

CHAPTER SEVEN

THE REGULATION OF INSIDER TRADING IN AUSTRALIA: A COMPARATIVE PERSPECTIVE.

7.1. INTRODUCTION.

It is widely acknowledged that Australia currently has the most developed insider trading legislation in the world.¹ Its regulatory framework prohibits insider trading indirectly through common law and directly through statutory insider trading provisions.² Moreover, in Australia, the insider trading prohibition is well received by both the investing and the non investing public. This co-operative and co-ordinated approach resulted in an increased awareness and effective curbing of insider trading and other related activities in the Australian securities markets, corporations and companies.

The successful track record of the Australian regulatory framework therefore demands an in-depth comparative analysis. In this Chapter the significant lessons which may be learnt from developments in Australia will be considered for the purpose of recommending amendments to the South African regulatory framework. However, the comparative analysis will mainly concentrate on the provisions of the Corporations Act.³

¹ See Huang H “The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform” (2005) 17 *Australian Journal of Corporate Law* 281-322, who argues that China and other countries that follow the American (US) insider trading principles should consider adopting the Australian model or principles to enhance their efforts of combating of insider trading practically and effectively.

² See Ziegelaar M “Insider Trading Law in Australia” in Walker G and Fisse B (eds) *Securities Regulation in Australia and New Zealand* Oxford University Press 1994 677-678.

³ See the Corporations Act of 2001 (C’th). This statute is hereinafter referred to as “the 2001 Act”.

7.2. OVERVIEW OF INSIDER TRADING LEGISLATION IN AUSTRALIA.

The prohibition and regulation of insider trading was introduced in Australia in the early 1970's, when statutes such as the Securities Industry Act of 1970 (NSW) were enacted to give Australia its pioneering insider trading provisions. This Act imposed criminal and civil liability on any person who traded with another person associated to or in association with a corporation or company for purposes of obtaining a financial advantage, gain or profit, if that person possessed specific price-sensitive inside information relating to the corporation or company which was not generally available (known) to the public.⁴

The Securities Industry Act of 1975 (NSW) was thereafter introduced in an attempt to strengthen the insider trading prohibition. This Act as amended broadened the insider trading prohibition to incorporate similar prohibitions which were also contained in the provincial statutes of Queensland, Victoria and Western Australia.⁵

Subsequent review of the insider trading legislation led to the enactment of the Securities Industry Act of 1980 (NSW). Its provisions added a few changes to the insider trading prohibition contained in its predecessor. For example, it included more elaborate civil remedies for all persons who were prejudiced by insider trading and related activities such as tipping.⁶

Furthermore, the Corporations Act of 1989⁷ was enacted at a federal level. This Act prohibited insider trading *indirectly* through common law by punishing any officer, adviser or employee of any corporation or company who negligently or fraudulently

⁴ See section 75A.

⁵ See section 112; Baxt R, Black A and Hanrahan P *Securities and Financial Services Law* 6th ed Lexis Nexis Butterworths 2003 503-504.

⁶ See section 128. Also see Baxt R, Black A and Hanrahan P *op cit* note 5 503-504.

⁷ Corporations Law of 1989 (C'th). This Act is hereinafter referred to as "the Corporations Law".

breached their fiduciary duties by practising insider trading.⁸ The general common law fiduciary principles requiring these persons to act in good faith and with reasonable care were therefore applicable. The statutory (direct) prohibition on insider trading was contained in Division 2A of Part 7.11 of the same Act. It prohibited any person who had non public price-sensitive inside information relating to securities to subscribe for, purchase or sell such securities. It also prohibited any such person from directly or indirectly communicating (tipping) such information to another person, the tippee.⁹

In 1990, yet another legislative review was undertaken and the *Corporations Law* of 1990 (as amended) came into force. However, shortly and before contributing much towards curbing of insider trading in Australia, its provisions were amended and repealed by the Corporations Legislation Amendment Act of 1991. This followed the adoption of several recommendations made in a Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee) in October 1989.¹⁰

Currently, the insider trading prohibition is proscribed in the 2001 Act. Its provisions are aimed at ensuring free and fair operation of securities markets to avoid harm to any person caused by insider trading and similar activities. Thus, the Australian legislature seeks to encourage a free and informed market which promotes and enhances public investor confidence.¹¹ Unlike its predecessors, the 2001 Act does not rely on fiduciary and misappropriation theories. Its main focus is on the possession and use by insiders or any other person of non public price-sensitive inside information that relates to a company or to any listed securities, the so-called *information connection only approach*.

⁸ See section 232(5); Ziegelaar M *op cit* note 2 678 and also see Tomasic R and Bottomley S *Corporations Law in Australia* The Federation Press 1995 690-698.

⁹ See section 1002G. Also see generally Cox J D “An Outsider’s Perspective of Insider Trading Regulation in Australia” (1990) 12 *Sydney Law Review* 455 463-470.

¹⁰ See section 1002; Baxt R, Black A and Hanrahan P *op cit* note 5 503-504. Also see generally Anisman P “Insider Trading Legislation for Australia: An Outline of Issues and Alternatives Report” 1986 63-65.

¹¹ See Division 3 of Part 7.10 of the 2001 Act. See further Lyon G and Du Plessis J J *The Law of Insider Trading in Australia* The Federation Press 2005 12-13.

On the other hand, it seems as if the South African regulatory framework still has to travel some distance before it would attain the same adequacy, competitiveness and efficacy as its Australian counterpart.¹² Therefore, it is against this background that this researcher submits that the South African legislature should emulate and where possible adopt some of the regulatory provisions of Australia.

7.2.1. The scope and meaning of “insider trading”.

The concept of insider trading is not statutorily defined in the Australian statutes. There seems to be less than full agreement with regard to the literal, purposive and legislative interpretation of this concept in Australia. Therefore, the term “insider trading” is not prominently used in the Australian insider trading legislation.¹³ The Australian legislature however defined a few terms which constitute or involve insider trading. For example, it defined terms such as *insider*,¹⁴ *inside information*,¹⁵ *material effect*,¹⁶ *person*¹⁷ and *procuring*.¹⁸ Regrettably, other terms such as *tipping*, *tippee*, *tipper* and *generally available* are not statutorily defined in the current insider trading provisions.

However, it is generally accepted that insider trading involves the abuse of or exploitation of non public price-sensitive inside information that relates to a body corporate or its securities for personal gain by any person.¹⁹

¹² See Jooste R “A critique of the insider trading provisions of the 2004 Securities Services Act” (2006) 123 *SALJ* 437. Also see the discussion in Chapter 4.

