Singapore Journal of Legal Studies
[2002] 574 - 603

AUSTRALIAN INFLUENCES ON THE INSIDER TRADING LAWS IN SINGAPORE

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The insider trading laws in Singapore have been revamped with the passing of the Securities and Futures Act 2001, a comprehensive legislation dealing with the regulation of securities and futures markets in Singapore. Our new insider trading provisions have been largely modelled after the equivalent provisions in the Australian Corporations Act 2001. This paper seeks to discuss the background for the reforms to insider trading law in Singapore and will argue that these reforms have come about because of an earlier adoption of Australian legislation on securities regulation in the area of initial public offers, entailing a continuity and coherence in the policy rationale for the securities laws in Singapore. This paper will also discuss the Australian origins of the new Singapore provisions and examine comparatively our Singapore provisions with their Australian precedents. I will discuss how the Australian origins may affect the interpretation of these provisions in Singapore. I will also point out a significant difference between our legislation and our Australian precedent, namely, that we have retained a specific provision on connected persons as insiders and have shifted the onus of proof to connected persons to deny that there was insider trading upon the satisfaction of the existence of certain factors.

I. INTRODUCTION

On 5 October 2001, the new Securities and Futures Act 2001[1] ("Securities and Futures Act") that sets out a new regulatory regime for securities and futures trading in Singapore was passed. One of the most significant reforms is the redefining of the insider trading laws in Singapore, based on the model found in the Australian Corporations Act 2001.[2]

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** I wish to thank Professor Andrew Phang, Assoc Prof Pearlie Koh and Asst Prof Lee Pey Woan, from the Singapore Management University for their valuable comments and input. I also wish to thank Assoc Prof Hans Tjio from the National University of Singapore for his thoughts on this article. All errors and omissions however remain the responsibility of the author.

1 Act 42 of 2001.

2 See the Table of Derivatives in the Securities and Futures Bill 2001 that shows the source of the Singapore provisions. The Australian provisions from which the Singapore legislation was derived have however undergone some significant amendments recently via the Financial Services Reform Act 2002.

The Australian model, which has been in place since 1990, is commonly known as the "information-based" regime against insider trading. The information-based regime, in brief, premises insider liability upon trading while in possession of price-sensitive information, regardless of whether the alleged insider is connected to the corporation whose shares are traded. Before the passing of the Securities and Futures Act, the former regime prohibiting insider trading in Singapore is commonly known as the "connected-person" approach. The connected-person approach also predates the information-based regime in Australia. In brief, the "connected-person" approach assumes that insider trading would be carried out by persons who hold office or are somehow related to a corporation and thus, only such persons are susceptible to liability.[3]

Singapore has now indicated that insider liability need not arise from privileged connections alone and thus prefers to adopt an approach that premises insider liability upon information advantage, that is, insider liability could be established if any person trades on inside information at the expense of others. This new regime has altered the old belief that insiders are always connected persons. Singapore has chosen to adopt the Australian precedent in the Corporations Act 2001 to a large extent except for a slight deviation as I shall discuss.

This paper seeks to discuss the background for the reforms to insider trading law in Singapore and will argue that these reforms have come about because of an earlier adoption of Australian legislation on securities regulation in the area of initial public offers, entailing a continuity and coherence in the policy rationale for the securities laws in Singapore. This paper will also discuss the Australian origins of the new Singapore provisions and examine comparatively our Singapore provisions with their Australian precedents. I will discuss how the Australian origins may affect the interpretation of these provisions in Singapore. I will also point out a significant difference between our legislation and our Australian precedent, namely, that we have retained a specific provision on connected persons and have shifted the onus of proof to connected persons upon the satisfaction of the existence of certain factors.

II. Rationale For Adopting the Australian Counterpart

Since 1997, reform in securities laws in Singapore had been underway. The government of Singapore commissioned the Corporate Finance Committee led by prominent members of the private sector to look into securities laws reforms. The Corporate Finance Committee issued a report[4] that recommended the adoption of a disclosure-based regime for securities

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[3] The only category of "outsiders" who may be liable under the "connected-person" regime are "tippees" of connected persons.

[4] Corporate Finance Committee Report, June 1997.

offerings in Singapore, based on Australian precedent.[5] In summary, this regime would no longer require the regulatory authority to check the merits of every public offering by labouring through the prospectus documents before allowing the offering. The authority would instead prescribe disclosure requirements based on what a reasonable investor would like to know,[6] and approve prospectuses automatically. The authority however would be supplemented by greater enforcement powers against offerors who breach the disclosure requirements. This move heralds a more mature financial market in which investors take responsibility for their investments while regulators maintain a prudent level of policing without encouraging moral hazard.

The reforms resulted in the Singapore Companies Act being amended, in respect of prospectus requirements,[7] and the Securities Industry Act being amended, to introduce a civil penalty option for proceedings against insiders. The latter was not based on Australian precedent. Instead, they largely drew inspiration from the US Securities Exchange Act. Australian provisions on the information-based approach in sanctioning insider trading were also not considered or adopted in that round of reforms.

The lack of adoption in the Singapore legislation of the information-based approach in sanctioning insider trading in 2000, has, in my view, resulted in a gap in the "policy coherence" of the legislative regime. The Australian provisions on disclosure were intended to encourage information releases into the market for the greater empowerment of investors to make informed decisions. Thus, sanctions against insider trading, which essentially is the use of information disparity to gain an advantage, should be targeted against those who have an unfair advantage in possession of information. To retain the old connected-person approach in sanctioning insider trading in a new legislative framework based on disclosure is unprogressive as the connected-person approach does not capture all persons who trade with an information advantage, but only persons connected to a corporation. Thus, I am of the view that the recent reform of the insider trading provisions in Singapore law is timely, and adoption from Australian precedent is also appropriate, given that the disclosure-based regime enacted earlier is also based on Australian precedent. The adoption of the information-based approach against insider trading is an essential complement to the legislative reforms that began in 2000 to herald an information-based approach to market regulation, that is, to compel and facilitate disclosure and bring about market fairness. Singapore believes in the merits of an information-based approach in the regulation of securities markets as a whole.[8] However, it is beyond the scope of this essay to

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5 Part 6-D.2 of the Australian Corporations Act 2001.

6 Based on section 710 of the Australian Corporations Act.

7 See Division 1, Part IV of the Companies Act (Cap 50).

8 See generally, Corporate Finance Committee Report 1997.

discuss the whole policy rationale for an information-based approach in securities regulation.

III. Singapore's Deviation From The Australian Provisions

It is to be noted that the Singapore provisions contain a deviation from its Australian counterpart. The Australian information-based approach to sanctioning insider trading is enshrined within section 1002G of the Australian Corporations Act 2001. The Singapore Securities and Futures Act contains two provisions on insider liability. Section 218 deals with insider trading by connected persons, as defined within the section,[9] and section 219 deals with persons other than connected persons.

This deviation does not, however, entail the view that the connected-person approach is somehow still retained in the insider trading laws in Singapore. The Parliament has made it clear that the underlying philosophy behind sanctioning insider trading is to prohibit the taking advantage of information disparity, as that would result in a negative impact on market confidence.[10] Thus, Parliament is no longer premising insider liability upon assumptions that persons in privileged positions of connection with corporations are the ones who would engage in insider trading.

Section 218 contains a presumption of *mens rea* against connected persons, resulting in the reversal of the onus of proof upon the defendant with respect to the existence of the mental element. The section provides that the connected person is presumed, under sub-section (4), to know that the information concerned is non-public and price-sensitive once the prosecution establishes that the connected person was in possession of information concerning the corporation to which he is connected, and that the information is not generally available. This presumption is not found in the Australian Corporations Act, and is thus unique to Singapore. But the general policy rationale of an information-based approach is not compromised by having a specific provision on connected persons. This section merely provides that in the circumstance where a connected person is proceeded against for insider trading, the mode of proof is different from where a non-connected person is proceeded against.

Proof is an age-old problem faced in insider trading prosecutions. In 2000, the Securities Industry Act amendments were intended to address the

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[9] Sub-sections (5) and (6) of section 218. A "connected person" includes an officer, a substantial shareholder or a person who occupies a position which may reasonably be expected to give him access to price sensitive information. The "connected persons" listed in section 218 are identical to the connected persons referred to in the repealed Securities Industry Act.

