

**THE DEFINITION OF “INSIDER” IN SECTION 3  
OF THE *SECURITIES MARKETS ACT 1988*: A  
REVIEW AND COMPARISON WITH OTHER  
JURISDICTIONS**

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## ABSTRACT

Statutory definitions of what constitutes an “insider” for the purposes of insider trading laws may be based on either a “person connection” approach or an “information connection” approach. The “person connection” approach defines “insider” by reference to the relationship of the person to the public issuer of securities, while the “information connection” approach considers anyone who has material price-sensitive information about the issuer to be an insider, regardless of his or her relationship to the issuer.

In common with Japan, Hong Kong and China, New Zealand’s insider trading law — the *Securities Markets Act 1988* — uses a person connection approach in its definition of “insider”. Other jurisdictions, however, including both the United Kingdom and Australia, have, to varying degrees, recently amended their definitions to reflect the information connection approach. The United States, although the first country to address the issue of insider trading, lacks a statutory definition of “insider” and instead relies on generally applicable laws against securities fraud. It has developed a definition with elements of both approaches.

This paper reviews the definitions in use in the United States and in other countries (including New Zealand) which have been influenced by the American experience. It concludes that the narrow, relationship-based approach does not capture some conduct that may be damaging to the integrity of the securities market. A definition based on the information connection approach (perhaps combined with elements of the person connection approach) may therefore be preferable to New Zealand’s current definition.

## INTRODUCTION

New Zealand acquired a statutory prohibition against insider trading in 1988 with the enactment of Part I of the *Securities Markets Act 1988*<sup>1</sup>. However, the experience since the *Securities Markets Act 1988* came into effect is that little action has been taken against insider trading and no one has been successfully held liable for insider trading in New Zealand. Public comment has suggested that the current insider trading regime does not capture the type of behavior that is perceived by the public to be insider trading and that a first principles review of our law is necessary.<sup>2</sup> As a fundamental part of the insider trading regime, the definition of “insider” is no doubt worthy of a review.

The *Securities Markets Act 1988* adopts a “person connection” approach in defining “insider”, whereby an insider is defined to include anyone who holds material price-sensitive information that is not generally available, and who has certain relationships with the public issuer.<sup>3</sup> This may be contrasted with the “information connection” approach, under which anyone who has material price-sensitive information that is not generally available is considered an insider, regardless of his or her relationship to the source of the information.<sup>4</sup> It has been suggested that there are two main issues to consider when formulating a definition of “insider”:

Should the definition include a “person connection” and/or “information connection” approach?; and

Should the definition of “insider” be limited to a natural person or extended to include other entities?<sup>5</sup>

This paper focuses on the first issue, by way of considering other jurisdictions, to review the definition of “insider”. It is worth mentioning here that the *Securities Markets Amendment Act 2002* does not make any amendments to sec 3 of the *Securities Markets Act*. However, as different provisions of an Act interact and reinforce each other, we will give suitable attention to the amendments introduced by the *Securities Markets Amendment Act 2002* when reviewing the definition of “insider”.

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<sup>1</sup> In terms of sec 4 of the *Securities Markets Amendment Act 2002*, with effect from 1 December 2002, the name of the *Securities Amendment Act 1988* has been changed to the *Securities Markets Act 1988*.

<sup>2</sup> *Reform of Securities Trading Law: Volume One: Insider Trading: Fundamental Review*. Discussion Document, Ministry of Economic Development (May 2002) [3]. In addition, the Ministry of Economic Development has also released other discussion documents on the reform of securities trading law: *Volume Two: Market Manipulation Law* and *Volume Three: Penalties, Remedies and the Application of Securities Trading Law*.

<sup>3</sup> *Securities Markets Act 1988*, sec 3(1).

<sup>4</sup> See, for example, *Corporations Act 2001*(Cth), sec 1043A(1).

<sup>5</sup> *Reform of Securities Trading Law: Volume One: Insider Trading: Fundamental Review*. Discussion Document, Ministry of Economic Development (May 2002) [109].

## THE DEFINITION OF “INSIDER” IN THE UNITED STATES: A BACKGROUND

Laws dealing with insider trading in the United States (US) have been in force for a number of years, and insider trading has been described as “the representative white-collar crime of the 1980s”.<sup>6</sup> The US was the first country to tackle insider trading effectively. To some extent the law of insider trading in the US reflects and has influenced the development of the definition of “insider” in other jurisdictions.<sup>7</sup>

Prior to legislation specifically prohibiting insider trading, actions for insider trading in the US were based on the common law action for fraudulent transactions. In *Strong v Repide*,<sup>8</sup> the US Supreme Court enunciated the so-called “special circumstances” doctrine,<sup>9</sup> which was based on the existence of a relationship between director and stockholder that is different from the relationship between arm’s-length traders. In this case, a controlling stockholder and general manager of a corporation purchased the holdings of a minority stockholder without disclosure of the then current status of negotiations for the sale of corporate assets. The “special circumstances” were found in the fact that the defendant had been entrusted with the negotiations to sell the corporate assets; if he had not been a director he would not have had an affirmative duty to make disclosure.<sup>10</sup> Thus, under this doctrine directors and officers may, in particular circumstances, owe a fiduciary duty to individual shareholders.

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<sup>6</sup> Elizabeth Szockyj, *The Law and Insider Trading: In Search of A Level Playing Field* (1993) 1.

<sup>7</sup> Michael Ashe and Lynne Counsell note that, while only a few countries have adopted the US approach to the law in this field, the fact that the US has a law on insider trading and has adopted, since the early 1960s, a fairly aggressive stance in enforcing it has influenced most other countries to enact laws on insider trading. (Michael Ashe and Lynne Counsell, *Insider Trading* (2<sup>nd</sup> ed, 1993) 27.) This is particularly true with regard to the New Zealand law. It has been submitted, “New Zealand’s proscription of insider trading, tipping and tippee trading bear a strong resemblance to America’s definition of these concepts. The American experience can, therefore, serve as useful reference point for possible tensions to be encountered in New Zealand’s regulation of these abuses.” (James D. Cox, ‘An Economic Perspective of Insider Trading Regulation and Enforcement In New Zealand’ (1990) 4 *Canterbury Law Review* 268, 277.)

<sup>8</sup> 213 US 419,431 (1909).

<sup>9</sup> Apart from the “special circumstances” doctrine, there are also two common law rules: the “majority” or “strict” rule and the “minority” or “fiduciary” rule. Under the former, directors and officers owe a fiduciary duty only to the corporation; in contrast, the latter holds that directors and officers have a fiduciary duty to disclose all material facts when dealing with a shareholder, regardless of whether there are special circumstances. Most US jurisdictions take an in-between position, namely the “special circumstances” doctrine. (See Louis Loss, *Fundamentals of Securities Regulation* (1983) 818-819.) However, whatever the facts were, the above common law rules did not apply to transactions between insiders and someone who was not a shareholder.

<sup>10</sup> *Ibid* 819. When granting rescission of the sale of stock, the Supreme Court held, “that the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak.” (Above n 8 at 431.)

The seeds of insider trading regulation were planted with the enactment of the *Securities Exchange Act* of 1934 (hereinafter the 1934 Act),<sup>11</sup> which was a product of the so-called “New Deal” after the stock market crash of 1929. Under sec 16 of the 1934 Act, a limited category of insiders must report their transactions in the securities of their companies together with any profit gained by them from within a six-month period. The insiders to whom this provision applies are officers or directors of companies with a class of equity securities registered under the 1934 Act and beneficial owners of 10 per cent or more of such securities.