¹³ This is the so-called “fuzzy law” technique that characterises most of the Australian insider trading criminal sanctions. See Lyon G and Du Plessis J *J op cit* note 11 66.

¹⁴ See section 1043A (1) of the 2001 Act.

¹⁵ See section 1042A of the 2001 Act.

¹⁶ See section 1042D of the 2001 Act.

¹⁷ See section 1042G and 1042H of the 2001 Act.

¹⁸ See section 1042F of the 2001 Act.

¹⁹ See Ziegelaar M “Insider Trading Law in Australia” in Walker G, Ramsay I and Fisse B (eds) *Securities Regulation in Australia and New Zealand* LBC Information Services 1998 556-560; Bostock “Australia’s New Insider Trading Laws” (1992) 10 *Company and Securities Law Journal* 165 181; Tomasic R *Casino Capitalism? Insider Trading in Australia* Australian Institute of Criminology

Seemingly, the South African Securities Services Act,²⁰ like its Australian counterpart also does not define the concept of insider trading. Furthermore, the latter Act does not define adequately some of the terms that relate to conduct that constitutes insider trading. It contains for instance, flawed definitions of terms such as *insider*, *person* and *inside information*.²¹ Although there are otherwise many similarities between the South African and the Australian insider trading legislation, it is questionable due to the absence of proper definitions, whether the New Act will be as adequate and effective as its Australian counterpart.

7.2.2. The prohibition on “insider trading”.

As highlighted earlier, the insider trading prohibition is currently contained in Division 3 of Part 7.10 of the 2001 Act and applies to Division 3 financial products. Division 3 financial products include securities, derivatives, or managed investment products, or superannuation products other than those proscribed by the regulations made for the purposes of section 1042, or other financial products that are capable of being traded on a financial market.²² Consequently, insiders or any other persons who possess price-sensitive inside information that relates to the securities of a body corporate and who know or ought reasonably to have known that such information was not generally available to the public are prohibited from subscribing for or procuring or purchasing or selling such securities.²³

Canberra 1991 115-117; Lyon G *An Examination of Australia's Insider Trading Laws* SJD Thesis Deakin University 2003 9-100.

²⁰ Act 36 of 2004. This Act is hereinafter referred to as the “New Act”.

²¹ See Jooste R (2006) *op cit* note 12 438; also see Chapter 4 of this dissertation for detailed analysis.

²² See generally section 1042A of the 2001 Act; Lyon G and Du Plessis J J *op cit* note 11 54-56. Also compare it with section 764 of the *Corporations Law*.

²³ See section 1043A of the 2001 Act; Lyon G and Du Plessis J J *op cit* note 11 22-23; O'Brien “Insider Trading Case to test Chinese Walls” *Irish Times* 01 May 2006, on the prospect of the Citigroup Global Capital Market company facing heavy penalties for allegedly practising insider trading amounting to a profit of about Aus \$4, 6 billion of (its client) Toll Holdings shares.

It is therefore noteworthy that the prohibition of insider trading in Australia applies to any person as defined or who qualifies to be an insider by virtue of section 1043A (1). Thus, it is plausible to understand the meaning of the term “person”. This term is defined to include a body corporate or partnership (juristic persons) as well as a natural person (an individual).²⁴ It is clear that the insider trading prohibition in Australia has a much wider application than the prohibition in South Africa. It covers explicitly, both juristic and natural persons as well as a wide range of financial products. Furthermore, it also applies to other illicit practices such as tipping. An insider or any other person is specifically prohibited from deliberate, intentional and unlawful communicating (disclosure) of price-sensitive inside information to another person before it becomes generally available to the public (published).²⁵

Furthermore, the prohibition of insider trading in Australia has extra-territorial application. The prohibition on insider trading applies to *acts or omissions* (unlawful trading) *within Australia* relating to securities of any Australian or *foreign body corporate* as well as to acts or omissions *outside Australia* in relation to the securities of a body corporate that is established or is carrying on business *in Australia*.²⁶ Thus, all territorial limitations and problems which previously impeded the enforcement of insider trading provisions outside Australia are now solved.²⁷

²⁴ See section 1042G and 1042H of the 2001 Act.

²⁵ See comparatively Brand V “Sanctioned ‘dobbing’: Whistle Blowing under the Corporations Act, 2001(C’th)” <http://www.parsons.law.usyd.edu.au/CLTA/BrandPaper.pdf> 28 February 2007; Latimer P “Whistleblowing in the Financial Services Sector” (2002) 21 *University of Tasmania Law Review* 39 46; Zipparo L “Encouraging Public Employees to Report Workplace Corruption” (1999) 58 *Australian Journal of Public Administration* 83 88; Liverani M “Cool Reception for Whistleblowing in the Professions” (December 2002) *Law Society Journal* 26; Gobert J and Punch M “Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998” (2000) 63 *Modern Law Review* 25 46.

²⁶ See section 1042B (a) and (b) of the 2001 Act. Also see generally Ford, Austin and Ramsay *Ford’s Principles of Corporations Law* Looseleaf service update number 43,9/2004,9338 [9.605].

²⁷ See *Danae Investment Trust plc v Macintosh Nominees Pty Ltd* (1993) 11 ACLC 273 1242, where the Supreme Court of South Australia previously held that section 128 of the Securities Code did not apply to the purchase or sale of shares in a company incorporated in Australia if such transactions took place

The current insider trading provisions in South Africa also prohibit any “person” (juristic persons and natural persons) from practising insider trading and other related activities such as tipping. Notably, the definition of the term “person” proscribed in section 72 of the New Act also includes a partnership and a trust. This means that a trust or a partnership can be held liable for insider trading. However, unlike in Australia, liability for insider trading can only be incurred by an insider who *knowingly* trades or deals in securities on the basis of the non public inside information that *he or she* possesses.

The South African insider trading prohibition also has unlimited extra-territorial application but its application is not limited to situations where there is a territorial basis. Part of the reason for this is possibly inadequate financial resources to enforce it effectively in South Africa and elsewhere.²⁸ Perhaps the South African legislature should have adopted a more feasible and practically enforceable approach rather than an over ambitious and unlimited extra-territorial approach in relation to the insider trading prohibition.

7.2.3. The role and effectiveness of the Australian Securities and Investments Commission (ASIC).

The regulation of securities markets in Australia has come a long way. It was introduced by the *Corporations Law* on 1 January 1991 and was administered by a single federal agency or regulatory body, the Australian Securities Commission (ASC).²⁹ This followed the failure of its predecessor, the National Companies and Securities Commission (NCSC) in the early 1980s to enforce and to ensure compliance by the Australian securities markets and companies.³⁰

elsewhere. In this case it was further held that section 128 did not apply to transactions which took place in the United Kingdom.

