INSIDER TRADING IN SINGAPORE AND MALAYSIA

The legal framework for the control of insider trading in Singapore and Malaysia reveals a novel and multifaceted scheme which differs somewhat from other models; and the experience of insider trading control has been uneven. The object of this article is to explore in some detail the underlying policy implications and efficacy of the regulatory scheme in both countries.

The stereotyped insider transaction involves a person who by virtue of his relationship with a company is in possession of corporate information relating either to the company or its securities, and the use of such information for personal advantage, at the expense of shareholders who have bought or sold their shares to the insider without knowledge of such information.

The free market concept of the stock exchange, that is, a bargain at arm's length with each party having access to similar material information is explained thus:

> It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing facts affecting the value of the stock, known to the majority stockholder by virtue of his insider position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers. The duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the uninformed minority stockholders. It is an attempt to provide some degree of equalization of bargaining position in order that the minority may exercise an informed judgment in any such transaction.[1]

It is therefore a subversion of the free market concept of most stock exchanges to permit, *inter alia,* insider trading. The information which has an inherent value, is made available to the insider for his use for the benefit of the company. The use by the insider of such information for his personal benefit whether directly or indirectly is therefore an improper use of such information. The price to be paid for a security on a stock exchange is to be arrived at by free market forces. Insider trading subverts this because the price arrived at does not reflect market forces for the disclosure of such information would affect the security's price significantly. Further, to permit insider trading is to encourage a conflict of interest to arise in a director having access to price-sensitive information the use or disclosure of which is apt to be affected by the director's own financial interests in trading. Insider trading is a perennial problem in most stock markets. Like prostitution it cannot be totally eradicated but its most flagrant abuses, when the

1. *Speed* v. *Transamerica Corp.* 361 F 2d. 260 at p. 268. See generally, W. Painter, *Federal Regulation of Insider Trading,* Virginia: Mitchie Co., 1968, and L. Loss "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States" (1970) 33 M.L.R. 34.

public interest in a fair open market is threatened, require checks and controls. Minor breaches of the insider rules do not surface for public condemnation because no machinery for constant public disclosure of holdings exists and no administrative unit exists to enforce these breaches. Flagrant abuses on the scale of the Timmins strike in Texas Gulf Sulphur[2] or the Poseidon strike in Australia[3] generate the outcry for regulation.

In this paper, an underlying assumption is that insider trading is undesirable and that it should be outlawed in no uncertain terms. The school of thought that finds insider trading unobjectionable on the theory that such information is one of the implicit perks to insiders, finds little support outside the United States.[4] It is also assumed that it is felt desirable to encourage controllers to be owners of shares in the company. Indeed the outcry about the divorce of ownership from control in the modern corporation implicitly sanctions the desirability of directors holding shares in their own companies.[5]

THE COMMON LAW POSITION

The contractual base of insider trading is self-evident. At common law, there is no general duty on one contracting party to disclose facts that are within his own knowledge and not shared. Silence or non-disclosure affords relief only in three instances: (i) where silence distorts a positive representation;[6] (ii) where the contract requires *uberrimae fides;*[7] and (iii) where there is a fiduciary relationship.[8]

In the English common law system, the inability of the company to transact in its own shares,[9] makes these rules of liability inoperative

2. See p. 366, *infra.*
3. See p. 363, *infra.*
4. Manne, *Insider Trading and the Stock Market,* Free Press, 1966. The approach of Professor Manne is economic: "To the economist individuals are a fungible commodity, each substitutable for another. The economist, viewing the issue of insider trading, will ask how all shareholders are affected financially by the practice, whether it results in a desirable allocation of resources, and whether the return to insiders reflects a competitive or monopoly gain." Professor Manne argues that the profits made by insiders are not made at the expense of anyone. The only persons disadvantaged are the speculators, for the long term investor by holding on to his shares will ultimately acquire the value of any insider information by way of the increased value of his shares on the stock market.
5. See generally John Galbraith, *The New Industrial State*, Pelican, 1967 and A. Berle & G. Means, *The Modern Corporation and Private Property,* Harvest Books, rev. ed., 1968.
6. *Oakes* v. *Turquand and Harding* (1867) L.R. 2 H.L. 325.
7. E.g. insurance contracts.
8. "Whenever the relation between the parties to a contract is of a confidential or fiduciary nature, the person in whom the confidence is reposed and who thus possesses influence over the other cannot hold that other to the contract unless he satisfies the court that it is advantageous to the other party and that he has disclosed all material facts within his knowledge." *Per* Scrutton L.J. in *Moody* v. *Cox and Hatt* [1917] 2 Ch. 71 at p. 88.
9. See *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409; and s. 67 of the Singapore Companies Act, Cap. 185, and the Malaysian Companies Act, 1965 (Revised Act 125, 1973).

as relates to the company and shareholders, for the company itself can never be (except illegally)[10] a contractual party in the purchase and sale of its own shares. However, where an insider trades on corporate information a possible theory exists to deem this a breach of his fiduciary duty to the company even though the transaction is with a third party shareholder. On the basis of *Phipps* v. *Boardman*[11] it can be established that corporate information is corporate property and its use for the benefit of the insider or anyone else renders any profit made recoverable by the company. On another theory, as demonstrated by the American case of *Diamond* v. *Oreamuno*, recovery by the company is available thus:

> Although the corporation may have little concern with the day-to-day transactions in its shares, it has a great interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock. When officers and directors abuse their position in order to gain personal profits, the effect may be to cast a cloud on the corporation's name, injure stockholder relations and undermine public regard for the corporation's securities.[12]

This theory, an outcrop of the development of American common law on insider trading has yet to gain currency in other English common law tradition countries.

The basic question at common law, then, turns upon whether the shareholder, who bought or sold to an insider, has a remedy against the insider. *Percival* v. *Wright*[13] puts the question beyond doubt by holding:

> It is urged that the directors hold a fiduciary position as trustees for the individual shareholders, and that where negotiations for sale of the undertaking are on foot, they are in the position of trustees for sale.... I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive.

In holding that the fiduciary relationship does not extend to a director who is in a purchase and sale of securities relationship with a shareholder, the common law arrived at a disastrous *cul de sac*. The stage was now set for legislative reversal of this iniquitous ruling.

The United Kingdom Jenkins Committee Report recommended:[14]

> We have come to the conclusion that the law should protect a person — whether or not a member of the company or companies concerned — who suffers loss because a director has taken unfair advantage at his expense of a particular piece of confidential information about the company or any other company in

10. Where the company transacts in its own shares, section 67 in both Singapore and Malaysia renders such transaction illegal. In Singapore only, by section 67(3), any transfer or allotment is void. *Query:* when the company makes an initial allotment.

11. [1967] 2 A.C. 46. See p. 351, *infra,* for a possible theory of liability of a tippee to the company for insider profits.

12. *Per* Fuld C.J.: 301 N.Y.S. (2d) 78, at pp. 81 and 82 (1969) (U.S. New York Court of Appeals). See *Schein* v. *Chasen* 478 F 2d. 817 (1973) where a tippee was held liable to the company on the same basis as in *Diamond* v. *Oreamuno.*

13. [1902] 2 Ch. 421 *(per* Swinfen Eady J, at pp. 426 and 427).

14. Cmd. 1749, para. 89, London, H.M.S.O., 1962. See also Justice Report "Insider Trading" London, 1972.

> the same group in any transaction relating to the securities of such companies. We realise that it might well be very difficult for the other party to establish that he was transacting with a director; this problem is particularly difficult in the case of transactions through the London Stock Exchange because of the method of settlement. It may also be difficult for the other party to establish a case. Nevertheless we think a remedy should be provided and we recommend accordingly below.

The Jenkins Committee recommendations involve making recovery available to the company as well as to the aggrieved shareholder.

The implications and problems to be met in insider regulations are dealt with at length by the United Kingdom White Paper on Company Law Reform[15] thus:

> The object of legislation on insider dealing must be to ensure that anyone who is in possession of information which would be likely, if generally known, to have a material effect on the price of the relevant securities refrains from dealing until the material information has properly been made generally available. It is no part of the purpose of legislation to inhibit normal and honest transactions.
>
> There are two main problems to be resolved in drafting the legislation. The first is the definition of an 'insider'. It is important to avoid an unfairly onerous restriction on normal transactions by people who have no direct relationship with the company or its officers. The definition should, in the Government's view, include directors, employees, major shareholders and professional advisers of a company, together with the near relations of each of these people. Secondly, there is the question whether an offence is committed by an insider only when he deals with the guilty intent of profiting from inside information, or simply when he deals having price-sensitive inside information at the same time. The Government's view is that dealing in a company's securities by anyone who, by reason of his relationship with the company or with its officers, has information which he knows to be price-sensitive, should be a criminal offence unless he can show that his primary intention in dealing at that particular time was not to make a profit or avoid a loss.
>
> There is also the question of civil liability. An insider deal of this kind will normally have involved one party in taking unfair advantage over another by misusing information relating to a company or companies. In principle someone who profits unfairly in this way should be liable at law to the other parties concerned — the person with whom he dealt, and the company in whose securities he dealt or whose information he used in so doing. The law should therefore confer a civil remedy on persons who can establish that by reason of the misuse of materially significant information they have suffered an identifiable loss. Similarly, the law should preserve the present position whereby an insider may be accountable to the company for his profit.
>
> Steps need to be taken in addition to ensure that more knowledge is made available to shareholders about transactions by directors in the quoted shares of their company. A director who deals in his company's shares is not obliged by the present requirements of the law to bring such transactions to the shareholders' attention for some considerable time. Sections 27-29 of the Companies Act 1967 require notification within 14 days, and require the company to keep a public register of such transactions. The Government propose to require notification to the company within the shortest practicable period. A valuable offer of help in this connexion has been made by the Stock Exchange, which has undertaken to publish details of such transactions if the law *is* amended to require notice to be given simultaneously there also. Such dealing is normally wholly innocent, and publicity is the best means of ensuring that it is so.

15. Cmd. 5391, paras. 15-20, London, 1973. See also a Green Paper "The Community and the Company" Labour Party Industrial Policy Sub-Committee, U.K.

THE SINGAPORE AND MALAYSIAN LEGISLATIVE SCHEME

Insider trading in both countries is regulated by a complex network of legislation. In tabloid form the scheme is as follows:

A. *Indirect Disclosure through Registers of Interest*

	Singapore	**Malaysia**
Register of Substantial Shareholdings	ss. 69A-69N Companies Act	s. 135(3) Companies Act
Register of Director's Interests	ss. 134-135A Companies Act	ss. 134-135 Companies Act
Register of Interests of Stockbrokers, Analysts and Financial Journalists	ss. 26-30 Securities Industry Act	ss. 26-30 Securities Industry Act

B. *Direct Insider Regulation Provisions*

	Singapore	**Malaysia**
Duty and liability of Officers	s. 132(2)	s. 132(2)
Dealings by Officers in Securities	s. 132A Companies Act	s. 132(4) Companies Act
Employment of Manipulative or Deceptive Devices	s. 87 Securities Industry Act	s. 87 Securities Industry Act
	Corporate Disclosure Policy of the Singapore Stock Exchange	Insider Provisions of the Kuala Lumpur Stock Exchange

A. INDIRECT DISCLOSURE

Peripherally significant control exists firstly through the registers of interests. In Singapore, sections 69A-69N of the Companies Act[16] requires the disclosure of the nature and extent of substantial shareholders' holdings; section 134 [17] requires the maintenance of a register of director's interests; sections 135 and 135A [18] imports a duty on director to notify the company of the state of his holdings and other details. Sections 26-30 of the Securities Industry Act[19] require the maintenance of a register of holdings of stockbrokers, analysts and financial journalists. The Malaysian peripheral legislative scheme[20] excludes Division 3A (ss. 69A-69M) but has a similar scheme under section 135(3) and contains identically numbered sections 134 and 135 with differing implications. Also sections 26-30 of the Malaysian Securities Industry Act is identical to the Singapore provisions in requiring the register of holdings of stockbrokers, analysts and financial jornalists. These provisions, which will be considered shortly, have and are intended to have a direct bearing on insider trading and further the underlying

16. Cap. 185, as amended by No. 60 of 1970.
17. By Amendment No. 49 of 1973.
18. By Amendment No. 49 of 1973.
19. No. 17 of 1973.
20. I.e. under the Companies Act (Revised Act 125, 1973).

disclosure philosophy of the Companies Act. By requiring such data to be recorded and maintained, the argument goes, insiders run the risk of their trading being publicised and are deterred from so trading. The threat of discovery, through disclosure of holdings, dampens the temptation to trade on inside information. The reality of this stance is questioned later in this article.

The key insider trading prohibitions are to be found in Singapore in sections 132 and 132A of the Companies Act, section 87 of the Securities Industry Act, and the Corporate Disclosure Policy Statement of the Singapore Stock Exchange.[21] In Malaysia the analogous provisions are section 132 of the Companies Act, section 87 of the Securities Industry Act,[22] and the Kuala Lumpur Stock Exchange Listing Requirements.