While sec 10(b) of the 1934 Act was not originally designed to prosecute insider trading, Rule 10b-5 made in 1942 by the Securities and Exchange Commission (SEC) under sec 10(b) has been of prime importance in the development of insider trading law. Rule 10b-5 is a provision which prohibits the use of manipulative or deceptive devices in relation to the purchase and sale of securities on stock markets.<sup>12</sup> Accordingly, the Rule itself makes no specific reference to insider trading, let alone giving a definition of insider. However, the lack of a clear legislative definition allows the SEC to construct its own interpretations of what is “insider trading”, subject to judicial scrutiny.<sup>13</sup> Thus, the definition of what insider trading is and who is an insider has evolved from administrative agency and court decisions.<sup>14</sup>

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<sup>11</sup> Interestingly, due to the widely perceived connection between securities trading and political corruption, in 1779 when considering a Bill to establish a Treasury Department, the First US Congress added the ban on speculating to the Bill. According to the resulting Act, officials and clerks who violated any of its provisions were to “be deemed guilty of a high misdemeanor”, were to pay a \$3,000 fine (\$500 in the clerk’s case), and were to be removed from office and banned from holding any federal office in the future. Half of the fine could go to a person who provided the government with information leading to a conviction. Although there have been no reported cases of anyone ever having been prosecuted under the Act over two centuries, Stuart Banner argues that the passage of the Act incorporated the first prohibition in English or US law of what would much later (and normally with reference to corporate stock rather than the public debt) come to be called insider trading. (Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (1998) 161-164.)

<sup>12</sup> SEC Rule 10b-5, 17 CFR 240.10b-5 (1942) reads:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mail or any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

<sup>13</sup> The SEC, as an “independent” agency, exercises not only executive but also quasi-legislative (rulemaking) and quasi-judicial powers under a total of seven related but separate statutes. The first six were enacted between 1933 and 1940; the seventh in 1970. (See Loss, above n 9, 39.)

<sup>14</sup> Szockyj, above n 6, 3.

Two early judicial pronouncements on Rule 10b-5 came in *Kardon v National Gypsum Co.*<sup>15</sup> and *Speed v Transamerica Corp.*<sup>16</sup> In both cases, traditional insiders, such as directors, officers and majority shareholders, were found guilty of breaching Rule 10b-5 in situations involving face-to-face transactions rather than those taking place through impersonal exchanges. Because of their special position, traditional insiders have access to confidential corporate information and a trust or obligation to refrain from abusing their role for personal financial gain has been customary.

In 1961, the SEC extended the reach of the regulation of insider trading on the basis of the decision in *Re Cady, Roberts and Co.*,<sup>17</sup> which moved the definition beyond normal fiduciary duty. In this case, the defendant Robert Gintel was a broker and partner of Cady, Roberts and Co., and Cowdin was a director of Curtiss-Wright Corp and an associate at Cady, Roberts. Gintel received inside information about Curtiss-Wright's dividend from Cowdin and used that information to sell Curtiss-Wright stock. Unlike the previous cases, the trades took place on an exchange rather than through direct contract with the purchasers. However, in concluding that Gintel had violated Rule 10b-5, the SEC extended the duty to disclose to individuals who were not previous shareholders (ie. sellers), but rather were purchasers of the stock. In addition, this case established that individuals who are outside the corporate organisation could also be found guilty of insider trading if they have a "special relationship" with the company.<sup>18</sup>

The *Cady Roberts* decision was subsequently applied in *SEC v Texas Gulf Sulphur Co.*<sup>19</sup> In this case, the appellate court held that simple possession of material inside information was sufficient to evoke the "disclose or abstain" doctrine and, more importantly, it emphasized that the Rule is also applicable to one possessing the information who may not be strictly termed an "insider". Thus, the reach of Rule 10b-5 extended to individuals who, because of special connections to the corporation, are privy to confidential information, thereby becoming "temporary insiders", for example, lawyers, brokers and accountants.<sup>20</sup>

The US Supreme Court first examined the matter of insider trading in *Chiarella v United*

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<sup>15</sup>73 F Supp 798 (ED Pa, 1947).

<sup>16</sup>99 F Supp 808 (D Del, 1951)

<sup>17</sup>40 SEC 907 (1961). The fundamental theory of insider trading liability, the "disclose or abstain" theory, was first initiated in this case. According to this theory, anyone who is in possession of material nonpublic information should either disclose it to the investing public before trading or abstain from trading.

<sup>18</sup>In this respect, the SEC emphasized that the duty arose from two principal elements: (i) The existence of a relationship giving access, directly or indirectly, to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure. (Ibid at 912.)

<sup>19</sup>401 F 2d 833 (2d Cir 1968).

<sup>20</sup>Szockyj, above n 6, 42.



States.<sup>21</sup> The *Chiarella* case concerned a print worker who traded on material nonpublic information about takeover bids. He obtained this information from the announcements that he helped to print. The court ordered his acquittal because he did not owe a fiduciary duty to the vendor shareholders of the target companies in the takeover bids. That is, to impose the “disclose or abstain” doctrine, the trader must be a fiduciary to the firm and consequently to its shareholders. Thus the *Chiarella* case in fact limits the application of the “disclose or abstain” theory to only registered insiders.

The question was raised as to the liability of a tippee if the tip is received from an individual who is a fiduciary. Soon after *Chiarella*, the Supreme Court reviewed this issue in *Dirks v SEC*<sup>22</sup> in which the court established that in order to impose liability on a tippee, the tipper must be a fiduciary and the tip has to result in personal profit for the tipper. As there were no personal gains in the *Dirks* case, the court reversed the earlier ruling that the tippee was liable. Subsequently the definition of personal gains was broadened to include not only explicit personal financial gains but also subjective gains such as gains to one’s reputation, and gaining a “warm glow” from providing information to a friend.<sup>23</sup> More significantly, the Supreme Court in the *Dirks* case stated that included within the scope of *Chiarella*’s definition of insider are those who have but a temporary relationship with the firm, provided that relationship is under circumstances that provide the “temporary insider” with access to confidential corporate information.<sup>24</sup> Thus, the Supreme Court revoked the limitation of the *Chiarella* case and broadened the definition of an insider.

With the Supreme Court limiting the application of sec 10(b), the SEC, federal prosecutors and the lower courts began to apply the misappropriation theory,<sup>25</sup> which broadened the duty owed solely to shareholders to include the trader’s employer or clients. The theory was developed in *Carpenter v United States*, in which R. Foster Winans, a writer for the *Wall Street Journal* daily column “Heard on the street” had disclosed the content of his forthcoming articles to a broker who traded based on that information and provided a “kickback” to Winans. The *Carpenter* case did not involve the passing of confidential securities information. The information was based on an analysis of publicly available knowledge, as opposed to confidential corporate knowledge. However, since Winans was an employee of the *Wall Street Journal*, the information he had produced was the property of the *Journal*. Therefore, by using the

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<sup>21</sup> 445 US 222 (1980).

<sup>22</sup> 463 US 646 (1983).