[10] Second Reading Speech by DPM Lee Hsien Loong, Singapore Parliamentary Reports, 5 October 2001.

problem of proof as well.[11] It is well recognised that evidence concerning the mechanics and *mens rea* of insider trading is difficult to obtain and thus, it has been very difficult for the prosecution to prove beyond a reasonable doubt that insider trading took place.[12] It is in this round of amendments, in section 218, that the problem of proof may indeed be overcome significantly. In 2000, Parliament introduced an action for civil penalties against insiders[13] so that the problems of proof might be alleviated as the civil penalty proceedings require a lower standard of proof, ie the civil standard. The option of a civil penalty proceeding, based on the US Securities Exchange Act 1934, allows the state to carry out punishment against an insider by severe fines (the amount of the civil penalty is treble the amount of profit made or loss avoided by the insider) if liability is proved on a balance of probabilities.

The presumption of *mens rea* operates to allow the reversal of the onus of proof that there was no mental element upon the defendant. Thus, the onus of proof upon the prosecution is very much lighter as only proof of "possession" and the objective price-sensitivity of the information concerned, as well as the relevant actus reus,[14] is required before the presumption of *mens rea* would kick in. The presumption is useful to the prosecution chiefly because it relieves the prosecution from having to prove actual or constructive knowledge that the information in the possession of the accused is non-public and price-sensitive. The *mens rea* elements of insider trading are perhaps the most difficult to prove as much of what is going on within a corporation may not be readily obtained in the form of evidence by the prosecution.[15]

There is a limitation in section 218 that circumscribes the application of the presumption, and thus, the fact that its applicability is restricted should provide some comfort for those who are wary of introducing presumptions in the law that generally have the effect of displacing the presumption of innocence. Sub-section (4) refers to possession of information *concerning the corporation to which he is connected*. Thus, as this limb circumscribes the scope of information defined in section 214,[16] the presumption would not be applicable in "indirect insider liability" situations where the

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[11] The introduction of an optional civil penalty which may be meted out upon proof on the civil standard was intended to ease the problem of proof. See the Second Reading Speech by DPM Lee Hsien Loong for the Securities Industry (Amendment) Bill 1999.

[12] See Second Reading Speech by DPM Lee Hsien Loong for the Securities Industry (Amendment) Bill 1999.

[13] Section 104A of the Securities Industry Act (Cap 289), now section 232 of the Securities and Futures Act 2001.

[14] Discussed under the section titled "Prohibited Acts".

[15] See some general discussion in Eads, "From Capone to Boesky – Tax Evasion, Insider Trading and Problems of Proof" (1991) 79 Cal L Rev 1421. Professor Eads also pointed out that in the US, problems of proof have led to courts using implied or constructive presumptions to reallocate the burden of proof in order to establish insider liability.

[16] See discussion in section titled "Definition of Information".

information concerned does not relate to the corporation the connected person is connected to, but another corporation. It shows that Parliament's intention is to place the onus on persons who have access to privileged information of the corporation he is connected to, to act fairly, and thus, the presumption would only arise if use is made of information so obtained.

It is noted that the Griffiths Committee in Australia earlier considered reversal of the onus of proof as "…information is within the exclusive knowledge of a very limited range of people and other evidence is not obtainable for a variety of reasons such as due to its destruction".[17] However, as the proposal to reverse the onus of proof was not supported,[18] and hence not adopted in the Griffiths Committee's recommendations[19] and the resulting legislation.

I am of the view that the introduction of the presumption for connected persons is warranted and to be welcomed. Connected persons are in a position of privilege where access to information is concerned, and they are also in a privileged position to destroy evidence of any improper market behaviour. Thus, it is not unjust to presume that this group of persons has the requisite mens rea once the prosecution has proved the fact of trading while in possession of non-public and price-sensitive information. Connected persons are in a position to adduce evidence to dispute that they have the requisite mens rea. Presumptions that reverse the onus of proof are generally accepted when there are systematic biases in the litigation process with respect to access to evidence. Such presumptions actually help to maintain a reasonable balance between the parties to litigation.[20]

The availability of the presumption of *mens rea* in section 218 would, together with the availability of the civil penalty option that regulators may take in enforcement against insiders, greatly ease the difficulties of proof both in terms of evidence gathering and burden of proof, for satisfactory establishment of insider liability. Since the commencement of the civil penalty provisions in the Singapore Securities Industry Act in 2000, there has not been any case law on civil penalty proceedings to date. That may not be an indication that easing the burden of proof alone was insufficient to help enforcers establish liability. But with the availability of the presumption of *mens rea* against connected persons, the enforcement

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17 R Tomasic, *Casino Capitalism? Insider Trading in Australia* (published by the Australian Institute of Criminology in 1991, available on http://www.aic.gov.au.

18 The Attorney-General's Department took the view that general reversal would be "unreasonable" but that a limited reversal may be desirable as it is difficult to obtain any evidence that is within the exclusive knowledge of the defendant. The Business Council of Australia and others voiced strong opposition, arguing that a reasonable man test for the nature of the inside information was sufficient to aid the prosecution.

19 See recommendation 10 of the Griffiths Committee Report, Parliament of the Commonwealth of Australia, October 1989 (the "Griffiths Committee Report").

20 See generally, Allen, "How presumptions should be allocated" (1994) 17 Harv J L & Pub Pol'y 627 and R H Gaskins, *Burdens of Proof in Modern Discourse* (New Haven: Yale University Proess, 1994).

mechanism against insiders would be enhanced. In Australia, it should be noted that the Financial Services Reform Act 2002, which has yet to come into force, has included provision for the Australian Securities and Investments Commission to impose a civil penalty[21] as well.

IV. Comparison With the Australian Corporations Act

Other than the deviation from its Australian precedent canvassed above, the Singapore legislation has largely mirrored its Australian precedent. In this part of the paper, I will proceed to examine in detail the Singapore provisions against their Australian precedents, and predict the likely issues that may arise in Singapore. I will discuss a couple of interpretive issues of considerable significance that have arisen in Australia, notably on the definition of price-sensitive information. The Australian provisions have the merit of setting out comprehensively the parameters of insider liability, as the Griffiths Committee that drafted the provisions intended that the courts should not be left to grapple with the interpretive problems of what inside information is.[22] However, the courts in Australia still have to fill in the interpretive gaps as the legislature could not have envisaged every possible factual matrix that may arise. I will also provide my own views on how the Singapore provisions should be interpreted, in light of their Australian origins.

A. *Extra-territorial application*

The increased width of application of a jurisdiction's insider trading laws is in line with the global expansion of fund-raising activities by corporations no longer confined to domestic markets. Activities such as insider trading affecting a corporation outside a particular jurisdiction, which also has shares listed in that jurisdiction, may affect local investors and thus, insider trading prohibitions should not be limited only to activity arising out of the domestic market alone.

Section 213 of the Securities and Futures Act thus provides for extra-territorial application of the insider trading provisions and is in pari materia with section 1002 of the Australian Corporations Act 2001.[23]

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[21] Section 1317E of the Financial Services Reform Act 2002 provides for a maximum civil penalty of $200,000.

[22] Para 4.4.12, Griffiths Committee Report.

[23] The section provides for extra-territorial application of the prohibition against insider trading to activities occurring in Singapore, in relation to securities of a corporation formed in Singapore or elsewhere, or securities quoted or listed for quotation in Singapore or elsewhere, or futures contracts traded in Singapore or elsewhere. The section also extends the application of the insider trading provisions to activities occurring outside Singapore if in relation to securities of a corporation formed or carrying on business in Singapore, or securities quoted or listed for quotation in Singapore, or futures contracts traded in Singapore.

In relation to the limb that extends the application of the insider trading provisions to activities occurring outside Australia, in respect of securities of a corporation formed or carrying on business in Australia (the equivalent of section 213(b)(i) in the Singapore Act), Michael Ziegelaar[24] opined that the application of the equivalent Australian section 1002 would extend to a Swiss investor who obtains materially price-sensitive information in Switzerland about a Swiss company which has a branch carrying on business in Australia, and deals in the shares of that Swiss company in Switzerland. However, one wonders if the insider trading provisions would indeed be invoked in the domestic court in Australia against that Swiss investor.

