The Regulation of Insider Trading in Fiji[1]

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Abstract

The Capital Market Development Authority Act (1996) introduced a statutory prohibition on insider trading in Fiji. This paper assesses the legislative approach towards insider trading and questions whether the legislation regulating insider trading is sufficient to prohibit this practice in Fiji. The paper will also examine the Companies Act (1985) in the context of insider trading. The paper concludes that the legislative provisions on insider trading are ineffective and suffer from far too many constraints. The paper recommends an urgent reform of the CMDA Act in order to allow the CMDA to effectively and efficiently regulate the Fijian stock market.

Introduction

Insider trading laws are normally evaluated in terms of their effectiveness at prohibiting the incidence of trading on price sensitive non-public information. The Capital Market Development Authority Act 1996 (CMDA Act) is designed to eliminate insider trading on the securities listed on the South Pacific Stock Exchange. Essentially, the CMDA Act prohibits a defined insider, who obtains non-public price-sensitive information by virtue of being connected with the body corporate as an insider, from dealing in securities or communicating/tipping (recommending to purchase or sell the securities to others). Insider trading, under the Fijian regime, is a criminal offence. An insider who is found guilty of the insider trading/tipping offence, is liable to pay damages to the other party whom he deals with..

[1] In 2009, the Reserve Bank of Fiji acquired the administration of the Capital Market Development Authority under the new Capital Market Decree 2009. This paper analyses the insider trading rule present in the CMDA Act before its repeal. A subsequent paper shall examine the status after the repeal.

The Fijian framework for insider trading liability is based on the old Australian regime in its base premise - that a person who is in a fiduciary relationship with a company must not misuse the confidential information of the company for his/her own benefit. The basis for insider trading liability is of vital importance because it defines the ambit and the effectiveness of the proscription. Therefore, the purpose of this paper is to examine whether the Fijian legislation, in its current form, goes far enough to address the real problems associated with insider trading.

The paper shows that there are regulatory imperfections in the current Fijian insider trading framework. It suggests that the basis of the current legislative proscription of insider trading is limited in its application, and the scope of the CMDA Act does not successfully prohibit everyone who possesses non-public price-sensitive information, from committing insider trading. In doing so the paper attempts to compare the Fijian insider trading regime with the Australian and the New Zealand regimes. The paper finds that the Fijian Companies Act 1985 fails to prohibit insider trading. The common law (civil) cause of action, which is based upon a breach of fiduciary duty or a breach of confidence, continues to have application and relevance in regard to insider trading committed in the securities of unlisted private and closely held companies in Fiji; as s59 of the CMDA Act only regulates insider trading in the context of listed public companies. The paper also examines some of the practical problems that the CMDA, a regulatory body responsible for supervising the Fijian Market, will face in enforcing insider trading prohibitions due to the secretive nature of the crime. The paper suggests that in the absence of civil sanctions, proving criminal liability will be difficult with the limited resources generally available to the CMDA.

The Context

Fiji, a former British colony, gained its independence in 1970. The 1970 Constitution became the supreme law for Fiji and allowed Fijian legislature to develop its own laws and regulations that support the Fijian society. At present Fiji's constitutional situation is in a state of crisis as a result of events which arose in an attempted

coup undertaken by the Fiji Military Force in 2006. All the laws as at independence of Fiji, were adopted from the United Kingdom. Many of these are generally outdated, or culturally inappropriate or lack operational effectiveness. For example, the Companies Act 1985 suffers from many deficiencies compared to modern company law principles. Without referring to common law principles, the Act can not serve the Fijian corporate environment. The same can be said about other Fijian Legislation. The Law Reform Commission in Fiji is responsible for law reform; however, it faces a number of difficulties in properly implementing its roles and objectives.[2] Some of the obvious problems are limited resources, lack of qualified staff, and inconsistency in funding and political influence.[3]

Fiji has the most developed and extensive financial market in the South Pacific region.[4] It has a small but developing stock market. While the Fijian financial system falls far short of its potential, potentials for growth are significant. The SPSE could become a regional centre for raising finance in the Pacific.[5]