²⁸ See Jooste R (2006) *op cit* note 12 453.

²⁹ See Adams M and Freeman M “The Securities Market in Australia” in Walker G and Fisse B (eds) *Securities Regulation in Australia and New Zealand* Oxford University Press 1994 141-145.

³⁰ *Ibid*; Comino V “National Regulation of Corporate Crime” (1997) 5 *Current Commercial Law* 84. Also see generally Tomasic R “Corporations Law Enforcement Strategies in Australia: The Influence

The ASC was renamed ASIC on 1 July 1998.³¹ ASIC has several responsibilities which include among other things, to investigate any criminal matters involving corporate law (such as insider trading) and to prosecute such matters in terms of the ASIC Act of 2001³² and the 2001 Act³³ respectively. ASIC is, in relation to criminal matters, empowered further, to refer any serious or complex matter to the Commonwealth Director of Public Prosecutions (DPP) for prosecution in accordance with a Memorandum of Understanding (MOU) between itself and the DPP.³⁴

ASIC also has powers to disqualify any person convicted of insider trading from his or her directorship or managerial position in any company or corporation.³⁵ Furthermore, it has powers of search and seizure of any proceeds in relation to any benefits that may result from insider trading activities.³⁶ It is further responsible for maintaining, facilitating and improving the performance of companies, securities markets and futures markets. Thus, ASIC has a major role to play in maintaining confidence of investors in securities markets and futures markets by ensuring adequate protection of such investors,³⁷ for the purpose of enhancing commercial stability, efficiency, the development of the economy and generally reducing business costs.

of Professional, Corporate and Bureaucratic Cultures” (1993) *Australian Journal of Corp Law* 192 197.

³¹ See generally Comino V “High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance” <http://www.parsons.law.usyd.edu.au/CLTA/CominoPaper.pdf> 28 February 2007.

³² See section 49 of the Asic Act (C’t’h).

³³ See section 1314 of the 2001 Act.

³⁴ See generally Tomasic R “Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Descriminalisation Solutions” (1992) 2 *Australian Journal of Corp Law* 82 102-105.

³⁵ See in detail *R v Rivkin* (2003) 198 ALR 400 406 where one Rivkin was disqualified from managing any corporation or company for 5 years and fined Aus \$30 000.

³⁶ See *R v Hannes* (2002) 43 ACSR 508 529 where ASIC seized Aus \$2 million’s worth of unlawful insider trading profits from the accused, Mr Hannes.

³⁷ See generally Shaw A and Von Nessen P “The Legal Role of the Australian Securities Commission and The Australian Stock Exchange” in Walker G, Ramsay I and Fisse B (eds) *Securities Regulation in Australia and New Zealand* LBC Information Services 1998 163-164. Also see De Marzo P M,

With regard to civil remedies and sanctions, ASIC may in the public interest, bring an action in the name of and for the benefit of the body corporate to recover its losses or entitlements as contemplated in section 1043L(2) or (5). This is usually done in instances where the issuer's board of directors is unable or unwilling to pursue those proceedings to utilize their civil remedies. Therefore, ASIC may institute a civil action for insider trading without the consent of the affected persons or the issuer of the affected securities.³⁸

ASIC may also apply for a compensation order on behalf of any person who was prejudiced by unlawful insider trading.³⁹ Furthermore, ASIC may seek court orders such as restraint, investment, mandatory direction and cancellation orders to ensure timely compensation for the victims of insider trading⁴⁰ and is empowered to apply for a civil penalty by way of a pecuniary penalty. A pecuniary penalty is a penalty imposed only after a declaration of contravention of a financial services penalty provision has been proved in a court of law.⁴¹

Although the role of ASIC as a corporate watchdog against insider trading and related practices has been criticised by some commentators for being ineffective,⁴² many successful cases have been reported to date that serve as proof of ASIC's efficiency. At

Fishman M J and Kathleen M H "The Optimal Enforcement of Insider Regulations" (1998) Vol 106 No 3 *The Journal of Political Economy* 602-606.

³⁸ See Lyon G and Du Plessis J J *op cit* note 11-125. Also see "ASIC Commences Civil Proceedings Against former One.Tel Officers and Chairman" *ASIC Media Release* 01/441 12 December 2001 and "Landmark Decision on Chairman's Duties" *ASIC Media Release* 03/068 24 February 2003.

³⁹ See sections 1317J and 1325 of the 2001 Act.

⁴⁰ See section 1043O of the 2001 Act; *ASIC v Petsas* [2005] FCA 88.

⁴¹ See *ASIC v Adler* (2002) 42 ACSR 80-115 and *Rich v ASIC* (2004) 209 ALR 271.

⁴² See *Comino V* *op cit* note 30-84. Also see "Brad Keeling Settles in ASIC One. Tel Proceeds" *ASIC Media Release* 03/099 21 March 2003; Ferguson A "The Watchdog No one Fears" (2000) 1 *BRW* 58.

least five persons were for instance recently convicted of insider trading as a result of the functioning of ASIC and the courts.⁴³

It is noteworthy that the South African legislation, unlike the legislation of Australia, does not provide for a right of action by the *issuers of securities*. Regrettably, it rigidly and solely imposed the responsibility for taking action on the FSB. It is submitted that if the Australian approach in this regard is followed it may lead to more effective curbing of insider trading in South Africa.⁴⁴

7.2.4. Establishment of competent courts to prosecute insider trading cases.

The courts play an important role in the enforcement of insider trading legislation in Australia. Both the High and Supreme Courts of Australia have inherent powers to impose sanctions and penalties on any person who contravenes the insider trading provisions.⁴⁵ These powers include the making of orders restraining any accused persons to exercise rights attached to Division 3 financial products, orders to restrain the acquisition, issue or disposal of such products, orders for the vesting of such products in ASIC or to direct the disposal of such products, or orders for the cancellation of Australian financial services licences.⁴⁶ Some commentators submit that the courts also have powers to make orders that direct any person to do or refrain from doing specified

⁴³ See Lyon G and Du Plessis J *J op cit* note 11 *Appendix 1 Table of Australian Insider Trading Cases* 199. Also see *ASIC v Adler* (2002) 42 ACSR 80 97-99; *ASIC v Rich* [2003] NSWSC 186; *ASIC v Loiterton* [2004] NSWSC 897 and *ASIC v Petsas supra* note 40.

⁴⁴ See Jooste R (2006) *op cit* note 12 458-459.

⁴⁵ See section 1043O of the 2001 Act.

