory regime has, so far, openly espoused an interventionist-biased philosophy, albeit admirably motivated by sincere paternalistic

1 The phrase "securities market" is used to refer loosely and compendiously to the primary (offering) and secondary (trading) markets of financial products including shares and other participatory interests, debt instruments and options.

2 The CFC consisted of 14 members and was chaired by Lim Yong Wah.

3 The Financial Sector Review Group was itself formed in August 1997 and is headed by Deputy Prime Minister Lee Hsien Loong.

urges. The Monetary Authority of Singapore (the "MAS"), the regulatory authority of the financial markets, has secured the reputation of a tough disciplinarian.[4] As the 1990's draw to a close, Singapore has chosen to re-examine its long-standing and admittedly strict approach[5] to the regulation of its financial markets. Ironically, this is occurring at a time when such an approach has been accredited with the island's robust weathering of the Asian economic crisis that broke loose mid-year in 1997. As past policies appear to be vindicated, policy-makers are reviewing them and mooting their change.

The market regulator's unceasing challenge is to constantly assess local and international changes and trends, to identify and limit the risks of market abuse, exploitation, manipulation and failure, and yet to have under its charge, an active and growing market. At the most stable of times, regulatory complacency is not a viable option. As the international financial markets speed on ahead with product innovation and new trading techniques and technology, amidst ever-fickle political and economic climates, regulatory complacency cannot be an option at all.

As Deputy Prime Minister Lee Hsien Loong sought to explain in late 1997:

> Changing policies is never easy. It is harder to change policies which have been extremely successful and which continue to yield results, than policies which have failed and must clearly be abandoned. Yet we have to look ahead and prepare for major changes in our operating environment.[6]

That same address heralded a directional change in regulatory policy, as DPM Lee announced:

> We need to regulate the financial sector with a lighter touch, accept more calculated risks, and give the industry more room to innovate and stretch the envelope...We need to promote a more competitive, dynamic and innovative environment....[7]

4 In "Regulation, How tough is enough?" *Euromoney Magazine*, 15 February 1997, the MAS was described as being reputed to be "authoritarian, bureaucratic and tough."

5 At a speech given during Sesdaq's 10th anniversary dinner, then Acting Prime Minister Lee Hsien Loong averred to Singapore's strict and vigorous approach to regulating and supervising the financial sector, see "Time to chart new directions for financial services sector" *The Straits Times*, 5 November 1997.

6 See *ibid.*

7 See *ibid.*

In the context of the securities markets, the "lighter touch" is manifested in the CFC's recommendation that Singapore's merit-cum-disclosure based philosophy of regulation should give way to a predominantly disclosure based one. This, it is suggested, would best bring about "a market driven environment that promotes innovation, entrepreneurship, efficiency and business flexibility while protecting the integrity of the securities market."[8]

A merit-based philosophy endorses an interventionist-biased approach to securities regulation. In the current regulatory regime, this philosophy is manifested in particular by the practice that securities products initially offered in the securities market would be scrutinised first and foremost by the regulator. The securities regulator has the ultimate discretionary say as to whether the transaction should be allowed to proceed at all. On the other hand, the securities regulator in a predominantly disclosure based regime would find its mandate limited primarily to ensuring and monitoring full and adequate disclosure by the market participants who proffer the securities products. The assessment of the product as a worthwhile investment, taking into account the perceived risks or merits of the transaction, would be done by the investor. The basic tenet of the disclosure based philosophy is that the investing community is the most appropriate assessor of a securities offering.

The establishment of an effective disclosure based regime requires the promulgation of a set of comprehensive, clear and certain disclosure criteria[9] as well as the prompt and reliable enforcement thereof. The importance of a vigilant corrective regime cannot be understated. Broadly speaking, market participants have an innate aversion to making voluntary disclosure. Therefore, the paradox is that the "lighter touch" in regulating product innovation has to be undergirded by a heavy hand unwilling to condone transgressions.

[8] See Recommendation 1 of the Report.

[9] There is concern that the more onerous disclosure requirements accompanying a shift to a predominantly disclosure based regime may result in higher regulatory compliance costs. It is argued that this would place issuers at a comparative disadvantage since their foreign counterparts operating in regulatory environments with less onerous disclosure requirements would have less compliance costs and would thus attract more investor activity. However, it has been counter-argued that comprehensive disclosure requirements signal a stable and sophisticated market that will attract investors who consider higher compliance costs a small price to pay for such security. The US securities market is an example of a regime where relatively onerous disclosure requirements have not hampered growth. See also para 2.4.2 of the Report. This form of alleged "overregulation" (onerous disclosure requirements) is distinct from "overregulation" in the form of an invasive case-by-case exercise of regulatory discretion, a characteristic of the merit based philosophy which is anathema to a disclosure based regime.

Presently, regulatory enforcement options for non-disclosure and inadequate or inaccurate disclosure are a salad of criminal prosecutions, civil proceedings for injunctive and other relief as well as exchange-imposed sanctions. As an added enforcement option, the CFC has recommended the empowerment of the securities regulator to pursue civil actions, where it is in the "public interest" to do so.[10] At the same time, the standard of disclosure would be raised.[11] This article aims to explore the recommended role and potential power of the securities regulator, and its effectiveness as a new and alternative enforcement option.

II. The "Securities Regulator"

Who would the enigmatic "securities regulator" be? The present legal and regulatory regime spreads the task of securities regulation over various regulatory bodies. Under the Securities Industry Act[12] (the "SIA"), the MAS administers the licensing regime for professional intermediaries in the securities market.[13] It also has various supervisory powers[14] over the securities market, in particular, over the Stock Exchange of Singapore Limited (the "SES"), the only securities exchange in Singapore. Notably, the MAS has the power to issue directions to the SES regarding its trading and business "where it appears to be in the public interest"[15] to do so. The MAS also has the power to prohibit trading in particular securities on the SES in order "to protect persons buying or selling the securities or in the interests of the public".[16] This means that the MAS may order a trading suspension of a listed company. It is noted that despite the MAS's wide-ranging powers of intervention in relation to the SES under the SIA, it has been content to let the SES regulate the market.[17]

[10] See Recommendation 7(a) of the Report.

[11] See Recommendation 2 of the Report.

[12] Cap 289, 1985 (Rev Ed).

[13] A "dealer", "dealer's representative", "investment adviser" or "investment representative" has to be licensed by the MAS, see s 2 of the SIA for the respective definitions and Division 1 of Part IV of the SIA for the licensing provisions. Dealing in securities or giving investment advice without the requisite licence is a criminal offence, see s 116 of the SIA.

[14] For an overview of the MAS's supervisory powers, see Woon, *Company Law* (2nd ed, 1997) at 533-5.

[15] See s 21 of the SIA.

[16] See s 22 of the SIA.

[17] See W Woon, "Regulation of the Securities Industry in Singapore" *Pacific Rim Law & Policy Journal* (Vol 4, No 3, July 1995) 731 at 734 where this point was made, and which appears to hold true to date.

The SES, insofar as exchange-related activity is concerned, undertakes the day-to-day regulation of the securities market. The SES's membership consists of stockbroking companies and trading on the SES is subject to compliance with the SES's Rules and Bye-Laws.[18] The SES also administers the Listing Manual which sets out listing criteria and the obligations of companies listed on the SES. Companies seeking a listing on the SES and those listed have to comply with the corporate disclosure[19] requirements set out in the Listing Manual. Listed companies are under a contractual obligation to comply with the continuing listing requirements in the Listing Manual by virtue of a Listing Undertaking which the company has to execute upon listing.[20] Failure to comply may result in a reprimand by the SES, a suspension of trading of the securities or a delisting.[21]

Since a public offer of securities is usually a prelude to an SES listing, the company would be required to satisfy the listing criteria set out in the Listing Manual before SES approval for a listing is given. The Listing Manual, however, is not exhaustive. Even if a company meets the numerical standards and qualitative factors set out in the Listing Manual, the SES may impose additional requirements, and retains a residual discretion to allow or disallow the listing.[22] It is at this stage that the SES, in its regulatory role, assesses the merits of the securities offering, belying a merit-based philosophy of regulation.

Where securities are offered to the public, the SES's prospectus disclosure requirements overlap with the statutory prospectus requirements set out in the Companies Act[23] (the "CA"). Under the CA, where an offer of securities is made to the public, generally, a prospectus has to be registered with the Registry of Companies and Businesses (the "RCB").[24] The RCB reviews the contents of the prospectus and ensures that it complies with the requirements of the CA, before it is registered. If it does not comply, the RCB will refuse to register it. The CA also provides that the RCB shall refuse to register a prospectus if it appears that it is not in the public interest

[18] The Rules and Bye-Laws are made pursuant to Arts 112 and 113 respectively of the SES's Articles of Association.

[19] The expression "corporate disclosure" will be used to refer to the disclosure by companies of price-sensitive information prior to listing ("prospectus disclosure") or during the course of their listing ("continuing disclosure").

[20] See Appendix 7 of the Listing Manual for forms of listing undertakings.

[21] See Clause 208 of the Listing Manual.

[22] See Clause 203 of the Listing Manual.

[23] Cap 50, 1994 (Rev Ed).