<sup>23</sup> Nasser Arshadi and Thomas H. Eysell, *The Law and Finance of Corporate Insider Trading: Theory and Evidence* (1993) 52-53.

<sup>24</sup> Above n 22, 655.

<sup>25</sup> The misappropriation theory relies on the principle that all information generated by or through the company belongs to the company. Thus, persons who come into possession of such information in circumstances that warrant confidentiality are not permitted to misappropriate the information for their personal gains or benefits.

information for his personal gain he violated his fiduciary duty toward his employer.<sup>26</sup> It is worth noting that in this case the Supreme Court affirmed the mail and wire fraud conviction, but it was divided 4-4 over whether Winans had committed securities fraud.<sup>27</sup> By contrast, although not in legislation, the US Congress has expressed its approval of the misappropriation theory as validly falling within the bounds of sec 10(b) and Rule 10b-5.<sup>28</sup>

The application of the misappropriation theory has been further clarified in a more recent case, *United States v O'Hagan*,<sup>29</sup> in which the Supreme Court had to decide whether it was unlawful for defendants, who have no relationship to the corporation in whose shares they trade, to purchase or sell while in possession of information acquired from another person with whom they have a fiduciary relationship. The *O'Hagan* case retains the requirement of a fiduciary relationship between the defendant and the party from which the information is misappropriated. That is, if there is no fiduciary relationship between the source of the information and the defendant, there is no wrongful misappropriation.<sup>30</sup> The misappropriation theory seems to represent the current position in the US, and has been used in scenarios beyond employment relationships.<sup>31</sup>

From the evolution of insider trading law in the US described above,<sup>32</sup> there are three points worth noting:

First, there is a trend to broaden the definition of what insider trading is and who is an insider. With the evolution of insider trading, liability for insider trading has been extended from the common law doctrine of fraud in a personal stock transaction between two parties to trades which occur on an impersonal stock exchange. Likewise, instead of only corporate directors,

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<sup>26</sup>In a strong dissent to the majority decision of the Court of Appeals, Miner J believed that this was not a securities-related issue and the majority was erroneous in its application of the misappropriation theory: see *United States v Carpenter* 791 F 2d 1024 (2d Cir 1986). This question is discussed further below.

<sup>27</sup>484 US 19, 24 (1987). The judgment, delivered by White J, records simply that "the court is evenly divided with respect to the convictions under the securities laws and for that reason affirms the judgment below on those counts". No explanation is given as to how the nine-member court came to be evenly divided.

<sup>28</sup>Szockyj, above n 6, 50-51.

<sup>29</sup>117 S Ct 2199 (1997). It is argued that the Supreme Court in this case has "completed the regulatory quilt for insider trading regulation". (Ross Buckley, 'United States v O'Hagan: completing the insider trading mosaic' (1998) 72 *Australian Law Review* 412, 412).

<sup>30</sup>See *United States v Chestman* 946 F 2d 551 (2d Cir 1991), cert denied, 112 S Ct 1759 (1992).

<sup>31</sup>Lori Semaan, Mark A Freeman and Michael A Adams, 'Is Insider Trading a Necessary Evil for Efficient Markets?: An International Comparative Analysis' (1999) 17 *Company and Securities Law Journal* 220, 222.

<sup>32</sup>The above discussion is not the whole story of insider trading law in the US. For the present purposes, we will not deal with insider trading liabilities arising under other statutes such as *Rule 14e-b*, the *Mail and Wire Fraud Statutes*, and the *Racketeer Influenced and Corrupt Organisations Act*.

officers and majority shareholders who owe a fiduciary duty to shareholders, insiders may now include employees of the company, individuals with temporary access to confidential corporate information and tippees.<sup>33</sup> Although the law involving “outside-insiders” remains unclear, it seems that the definition of insider has been extended to catch anyone who trades on nonpublic information.

Secondly, the misappropriation theory has become one of the most effective tools in the enforcement of the insider trading law. In one sense, anyone who trades on nonpublic information could be caught by the misappropriation theory. After all, every insider trading case involves an unauthorised use of confidential information. That is, misappropriation could occur in all insider trading cases, whether the defendant is the classic insider that is embraced in *Chiarella*, or the outsider whose fiduciary relationship with one company provides valuable information about a company with whom the defendant has no relationship.<sup>34</sup>

However, this is not to say that the misappropriation theory is not without limitation.<sup>35</sup> In some cases such as *Carpenter*, whether or not the misappropriation theory is applicable is still open to question. In this respect, it has been submitted that misappropriation is present only when there is a secretive breach of an expectation of loyalty. This means two things: first, employers and other sources can presumably authorise insider trading if they so desire; second, if the trader tells the source in advance of his intent to trade, there can be no secretive breach.<sup>36</sup> To justify the prohibition against insider trading as such, Professor James Cox has argued:

There is a grave danger that such a privatised view of insider trading will ultimately cause our present concern for preserving the integrity of fair and efficient capital markets to be subordinated to the vagaries of private arrangements between the defendant and his employer. Just as the successful prosecution of Mr Winans should not have been scuttled if his employers, Dow Jones and Co., has licensed him to trade on the advance knowledge of companies touted in his column, the proscription of trading which poses a threat to the fairness and efficiency of capital markets should not be subordinated to private arrangements between an employer and his employees.<sup>37</sup>

It seems that under the misappropriation theory, at least as far as the American insider trading regime is concerned, the underlying policy has shifted to the rationales of market fairness and efficiency. In this sense, the American approach has elements of the “information connection”

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<sup>33</sup>Szockyj, above n 6, 54.

<sup>34</sup>Buckley, above n 29, 416.

<sup>35</sup>For example see Alcock’s discussion on this issue. (Alistair Alcock, ‘Order Restored to US Insider-dealing Law’ (1997) 18 *Company Lawyer* 301, 303.)

<sup>36</sup>James D. Cox, Robert W. Hillman and Donald C. Langevoort, *Securities Regulation: Cases and Materials* (3<sup>rd</sup> ed, 2001) 966-967.

<sup>37</sup>Ibid.

approach; to some extent we could say that the definition of “insider” under the US law is based on a person connection approach, but includes an information connection. After all, if we apply the notion that an insider is someone who has a relationship with the issuer of the securities, then a person such as Winans would be unlikely to be regarded as an insider except where there is a business relationship between the newspaper and the company about which the journalist obtained unpublished information.<sup>38</sup>

However, the American approach does require a fiduciary relationship between the insider and the source of the inside information. Although in *Carpenter* Winans had no a fiduciary link with the issuer, he did with his employer, whose property the inside information was considered to be. Under the misappropriation theory, a fiduciary relationship might be established through any position of trust and confidence and the definition of insider might cover any outsiders who trade on nonpublic information, but due to the requirement of a fiduciary link between the insider and the source of information, the practical effect of the misappropriation theory is narrower than the information connection approach. For example, a taxi driver who overhears passengers discussing a sensitive corporate matter would be unlikely to be caught by the misappropriation theory.

Thirdly, lacking a legislative definition of insider trading and “insider”,<sup>39</sup> the SEC could, and still can, test the boundaries to determine how far it may push the parameters, subject to judicial scrutiny. Although it has been argued that the SEC has overstepped its power in its interpretation of the current law, the US Congress and the courts usually leave in the hands of the SEC the ability to define what it believes insider trading to involve.<sup>40</sup> In fact, the SEC has an important role in regulating insider-trading activities and enforcing the insider trading law. Since the SEC has a closer relationship with the securities market and can quickly react to the newest developments in insider trading, this regime could widen or narrow the scope of the regulation through the SEC’s interpretation subject to judicial review. On the other hand, to some extent

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<sup>38</sup>Ross Grantham and Charles Rickett, *Company and Securities Law: Commentary and Materials* (2002) 960.