If Australian investors have invested in the Swiss stock market and have suffered a disadvantage due to the insider trading scenario painted above and wish to take action in an Australian court, these provisions can technically act in their favour. But one questions the rationale for the extent of such extra-territorial application, as much of the Australian public would not be affected (assuming that the Swiss corporation concerned is not dually listed in Australia), and certainly the Australian market itself is not affected. It is uncertain why the Australian, as well as Singapore's Parliament saw it beneficial to extend the application of its extra-territorial jurisdiction to activities that would probably have no effect on the domestic market. I am of the view that the width of section 213(b)(i) may be for the purpose of protecting the resident public from abusive investment behaviour (wherever that may be) that affects them. This would be more extensive than the rationale enunciated in Parliament, that is, chiefly to protect the integrity of domestic markets. I am of the view that the extensiveness of the extra-territorial application is not warranted as the section of the public who may make foreign investments in foreign securities markets should be relatively sophisticated and governments should avoid the moral hazard of protecting investment decisions as such.

B. *Information-based regime against insider trading*

Section 219 of the Securities and Futures Act implements the information-based regime against insider trading, based on section 1002G of the Australian Corporations Act 2001. Section 219 contains many elements for the establishment of insider liability. I will discuss these elements and examine the Australian approach in interpreting these elements and how it may be relevant to Singapore.

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[24] See Michael Ziegelaar, "Insider Trading Law in Australia" in G Walker, B Fisse and I Ramsay eds, *Securities Regulation in Australia and New Zealand*, 2nd ed (Sydney, NSW: LBC Information Services, 1998) at 561.

1. *Possession of inside information*

Proof of possession of inside information is required under section 219 (also section 218). This requirement is common to both previous[25] and new law. Under the previous law, possession of inside information had to be by virtue of the connection with the corporation. Now that the underlying rationale for sanctioning insider trading is no longer based on connection to a corporation, the fact of possession may arise from other circumstances.

In Singapore, an argument may be mounted that the element of "possession" is not entirely divorced from that of connection to a corporation as section 218 deals exclusively with connected persons' liability. However, as section 218 is worded differently from the former law,[26] and, as argued above, this author is of the view that Parliament has made it clear that the basis for determining insider liability has changed to that of prohibiting unfair use of privileged information, this author submits that it is unlikely that the courts would hold that the circumstance of possession of inside information is still inextricably linked to being connected to a corporation.

2. *Nature of Inside Information*

(1) *Definition of "information"*: Under the previous law in Singapore, there is no definition of inside information or price-sensitive information. Courts are left to grapple with these terms and made judicial expositions of what they thought these terms meant.[27] The Griffiths Committee which promulgated the Australian provisions recommended that it was essential to provide definitions so that these concepts that are central to the operation of the legislation would not be left uncertain.[28]

Section 214 of the Securities and Futures Act provides for a non-exhaustive definition of "information" which is in *pari materia* with the Australian counterpart of section 1002A(1) in respect of the first two limbs. As "information" includes matters of supposition and intentions or likely intentions of any person, this definition would, I submit, diminish the need

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[25] See Annex 1 on a brief sketch of the previous law on insider trading under the Singapore Securities Industry Act.

[26] Section 103(1) of the repealed Securities Industry Act provides that "[a] person who is, …, connected with a body corporate shall not deal in any securities of that body corporate *if by reason of his so being, or having been, connected with that body corporate he is in possession of information that is not generally available* but, if it were, would be likely materially to affect the price of those securities." [Emphasis added.] It has been interpreted in *Darvall* v *Lanceley* (1986) 10 ACLR 893 that a nexus between connection and possession of inside information must be established.

[27] See generally Annex 1 where the previous law is briefly discussed.

[28] Para 4.4.12 of the Griffiths Committee Report.

to prove that the information in question is of a "specific nature" as required under the previous law.[29]

Section 214 of the Securities and Futures Act also provides for limbs (c) to (f) in the definition of "information", which are *not* found in its Australian counterpart. These are adopted from the Malaysian Securities Industry Act 1983.[30] Limbs (c) to (f) provide that "information" also includes:

> (c) matters relating to negotiations or proposals with respect to —
> (i) commercial dealings; or
> (ii) dealing in securities;
> (d) information relating to the financial performance of a corporation or otherwise;
> (e) information that a person proposes to enter into, or had previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
> (f) matters relating to the future. …

As these provisions have not yet been tested in court, it is uncertain as to how the courts in Singapore would give effect to their scope. For example, in limb (d), information relating to financial performance or otherwise may be interpreted widely, *ie* "otherwise" may be taken to mean other aspects of the corporation not related to profitability. Would that include for example, knowledge of the likelihood of a lawsuit against a corporation or a substantial shareholder? But such information could also fall under limb (b) on likely intentions, or even limb (f).

Limb (f) is worded very widely, and even on application of the *ejusdem generis* principle, it is hard to see the common thread through all the limbs in order to give limb (f) a more meaningful but restricted interpretation. Limb (f) appears to be so wide that it may include even matters that do not relate specifically to the corporation, but matters such as likely economic performance, projected dips in demand in a particular market and such other "secrets". But if a piece of information is not related to a corporation *per se*, it would be uncertain if a reasonable person would expect it to have a material effect on the price of securities of that corporation and thus, such information may not qualify as price-sensitive information for the purposes of sections 218 and 219, which are the prohibitory provisions.

(2) *"Information that is not generally available"*: The central concept that the Griffiths Committee intended to embody in legislation for the sake

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[29] See Annex 1 which canvasses the possibility that later Australian cases on that issue seemed to have placed less significance on whether "specificity" must be made out. However, this author has stated in Annex 1 that the Singapore position may be to require specificity as a result of the case of *PP* v *Choudhoury*.

[30] See section 89 of Malaysian Securities Industry Act 1983.

of certainty and clarity is the definition of price-sensitive or material information.[31] Under both sections 218 and 219 of the Singapore Act, and section 1002G of the Australian Act, price-sensitive information is defined as information that is not generally available, but, if the information were generally available, a reasonable person would expect it to have a material effect on the value of the securities concerned. As this is a central concept, I will proceed to analyse each element in the definition of price-sensitive information.

First, as to determining if information is generally available or not, section 1002B of the Australian Corporations Act 2001 contains a definition of "information that is generally available", which is adopted in section 215 of the Singapore Act. Information that is generally available may be of the nature described in any one of the three limbs in section 215. The first refers to "readily observable matter". The Malaysian Securities Industry Act 1983 which, in 1998, imported the Australian definition of "information generally available" did not import this limb. It is this author's view that this limb is not necessary in the definition of "information generally available", as the other two limbs to be explained below are sufficient. Recent Australian case law interpreting this limb has also made the interpretation of this limb more perplexing.[32]

(a) *"Readily observable matter"*: In *R* v *Kruse*[33] and *R* v *Firns*[34], the cases turned on the same facts. Kruse and Firns's fathers were connected to a corporation which had a subsidiary registered in Papua New Guinea and held a licence to explore a large area in Papua New Guinea for gold. Within the area of exploration, there was a smaller area which was the subject of a special mining lease owned by an unrelated company. In 1992, regulations were passed under a new Act in Papua New Guinea which directly affected the subsidiary company by divesting it of a valuable exploration incident of its licence, and enhanced the rights to explore by the other mining company. The company challenged the validity of the regulations in the Papua New Guinea court. The challenge failed at first instance but was upheld on appeal.

Mr Kruse was in the Papua New Guinea Court at the handing of the judgment on appeal in open court. Mr Firns was in Australia then. When the regulations were declared to be invalid, Kruse phoned his broker to purchase shares of his holding company of the Papua New Guinea subsidiary, and phoned Firns's father who immediately phoned his son.

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31 *Infra*, note 32.

32 In *R* v *Hannes*, [2000] NSWCCA 503, it is stated in no uncertain terms that this phrase is "reasonably plain English" and required no further elaboration. However, contentions raised in *R* v *Kruse*, New South Wales District Court, November 1999 and *R* v *Firns* [2001] NSWCCA 191, have exposed the ambiguities present in this limb, as will be discussed in the main text.

33 *Supra*, note 32.

34 *Infra*, note 36.

Firns then phoned a Brisbane stockbroker to purchase shares, under his wife's maiden name, of that company. The Australian Stock Exchange was notified of the successful appeal the following day. Subsequently the share price of the corporation rose and Kruse and Firns disposed of the purchased shares at a handsome profit.