The Fijian stock market, which was introduced as a trading post in 1979, began operating as a market in 1997. The market, named the South Pacific Stock Exchange, 'is not a highly liquid market though liquidity is improving over time' (Mala, 2007). The number of listed companies has grown from 4 in 1996 to 16 by 2008, while market capitalization increased from $F114m to F$1,002m, and the volume of trade increased from $0.2m to $18.4m over the same period.[6] Table 1 shows the share trading statistics from 1996 to 2008. Over the years there have been an increase in the number of listed companies and a corresponding increase in the market capitalization as well as an increase in the number and values of shares traded.

[2] Law reform is normally funded by the Attorney Generals office.

[3] Fiji Law Reform Commission *Annual Report 2002-2003* (Suva, 2004) 5. The Fijian courts have, but in a very limited way, reviewed and applied new common law principles to novel company law situations.

[4] Fiji has five commercial banks (Foreign companies own a majority share of all of the commercial banks); 3 credit institutions; 10 insurance companies; 6 unit trusts and also Fiji Development Bank and Fiji National Provident Fund (World Bank, 2007: para 20).

[5] Some of the main issues identified by the Asia Development Bank (ADB) affecting financial sector are: (1) High Interest Rate Spreads; (2) Low Levels of Credit to the Private Sector; (3) Low Levels of Investment; (3) Low Levels of Foreign Direct Investment; (4) The economy is not highly monetized: Asian Development Bank, 2006: 11).

[6] See Appendix 1 for detailed overview of listed companies ownership and also the volume and value trade on SPSE.

Table 1: Share Trading on the SPSE, 1996-2008

	Listed Companies-No.	Market Capitalization ($FM)	No. of Trades	No. of shares traded (M)	Value of Trade ($FM)
1996	4	114	59	0.2	0.4
1997	8	114	170	2.1	2.9
1998	9	175	470	4.6	9.7
1999	9	214	572	3.4	4.9
2000	10	243	608	2.5	8.1
2001	14	275	694	2.6	4.4
2002	15	769	651	6.8	7.1
2003	15	748	588	3.6	4.3
2004	16	882	881	7.8	12.7
2005	16	1,024	974	5.9	7.9
2006	16	1,060	954	2.3	5.7
2007	16	809	613	2.6	3.6
2008	16	1,002	757	18.4	26.0

(Source: South Pacific Stock Exchange and Annual Report of Listed Companies)

The size of the Fijian stock market since 1996 has significantly improved as presented in Table 2. Stock market size increased from 1996, fluctuated in 2002 and then drastically decreased in 2007 before increasing in 2008. In 2002, the Amalgamated Telecom Holding (ATH) was listed on the SPSE. The inclusion of ATH shows a healthy increase in stock market activity. The political crisis in 2006 created uncertain political and economic conditions in 2007, as consumer confidence plummeted, which resulted in investors opting to sell their shares (CMDA, 2008: 1, 6). This resulted in a decrease of 23.5 per cent in trading compared to 2006 and affected the stock prices of most listed companies causing an overall decrease in market capitalization from $1,059 million in 2006 to $809 million in 2007. In 2008 one of the largest listed companies, Fijian Holdings Limited, through its fully owned subsidiary Fijian Holding Energy Limited, took over the BP South-West Pacific Limited (BP SWP (Oil) Company).[7] Table 2 shows the effect of the take-over by FHL.

[7] The Acquisition of BP South-West Pacific Limited was for $190m; this is the largest investment that Fijian Holding Ltd has made in its 24 years of existence.