[24] For an overview of the legal regime relating to the issue of prospectuses, see Woon, *Company Law* at 423-5.

to do so.[25] In practice, the RCB seldom assesses a prospectus qualitatively over and above ensuring its compliance with the requirements of the CA. The failure to register a prospectus where one is required, the issue of a prospectus which does not comply with the requirements of the CA, or the issue of one that includes untrue statements or wilful non-disclosure, are criminal offences under the CA,[26] although the RCB plays no part in the prosecution of these offences.

Apart from the MAS, the SES and the RCB, two other prosecutorial entities have roles to play in the current regulatory framework.[27] The Attorney General's Chambers (the "AGC") is the traditional prosecutorial agency. However, securities-related offences under the SIA and CA are investigated and prosecuted by the Commercial Affairs Department (the "CAD"). The CAD is established under the Ministry of Finance (the "MOF") and deals with criminal prosecutions of white-collar crime.[28]

The CFC has proposed that the enforcement of a consolidated body of securities laws and regulations is to be the responsibility of a single securities regulator.[29] The single securities regulator would then regulate all aspects of securities laws and regulations, including in particular, disclosure requirements, but excluding the pursuance of criminal prosecutions. Which regulatory authority would be charged with the mammoth task of being the single securities regulator? The MOF, the MAS and the RCB are studying the issue.[30]

[25] See s 50(2)(e) of the CA and the other grounds in s 50(2) of the CA whereby the RCB must refuse to register the prospectus.

[26] See ss 44(9) and 50(3), 45(4) and 56 of the CA.

[27] Furthermore, in the case of takeovers involving listed companies, the Singapore Code on Take-overs and Mergers is administered by the Securities Industry Council (the "SIC") with powers given to it under the CA.

[28] Criminal prosecutions by the CAD are handled by officers who are, at the same time, personnel of the AGC.

[29] See Recommendation 6 of the Report.

[30] The CFC recommended that the securities regulator be distinct from and should not be subordinated to the banking prudential regulator, see Recommendation 6(c) of the Report. The separation of powers would eliminate the conflict between the risk-avoidance mindset prevalent in prudential regulation, and the risk-neutral mindset desirable in securities regulation, see para 3.3.5 of the Report. The MAS is involved in prudential regulation pursuant to its powers under the Finance Companies Act, Cap 108, 1995 (Rev Ed), and the Banking Act, Cap 19, 1994 (Rev Ed). In its response to this CFC recommendation, the MAS agreed with the recommendation, but commented that securities regulation is currently under the purview of a Securities and Futures Department within the MAS which is separate and distinct from the Banking Department, see "Recommendations and Government's Response" *The Straits Times*, 10 November 1998.

It is highly unlikely that a separate regulatory authority overseeing the securities market would be set up. Indeed, such an approach would be anomalous and opposed to the recent regulatory moves in various jurisdictions like Australia and the UK, where the late 1990s has witnessed a trend towards consolidating the regulation of *all* financial services and products with one authority. In Australia, the Australian Securities and Investment Commission (the "ASIC") is now the regulatory authority overseeing, *inter alia*, the securities, futures and insurance industries.[31] The UK's Financial Services Authority (the "FSA") will eventually take over the regulatory portfolios of various regulatory bodies in charge of securities, futures, insurance, deposit-taking, banking and foreign exchange.[32] The USA, where securities market regulation is vested with the specialist Securities and Exchange Commission (the "SEC"), is the exception.[33]

The trend of consolidating the regulation of all financial services and products with one authority ought to be observed by Singapore with bemusement. The MAS has always, since its establishment in 1971 as a statutory board,[34] governed all aspects of the financial markets, having been given supervisory powers over particular industries, such as finance companies, banking, futures, securities and insurance, under various statutes.[35] It does appear that it is consistent with the prevailing regulatory policy for MAS to assume the role of the single securities regulator.

Yet, in relation to the pursuance of civil action "in the public interest", the MAS is reported to be studying, together with the MOF, whether it would be more efficient for civil actions to be pursued by the MAS or by the CAD.[36] This is so even though it appeared that the CFC was of

[31] The ASIC was launched on 21 June 1998 and was previously known as the Australian Securities Commission or ASC. It is noted that the ASIC is not to have jurisdiction over certain areas of banking and prudential regulation. Prudential and banking regulation is placed under the auspices of the Australian Prudential Regulation Authority.

[32] The FSA was launched on 28 October 1997. Previously, securities regulation was the remit of the Securities and Investments Board or SIB. It is interesting to note that the prudential supervision of banks, previously the remit of the Bank of England, has been placed within the sphere of responsibility of the FSA.

[33] The Commodities and Futures Trading Commission (the "CFTC") regulates all aspects of the futures market. The regulation of other financial services and products is the remit of various authorities including the Federal Reserve. This diffused approach to the regulation of financial services and products stands in stark contrast to the recent regulatory consolidations seen in Australia and the UK.

[34] See Monetary Authority of Singapore Act, Cap 186, 1985 (Rev Ed).

[35] See the Banking Act, the Insurance Act, Cap 142, 1994 (Rev Ed), the Finance Companies Act, the SIA and the Futures Trading Act, Cap 116, 1985 (Rev Ed).

[36] See "Recommendations and Government's Response" *The Straits Times*, 10 November 1998 and "Proposed super regulator to get new legal powers" *Business Times*, 10 November 1998.

the opinion that the "securities regulator" and thus the entity pursuing civil action "in the public interest" would be separate from the CAD.[37]

If the CAD is tasked with taking civil action, the pursuit of civil action and criminal prosecution would be vested in one organisation. It is difficult to assert conclusively whether civil and criminal enforcement powers and responsibilities ought to be vested in one organisation or in separate organisations.[38] Suffice to say that howsoever structured, the success of an enforcement agency depends on skilled and dedicated personnel as well as adequate, if not abundant, resources. In this respect, it may be taken into account that civil and criminal pursuit each require, to a degree, different skills, expertise, knowledge, experience and even zeal. An argument in favour of having both civil and criminal enforcement functions reside in one organisation is that the co-existence could foster a cumulative expertise in securities regulation, that could result in efficient and unified enforcement efforts. However, vesting the responsibility to pursue civil action with the CAD and not the MAS separates enforcement powers from supervisory powers. This detracts from the objective of consolidating all aspects of securities regulation in a single securities regulator.

III. In Civil Pursuit

A. *Powers of Investigation*

The proposal to invest the securities regulator with powers of investigation to enable it to effectively perform its role in pursuing civil remedies[39] necessarily raises the question as to whether the investigative powers of the new securities regulator would go beyond those currently possessed by the MAS and the CAD. The CFC has suggested that such powers of investigation would include the right to hold hearings or interviews and to inspect documents.[40]

[37] See para 3.3.5 of the Report where the CFC stated that criminal prosecution ought to be pursued by the CAD or the AGC because "criminal prosecution for breach of securities regulation is a specialised area and the preserve of the State." See also para 3.4.6 of the Report which presupposes that the securities regulator responsible for pursuing civil action will be distinct from the CAD.

[38] In the US, the SEC is vested with civil enforcement powers alone, leaving criminal prosecutions to be brought by state prosecutorial agencies or the US Department of Justice. In the UK, criminal prosecutions are brought by the Serious Fraud Office and not by the FSA. In Australia, the ASIC has the right to take out civil actions as well as engage in less serious prosecutions. Serious criminal matters are referred by the ASIC to the Commonwealth Director of Public Prosecutions.

[39] See Recommendation 9 of the Report.

[40] See *ibid*.

At present, the MAS has wide-ranging investigative and information-gathering powers under the SIA.[41] For instance, the MAS may direct the SES, dealers or investment advisers,[42] and "any other person who is or has been a party to any dealing in securities" to produce books.[43] The MAS may, in any case, inspect the books of the SES, a dealer or an investment adviser at any time.[44] It may also require a dealer to disclose the name of a person from whom or to whom securities were traded as well as the nature of the instructions given regarding the acquisition or disposal of securities.[45] Any person who has acquired, held or disposed of securities as a trustee or nominee may be required to disclose the identity of the beneficiary or principal, as the case may be, to the MAS.[46] The procedure or method whereby the stipulated disclosure is to be effected to the MAS is not set out either in the SIA or in any publicly available code of conduct, but could conceivably include the mechanism of informal hearings. Failure to comply with or to assist the MAS in accordance with the SIA is a criminal offence.[47]

These powers of the MAS are useful in the surveillance of the market and the discovery of offences under the SIA, which in the main, deal with licensing and securities trading.[48] However, these MAS powers seem little used. In practice, the CAD prosecutes the criminal offences under the SIA and the CA. The CAD would handle the requisite investigation and exercise

[41] See generally ss 5 to 12 of the SIA. The CFC has suggested that the securities regulator's investigative powers include "the right to conduct hearings or interviews and to inspect documents," see para 3.4.6 of the Report. S 10(4) of the SIA provides the MAS with wide powers to compel persons to disclose information to it. The procedure or method whereby such disclosure is to be effected is not set out either in the SIA or in any publicly available set of rules on conducting investigations, but could conceivably include the conduct of hearings or interviews.

[42] See *supra*, note 13.

[43] See s 5 of the SIA. In summary, a "book" includes any register, document of other record of information and any account or accounting record, see s 2 of the SIA.