Kruse was prosecuted and the issue turned on whether information he traded on, whose source is outside Australia, (*ie* from the Papua New Guinea Court) is "readily observable matter". The District Court held that "readily observable matter" must be directly observable in the public arena and is not limited to within Australia. Thus, Kruse was acquitted as the information he possessed, in the form of an overseas court judgment, was held to be public in nature and not inside information.

I agree with the decision in *Kruse*. In *Kruse*, the defendant was in Papua New Guinea when he instructed his broker to trade in Australia. His decision to trade was based on a court decision he observed in Papua New Guinea himself. As the facts took place outside of Australia, the judge had to decide on the meaning of "generally available" in a context that is not confined to the domestic jurisdiction. It would have been very peculiar if the Judge held that the information is "readily observable" only if it is "readily observable" in Australia. In Papua New Guinea, the decision is a public fact and hence, it had to be held as "readily observable matter".

In *Firns*, the distinguishing factor from *Kruse* was that Firns was in Australia when he received the information by phone. Thus, could a piece of information that was "readily observable matter" abroad be held as "readily observable" in Australia? If one takes Kruse's conclusion as the statement of law on the meaning of "readily observable matter", then jurisdictional borders have no effect on the nature of information that is readily observable in a foreign jurisdiction. This reasoning was espoused in *Firns*. I do not however support the decision in *Firns* and will explain why.

The majority[35] of the New South Wales Criminal Court of Appeal, led by Mason P, was of the view that "readily observable matter" cannot be confined to observation by the Australian public as traders of many jurisdictions can trade on the Australian Exchange. Mason P was of the view that as the judgment handed down in open court was available, understandable and accessible to a significant group of the public, namely the ones present in the court, thus, the judgment was readily observable to this class. Thus, since the judgement was readily observable, it did not

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[35] Firns was convicted at first instance and Judge Sides QC held that for the information to be generally available, it had to be readily observable in Australia. Firns appealed and his appeal was held to be successful by a majority in the New South Wales Court of Criminal Appeal. The dissenting judge, Carruthers AJ, agreed with the lower court, saying that "readily observable matter" cannot operate in a vacuum and must relate to a class of persons who are capable of trading in the share market in Australia, and thus, such class of persons must include the Australian public. He also argued that the judgment handed down in Papua New Guinea in open court was "readily available" but not "readily observable".

matter how many people actually observed it. Observability could not be confined to observation directly by unaided human senses and should include observation via the use of various forms of media or telecommunications.

In this day and age where information may be transmitted easily regardless of jurisdictional borders, to confine "readily observable matter" to within the borders of the jurisdiction concerned is rather archaic. However, I submit that "observability" is a quality that allows primary discernment by any of the senses of a person in the public arena, or primary discernment by a person via telecommunications or electronic means that are commonly used.[36] Thus, whether a person hears the matter over the radio or receives a summary of a news report over a WAP-enabled mobile phone, such a matter would have been "observed" by him. Since observability is a quality that allows primary discernment or perception, a matter that may only be made known by another's conveyance, ie capable only of secondary receipt, is not observable. Thus, although Mason P stated that observability should not be confined to direct observation by senses and should include observation via telecommunications or internet means, Mason P omitted to state whether or not such observation by telecommunications or electronic means is primary observation or secondary receipt.[37]

It is submitted that the court should have examined whether or not Firns could have observed the judgement in the Papua New Guinea court himself without his father's phone call. But no evidence was led in the court to show whether or not at the point in time when Firns bought the shares, the decision had been broadcast over the Internet or had been documented in any public repository of information.

It is also submitted that the court should have considered the applicability of the second limb in the definition of "information generally available" to determine the nature of the information in *Firns*. The second limb deals with "publishable information" and requires that a reasonable period should have elapsed after publication of such information to allow dissemination amongst likely investors for the information to be regarded as generally available. This limb is, I submit, to be the limb that should have been applied to *Firns* as there was no "observed matter" in issue. Firns obtained the information via his father's phone call and it had not been proved that primary discernment of the information could have been undertaken by himself. Thus, to determine in this case whether the information was public or not, the court should have referred to the limb

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[36] See the ordinary meaning of "observability" in the Oxford English Dictionary, 2nd Ed (Oxford: Clarendon Press, 1990) that defined observability as "a thing that may be observed or noticed, something that can be perceived more or less directly, knowable through the senses".

[37] See also critique of the *Firns* decision in the CASAC Discussion Paper on Insider Trading (June 2001) in paras 2.41 to 2.50.

relating to publishable information and not readily observable matter. This issue was examined by the Company and Securities Advisory Committee[38] of the Australian Securities and Investment Commission which has produced a discussion paper[39] in June 2001 ("CASAC paper"). If the court had made a determination based on the limb relating to publishable information, Firns would have failed in his appeal as a reasonable amount of time had not elapsed since the handing down of the judgment in the Papua New Guinea court for effective dissemination of the information to investors, and thus, the information he had traded on would be non-public in nature.

The CASAC paper proposed reforms to the insider trading legislation to overcome the consequence of *Kruse* and *Firns*, *ie* corporate officers who become aware of any "readily observable matter" affecting their company, such as a court judgment or a natural disaster, can trade immediately in the company's securities, before the market becomes aware of that matter. The Committee was of the view that limb (b), which deals with publishable information, should take priority in determining if a piece of information is "generally available", and only those matters that do not fall within that limb may be considered as to whether they fall within "readily observable matter". The limitation of the scope of application of limb (a) is, in the view of CASAC, in line with the original spirit of the Griffiths Committee[40] that initiated the insider trading reforms in 1989, which sets out to prevent insiders from getting an unfair headstart over other market participants.[41]

However, there is also room to consider if the effect of *Kruse* and *Firns* may be overcome by tighter continuous disclosure requirements imposed on office holders of corporations. CASAC proposes that these corporate officers be required to wait a reasonable time for the matter to be publicly disseminated before they can lawfully trade.[42] This view is also expressed by John Kluver[43] in a reported interview with *The Business Daily*,[44] and is

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[38] CASAC was established under Part 9 of the Australian Securities and Investments Commission 1989, in September 1989. CASAC's functions are to make proposals and carry out law reform in relation to a national scheme law, or laws relating to corporations, securities and futures industries.

[39] The paper can be downloaded from the Australian Securities and Investments Commission's website on http://www.asic.gov.au.

[40] See para 4.5 of the Griffiths Committee Report. The Committee clearly stated that "it is clearly incompatible with the intent of the legislation if an insider gains an advantage from the dissemination of inside information before the market has had a reasonable opportunity to absorb that information" (para 4.5.7).

[41] See para 2.28, CASAC Discussion Paper on Insider Trading (June 2001).

[42] However, as commented by Janine Pascoe in "Insider Trading law Reform in Malaysia: Lessons from Down Under" [2000] 2 MLJ xxxii, continuous disclosure would not apply to persons who have no obligation to disclose; for example, in the scenario of *R* v *Evans and Doyle*.

[43] John Kluver is the Executive Director of CASAC.

[44] Interview with John Kluver, *The Business Daily* (18 July 2001): http://www.businessdaily.com.au/robertson/archive/180701.htm.

similar to the views expressed in laymen circles.[45]

It is to be noted that the new Financial Services Reform Act 2002 in Australia did not reform the definition of "information generally available" in respect of the relationship between the limb regarding "readily observable matter" and "publishable information". The Act also did not attempt to clarify the meaning of "readily observable matter". Thus, in Australia, until the law is further reformed, "readily observable matter" would extend to matters outside of Australia and need not be primarily discerned.

This is a conclusion that may result in the practical consequence of favouring the sophisticated investor who may be able to access more remote information, albeit in the global public domain, and prejudice the less savvy investor whose store of information may be more localised. It may be arguable whether the information-based approach in regulating market behaviour should focus on making information available or making information accessible. It is therefore submitted that this limb actually "muddies the waters" in the definition of price-sensitivity. It is hoped that should a similar issue arise in Singapore out of facts similar to Firns, the court determine carefully which limb relating to the definition of "information generally available" should be applicable.

(b) "*Publishable information*": The second limb of the definition of "information generally available" pertains to information that has been made known in a manner that would or would be likely to bring the information to the attention of persons who commonly invest in those securities, and the price of those securities is likely to be affected by the information, and a reasonable period for dissemination of such information among such persons has elapsed.