Figure 2: The Size of the Fijian Stock Market from 1996 to 2008

Year	Market Capitalization ($F m)	Gross Domestic Product ($ Fm)	Market Cap/GDP (%)
1996	114	2575	4.4
1997	144	2571.1	5.6
1998	175	2792.5	6.3
1999	214	3238.8	6.6
2000	243	3049.1	8.0
2001	275	3199.5	8.5
2002	769	3442.9	22.3
2003	748	4134.9	18.1
2004	882	4373.8	20.2
2005	1,023	4616.6	22.2
2006	1,060	5030	21.1
2007	809	5568.8	14.53
2008	1,002	3900	25.7

(Source: South Pacific Stock Exchange and Reserve Bank of Fiji.)

The Capital Market Development Authority and the SPSE

The CMDA is the main regulatory body for securities market in Fiji. It was established by the *Capital Market Development Authority Act 1996*. The CMDA works 'to facilitate the fair and orderly development of the capital markets so that businesses have access to capital and at the same time investors are provided with investment opportunities'. The CMDA licenses, approves, controls and acts as the supervisory body for the stock exchange and the intermediaries. Companies wanting to be listed on the SPSE must get approval from the CMDA.[8] Moreover the CMDA (s14) seeks to minimize market abuses, other improper practices and exercise an oversight over trading in securities. The CMDA has made a set of regulations and rules under the CMDA Act.[9]

These Acts, regulations and rules are the primary source of regulation of the securities market. The CMDA Act (s34(1)) allows

[8] CMDA (Securities Exchanges and Licensing) Regulations 1997, s3 contains the minimum structural and operational requirements needed for an approval.
[9] These are CMDA (Securities Exchange and Licensing) Regulations 1997 (CMDA Regulation). and CMDA Rules 1997(CMDA Rules).

a stock exchange business to operate in Fiji. SPSE is the only stock exchange operating in Fiji. The exchange was established in 1979 as the Suva Stock Exchange (SSE). In 2000, SSE changed its name to the South Pacific Stock Exchange. The exchange changed its operation from a trading post to a 'call market', where the name of each listed company is called out, and the brokers submit their orders for the company (Mala, 2007). The transactions are paper-based, and call sessions occur on a physical trading floor. The caller matches the orders and executes trades on a price time priority basis. Unmatched orders at the end of the session are carried forward to the next day. The market sessions are conducted at 10.30 am on weekdays except on public holidays.

Fijian Insider Trading Proscription

Insider trading remains one of the most controversial aspects of securities law. While some commentators argue that insider trading is not a problem but a good thing for a free market,[10] others argue that insider trading is the fundamental problem for a market and is immoral, therefore, should be regulated.[11] The current insider trading regime policy in Fiji is based on the fiduciary duty rationale and breach of confidence principle (s59 CMDA Act).[12] The Fijian regime is similar to the old Australian[13] and New Zealand regime,[14]

[10] Deregulators support 'an efficiency-based analysis and are confident that a free market without prohibition on trading will produce results which conform not only to particular interest, but also to broader social objectives' (Bergmans, 1991: 99,103). Henry Manne's theory provides credible justification for deregulation of insider trading; Manne argues that insiders, by trading on non-public information, improve the informational efficiency of stock prices. He suggests that insider trading may be used as a compensation scheme for corporate entrepreneurs (Manne, 1966a: 89; 1966b:113).
[11] Regulators generally rely on fairness-related arguments. They believe that insider trading is inherently unfair, affects investor confidence and that it is not a cost effective mechanism for promoting market efficiency (Dyer, 1992; Carlton and Fischel 1983; Jacobs, 2005: 231; Bainbridge, 1986).
[12] In Fiji, the debate of deregulation and regulation can be considered as of academic interest only, since it is certain that Fiji will continue to prohibit insider trading.
[13] Securities Industry Act 1980, s128; amended by Corporation Act 2001 (Cth).
[14] The Securities Amendment Act 1988 after 2002 was referred as Securities Market Act 1988 and was later amended Securities Market (Amendment) Act 2006. Also see Padilla , 2008. A recent survey on insider trading, in New Zea-

where insider trading liabilities were largely based on old, equitable principle of breach of confidence and fiduciary duty. The fiduciary duty rational suggests that a person who owes a fiduciary duty to a company is in a special position of trust, and should not use the companies' confidential price-sensitive information to make a personal profit or avoid loss by trading on securities.[15]