<sup>39</sup>It is worth mentioning here that in connection with its codification of a good deal of the 10b-5 jurisprudence, sec 1603(b) of *the Federal Securities Code* defines “insider” in a manner thought to represent existing case law:

For purposes of section 1603, “insider” means (1) the issuer, (2) a director or officer of, or a person controlling, controlled by, or under common control with, the issuer, (3) a person who, by virtue of his relationship or former relationship to the issuer, knows a material fact about the issuer or the security in question that is not generally available, or (4) a person who learns such a fact from a person within section 1603(b) (including a person within section 1603(b)(4)) with knowledge that the person from whom he learns the fact is such a person, unless the Commission or a court finds that it would be inequitable, on consideration of the circumstances and the purposes of this Code (including the deterrent effect of liability), to treat the person within section 1603(b)(4) as if he were within section 1603(b)(1), (2), or (3). (Loss, above n 9, 830.)

<sup>40</sup>Szockyj, above n 6, 53.

the flexibility of this regime has resulted in complex — and sometimes controversial — decisions in this field. Nonetheless, it must be admitted that the SEC, among other things, has achieved a greater degree of success in at least being seen to combat insider abuse than anyone else. In this sense, it has been argued, “while many abroad regard the absence of an SEC-equivalent as something of a blessing, there is little doubt that the credibility of the statement that a particular country regulates insider trading requires something more than a look at statute books to assess.”<sup>41</sup>

## THE DEFINITION OF “INSIDER” IN OTHER JURISDICTIONS: A COMPARISON

The US is not the only nation to address the issue of insider trading. Insider trading regulation is also common outside the US; more than one hundred countries now have insider-trading prohibitions. Most have followed the US in applying criminal sanctions in cases where *mens rea* can be proven. New Zealand currently stands out as one of the few jurisdictions where insider trading is not a criminal offence, though this has been suggested as an area of possible future reform.<sup>42</sup>

As mentioned above, there are two approaches to the defining of “insider”: the “person connection” and “information connection” approaches. The former defines an insider as someone who has a relationship (direct or indirect) with the issuer of the securities. Under this approach, insider trading is considered inconsistent with a fiduciary or similar duty owed to the entity whose securities are traded or which is the owner of the inside information. The person connection approach can be divided into three categories: the direct connection, employment, and fiduciary duty approaches.<sup>43</sup> In contrast, under the information connection approach any one who has material price-sensitive information that is not generally available is considered an insider, regardless of their relationship to the source of the information. It is considered that trading with knowledge while in possession of information, rather than a person’s connection, is what can detrimentally affect the market.<sup>44</sup>

### ***Australia***

The definition of “insider” contained in sec 1043A(1) of the Australian *Corporations Act 2001* is significantly different to that contained in previous insider trading legislation in that country. The previous provisions defined an insider by reference to that person’s connection with a body corporate. However, the Griffiths Committee report of 1989, *Fair Shares for All: Insider Trading in Australia*, described this aspect of the previous legislation as an unnecessary complication. It argued that the basis for determining whether insider trading had occurred should be the use of

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<sup>41</sup>Cox, Hillman and Langevoort, above n 36, 1004.

<sup>42</sup> See *Insider Trading: Discussion Document*, Ministry of Economic Development (September 2000) [7.1]-[7.17].

<sup>43</sup> See above n 5, [110]-[113].

<sup>44</sup> *Ibid* [120]-[122].

information, rather than the connection between a person and a body corporate.<sup>45</sup> Australia subsequently adopted the information connection approach without any person connection. Section 1043A(1) provides that insider trading occurs if:

- (a) a person (the “**insider**”) possesses inside information; and
- (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of “**inside information**” in sec 1042A are satisfied ...

The matters specified in those paragraphs are:

- (a) the information is not generally available; and
- (b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular ... financial products.

In Australia, an insider is thus any person who possesses inside information and who knows or reasonably ought to know that the information is inside information. Thus, if a person merely overhears a conversation in a lift or on the street they can be regarded as an insider even though they do not have any connection with the issuer of the securities. It is clear that the Australian regime has created a broader net of potential defendants to cover anyone who has confidential price sensitive information.

### **United Kingdom**<sup>46</sup>

The original UK legislation on insider dealing was contained in Part V of the *Companies Act 1980* and was later consolidated in the *Company Securities (Insider Dealing) Act 1985*. In order to adopt the European Community Directive 89/592 coordinating regulations on insider dealing, Part V of the *Criminal Justice Act 1993* (hereinafter the CJA) was introduced.

Under the CJA, perhaps the most significant change is the abandonment of the traditional requirement that the insider be “knowingly connected” with the company to which the inside information relates. Under the previous law, the concept of “primary insiders” was defined by reference to a “connection” with a company. By contrast, the CJA does not require such a nexus. Under sec 57(1) of the CJA, a person will have information as an insider if, and only if:

- (a) the information is, and he knows that it is, inside information; and
- (b) he has the information, and knows that he has it, from an inside source.

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<sup>45</sup>Phillip Lipton and Abe Herzberg, *Understanding Company Law* (10<sup>th</sup> ed, 2001) 535.

<sup>46</sup>With respect to the definition of insider, South African law is almost identical to that of the UK. See Richard Jooste, ‘The Regulation of Insider Trading in South Africa — Another Attempt’ (2000) 17 *South African Law Journal* 283, 286-290.

Obviously, under the CJA, it is sufficient that an insider has access to the information by virtue of his employment, office, or profession. This represents a significant extension of the law to catch improper conduct by persons who are not “connected” with a company but nevertheless have direct access to price-sensitive information about it.

It is worth noting that the UK does not have a “pure” information connection approach. Under sec 57(2) of the CJA, three categories of insider can be identified: true insiders, temporary insiders and tippees.<sup>47</sup> Under the previous law, they were regarded as “connected persons” and had a “connection” with the issuer of the securities. Generally speaking, inside information comes from an inside source. So in practice, there is a need to define the exact scope of “an inside source”. Under the CJA, as an additional definition of “insider”, sec 57(2) is used to explain what comprises “an inside source” and to some extent this makes the definition of “insider” a little clearer, although its test is still not entirely clear.<sup>48</sup> On the other hand, sec 57(2) imposes a requirement of *mens rea* for criminal liability under the CJA. That is, the accused must be proved to have known that the information came from “an inside source”, ie. that he or she fell within one or other of the three categories of “connected persons”.<sup>49</sup> In this sense, although it has been submitted that sec 57(2) is no longer necessary since a simple access test will determine whether or not such individuals have information as insiders,<sup>50</sup> at least as far as the definition of insider is concerned, the partial application of the person connection approach further clarifies who is an insider and is useful to improve certainty in the definition.