SINGAPORE:

Register of Substantial Shareholdings[23]

The following scheme is to be found in Singapore and is based with

21. Stock Exchange of Singapore Ltd. Listing Manual and Corporate Disclosure Policy 1973.

22. Securities Industry Act No. 112 of 1973 (revised).

23. For the purposes of Division 3A, and sections 133A, 134 and 135, 'interests in shares' is widely defined under varying circumstances by section 6A (Amendment No. 62 of 1970) to include:

(1) where the subject of a trust includes shares, a beneficiary of the trust who has reasonable grounds for believing that he has an interest under the trust is deemed to have an interest in the shares comprising the trust;

(2) a right under section 84 (interests other than shares or debentures eg. unit trusts) issued through public offerings does not constitute an interest in the shares comprised in the scheme;

(3) where a body corporate has an interest in a share, and itself or its directors are controlled formally or informally by another person or that other person has a controlling interest in it or that person and his associates control the exercise of at least 15 per cent of the voting shares of the body corporate; then that other person is deemed to have an interest in the shares held by the body corporate;

An associate is described by section 6A(5) as including related corporations under section 6; a person, body corporate or its directors, in accordance with whose directions others (persons, corporations or directors) are accustomed or obliged to act in relation to the shares; and the person who acts in such a manner;

(4) where a person has contracted to buy shares; or has a right (present or contingent) other than by trust to have a share transferred to himself or his order; or has a right to acquire shares or interests under an option; or is entitled (otherwise than by proxies) to exercise or control the exercise of a right to a share where he is not a registered holder; he is in all cases deemed to have an interest in that share.

The indivisibility of the shareholdings does not preclude section 6A's application (see s. 6A(8)).

Excluded from being deemed an interest are joint shareholdings (subsection 7); a holding as bare trustee; holding the interest as security by one whose ordinary business is to lend money, in connection with such a transaction; a holding by reason of one holding a prescribed office and a prescribed interest in a share in such prescribed office (subsection 9). An interest is not to be disregarded merely because of its remoteness, the way it arose or that its exercise is capable of being made subject to restraint or restriction (s. 6A(10)).

modifications on the Australian model.[24] The background to this scheme is to be found in paragraph 4 of the Eggleston Committee's Report:[25]

> Legislation such as that referred to above is, in our opinion, justified by the consideration that in the case of companies whose shares are traded on stock exchanges, shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend. The Acts, of course, do make provision for the registration of shareholders, but it has always been possible to conceal the identity of the person beneficially entitled by vesting the shares in a trustee. Indeed the English Act of 1862 expressly provided that no notice of any trusts should appear on the register (see now section 156(4) of the Victoria Act); this provision no doubt originated in a desire to relieve the company from the necessity of determining whether particular dealings were in breach of trust, although the objective could have been achieved in other ways. At all events, it is now a common practice for investors to have their shares registered in the name of nominees, sometimes for purposes of concealment, but in many cases merely for convenience in dealing with the shares, for example, in the case of investors who are permanently or frequently absent from Australia. In other cases, shares are registered in the name of trustees under wills or settlements. The introduction of a requirement that all beneficial interests should be disclosed would lead to an enormous amount of paper work much of which would be pointless. We think, however, that the figure of 10 per cent, which has been adopted in the United States and in the United Kingdom is a reasonable one, and that provision should be made substantially along the lines of the United Kingdom legislation for the disclosure of interests giving rise to control of voting power where this reaches the 10 per cent level.

The primary disclosure provision is section 69D, which requires a substantial shareholder to give notice to a company of the voting shares in the company of which he has an interest and the circumstances by which he acquired the interest within seven days of so becoming. This requirement applies to: companies who have their securities listed on the Stock Exchange or who are declared by the Minister to be companies intended to be so regulated;[26] all natural persons and bodies corporate in or out of Singapore, and to acts or omissions outside Singapore;[27] and a substantial shareholder is defined as one who has an interest in the voting shares of the company, the nominal amount of his share or aggregate amount of his shares being not less than 5 per cent[28] of the aggregate nominal amount of all voting shares of the company. If there are classes of shares in a company, 5 per cent of any one class would constitute a substantial shareholder.[29] Section 69E imposes a correlative duty to notify the company when changes in the interests (including acquisitions and dispositions of the shares) occur; and when the shareholder ceases to be a substantial shareholder, full particulars of the circumstances of the cessation.[30]

24. Australian Uniform Companies Act 1961, ss. 69A-69M.

25. Eggleston Committee on Disclosure of Substantial Shareholdings and Takeovers.

26. S. 69A.

27. S. 69B.

28. Reduced from 10 per cent by Amendment No, 10 of 1974.

29. S. 69C(2).

30. S. 69D.

By section 69H a person who holds voting shares in a company, the shares being those in which a non-resident has an interest, is obliged to give the non-resident a notice including all the details required by these provisions. This enables foreign shareholders to be aware of the disclosure requirements.

The register of substantial shareholders is kept by the company at its registered or principal office and is freely open to inspection and for copies to be made, by members and to non-members on a charge of not more than two dollars. By section 69J(6) the entries in the register do not impose on the company notice of any rights or relations to a share in the company. This maintains the principle that the company is not affected by any notice of any trust on shares which are on its register of shareholders.[31] Outside the usual criminal sanctions of section 69K and the defences thereto in section 69L, significant consequences attach to non-disclosure. The Court on an application by the Minister may: restrain the disposal of any such shares; restrain the exercise of any voting or other rights in the share; or order the disregarding of any such exercise; direct the company not to make payment of any sum due relating to the shares; or direct the sale of all or any of the shares; prohibit the company from registering any transfer or transmission of such shares.[32] The Court has at all times power to extend the time for giving the requisite notice.[33]

Where all a company's shares are listed on the Stock Exchange, by section 69N[34] the company is empowered to require any member to inform it whether he holds any voting shares in it as beneficial owner or trustee and the identity and nature of the beneficiaries; and may proceed to trace the real owner right through multiple nominees. By section 69N(3) the company may require information as to the terms and parties of any agreement or arrangement under which another person is entitled to control the exercise of these rights. The company is obliged to inscribe the information received on the register of substantial shareholders. No mandatory disclosure is required until the company first makes a request. This prevents the company from being swamped by useless paperwork. The key problem in relation to section 69N relates to its coverage. Section 69N is couched in terms that make it applicable to 'any member'. Thus in a public listed company it would appear that any member regardless of the size of his holdings can be compelled to disclose his nominator and details of any arrangements relating to the shares. However, section 69N is placed in Division 3A which relates wholly to substantial shareholders. The inappropriate numbering of it as section 69N coming after sections 69A to 69M compels the conclusion that it relates only to substantial shareholders. Section 69N(4) and (5) in requiring the company to inscribe the details in the register of substantial shareholders furthers this reading. However, section 69N uses the term 'any member' rather than 'a person who is a substantial shareholder' which is used liberally in sections 69A to 69M.

31. See s. 163(4).

32. S. 69M.

33. S. 69J.

34. Added by Amendment No. 10 of 1974.

The *Explanatory Note* to section 69N[35] explains the object of the section thus:

> Clause 12 introduces a new section 69N and confers upon companies, whose shares are listed, a right to require any shareholder to disclose whether he holds the shares or the voting rights attached to them for himself or for others and, if for others, to disclose who they are.

The intent to enable the company to discover the real controllers of shares, obviates the key defect of the then sections 69A-69M scheme of disclosure. The scheme could have been avoided merely by having multiple nominees hold such shares. Failure to furnish the information visits the shareholder with criminal consequences unless the company was already in possession of such information or the requirement to furnish details was for any reason frivolous or vexatious.[36]

Register of Director's Shareholdings

(i) *Types of interests to be disclosed*

A director's[37] shareholdings in his company or a related corporation [38] are to be recorded in a register by section 134. The holdings which are to be recorded extend beyond shares of the company or a related corporation to include his interests[39] therein; interests, rights or options of the director or of another debentures or participatory person in respect of the acquisition or disposal of shares; contracts under which the director is a party or entitled to a benefit under which a person has a right to call for or make delivery of shares.

(ii) *Character of holdings to be disclosed*

The key evasion technique available is of course to have the holdings in nominees or in the name of persons within the director's family. Section 134(15) attacks this problem by deeming the director to have

35. Companies (Amendment) Bill, No. 11 of 1974.

36. S. 69N(6) and (7).

37. Denned in section 4 to include any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

38. Defined in s. 6 to where a corporation —
   (a) is a holding corporation of another corporation;
   (b) is a subsidiary of another corporation; or
   (c) is a subsidiary of the holding company of another corporation, that first mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other....

39. See discussion on s. 6A, at p. 338, *supra*; and see s. 134(13): "In this section —
   (a) a reference to a participatory interest is a reference to an interest within the meaning of section 84; and
   (b) a reference to a person who holds or acquires shares, debentures or participatory interests or an interest in shares, debentures or participatory interests includes a reference to a person who under an option holds or acquires a right to acquire or dispose of a share, debenture or participatory interest, or an interest in a share, debenture or participatory interest."

an interest when his spouse, infant son or daughter (including step and adopted children) have such interest themselves; and any contract, assignment or right of subscription to them is treated as having been made to the director himself. The question arises whether in the context of Singapore's extended family system it is necessary to include members of the extended family, i.e. parents and collaterals.

Disclosure is unnecessary in two specific instances: where the shares are in a related corporation that is wholly-owned, and where disclosure is made to one company in a wholly-owned subsidiary relationship, it need not be made to the other corporation as well. In both these cases a company is a wholly-owned subsidiary of another only if its members are the company itself or its nominees or a wholly-owned subsidiary of the second company or its nominees.[40] Again, the register of directors' shareholdings is by section 134(5) to contain the number and description of the shares or other interests or contracts acquired by the director; the price or consideration for the transaction; the date of the agreement or its completion or the occurrence of the event. Entries therein do not operate to put the company on notice of the existence of any other rights in the shares.[41] The register is to be kept at the registered office and open to inspection to a member without charge and to others on payment of not more than three dollars, and it is to be available to all members at each general meeting of the company.[42] Extracts are available to anyone on payment of not more than one dollar per hundred words within 21 days of application or longer as the Registrar of Companies thinks fit.[43]

Section 135 of the Companies Act focuses on the director himself and imposes on him, on pain of criminal sanction, to lodge the details of his interests and changes in his holdings of the company or its related corporation shares within twenty four hours of becoming a director or acquiring the interest.[44] The company on receipt of such notice is obliged to furnish a copy of it to all directors within seven days of its receipt.[45] An elaborate defence scheme for non-compliance is laid out in section 135(4). It is a defence to prove that the failure was due to unawareness on the date of the information or summons or was so unaware until less than seven days of the information or if more than seven days he had given such notice. One is conclusively presumed to be aware of the fact or occurrence if on reasonable diligence one would become so aware or if one's servant or agent in relation to the interest was so aware, or ought with reasonable diligence to have been so aware.[46]

40. S. 134(2), (3) and (4).

41. S. 134(7)

42. S. 134(8) and (11)

43. S. 13A(9)

44. S. 135(2). See *Raja Nong Chik* v. *P.P.* [1971] 1 M.L.J. 190; and see a note by the writer in [1972] 1 M.L.J. xi.

45. S. 135(3) .

46. S. 135(5) .

By section 135A,[47] all the matters to be disclosed by section 135, if they relate to shares or debentures listed on the Stock Exchange, have additionally to be disclosed to the Stock Exchange within the same period and the Exchange may publish any information received by it.

Register of Shareholdings of Stockbrokers Investment Analysts and Financial Journalists

The disclosure of interest by way of a register of shareholdings is not limited to officers and substantial shareholders. For two reasons at least it is necessary to require other insiders who while not officers of the company are nevertheless privy to information and have considerable influence over the stock market, *viz.*, stockbrokers, investment analysts and financial journalists. The second reason to require disclosure is outlined again by the Rae Committee:[48]

> That the Stock Exchanges have not introduced a rule requiring the disclosure of broker's interests in public issues, is in our view, distorting. We believe it is of the utmost materiality to the market to know when the supply of shares in a public flotation is being restricted though the retention of the shares by those carrying out its distribution, for only through such disclosure can investors judge whether a genuine offer has been made to the general public of all the shares said to be available for public subscription.

In Singapore sections 25 and 26 of the Securities Industry Act[49] implements the need for a register of share holdings. By section 25, the following persons are required to maintain a register of their holdings : dealers,[50] dealers' representatives,[51] investment advisers[52] and their

47. By Amendment No. 11 of 1974.

48. *Australian Securities Markets and their Regulation,* vol. 1, pt. 1. (Report from the Senate Select Committee on Securities and Exchange, Australian Government Publishing Service, Canberra, 1974, at p. 11:28.)

49. No. 17 of 1973.

50. Defined in section 2 to mean "a person who carries on a business of dealing in securities ["as a corporation" added by Amendment No. 6 of 1974] whether or not he carries on any other business, but does not include an exempt dealer."

    By the amendment No. 6 of 1974, clause (e) was deleted — It read: "a person in the direct employment of or acting for or on arrangement with a stockbroker and who performs for such stockbroker any of the functions of a dealer or investment adviser (other than work ordinarily performed by accountants, clerks or cashier) whether his remuneration is by way of salary, wages or commission or otherwise."