[44] See s 12 of the SIA.

[45] See s 10(1) of the SIA.

[46] See s 10(2) of the SIA.

[47] See ss 6, 10(8) and 12(5) of the SIA.

[48] For instance, in the case of offences under Part IX of the SIA which may be loosely described as those dealing with false trading, market rigging, market manipulation, fraudulent inducement and insider dealing the MAS has the power to require *any* person to give information concerning conduct which offends Part IX, where the MAS believes on reasonable grounds that such person is one who is able to give information, see s 10(4)(b) of the SIA. This power is also available to the MAS in relation to suspected breaches of Division 4 of Part IV of the CA which relates to the obligations of substantial shareholders in listed companies, see s 10(4)(c) of the SIA.

its own investigative powers. The CAD is empowered under the CA[49] to exercise all the powers in relation to police investigations conferred by the Criminal Procedure Code[50] ("the CPC") in any case where a seizable offence has been committed under the CA or the SIA.

On another level, the MAS's powers of investigation are greater in objective to those of the CAD. The MAS's powers extend beyond policing the market to detect and prosecute criminality. The MAS oversees the securities market in general and is responsible for its wellbeing. It therefore has wide powers of investigation concomitant with that portfolio. For instance, where the MAS is of the opinion that it is necessary to prohibit trading in particular securities "to protect persons buying or selling the securities or in the interests of the public", the MAS may require *any* person whom it believes on reasonable grounds to be capable of giving information, to give information.[51]

If the MAS is to be charged with enforcing corporate disclosure obligations against companies and their directors, its present investigative powers would have to be expanded to accommodate its new enforcement role. Giving the MAS extensive investigative powers over companies suspected of breaching their disclosure obligations, the directors, officers, employees or indeed any person with relevant information, may be considered rather intrusive. This is particularly so if the investigations are intended to obtain a civil remedy on behalf of investors, albeit in the public interest. Is it desired that a defendant in a civil claim would be subject to an investigation more akin to the pursuit of a criminal prosecution? Is it envisaged that the securities regulator's investigative powers in pursuit of a civil action would exceed monumentally the ordinary plaintiff's rights of discovery? Furthermore, the inequality of positions is aggravated further by the possibility that the potential defendant in a civil action could be subject to a separate criminal prosecution for any failure to assist the securities regulator.[52]

Perhaps the safeguard that the potential defendant may seek solace in is that civil action will only be pursued by the securities regulator when it is in the public interest to do so. Suffice to say for now that an over-intrusive securities regulator may negatively affect the commercial attrac-

[49] See s 409B of the CA.

[50] Cap 68, 1985 (Rev Ed).

[51] See s 22 and 10(4)(a) of the SIA.

[52] See *supra*, note 47 and the accompanying text. In the USA, the SEC is empowered to issue subpoenas to compel witnesses to testify or to compel the release of documents. Failure to comply would result in judicial enforcement of the subpoena, and is not a criminal offence. For an overview of the conduct of SEC investigations, see Hazen, *Treatise on the Law of Securities Regulation*, Vol 1 (3rd ed, 1995) at 543-6.

tiveness of a market, and it could not be in the public interest for a securities regulator to pursue an overly pro-investor policy.

B. *Civil Enforcement Options*

Insofar as civil actions connote the pursuance of a civil complaint in the civil courts to achieve a civil remedy, the MAS and the SES currently have routes of civil recourse against those who breach the SIA or the listing rules. Under sections 13, 20 and 114 of the SIA, they may, where appropriate, apply to the court for statutory orders, comprising injunctive and other relief. The relevant sections of the SIA which provide the MAS and the SES with civil enforcement options are sections 13, 20 and 114.

(i) *Sections 13, 20 and 114 of the SIA*

Under section 13 of the SIA, the MAS may apply to the court for various orders where a person has committed an offence under the SIA, has contravened the conditions or restrictions of his licence, or has contravened listing rules,[53] or is about to do an act that, if done, would result in such an offence or contravention. The SES may also apply to the court for an order under section 13 but only where a person has contravened its listing rules. The orders that may be made by the court are set out in section 13 with a certain amount of specificity. They are an injunctive order restraining the person from carrying on a business of dealing in securities or from dealing in particular securities,[54] an order appointing a receiver of property held by a dealer,[55] an order declaring a contract to be void or voidable,[56] or an injunctive order directing a person to do or refrain from doing a specified act.[57] Furthermore, as a catch-all, section 13(1)(vi) gives the court a discretion to make any "ancillary" order which the court deems desirable in consequence of one of the above-mentioned orders being made. It is submitted that an "ancillary" order could encompass a restitution order. For example, where a dealer has contravened the restrictions of his licence, an injunctive order may be made preventing him from committing further breaches, any affected contracts with clients may be declared void, a receiver may be appointed and restitution of any monies received from clients may be ordered. Therefore,

[53] See s 2(1) of the SIA for the definition of "listing rules." For all intents and purposes, references to the listing rules are references to the SES Listing Manual.
[54] See s 13(1)(i) and (ii) of the SIA.
[55] See s 13(1)(iii) of the SIA.
[56] See s 13(1)(iv) of the SIA.
[57] See s 13(1)(v) of the SIA.

it could be said that in circumstances that fall within section 13, the MAS or the SES already has the power to claim restitution on behalf of investors.

In relation to a failure to comply with the listing rules of the SES, section 20 of the SIA provides that the MAS, the SES and any "person aggrieved" may apply to the court for a compliance order against a person who is under an obligation to comply with the listing rules of the SES. Section 20 applies to listed companies and is also deemed to apply to "persons associated"[58] with the listed company, notably its directors. To an aggrieved investor, section 20 often offers little comfort. Where a breach of the listing rules occurs, it is generally in the interest of the aggrieved investor to seek rescission, restitution or compensation. These are remedies that are unavailable under section 20. Indeed, more appropriate, although by no means adequate, remedies are set out in section 13, for which the investor has no *locus standi* to apply.

Where there is a breach or threatened breach of any of the provisions of the SIA, the MAS or "any person whose interests have been, are or would be affected by the conduct" may apply to the Court for an injunction under section 114 of the SIA. Section 114(8) provides that the Court may, "either in addition to or in substitution for the grant of the injunction", order damages to be paid. Therefore, under section 114, the MAS as a securities regulator is empowered to seek damages for investor loss. The scope of section 114 injunctive relief, however, is limited to restraining conduct which constitutes a contravention of the SIA or mandating to be done an act which is required to be done under the SIA. It does not extend to breaches of the CA or the listing rules.[59]

It is interesting to observe that in the US, the injunction has become the SEC's primary civil remedy.[60] Ancillary remedies awarded under successful injunction proceedings include restitutionary orders involving disgorgement of ill-gotten gain or compensation for loss as well as orders for rescission.[61]

[58] See s 20(2) of the SIA. For a definition of "associated person", see s 3 of the SIA. In short, "associated persons" include the director or secretary of the listed company, a related company of the listed company, and a director or secretary of the related company of the listed company.

[59] Except insofar as a failure to comply with an order made under s 13 of the SIA is a criminal offence, see s 13(5) of the SIA, which could then be the subject of injunction proceedings under s 114 of the SIA.

[60] See J J Fishman, "A comparison of enforcement of securities law violations in the UK and US" (1993) 14 *Company Lawyer* 163 at 167.

[61] This is despite the fact that the relevant provisions in the US securities acts enable the SEC solely to seek injunctive relief, unlike ss 13 and 114 of the SIA which expressly provide for other non-injunctive relief. See generally TL Hazen, "Administrative Enforcement: An Evaluation of the Securities and Exchange Commission's Use of Injunctions and Other

The legislature in Singapore seemed to acknowledge that a bare prohibitory injunction which merely prohibits misfeasors from repeating the impugned conduct in the future is of little use in the sphere of securities fraud and misconduct which tend to consist of one-time violations. Therefore, section 13(1)(vi) of the SIA explicitly sets out the power of the court to grant "ancillary" orders and section 114(8) explicitly caters for damages to be awarded, "in addition to or in substitution for the grant of the injunction".

The present statutory enforcement options are seen to be unsatisfactory largely because they do not directly penalise any failure to comply with continuing disclosure obligations in the Listing Manual, although compliance with the listing rules may be sought and ordered by the court under section 20 of the SIA. The CFC has intimated that this is not effective enough.[62] It is noted at this point that there are no reported cases of the MAS, the SES, or for that matter, any other person, as the case may be, making an application under either section 13, 20 or 114. This may be because these sections are inadequate, for whatever reason, in which case an alternative regulatory enforcement option ought to be provided. On the other hand, the little use of these sections may suggest that neither the MAS nor the SES has vigorously pursued a policy of corrective enforcement. In a merit-based regime, corrective or remedial action is not a priority since the emphasis is placed on preventive measures. The observation is made that granting the securities regulator wide investigative powers and the right to pursue civil remedies may not enhance enforcement activity, without a corresponding shift by the securities regulator in mindset to one that considers taking corrective or remedial action a major *raison d'etre.*

(ii) *Civil Action In the Public Interest*

The scope or range of the securities regulator's power of civil pursuit remains open. The power could be a general one, enabling the securities regulator to pursue all causes of action that are available to the investor, either in common law or through particular statutes, within the context of securities market transactions. On the other hand, the securities regulator's power could be limited to specified causes of action, in particular, to those provided by statute.