## **Singapore**

The previous provision that dealt directly with insider trading in Singapore was sec 103 of the *Securities Industry Act* (hereinafter the SIA). Under the SIA, a person connection approach was used. Compared to other jurisdictions, perhaps the most striking feature of the old Singapore insider trading law was that its scope covered almost all potential insiders provided for in other jurisdictions.<sup>51</sup>

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<sup>47</sup>Section 57(2) of the CJA provides that a person has information from an inside source if and only if: (a) he has the information through being a director, employee or shareholder of an issuer of securities or has access to the information by virtue of his employment, office or profession; or (b) the direct or indirect source of his information is a person with paragraph (a).

<sup>48</sup>See Paul L. Davies, *Gower's Principles of Modern Company Law* (6<sup>th</sup> ed, 1997) 465-466.

<sup>49</sup>Davies has argued that sometimes the requirement that inside information must come from an “inside source” is likely to be difficult to meet, and in circumstances such as the accused being a director, the fact will presumably raise “a pretty strong prima facie case” that the accused knew that fact, and so move the evidential burden to the director to disprove knowledge. (Emphasis added) (Ibid 467). By way of comparison, see the approach taken in Singapore's insider trading laws discussed below.

<sup>50</sup>Ashe and Counsell, above n 7, 91.

<sup>51</sup>For example, natural persons who could be potential corporate insiders under the SIA were:

(1) a director, secretary, executive officer or employee of the body corporate;

Section 103 of the SIA was based on sec 128 of the Australian *Securities Industry Act 1980*.<sup>52</sup> Since the Australian insider trading laws were completely redrafted in 1991 in order to overcome the shortcomings of its previous provisions, the *Securities and Futures Act 2001* (hereinafter the SFA) was passed in Singapore on 5 October 2001 to follow the current Australian model in adopting an information connection approach.

Under the SFA, an insider is anyone in possession of inside information. The SFA divides insiders into two groups and contains two provisions on insider liability: sec 218 deals with insider trading by connected persons<sup>53</sup> and sec 219 deals with persons other than connected persons. No provision on connected persons appears in the current Australian legislation, but this deviation does not mean that the person connection approach has been retained in the insider trading laws in Singapore.<sup>54</sup> Instead, the underlying philosophy behind sec 218 is the same as the Australian provision. That is to say, a person who has an informational advantage over another should be prohibited from taking such an advantage, regardless of how such an advantage came about. In this respect, there should not be any distinction between connected persons and other persons. Although the SFA does contain a specific provision on connected persons, in effect the person connection approach has been done away with by sec 219 so as to widen the previous prohibition.

It is noteworthy that sec 218 contains a presumption of *mens rea* against connected persons, resulting in the reversal of the onus of proof upon the defendant with respect to the existence of the mental element.<sup>55</sup> It is therefore submitted that the difference between sec 218 and sec 219

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- (2) a receiver, or receiver and manager, of property of the body corporate;
  - (3) an official manager or a deputy official manager of the body corporate;
  - (4) a liquidator of the body corporate;
  - (5) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons;
  - (6) an officer of a related body corporate;
  - (7) a substantial shareholder or an officer of such substantial share holder, within the meaning of Division 4 of Part IV of the Companies Act in that body corporate or in a related body corporate;
  - (8) a professional or business associate of the body corporate or a related body corporate occupying a position that may reasonably be expected to give him access to price sensitive information or information otherwise not generally available. (Hairani Saban, *Corporate Debt Securitization – Regulation and Documentation* (1994) 31.)

<sup>52</sup> Mark Stamp and Carson Welsh (eds.) *International Insider Dealing* (1996) 416.

<sup>53</sup> Under sec 218, a connected person includes an officer, a substantial shareholder or a person who occupies a position that may reasonably be expected to give him access to price sensitive information. Hence the connected persons listed in sec 218 are identical to those referred to in the SIA.

<sup>54</sup> Chiu Hse Yu, 'Australian Influences on the Insider Trading Laws in Singapore' [2002] *Singapore Journal of Legal Studies* 574, 577.

<sup>55</sup> *Ibid.*



is the mode of proof. In order to establish insider liability, sec 218 reverses the onus of proof to ease the difficulties of proof both in terms of evidence gathering and the burden of proof.<sup>56</sup> This approach seems better than the UK model (see above).

### **Japan**

The principal prohibition in Japan against insider trading is set out in a 1988 amendment to the *Securities and Exchange Law* of Japan (hereinafter the SEL). Articles 166 and 167 of the SEL set out two different definitions of insider: Company insiders, and related persons in a tender offer. The persons subject to the prohibition are:

- (1) officers, agents, employees of the issuer and its parent corporation and subsidiary corporations (the “issuer, etc.”);
- (2) the holders of 3% or more of the shares of the issuer, etc.;
- (3) if such shareholder is a corporation, its officers, agents and employees
- (4) any person who has a statutory power to investigate the issuer, etc. (such as government officials who have the statutory power to investigate the issuer, etc.); and
- (5) any person who has entered into an agreement with the issuer, etc., and if such person is a corporation, its officers, agents and employees.<sup>57</sup>

When such persons obtain their knowledge in connection with the performance of their duties, with the exercise of their power, or with the entering into or performing of the contract, they are regarded as insiders. Clearly, Japan adopts a person connection approach to define who is an insider.

### **Hong Kong**

In Hong Kong, insider dealing is regulated under the *Securities (Insider Dealing) Ordinance* (hereinafter the SIDO). Section 9 of the SIDO sets out the circumstances under which insider dealing will be found to have occurred. According to this section, the SIDO identifies four categories of “insider”: persons contemplating takeovers; persons connected with a corporation; persons who receive relevant information from a connected person and who knowingly use it to deal in securities or who counsel others to do so; and “tippees” of each of the above. A person who is “connected with a corporation” includes, among others, directors, officers and employees of a corporation. It is worth noting here that in ss 10-12 of the SIDO, some statutory exceptions are set out to permit dealing where insiders have not exploited their access to information. Of them, sec 10 is the most important provision, which lists “certain persons not to be held insider dealers”.<sup>58</sup>

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<sup>56</sup>Ibid 579.

<sup>57</sup>SEL, art 166, para. 1.

<sup>58</sup>Section 10 of the SIDO reads: “Certain persons not to be held insider dealers:

## China

The definition of insider is set out in article 68 of the *Securities Law of the People's Republic of China 1998*. Like many countries, China adopts the person connection approach to define insider. One thing worth mentioning is that subject to article 68(7), "other persons specified by the State Council's Securities Regulatory Authority" may be regarded as insiders. This provision

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(1) A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction —

- (a) for the sole purpose of the acquisition of qualification shares required by him as a director or intending director of any corporation;
- (b) in the bona fide performance of an underwriting agreement with respect to the securities to which the transaction relates; or
- (c) in the bona fide exercise of his functions as a liquidator, receiver or trustee in bankruptcy.

(2) A corporation which enters into a transaction which is an insider dealing shall not be held to be an insider dealer if, although relevant information concerning the corporation whose securities are the subject of the insider dealing is in the possession of a director or employee of the first corporation it establishes that —

- (a) the decision to enter into the transaction was taken on its behalf by a person other than that director or employee; and
- (b) arrangements were then in existence for securing that the information was not communicated to that person and that no advice with respect to the transaction was given to him by a person in possession of the information; and
- (c) the information was not in fact so communicated and advice was not in fact so given.

(3) A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction otherwise than with a view to the making of a profit or the avoiding of a loss (whether for himself or another) by the use of relevant information.