61. Defined in section 2 to mean "a person, by whatever name described, in the direct employment of, or acting for, or by arrangement with, a dealer, not being an exempt dealer, who performs for that dealer any of the function of a dealer (other than work ordinarily performed by accountants, clerks or cashiers) whether his remuneration is by way of salary, wages, commission or otherwise; and ["includes any director or officer of a corporation" included by amendment No. 6 of 1974 replacing the previous phrase "where the dealer is a corporation", includes any director, member or officer of the corporation who is not the holder of a dealer's licence] and who performs for the corporation any of the said functions (whether or not his remuneration is as aforesaid)."

52. Defined in section 2 to mean "a person who carries on a business of advising others concerning securities or who as part of a regular business issues or promulgates analyses or reports concerning securities." Excluded from this expression are banks; insurance companies and societies; lawyers and accountants; trust companies; dealers and their employees or representatives and exempt

representatives[53] and financial journalists.[54]

(i) *Types of interests to be disclosed*

By section 26(3)[55] interests to be disclosed are defined to include (a) interests in a trust comprising securities where the beneficiary knows or has reasonable grounds for believing that he has an interest under the trust and that the trust property includes securities; (b) where a body corporate has an interest in securities and it or its directors are accustomed to act under the instructions or wishes of a person in relation to the securities or where a person and/or his associates have a controlling interest in the body corporate, in both cases that other person is deemed to have an interest that has to be disclosed; (c) where a body corporate having no more than twenty members has an interest in securities every such member or his associate is deemed to have an interest in the securities. For the purposes of section 26(3) a person is an associate of another if he would be deemed an associate under section 6A(4)(c) of the Companies Act.[56] Again the term "interest in securities" as defined in section 6A(3), section 6A(6)-(10) of the Companies Act[57] are expressly made applicable here.

(ii) *Nature of the Register*

The register has to be maintained by each of the abovementioned persons and particulars required are to be entered within seven days of the acquisition of the interest.[58] Where there is a change in the interests, which is defined in section 26(4)(c) to include an acquisition or disposition of securities, the change must be recorded in the register within seven days thereof, together with particulars including the date and the circumstances relating to its occurrence.[59]

dealers who advise merely incidentally to their securities dealing; and newspaper proprietors only where their newspapers are generally distributed for sale; such advice is issued through the newspaper, and the proprietor receives no consideration for so doing and that such advice is merely conducted incidentally to the newspaper business.

53. Defined in section 2 to mean "a person in the direct employment of or acting for or by arrangement with an investment adviser ['not being a dealer stock-broker or exempt dealer' — deleted by amendment No. 6 of 1974] who performs for such investment adviser any of the functions of an investment adviser (other than work ordinarily performed by accountants, clerks or cashiers) whether his remuneration is by way of salary, wages, commission or otherwise; and ["includes any director or officer of a corporation" — included by amendment No. 6 of 1974 replacing the previous phrase "where the investment adviser is a corporation includes any director, member or officer of the corporation who is not the holder of an investment adviser's licence and"] who performs for such corporation any of the said functions (whether or not his remuneration is as aforesaid)."

54. Defined in section 25(2) to mean "a person who contributes advice concerning securities or prepares analyses or reports concerning securities for publication in a *bona fide* newspaper or periodical."

55. Previously subsection (4) but now renumbered by amendment No. 6 of 1974.

56. *Ibid.*

57. See fn. 20, *supra*. The discussion at p. 338, *supra,* is equally applicable here.

58. S. 26(2) as amended and renumbered.

59. S. 26(4) as amended and renumbered.

By section 27 the person shall give notice to the Registrar of Companies, a prescribed notice including the place at which the register of interests will be kept, on pain of a fine, where he is licensed, the notice is to be part of his licence application and in any other case within fourteen days of becoming such a person.[60]

The Registrar may require any person to produce for inspection the register and authorise the making of extracts on pain of a fine.[61] He may by notice in writing require the proprietor or publisher of a newspaper or periodical to supply him with the name and address of any financial journalist who has contributed any advice or prepared any analysis or report that has been published, or require the names and addresses of all financial journalists who have so contributed within a period specified in the notice.[62]

Any copy of the extract received by the Registrar may be supplied to any person whom the Registrar is of the opinion, in the public interest, ought to be informed of the dealing in securities disclosed in the register.

It is at once obvious that this register is not a document open to public inspection as recourse is only available *via* the Registrar. It preserves the privacy of such persons but makes readily available for inspection when necessary the register itself. One defect of this form of reporting is: how does one ensure that all interests owned are so disclosed particularly if the holdings have been temporary, as it is in most insider trading cases? Again what checks are there to ensure against nominee shareholdings which stockbrokers frequently use?

The abuses of insider trading are not restricted to directors and controlling shareholders. Both in Singapore and Malaysia the investment adviser's role has been taken over by investment analysis companies, merchant banks and trustee companies who manage portfolio investments. These new consultants issue regular investment guides and have close contacts with stockbrokers and companies' management. In the case of Australian Investment Counsellors Pty. Ltd. (A.I.C.) the Rae Committee Report traced its activities thus:

> A striking feature of the evidence of this case-study is the way, in just over two years, a chartist with a capital of about $100 was able to publish two investment and tipping newsheets for distribution to brokers and investors around Australia and overseas, engage in share trading through a subsidiary and two other names, manage share portfolios for clients, publicise his activities on television, build up an association with a financial journalist who ran a sharemarket column in a Sydney-based national newspaper, and promote a $2 million public company, selected Mining Holdings, of which he became

60. A defence is provided by section 28 to prosecution under sections 26 and 27 if he proves that his failure was due to his not being aware of a fact or occurence of the existence of which was necessary to constitute the offence and that he was not so aware on the date of summons; he became aware less than fourteen days before the summons or he became so aware not less than fourteen days before the summons and complied with the section within fourteen days after becoming so aware. He is presumed to be aware of a fact if his servant or agent was aware of it at that time.

61. S. 29.

62. S. 30, on pain of a fine.

chairman and manager (through a proprietary company) mainly to engage in share speculation.[63]

The Rae Committee noted the shortcomings of existing regulations, which are similar to the Singapore and Malaysian scheme as found in the Securities Industry legislation:

> Investment consulting firms are clearly one type of organisation in the securities market which can spring up quickly and can rapidly spread their interest to carry out numerous activities, with many of them impugning in different ways on the share markets. They require special attention by the regulatory authorities, especially during periods of widespread public interest in the share market, and in monitoring their affairs the authorities should be concerned with the nature of the ownership of the organisation, the methods by which advice is given, the consultant's own dealings, the extent of the consultant's discretion to deal in securities with or for his clients, the basis of compensation, and the relationships between the consultant, his employees and the press. Beginning in 1970, four of the States introduced a measure of regulation of investment advisers, by requiring their licensing and the licensing of their employees performing this function, but this regulation has not spelt out what, in the Committee's view, are adequate standards on the matters just mentioned. Nor is the quality of administration uniform or sufficient in our view.

MALAYSIA:

The Malaysian peripheral scheme *via* disclosure has no equivalent register of substantial shareholdings but combines both disclosures *via* section 135(3). Section 134 of the Companies Act has an analogous scheme requiring the maintenance of a register of directors' shareholdings. Section 135 is less elaborate in its imposition of a duty on directors to furnish the details required. Section 25 to 30 of the Securities Industry Act is identical in implication to the Singapore Securities Industry Act in requiring a register of holdings of stockbrokers, analysts and financial journalists.

Register of Director's Shareholdings

(i) *Type of Interest to be disclosed*

By section 134(1) and (12), the types of interests to be disclosed are narrower than in Singapore, and are limited to shares or debentures or share or debenture options in the company or its related corporation.[64] It does not extend to interests other than shares or debentures. The types of interests include direct or indirect beneficial interest even where the interest is held in trust for *him* or where he has any right to become the holder (with or without payment). Excluded from the need to disclose are shares in any corporation which is the wholly-owned subsidiary of another corporation. Where a holding company maintains such a register and it is kept open and accessible at the annual general meeting and at its registered office, the subsidiary is deemed to have complied with the requirements in relation to directors of both companies.[65]

63. *Australian Securities Markets and their Regulation,* vol. 1, pt. 1. Report from the Senate Select Committee on Securities and Exchange. Australian Government Publishing Service, Canberra, 1974 at p. 7.57.

64. Defined in section 6 of the Malaysian Act, which is identical in terms to section 6 of the Singapore Companies Act. See fn. 27, *supra.*

65. S. 134(10).

(ii) *Character of Interest to be disclosed.*

There is no provision deeming a director's family holdings to be his own for the purpose of disclosure. Holdings in trust for him may be interpreted to include such family holdings. It is clear that an express trust scheme in which the director is a beneficiary would have to be disclosed under section 134(1). If the director merely places the shares or debentures in the name of his wife or children, the question arises whether this is "being held in trust for him". A resulting trust in favour of the donor ordinarily exists where property is purchased by one in the name of another where the relationship of *in loco parentis* is absent. The difficulty raised in such a circumstance is depicted by *Palaniappa Chettiar* v. *Arunasalam Ckettiar* [66] *per* Lord Denning:

> . . .for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances, see *Shephard* v. *Cartwright* [1955] A.C. 431 at page 445. The fact that the father received the income does not suffice, see *Commissioner of Stamp Duties* v. *Byrnes* [1911] A.C. 386. The father had also to get over this pertinent question: If he intended the son to take as trustee, why did he not insert on the memorandum of transfer the words 'as trustee' and register the trust....

The result of using the words *as trustee* would be to render such holdings immediately liable to disclosure. The company under section 163(4) is not bound by notice of such trust. The use of infant children usually obviates the chance that the children will refuse to transfer in accordance with the wishes of the parent. Where a director places shares in the name of his family, he therefore runs the risk of illegality for non-disclosure of his holdings. Thus evidence that the director received dividends, transacted in other shares in the name of his family goes to negative the presumption of a gift to his family. Contrast section 6A(9) of the Singapore Act, where the interests of a bare trustee need not be disclosed *per se*. The policy behind disclosure equally avails here, and evasion by way of placing the shares in the names of nominees (family) may by construction be outlawed.[67]

By section 134(11) a director is deemed to have an interest or right over shares or debentures if a corporation other than the company has such rights and that corporation or its directors are accustomed to act on his directions or are entitled to exercise or control the exercise of one-third of the voting power at any general meeting.

By section 134(4) the director may require the company to enter the details of his disclosed interest in the register. The register is to

66. (1962) 21 M.L.J. 143, at p. 145. Privy Council Appeal from the Court of Appeal of Malaya.

67. On another analogy, section 13 of the Malaysian Estate Duty Enactment 1941 and section 8 of the Singapore Estate Duty Act (Cap. 137) are useful. Where a disposition is made more than 5 years before death, and possession and enjoyment of the property was bona fide assumed by the beneficiary immediately upon the creation of the trust and thenceforward to the entire exclusion of the deceased or of any benefit to him by contract or otherwise; such property does not constitute the estate of the deceased subject to estate duty.

be kept at the registered office and open during business hours to inspection by any member or debenture holder of the company or its related corporation. Contrast the Singapore scheme, where it is open to public inspection and to make copies on payment of a nominal fee.[68] The Minister is empowered to obtain a copy of the register or parts of it by section 134(7). Access is also open, by section 134(8), to all members only during the company's annual general meeting *(contra* Singapore, where it is to be available at all general meetings) to any persons attending the meeting.

By section 135 a duty is imposed on the directors to give notice of all events relating to himself (in particular his shareholdings) to enable the company to comply with the Act. Such notice is to be given within seven days of the occurrence of the event or its becoming relevant, to be disseminated to the directors.

Register of Substantial Shareholders

While there is no specific register of substantial shareholders as such, section 135(3) achieves the same effect by deeming anyone beneficially entitled to 5 per cent or more of the issued equity shares of a company to be a director for the purposes of section 134 disclosures.

Significantly, section 135(3) is not limited to shares listed on the Stock Exchange as it is in Singapore disclosure; here it is only limited to disclosure of shares or debentures or options therein and not the wide interests as defined in section 6A of the Singapore Companies Act[69] which includes interests other than shares or debentures. The only sanction for non-disclosure is criminal rather than the extensive prohibitory powers of the Singapore Court under section 69M. In relation to the register and its availability for public inspection the same differences exist when contrasted with the Singapore register of directors' shareholdings.

Register of Shareholdings of Stockbrokers, Analysts and Financial Journalists

Sections 25 to 30 of the Malaysian Securities Industry Act[70] has identically worded provisions to the Singapore Securities Industry Act except for the repealing amendments made by the Singapore Securities Industry (Amendment) Act, No. 6 of 1974. The absence of any equivalent to section 6A (on interests) of the Singapore Companies Act necessitates a restatement of the same and this is so in the schedule to the Malaysian Securities Industry Act.

This then concludes the survey of the peripheral scheme of insider trading regulation in Singapore and Malaysia. Both schemes reveal a fundamental deficiency. While the data is disclosed there is no assurance that it deters insider trading. There is in both countries, no

68. S. 134(6).

69. See fn. 23, *supra.*

70. Act 112 (Revised, 1973). See p. 343, *supra,* for the discussion on the Singapore Securities Industry Act.

central agency that monitors these registers and insider trading activities if ever brought to court are fortuitously discovered. The Securities Industry Council in Singapore and the Malaysian Capital Issues Committee have yet to acquire the vetting powers and functions so necessary in making such disclosure meaningful and effective in curbing insider trading. We now proceed to consider the core insider regulatory scheme.