Enforcement Methods" 31 Hastings LJ 427 and JR Farrand, "Ancillary Remedies in SEC Civil Enforcement Suits" 89 Harv L Rev 1779.

62 See para 3.1 of the Report.

What appears certain and sound is that the securities regulator's proposed right to take civil action in the public interest would be premised on an investor's existing right.[63] The regulator's right would essentially be a parasitic one and only arises where the investor himself has recourse to civil action. At present, the investor has rights of action in statute as well as in common law for various securities law infractions. Notably, however, the investor lacks any direct right to pursue an action, either against the company or the persons responsible, for breaches of any continuing corporate disclosure obligations. As a precursor to the empowerment of the securities regulator to pursue actions in this realm, the investor would have to be empowered first and foremost. This would greatly expand an investor's rights, and concomitantly, a listed issuer's liability, and understandably cause consternation amongst listed issuers and their advisers.

Insofar as prospectus disclosure is concerned, the investor has at present a panoply of possible causes of action. Where a misleading statement is made in the prospectus or where there is wilful non-disclosure, section 55(1) of the CA gives the investor who has subscribed for or purchased shares on the faith of a prospectus in a public offer of a company's securities a cause of action against certain individuals, particularly directors. Under section 55(2) of the CA, an expert who has given consent to the issue of a prospectus may also be liable for misleading statements made by him as an expert. The investor who has suffered loss as a result of any misleading statements in the prospectus may also avail of a common law action for fraudulent or negligent misrepresentation, or may pursue remedies available under the Misrepresentation Act.[64]

Sections 99, 100 and 102 of the SIA cover situations where a person has dishonestly concealed material facts to induce another person to deal

[63] See Recommendation 7(c) of the Report. The CFC makes it clear that "[t]he rights of individual investors to litigate for themselves should be preserved, but the securities regulator should have the right to intervene in litigation brought by private litigants or to initiate litigation on its own in the public interest".

[64] Cap 390, 1994 (Rev Ed). Where the misrepresentation results in a contract, a contractual claim be pursued. Prior to the Misrepresentation Act (the "MA"), in a contractual claim, the plaintiff could have claimed only for rescission of the contract and perhaps an indemnity. Under s 2 of the MA, the misrepresentor could now be liable for damages. The amount of damages awardable under s 2 of the MA remains a subject of controversy. For a fuller exposition of the law of misrepresentation applicable in Singapore and an account of the problems surrounding s 2 of the MA, see A Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (2nd edition, 1998), at Ch 10. It is submitted that it is timely to review the MA and to rationalise the provisions relating to damages therein.

in securities.[65] These sections create criminal offences[66] but where a successful criminal prosecution has occurred, the investor is given a civil right of action under section 105 of the SIA to recover losses. Similarly, in the event of insider trading, section 103 of the SIA criminalises the conduct, but section 105 provides the aggrieved investor with a civil right of action against the insider. The requirement of a criminal conviction before an investor may pursue civil action has been criticised as an unnecessary restriction of the investor's rights.[67] In the case of insider trading, the CFC has recommended the removal of this requirement.[68] Once the requirement of a criminal prosecution is discarded, the securities regulator would be faced with the conundrum of whether to pursue a civil action in the public interest, or to encourage a criminal prosecution, or both.

With respect to insider trading in particular, the CFC has recommended that the securities regulator be allowed to intervene or commence civil actions for insider trading.[69] By virtue of section 105 of the SIA, the investor may commence an action against an offender who has been convicted, not only of insider trading, but of other market frauds, for instance, under sections 99, 100 and 102. Whether the securities regulator would be able to pursue such actions under section 105 on behalf of the investor was not discussed in the Report, although there appears to be no reason why the securities regulator should be so deprived. The offence of insider trading was probably singled out of all market frauds for closer examination by the CFC since it is an offence that has a close linkage with the issue of disclosure. Insider trading is a by-product of untimely or deficient disclosure. By efficaciously sanctioning insider traders, at least one illicit incentive for insiders to cause any breaches of disclosure obligations, where the insider is in a position to do so, is dispensed with.

[65] S 99 deals with false or misleading statements. S 100 deals with fradulently inducing persons to deal in securities. S 102 deals generally with the employment of manipulative and deceptive devices and is a replicate of the well-known Rule 10b-5 promulgated under the 1934 Securities Exchange Act of the USA. For an overview of ss 99, 100 and 102 of the SIA, see Woon, *Company Law* at 578-84.

[66] See s 104 of the SIA.

[67] For a critique of s 105 of the SIA in relation to insider trading, see M Chew "The Adequacy and Efficacy of Civil Remedies for Insider Trading: A Comparative Critique" [1998] SJLS 331.

[68] See Recommendation 10(a) of the Report.

[69] See Recommendation 10(c) of the Report.

(a) *The Enforcement of Continuing Disclosure*

A listed company's continuing disclosure obligations are set out in the Listing Manual.[70] Under the present regulatory regime, the only sanctions against listed companies for the breach of continuing listing requirements are a reprimand, a suspension of trading or a delisting of the relevant securities. Suspension or delisting are fairly uncommon courses of action as the SES in all likelihood recognises the reality that such action could do more harm to the market and the shareholders of the company than to sanction those responsible for the company's breach of its disclosure obligations. As mentioned earlier, sections 13, 20 and 114 of the SIA may be utilised to enforce the listing rules, but the viability of these enforcement options is questionable.

It is submitted that by providing the investor and thereby the securities regulator with a civil right of action against those responsible for the listed company's breach of its continuing disclosure obligations will enable the isolation and pursuit of those persons, without affecting the trading of the company's securities. In this vein, capturing continuing disclosure requirements in statute would imbue them with the *gravitas* it now seems to lack.[71] Presently, the legal regime governing prospectus disclosure requirements stands in stark contrast to that governing continuing disclosure requirements. The failure to comply with prospectus disclosure requirements in the CA may lead to civil sanctions as well as a criminal prosecution, and a conviction could in turn lead to a person being disqualified from being a director of a company.[72] On the other hand, persons who cause a company to breach continuing disclosure requirements are not subject to any legal sanctions.

Continuing disclosure requirements consist of the obligation to file periodic reports[73] as well as the obligation to disclose other specified[74] or material

[70] See Chs 9 to 12 of the Listing Manual which sets out a listed company's continuing obligations, including its disclosure obligations.

[71] The CFC was of the view that "similar to prospectus disclosure, continuing disclosure by listed issuers should be subject to requirements and standards which are backed by law", see para 4.1 of the Report.

[72] See ss 55, 56 and 154 of the CA.

[73] See Clauses 911 and 912 of the Listing Manual which requires the listed company to publish half-year and full-year financial statements as well as an annual report. The CFC has also recommended that listed issuers should be encouraged to report their results on a quarterly basis, since "[m]ore frequent and more timely reporting of interim results would underpin the philosophy of more effective disclosure and greater transparency," see para 4.3.3 of the Report. The CFC has also recommended changes to be made to the timing for the issue of annual reports so that shareholders will have timely access to the reports, see para 4.3.2 of the Report.

[74] Specific circumstances which require immediate announcements to be made to the SES for public release are set out in Clauses 901 to 907 of the Listing Manual. Interested person

information[75] concerning the company for public release to avoid the establishment of a false market in the company's securities. In the case of periodic reports, where such reports do not make full disclosure of requisite information or contain misleading statements, there is a case for criminally penalising those responsible as well as giving the investor, and thus the securities regulator, a right to claim compensation for any loss or damage suffered as a result of reliance thereon. Similarly, in the case where a company is obliged to disclose specific information but fails to do so, those responsible could be subjected to either criminal prosecution or civil action.

This, of course, may appear a harsh step forward, especially in the light of the CFC recommendation that a general test of disclosure be adopted in the primary legislation.[76] The general test of disclosure would require that listed companies be legally obliged to disclose all information that investors and their professional advisers would reasonably require and expect to find in order to make an informed decision.[77] The line between events which will be perceived by a reasonable investor to affect the prospects of a company and events which will not is a difficult one to draw. Indeed, there is comfort in the presence of a checklist, no matter how comprehensive. It is proposed that specific disclosure items in the form of a checklist would continue to be found in regulations or subsidiary legislation.[78] Yet the checklist would not be an exhaustive one and complying with the checklist would not necessarily ensure compliance with the general disclosure test. It is submitted that even though a general test of disclosure is adopted,

transactions must be approved by shareholders of the listed company and immediately announced, see Ch 9A of the Listing Manual. Certain acquisitions and realisations are considered discloseable transactions requiring the listed company to make an announcement as soon as possible to the SES for public release, see Ch 10 of the Listing Manual. Where a listed issuer receives a notice of intention to make a takeover offer, it shall immediately send an announcement to the SES for public release, see Clause 1101(3) of the Listing Manual.

75 Clause 1201(2) of the Listing Manual states that "any information necessary to enable holders of the issuer's listed securities and the public to appraise the position of the listed issuer and to avoid the establishement of a false market in the listed securities must be submitted promptly to the Exchange for public release." See generally Ch 12 of the Listing Manual which sets out the SES's corporate disclosure policy. Essentially, a listed company is required to disclose all material information. "Material information" is defined as "any information of a factual nature relating to the business and affairs of a listed issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the issuer's securities", see Clause 1202(2) of the Listing Manual.