(4) A person who, as agent for another, enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that he entered into the transaction as agent for another person and he did not select or advise on the selection of the securities to which the transaction relates.

(5) A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes —

- (a) that the other party to the transaction knew, or ought reasonably to have known, of the relevant information in question before entering into the transaction; and
- (b) that the transaction was neither recorded on the Unified Exchange nor required to be notified to the Unified Exchange under its rules.

(6) A person who enters into a transaction which is an insider dealing in relation to a listed corporation shall not be held to be an insider dealer, other than as a person who has counseled or procured another person to deal in listed securities or their derivatives, if he establishes that the other party to the transaction knew or ought reasonably to have known that he was a person connected with that corporation.

(7) A person who enters into a transaction which is an insider dealing shall not be held to be an insider dealer if he establishes that the transaction is a market contract within the meaning of section 2 of the *Securities and Futures (Clearing Houses) Ordinance (Cap 420)*".

leaves in the hands of the government agency the ability to define those persons it believes to be insiders and greatly increases the flexibility of the definition of insider. Unlike the SEC in the US, the government agency can employ its power without judicial review, which is unique in the world.

### **Critique**

In summary, there are two approaches to the question of who an insider is: Australia, the UK and Singapore adopt the information connection approach; Japan, Hong Kong and China still adopt the person connection approach. Which approach is better to define “insider”? Unquestionably, both approaches have their advantages and disadvantages.

Under the person connection approach it is, in theory, easier to identify a person who falls within one of the categories provided by the law; however, in practice difficulties have arisen in the use of the person connection criteria. Those regimes that employ this approach have to list as many potential insiders as they possibly can. The resulting definitions have become long and complex, such as that used in Japan. Even with a comprehensive list, the person connection criteria may still leave gaps in coverage. A good example is the old insider trading laws in Singapore, where not all people who traded on inside information could be covered by the definition of insider, even though that definition was very comprehensive.<sup>59</sup>

Some might suggest that the regulation of article 68(7) of the *Securities Law of the People's Republic of China 1998* would, to some extent, overcome the above problems. However, such a regulation leaves too much power in the hands of the state agency, and it is too imprecise for the regulated to order their own behaviour. It is clear that this is inconsistent with the rule of law. An alternative might be to adopt a regime based on common law.<sup>60</sup> In the US, any outsiders who trade on nonpublic information could be caught by the misappropriation theory, where the definition of insider is, in practice, similar to that in Australia. However, as discussed above, the American approach requires a fiduciary link between the insider and the source of information. To some extent, that has resulted in difficulties in catching some persons who trade on inside information even though the American government, in particular the SEC, has endeavoured to widen the scope of insiders to catch as many as they can. In addition, the common problem of adopting a regime based on common law is that the flexibility of those regimes reduces certainty in this field. The US laws have therefore been questioned as to whether they are as effective and efficient as is often maintained.<sup>61</sup>

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<sup>59</sup> See Yang Ing Loong, Andy Yeo and Sharon Lee, *Insider Trading: New Wine in Old Wineskins?* <http://www.lawgazette.com.sg/2001-9/Sep01-focus3.htm>.

<sup>60</sup> Semaan, Freeman and Adams, above n 31, 230.

<sup>61</sup> Charles Rickett and Ross Grantham (eds.) *Essays on Insider Trading and Securities Regulation* (1997) 142-143.

Under the information connection approach, the definition of insider is not as important as it is under the person connection approach: Under the person connection approach, “insider” and “inside information” are both core definitions of regulating insider trading; however, since the information connection approach defines insiders as anyone who has inside information, only “inside information” is of prime importance.<sup>62</sup> In this sense, it seems that the test for the definition of “insider” has been simplified. To some extent, we can say there is no need to define “insider” under the information connection approach. On the other hand, the information connection approach has created a wider scope of insiders than before. Under this approach, anyone in possession of inside information may attract liability, thus creating the potential for innocent persons to find themselves in a very technical breach of the law. Clearly there is a need to reduce uncertainty when introducing an information connection approach; otherwise, this approach may have the undesirable result of sanctioning insider trading, but also potentially stifling innovative research and analysis of matters impacting on company and market performance by preventing analysts from identifying mis-priced securities and trading on those securities accordingly. This creates a risk that the price may not reflect the fair value and market efficiency may be damaged.<sup>63</sup>

It should be stressed here that although the advent of the information connection approach greatly simplifies the definition of insider, there is a danger of overstating the case. In Australia, the central recommendation of the Griffiths Committee was that the person connection approach should be removed, principally in the interests of simplicity. However, the 1991 insider trading reforms did not take up the principal recommendation. In contrast, the new insider trading provisions in Australia are at least four times as long (and in many respects far more complex than) the provisions they replaced.<sup>64</sup> Just as was the case under the person connection approach, the 1991 reforms still included a range of exceptions and exemptions as part of the insider trading provisions now found in Div 3 of Part 7.10 of the *Corporations Act 2001*.<sup>65</sup> In its response to the Griffiths Committee’s report, the government argued that:

Simplicity in the language of statutes is certainly the aim but when it is inconsistent with certainty, certainty has usually been preferred. The tension between simplicity

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<sup>62</sup>In this sense, it has been submitted that the expression “insider trading” is not strictly correct. It is more accurate to describe the provisions as dealing with the “misuse of non-public information”: Lipton and Herzberg, above n 45, 535.

<sup>63</sup>Above n 5, [124].

<sup>64</sup>Roman Tomasic, James Jackson and Robin Woellner, *Corporations Law: Principles, Policy and Process* (4<sup>th</sup> ed, 2002) 998.

<sup>65</sup>Simply speaking, there are eight broad categories of exceptions and exemptions provided in the 1991 reforms: 1. trustees; 2. underwriters; 3. effect of legal requirements; 4. Chinese walls; 5. knowledge of own intentions; 6. knowledge of proposed or previous transactions; 7. dealers and dealers’ representatives; 8. where information was generally available or known to the other party. (For more detail discussion, see Tomasic, Jackson and Woellner, *ibid* 1008-1009.)

Interestingly, a similar approach has been adopted in the UK, where the information connection approach includes a person connection in order to further clarify the definition of insider. Davies discusses this approach as follows:

It might be thought that nothing more needs to be said other than that an insider is a person in possession of inside information. In other words, the definitional burden in the legislation should fall on deciding what is inside information and the definition of insider should follow as a secondary consequence of this primary definition. The Government's consultative document on the proposed legislation rejected this approach as likely to cause "damaging uncertainty in the markets, as individuals attempted to identify whether or not they were covered". This is not convincing. Either the definition of inside information is adequate or it ought to be reformed. If it is adequate, so that it can be applied effectively to those who are insiders under the Act, then it is not clear why it cannot be applied to all individuals, whether they meet the separate criteria for being insiders or not. If the definition of inside information is not adequate, it is not proper to apply it even to those who clearly are insiders under the legislation and it should be changed. In fact, the proposal that insiders should be defined as those in possession of inside information would to some extent reduce uncertainty, because the only question which would have to be asked is whether the individual was in possession of inside information and the additional question of whether the individual met the separate criteria for being classed as an insider would be irrelevant.<sup>67</sup>

Unfortunately, the definition of inside information is not adequate. Partly this is because the concept of inside information itself is not clear; partly it may be because the law may not be capable of making it clear. In fact, the definitions of "insider" and "inside information" are interlaced, and to some extent they reinforce each other. An insider is one who possesses inside information; likewise, in most cases, if not all, it is sufficient to infer inside information from an inside source. In this sense, it seems that to identify who is an insider, neither the person connection only approach nor the information connection only approach is the best option.