⁴⁶ See further Baxt R, Black A and Hanrahan P *op cit* note 5 546. Also see Mann K "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1992) 10 *The Yale Law Journal* 1795 1845; "ASIC Restrains Rich Assets" *ASIC Media Release* 01/199 8 June 2001; "ASIC Obtains Court Undertakings Freezing Assets of former One. Tel Managers" *ASIC Media Release* 01/343 24 September 2001; "Jodee and Maxine Rich Asset Transfer Agreement" *ASIC Media Release* 03/362 13 November 2003.

acts, for purposes of ensuring compliance with any other order it may make in this regard.⁴⁷

The success achieved by the Australian courts in relation to the effective enforcement of the insider trading provisions is clearly reflected in the number of reported settlements and prosecutions recorded in both civil and criminal cases to date.⁴⁸ The Australian courts have in fact been commended for effectively enforcing the insider trading prohibition.⁴⁹ They do not only rely on circumstantial evidence to impute liability on accused persons, but also take cognisance of other relevant factors, such as actual abuse of material non public price-sensitive inside information by an insider or any other person for personal benefit or for another.

Notwithstanding the fact that South Africa also empowers the High Courts or in relation to criminal prosecutions, also the Regional Courts to hear any matter of insider trading and related prohibited practices,⁵⁰ the absence of settlements and successful prosecutions suggests that these courts are not effectively fulfilling this function. This is a major

⁴⁷ See generally Kluver J “Insider Trading” <http://www.camac.gov.au> 04 January 2007. Also see the Corporations and Markets Advisory Committee (CAMAC) *Insider Trading Report* (November 2003) <[http://www.camac.gov.au/camac.nsf/byHeadline/PDFFinal+Reports+2003/\\$file/Insider_trading_Report_Nov03.pdf](http://www.camac.gov.au/camac.nsf/byHeadline/PDFFinal+Reports+2003/$file/Insider_trading_Report_Nov03.pdf)> 12 December 2006; section 1043O of the 2001 Act.

⁴⁸ See for example *ASIC v Saddey* (1991) 9 ACLC 874; *Exicom v Futuris* (1995) 13 ACLC 1758; *ASIC v Kippe* (1996) 67 FCR 449; *Ampolex v Perpetual Trustee Company (No 2)* (1996) 14 ACLC 1514 1524; *ASIC v Donovan* (1998) 28 ACSR 583 608; *ASIC v Roussi* [1999] FCA 618; *R v Hannes* (2000) 36 ACSR 72 120; *ASIC v Hutchings* (2001) 38 ACSR 387; *R v Firns* [2001] 51 NSWLR 548; *ASIC v Adler supra* note 41; *ASIC v Rich* (2003) 45 ACSR 305; *R v Rivkin* [2004] NSWCCA 7 17; *ASIC v Pestas supra* note 40. Also see Tomasic R “Corporate Crime and Corporations Law Enforcement Strategies in Australia” Discussion Paper 1/93 Center for National Corporate Law Research Canberra (1993) 17 70; Cox D “An Economic and American Perspective of Insider-trading Regulation in Australia and New Zealand” in Walker G and Fisse B (eds) *Securities Regulation in Australia and New Zealand* Oxford University Press 1994 621-637.

⁴⁹ See the Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia Report No 95* (2002) 113; Lyon G and Du Plessis J J *op cit* note 11 163-166; *Comino V op cit* note 30 84.

⁵⁰ See section 79(1) of the New Act.

concern of many investors and other persons and it is generally agreed that the lack of successful prosecutions or settlements in South Africa is a problem that is caused exclusively by the legislature's rigid adoption of contemporaneous American insider trading principles.⁵¹ Instead of engaging many regulatory agencies (bodies) and fully empowering the courts to enforce the prohibition on insider trading, only the FSB has such inherent powers.⁵² Worse still, neither the courts nor the FSB has sufficient and adequate resources to ensure effective enforcement. The South African legislature would be well advised to consider some of the helpful lessons that can be learned from the Australian regulatory experience in order to strengthen its own regulatory and enforcement framework.

7.2.5. Reliance on both civil and criminal sanctions.

It is acknowledged in Australia that for purposes of achieving the best results, the remedies for violating insider trading provisions and the criminal sanctions fall in three categories, namely criminal penalties, civil remedies and civil penalties.⁵³ Each of these three categories will be discussed under this sub heading to determine and assess their effectiveness. It will also be analyzed comparatively, why the Australian model is more successful than that of South Africa.

With respect to criminal sanctions, liability for contravention of the insider trading prohibition proscribed in section 1043A stems from section 1311(1). Any person who contravenes section 1043A will be guilty of the insider trading offence. The discretion to institute criminal proceedings on an indictment for insider trading is vested in ASIC and the DPP.⁵⁴

⁵¹ The so-called US approach; see Jooste R (2006) *op cit* note 12 460 (summary and concluding remarks).

⁵² See Lyon G and Du Plessis J J *op cit* note 11 137.

⁵³ See Lyon G and Du Plessis J J *op cit* note 11 107.

⁵⁴ This is done in accordance with a memorandum of understanding between the DPP and ASIC which was signed on 22 September 1992. See *ASIC Digest* Vol 4 (3603) 3330; *ASIC Digest* Vol 1 (1047) 58.48. Also see generally section 1316 of the 2001 Act; Commonwealth Director of Public Prosecutions *The Decision to Prosecute: The Policy of the Commonwealth* (2003) [2.28]

Although no specific provision of the 2001 Act imputes criminal liability on accessories (aiders or abettors) who deliberately engage themselves in insider trading, such persons may still be liable in terms of the *Criminal Code* which applies to all contraventions of Commonwealth Acts.⁵⁵ This *Criminal Code* stipulates that a person who aids, abets, counsels or procures the commission of an offence is regarded to have actually committed that offence and is sentenced accordingly even where the principal offender has not been prosecuted or convicted.⁵⁶

Penalties for contravening the insider trading provisions are stipulated in Schedule 3 of the 2001 Act.⁵⁷ For example, where an individual (natural person) is convicted of insider trading, he would be liable for a fine up to 2000 penalty units (Aus \$200,000) or a maximum sentence of five years imprisonment.⁵⁸ A body corporate may, if it is convicted, be fined up to 10,000 penalty units (Aus \$1million) and in addition, to a maximum fine of up to five times the pecuniary penalty.⁵⁹

In addition, where the convicted person has managed a company or corporation, that person is automatically disqualified from performing his or her duties for a period of five years from the date of conviction or release from prison. Again, ASIC may increase this period by applying to a court for a longer disqualification or banning order where it is justified by exceptional circumstances.⁶⁰

<<http://www.cdpp.gov.au/Prosecutions/Policy>> 12 January 2006 and *Kovess v Director of Public Prosecutions* (1998) 74 FCR 297. See further *Attorney-General (C'th) v Qates* (1999) 198 CLR 162.