76 See Recommendation 11(a) of the Report. The general disclosure test is recommended to cover both prospectuses and continuing disclosure.

77 See para 4.1 of the Report.

78 See *ibid*.

it is not inconsistent to have in place a clear and tightly formulated checklist, for the sake of certainty in compliance.[79] In exceptional cases, the failure to disclose what does not appear on the checklist may be impugned, but the burden of showing that the undisclosed information was material enough to warrant disclosure weighs heavy on the regulator.

(b) *Interested Person Transactions*

Transactions between a listed company and an interested person may prejudice shareholders, and the Listing Manual provides that transactions considered as interested person transactions have to be disclosed to and approved by shareholders.[80] An "interested person" is defined in the Listing Manual as a director, chief executive officer or substantial shareholder of the listed issuer, or their associates.[81] This means that interested persons have to play a part in disclosing their interests to the listed company to ensure that compliance with the Listing Manual may be made. Where an interested person fails to effect disclosure, the SIA does not provide for any direct sanctions. At worst, such a person may be the subject of a compliance order pursuant to section 20 of the SIA.

Insofar as the interested person is a director, he will be under a duty to the company to disclose any contracts in which he is interested in, under his common law fiduciary duties as well as his statutory duties. Under the CA, a director is required to disclose any interest, whether direct or indirect, in a contract with a company.[82] This disclosure is to be made to the board of directors and any failure to do so could constitute a criminal offence.[83] Since existing rules of common law and equity are preserved,[84] any director who fails to disclose, or indeed, even directors who do disclose, may be in breach of their fiduciary duty not to place themselves in a position of conflict. Where there is a breach of fiduciary duty, the company has an action against the director for breach of fiduciary duty, for either damages or the restitution of any "secret profits." Oftentimes, it is unrealistic to leave the enforcement of directors' duties to the company since the directors may hold the majority shares in the company and therefore could prevent any

79 The CFC has indicated that "the general test approach should be combined with the checklist approach to take advantage of the benefits of both approaches," see para 4.1 of the Report.

80 See Ch 9A of the Listing Manual.

81 For the definition of "associate", see Ch 1 of the Listing Manual. In summary, associates are immediate family, trustees and any company in which the relevant person and his immediate family together have a 25% interest.

82 See s 156(1) of the CA.

83 See s 156(10) of the CA.

84 See s 156(9) of the CA.

corporate action being taken against them. Since directors do not owe the shareholders directly any duties, a minority shareholder has no cause of action.

The CFC has recommended that the law on directors' duties should be augmented to cover interested person transactions such that a breach of which could attract legal remedies that can be enforced by the shareholders and the securities regulator.[85] How should and could the statutory law on directors' duties be augmented, in relation to listed companies, to cater for interested person transactions? Did the CFC envisage the ambitious import of the interested person transaction provisions of the Listing Manual into statute? If a breach of the law leads to the commission of a criminal offence as well as civil sanctions, in imposing a legal obligation to disclose interested person transactions, the criteria as to what constitutes an impugned transaction would have to be unambiguously and painstakingly clear. The CFC does not consider the present provisions on interested person transactions to be ideal. It has recommended that the present rules on interested person transactions be streamlined to give greater flexibility to the listed issuer, and made suggestions on making the provisions less onerous.[86]

It is noted that the provisions pertaining to interested person transactions cover personages such as the chief executive officer and substantial shareholders. The law on directors' duties insofar as it relates to interested person transactions could be specifically augmented to include certain non-directors, namely persons capable of exerting some form of control or dominion over the company.[87] If persons apart from directors are to be caught in legislation which traditionally catered for directors alone, the logistics of making requisite disclosure may require a formulation of an entirely different disclosure mechanism, as a directors' meeting may not be the appropriate forum any longer.

[85] See Recommendation 30(a) of the Report. The CFC did not elaborate further on how this was to be done. Perhaps the augmentation envisaged could be the statutory prohibition and criminalisation of boardroom voting in relation to a matter in which a director has a material personal interest, as exemplified in s 232A of the Australian Corporations Law, which applies only to public companies. Presently, in Singapore, an article disqualifying interested directors from boardroom voting on the matter is required by the SES to be included in a listed company's articles, see Clause 714 and para 9(5) of Appendix 5 of the Listing Manual.

[86] By redefining "associate", "entity at risk", "control" and reworking the materiality thresholds, see paras 5.8.1 to 5.8.3 of the Report.

[87] The CFC has indicated that "control" means "the capacity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of the relevant company," see para 5.8.1 of the Report. It is noted that if such persons are ones "in accordance with whose directions or instructions the directors of a corporation are accustomed to act," they may already fall within the extended definition of a "director" in s 4(1) of the CA.

Currently, the company has a clear right of action against a director in breach of his duties. The investor, as a shareholder, may commence a derivative action. With regard to listed companies, the minority shareholder has to avail of the "fraud on the minority" exception to the rule in *Foss* v *Harbottle*[88] to maintain an action in the name of the company. In the case of companies that are not listed, section 216A of the CA[89] provides the minority shareholders with a simplified and straightforward procedure in the application for leave to maintain an action in the name of the company. There appears to be a case for extending section 216A of the CA to include listed companies such that a shareholder in a listed company may avail of it.[90] This is especially so if it is contemplated that it would be efficacious to give the securities regulator a right to maintain a derivative action, being a right in itself dependent upon the investor having such a right.

Furthermore, apart from pursuing a derivative action for breach of director's duty on behalf of the company, an aggrieved minority shareholder may also pursue an action under section 216 of the CA for "oppression", "unfair prejudice", "unfair discrimination" or "disregard of interests". It could be asserted that a director in constant breach of his director's duties is acting oppressively for the shareholders have a legitimate expectation that directors would act in accordance with their fiduciary duties in managing the company.[91] Perhaps the empowerment of the securities regulator to intervene in or commence oppression actions on behalf of shareholders, in the public interest, could be mooted.[92]

(iii) *Administrative Sanctions*

The general framework proposed by the CFC preserves the existence of essentially two levels of securities market rules.[93] There would be rules made at the statutory level, being primary and subsidiary legislation, and those made at the non-statutory or exchange level, being the rules and listing

88 (1843) 2 Hare 461.

89 For an overview of s 216A of the CA and the statutory derivative action, see W Woon and A Hicks, *The Companies Act of Singapore: An Annotation* at s 216A.

90 S 216A of the CA was inspired by Canadian legislation, however, the equivalent legislation in Canada does not limit the statutory derivative action to unlisted companies only. See, for example, *Re Richardson Greenshields of Canada* (1995) 123 DLR (4th) 628.

91 For an overview of s 216 of the CA, see Woon and Hicks, *supra*, note 89, at s 216.

92 The ASIC may intervene or commence oppression actions, see ss 1330 and 260 of the CL. See *infra*, note 111 and the accompanying text.

93 See para 3.2.2 of the Report. The CFC refers to three tiers of rules, but the first and second tiers relate to rules made at what is referred to as the statutory level.

rules of the SES. Only when a breach of the law occurs at the statutory level does the CFC envisage the matter being handed over to the securities regulator for investigation and enforcement.[94] The CFC, however, has also proposed that the securities regulator be empowered to mete out a range of administrative sanctions so that the sanction is commensurate with the breach.[95] It is unclear from the CFC Report what kinds of "administrative sanctions" are contemplated but they may be relevant in situations where, in the course of investigation, the infringements do not appear serious enough to warrant a criminal prosecution nor a civil action in the public interest. Possible administrative sanctions could include a public censure or reprimand by the securities regulator. These could be addressed to those responsible for the company's breach, rather than to the company itself.

Administrative sanctions, therefore, refer to an amorphous range of administrative measures that may be meted to transgressors. These could be imposed with or without conducting a formal hearing.[96] Currently, for breaches of the Listing Manual, the SES is empowered to delist, suspend or censure a listed company, without recourse to a formal hearing of any sort. It is unclear from the Report whether a formal structure of administrative hearings would precede the imposition of administrative sanctions. It is submitted that the establishment of an administrative system of non-criminal enforcement or administrative proceedings against an alleged wrongdoer does raise a host of difficult issues. What infringements deserve to be tried in this way? Who would constitute the administrative tribunal? Would there be an avenue for appeal? What sanctions would be meted out?

The CFC has voiced its objections to the securities regulator or the SES meting out fines for a breach of the listing rules and further states that it may be unconstitutional for a non-judicial body to impose fines.[97] This

[94] See para 3.3.5 of the Report.

[95] See para 3.4.5 of the Report.

[96] In the US, the SEC may order an administrative hearing to determine responsibility for a securities law violation and to impose sanctions. Sanctions available to an administrative proceeding include censure, and in the case of persons registered with the SEC such as brokers, the SEC may impose limitations on the registrant's activities, or revocations of registration. For an overview of SEC administrative proceedings, see Ratner, *Securities Regulation In a Nutshell* (4th ed, 1992) at 245 to 250 and Hazen, *supra*, note 52, at 548-56. In Singapore, before the MAS may revoke or suspend a licence under the SIA, it must give the licensee an opportunity to be heard, see s 38(4) of the SIA.