B. DIRECT INSIDER REGULATION

Before proceeding to analyse the key provisions, it will be useful to adumbrate the underlying policy on insider trading. Any person who trades on price-sensitive information, generally unavailable to investors or passes such information in the context of a securities transaction should be liable to all investors disadvantaged as a result, as well as be made liable to account to the company for his profits and to indemnify it against any damage caused.

While recovery should be made available to all disadvantaged investors, the difficulty caused by having to identify the purchaser/seller on an open market transaction, should not bar the company from recovering the profits so made.[70a]

Section 132 — Singapore and Malaysian Companies Acts

Section 132(2) of the Malaysian Companies Act reads:

> An officer or agent of a company shall not make [improper][71] use of any information acquired by virtue of his position as an officer or agent of the company to gain directly or indirectly an improper[71] advantage to himself or for any other person or to cause detriment to the company.

Who is an Insider?

It is immediately significant that insider control is extended beyond directors to cover officers and agents. By section 132(6) officer[72] is defined to include a person who has at any time been an officer of the company, and an agent is defined to include a banker, advocate or auditor of the company who has at any time held such office. Significantly actions may be brought therefore under section 132 against officers or agents for insider trading even after they have ceased to hold such office. This prevents evasion of liability under the section by an officer resigning from office and thus arguing that the section does not apply to him. The liability is of course contingent, upon his having made use of such information which came to him while he held such office even if the profit or damage is sustained after he has left the office.

70a. See Robin White, "Towards a Policy Basis for the Regulation of Insider Dealing" (1974) 90 L.Q.R. 494 where the writer makes two other policy suggestions not shared by this writer, viz: that the definition of price sensitive information be left to the Courts to determine and that the requisite disclosure should be made to all shareholders rather than only to the shareholder who transacted with the insider.

71. In the Singapore Act the word "improper" has been deleted before "advantage" and replaced before "use", by Amendment No. 62 of 1970.

72. Defined in section 4 to include directors, secretaries, employees, receivers and managers not appointed by the court and liquidators appointed in a voluntary winding up.

What is Inside Information?

The second question that needs consideration is the significance of the term "improper" and the significance, if any, of its shifted position in Singapore from being placed before "advantage" to being placed before "use". The Malaysian statute phrased as "improper advantage" would lead to the interpretation that all insider trading is *ipso facto* an improper advantage.[73]

While arguably all insider trading constitutes improper use or advantage, section 132(2) is not necessarily restricted to insider trading. Liability to the company is imposed and the profits or damage caused need not, in section 132(2), be related to trading in the company's securities. *Contra* section 132(4) and section 132A, which specifically mention trading in securities. Conceivably the position in *Phipps* v. *Boardman*[75] where information received because of the trust position was used to advantage in a non-securities transaction would additionally be covered by section 132(2). The need to extend section 132(2) beyond insider trading is not crucial here because section 132(5) in Malaysia and section 132(8) in Singapore preserve the common law rules in relation to directors' duties. Thus the common law rules developed in *Regal (Hastings)* v. *Gulliver*[74] and *Phipps* v. *Boardman*[75] are equally applicable here to enable recovery by the company even when it has suffered no loss. The transfer of "improper" to qualify "use", makes the position in Singapore even clearer. The previous necessity to establish that the advantage gained is improper could flounder if the advantage is gained by a third party (recovery from the director for such advantage being unavailable under section 132(2)).[76] Section 132(2) of both Singapore and Malaysia imposes liability on a officer or agent if advantage was made by someone else. Thus the emphasis, in Singapore at least, has now been corrected to stress that the "use" is improper even when the advantage has been made for someone else.

The character of "information" acquired by virtue of his position remains problematic in the absence of litigation. The paradigm case is delineated by the Cohen Committee as "information known to them and not at the time known to the general body of shareholders, e.g. the impending conclusion of a favourable contract or the intention of the board to recommend an increased dividend".[77] The requisite nexus, between the acquisition of the information and an insider's office, is unclear. In construing the Australian provision Burt J. in *Es-Me Ply Ltd.* v. *Panker* stated:

> ...learned judge held that section 124(2) of the Companies Act 'relates to the improper use of secret or confidential information by an officer of a

73. See Allen Afterman, *Company Directors and Controllers,* Australia: Law Book Co. Ltd., 1970, at p. 114, where he argues that the underlying assumption of both the United Kingdom Cohen Committee Report (Cmnd. 6659) and the Jenkins Committee Report (Cmnd. 1749 paras. 89 and 90) is that this is the case. See also fn. 10, *supra.*

74. [1942] 1 All E.R. 378.

75. [1966] 3 W.L.R. 1009.

76. See Companies Act 1971 (Vic.), s. 124(2).

77. Cmnd. 6659, para. 86.

> company for his own personal gain'.. . For myself, I am unable to agree that information to be within section 124(2) of the Companies Act need be 'secret' but it must be, in the terms of that subsection, 'information acquired by virtue of his position as an officer' and to satisfy that description the information would, I think, necessarily be 'confidential' in the sense that apart altogether from the statute it would be a breach of the officer's fiduciary duty to the company to use that information to gain an advantage to himself.[78]

While it is clear that information that is restricted to officers for management use would come within the section, it is unclear whether non-confidential information which is circulated within the company is also intended to be within the section. Information that an officer obtains fortuitously by virtue of his presence at company functions is another type of acquisition which is arguably beyond section 132, unless the test used is the "but for" test — that is: were he not an officer, he would not have been at the company function and become privy to such information. It is submitted that the "but for" test is inappropriate here as what is intended to be outlawed is information specifically designated for use by corporate executives in the execution of their duties.

Liability under section 132(4) is imposed where advantage (in Malaysia, "improper advantage") is made either for the officer himself or for any other person or if it causes detriment to the company. Thus if a director fearing personal liability imparts inside information to a friend or a relative and that other person (the "tippee") trades on the information the officer himself (as "tipper") is liable under section 132(3) criminally but not for the profits made by the other person. This provision covers the obvious loophole in banning only trading by directors themselves. It deters officers from disseminating inside information to their friends. The tippee himself who is conceivably an insider because of his use of the inside information, is not caught by section 132(2) as the persons regulated are restricted to officers and agents, thus excluding outsiders. The degree of "intention" required of a director in the "use of information" and "to gain an advantage to himself or others" or to "cause detriment to the company" is unclear. To require only all intention only to use information as being sufficient to incur liability provided a causal connection exists and relating to the advantage or detriment imposes a stringent liability on directors. The alternative view is more in line with the policy of insider regulation. This view requires the intention not only to use such information but also the intention to gain an advantage or cause detriment to the company from such use.

Remedies Available

It is very rarely that any detriment is caused to the company merely in connection with insider trading. What damage could arise would be the loss of a potential contract or clientele. In such a case section 132(3) specifically enables the company to recover against the officer for such damage caused. This limb squares with the development of American common law in *Diamond* v. *Oreamuno*[79] that insider trading

78. [1972] W.A.R. 52, at pp. 54 and 55.

79. See p. 335, *supra,* where this case is discussed.

damages a company in so far as it damages the company's name and reputation. It is thus possible on this theory to construe section 132(2) to enable a company to recover wherever there is insider trading, although the real loser is the corresponding shareholder and not the company. (This is however not necessary as section 132(3) specifically enables the company to recover any profits made by the director). Any profits made by others given inside information by the director cannot be recovered under section 132(3) for it provides a restricted remedy. In such a case only the criminal offence under section 132 (3) (6) is available. It is open on the theory of *Diamond* v. *Oreamuno* to hold the director liable to the company for profits made by an outsider. It is submitted that this should be made abundantly clear by amending section 132(3) and by making the profits of any other person recoverable from the director. When a tippee trades on inside information, by section 132(3) no recovery is available by the company against the tippee for profits made — if the theory established in *Diamond* v. *Oreamuno* is accepted then whenever there is insider trading even by a tippee the company suffers damage. By the superimposition of the new theory of constructive trustee developed by *Selangor Rubber Ltd.* v. *Craddock (No. 3)*[80] and *Karak Rubber Co. Ltd.* v. *Burden*,[81] the tippee may be held to be a constructive trustee and therefore liable to the company for damage suffered by it. This liability is conditional upon the following:

> ... assist with knowledge in a dishonest and fraudulent design on the part of the trustees, that is the basis of the plaintiff's claim that the defendants are liable as constructive trustees. There are thus three elements: (1) assistance by the stranger, (2) with knowledge, (3) in a dishonest and fraudulent design on the part of the trustees.... The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on inquiry, which the stranger failed to make, whether it was being committed.[82]

Under section 132(3) (a) the company can recover any profits made by the director in breach. While actual profits are clearly recoverable, it is unclear whether paper profits should be also recoverable. If a director trades on inside information but has not disposed of the shares, he has not realised a profit. To preclude recovery by the company would be iniquitous and as such recovery should be available on the difference between the actual price paid and the price of the shares when the information was publicly disseminated. Profit realised or otherwise are recoverable by the company under section 132(3) (a). However in the case of an insider's sale of securities prior to a drop in the market price, this is clearly an advantage for which criminal liability under section 132 (3) (b) avails. Can it be said that this advantage, that is, staving off a loss, is a notional profit recoverable by the company ?

The civil remedies under section 132(3) are in the alternative: either recovery of the profits made or recovery for damage suffered. The Eggleston Committee[83] in Australia has recommended that they be

80. [1968] 2 All E.R. 1073.

81. [1972] 1 All E.R. 1210.

82. *Per* Ungoed Thomas J., *op. cit.*, at pp. 1580 and 1590.

83. Companies (Amendment) Bill (Vic.) 1971. See further p. 354, *infra.*

cumulative and that liability exists for profits made in all cases and additionally liability exists where the company demonstrably suffers damage as a result.

Section 132(4)—Malaysian Companies Act[84]

Section 132(4) reads:

> An officer or agent who directly or indirectly gains an improper advantage for himself or for any other person from dealing in shares or debentures or options relating to shares or debentures of the company by the use of information acquired by virtue of his position as an officer or agent of the company shall be liable to compensate any person who is deprived of a benefit either actual or potential or who suffers loss as a result of the use of such information.

The foregoing discussion is equally applicable here except for two modifications. Firstly, section 132(4) now specifically relates the remedy to transactions involving shares or debentures or options therein. Secondly, recovery is made available to the aggrieved shareholder who was deprived of a benefit actual or potential or who suffers loss as a result. Thus where a shareholder who sells to an insider at a price lower than what he could have obtained had the information been disseminated, *quare:* whether the shareholder should be able to recover in this case when if he decides to sell before the date of the announcement, he does in fact suffer a loss by the insider's action, since if he did not sell to the insider he would have received the same price for the shares on the stock market. In such a case recovery should be available only to the company.[85]

Section 132A — Singapore Companies Act

This provision, absent in Malaysia, is modelled on section 124A of the Australian States Companies Act,[86] and provides a more radical scheme of recovery for insider trading to the aggrieved shareholder.

Section 132A(1) reads:

> An officer, agent or employee of a corporation who or in relation to a dealing in securities of the corporation by himself or any other person makes use to gain directly or indirectly an advantage for himself or any other person of specific confidential information acquired by virtue of his position as such officer, agent or employee which if generally known might reasonably be expected to affect materially the price of the subject-matter of the dealing on a stock exchange shall, in addition to any penalty imposed under subsection (8) of this section, be liable to a person for loss suffered by that person by reason of the payment by him or to him of a consideration in respect of the securities greater or lesser, as the case may be, than the consideration that would have been reasonable if the information had been generally known at the time of the dealing.

Who is an Insider?

In contrast to section 132(2) of the Companies Act, it is officers, agents or employees who are caught within the ambit of section 132A.

84. In Singapore s. 132(4) has been repealed and replaced by s. 132A.

85. The Eggleston Committee makes this distinction in the drafting of section 124A (in Singapore s. 132A).

86. See Companies Act (Vic.) 1971.

These are defined in wider terms. Firstly, agent include accountant and stockbroker as well as banker, solicitor and auditor. Secondly, these persons and officers are caught if they have held office at any time within the preceding twelve months *(contra* at any time under section 132(2)). Also a statutory time bar to actions exists in section 132A(3) : that actions must be brought within 2 years after the transaction. While section 132(2) is limited to officers and agents of a company,[87] section 132A extends to agents and officers of corporations[88] and by section 132A(4) this term in this section is defined to include related corporations (as defined in section 6).

While section 132(4) of the Malaysian Act relates to shares and debentures and options therein, section 132A(4) defines "dealing in securities" to include additionally interests other than shares or debentures[89] as well as rights and options therein. These interests are to be of the corporation or of the related corporation. The insider trading here extends to a wider set of corporate instruments and extends to officers dealing in the interests of related companies which is justifiable as the opportunity to trade on information relating to related corporations (holding and subsidiary relationships) indubitably exists.

What is Inside Information?