There is no definition in the Securities and Futures Act or the Australian Corporations Act 2001 as to what suffices for information to be made known in a manner that is likely to bring to the attention of that class of persons who commonly invest in securities of a kind whose price might be affected by the information. Such a requirement at first blush does not seem to stretch as far as publication to the public at large. However, Baxt, Ford and Black[46] are of the view that the requirement of "publication" to a class of persons who commonly invest in those securities is not indistinguishable from a requirement to put the information into the public domain, *ie* to release to the public at large. The authors believe that restricted publication would not suffice to make information generally available under this limb. The authors are of the view that the approach to be taken in Australia should be similar to the US approach in *Re Faberge Inc*,[47] in that the

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[45] Issue 6 of the Discovery Smarts Newsletter published by the SMARTS Limited, a voluntary software support organisation.

[46] R Baxt, H A J Ford and A J Black, *Securities Industry Law*, 4th ed (Sydney, NSW: Butterworths, 1993), see para 1210.

[47] 45 SEC 249.

information should be calculated to reach the securities market place generally in order for it to be publicly available. Thus, a media release would probably be one of the best ways to meet the "generally available" requirements. I am inclined to agree with that position as it ensures that the playing field in the securities market is made as level as possible.[48]

This limb also requires that a reasonable amount of time for dissemination amongst the class of persons referred to above must have elapsed before the publishable information is to be considered as "generally available". Again, there is no legislative guidance on what an amount of "reasonable time" for dissemination would be. The Griffiths Committee Report[49] recommended that this be dealt with on a case by case basis as the issue arises in court.

In the case of *R* v *Evans and Doyle*,[50] the issue of what was a reasonable period of time for dissemination was raised but there was no determination as the case turned on a technicality.[51] In that case, Evans and Doyle wanted to purchase the shares of the corporation concerned immediately after making a press release available to a journalist. They intended to make a press release of the information they possessed at 2 pm and between 2 pm and 2.07 pm, they made arrangements with their brokers to purchase shares after the public announcement. However, due to certain delays, the information could only remotely be said to be publicly available at 2.50 pm. Thus, at the material time the defendants made arrangements with their brokers, the information was not generally available and thus they were prosecuted for insider trading. However, the case turned on a technical point and the court did not deal with the possibility where the information had been released on time as scheduled by the defendants, *ie* whether 30 minutes or so would constitute sufficient time for dissemination so that the information would be regarded as generally available? This is a missed

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[48] Michael Ziegelaar, "Insider Trading Laws in Australia" in *Securities Regulation in Australia and New Zealand*, *supra*, n 24. It is noted that Michael Ziegelaar expressed the view that a court would be likely to hold that disclosure to brokers and institutional investors would be sufficient. This view is probably based on the assumption that brokers and institutional investors make up the majority of the investing population and disclosure to them should be sufficient. However, it is doubted that the court would adopt an interpretation that so obviously favours sophisticated investors over small-time investors.

[49] Para 4.5.8.

[50] [1999] VSC 488. In this case, the defendants who were related to a private mining company were privy to information on the discovery of high-grade nickel sulphide in an area where a publicly listed corporation had interests. Thus, they had inside information without being connected to the corporation. This was a case where unconnected persons were prosecuted for insider trading, and although no conviction was obtained due to a turn in technical interpretation of the law, this prosecution showed that the information-based regime has made possible an action which could not have been proceeded under the old law.

[51] The case turned on whether or not the prohibited act of buy, sell or procure was committed, and since the act in question was the making of an agency agreement with a broker with the intention to buy or sell, and not the actual transaction to buy or sell, it was held that there was no insider trading.

opportunity[52] for judicial clarification of a "reasonable time for dissemination" (albeit it would have been obiter), and in this day and age where information can be accessed through e-mail prompts, news prompts on WAP phones and Internet news reports, 30 minutes could well have been held as a reasonable time for dissemination.

(c) "*Deduction, conclusions or inferences drawn from readily observable matter or publishable information"*: Information is also treated as "generally available" if it consists of deductions, inferences or conclusions drawn from readily observable matter or publishable information.

This limb protects investment analysts who trade in securities in so far as the information upon which they rely is already generally available. However, research and analysis carried out by analysts based on material non-public information would not be afforded statutory protection.[53]

It is noted that in the US, a more liberal position is taken with respect to research and analysis of material non-public information. In *Dirks* v *SEC*,[54] Dirks was proceeded against for abetting securities fraud, ie insider trading by his clients as he discussed inside information he had received regarding an insurance company with them. However, the court held that as Dirks gained no personal benefit and the purpose of the discussions was to expose a fraud that the insurance company was committing, an exception was created to allow investment analysts to communicate inside information if it is for a business purpose that does not bring personal gain to the analyst. In Australia, the CASAC Paper[55] emphatically stated that it does not support the US position. It is also not certain as to what selective disclosure[56] of inside information may entail and thus I would advocate a cautionary approach.

(3) *Objective test of price-sensitivity—"reasonable person expects information to have a material effect on price or value of securities"*: Secondly, the definition of "price-sensitive information" in both sections 218 and 219 of the Securities and Futures Act and section 1002G of the Corporations Act 2001 requires an objective test of the price-sensitivity of the information concerned.

The objective test is that a reasonable person would expect that the information would have a material effect on the value of the securities concerned. The Griffiths Committee in its deliberations stated that the

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[52] See also comments by G Walker, "Insider Trading in Australia – When is information generally available?" May 2001 Comp and Sec LJ 213.

[53] See Baxt, Ford and Black, *supra*, n 46, para 1211, and CASAC Discussion Paper on Insider Trading, paras 2.68 to 2.84.

[54] 463 US 646 at 659.

[55] See para 2.74.

[56] For some general discussion, see Victor Brudney, "Insiders, Outsiders and Informational Advantage under the Federal Securities Laws" 93 Harv L Rev 322; Brountas, "Rule 10b-5 and Voluntary Corporate Disclosure to Securities Analysts" (1992) 92 Columb L Rev 1517.

adoption of a reasonable person standard with respect to materiality is essential as it serves to remedy the defect of the then existing law which did not provide for any statutory definition of price-sensitivity. The reasonable person standard is also a concept familiar to courts, as opposed to a percentage formula to calculate movement in price, and there would be no necessity to prove materiality of information by expert evidence. Further support for the adoption of the reasonable person standard lay in the fact the standard is applied by American courts and it is desirable to achieve some form of consistency in view of the growing international reach of the world's securities markets.[57]

The definition of materiality of the inside information is found in both section 216 of the Securities and Futures Act and section 1002C of the Australian Corporations Act 2001, as "would be likely to influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the securities in question". Baxt, Ford and Black in their practice-oriented Australian text *Securities Industry Law*[58] are of the view that the objective test of materiality is a question for the court and not a question of fact. The authors suggest looking to the American experience. *TSC Industries Inc* v *Northway Inc*[59] is the landmark case that held that information would have a material effect on price if there is a substantial likelihood that a reasonable shareholder would consider important in deciding how to exercise his rights attached to the shares. This test has been applied in many US cases.[60] I note that the Griffiths Committee had opined that adopting a similar test as in the US was in line with the growing trend of international securities markets.[61]

However, it is submitted that in Singapore, the test for materiality likely to be adopted is whether a reasonable investor would be influenced by knowledge of the information when deciding whether to buy or sell shares.[62] This test has been espoused to be the test for materiality of information in a recent Malaysian case,[63] based on the Malaysian Securities Industry Act 1983 whose provisions are modelled after the Australian

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57 Para 4.4 of the Griffiths Committee Report.

58 *Supra*, n 46 at 303-306 (4th ed).

59 426 US 438 at 449 (1976).

60 The application of the reasonable shareholder test was seen in *Elkind* v *Liggett & Myers Inc*, 635 F 2d 156 (1980), where a piece of information was proven to have received mixed reactions amongst investment analysts, *ie* some thought that it was material while others did not. It was held by the court that the information could not be said to have a material effect on price. *SEC* v *Texas Gulf Sulphur Co*, 401 F 2d 833 (1968) held that where information related to a future event had a high probability of occurrence, and it passed the "substantial likelihood" test outlined above, that information would also be regarded as material with respect to the price of the securities of the corporation concerned.

61 Para 4.4.15 of the Griffiths Committee Report.

62 Walter Woon, *Butterworths Handbook of Singapore Securities Law* (Singapore: Butterworths, 1998) at 164; see also *PP* v *Allan Ng Poh Meng*, [1990] 1 MLJ v.

63 *PP* v *Chua Seng Huat* [1999] 3 MLJ 305.