[97] See para 3.4.5 of the Report. The argument is that since the imposition of a fine is equivalent to a statutory penalty for a criminal offence, to use the lower civil burden of proof to impose a sanction identified with a conviction for a criminal offence is objectionable. This suggests that a formal hearing is contemplated. The CFC is of the opinion that the fines should be reserved only for criminal prosecutions.

of course leaves open the question whether it would be unconstitutional for a quasi-judicial or even a judicial body to impose fines.[98] In any case, if the sanctions to be meted out either by the securities regulator or some other administrative tribunal are limited only to public censures or reprimands, it is submitted that they may be ineffectual and of little consequence. At the same time, more severe penalties like director disqualification orders seem harsh and inherently inappropriate to be imposed as a consequence of administrative enforcement proceedings.

IV. In the Public Interest

That a public body is to take action in the public interest is a truism. Yet, any definitive and comprehensive exhortation of what constitutes the public interest eludes. The CFC recognised the difficulty of defining "public interest" in legislation, and stated that it would be best to leave it to the securities regulator and the courts to develop its scope over time.[99] This could unnerve issuers, advisors and other market participants who may find themselves exposed to a novel and uncertain liability. As if to alleviate such concerns, the CFC acknowledged that the public interest test has to be properly defined, albeit not in legislation, but in a policy statement, following the example of the ASIC in Australia.[100]

A. *The Australian Approach*

The term "public interest" is used, but not defined, in section 50 of the Australian Securities Commission Act (the "ASC Act"). Section 50 provides:

> Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part...), it appears to the [ASIC] to be in the public interest for a person to begin and carry on a proceeding for:
>
> (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or
>
> (b) recovery of property of the person;

[98] See *infra*, notes 137 and 138 and the accompanying text.
[99] See para 3.4.2 of the Report.
[100] See *ibid*.

> the [ASIC]:
>
> (c) if the person is a company – may cause; or
>
> (d) otherwise – may, with the person's written consent, cause;
>
> such a proceeding to be begun and carried on in the person's name.

The CFC has not intimated that section 50 of the ASC Act be adopted as a model. Indeed, section 50 is far from an ideal piece of legislation. Much controversy surrounds its scope and application. For instance, the reference to "a result of an investigation" poses the question whether the investigation referred to is a formal one under the CL and whether the ASIC's litigation power is available only when the investigation is completed.[101] Furthermore, does the reference to "recovery of damages" cover relief of a monetary nature for breach of trust,[102] does "negligence" include general common law negligence or is confined to negligent acts falling within the scope of specific statutory duties,[103] and does "recovery of property" include the recovery of a debt?[104]

Section 50 is not the only statute in the Australian statute books which empowers the ASIC to take civil actions. Section 1330 of the Corporations Law (the "CL") provides:

> The [ASIC] may intervene in any proceeding relating to a matter arising under this [CL].

Although section 1330 of the CL does not explicitly mention the "public interest", it is inherent in the ASIC's policy that the ASIC would utilise its power under section 1330 when it is in the public interest to do so. To address the uncertainties pertaining to ASIC intervention and to chart its general policy under both section 50 of the ASC Act and section 1330

[101] See JB Kluver, "ASIC Enforcement" *Butterworths' Australian Corporation Law* (Service 58: 1/97), note 190, at 152, 223.

[102] See Kluver, *ibid,* note 240, at 152, 224. In *Walsh* v *Permanent Trustee Australia Ltd* (1996) 21 ACSR 213 at 1216, Brownie J expressed the view that the relief of damages in s 50 extends to a claim for relief of a monetary nature for breach of trust or for other kinds of misconduct which traditionally have not led to liability for damages "properly so called".

[103] See Kluver, *ibid.* The ASIC is said to take the view that "negligence" is not confined to negligent acts falling within the scope of statutory duties, but, in any event, the term "other misconduct" in s 50 would include common law negligence.

[104] See Kluver, *ibid.* The ASIC is said to take the view that this would include actions for recovery of a debt.

of the CL, the ASIC has published its policy in relation to intervention in a policy statement[105] (the "Policy Statement"). Supplementary indications as to the ASIC approach to intervention are also found in two unofficial papers.[106]

The Policy Statement expressed that the ASIC would consider intervention in circumstances where there is involved one or more of the following: a matter of national significance, construction of the CL, knowledge acquired through investigations, and the protection of minorities. What is a "matter of national significance"? It was stated in broad terms that "[c]ertain cases will raise issues which affect the integrity of the financial markets or are of such financial or commercial significance that the [ASIC] would wish to make submissions".[107] The example given in the Policy Statement of a matter of national significance related to the role of an independent expert providing a report to shareholders in the context of a takeover offer.[108]

It should be noted that the CL is vast, with over a thousand sections dealing with all aspects of corporate and commercial dealing. It contains provisions dealing with the regulation of companies, the securities industry and the futures industry. As such, charged with enforcing the CL, the ASIC is more than a "securities regulator".[109] The Policy Statement provides that where a construction of the CL is at issue, intervention by the ASIC is warranted.[110] Under section 1330, the ASIC may intervene in shareholders' disputes. The Policy Statement states that if the ASIC is satisfied that the affairs of a corporation were being conducted in a manner oppressive to minority shareholders, and those minority shareholders had insufficient resources to bring appropriate proceedings, the ASIC may consider a request for intervention under section 1330 of the CL.[111]

The ASIC has extensive investigative and information-gathering powers.[112] It may therefore acquire information through the examination of

[105] See "Australian Securities Commission Policy on Intervention" *Policy Statement 4* issued 3 June 1991.

[106] They are P Thompson, "Section 50 of the ASC Law – The Power and its Application" (1993) 3 ASC Digest SPCH 75 and L Shervington, K Ratneser and J Cutri, "Provisions Relevant to the Civil Recovery Process under the Corporations Legislation" (1992) 3 ASC Digest SPCH 18. These papers were cited in D Richardson, "Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?" (1994) 12 C&SLJ 418, note 33, at 424.

[107] See para 3(a) of the Policy Statement.

[108] See *ibid*.

[109] See *supra*, note 31 and the accompanying text.

[110] See para 3(b) of the Policy Statement.

[111] See para 4 of the Policy Statement and see *supra*, note 92 and the accompanying text.

[112] For an overview of the ASIC's powers in this respect, see JB Kluver, "ASIC Investigations" *Butterworths' Australian Corporation Law* (Service 74: 9/98) at 151, 011.

witnesses and the inspection of documents pursuant to its powers under the ASC Act, as well as through the assistance of foreign regulators. The Policy Statement assures that whenever the ASIC holds information which is relevant to the determination of an issue before the court, by reason of its own investigations, it will seek to ensure that the court is informed of those matters.[113]

The Policy Statement makes it clear that the ASIC believes that the private plaintiff is best able to assess the costs and benefits of litigation.[114] The ASIC would be reluctant to undertake civil proceedings, where there is a potential plaintiff with sufficient funds to bring those proceedings, but is not prepared to do so. However, where the ASIC is satisfied that civil proceedings which may be justified by reason of a contravention of the CL cannot be brought, because of the financial circumstances of a potential plaintiff, the ASIC "may be prepared to undertake a greater role in ensuring the prosecution of those proceedings if it appears to be in the public interest for the proceedings to be brought".[115] The question is where there are several potential plaintiffs, some of whom have financial resources, and some of whom do not, what role would the ASIC play?[116] In any case, where the ASIC wants to bring an action under section 50 in the name of a natural person, the ASIC must obtain that person's consent.[117]

In *ASC* v *Deloitte Touche Tohmatsu*,[118] the leading case on section 50 of the ASC Act, the Full Court of the Federal Court held that section 50 conferred a very wide discretion on the ASIC. The ASIC, under section 50, is required to form a judgment as to where the public interest lay, and the Full Court observed:

> This exercise called for an evaluation, at that stage and on the material then available to the [ASIC], of several, perhaps many, aspects of the public interest. Some aspects may have competed with one another. But the judgment involved in making that evaluation was essentially one of fact and degree, and by its very nature it will be something that is not easily susceptible to judicial review.

[113] See para 3(c) of the Policy Statement.
[114] See para 4 of the Policy Statement.
[115] See para 4 of the Policy Statement.
[116] Should the ASIC take into account the public interest in respect of each plaintiff when deciding whether to bring proceedings on behalf of numerous plaintiffs? See Richardson, *supra*, note 106, at 432.
[117] See s 50(d) of the ASC Act.
[118] (1996) 14 ACLC 1486.

The Full Court discussed the meaning of the "public interest" in great detail and referred to numerous authorities, highlighting the broad nature of the concept and the broad discretion that the use of the term confers on the decisionmaker. In particular, the Full Court noted:

> [T]he "public interest" requirement in section 50 imports (in the language of *O'Sullivan* v *Farrer* and *Browning's Case*) "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view."

In not providing a definition of the "public interest" in legislation, the Australian approach preserves the wide discretion of the securities regulator to decide, as circumstances arise, whether it should or should not, pursue a civil matter. Attempting to define a concept such as the public interest may result either in a definition so wide as to serve no purpose, or one so narrow as to unnecessarily constrict the regulator's sphere of intervention.