⁵⁵ See *Criminal Code* (C'th) Part 2.4 Division 11; section 11.22 and section 11.2(5).

⁵⁶ The so-called ancillary liability. See sections 1370 and 1384 of the 2001 Act; Lyon G and Du Plessis J J *op cit* note 11 109.

⁵⁷ See 2001 Act Schedule 3 items 311B and 311C.

⁵⁸ See *R v Hannes supra* note 36.

⁵⁹ See section 1312 of the 2001 Act; *Kovess v Director of Public Prosecutions supra* note 54. Also see generally Watson I and Young A "A Preliminary Examination of Insider Trading Takeover Announcements in Australia" (June 1998) <http://www.google.com> 17 March 2006.

⁶⁰ See *ASIC v Rich* [2003] NSWSC 186.

Where a person has been convicted of insider trading, the prosecutor on behalf of the DPP may make an application for forfeiture of any benefit derived from the trading. The proceeds being the amount of illicit profit made, may be forfeited through the intervention of the DPP and the courts.⁶¹

The 2001 Act also provides for civil sanctions and penalties imposed on those who practise insider trading. It is therefore important to note that the civil remedies are twofold in nature. Any person who violates the insider trading provisions will firstly be liable to compensate any other person who falls victim to insider trading or tipping, for his losses.⁶² Secondly, a civil penalty is provided for in section 1317HA. The actions for compensation and to impose a penalty must be instituted within 6 years of the arising of the cause of action.⁶³

Although it appears that tipping another person as contemplated in section 1043A(2) does not lead to an action for compensation under section 1043L, various circumstances are specifically provided for in section 1043L(2)-(5) under which such an action may be brought against an insider or any other person whose conduct amounts to tipping.

These provisions enable an uninformed purchaser, the issuer of securities and ASIC to invoke the civil proceedings in a number of ways.

Firstly, the *issuer* of the securities or financial products is entitled to recover any damages suffered by him from the insider or from any person who applies or procures another to apply for financial products as contemplated in section 1043L (2). The damages will then comprise the difference between the application price and the price that could have been asked if the information had been available to the public at the time of application. The issuer of financial products has additional rights provided for in section 1043L (5).

⁶¹ See sections 19(1) and 43 of Proceeds of Crime Act of 1987 (C'th); *R v Rivkin* supra note 35 and *R v Hannes* supra note 36 519.

⁶² See section 1043L of the 2001 Act.

⁶³ See section 1317K of the 2001 Act.

For example, if such products were the subject matter of an affected transaction, the issuer in question may also recover the loss incurred.⁶⁴ This implies that an insider or any person who contravenes the provisions may incur civil liability where the securities in question have been purchased or sold.⁶⁵

Secondly, the *uninformed purchaser* or any *person who disposes of a financial product* may recover his loss suffered, from an insider or any other person who purchases the disposer's financial products.⁶⁶ Lastly, as pointed out earlier, ASIC may, where it considers to be in the public interest, bring an action in the name of and for the benefit of any affected body corporate to recover civil damages.⁶⁷

Noteworthy, in South Africa like in Australia both civil and criminal sanctions are imposed to curb insider trading and interestingly, the South African legislation now also covers juristic persons.⁶⁸ However, unlike the position in Australia, there is no distinction between the penalties and sanctions that are imposed on individuals and juristic persons in South Africa.⁶⁹ Moreover, there is no statutory duty on the part of insiders in South Africa to disclose their transactions pertaining to securities or other instruments issued by their companies or other institutions,⁷⁰ or any express duty on companies or institutions to disclose their unpublished price-sensitive inside information to the public. This unfortunately also means that there are no appropriate sanctions for such non-disclosure.

⁶⁴ See further section 1043L (3) and (4) of 2001 Act.

⁶⁵ See Ford, Austin and Ramsay *Ford's Principles of Corporations Law* looseleaf service update 43, 9/2004 9406 [9.690]. Also see *Keygrowth Ltd v Mitchell* (1990) 3 ACSR 476 487.

⁶⁶ See for detail section 1043L (3) of the 2001 Act.

⁶⁷ See paragraph 7.2.3 above for a detailed analysis of the role of ASIC. Also see section 1043L (2) and (5) of the 2001 Act; *ASC v Forem Free-way Enterprises Pty Ltd* (1999) 30 ACSR 339 351; Welsh "The Corporations Law Civil Penalty Provisions and the Lessons Learned from the Trade Practices Act 1974" (2000) 11 *Australian Journal of Corporate Law* 299.

⁶⁸ For the position in South Africa see sections 73 and 77 of the New Act.

⁶⁹ For the position in South Africa see section 115(a) of the New Act.

⁷⁰ See Jooste R (2006) *op cit* note 12 452.

On the other hand, although it appears that the civil sanctions of Australia might be somewhat inadequate and that the penalties for criminal offences are not severe, the significant number of successful insider trading cases reported to date points to the fact that such sanctions are at least effectively utilized. It is against this background that the researcher submits that meaningful lessons can be learned from Australian law in relation to the campaign against insider trading.

7.2.6. The adequacy of available defences and exceptions.

The Australian insider trading regulatory framework offers several exceptions and defences that are specifically formulated to relieve insiders or other persons from incurring liability in instances where their actions or conduct would otherwise amount to insider trading or tipping. It is therefore important to determine how such defences and exceptions are utilized in Australia.⁷¹

It appears the term “exception” is used in some of the provisions that apply to curtail liability in both criminal and civil proceedings,⁷² while the term “defences” is mostly used in relation to criminal proceedings only.⁷³ Interestingly, these terms seem to be used interchangeably in the current regulatory framework in Australia.⁷⁴

The onus of proof of these defences and exceptions lies upon the alleged insider or any person who is alleged to have contravened the insider trading provisions. Furthermore, the prosecution is not required to prove the non-existence of the facts or instances which

⁷¹ For purposes of this sub-heading, this analysis is done mainly with reference to the 2001 Act. Other defences and exceptions that are provided for in the *Corporations Regulations Act* (C’t) of 2001 will not be referred to in detail.

⁷² See sections 1043B-1043K of the 2001 Act.

⁷³ See section 1043M of the 2001 Act.

⁷⁴ See section 1043M (1) of the 2001 Act with a sub-heading called “Defences to Prosecution for an Offence”, but nonetheless it expressly discusses the exceptions proscribed in section 1043B-1043K of the same Act. Also see the CAMAC *Insider Trading Report supra* note 47.

stop such provisions from being applicable.⁷⁵ The accused is required to prove any of the proscribed defences or exceptions on a balance of probabilities.⁷⁶ Firstly, the exceptions will be discussed and thereafter, the defences.