Corporations Law 1990.[64] In light of this decision, it is submitted that our courts are likely to hold that *Chua Seng Huat* would be very persuasive in Singapore as the legislative provisions in question are in *pari materia*, both being of Australian origin. It is also noted that although the US test of "substantial likelihood" as explained above is well-known, it was not cited in *Chua Seng Huat.*

3. Mens rea *of knowledge of non-public nature of information*

The *mens rea* prescribed in both sections 218 and 219 is that of knowledge that the information concerned is non-public and price-sensitive. However, there are different levels of knowledge required under sections 218 and 219. This is different from the Australian approach which has prescribed a uniform *mens rea* for the information-based approach, that is, "knows or ought reasonably to know", and has made no distinction between connected insiders and unconnected insiders.

The level of *mens rea* required under section 218 is "know or ought reasonably to know", *ie* both actual and constructive knowledge[65] are included. This is based on section 1002G of the Australian Corporations Act 2001. This is different from the previous regime in Singapore where it was held that although knowledge is not expressly found in section 103 of the repealed Securities Industry Act, it should be read into the statute and should mean objective knowledge.[66]

Strangely enough, section 219(b) of the Securities and Futures Act which deals with the information-based regime against insider trading in respect of unconnected persons provides only for actual subjective knowledge. It is puzzling to the author why constructive knowledge should be left out. The consequence would be that the prosecution has to prove actual subjective knowledge which is very difficult because the defendant can always deny such knowledge. No explanation has been found for such a deliberate differentiation in the Second Reading speech for the Securities and Futures Bill 2001. It is this author's view that the higher threshold for *mens rea* in section 219 would be counter-productive and not in sync with the one of the reform objectives of easing the problem of proof for the prosecution.

There are two matters that the prosecution has to prove that the insider had the requisite *mens rea*. The first is with regards to the non-public nature of the information.

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[64] Section 89E of the Malaysian Securities Industry Act 1983 is based on section 1002G of the Australian Corporations Law 1990, which is the same as section 1002G of the Australian Corporations Act 2001 on which our sections 218 and 219 are based.

[65] *PP* v *Teo Ai Nee* [1995] 2 SLR 69.

[66] *PP* v *Ng Chee Keong, supra.* See also Leow Chye Sian, "Insider Trading: *PP v Ng Chee Keong & Anor*" [1999] 4 SLR 56 May 2000 Comp & Sec LJ 233.

In *R* v *Evans and Doyle*,[67] when the defendants dealt with the securities of the corporation about which they had obtained inside information, they thought that the information was already made public by the press release they initiated 30 minutes before the dealing took place. The defendants pleaded that they did not know that the information was not made public. On the facts, the trial judge found that the plea was not true. But the judge did not comment on whether an innocent mistake as to the nature of the public could negative actual and constructive knowledge of the nature of the information. I submit that if an innocent mistake has been found, it should suffice to negative both actual and constructive knowledge.

The other matter that the prosecution has to prove that the insider had the requisite *mens rea* is that the information might have a material effect on the price of the securities concerned. This limb has been criticised by Michael Ziegelaar[68] as placing an onerous burden on the prosecution as the defendant has the most knowledge of the facts and would be in the best position to prove that he did not know that the information was materially price-sensitive. However, the difficulty as stated is a problem of proof. As discussed above, Singapore has attempted to avert the problem of proof for cases where connected persons are proceeded against for insider trading.

4. *Intention to use inside information?—overruling of* PP *v* Ng Chee Keong

Section 220 of the Securities and Futures Act is unique to Singapore and expressly provides that there should not be a requirement to prove, as an element of *mens rea* that the defendant had intended to use the information in insider trading. The intention behind this section is to overrule a local Court of Appeal case.

By this section, the Singapore Court of Appeal case of *PP* v *Ng Chee Keong*[69] is overruled. In that case, the Yong Pung How CJ held that the requirement of knowledge that information is non-public and price-sensitive under section 103 of the Securities Industry Act is to be proved objectively, and thus, without any further express reference to *mens rea* in the section, the offence of insider trading under that section would be read as creating strict liability once the facts of possession of the inside information and the objective nature of the information has been proved. The learned Chief Justice was of the view[70] that "no legislative intent would be served by adopting a strict liability approach toward trading by an insider as it would discourage entrepreneurial persons from holding directorial positions in

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67 *Supra*, n 62.

68 G Walker, B Fisse and I Ramsay, *Securities Regulation in Australia and New Zealand*, *supra*, n 24 at 571-572.

69 [1999] 4 SLR 56.

70 See also Leow Chye Sian, "Insider Trading: *PP v Ng Chee Keong & Anor* [1999] 4 SLR 56", May 2000 Comp and Sec LJ 223.

companies"[71] and that "*mens rea* is presumed to be a necessary ingredient [in offence-creating legislation] unless there are clear words to indicate the contrary."[72] Thus, the Yong CJ held that intention to use inside information had to be proved in proceedings against an insider. The learned Chief Justice's views were *obiter* as on the facts, it had not been proven that the information was price sensitive; thus, no conviction was obtained.

The new Securities and Futures Act has revamped the statutory definition of insider trading and as elaborated above, the *mens rea* of actual or constructive knowledge is already provided for. Thus, the Chief Justice's views espoused in *Ng Chee Keong* are no longer applicable. The legislature may be concerned that the lack of an express overruling of the requirement to prove "intention to use" may result in the courts' adherence to the *Ng Chee Keong* approach even under the new law; thus, express overruling was the approach taken.[73]

I am of the view that the *mens rea* of "intention to use" would be almost impossible to prove. The approach taken in *Ng Chee Keong* also totally ignored the legislative intent behind the insider trading prohibition under the former law[74] and thus, section 220 is timely.

C. *Prohibited acts*

The prohibited *actus reus* found in sections 218 and 219 of the Securities and Futures Act is identical to section 1002G of the Australian Corporations Act 2001.[75] These provisions are a great improvement over the previous law as they contain clear guidance on what the prohibited acts are and who may be liable. These provisions also significantly addressed the problem faced by enforcers against tippees under the previous law, where it had been difficult to prove that persons who had been tipped off by connected insiders have the requisite "arrangement" or "association" with such connected insiders in order to establish liability.[76] Reforms to tippee

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71 See para 45D, pg 68 *supra* n69

72 See para 40C, pg 67, *supra* n69

73 See Second Reading Speech for the Securities and Futures Bill 2002 by DPM Lee Hsien Loong on 5 October 2001, where it is said that "[the court's] interpretation of section 103 of the Securities Industry Act negates the very intent it was meant to remedy. The requirement of proof of 'intent to use' information by the prosecution makes it too onerous and reduces the effectiveness of insider trading laws."

74 In the Second Reading Speech by Dr Richard Hu for the Securities Industry Bill 1986, it was stated that "[under] the new provision (as it then was)… an offence is committed whether or not the dealing is undertaken with the intention of using the information to gain an advantage; the purpose of dealing is irrelevant."

75 It should be noted that the Australian Financial Services Reform Act 2002 has totally changed the terms of *actus* under section 1002G of the Australian Corporations Act 2001. "Subscribe, purchase or sell" have been replaced by "apply for, acquire or dispose of". However, it is beyond the scope of this article to discuss the differences between the Singapore laws and the new Australian laws.

76 See generally Annex 1.

liability is a major achievement by the Griffiths Committee[77] and the adoption of these provisions into the Singapore legislation is indeed a welcome move.

1. *Primary activities*

An insider is prohibited from subscribing for, purchasing or selling securities, or entering into an agreement to do so, or procuring another person to subscribe for, purchase or sell securities or enter into an agreement to do so.

The term "subscribe" primarily refers to subscriptions for new issues of securities. The use of "subscribe" under the Australian Corporations Act 2001 was to remedy the defect that share subscriptions for new issues was not covered under the old law.[78]

The term "purchase" is defined in section 214 of the Securities and Futures Act as including an option or right under a contract or taking an assignment. "Sell" is also defined in the same section as including the grant or assignment of an option. These terms have replaced the single term of "deal" as the prohibited *actus* under the previous law.