B. *Singapore: Narrowing the Range, Identifying Regulatory Purpose*

The CFC knowingly refrained from offering any definition or exhaustive indication as to what would constitute the public interest, but stated:

> The public interest test must be framed in a way that would only allow the securities regulator to pursue civil action in a narrow range of cases. These would include serious infringements of securities law, particularly where there is suspicion of fraud, or where there is a need to test a legal principle or interpretation in court. It would not be in the public interest to pursue civil action where investors suffer loss as a result of the issuer or its directors exercising poor business judgment.[119]

It is submitted that rather than attempting to define, narrowly or otherwise, the "public interest", the first exercise that ought to be undertaken is the delimitation of the causes of action for which the securities regulator may pursue. The CFC has referred to "fraud or misrepresentation" as areas wherein the securities regulator would take civil action in the public interest.[120] "Fraud

[119] See para 3.4.2 of the Report.
[120] See para 3.4.1 of the Report.

or misrepresentation" cover a multitude of sins and sources of liability. The term "fraud" is notoriously hard to define. Would the securities regulator be empowered to take civil action based on the tort of deceit, the breach of fiduciary duties, as well as pursuant to specific statutory provisions in the CA and the SIA dealing with fraudulent conduct? The emphasis on fraud is noted. However, this is not to say that the emphasis on impeaching fraud implies that the securities regulator would condone honest but incompetent financial intermediaries or corporate management. The securities regulator is expected to take action against market practitioners who do not exercise due care and diligence.[121] "Misrepresentation" encompasses negligent or fraudulent misrepresentation at common law as well as other causes of action based on provisions in the CA and the SIA. It should be noted that misrepresentation does not cover cases of non-disclosure, in particular, in the context of continuing disclosure requirements. A cause of action based on non-disclosure would be provided by statute, as indicated by the CFC.[122]

To be cautious in approach, the securities regulator's power to take civil action could be limited initially to specific causes of action created by statute of particular relevance to securities market transactions. The breach of statutory prospectus and continuing disclosure requirements would be obvious inclusions, whereas derivative actions for the breach of directors' duties and oppression actions, albeit involving listed companies, may be less obvious candidates for inclusion. Once a list of actions of specificity is drawn up, only if a matter falls squarely within the "narrow range" of causes of action, would the securities regulator have to exercise its discretion and decide whether it would pursue the matter, in the public interest.

In deciding whether the circumstances warrant regulatory pursuit, it ought to be borne in mind that as a starting point, in a commercial transaction, where an investor suffers loss, it is the responsibility first and foremost of the investor to stake his claim. An investor is not to rely on the securities regulator to take up civil action on his behalf regardless.[123] Therefore, in what situations would the investor warrant special treatment, such that the

[121] See para 2.2 of the Report where in setting out the disclosure based philosophy the CFC stated: "Enforcement would be carried out by ex-post review of disclosure and transactions, and by taking remedial action, including civil action for damages for the losses of investors, against companies who made misleading or inaccurate information, against persons who defraud investors, and against market practitioners who did not exercise due care and diligence."

[122] See *supra*, note 71 and the accompanying text.

[123] The danger of such investor reliance is termed "investor moral hazard", see para 3.4.2 of the Report.

securities regulator would intervene in or initiate an action on his behalf? It is submitted that there ought to be a "regulatory purpose" to the civil action should the regulator decide to pursue it.[124] This means that the action, if successful, would benefit investors as a whole and the market generally, and not a particular investor or group of investors. Furthermore, the action should, of course, have a decent prospect of success and recovery.

Identifying the regulatory purpose will never be a simple exercise, but nevertheless, it is a necessary one to embark upon as the regulator seeks to avoid over-intervention, which could negatively impact upon market growth, on the one hand, and under-intervention, which could make a mockery of its new-found powers, on the other hand. It is submitted that even in a scenario where an investor has suffered great loss due to egregious fraud in a case with a good prospect of success and recovery, and where the investor is not financially competent to pursue the action, there still ought to be a independent regulatory purpose before the securities regulator takes up civil pursuit. After all, the civil action will be funded from public coffers, therefore, why should an investor-victim benefit over another by his very impecuniosity? A regulatory purpose over and above the impeachment of specific conduct or the recovery of loss ought to be identified, before an action may be said to be in the "public interest". This could be the testing of a legal principle or interpretation in the courts, to resolve any ambiguity or uncertainty in the law. In cases involving negligence, judicial pronouncements could be useful in setting standards of duty of care. The regulatory purpose could also be the signalling to the market that certain conduct, in particular, where it is widespread, will not be condoned.[125]

Policy statements would be useful in elucidating or fine-tuning the notion of "regulatory purpose". Ideally, the investing public and market participants ought to be encouraged to participate in the formulation of policy statements and a healthy dialogue should be maintained between the regulator and the regulated. Policy statements could be well viewed as dynamic and live, constantly refined by responses and feedback, in particular, where shifts in market trends, sentiments and concerns occur, as they are wont to do. In this way, a relevant and effective policy of regulatory intervention is assured.

[124] In determining whether it would be in the "public interest" to commence an action under s 50 of the ASC Act, Thompson has set out the issues which the ASIC will consider, see Thompson, *supra*, note 106. First, there must be a regulatory purpose to the action in that the action would benefit investors as a whole. Next, the action should have good prospects of success and recovery.

[125] See *ibid*.

V. Civil Action v Criminal Prosecution

The inter-relationship between civil action and criminal prosecution is a delicate one. That an individual may be subject to both civil and criminal pursuit is not unacceptable. The CFC did not consider it double jeopardy for a party to be subject to both criminal prosecution as well as a civil action. This was because "the civil action is directed towards disgorging the unfair profits from the offender and compensating the victim, while criminal prosecution is directed towards punishing a person for a criminal act".[126]

As an enforcement option, the civil action has several advantages over the criminal prosecution.[127] For a start, civil actions are subject to a lower burden of proof as compared to criminal prosecutions. Civil claims have to be proved on a balance of probabilities whereas criminal allegations have to be proved beyond reasonable doubt. The criminal law also has restrictive rules regarding the evidence that may be adduced at trial. Indeed, the stigma of a criminal conviction and the likelihood of imprisonment justify the higher burden of proof and the stricter rules of evidence in the criminal law. Therefore, the threat of being successfully sued in a civil suit would be more real than the threat of being successfully convicted. Furthermore, an award of damages under a civil action could well exceed any maximum fine that may be imposed pursuant to a criminal conviction. In short, the eased impeachment process and the potentially crippling damages in a civil action could be a potent disincentive and deterrent for any aspiring offender, who in the case of securities law infringement, is often motivated by financial gain.

The CFC has intimated that "[t]he primary purpose of civil action would be as a deterrent".[128] Unabashedly touting the civil action for its deterrent purpose might arouse the ire of constitutional rightists. It may be perceived that the safeguards built into criminal law and procedure are being dangerously circumvented by the civil action, and the civil action is used, in

[126] See para 3.6.2 of the Report. The emphasis on loss recovery and restitution may also be implicit in the recommendation that the securities regulator be empowered to administer the distribution of the proceeds from successful civil actions to the affected investors, see para 3.4.4 of the Report.

[127] See para 3.4.1 of the Report. The inadequacy of the criminal law in regulating the financial markets has been raised in Singapore as early as 1991. See B Rider, "Policing the International Financial Markets" *The Regulation of Financial and Capital Markets* (1991) 94 at 105, wherein he states that the criminal law "operates at too high a level of proof, is generally slow and over exacting in its procedures, restrictive in the evidence it will allow to be adduced and unimaginative in its application."

[128] See *ibid* of the Report.

clandestine fashion, to achieve the punitive purposes for which the criminal system was designed. It is suggested that the position may be clarified thus. The securities regulator pursuing a civil action does not seek either to stigmatize or punish the offender nor to specifically aid the affected investors in the recovery of any losses. The pursuit, in the public interest, ought to have an independent regulatory purpose. Such a regulatory purpose could very well be to deter certain conduct, which cannot be effectively achieved by the criminal law.

In this respect, perhaps the prime advantage of the civil action is that a securities regulator capable of taking civil action has at its behest a sophisticated variety of orders or remedies unavailable under the criminal system, for instance, interim injunctions or other civil relief to preserve assets at risk, pending the completion of litigation. Of immediate mention is the Mareva injunction. Where the breach of securities laws has resulted in large losses to investors, often though not always, the wrongdoer may have made some gains. In cases where there is such illegal bounty, it would be useful to prevent the wrongdoer from dissipating monies or property with the aim of defeating any potential judgment. A Mareva injunction is generally unavailable under the criminal jurisdiction of the court.[129]

Furthermore, interlocutory or final orders made pursuant to civil proceedings have the possibility of being enforced overseas. This point may be worth further consideration, taking into account the globalisation of the securities market. The potential international scope of civil orders is a real and powerful advantage of the securities regulator's *locus standi* to pursue a civil action.

A case that highlights this point is that of *SIB* v *Pantell SA (No 1)*.[130] The facts were as follows:

> Pantell was a Swiss company who had been sending advertisements to investors in the United Kingdom. The advertisements recommended shares in a United States company, Euramco, stating that the shares were listed and publicly traded. The shares were not listed or traded on any exchange, and the president of Euramco was a director of Pantell. The SIB,[131] found out from the Swiss authorities that they were taking action to close down Pantell's business and to institute criminal proceedings against the directors. The Swiss authorities also disclosed that Pantell had been sending cheques from United Kingdom investors to a branch of Barclays Bank in London.