As noted above, there is a trend to broaden the scope of insiders. With the globalisation of securities markets and the advent of Internet securities trading, this issue will become more and more complex. In order to simplify the provision and reduce uncertainty, the better way may be to base the definition of "insider" on the information connection approach but include a person connection (as in the UK and Singapore models). Compared to the information

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<sup>66</sup>Ibid 998.

<sup>67</sup>Davies, above n 48, 464-465.

connection only approach, this approach needs to achieve two functions: First, by way of listing connected persons, this approach should further clarify the definition of insider and meet the practical need of connected persons to identify whether or not they fall within the scope of insiders. In this sense, any unclear or “gray” area in the definition of insiders should be excluded from the connected persons list, to make it clear and reduce uncertainty. Secondly, it is difficult to prove the *mens rea* elements of insider trading when prosecuting connected persons as they are in a privileged position to destroy evidence of any improper market behavior.<sup>68</sup> In order to establish liability of connected persons effectively, this approach may be used to introduce a presumption that reverses the onus of proof. It seems that the UK and Singapore models, to different extents, have been used to achieve these two functions. However, the UK model does not have such a clear regulation on connected persons as the Singapore model, and more importantly, there is no explicit presumption of *mens rea* in the UK, which is quite different from the presumption for connected persons in Singapore’s insider trading laws. On balance, the Singapore model seems preferable.

It is worth mentioning that to avoid throwing too wide a net on the scope of the prohibition, it is common practice to include a range of exceptions in the insider trading law, even under the person connection approach. Put another way, to protect market confidence, the net should be cast wide enough to catch anyone who trades on inside information on one hand; and to protect the public interest, the net should not be cast so wide to catch legitimate market activities. A good approach will achieve a balance between them. So the question here is not whether there is a need to provide exemptions, but how to provide exemptions. It has been submitted that the simplicity of the information connection approach has been undermined by a large number of generous exceptions and exemptions that the 1991 Australian reforms not only preserve, but also extend.<sup>69</sup> It is necessary to work out what exemptions should (and should not) be included as part of the insider trading provisions.<sup>70</sup>

## THE DEFINITION OF “INSIDER” IN NEW ZEALAND: A REVIEW

In New Zealand, the definition of “insider” contained within sec 3(1) of the *Securities Markets Act 1988* reads as follows:

For the purpose of Part I of this Act, “insider” in relation to a public issuer, means—

(a) The public issuer;

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<sup>68</sup>Yu, above n 54, 579.

<sup>69</sup>Tomasic, Jackson and Woellner, above n 64, 999.

<sup>70</sup>Generally speaking, there are different ways to provide exemptions even though the content of exemptions provided by most countries are similar. We are of the view that when providing exemptions, it would be better to list exceptions such as sec 10 of the SIDO (HK) to improve the clarity of exemptions. However, a discussion on this issue is beyond the scope of this paper.

- (b) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, the public issuer, has insider information about the public issuer or another public issuer;
- (c) A person who receives inside information in confidence from a person described in paragraph (a) or paragraph (b) of this subsection about the public issuer or another public issuer;
- (d) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, a person described in paragraph (c) of this subsection, has that inside information;
- (e) A person who receives inside information in confidence from a person described in paragraph (c) or paragraph (d) of this subsection about the public issuer or another public issuer;
- (f) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, a person described in paragraph (e) of this subsection has that inside information.

Obviously, the *Securities Markets Act 1988* adopts a person connection approach. Under that Act, there are two kinds of insider. One is the public issuer. The other is the individual. When referring to the individual, there are two ways a person can be an insider. The first is where a person has a relationship with the public issuer (as a principal officer, employee or substantial security holder) and possesses the inside information. The second is where a person receives the inside information in confidence from an insider.<sup>71</sup>

Several difficulties have been raised in the interpretation and application of the *Securities Markets Act 1988* definition of “insider”.<sup>72</sup> There are four arguments put forward in the Ministry of Economic Development’s 2000 discussion paper on insider trading, suggesting a lack of clarity in the definition of “insider” and the circumstances in which an insider is liable for trading:

3.4 It has been argued that the present definition of insider is too broad in some instances, and accordingly, may lead to outcomes that are not intended. For instance, at present the law applies to transactions between informed parties. In an instance where both parties are informed and aware of the confidential information, there is arguably no detriment to either party.

3.5 It has also been argued that the present definition is too narrow in some instances. For example, the current definition applies to a person who has received inside information in confidence from an officer of the public issuer. However, it is unclear as to whether the Securities [Markets] Act applies in a situation where the person has obtained illegal access to the officer’s records.

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<sup>71</sup> See Gordon Walker et al (eds.) *Securities Regulation in Australia and New Zealand* (2<sup>nd</sup> ed, 1998) 611-612.

<sup>72</sup> *Insider Trading: Discussion Document*, Ministry of Economic Development (September 2000) [3.2].

3.6 The issue is also sometimes raised that the Securities [Markets] Act is impractical in its application to situations involving due diligence. For example, an institutional investor may gain inside information about a public issuer in the course of acting as an underwriter in the raising of new capital.

3.7 Liability for tipping in the Securities [Markets] Act raises a further potential issue. At present, the law applies to make an insider who is a tipper liable for the trading of a tippee. Questions have been raised about whether the tipper needs to be aware that the information is inside information, and, if not, whether liability is appropriate in those circumstances.<sup>73</sup>

Does the present definition of “insider” lack clarity? To answer this question, it is necessary to consider what the rationale for the present definition is.

As mentioned above, under the person connection approach, the application of the prohibition on insider trading is linked to the fiduciary duty or misappropriation rationales. Accordingly, the rationale for a person to be regarded as an insider lies in the following grounds: It is easy to understand that a person who possesses inside information is probably an insider. But merely possessing inside information does not mean that the person is an insider, if he does not receive the inside information in confidence. Bearing this in mind, we discuss the four arguments as follows.

***The first argument “that the present definition of insider is too broad in some instances”***

As noted above, in the US, an insider is not liable for his insider trading unless a profit is gained or loss avoided. That is, under the US regime, the intention of gaining profit or avoiding loss constitutes an element of the definition of “insider”. Thus, in terms of the Ministry of Economic Development’s first argument, since there is no detriment to either party, the traders would not be liable for insider trading. However, the *Securities Markets Act 1988* does not have this requirement, so those people who are informed and aware of the confidential information would fall within the definition of insider. In this sense, we agree with the first argument that the present definition is too broad in some instances.

***The second argument “that the present definition is too narrow in some instances”***

The person connection approach reflects the fiduciary duty or misappropriation rationales in the New Zealand regime. In this respect, the Securities Commission’s report that preceded the enactment of the *Securities Markets Act 1988* states that the core concept behind the insider trading provisions is the prevention of profit taking in situations where information in relation to the value of securities is held in confidence.<sup>74</sup> Receipt of inside information in confidence is the

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<sup>73</sup>Ibid [3.4]-[3.7].

<sup>74</sup>Adrian van Schie, *Insider Trading, Nominee Disclosure and Futures Dealing: an Analysis of the*



first important element in understanding the definition of “insider”.