The term "deal" under the previous law was defined in the Securities Industry Act as "dealing in securities", which meant that a person, whether as principal or agent, was considered as making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into —

(a) any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting securities; or
(b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities.[79]

The newly drafted prohibited *actus* under the Securities and Futures Act is more specific in nature, and provides for the express application of the insider dealing prohibitions to the grant and assignment of options and subscription for newly issued securities. But it is not certain whether other forms of dealing in securities may emerge in the future to result in the transfer or contingent transfer of interests, and such other forms of dealing or transfer that would not be caught within the specific prohibited *actus* of the legislation.

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77 See generally para 4.7 of the Griffiths Committee Report.

78 *Hooker Investments Pty Ltd* v *Baring Bros Halkerston & Partners Securities Ltd* (1986) 10 ACLR 524.

79 Section 2 of the Securities Industry Act (Cap 289).

The previous use of "dealing" is submitted to be wider as it allows for any form of dealing in making an agreement the purpose or pretended purpose of which is to make a profit from the yield of securities.[80] Thus, the old law may allow new forms of trading in securities or transfers to be interpreted by the court as falling within the act of "dealing" as the definition under the old law is targetted towards the object of the activity. The court may take a stricter approach to interpret "subscribe for, purchase or sell", although in the definitions of "purchase" and "sell", the definition is only inclusive and not comprehensive in nature.

2. *Procurement of insider trading*

Sections 218 and 219 of the Securities and Futures Act also prohibit an insider from procuring another to subscribe for, purchase or sell shares. The term "procure" is defined in section 217 as inciting, inducing or encouraging an act or omission. This is taken from section 1002D(2) of the Australian Corporations Act 2001. It is submitted that the ordinary meaning of "procure", that is to "contrive, devise with care, or endeavour to bring about"[81] would be relevant to the interpretation of this term in the Act.[82] The proactive nature of this term also highlights the difference between this limb and the limb relating to "direct or indirect communication" in sections 218(3) and 219(3) which, as will be discussed later, is more akin to tippee liability, as opposed to primary liability under this limb.

It is also noted that in the prohibition against procurement in sections 218 and 219, it is not stated that there is a need to prove that the procurer must know or reasonably ought to know that the other person would subscribe for, purchase or sell securities. This is different from the prohibited *actus* of "directly or indirectly communicating inside information", when the insider knows or ought reasonably to know that the other person would subscribe for, purchase or sell shares or procure another to do so.

3. *Communication to facilitate insider trading*

Sections 218(3) and 219(3) also prohibit an insider from communicating, directly or indirectly, inside information when he knows or ought reasonably to know that the other would subscribe for, purchase or sell

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80 There is virtually no case law containing any judicial interpretation of the term "deal".

81 *Oxford English Dictionary*, 2nd edition (Oxford: Clarendon Press, 1990).

82 It is also noted that in Stroud's Judicial Dictionary (6th Ed, 2000) and Words and Phrases Legally Defined (3rd Ed, 1989), "procure" has been defined in many criminal cases to involve an element of taking steps to see that a result is achieved (*per* Fry LJ, *Lawdner* v *Caledonian Rly* [1982] 1 Ch 73), and contrivance and management towards a desired end (*per* Sugerman J, *R* v *Castiglione* [1963] NSWR 1).

securities or procure another to do so. This limb is also taken from section 1002G(3) of the Australian Corporations Act 2001.

The "communication" limb has significantly and plausibly revamped the old tippee provisions as it no longer requires the proof of a formal arrangement or association between the tipper and tippee to make out an offence of insider trading, both of which were statutorily defined and could be narrowly interpreted.[83] This limb also covers both "direct and indirect communication", and thus, a hint of sorts would also likely be caught as "indirect communication".

D. *Exceptions to insider liability*

The Australian Corporations Act 2001 provides for a number of exceptions to insider trading liability, possibly in view of the expanded scope of liability created in section 1002G. This approach is also taken in the Singapore Act so that legitimate market activities would not be caught within the insider liability provisions.

Section 1002H of the Australian Corporations Act 2001 and section 222 of the Singapore Securities and Futures Act provide for an exception for redemption by a trustee of interests under a buy-back covenant in a trust deed. The rationale for the exception as noted in the Explanatory Memorandum to the Australian Bill[84], is that the buy-back price may not reflect the price of the securities if all material information underlying the securities were made known. Thus, this exception has been created to allow trust managers to redeem the securities whether or not they do so in the possession of price-sensitive information.

Section 223 of the Securities and Futures Act and section 1002J of the Australian Corporations Act 2001 provide for an exception for underwriters as underwriting share issues is the norm in the market. CASAC, in reviewing these provisions, expressed continuing support for their retention as communication of inside information to underwriters is essential in their decision whether or not to underwrite share issues.[85]

Section 226(2) and 227(2) of the Singapore Act are identical to sections 1002M and 1002N of its Australian counterpart, providing for an exemption for activities of corporations or partnerships which are separated by Chinese walls from other activities in the corporation or partnership which entail the possession of price-sensitive information. The CASAC has also its Discussion Paper for reform[86] doubted the effectiveness of Chinese walls in

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[83] See Annex 1 for a write-up on tippee liability under the previous law.

[84] See Michael Ziegelaar, "Insider Trading in Australia" in G Walker, B Fisse and I Ramsay, *Securities Regulation in Australia and New Zealand*, *supra*, n 24.

[85] Para 2.163, CASAC Insider Trading Discussion Paper, June 2001.

[86] Para 2.195, CASAC Insider Trading Discussion Paper, June 2001

quarantining inside information.[87] A discussion on the effectiveness of Chinese walls is beyond the scope of this article, and it remains to be seen if Australian Parliament will adopt CASAC's views in reviewing the Chinese walls defence.

Section 231 of the Singapore Act is based on section 1002T of the Australian Corporations Act 2001. The parity of information defence in section 231 is based on the underlying rationale against insider trading in that insiders abuse a superior position of knowledge to make a gain or avoid a loss at the expense of other investors. If the party on the other side of the bargain possesses parity of information, the playing field has not been tilted in favour of the insider and thus, there is no unfairness in the deal. However, on a faceless exchange, buyers and sellers are unlikely to know whom they transacted with. This defence is, it is submitted, applicable only to unlisted securities traded between known parties.

E. *Enforcement measures against insider trading*

As mentioned earlier, besides enforcement against insider trading under the criminal law, the Singapore Securities and Futures Act also contain civil penalty provisions largely modelled after the US Securities Exchange Act 1934.

In 2000, Singapore introduced the civil penalty regime as an alternative enforcement regime against insider trading. Insiders could be taken to task by the regulatory authority in Singapore in civil proceedings and if insider trading is proven on a balance of probabilities, the authority could obtain a fine or civil penalty against the insider, up to three times the amount of gain made or loss avoided by the insider.

The Australian Corporations Law,[88] as it then was, contained only criminal sanctions against insider trading, and the possibility of individual actions and Commission actions on behalf of the beneficiaries of a unit trust scheme, against the insider for compensation for their actual losses. The civil action for compensation is, I submit, a difficult one as it is costly for an

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[87] Professor Tomasic is skeptical of the defence of Chinese walls as he doubts that Chinese walls are effective in preventing overflow of information at all. He also supports his view by case law that has illustrated that the Australian court is skeptical of whether Chinese walls are effective in preventing a conflict of interest in professional firms. See the case of *Mallesons Stephen Jacques* v *KPMG Peat Marwick & Ors* (unreported, Supreme Court of Western Australia, 1990) concerning whether Chinese walls in professional advisory firms are effective in preventing a conflict of interest. Justice Ipp was of the view that a conflict of interest was a real possibility and Chinese walls have not successfully separated the different interests of the corporation. There is a large amount of academic discussion on the effectiveness of Chinese walls. See generally, Hall, "Are Chinese Walls Ever Effective?" Vol 10 n 9 International Company and Commercial Law Review (Sept 1999) at 276-9; Coull, "Conflicts of Interests and Chinese Walls" 1998 NZLJ 347; Midgley, "Confidentiality, conflicts of interest and Chinese walls" (1992) 55 MLR 822.

[88] 1990 Rev Ed.

individual or the regulator to mount an action fraught with problems of proof against an insider, and to prove actual loss, both in the respect of quantifying the loss as well as the fact that there was actual trade between the insider and the aggrieved plaintiff.

The US civil penalty provisions have proven to be effective against insider trading[89] and the treble penalty acts as an effective deterrent, if not an effective incentive for insiders to settle, albeit at a sizeable amount. The adoption of the civil penalty provisions from the US fits in well with the rest of the legislative fabric as it is in line with both the rationales of tackling insider trading effectively and easing problems of proof. In fact, the Australian Financial Services Reform Act 2002 contains a provision on civil penalty, up to A$200,000.[90] Thus, Australia seems to be of the view too that the civil penalty regime would be an enhancement to their existing framework.