[129] Hoffmann J refused to grant a Mareva injunction in criminal proceedings in *Chief Constable of Leicestershire* v *M* [1988] 3 All ER 1015.
[130] [1989] BCLC 590.
[131] See *supra*, note 32.

The SIB sought a Mareva injunction to freeze Pantell's bank account at Barclays. The SIB proceeded under the provisions of the Financial Services Act 1986 (the "1986 Act") which empowered the SIB to obtain a court order requiring a company which had carried on an unauthorised investment business to pay the SIB such sum as the court deemed just, for the benefit of persons affected by the company's unauthorised activities.[132]

Sir Nicolas Browne-Wilkinson V-C (as he then was) granted the Mareva injunction. The order he made extended to assets in the Channel Islands since the information available suggested that money had been transferred from the Pantell's account at Barclays' London branch to the account of a company associated with Pantell at Barclays' branch in Guernsey. This illustrates the possible extraterritorial effect of a Mareva injunction. A bank upon receipt of a Mareva injunction order could be required to ensure that funds held at other branches of the bank, wherever located, are not dissipated.[133]

It is a fundamental principle of international law that one state will not enforce another's penal law.[134] However, in the realm of civil matters, it is recognised that a state cannot enforce the orders of its courts in the territory of another state without the consent of that state, but such concessions are made in the interests of comity. The potential of a civil order having far-reaching consequences beyond the shores of Singapore has been used in argument in favour of empowering the securities regulator with the right to pursue civil action.[135] When misfeasors are domiciled abroad, the criminal law as an enforcement option is noticeably impotent.[136]

At this stage, it is apt to point out that a civil action may be considered, at least by a commonwealth court, to be a criminal one in disguise. In the

[132] See ss 3 and 6 of the 1986 Act.

[133] See C Currie, "The Civil Law as a Means of Enforcing Securities Law" *Developments in European Company Law*, *Volume 1/1996* (B Rider and M Andenas ed, 1997) at 103. Commenting on *SIB* v *Pantell (No 1)*, Currie observed:

> The extension of the Mareva injunction to cover assets abroad is an important development for victims of securities law violations. Provided the legitimate interests of third parties are recognised and protected, this development, allowing the ill-gotten gains of wrongdoers to be blocked and subsequently recovered for defrauded investors, is to be welcomed.

[134] See Rider, *supra*, note 127, at 106 and note 87.

[135] See *ibid*.

[136] See Currie, *supra*, note 133, at 100. When asked why the SIB did not pursue a criminal prosecution in the *Pantell* case by a commentator, the SIB was not prepared to answer, and Currie stated pertinently:

> [O]n the facts of the case, the obvious answer to the question posed is that the defendants were Swiss nationals domiciled in Switzerland and that a conviction in their absence would have achieved little and that, additionally, civil proceedings were necessary in any event to ensure that restitution could be made to investors.

US, the SEC is empowered to seek in the federal district courts civil monetary penalties for securities law violations.[137] An attempt to enforce such an order for a civil penalty in Singapore, for instance, may be unsuccessful. This point was evinced *obiter* in the local case of *SEC* v *Bobby Congqin*.[138]

It has been assumed, thus far, that there is virtue in investing the securities regulator with the right to pursue a civil action which already rests with an individual investor. The case of *SIB* v *Pantell (No 1)* highlights the advantages of empowering the securities regulator to take up civil action. Indeed, the victims in *SIB* v *Pantell (No 1)* were mainly small investors who would be unlikely to have the funds to pursue an action against the defendant. Giving the securities regulator the right to take civil action addresses the problem of investor apathy or the investor's lack of resources to pursue actions. Furthermore, there is economy of scale where the securities regulator takes out an action on behalf of a group of investors. However, it is submitted that this might not have been enough to warrant regulatory intervention. In *SIB* v *Pantell (No 1)*, the greater regulatory purpose of the SIB action, being the deterrence of the commission of offences by offenders located offshore and an indication of the SIB's willingness to pursue such offenders, might have prevailed over the recovery of investor loss.

The securities regulator, as a regulatory authority, has privileges unavailable and powers inaccessible to the private investor when taking civil action. In the SIB's application for a Mareva injunction in *SIB* v *Pantell (No 1)* and in *SIB* v *Lloyd-Wright,*[139] no undertaking as to damages was required of the SIB. Normally, an applicant for *Mareva* relief has to provide an undertaking that he will recompense the defendant for any losses caused by the interim injunction upon the event that he ultimately loses at trial. The English authorities appear to support a proposition that public authorities in their capacity as a law enforcer may be exempt from such a requirement.[140]

[137] See s 21(d)(3) of the Securities Exchange Act of 1934 as amended by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. For a discussion of the 1990 statute and the SEC's use of civil penalties, see RC Ferrara, Thomas A Ferrigno and David S Darland, "Hardball! The SEC's New Arsenal of Enforcement Weapons" 47 Bus Law 33 (1991).

[138] [1999] 1 SLR 310. See also *supra*, note 98 and the accompanying text.

[139] [1993] 4 All ER 210.

[140] This point in relation to the SIB is comprehensively discussed in Currie, *supra*, note 133, at 97 to 99. In brief, there is House of Lords authority to support the proposition that when the Crown seeks an interlocutory injunction in its capacity as law enforcer, the courts, in the absence of special considerations, do not require the customary undertaking in damages, see *Hoffman-La Roche* v *Secretary of State for Trade and Industry* [1975] AC 295. The underlying policy behind this approach as seen by Hoffmann J in both *Attorney General* v *Wright* [1988] 1 WLR 164 and *Director General of Fair Trading* v *Tobyward Ltd* [1989]

The policy argument supporting the proposition is that the public authority should not be deterred from acting as a law enforcer.[141]

Furthermore, the SIB had obtained timely information regarding Pantell from the Swiss authorities. The assistance of foreign regulators is a privilege available only to fellow regulators. Coupled with the wide investigative and information-gathering powers of the securities regulator, a regulator is well placed to gather evidence of wrongdoing. The investor would have to rely on traditional civil procedures like discovery, to gather evidence, which may prove unfruitful especially when pitted against fraudsters.

VI. Conclusion

Inevitably, a discussion of the new role of the securities regulator as a civil plaintiff raises more questions than it clarifies. The proposal that the securities regulator be empowered to take civil action in the public interest is a welcome and refreshing one. The role of the securities regulator has not been considered since the MAS received its powers to oversee the securities market under the SIA in 1986. However, it is suggested there would be no shame in stepping forward cautiously. This may be done by initially providing a narrow range of actions in which the securities regulator may commence action or intervene, to cover the most infamous of securities law transgressions, for instance, fraudulent disclosure or non-disclosure and insider trading. Needless to say, the regulatory and legislative authorities should bear an open mind to widening the range. Indeed, as the markets are dynamic, this area of the law should be dynamic.

It is envisaged that, at times, public opinion may fervently support the securities regulator's remedial interventionist role where there are allegations of fraud or gross negligence, particularly when many small investors are affected. Nevertheless, the securities regulator ought to be selective in the causes it adopts and adhere strictly to the adage that it may only take up

1 WLR 517 is the prevention of the Crown being deterred from acting as a law enforcer. It is pointed out by Currie, however, that the FSA provides that the SIB cannot rely on Crown immunity, and that it is not to be regarded as acting on behalf of the Crown. In answer to this point, the House of Lords in *Kirklees BC* v *Wickes Building Supplies Ltd* [1992] 3 WLR 170 held that although there is no rule of law that the Crown is exempt from giving a cross-undertaking in damages in law enforcement proceedings, the court has a discretion not to require the undertaking where the Crown is concerned and this discretion extends to other public authorities exercising the function of law enforcement in appropriate circumstances.

[141] In the case of the SIB, Morritt J in *SIB* v *Lloyd-Wright, supra*, note 139, went as far to share an observation that he had been told that the invariable practice of judges of the Chancery Division had been not to require a cross-undertaking in damages in cases such as the one before him.

civil action where it is in the public interest to do so. It is submitted that it is not in the public interest that the securities regulator is in the business of providing "super" legal aid. Unless a regulatory purpose to taking action is identified, the securities regulator ought not to pursue an action simply because the fraud is egregious (in which case the criminal law provides the appropriate punitive sanction) or where many irate and impecunious investors have suffered loss. The regulator being able to pursue a civil action with wide-ranging investigative and information-gathering powers is a powerful weapon indeed. It must be used sparingly, judiciously and purposively.

Finally, it should not be considered an indictment of the proposals if the regulator's new powers are never used. In fact, this could evidence that there is adequate enforcement by other means, in particular, surveillance and compliance review. Where these are adequately in place, corrective or remedial measures may only be necessary occasionally, if ever. Nonetheless, when market deviance or misfeasance does arise, the securities regulator has to come to terms with its corrective or remedial role. In deciding whether to take civil action in the public interest, the tension between over-intervention and under-intervention will be a never-ending one, and the wise regulator, like the man, avoids all extremes.

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