With regard to the exceptions, the first one entails that the prohibition on insider trading does not preclude members of a body corporate's registered managed investment scheme from withdrawing, if on such withdrawal they receive a payment determined by valuating the underlying value of the assets even if the institution (company) in question has non public price-sensitive inside information at the time of redemption.⁷⁷ The registered managed investment scheme is a scheme on property for all approved members. For example, it may involve buying or selling of property which would have a material effect on the value of the interests in the scheme in question.

The second exception relates to the purchase of securities in fulfillment of a legal obligation imposed in terms of the 2001 Act.⁷⁸ Examples of situations in which an obligation to repurchase shares may arise are:

- the acquisition of shares from shareholders dissenting from a scheme or contract approved by the majority shareholders;⁷⁹
- the right of remaining securities holders to require a bidder to acquire their shares in certain circumstances;⁸⁰
- and the right of remaining convertible securities holders to require a bidder to acquire their shares in certain circumstances.⁸¹

⁷⁵ Section 1043M of the 2001 Act. Also see *Securities Ltd v National Companies and Securities Commission* (1990) ACSR 796.

⁷⁶ See section 13.5 of the *Criminal Code* (C'th).

⁷⁷ See sections 1043B; 601GA (4); 601FC and 601MA of the 2001 Act.

⁷⁸ See Ziegelaar *M op cit* note 19 556 582 and section 1043D of the 2001 Act.

⁷⁹ See section 414 of the 2001 Act.

⁸⁰ See section 662A-662C 2001 Act.

⁸¹ See section 663A of the 2001 Act; also see analysis by Lyon G and Du Plessis *J J op cit* note 11 78.

However, it should be noted that this exception does not apply to discretionary purchases, for instance where a corporation or a company exercises its discretionary powers in implementing a buy-back scheme or in the event of a compulsory acquisition of securities.⁸²

Thirdly, an underwriter or sub-underwriter who has unpublished price-sensitive inside information is exempted from insider trading liability if he:

- (i) applies for, acquires securities or manages investment products under an underwriting agreement or sub-underwriting agreement; or
- (ii) disposes of securities or managed investment products acquired under such agreement; or
- (iii) enters into an underwriting or sub-underwriting agreement.⁸³

Thus, for purposes of this exception, an underwriter or sub-underwriter may disclose inside information to procure any person to enter into an underwriting agreement in relation to any such securities or managed investment products or to enter into a sub-underwriting agreement in relation to such similar products or securities.⁸⁴

Fourthly, the prohibition against communication (tipping) of inside information is not applicable in instances where such tipping was in line with a legal requirement imposed by the Commonwealth, a State, a Territory or any other recognized regulatory authority.⁸⁵ This exception was enacted to enable unpublished price-sensitive inside information to be lawfully disseminated by any person who possesses it to either ASIC or the Australian Stock Exchange (ASX).⁸⁶

⁸² See sections 414(2) and 664A (2) of the 2001 Act.

⁸³ See section 1043C (1) of the 2001 Act.

⁸⁴ See Lyon G and Du Plessis J *op cit* note 11 76. Also see *Hooker Investments Pty Ltd v Baring Halkerston and Partners Securities Ltd* (1986) 10 ACLR 462 467.

⁸⁵ See section 1043E of the 2001 Act.

⁸⁶ See *Explanatory Memorandum Corporations Legislation Amendment Bill of 1991*(C'th) 100 350.

Fifthly, perhaps one of the most important exceptions ever to be promulgated by the Australian legislature entails Chinese Walls.⁸⁷ This exception protects corporate entities,⁸⁸ partnerships and dealers who trade in securities in instances where a company officer, employee, security dealer⁸⁹ or member of a partnership⁹⁰ or an agent has or is deemed to have unpublished price-sensitive inside information relating to the affected securities.⁹¹

However, for any such persons to rely on the Chinese Wall exception, they must satisfy the following four requirements:

- The decision to enter into an agreement should have been taken by a person other than the officer or employee who has the non public material inside information.
- The entities must have in place structures (Chinese Walls) which can objectively be expected to ensure that such inside information is not prematurely disclosed to the person or persons who then trade on that information.
- These structures must also ensure that such persons do not communicate (tip off) with any other person to trade on the premise of the inside information so disclosed and that relates to the affected transaction.
- Persons tipped off should not have been forced or coerced to trade or enter into any transaction.

⁸⁷ See Goldwasser “Recent Developments in the Regulation of Chinese Walls and Business Ethics” (1993) 17 *Company and Securities Law Journal* 227 228.

⁸⁸ See section 1043F of the 2001 Act.

⁸⁹ See section 1043K of the 2001 Act.

⁹⁰ See section 1043G of the 2001 Act.

⁹¹ See Lyon G and Du Plessis J *op cit* note 11 80-82, for a detailed analysis of the Australian Chinese Walls exception; see also paragraph 4.5 of Chapter 4 for the researcher’s analysis. See however Cassim R “Some Aspects of Insider Trading – Has the Securities Services Act, 36 of 2004 Gone too Far?” (2007) 19 *SA Merc LJ* 44 46-54 for her objections and criticisms of the Chinese Wall defence.

Lastly, the Australian legislation also exempts individuals, bodies corporate,⁹² bodies corporate in respect of the conduct of their employees or officers⁹³ and officers of bodies corporate⁹⁴ from any liability in respect of their knowledge and intentions pertaining to certain share transactions that they may undertake. This exception enhances multiple trading in the securities of a body corporate irrespective of the fact that trading in such securities may result in the price of such securities being materially affected.⁹⁵

The *statutory defences* against insider trading liability are provided for in section 1043M of the 2001 Act which also provides that the onus of proof rests on the accused or the defendant to prove any of the proscribed defences. There are generally two defences which are provided for in section 1043M (2) and (3) respectively.

Firstly, there is the so-called publication defence which entails that no person is liable for insider trading or tipping if the price-sensitive inside information that relates to the affected securities is acquired after it has been made available to the public (published)⁹⁶ in a manner known or common to investors of such securities and if a reasonable time since disclosure has elapsed. This also applies where the persons involved have or ought reasonably to have the same information affecting the securities in question.⁹⁷ Interestingly in this respect, is the fact that the Australian provisions seem to allow persons to trade or to tip others to trade on the basis of such information when they have become aware that it has been published already.

Secondly, any person accused of insider trading or tipping may be exempted from liability if he proves that the other party to the transaction in question knew or ought reasonably to have known about the inside information before entering into the

⁹² See section 1043I (1) of the 2001 Act.