V. Conclusion

Combating insider trading is a continuous exercise in both Singapore and Australia. In Singapore, although the Securities and Futures Act has been enacted, it has not yet come into force and it remains to be seen how courts here would interpret and apply the new provisions.

Australia has had ten years of interpreting and applying these provisions, and although CASAC is prepared to subject the entire regime against insider trading to review, including the information-based philosophy itself, this author submits that it is unlikely that the basic tenets of the regime would be reformed. In fact, the recent Australian Financial Services Reform Act 2002 did not make any significant amendments to the insider trading provisions.

In conclusion, I note that there are alternative approaches taken by other jurisdictions in ensuring robust market enforcement against insider trading. The Financial Services and Markets Act 2000 passed by the UK[91] allows the regulatory authority to enforce against market abuse, such "abusive" behaviour, including insider trading, being set out in the relevant code of conduct issued by the authority. Enforcement measures would primarily be administrative in nature. As opposed to Australia and Singapore who have strengthened the criminal law against insider trading, the UK has strengthened its administrative arsenal. I see the preliminary advantage of such a system in its flexibility and that the burden of having to prove legislative elements to a certain standard of proof is removed. Administrative sanctions may also be swift and informally carried out and

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89 See generally, Committee on Federal Regulation of Securities, "Report of the task force on SEC settlements", 47 Buslaw 1083 (May 1992).

90 *Supra*, n 30.

91 This may be found in Her Majesty's Stationery Office website at http://www.hmso.gov.uk.

may be of significant deterrent value. However, as this jurisdiction has decided to retain a formal framework of legislation to combat insider trading, we should give it some time to see how it may work.

ANNEX 1

Insider Trading Laws in Singapore prior to passing of new Act

The insider trading laws in Singapore prior to the passing of the new Act were found in section 103 of the repealed Securities Industry Act,[92] and were based on section 128 of the Australian Securities Industry Act 1980 (later superseded by the Corporations Act 1989). The former regime is thus equivalent to a preceding Australian regime which has been repealed for more than a decade.

The "connected person" regime pinpointed three categories of insiders, the "direct insider", "indirect insider" and the "tippee".[93]

Direct Insider

The "direct insider"[94] was a connected person to a particular corporation[95] who possessed information by reason of the connection and intended to use such information, knowing it to be price-sensitive. He then dealt in the securities of his own corporation.

Possession of Information

Possession of such information must be by virtue of the connection.[96] Possession could be proved by circumstantial evidence. If a person had attended meetings where such information was likely to be discussed, for example, that could be used to prove that he was in possession of such information.[97]

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92 Formerly Cap 289.

93 See generally, Walter Woon, *Butterworth's Handbook of Securities Law in Singapore* (Singapore: Butterworths, 1998) at 158-170.

94 Section 103(1) of the repealed Securities Industry Act (Cap 289).

95 The Act sets out who connected persons are, namely, an officer of the corporation, judicial manager or other administrator, substantial shareholder, or occupier of a position in the corporation which gives that person access to price-sensitive information, see section 103(9) and (12) of the repealed Securities Industry Act (Cap 289).

96 *Darvall* v *Lanceley* (1986) 10 ACLR 893.

97 *Waldon* v *Green* (1977-78) 3 ACLR 289; see also *Ryan* v *Triguboff* (1976) 1 ACLR 337.

Intention to use Information

The *mens rea* of "intention to use", although not expressly found in the legislation, was expressed to be indispensable by the Court of Appeal in Singapore in the case of *PP* v *Ng Chee Keong*.[98] This was because without the nexus between possession of the information and intentional use of the information to deal in shares, the offence would be one of strict liability. The Court was of the view that strict liability was not envisaged under the Act and thus, the element of intention had to be read in.

Price-sensitivity and nature of information

The Act also required the prosecution to prove objectively that the information concerned was price-sensitive in nature. Examples of information that had been held to be objectively price-sensitive were information on an impending takeover bid,[99] knowledge that a company was facing a financial crisis,[100] and knowledge of the year-end results of a company.[101] Professor Walter Woon summed up the test for determining whether information was price sensitive or not by asking if a reasonable investor would be influenced by knowledge of the information when deciding whether to buy or sell the shares.[102]

On the issue of whether the information in question needed to be "specific" in nature, an old Australian case based on a provision with different wording held that the specific nature of the information must be made out.[103] The case was quoted with approval in the local case of *PP* v *Choudhoury*,[104] but in more recent Australian cases based on section 128 of the Australian Securities Industry Act from which our provision was derived, it was stated that the information in question was not required to be "specific"—a hint that may suggest the information or enable an inference to that information would suffice.[105]

Under the old law, the prosecution also had to prove objectively that the information was not generally available to the public. Such information need not be formally announced in order to make it generally available. Documents filed in court referring to that piece of information would make

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98 [1999] 4 SLR 56.

99 *Kinwat Holdings Pty Ltd* v *Platform Pty Ltd* (1982) 6 ACLC 398; *PP* v *Yong Teck Lian* (1989) (District Court, Singapore).

100 *PP* v *Choudhoury* [1981] MLJ 176.

101 *PP* v *SA Shee & Co (Pte) Ltd* (1993) (District Court, Singapore, unreported).

102 See *PP* v *Allan Ng Poh Meng*, [1990]1 MLJ v.

103 *Ryan* v *Triguboff* (1976) 1 NSWLR 588.

104 [1980-81] 1 SLR 146.

105 *Waldon* v *Green* (1977-78) 3 ACLR 289, *Hooker Investments Pty Ltd* v *Barings Brothers Halkerston Securities Ltd* (1986) 10 ACLR 462.

it generally available.[106] Thus, some extent of dissemination would be needed to make the information generally available.

Indirect Insider

The "indirect insider" was also connected[107] to a certain corporation, and possessed price-sensitive inside information by reason of the connection. Such information related to transactions of the corporation he was connected with, and another corporation. He then dealt in the shares of the corporation he was connected with or the other corporation.[108] "Transactions" could cover dealings including impending takeover bids, merger and acquisition discussions.

Tippee liability

The third category of insiders pin-pointed under the old law, the "tippee", was not an office-holder in the corporation concerned. A tippee's "connection" to a corporation was through an arrangement he made with an informer or his association[109] with the informer, who was presumably a connected person as described above ie either a direct or indirect insider[110], in order to "obtain" inside information. Proof of "obtain" was unlikely to require a deliberate attempt on the tippee's part, such that an unsolicited receipt of information could suffice.[111] However, it had been criticised that the tippee provisions were largely unworkable as the requirement of "association" was too specific, and the alternative requirement of "arrangement" purported some formality and continuity, both of which were difficult to prove, as tippee activities were likely to be very opportunistic in nature.[112]

Under the repealed Securities Industry Act, it may be broadly rationalised that connection to a corporation was the key element that defined an insider for the purposes of establishing liability. The assumption seemed to be that persons who would trade with an unfair market advantage over others would be people who were also in privileged positions to obtain

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106 *Kinwat Holdings Pty Ltd* v *Platform Pty Ltd* (1982) 6 ACLC 398.

107 Section 103(2), read with subsections (9) and (12).

108 See generally section 103(2) of the Securities Industry Act.

109 An "associated person" is defined in section 3 of the Securities Industry Act and refers to a director, secretary, trustee, or a person who is acting in concert with another.

110 The tippee knows or ought reasonably to know that the informer himself is precluded from dealing in the securities; thus, the informer is presumably a connected person who is a direct/indirect insider.

111 *Attorney-General's Reference (No 1 of 1988)* [1989 All ER 1].

112 See chapter 2 of Tomasic, *Casino Capitalism? Insider Trading in Australia* (published by the Australian Institute of Criminology, available on http://www.aic.gov.au. In Singapore, it is documented at 166 in Walter Woon, *Handbook of Securities Law in Singapore*, that only one prosecution against a tippee has been mounted.

the unfair advantage. However, if a coffee lady overheard an office conversation which turned up price-sensitive information and dealt in those shares referred to in the price sensitive information, she would not be regarded as an insider under law. She would have obtained an unfair advantage but would not have been caught within the ambit of the former law.