The requirement of “confidential relationship”, however, has resulted in difficulties in catching someone who trades on inside information without “confidential relationship”. Under the present definition, if there is no “confidential relationship” between the person who receives inside information and the person who has the source of the inside information, the receiver presumably has no liability to keep the information secret, and his trading on that information will not constitute insider trading. As van Schie states: “It seems that someone who obtains the relevant information by theft is not an insider, nor is someone who purchases information on a non-confidential basis from an insider.”<sup>75</sup> Such a result seems to be at odds with the policy of the prohibition on insider trading.

***The third argument “that the Securities Markets Act 1988 is impractical in its application to situations involving due diligence”***

Whether information has been received in confidence by a person should be treated as a question of fact taking into account the circumstances and terms of communication.<sup>76</sup> In this sense, if in a conference or other commercial activities, either party promises, either implicitly or explicitly, to keep the information secret from other parties, even if a contact never eventuates between them, there still lies a “confidential relationship” between them. As Lord Goff expressed the principles in the case of *Attorney-General v Guardian Newspapers (No. 2)*: “ a duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.”<sup>77</sup> Accordingly, we disagree with the assertion that the *Securities Markets Act 1988* is impractical in situations involving due diligence. In such situations, the institutional investor should have notice or have been held to agree that the information is confidential, and he should therefore be required to keep it confidential. Otherwise, the investor should be liable for any insider trading that occurs.

***The fourth argument on liability for tipping in the Securities Markets Act 1988***

As for liability for tipping, there are two points to be stressed here: First, according to the Court of Appeal’s decision in *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd*,<sup>78</sup> absence of moral fault has no bearing on liability under sec 7 or 9. An insider will be liable for tipping under sec 9 irrespective of whether or not the insider realises he or she possessed the inside

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*Securities Amendment Act 1988* (1994) 15.

<sup>75</sup>Ibid 13.

<sup>76</sup>Walker et al, above n 71, 614.

<sup>77</sup>[1990] 1 AC 109 at 281.

<sup>78</sup>[1994] 2 NZLR 152 (CA).

information or the significance of the information.<sup>79</sup> Secondly, it is not necessary to show causation between the tipping and the ultimate decision to buy or sell.<sup>80</sup>

The fourth argument suggests, “questions have been raised about whether the tipper needs to be aware that the information is inside information, and, if not, whether liability is appropriate in those circumstances”. In *Wilson Neill*, the Court of Appeal held, “The test is not subjective knowledge, but the objective possession of information. *Otherwise the purpose of the legislation could be thwarted by difficulties of proof.*”<sup>81</sup> It is clear that the tipper does not need to be aware that the information is inside information. In the circumstance that the insider is not aware that the information is non-public and is likely to affect materially the share price, if the victim suffers a loss when trading with the tippee, the insider might be liable under s 9(2). It is presumably because the insider, whether he is conscious the information is inside information or not, has a confidential relationship with the source of the information, that he has the responsibility to keep it secret. Once he tips the information to the tippee, his action is a breach of his duty. So, he should be liable for the loss of the person who trades with the tippee.

From the above analysis, it seems that the definition of insider in the *Securities Markets Act 1988* is clear on the whole. However, clarity is not always sufficient. Under the person connection approach, the *Securities Markets Act 1988* faces the same problems as that of other overseas regimes: the definition of “insider” in sec 3 is long and complex. It has been argued that the policy underlying the *Securities Markets Act 1988* is less concerned with fraud on the market and more concerned with abuse of a relationship that imports an obligation of confidence.<sup>82</sup> Under this policy, the scope of the insider trading prohibitions has been greatly limited. This has been illustrated by the trading in the shares of Fletcher Challenge Ltd in May 1999, where the subjects of the investigation were not considered insiders under the Act, as they were both too many steps removed from the source of the information.<sup>83</sup>

When reviewing the New Zealand definition of insider, a suitable consideration should be given to the suggestions from the 1991 reforms in Australia:

3.3.5 Insider trading legislation should not be based on any theory which may limit the scope of the prohibition, either by some concept of fiduciary duty or a theory of misappropriation.

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<sup>79</sup>Walker et al, above n 71, 617.

<sup>80</sup>Van Schie, above n 74, 24.

<sup>81</sup>Above n 78 at 161 (Emphasis added).

<sup>82</sup>Frank McLaughlin and Roger Wallis, *Securities Markets Update*, New Zealand Law Society seminar (October 2002) 39-40.

<sup>83</sup>*Insider Trading Law and Practice: Report on Questions arising from an Inquiry into Trading in the Shares of Fletcher Challenge Limited in May 1999*, New Zealand Securities Commission (2000).

3.3.6 Rather, it must be emphasized that the basis for regulating insider trading is the need to guarantee investor confidence in the integrity of the securities markets.<sup>84</sup>

Similarly, the experience drawn from the American practice is that to tackle insider trading effectively, as noted above, the definition of insider has been broadened and the underlying policy has been shifted to the rationales of market fairness and efficiency. In this sense, if it could be argued that the New Zealand law also needs to focus on preserving the integrity of securities market, it seems clear that it is necessary to adopt a broader definition of insider and conduct such as that which happened in the share trading of Fletcher Challenge Ltd should not be excluded from the scope of the prohibitions. However, the current New Zealand law has adopted a more narrow, relationship-based, approach, which does not capture some conduct that could be thought of as damaging to the integrity of the market.

In response to the problems arising from the application of insider trading law, the *Securities Markets Amendment Act 2002* has been passed as an important step towards reorganising securities markets law, which makes the *Securities Markets Act 1988* a separate statute in its own right and as such emphasises the importance of this evolving area of law.<sup>85</sup> Under the *Securities Markets Amendment Act 2002*, greater powers have been given to the Securities Commission as an enforcement body. Correspondingly, the government has granted greater funding to the Securities Commission. Although the role of the Securities Commission is not as significant as that of the SEC in American, arguably the Securities Commission will play an important role in combating insider trading, which may, to some extent, overcome the limitation of the definition of insider. However, if we consider the problems contained in the *Securities Markets Act 1988* in a systematic manner,<sup>86</sup> it is no doubt necessary to review the definition of insider, and as discussed above, the better way may be to adopt an information connection approach when formulating a definition of insider.

## CONCLUSION

No definition is perfect. If a definition can be used to resolve most problems in practice, it can be considered to be successful. In this sense, the definition of “insider” in sec 3 of the *Securities Markets Act 1988* may be regarded as a good definition. However, with the evolution of insider trading, the definition of “insider” has become long and complex. Even so, there is still some conduct which is excluded from the scope of the *Securities Markets Act 1988*. In order to simplify the definition and reduce uncertainty, there may be two choices in identifying who is an

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<sup>84</sup> *Fair Shares for All: Insider Trading in Australia* Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, AGDS (1989).

<sup>85</sup> McLaughlin and Wallis, above n 82, 2.

<sup>86</sup> It has been submitted that the *Securities Markets Amendment Act 2002* falls into the trap of failing to address reforms in a systematic manner. (McLaughlin and Wallis, *ibid*)

insider: one is to adopt the information connection only approach; the other is to adopt the information connection approach but include a person connection. On balance, we would prefer the latter approach, along the lines of the Singapore model.

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Su, Z.

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