Australian writings indicate a reading of sections 132(2) and 132A in a way that renders section 132(2) only applicable where a director *buys* on inside information and section 132A where he *sells* on inside information. This distinction finds expression in many Australia writings. Ford in his *Principles of Company Law*[90] restates the Eggleston Committee's assumption:

> This provision [section 132A] amongst other things, gives a third person a right of action against an officer for loss suffered when the officer sells and in doing so makes use of inside information. The Eggleston Com-

87. Defined in section 4 to mean companies incorporated under the Companies Act or previous corresponding legislation.

88. Defined in section 4 to mean any body corporate formed or incorporated or existing in Singapore or outside Singapore and includes any foreign company.

89. Section 84 (as amended by Act 62 of 1970) defines "interest" to mean "any right to participate or interest, whether enforceable or not and whether actual, prospective or contingent —

(a) in any profits assets or realization of any financial or business undertaking or scheme whether in Singapore or elsewhere;

(b) in any common enterprise whether in Singapore or elsewhere in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in an investment contract whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include —

(d) any share in or debenture of a corporation; or

(e) any interest in or arising out of a policy of life insurance."

In Malaysia, section 84 is identical except that a subparagraph "(f) any interest in a partnership agreement" is included.

90. Butterworths, Sydney, 1974, p. 332. See also W. Paterson and E.H. Ednie *Australian Company Law,* Butterworths, Sydney, 1972. S. 124A/4 at p. 2102.

> mittee thought a remedy should be given to the third person only in the case where the officer sells and that the other case where the officer buys should be left to [section 132] so that the officer buying at an advantage should be liable to disgorge any profit only to the company. As the Committee pointed out, an outsider-vendor of shares who decides to sell to an officer at the price of the day before a favourable announcement, can hardly be said to have suffered a loss by the action of the officer who bought the shares, since if he had not sold to that officer he would presumably have got a price which was at least no higher than the one he actually received. In that case the profit should be disgorged to be company whose information has been misused.

The words of section 132(2) is wide enough to cover both purchases and sales. There are two possible reasons for the Australian reading. Section 132(2) was drafted specifically to overcome the ruling of *Percival* v. *Wright*[91] which was a situation in which the directors bought on inside information. Secondly, a reading of the remedy provided by the Australian section 124A, *viz.* "liable. .. for loss suffered... by reason of the payment by him of a consideration... greater than. .. would have been reasonable if the information had been generally known", leads to the conclusion that this provision applies only when the insider sells.

It must be noted however that Singapore's section 132A is differently drafted. Thus "...liable for loss suffered by...by reason of the payment by him *or to him* of a consideration greater *or lesser...* than would have been reasonable if the information had been generally known ..."[92] This clearly covers both purchases and sales by the insider and thus the Singapore provision is of wider import.

Recovery is available whether the insider gains an advantage for himself or for any other person. The information must be acquired by virtue of his position as officer or agent. The discussion of these two prerequisites to recovery, to be found also in section 132(2) of both the Singapore and Malaysian Companies Acts, equally avails here.[93]

Over and above being acquired by virtue of his office, the information has to be "specific confidential information". This terminology has been criticised thus:

> If the term "confidential" information is to be given any meaning, it must refer either to information revealed in confidence or classified as being not for public disclosure. In order to prove that this type of information was used by an officer, it might be necessary to show some formal (or implied) action by the company designating the information in question as being "confidential". Such a requirement might lead to difficult problems of proof in some circumstances unless the burden was placed upon the accused officer to show that such information was not "confidential". More importantly, it would allow officers to circumvent the prohibition by refraining from designating information which could reasonably be expected to affect the share market as being "confidential". Under these circumstances, an officer could use this non-confidential news (which is not known to the trading public) for his own ends.[94]

91. *Op. cit.*
92. Emphasis added.
93. See p. 351, *supra.*
94. Allen Afterman, *op. cit.*, at p. 117.

It is clear that liability is not attracted if the director uses his own judgment on data that is available to all, for in this case, all directors would always be better informed than the outsider by virtue of their office. It is not intended that directors refrain from owning shares in their companies. The use of "specific" information is thus understandable. The term "confidential" however gives rise to problems and it can hardly be interpreted to mean only every item of information that is labelled "confidential" for this would negate the whole objective of section 132A. Thus the term has to be interpreted as meaning information which is disseminated to directors for use for the benefit of the company and not for general dissemination. It is confidential in the sense that its currency beyond the corporate executives is not intended at the time it is acquired by them.

By section 132A(2) no liability exists if the person suffering loss knew or ought reasonably to have known of the information referred to. Problems in relation to section 132A(2) involve firstly on whom is the burden of establishing such exemption ? Secondly what degree of certitude has to be established beyond mere rumours before the aggrieved shareholder is held to have constructive access to the confidential information ? The difficulties of this defence have been pointed out:

> If it had to be proven that the trader did not know of the inside information, it would place the complainant in the extremely difficult position of having to prove a negative concerning the subjective state of the trader's knowledge i.e. that he did not know of such information on the other hand, if the accused officer is made to prove as, a defence that the other party actually knew of the information many difficult and irrelevant coonsiderations would be introduced.[95]

Further the information has to be such that "if generally known it might reasonably be expected to affect materially the price of the subject-matter of the dealing on a stock exchange." This clause is different from section 124A(1) of the Victoria Companies Act 1971 on which it is based. The Victorian provision reads "might be reasonably be expected to affect materially the value of the subject-matter of the dealing." The reason for the pegging of the information's materiality to market price sensitivity is unclear. Does it mean that liability exists only if the securities are listed on the Stock Exchange ? Or does it mean that if such securities were listed on the Stock Exchange, its price would be affected ? The words of the section would compel the conclusion that only listed securities are intended, because otherwise it should have been worded "if generally known might reasonably be expected to affect materially the price of the subject matter of the dealing *"were it listed"* on a Stock Exchange." This reading unduly restricts the efficacy of section 132A but the change of wording from the Victorian statute must indicate that such was intended. The fact that "dealing in securities" is not defined in section 132A(4) to mean securities in a Stock Exchange belies this reading but having been mentioned in section 132A(1) itself no further definition or clarification of Stock Exchange seems necessary. Thus it would appear that re-

95. Allen Afterman, *op. cit.*, pp. 117-118. The author contends at p. 118 that the notice and knowledge of the officer rather than the outsider is more material and that the defence should be available only if the officer could prove that the other party had knowledge of the information and that the officer knew this to be the case.

covery by an aggrieved shareholder is only available in the case of companies whose securities are listed on the Stock Exchange and not private companies or public companies without Stock Exchange listing. The liability is imposed for loss suffered by reason of the payment by him or to him of a consideration in respect of the securities greater or lesser than the consideration that would have been reasonable if the information had been generally known at the time of the dealing". Thus contrary to the Eggleston Committee Report recommendation[96] the outsider may recover for the loss he incurred by reason of his selling at a lower price than he would have received had the information been divulged. The sum recoverable would be the difference between the price received or paid and the price of the security when the information has saturated the market.

Remedies Available

Damages recoverable under section 132A should be the loss caused by insider trading i.e. the price differential between what was paid for the security and what the price would have been had the information been generally available. If the information is subsequently publicly disclosed then the Stock Market price on the day after disclosure is a good indication of this figure. If the Stock Market prices are generally depressed or bouyant owing to other factors not related to the inside information, e.g. an outbreak of war, then the difference caused by these events have to be discounted or else the insider will be made to bear the brunt of general market conditions unrelated to his insider trading. The whole scheme of section 132A is to enable compensation to be recovered not profits to be additionally made.

A novel preventive remedy exists in the form of section 132A(7) by which the Minister to protect investors may restrict dealings in securities of the corporation in certain specific circumstances or during certain periods of the corporation's financial year when the officer is or is likely to be in possession of special *(contra* specific in s. 132A(1)) confidential information acquired in his capacity and if generally known would affect materially its price on a Stock Exchange. This remedy which could prove useful in itself contingent upon the Minister or the Securities Industry Council being aware of the potential for abuse. The reality of the use of such a remedy is questioned in the absence of tight monitoring of public companies and their officers.

Further by section 132A(6) the Minister may direct a committee of the Stock Exchange or the Securities Industry Council to investigate any dealing in securities and it may summon any person to give evidence or produce any document necessary for the investigation. This power if used can certainly bring to book officers who have been indulging in insider trading. Again it is likely to be used in a situation where blatant insider trading is evident. The non-use of the powers of investigation under sections 193-210 of the Companies Act generally hitherto may indicate its lack of utility.

Finally under section 132A(5) recovery by an aggrieved outsider is available if insider trading takes place where there is the possibility

96. See fn. 62 *supra.*

of a takeover offer or bid being made to another corporation by the corporation of which he is an officer or the possibility of his corporation entering into a substantial commercial transaction with another corporation. It is significant that if the officer now purchases shares in that other corporation, rather than his own, he is still liable to compensate the aggrieved shareholder although no criminal or civil suit by the company is available against him under section 132(3).[97] It is not intended to consider insider trading here in relation to takeovers as this has been the subject matter of another article.[98]

Evaluation of Sections 132 and 132A

The scheme so far delineated by sections 132(2) and 132A in Singapore and sections 132(2) and (4) in Malaysia reveals some defects. The difficulties caused by judicial interpretation and lack of evidence can be alleviated by resort to an exceptionally harsh remedy as utilised in section 16b of the United States Securities Exchange Act 1934[98a] by which any officer or 10 per cent equity shareholder has to file periodic reports of his holdings to the Securities Exchange Commission which in turn disseminates such information. Further any profits (short-swing profits) realised by a sale and purchase or a purchase and sale within a period of six months is recoverable by the company without proof of insider trading. While this provision is itself subject to abuse, for example, by the purchase or sale of shares of business associates or friends, it does dampen insider trading considerably in view of the *carte blanche* designation and recovery. Significantly not only may the company being sent to recover the profits, the individual shareholder is empowered by statute to do the same on behalf of the company. This prevents the restrictions on shareholder actions from operating to prevent recovery where the majority shareholders have themselves indulged in insider trading.

In *Smolowe* v. *Delendo* Corp.[99] the court in determining the profits recoverable held that the all profits possibly made are so recoverable, viz. by matching the lowest purchases against the highest sale; the next lowest purchase against the next highest purchase, until all purchases and sales within the six months have been matched and the differences noted. The total of all the differences is treated as the short-swing profit made and thus recoverable. The use of this stringent recovery aids the punitive intent of section 16b of the Securities and Exchange Act. A less stringent recovery formula would have utilised the actual sums recovered by tracing the actual sums bought and sold *via* the numbered share certificates. The basis of recovery of short-swing profits is outlined thus:

> You hold the director, irrespective of any intention or expectation to sell the security within six months after, because it will be absolutely im-

97. See the writer's articles, "Corporate Takeovers in Singapore" (1974) 16 Mal. L.R. 170 at p. 181, and "Current Developments in the Corporate and Securities Law of Singapore and Malaysia" (1974) 16 Mal. L.R. 107.

98. *Ibid.* See Rules 30-37, Singapore Code on Takeovers and Mergers (1973) discussed at p. 216 of the above article.

98a. 15 U.S.C. sec. 78a.

99. (1943) 136 P. 2d. 231.

> possible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short-swing.[1]

Another model for change, which also illustrates the weakness of the current regulations is to be found in section 75A of the New South Wales Securities Industry Act 1970 by which officers, agents and substantial shareholders commit an offence if they trade in securities of the corporation to gain an advantage by the use of unpublished information which is market sensitive, as well as an offence to tip others of the same. Further liability to disgorge the profits exists and anyone suffering loss may recover their losses.

In both cases, a substantial shareholder who may be in possession of inside information, but who is not also an officer of the company may trade on such information with impunity. This is so unless one can consider a substantial shareholder as a director for this purpose though there is no express provision. The definition of director to include any person occupying the position and anyone in accordance with whose directions the directors of a corporation are accustomed to act, could conceivably include controllers — a question of fact. This interpretation while open, is questionable since section 135(3) of the Malaysian Act has expressly deemed a substantial shareholder to be a director only for the purpose of the register of shareholders. The existence of sections 69A-69N in Singapore requiring a register of substantial shareholders again would negative the extension of the definition.

The second major defect is that the person other than the director who has used inside information, the "tippee" himself, is not caught directly by either section. The "tipper" director who divulged the information is liable himself for the profit made by the tippee under section 132A. In such a case he is also criminally liable under section 132(b), which being a criminal suit, the consequent high burden of proof would operate in most cases to release the insider from liability.

A third major defect arises in the situation where the director purchases shares of an unrelated corporation on inside information *e.g.* a potential takeover bid or contract. Section 132(4) in Malaysia would appear to cover only purchases of the shares of the company of which he is an officer. In Singapore, section 132A(5) covers such information where the officer buys shares in his corporation or related corporation and also when he buys shares in an unrelated corporation.

One major problem arising out of the juxtaposition of the sections is whether in any one particular case (1) a company may first recover from an insider for profits made by him as well as any loss suffered by it; (2) a criminal conviction and fine under section 132(3)(b) may be obtained and (3) the aggrieved shareholder may recover his losses from the insider under section 132A as well. This would appear to operate as an exercise in overkill. However noticeably what the company recovers is for improper use of its property and damage to its reputation caused by such trading. The shareholders' personal suit is to receive compensation for his losses as a separate statutory cause of action.