The scope of the fiduciary duty is criticised as not providing sufficient justification for many familiar aspects of insider trading. The fiduciary duty theory would not cover persons who have other relationships with the company and may well possess similar valuable information as traditional fiduciaries.[16] There are concerns that fiduciary theory ignores the effect of insider trading on financial markets and their participants since this theory provides opportunities for insiders to avoid their duties by entering in agreements with the company (Corporations and Markets Advisory Committee 2000: 13). There are, as will be explained later, strong views that insider trading should not be decriminalised and that regulation ought to be left on the discretion of companies because this may be possible under the fiduciary theory (Ministry of Economic Development; Freeman & Adams, 1999: 156). Finally, fiduciary theory does not adequately explain why insiders should not use insider information against prospective purchasers of stock (strangers) while such action is regarded as unfair (Strudler and Orsts, 1999: 390).

It may be the case that the current policy does not serve the objectives of the CMDA, which regulates the Fijian securities market. The major objective of the CMDA is 'to protect investors by ensuring the maintenance of fair and honest markets through adequate

land shows strong support for regulating insider trading. New Zealand Society has shown continues protest against insider trading. The *National Business Review-Compaq* survey on New Zealand Shareholders reveals that 24 per cent view insider trading as a major problem; 59 per cent thought it was a minor problem while about 5% believed insider trading was not a problem ('Let's Jump Over … 2000: 16).

[15] See Ministry of Economic Development (2002); Jacobs (2005: 233). Accordingly, this trading breaches various fiduciary duties, namely the duty of confidentiality, the duty to avoid conflict of interest and the duty not to use corporate information for personal gain. This trading may also adversely affect the commercial standing or reputation of the company and its securities value.

[16] For example 'the fiduciary duty theory would not prohibit an officer of a prospective bidder company, or an employee of a third party connected with the bidder company, from trading on-market in the shares of a target prior to the disclosure of a takeover bid' (Ministry of Economic Development, 2002).

supervision of market participants and to promote good governance practice' (CMDA, 2007: 2). While the fiduciary theory generally ignores the impact of insider trading on financial markets and their participants, one may wonder how the CMDA will achieve its goal to protect its investors and have fair and honest markets. This paper anticipates that the present policy, which is based on fiduciary theory, is limited in its scope.

The market fairness and market efficiency rationales (present in Australian and New Zealand new regime) have broader market implications and may fulfil the current gap in the Fijian insider trading legislation.[17] The market fairness rationale 'suggests that all investors in a market should have an equal opportunity to obtain and evaluate information relevant to their trading decisions (Ministry of Economics Development, 2002). This rational provides wider prohibition on insider trading than the fiduciary duty principle. It is not restricted by a requirement, as s59 requires that the information be acquired by way of connection or association with the company to which the information relates. Rather, this principle prevents an insider from trading, irrespective of the source of information.

Subsequently, the market efficiency theory suggests that insider trading activity damages the integrity of securities market (Ministry of Economic Development; Semaan, Freeman and Adams, 1999: 221). For example, insider trading delays disclosure of price-sensitive information and adversely affects public confidence. Like the market fairness argument, market efficiency theory is broad in its application as both principles focus on the impact of insider trading on the market (*Driks v Securities..,* 1983). Fijian legislators should consider market fairness and market efficiency theory when reforming the CMDA Act 1996.

[17] The Australian (1991) and the New Zealand (2006) legislators recognised the ambiguities found in the fiduciary theory and introduced a completely new insider trading regime. The policy justification for prohibiting insider trading was based on the idea of market efficiency and market fairness rather than fiduciary theory. However, in the US (arguably where insider trading proscription began) both the academic commentators and the courts have not reached an agreement on the justification for prohibiting insider trading. The fiduciary duty was once the main policy for prohibiting insider trading but United States courts have also developed other justification to forbid insider trading, such as misappropriation rationale, market fairness or market efficiency approach. See Ministry of Economic Development, 2002; '*Fair Shares For All...* 1989:19, 58).