⁹³ See section 1043(2) of the 2001 Act.

⁹⁴ See section 1043J of the 2001 Act.

⁹⁵ See *Australian Mining Industries v King* [2002] NSWSC 1033. Also see Lyon G and Du Plessis J J *op cit* note 11 94.

⁹⁶ See section 1042C (1)(b) of the 2001 Act.

⁹⁷ See sections 1043M (2)(a) and (3)(a) of the 2001 Act.

transaction or before tipping has occurred.⁹⁸ Although it is not clear what exactly constitutes equal information or when such information can be said to have been equally available to the parties involved, this defence is well recognized in the Australian courts.⁹⁹

However, the Australian legislature should have enacted more defences to supplement the proscribed exceptions to avoid affecting innocent persons and creating an over-regulation problem.¹⁰⁰ Despite this shortcoming,¹⁰¹ it is generally acknowledged that the awareness and reliance on the existing exceptions and defences has objectively speaking, been successful.¹⁰²

Apparently, the current South African statute also provides for defences which are devised to prevent innocent persons from incurring insider trading liability. However, unlike the position in Australia, there are no “exceptions” to supplement the proscribed defences. Perhaps, the legislature should have made provision for exceptions in addition to the defences.¹⁰³

Furthermore, as is argued by Jooste, no effort has been made to preserve or to enforce the common law defences.¹⁰⁴ He argues that the current provisions should have expressly preserved common law defences. Although it may be said that according to the South

⁹⁸ The so-called equal information defence. See section 1043M (2) and (3) of the 2001 Act; Lyon G and Du Plessis J *J op cit* note 11 100.

⁹⁹ See *CLC Corporation v Cambridge Gulf Holdings NL* (1997) 25 ACSR 296.

¹⁰⁰ See comparatively Lyon G and Du Plessis J *J op cit* note 11 102-103 and Kluver J *op cit* note 47.

¹⁰¹ See generally Gething “Insider Trading Enforcement: Where are We Now and Where do We Go from Here?” (1998) 16 *Company and Securities Law Journal* 607 and Anisman P “Insider Trading Legislation in Australia: An Outline of the Issues and Alternatives Report (1986) 81-86.

¹⁰² See for instance, *Hook Investments Pty Ltd v Baring Bros Halkerston and Partners Securities Ltd* (1980) 10 ACLR 524 NSWCA, *Ampolex v Perpetual Trustee Company (Canberra) Ltd (No 2)* (1996) 14 ACLC 1514, *R v Evans* [1999] VSC 488 and *R v Hannes* (2000) 36 ACSR 72.

¹⁰³ See paragraph 4.5 of Chapter 4 of this dissertation for a detailed analysis on the adequacy of such defences.

¹⁰⁴ See Jooste R (2006) *op cit* note 12 450.

African common law principles such defences are regarded as valid and enforceable unless they have been expressly excluded by statute, the legislature should have enacted these and additional defences to protect persons who inadvertently become involved in insider trading from possible draconian effects of insider trading legislation.

7.2.7. The enforcement of insider trading legislation and the effectiveness of the Australian insider trading regulatory framework.

The interrelationship between various insider trading enforcement agencies in Australia will be examined, by focusing on relevant factors such as detection, prevention and prosecution of insider trading and related activities. Finally, a comparative analysis of the South African and Australian regulatory frameworks will be made.

Although it appears that the Australian regulatory framework comprises mainly of ASIC, the ASX and the courts, other self regulatory organs (SRO's) such as Australian Competition and Consumer Commission (ACCC), Corporations and Markets Advisory Committee (CAMAC), International Banks and Securities Association of Australia (IBSA), Securities and Derivatives Industry Association (SIASDIA) are also involved and systems such as the Stock Exchange Automatic Trading System (SEATS) and Clearing House Electronic Sub-register System (CHES) are also implemented. Each of these regulatory bodies and systems will therefore be discussed.

ASIC is regarded as the principal organ that ensures effective combating of insider trading in Australia. It also operates a system for Electronic Document Lodgment (EDGE). This system enables lodgment agents such as accountants, lawyers and brokers to promptly transfer relevant documents to ASIC electronically and free of charge to effect disclosure of inside information. It is generally agreed that ASIC has to date successfully performed its role as a “corporate watchdog” as well as a body that enforces the insider trading prohibition.¹⁰⁵

¹⁰⁵ See paragraph 7.2.3 of this Chapter for a detailed and elaborate discussion on the adequacy of ASIC.

It should be borne in mind that ASIC does not work in isolation. The courts are also involved in the enforcement of the insider trading legislation. These courts, as was highlighted earlier in paragraph 7.2.4, have generally managed to curb insider trading and related activities such as tipping effectively. They have, for example, in most cases and in pursuance of their discretion, adopted some practical guidelines to supplement the insider trading provisions.¹⁰⁶

Another body that monitors and regulates insider trading and related activities is the ASX. The establishment and statutory recognition of the ASX commenced in the early 1970's.¹⁰⁷ This follows the adoption of the recommendations in the report of the Senate Select Committee on Securities and Exchange which was chaired by Senator Rae in 1974.¹⁰⁸ In April 1987, the ASX was created to replace the Australian Associated Stock Exchange, to consolidate six former state Exchanges and to formulate a national exchange which has since been the only operating stock exchange in Australia.¹⁰⁹

The principal function of the ASX is to provide and to maintain an efficient, informed and fair trading securities market. Thus, the ASX is responsible for ensuring that Australian securities markets are free from any manipulative and unfair practices such as insider trading. Moreover, the ASX offers a number of services to the markets such as fair trading systems, control of market integrity, guarantees of trade completion and to supply relevant information pertaining securities trading, settlement and transfer systems.¹¹⁰ More specifically, such services include the Company Announcements Platform (CAP). CAP was introduced by the ASX in August 1995 to assist companies to lodge announcements by facsimile to the ASX from any place in Australia at a

¹⁰⁶ For an incisive analysis, see paragraph 7.2.4 of this Chapter.

¹⁰⁷ See Shaw A and Von Nessen *P op cit* note 37 161.

¹⁰⁸ *Australian Securities Markets and their Regulation* Senate Select Committee on Securities and Exchange Report of 1974. Hereinafter referred to as the Rae Report.

¹⁰⁹ See Part IIA of the Australian Stock Exchange and National Guarantee Fund Act of 1987. Also see Shaw A and Von Nessen *P op cit* note 37 174. For further comparative reading see Mitchell P L R *Insider Dealing and Directors' Duties* 2nd ed Butterworths 1989 232-260.