1. Hearings before the Committee on Banking and Currency, 72d Long. 2d Sess., s. 56 and s. 97, 73d Long. 1st and 2d Sess. 1934. 6557.

In most cases however, no real damage results to the company and in imputing damage to its reputation and allowing recovery which is determined by reference to the profits made, the courts are merely penalising insider trading indirectly. In such a case two bases of recovery would exist simultaneously: the action by the company to recover the profit made, and the action by the aggrieved shareholder.

One argument against this reading of section 132(3) is the use of the word "or" which suggests that recovery is available for profits made or damage suffered but not both. In response to this argument, with the background of section 132 in mind, it is submitted that "or" can be interpreted as being conjunctive rather than disjunctive. Even if this reading is adopted, it is open to develop the common law on the lines of *Diamond* v. *Oreamuno* and in fact create an alternative basis of recovery. Thus in all three cases recovery could conceivably exist concurrently as each basis is grounded on a separate theory of liability.

The complicated scheme of regulation, leaves much to be desired insofar as the liabilities of insiders other than officers, viz. controlling shareholders and tippees are unclear. A more comprehensive approach is to be found in the new Australian Corporations and Securities Industry Bill, 1974, which was withdrawn shortly after its introduction.

Clause 123(1) of the Bill regulates insider trading in the securities of the company of which the insider is connected.

> 123(1) A person who is, or at any time in the preceding 6 months has been, connected with a prescribed corporation shall not deal in any securities of that corporation if by reason of his so being, or having been, connected with that corporation he is in possession of information that is not generally available but, if it were, would likely materially to affect the price of those securities.

Clause 123(2) regulates insider trading in securities of companies other than the one to which he is connected.

> 123(2) A person who is, or at any time in the preceding 6 months has been, connected with a prescribed corporation shall not deal in any securities of any other prescribed corporation if by reason of his so being, or having been, connected with the first-mentioned corporation he is in possession of information —
>
> (a) is not generally available but, if it were, would be likely materially to affect the price of those securities; and
>
> (b) relates to any transaction (actual or expected) involving both those corporations or involving one of them and securities of the other.

Clause 123(3) covers the situation where a person not caught by the previous two provisions is nevertheless prohibited from trading if he obtained information from someone who is precluded himself from so dealing; where he is associated with that other person or had an arrangement to communicate such information. Clause 123(4) prohibits the practice of tipping by one who is himself precluded from so dealing. Clause 123(5) prohibits anyone barred from trading by reason of possession of such information to communicate such information to anyone else if the stock is traded on a stock exchange and he knows or has reasonable grounds for believing that that other person would himself deal or cause another person to deal in the securities. By clause 123(6) while an officer is barred from so trading, so also is his corporation.

Persons regulated by clause 122 of the Bill are 'those connected with a corporation' which is defined in sub-clause (7) to include: officers of that corporation or of a related corporation; substantial shareholders in that corporation or related corporations; or one who occupies a position that may reasonably be expected to give him access to inside information (likely materially to affect the price of the securities) by virtue of —

> (i) any professional or business relationship existing between himself (or his employer or a corporation of which he is an officer) and that corporation or in a related corporation; or
>
> (ii) his being an officer of a substantial shareholder... in that corporation or in a related corporation.

Similarly prohibited by clause 124 from trading are government employees with access to such information.

The remedies are set out by the Bill in clause 125, viz. criminal offence; on conviction, a liability to compensate the aggrieved seller or buyer, liability of a tipper directly to an aggrieved buyer or seller for profits made by the tippee. Finally, the transaction itself is not avoided by reason only of the insider trading.

Two areas of inadequacy which this new scheme shares with the existing Singapore scheme relate to remedies. The Bill does not permit the Commission to bring actions in appropriate cases to ensure restitution to the insider's victims. Secondly, no civil right of action to the company has been provided for recovery of profit when there is no accompanying loss to another.

Section 87 — Singapore Securities Industry Act

In Singapore, section 87 of the Securities Industry Act,[2] introduced into Singapore the potentially effective Rule 10b5 of the United States Securities Exchange Act.[3] There is no such equivalent provision in the Malaysian Securities Industry Act. Section 87 reads:

> It shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any security —
>
> (a) the employ any device, scheme or artifice to defraud;
>
> (b) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, or
>
> (c) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make statements made in the light of the circumstances under which they were made, not misleading.

Before proceeding to analyse this provision in the light of the American experience a caveat is necessary. It is unlikely, for reasons that follow, that section 87 would be interpreted by local courts in the widesweeping manner used by American Federal Courts and the Securities Exchange Committee. What is likely is a reference to American landmark cases as persuasive authority to aid interpretation on the ground that Parliament in adopting the American Rule must at least

2. *Op. cit.*

3. 17 C.F.R. section 240. Rule 10b5.

have been aware of its implications and the way in which American courts have interpreted it. In the same vein local courts have hitherto experienced no great difficulty in referring to Indian, Australian and Canadian decisions when the Singapore statute was expressly borrowed from such jurisdictions.

In contrast to the wide interpretation of the American courts, judicial conservatism and an over-emphasised tendency to closely follow British judicial decisions would compel a different approach.

The creativity of the American courts in first creating a civil remedy though none was present in the original statute,[4] is unlikely to be paralleled in Singapore. The same tort doctrine, a common law doctrine, exists here *viz:*

> If by a Statute a duty is laid on any person, every member of the public has a right to have that duty performed. The breach of it does not give every member of the public a right of action, because damage is an essential part of such cause of action, but it is settled law that where damage has accrued to any person through breach of a statutory duty by another person the latter is liable.[5]

However under section 94 of the Securities Industry Act:

> A person who is convicted of an offence under Part X (including section 87) shall be liable to pay compensation to any person who has purchased or sold any securities at a price affected by the act or transaction, the subject of the offence, for the damage suffered by him as a result of the purchase or sale.

This provision, which would would render the tort of breach of statutory duty inoperable here, therefore expressly provides for a civil remedy though contingent upon prior criminal conviction. This effectively renders section 87 of very limited significance as the number of prosecutions for securities frauds in the past ten years in Singapore number only three.[6]

In the United States, the success of Rule 10b5 has in part been due to the availability of the contingent fee, whereby the client is obliged to pay counsel's fees only in the event of successful litigation. This has encouraged somewhat the institution of such suits. In Singapore the contingent fee system would constitute champerty for which counsel may be struck off the rolls and is another reason for the probable insignificant effect of section 87.

Beyond the sanctions of the United States provision, the powerful administrative powers of the Securities Exchange Commission under section 21 (e) of the Exchange Act of 1934 together with a large ad-

4. In *Kardon* v. *National Gypsum Co.* 69F Supp. 512 (1946) civil liability for breach of Rule 10b5 was created on the basis that "where a legislative enactment contains no express liability provisions, the disregard of the command of a statute is a wrongful act and a tort." See generally A. Bromberg: "Securities Law: Fraud S.E.C. Rule 1065" (1973) McGraw Hill, New York, 3 volumes.

5. *Per* Fletcher-Moulton L.J. in *David* v. *Britannic Coal Co.* [1909] 2 K.B. 146 at p. 157.

6. *Public Prosecutor* v. *Ng Ting Fong,* unreported; *Public Prosecutor* v. *Fraser & Co.,* unreported; *Public Prosecutor* v. *Pinder* (trial pending).

ministrative machinery enables securities frauds not only to be detected but also to be brought to court under administrative suits which are then themselves the subject matter of private civil action.[7] The Singapore Securities Industry Council is at this stage merely in the throes of acquiring wider powers. Presently it regulates takeover bids and other general Stock Exchange related activities. It does not as yet have the administrative capacity to monitor the market nor even to initiate civil or criminal action by itself and is entirely dependent on the Attorney General to initiate such action. The number of securities frauds actually brought to court by individual aggrieved shareholders is bound to be negligible, as an individual shareholder does not have the facilities to detect such activity.

The inadequacy of mere statutory provision and a self-regulating Stock Exchange is amply illustrated by the recent Poseidon scandal in the Australian securities markets. The Rae Committee Report[8] firstly rejected the suggestion for a Panel on the London Model for the following reasons: The Panel has been scrutinising only takeovers and mergers while the new Commission has to undertake much wider functions; the Panel has no investigatory powers in law nor can it apply government sanctions; the Panel's endeavour to deal with insider trading led it to comment in its report for the year ended 31st March 1973 that it is hampered in its surveillance of market transactions in connection with takeovers "not only by the use of nominee names but also by the absence of a statutory power to interrogate or demand production of documents"; the Panel represents sectional interests rather than public interests.

In recommending a Commission in the nature of a statutory corporation, the Rae Committee adduced the following reasons:[9]

> Firstly, the regulatory body will need to exercise rule-making powers, to exercise discretionary powers, to carry out investigation involving the hearing of witnesses and to institute and conduct proceedings.
>
> Second, the national body should be administered by people of outstanding ability. They should be given the degree of independence in decision-making and the status which goes with the office of commissioner.
>
> Third, the task of administering the proposed legislation will be considerable. It will involve the exercise of important discretions, and will demand a high level of expertise and understanding.
>
> Fourth, a commission with a separate statutory status can develop the tradition, fund of expertise, authority and morale which can assist in the maintenance of a high quality of administration.
>
> Fifth, in the area of securities regulation and the administration of public company law, which involves the financial community and large corporations, influential pressure groups tend to operate. It the legislation is administered by a commission, there should be less scope for variation, anomalies and lapses in the regulatory body's work as the result of political influences.

7. See *Mitchell* v. *Texas Gulf Sulphur* 446 F 2d. 90 (1971), which was a private action following closely after the decision of the court in the S.E.C. instituted suit of *S.E.C.* v. *Texas Gulf Sulphur* 401 F 2d. 839 (1968).

8. *Op. cit.*, at p. 16.8.

9. *Op. cit.*, at pp. 16.8-16.20.

Another reason for the possible difference of approach is that in the United States Rule 10b5 constitutes the major statutory regulatory provision regulating insider trading and as such the courts have liberally construed it. In Singapore, alternative provisions exist by way of section 132(2) and section 132A. In Singapore a civil remedy *via* section 132A is probably much easier to establish since there is an express civil remedy and the need to resort to section 87 of the Securities Industry Act would be rare indeed. Essentially resort to section 87 would only be made when sections 132 (2) and 132A are unavailable. The following analysis is to demonstrate the areas in which section 87 could prove to be an effective remedy in such *lacunae* caused by the limited frame of reference of the earlier two provisions.

Who is an Insider?

The preliminary point to be made is that section 87 is not limited to insiders. It may be used whenever any person (including an outsider) indulges in fraudulent practices or mis-statements in connection with a securities transaction. In the case of an insider, the Courts have imposed the positive duty to disclose and have held generally that the failure to do so effects or operates as a fraud or deceit on the shareholders.[10] While the Companies Act insider scheme regulates primarily directors, officers and agents of the company *via* sections 132 and 132A, this is understandable as it is the companies' officers that are regulated in the Companies Act. In the Securities Industry Act, the *personae* regulated are different and they related to those in the securities industry *i.e.* stockbrokers, investment analysts and financial journalists. Thus at the very least, the term "any person" in section 87 here has to include the securities industry *personae* over and above any others. Company officers who trade on inside information would in most cases be within the ambit of section 132(2) or 132A of the Companies Act. Persons other than the companies' officers and securities industry persons may be within the ambit of section 87 which has a wider potential effect.

Beyond the range of persons covered by the Companies Act *i.e.* officers and agents, section 87 substantial shareholders may be within the provision.[11] While securities industry *personae* are within section provided they have access and trade on inside information, anyone who acquires access to inside information while negotiating with a company is to be treated as an insider as long as the information remains private.[12]

With the above caveat lodged it is now intended to briefly consider the American experience with section 87 and the analogies that are available. Secondly an alternative strict constructionist approach to interpreting section 87 will be postulated. Either approach is theoretically available and awaits judicial decision.

10. See *Kardon* v. *National Gypsum*, *op. cit.* See generally L. Loss, *Securities Regulation*, 2nd ed., chap. 9 (Little Brown & Co., 1969).

11. See *Speed* v. *Transamerica Corp.* 71 F Supp. 457. (D. Del. 1947).

12. *Kardon* v. *National Gypsum Co.*, *op. cit.*

An insider under section 87 is aptly dealt with in the United States by referring back to the origin and intent of the statute:

> ...the anti-fraud provisions are phrased in terms of 'any person', and that a special obligation has been traditionally required of corporate insiders, *e.g.* officers, directors and controlling stockholders. These three groups, however do not exhaust the classes of persons upon whom there is such an obligation. Anlytically, the obligation rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications. Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities.[13]

The underlying policy of section 87 is amply furthered by this view. It is therefore readily open in such a case to include a coverage of persons wider than sections 132 and 132A. Thus it is arguable that a "tippee" acquires inside information from an insider acquires indirectly information intended for corporate purposes. The liability of the "tippee" himself as an insider is theoretically open under section 87 while court cases have indicated that tippees are themselves liable, there is some difficulty of evidence *i.e.* the victims being unaware that they have transacted with tippees. In the administrative decision of *Investor's Management Co.*,[14] the prerequisites to recovery from tippees were held to be:

> ...the information in question be material and non-public; that the tippee, whether he receives the information directly or indirectly, know or have reason to know that it was non-public and had been obtained improperly by selective revelation or otherwise, and that the information be a factor in his decision to affect the transaction.[15]

Where a tippee does not know that his informant is an insider no liability should arise. Where the tippee is aware of the insider's position the American Restatement on Restitution[16] provides a theory of liability against the tippee:

> Where a fiduciary in violation of his duty to the beneficiary communicates confidential information to a third person, the third person, if he had notice of the violation of duty, holds upon a constructive trust for the beneficiary any profit which he makes through the use of such information.