The Operation of the Current Legislative Provisions

The Capital Market Development Act 1996 is the result of the Fijian government's effort to develop the capital market in Fiji. In 1992, with the help of the Asian Development Bank, the government published a report, called the Namasiyayam Report) recommending reforming the Suva Stock Exchange (now known as South Pacific Stock Exchange).[18] The CMDA Act was enacted to introduce the Capital Market Development Authority to supervise the capital market industry and the SPSE.

The statutory prohibition of insider trading was introduced through s59 of the CMDA Act.[19] The origin of the CMDA Act is unclear but the language of s59 can be traced to s128 of the Australian Securities Industry Act 1980 (SIA).[20] It is difficult to suggest whether s59 only applies to listed companies or both listed and unlisted companies.

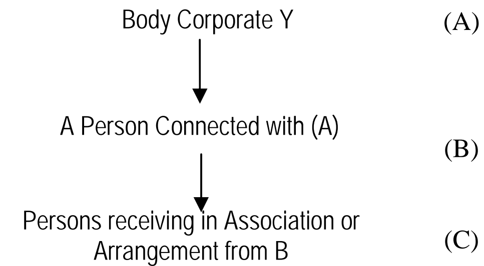
S59 provides relief only where there has been trading in securities by a person who has a particular relationship (connection) with the body corporate or by persons directly or indirectly encouraged by the person so connected. The CMDA Act (s2) defines securities as 'debentures, stock and shares in a public company or corporation, or bonds, bills, tradable promissory notes or drafts of any government or of any body corporate or incorporate...'. However, neither the CMDA Act nor the Companies Act 1985 define the term 'corporate body'. It may be possible to suggest that the scope of s59 is limited to persons trading in securities of listed companies. This is because, although the CMDA Act empowers the CMDA to regulate any market misconduct, the CMDA powers are limited to the affairs of the person which the authority has approved or to which it has 'granted a licence and any public company the securities of which are traded on an approved securities exchange' (s14). Therefore, the s59 prohibitions on insider trading only applies to listed companies and persons/company licensed by the CMDA.

[18] This report described the Suva Stock Exchange, 'as one of the most unique market places in the world. Of its weaknesses, it can be said that it lacks the chief characteristics of a listed exchange market. It is apparent that much needs to be done to institutionally strengthen the SSE to bring it in line with the conventional stock exchanges of the world in general and make it play a more active role in promoting the capital markets in Fiji, in particular' (1992: 10-12).

[19] It is possible that s59 of the CMDA Act was adopted from Securities Industry Act 1980 (Aust) because when developing its stock exchange, Fiji reviewed the Sydney Stock Exchange Listing Manual and studies were conducted on both Sydney and Melbourne stock exchanges to obtain advice (Mala, 2007).

[20] The language of the Securities Industry Act 1980 (Aust), 128 can be traced to Companies and Securities Industry Bill 1975 (Cth), Cl 123 which in turn owed much to Cl 12 of the Companies Bill 1973 (UK). The UK 1973 Companies Bill was introduced after the 1972 report by the UK law reform organization; the report suggested that insider trading should be made a criminal offence. Some suggest that the UK 1973 Bill may have been influenced by the New South Wales Securities Industry Act 1970 (Repealed). See Brazier (1996: 92, 93-94).

Under s59 three types of persons can commit an offence by insider dealing: (i) a person connected with a body corporate; (ii) certain recipients of information from a person so connected; (iii) a body corporate in which a person in categories (i) or (ii) is an officer. The scope of s59 can be represented as follows:



The arrow represents the flow of inside information. The body corporate Y is an insider of itself. The persons in the box (B) must receive inside information *in connection* from the body corporate in box (A). The person in block (C) needs to obtain the information by reason of *association or arrangement* with the persons in box (B).