¹¹⁰ See the ASX Annual Report 1996 2.

reasonably cheap cost. This service was introduced to encourage companies to comply with prompt disclosure requirements of any inside information that relates to securities.

Another service offered by the ASX is the SEATS system which was established in 1987 and became fully operative in 1990.¹¹¹ Its main role is to enable the ASX member organizations with recognized or confirmed orders to buy and sell securities that are traded on a market conducted by the ASX. It also provides its member organizations with adequate information pertaining securities market trading such as any changes in the market. This avoids abuse of non public price-sensitive information relating to securities, by any person who might have access to such information.¹¹²

In order to complement and supplement the SEATS system, the CHES system was put in place in September 1994 by the ASX Settlement and Transfer Corporation (ASTC), a wholly owned subsidiary of the ASX, for expedient electronic settlement in Australia of share transfers of both domestic and foreign issuers.¹¹³

Probably, one of the major services offered by the ASX is the electronic market surveillance. This surveillance is done by way of monitoring market activity and trading patterns through a computerized and sophisticated system called the Surveillance of Market Activity (SOMA). It is submitted that the SOMA system detects abnormal trading sequences by looking at the electronic signal of the SEATS system which contains the details of trading and some programmed parameters in order to alert persons such as financial analysts for consideration. These parameters are programmed to ignore normal trading activity but to immediately record and report any abnormal or irregular trading activity when such parameters are violated.¹¹⁴

¹¹¹ *Ibid* 8.

¹¹² See Simpson A “Securities Regulation for the Information Age” in Walker G, Ramsay I and Fisse B (eds) *Securities Regulation in Australia and New Zealand* LBC Information Services 1998 37.

¹¹³ *Ibid* 39-40.

¹¹⁴ See Australian Stock Exchange *ASX Surveillance: Helping to Protect the Australian Share Market for all Participants* (undated pamphlet). See further Simpson A *op cit* note 112 37. Also see Hannigan

Apart from the ASX, CAMAC also plays a pivotal role in the enforcement of the insider trading legislation in Australia.¹¹⁵ CAMAC was established in terms of Part 9 of the ASIC Act of 1989 as an advisory body to the government, which is responsible for monitoring insider trading activity and enforcing the insider trading provisions in Australia. Commentators agree that CAMAC has to date made a number of useful proposals for reform of the insider trading regulatory framework.¹¹⁶ Perhaps, this explains why many successful prosecutions of insider trading were achieved in Australia.

Lastly, the other regulatory authorities involved in the enforcement of the insider trading prohibition are the SRO's. For the purposes of this Chapter, these organizations include IBSA, ACCC and SIASDIA. Their role is to regulate market transactions, market participants and listing of securities. They are further responsible for dispute resolution. Moreover, they have formulated various guidelines for persons involved in the securities business such as brokers and other market participants such as financial analysts. These guidelines are aimed at maintaining market integrity and investor confidence.¹¹⁷

The South African regulatory framework, on the other hand, comprises mainly of the FSB and the courts. Regrettably, the South African legislature rigidly imposed the enforcement and regulatory powers on the FSB. The FSB has a mandatory task to refer criminal matters to the courts for prosecution, but unfortunately, it has to date failed to fulfill this task.¹¹⁸ Although it may be argued that the Johannesburg Securities Exchange

B *Insider Dealing* 2nd ed Longman Group Ltd 1994 20-46, for an incisive comparative analysis on the detection and surveillance of insider trading and tipping.

¹¹⁵ See Lyon G and Du Plessis J J *op cit* note 11 10. Prior to 11 March 2002 CAMAC was known as Companies and Securities Advisory Committee (CASAC), see <http://www.camac.gov.au> 08 March 2007.

¹¹⁶ See various references in note 46.

¹¹⁷ For a more detailed analysis see IBSA "Avoiding Conflicts of Interest: A Guide for the Financial Services Industry" (1989) and SIASDIA "Best Practice Guidelines for Research Integrity" (2001) <<http://www.securities.edu.au/cms/data/live/files/891.pdf>> 22 February 2006. Also see Shaw A and Von Nessen P *op cit* 37 181.

¹¹⁸ See paragraphs 4.6.1 and 4.6.3 of Chapter 4 of this dissertation.

(JSE), through its surveillance department, is also involved in the enforcement of the insider trading ban, interaction and co-operative effort between the JSE, the courts and the FSB can be increased to combat insider trading.

7.3. CONCLUDING REMARKS.

The current Australian insider trading legislation is aimed at promoting market integrity and public investor confidence. To attain this goal, the Australian legislature adopted a number of statutes, policies, recommendations and other necessary measures.

The “*information connection only approach*” is used. It defines an insider as any person who has non public price-sensitive inside information relating to financial products (securities). Such persons are then prohibited from unlawful trading in any securities (insider trading and tipping) on the premise of such information to avoid prejudice to other persons who did not have access to it.

Moreover, the Australian insider trading prohibition contains *mandatory disclosure requirements* for all issuers of securities and affected persons to ensure that all market participants have *equal access* to price-sensitive inside information relating to such securities.

Furthermore, the enforcement of the insider trading prohibition in Australia is not necessarily contingent upon a single regulatory body such as ASIC. It involves a co-operative effort of a number of regulatory and other bodies that compliment ASIC in curbing insider trading and tipping.

The South African regulatory framework, on the other hand, seems to be far from being adequate and effective, due to for example, the absence of other regulatory bodies that are statutorily obliged to assist the FSB and the courts, such as the Bond Exchange of South Africa (BESA), JSE or for that matter the government.

This is perhaps, at least in part, the reason for the many instances of insider trading that could have gone undetected in South Africa and the small number of cases that have actually been reported.¹¹⁹ Furthermore, unlike the position in Australia, there is no duty (mandatory disclosure requirements) on any person or company to disseminate non public inside information relating to instruments or securities.¹²⁰ Therefore, as Jooste lamented, the absence of such disclosure requirements increases the risk of insider trading and other prohibited conduct such as tipping.¹²¹

In conclusion, this Chapter will hopefully assist the South African legislature to recognize the shortcomings of the New Act and to learn from the Australian experience. Plausibly, as Huang¹²² purports, “the Australian ‘information connection only approach’ to the definition of insiders is both theoretically justifiable and practically manageable”. The researcher concurs with Huang and submits that instead of rigidly following US insider trading principles,¹²³ the legislature should consider to follow the Australian approach in order to make its insider trading legislation adequate, effective and more compatible to international best practice.

¹¹⁹ See various authorities quoted in note 117.

¹²⁰ See Jooste R (2006) *op cit* note 12 452.

¹²¹ *Ibid.*

¹²² See Huang H *op cit* note 1.

¹²³ See Chapter 5 of this dissertation.