The availability of a cause of action by the tippee against the tipper should the information prove inaccurate, was denied in *Kuehnert* v. *Texstar Corp.*[17] thus leaving the tippee, if caught, in an unenviable posi-

13. *In the Matter of Cady Roberts & Co.* S.E.C. Disciplinary Hearing 40 S.E.C. 907 (1961).

14. See Exch. Pel. No. 9263 (July 29, 1971) C.C.H. Fed. Sec. L. Rep. ss. 78, 163. Caselaw exists to affirm a limited basis of liability of tippees. In *Ross* v. *Licht* 263 F Supp. 395 (S.D.N.Y. 1967), a tippee was held liable for buying shares on inside information.

15. *Ibid*, at pp. 80, 519.

16. S. 201(2).

17. 412 F 2d. 700 (5th Cir. 1969).

tion. The liability of stockbrokers who have access to and use inside information for themselves or clients is in breach of section 87 was raised and settled in *Financial Industrial Fund Inc.* v. *McDonnell Douglas Corp.*:[18]

> The duty of Merrill Lynch (the stockbrokers) to disclose to the public in these circumstances in less clear than that of Douglas. This is not to say though that no duty existed or Merrill Lynch. In view of the demonstrated complicity between the two, and considering the fact that Douglas was a large corporation living in close proximity to the public and Merrill Lynch occupies a similar position and is or should be acutely aware of consequences of non-disclosure, it cannot say that it owed no duty to reveal the facts — that this was up to Douglas as principal. Merrill Lynch did, after all, communicate the facts internally and privately.[19]

To this extent section 87 could prove of greater potential utility.

Focussing on the language of section 87, the implication of the phrase "in connection with the purchase or sale of any security" raises the question of whether absence of trading in securities absolves the defendent from liability even though every other element of section 87 is satisfied. In the crystallised example of *S.E.C.* v. *Texas Gulf Sulphur* the question arose whether the company which issued a misleading statement in the context of insider trading was itself liable for the statement under Rule 10b5 even though the company itself was not involved in the trading of the securities. The majority opinion was expressed by Waterman J.:

> Therefore it seems clear from the legislative purpose Congress expressed in the Act, and the legislative history of s. 10 (b) that Congress when it used the phrase 'in connection with the purchase and sale of any security' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying cause them to purchase or sell a corporations' securities. There is no indication that Congress intended that the corporations or persons responsible for the issuance of a misleading statement would not violate the section unless they engaged in related securities transactions or otherwise acted with wrongful motives, indeed, the obvious purposes of the Act to protect the investing public and to secure fair dealing in the securities markets would be seriously undermined by applying such a gloss onto the legislative language.[20]

The dissenting minority however took the view:

> The expression 'in connection' is used...as a shorthand method of indicating that the activity ought to be made illegal is that having a direct relation to securities transaction.[21]

In effect it held that Rule 10b5 is violated whenever assertions are made as here is a manner reasonably calculated to influence the investing public, e.g. by means of the financial media, if such assertions are false or misleading or are so incomplete as to mislead, irrespective of whether the issuance of the release was motivated by corporate officials

18. C.C.H. Fed. Sec. L. Rep. 92, 760. (D. Colo. 1970).

19. *Ibid.*, at ss. 90, 701 (D. Colo. 1971).

20. 401 F 2d. 833, at p. 860 (US: Court of Appeals) (1968). See A. Fleischer, "Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding" (1965) 51 Virg. L.R. 1271.

21. *Per* Moore (Lumbard C.J. concurring), *ibid*, at p. 884.

or for ulterior purposes. An effective defence for the company to such an action is to demonstrate that management was diligent in ascertaining that the information it published was the whole truth and that such information was disseminated in good faith.[22]

What is Inside Information?

The degree of materiality the information has to possess is "whether a reasonable man would attach importance" to it in determining his choice of action in the transaction in question. This, of course, encompasses "any fact...which in reasonable and objective contemplation might affect the value of the corporation's stock or securities."[23] Materiality here is not pegged to stock market price sensitivity as in section 132A though in most cases what is material would affect the stock market price of the security but the reverse is not necessarily so.

It is now intended, to consider briefly each of the three limbs of section 87. Section 87(a)'s *"device, scheme or artifice to defraud"* has been the subject of some judicial construction. In *U.S.* v. *Ross* it was held that:

> a 'scheme' involves some connotation of planning and pattern, and it is hard to doubt that evidence sharing that the conduct changed to a defendant followed a pattern of fraud similar to one that was being contemporaneously practiced by a fellow employee, or even that was followed later by another employee of the same house with respect to the same stock, has enough logical bearing to pass the text of relevancy.[24]

Section 87(b)'s *"operate as a fraud or deceit"* has been interpreted to mean in fact where unfairness would otherwise result. This provision has been greatly used to encompass insiders trading on inside information on the ground that non-disclosure results in the effect of such transaction operating as a fraud. Thus for example in *Schoenbaum* v. *Firstbrook*[25] the sale by the controlling holding company of the company shares at an inadequate price just before the public disclosure of an oil strike by its subsidiary was held to be such a fraud or deceit on the minority shareholders.

The question of the relevance of the common law concepts of deceit to section 87 is at once germane. The law as delineated in *Derry* v. *Peek* is:

> First in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly careless whether it be true or false, with the intention that the plaintiff should in reliance upon the representation which causes damage to the plaintiff in consequence of his reliance on it. Thirdly, if fraud be proved, the motive of the person guilty or it is immaterial it matters not that there was no intention to cheat or injure the person to whom the statement was made.[26]

22. On remand the lower Court found the press release in the Texas Gulf Sulphur case to be misleading and not a product of due diligence. See *S.E.C.* v. *Texas Gulf Sulphur Co.* 446 F. 2d. 130 (1971).
23. *List* v. *Fashion Park Inc.* 340 F 2d. 457 at p. 462. (1965).
24. 321 F 2d 61 at p. 68 (2d Cir. 1963) Cert, denied 375 U.S. 5894.
25. 400 F. 2d 200 revd. en banc. 405 F 2d. 215 (2d Cir. 1968).
26. *Per* Lord Herscheil, (1889) 14 App. Cas. 337 at p. 373.

What is the impact of these rules on section 87 ? It is obvious that the degree of *scienter* necessary would be considerably higher than has been necessary under Rule 10b5. In the *Texas Gulf Sulphur* case the question as to the degree of *scienter* necessary was brought into focus by some of the insiders who in good faith believed that disclosure had already been made. In response Waterman J. stated:

> However whether the case before us is treated solely as an SEC enforcement proceeding or as a private action, proof of a specific intent to defraud is unnecessary. In an enforcement proceeding for equitable or prophylactic relief, the common law standard of deceptive conduct has been modified in the interests of broader protection for the investing public so that negligent insider conduct has become unlawful... However, a review of other sections of the Act from which Rule 10b5 seems to have been drawn suggests that the implementation of a standard of conduct that encompasses negligence as well as active fraud comport with the administrative and the legislative purposes underlying the Rule...This requirement, whether it be termed lack of diligence, constructive fraud, or unreasonable or negligent conduct, remains implicit in this standard, a standard that promotes the deterrence objective of the Rule.[27]

The above standard is unlikely to be adopted by the Singapore Court in view of the fact that first actions commenced would be criminal in nature and a greater degree of *scienter* is necessary if a criminal suit fails, no civil suit may be brought on a lesser civil remedy requirement because section 94 of the Securities Industry Act makes civil recovery conditional upon a prior criminal conviction.

Section 87(c) deals with mistatements arid half truths and an analogy to the similar statements in relation to prospectus may be made. The usual common law requirements of material mistatement of fact, reliance upon it and damage has to be established.[28] Also section 46 of the Companies Act insofar as it provides a remedy for untrue statements and wilful non-disclosure may prove relevant.

A final question under section 87 is whether recovery is available in the absence of a purchase or sale — *i.e.* if on reliance on the false statement, the shareholder refrained from buying or selling to his loss. The danger of permitting recovery is that this leads into the realm of speculation as to whether in fact a shareholder's decision was influenced by the statement. In the case of a purchase or sale such inference can easily be made but in its absence there is no check on spurious claims.

The upshot of this discussion of insider trading provisions leaves the insider with the following rules of thumb. If he wishes to trade while in possession of such information he must disclose the information to the other shareholders or generally. If its confidentiality does not allow disclosure then he may not trade.

Section 87 — Malaysian Securities Industry Act

Section 87 of the Malaysian Act reads differently:

> It shall be unlawful for any person, to make any statement or to disseminate any information with respect to any security, which at the time

27. See fn. 20, *supra.*

28. The United Kingdom Misrepresentation Act 1967, arguably received into Singapore by virtue of section 5 of the Civil Law Act (Cap. 30) may operate to provide, *inter alia*, damages in lieu of rescission under section 2(2).

it was made or disseminated, he knew or had reasonable grounds for knowing was false or misleading in a material particular.

The precise implications of this section are unclear. While it does not incorporate the wide nuances of Rule 10b5, it could apply to insider trading insofar as relates to all insiders or the company itself making a statement *e.g.* the misleading press release in *Texas Gulf Sulphur.* Section 87 does not impose a duty on insiders to make full disclosure on the theory of an extended fiduciary duty. It does not alter the basic contractual rules as to when an omission may amount to a representation of fact or when an affirmative duty to disclose material facts exists.

Thus the general provisions relating to the reality of consent to a contract to be found in the Contracts (Malay States) Ordinance[29] are germane. By section 19, where consent is caused by fraud or misrepresentation the agreement is voidable at the option of the aggrieved party and he may insist on performance and to be put in the position in which he would have been had the representation been true. Where misrepresentation, silence or fraud exists and the aggrieved party had the means of discovery of the truth with ordinary diligence the contract is not voidable. Again the fraud or misrepresentation must have been operative and relied upon.

Fraud is defined widely in section 17 to include acts committed with intent to deceive or induce entry into a contract in any of the following circumstances: (a) the suggestion of fact is not true and is not made with belief in its truth; (b) the actual concealment of a fact by one having knowledge or belief of the fact; (c) a promise made without any intention of performing it; (d) any other act fitted to deceive; and (e) any act or omission legally declared to be fraudulent. Of relevance to insider trading is the Explanation to section 17. "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech." This indicates that the common law categories of where there is a positive duty to disclose material facts, including the fiduciary relationship, are still operative.

Finally relevant is section 18 which defines misrepresentation. It includes a positive assertion, not warranted by the information of the maker, of an untruth, though he believes it to be true. Any breach of duty, without an intent to deceive, which gives a contracting party any advantage, by misleading another to his prejudice, is also a misrepresentation. Finally included is the causing, however innocently, of a party to make a mistake as to the substance of the agreement.

Corporate Disclosure Policy of the Stock Exchanges of Singapore and Kuala Lumpur

Singapore:

Finally it is intended to consider the Corporate Disclosure Policy of the Stock Exchange of Singapore Ltd. as well as the rules of the

29. No. 14 of 1950 which is a contracts code similar to the Indian Contracts Act.

Stock Exchange of Kuala Lumpur Listing Manual relating to insider trading.

Under Rule G10 of the Listing Manual of the Singapore Stock Exchange, any Company that has its securities listed on the Exchange enters an undertaking, *inter alia* to adhere to the Corporate Disclosure Policy requirements. A set of such policies have now been issued[30] which has the advantage that the rules are crystallised rather than having to be inferred from multiple Stock Exchange rulings.

This body of rules, obviously of American origin, displays a close response to the problems raised by the *Texas Gulf Sulphur* decision. First, it is here intended to consider the corporate disclosure policy on insider trading. It is relevant to consider the company's duties in the dissemination of corporate information under these rules.

What is Inside Information?

Rule 6 of the Policy defines insider trading as:

> not only to the purchase or sale of a company's securities, but also to the purchase or sale of puts, calls or other options with respect to such securities. Such trading is deemed to be done by an insider whenever he has any beneficial interest, direct or indirect, in such securities, regardless of whether they are actually held in his name.
>
> Included in the concept of 'insider trading' is 'tipping' or revealing inside information to outside individuals to enable such individuals to trade in the company's securities on the basis of undisclosed information.

The above rule is wider than the preceding statutory rules insofar as it additionally covers "puts" and "calls".[31]

Inside information is defined as 'that which has not been publicly released and which is intended for use solely for a corporate purpose and not for any personal use and which the company withholds." This is a definition preferable to 'specific confidential information' in that the type of information intended is readily discernible.

Who is an Insider?