For a person to be connected with body corporate Y, under the CMDA Act, an individual[21] must:

(a) be an officer[22] of body corporate Y or of a related[23] body corporate (s59(8)(a);

[21] The body corporate can not be a connected person under the CMDAA s59(8).

[22] The term 'officer' is defined in s59 (10) to include (i) a director, secretary, executive officer or employee; (ii) a receiver, or receiver and manager; (iii) an official manager or a deputy official manager; (iv) a liquidator.

[23] The word 'related' is neither defined in the CMDA Act nor in the Companies Act 1985. Therefore it is difficult to suggest what section 59 means when it refers to "related body corporate." I believe the CMDA Act should include the meaning of the word 'related'.

(b) be a substantial shareholder of body corporate Y or of a related body corporate (s59(8)(b)); or

(c) occupy a position giving access to price-sensitive information by virtue of a profession or business relationship between himself (or his employer or corporation of which he is an officer) and body corporate Y or a related body corporate (s59(8)(c)) or

(d) occupy a position giving access to price sensitive information by virtue of his being an officer of a substantial shareholder in body corporate Y or a related body corporate (s 59(8)d).

Example One: Director D tells his wife W some insider information about the company Y (listed on SPSE). W tells her friend F, and a broker B. F buys shares in the company. Acting on the information, B buys some shares on his own account. Also acting on the information, B advises a customer C to buy shares.

There is no difficulty that D as a director will be regarded as a connected insider under section 59 (8). However D will only be liable for communicating (tipping) inside information under section 59(4):[24]

(i) if the information D told his wife W, was price-sensitive and was not generally available as required in section 59(1); and
(ii) D knows or ought to reasonably have known that W will use the information for the purpose of dealing, or causing or procuring another person to deal in those securities (s59(4)(b)); and
(iii) if the information so communicated is about the securities of Y which are permitted on the SPSE (s59(4)a)).[25]

Under section 59, the word *information* is not qualified by any such adjective as 'specific' or 'confidential'.[26] However, section 59

[24] A person shall not, at any time when he is precluded by subsections 59(1) or (2) from dealing in any security by reason of his being in possession of any information, communicate that information to any other person if (a) trading in those securities is permitted on any securities exchange; and (b) he knows, or has reason to believe, that the other person will make use of the information for the purpose of dealing or causing or procuring another person to deal in those securities.

[25] In this case the securities of body corporate Y must be listed on the South Pacific Stock Exchange.

[26] In contrast Young J in the Australian context interpreting section 128(SIA) suggested that information would include 'factual knowledge of a concrete kind or that obtained by means of a hint or veiled suggestion from which one can impute knowledge'. *Hooker Investment*.

requires the information to be *price-sensitive* information which is *not generally available*. Again the limits of this qualification are not certain.[27] In contrast, the old New Zealand insider trading regime, required information to be received in *confidence* from an insider.[28] The difficulty is that the offence of communication requires, that in order to cause or procure another person to deal and so constitute the offence in s59(4), there needs to be some kind of inducement or active encouragement from D to W.

Therefore, only if the prosecution can prove beyond a reasonable doubt all the above mentioned elements in s59(4), will D be liable for tipping. However, if D himself used that inside information to deal in the securities of Y, then D's liability will fall under section 59(1). Under section 59 (1) the person connected with body corporate Y commits an offence if (i) he deals in securities of body corporate Y while in possession of price-sensitive information which is not generally available but if it were generally available, would be likely materially affect the price of the securities of body corporate; and (ii) he possessed that information by reason of his present connection with body corporate Y . D, no doubt, as a director is an insider and assuming the inside information was price-sensitive and not generally available, D will be liable under s59.