Of greater significance is the definition of insiders to include:

> All persons who come into possession of material inside information, before its public release, are considered insiders for the purposes of the Exchanges disclosure policy. Such person include *control stockholders*, directors, officers and employees, and frequently include outside attorneys, accountants, invertent bankers, *public relation advisers*, *advertising agencies*, *consultants* and other *independent contractors*. The *husbands*, *wives*, *immediate families and those under the control of insiders* may also be regarded as insiders.[32]

30. Stock Exchange of Singapore Ltd. Listing Manual and Corporate Disclosure Policy 1973. The Policy is modelled heavily on the New York Stock Exchange Company Manual A-18 — A-22. C.C.H. Federal Securities Law Report sections 23, 123.

31. Both are options but a "call" is the privilege of being able to demand delivery of a security at an agreed price and within a fixed period; and a "put" is the converse i.e. the privilege to make delivery of a security at an agreed price and within a fixed period.

32. Emphasis added.

> Where acquisition or other negotiations are concerned, the above relationships apply to the other parties to the negotiation as well. Finally, for purposes of the Exchanges disclosure policy, insiders include "tippees" who come into possession of material inside information.

Again, this coverage which is largely the crystallisation of the current American judicial decision on insiders is preferable to the narrow ambit of the Companies Act. It strikes at the root of the problem in that formal designation of insiders does not always coincide with the actual persons being privy to such information. The persons underscored are additional to those covered by the Companies Act scheme and it does specify those persons who are likely in the ordinary course of business to have access to such information. Again "tippees" are construed as insiders for this purpose and to that extent this scheme is much more comprehensive than the statutory scheme.

In response to the question raised in *SEC* v. *Texas Gulf Sulphur*[33] i.e. how soon after the release of material information may insiders begin to trade? The Policy states:

> This depends both on how thoroughly and, how quickly after its release the information is published by the news-wire services and the press. In addition, following dissemination of the information, insiders should refrain from trading until the public has had an opportunity to evaluate it thoroughly.... When dissemination is made in accordance with Exchange policy insiders should wait for at least twenty-four hours after the general publication of the release in a rational medium. Where publication is not so widespread, a minimum of 48 hours is recommended where publication does not occur, or if it should otherwise appear appropriate, it may be desirable to obtain an opinion of counsel before insiders trade.

Finally, the Policy refers to steps to be taken by companies to discourage insider trading and recommends

> Companies can establish, publish and enforce effective procedures applicable to the purchase and sale of its securities by officers, directors, employees and other 'insiders' designed not only to prevent improper trading, but also to avoid any question of the propriety of insider purchases or sales. One such procedure might require corporate insiders to restrict their purchase, and sales of the company's securities to periods following the release of annual statements or other releases setting forth the financial condition and status of the company. Another could involve the purchase of a company's securities on a regular periodic basis by an agent over which neither the company nor the individual has any control.

These preventive measures reinforce the desirability of officers owning shares in the company while attempting to take out the possibility of inspected insider trading. Allied to this is the power of the Minister under section 132A(a) to restrict particular insiders from trading during specified periods when they are likely to have access to such information.

In outline, the rest of the Corporate Disclosure Policy deals with (1) Immediate Public Disclosure of Material Information; (2) Through Public Dissemination; (3) Clarification or Confirmation of Rumours and Reports; (4) Response to Unusual Market Action and (5) Unwarranted Promotional Disclosure. In essence these rules are designed in response to some of the problems manifested by the *Texas Gulf Sulphur* decision. Significantly through the disclosure required by the Company, it is

33. Discussed at p. 366, *supra.*

intended that the company does not aid or further insider trading unwittingly or otherwise.

The kinds of events and conditions, warranting public disclosure by a company are those defined in Rule 1 that affect the price of the company's securities or a reasonable investor's decision whether to buy or sell those securities e.g. the acquisition or disposal by a company of a significant amount of its own securities,[34] and events affecting the present or potential dilution of the rights or interests of a company's securities, or events materially affecting the size of the public issue of its securities.

A company is entitled to withhold material information when immediate disclosure would prejudice the ability of the company to pursue its objectives and when the facts are in a state of flux and a more appropriate moment for disclosure is imminent. If rumours abound during such period and affect significant trading then full public disclosure is warranted.

Rule 2 of the Policy delineates the specific techniques of public disclosure. Where notification is made before or during trading hours it has to be made to the listing representative before public disclosure if it is non-routine or likely to have a substantial impact on the market. The Exchange could then decide whether to halt trading temporarily pending the announcement with a view to having the information thoroughly disseminated. At a minimum public disclosure through the business and financial news wire services have to be made simultaneously with disclosure to the Exchange.

Rule 3 relates to the policy on clarification or confirmation of rumours and reports which are unsubstantiated by the company and have or are likely to affect the stock market price or have a bearing on investment decisions. In the case of erroneous information, a statement denying them and setting out the facts should be set in the public release and its dissemination ensured. Where it relates to predictions of future roles, earnings or other data no response is necessary unless it is manifestly wrong.

Rule 4 deals with unusual market activity which occurs without any apparent publicly available information to account for it. The company is urged to check whether the activity is due to any disclosure of its affairs or whether there has been a leakage of non-public information; in the latter cases the company is to make public disclosure and if the leak is erroneous to correct such errors. If neither is the case then the company may be required to release a statement indicating the absence of any developments to account for the activity.

The above set of rules, while impressive in themselves have to be evaluated in the context of the sanctions available to ensure compliance. By Rule 71(3) of the Rules and Byelaws of the Stock Exchange of Singapore:

> The Committee shall have power to suspend for any period or withdraw altogether, the name of any company from the official list. Any decision by

34. This reveals the obvious American origin of these rules in Singapore and Malaysia. Section 67 of the Companies Acts would operate to prohibit companies dealing in their own securities.

the Committee to admit to quotation on the Official List, to refuse, suspend or withdraw listing may be made by the Committee at any time and from time to time in its absolute discretion without assigning any grounds or reasons therefor and its decision shall be final and conclusive.

However by Rule 71(5), any decision made is to be preceded by a reference to the Securities Industry Council for its views. As of 1 January 1975, a new form of listing in the Singapore Stock Exchange[35] is operative with an implicit sanction. Listed Securities will be assigned to one of two categories: the first trading section or the second trading section. To be assigned to the privileged first trading section the following criteria have to be achieved: (1) an issued and paid up capital of not less than $5 million; (2) the minimum number of shareholders is not less than five hundred; (3) the substantial shareholders do not hold more than 75 per cent of the total issued and paid up capital of the company; (4) the total turnover of shares is not less than 5 per cent of its paid up capital or 250,000 shares *per annum* whichever is lower; (5) the company has paid an annual dividend of not less than 5 per cent or the gross earnings per share is not less than 10 per cent for each of the preceding three years; and (6) companies which fail to comply with the Exchange's Listing requirements and Corporate Disclosure Policy shall not be permitted to be classified under the First Trading section.

The privilege that being listed on the First Trading section brings is that only they can be transacted under the new form of time bargains for settlement contracts under which delivery is due on the last business day of each calendar month or other date periodically specified rather than the usual ready contracts under which ready delivery will have to be made on the second market day following the date of contract.

Beyond the above sanctions the only other real remedy is that of suspension of trading. The surveillance and enforcement machinery of the Stock Exchange has, with few exceptions, yet to prove itself effective to regulate insider trading. The Rules while significant in themselves lack the requisite teeth to prove a significant deterrent. Insider trading seldom comes to light in the absence of a falling out between fellow delinquent officers. Thus monitoring of the market and shareholdings is a necessary concomitant to effective regulation which to date does not exist.

The gross inability of a purportedly self-regulating Stock Exchange to regulate insider trading and other abuses is voluminously documented in the Australia Rae Committee Report:[36]

> In sum, we consider that the exchanges have neither the jurisdiction, the power, the disinterested will and lack of bias nor the appropriate full-time professional approach to warrant the assumption that they are the principal and best regulations of the securities market and their members. We have no doubt that there will need to be a substantial self-regulatory role for stock exchanges. However, in our opinion a body with broader authority and greater sympathy with the public interest is required in order to stimulate the stock exchanges to carry out their self-regulatory functions.

35. Stock Exchange of Singapore Ltd.: New Trading System Announcement (Straits Times 30th December, 1974 at p. 17).

36. *Op. cit.* at p. 15.20.

Kuala Lumpur:

The Listing Manual of the Stock Exchange of Kuala Lumpur does not contain a similar Corporate Disclosure Policy. Instead there are separate rules that incidentally have an impact on insider trading and they will be briefly considered here. It should be noted at the outset that the Policy itself is of limited significance if the practice of the Stock Exchange is to require the same standards. Its existence as a separate Code merely crystallises the rules for the benefit of all members. The absence of a separate Policy in Malaysia does not foreclose the possibility that in practice those rules are in fact followed on the basis that they are necessary to the functioning of any stock exchange.

Article 4(5) of the Listing Manual deals with acquisitions involving directors and substantial shareholders and requires that a circular be sent to such persons in connection with a takeover bid and that their prior approval be sought of the transaction in the general meeting. If any of them are interested in the outcome of the voting arrangements are to be made for their abstention from voting and a statement to that effect is to be included in the circular.

The general undertaking to be given by a company before listing includes an obligation to immediately notify the Exchange of:

> any information concerning the Company or any subsidiary which, consistent with the interests of the Company, should be communicated to the Exchange for public announcement, including *inter alia*, any information.

The sanction for non-compliance is again the suspension, withdrawal or refusal to list the security on the Stock Exchange.

The creation of a Capital Issues Committee under section 3 of the Securities Industry Act with consultative powers to the Minister and Registrar is in essence the germination of a securities commission. Again, as is the case of the Singapore Securities Industry Council, this Committee presently only monitors and approves potential takeovers of Malaysian companies in its administering the Guidelines on Takeovers and Mergers.[37] It has not acquired any wider market regulating functions.

An example of the wide regulatory powers required is to be found in the proposed scheme in Australia. In Australia, the flagrant abuses experienced in 1973 led to a new Corporations and Securities Industry Bill 1974[38] creating a new Corporations and Exchange Commission with the following wide powers.

> 20(2) It is the duty of the Commission, to the extent to which the Parliament has power to confer that duty on the Commission, to —
>
> (a) ensure adequate protection of persons who invest in securities of prescribed corporations;
>
> (b) maintain effective surveillance over the operations and activities of registered stock exchanges and the holders of licences, having regard to the provisions of this Act;

37. See writer's article, "Current Developments in Corporate and Securities Law of Singapore and Malaysia" *op. cit.*

38. Australian Senate Bill circulated by the Attorney-General, Senator Lionel Murphy, Government Printer, 1974.

(c) take such action (including the making of rules under section 283) as is necessary and available to it to enforce or give effect to the provisions of this Act;

(d) make available to investors in securities of prescribed corporations and other interested persons general information for their guidance with respect to the rights, duties and responsibilities of persons under this Act or under any other law of Australia or any law of a Territory relating to, or to securities of, prescribed corporations and with respect to the carrying out of the functions and duties, and the exercise of the powers, of the Commission;

(e) conduct research in relation to matters affecting the interests of investors in securities of prescribed corporations, including research into the improvement of accounting principles and methods;

(f) develop and facilitate the opportunities for persons to participate in the ownership and control of Australian industry by means of collective investment schemes and improve the performance and efficiency of such schemes;

(g) promote the establishment of a national stock market;

(h) consider whether it is necessary or desirable to make amendments of, or additions to, the provisions of this Act, and make recommendations in a report to the Attorney-General as to the need for any such amendments or additions; and

(j) as soon as practicable after the commencement of this Part, inquire into the management, activities and performance of mutual funds, unit trusts and other collective investment schemes and the effect of their activities on the Australian economy and report to the Attorney-General the result of its inquiry.

CONCLUSION

In conclusion, this survey of insider regulation has revealed firstly the inadequate formal legislative mechanisms that exist in the Malaysian context. In Singapore a potentially impressive array of weapons exist on the statute book but effectively it is no different from Malaysia. The reality of insider regulation is conditional upon monitoring market operators, the stock exchange and insiders; the creation of an investigatory body as powerful as the Anti-Tax Evasion Unit of the Singapore Inland Revenue Department and the existence of punitive fines and recovery together would operate to assuage the Government's reluctance to embark on an unprofitable and costly market regulation.

The need for the legal machinery to be abreast current market developments is axiomatic. The ability to do so is usually non-existent. It is intended to conclude this paper with an extract from the Rae Committee Report, which is appropriate here as it represents the most recent experience of a common law system bedevilled with insider trading where the legal rules have proved grossly inadequate and the cry for a Securities Exchange Commission is pronounced.

> There is a constant problem of detecting when questionable practices are taking place. Even to unravel an inter-related series of transactions well after they have occurred and have in fact been partially exposed is a painstaking and lengthy process. In our view this regulatory problem will continue, for it is likely that many of the financial companies and firms that operate in the markets will go on developing new functions, relationships and practices as

they respond to new needs, incluences and opportunities. If the regulatory authorities are to adapt their procedures to these changes, it will be important to follow and understand them as they are happening. It will be necessary to review carefully institutional or legalistic classifications that can rapidly become out of date, and market developments should be studied in their national context....[39]

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39. *Op. cit.* at p. 1.13.

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