To impose liability on W as a receiver of information (tippee) will be a very difficult task under the CMDA Act. This is because the prosecution must first prove that W was a person precluded from dealing in the securities of Y as required by s59(2) before the liability of communication under s59(3&4) will suffice. The main obstacle the prosecution will face, is proving the elements of s59(2). S59(2) states that W will only commit an offence [if], she deals in securities of body corporate Y:

(i) when she obtains price-sensitive information, directly or indirectly, from a person (in this instance D) who was a connected person and who was precluded from dealing in the securities of body corporate Y;

[27] In contrast McHugh J while interpreting s128 (SIA) observed that the 'materiality' of information under section 128 was class-specific, with effect that 'possession of information likely to affect the price of one or more securities a body corporate does not preclude the possessor from dealing in other securities of that body corporate'. *Hooker Investment*. 528.

[28] The 'connection' requirement is now removed in the new regime; Securities Market Act 1988 (NZ), s3 (1) amended by Securities Amendment Act 2006 (NZ).

(ii) when W was *associated*[29] with the insider D, or had an *arrangement* with the insider for the communication of price-sensitive information with a view to deal herself;

(iii) when that W knew the other person is precluded from dealing (s59(3));

(iv) when W knew that D was precluded from dealing in the securities of Y.

The Act s59(2) prohibits recipients from both tipping and trading only where they have an *association* or an *arrangement* with the insider. As it is, this provision is unsatisfactory because W is only prohibited from dealing if W goes to the trouble of formalising the arrangement. The problem in s59(2) is that the Act does not define who is an *associated person* to an insider. Also, neither the Companies Act nor the Interpretation Act 1978 define this term. In the absence of the definition of this term, s59 and thus the Act, become redundant. However, reliance can be placed on SIA s6 which defines *associated person* as a person who has business relationships with the insider, for example director, secretary, related body corporate, person's carrying business of dealing securities (brokers) and partners (Securities Industries Act 1980 (Aust), s6. Repealed by Corporation Law 2001 (Aust)).

These persons, however, are usually characterised as insiders under s59(8). Therefore, spouses and close relatives may not be covered. This means W will not be liable and therefore F, B and C will not be liable as well. All in all, the prosecution will not only face difficulties proving the steps of informational chain of communication but it will face insurmountable difficulties because of the complicated cross-references to s59(4) to 59(2) elements that must be established in order to hold a person liable as a tippee.

The Scope of S59: Transactions Amounting to Insider Trading

Insider trading proscription in Fiji, as explained above, basically prohibits persons who are defined as insiders of the body corporate and persons who are in close business relationships with those insiders. In addition, a body corporate in which a person or a recipient described above is an officer, required the officer is precluded from dealing, may not deal in the securities of body corporate or related body corporate (s59(5)).[30] Moreover, a person can be a tippee if they receive information in association with a defined insider or have an arrangement with the insider for the communication of the inside information. If the definition of *associated persons* from the Securities Industries Act (s6) is adopted for the CMDA Act, the persons who may be regarded as in a business relationship with the insider, are technically already insiders under s59(8). Therefore, unless the recipient makes an effort to arrange for the communication of inside information, the CMDA Act only applies to persons who are defined as insiders (1 tier prohibition).

[29] The word 'Association' is not defined in the CMDA Act.

Similarly, under the old New Zealand insider trading regime an insider was liable if he/she had a relationship with a public issuer as an officer, employee, company secretary or substantial security holder, or received information in confidence from someone with such a relationship (s3(1) Securities Market Act 1988, as amended). However, under the new insider trading regime, which is similar to the Australian proscription[31], an information insider is one:

> who has material information about a public issuer that is not generally available to the market where that person knows or ought reasonably to know that the information is material information and is not generally available to the market. In addition a public issuer may be an information insider of itself. (Securities Market Act 1988, s8A (NZ)).[32]

Therefore, unlike Fiji, Australia and New Zealand prohibit a person who just possesses the inside information and knows or ought to have known that the information is an inside information

[30] However if certain conditions are satisfied under s59(6)(7), the body corporate is not precluded from dealing.

[31] S1043 of the Corporation Act 2001(Aust) defines an insider as a person who '(i) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate(s1043(1)(a)); and the person knows, or ought reasonably to know, that the information is not generally available and if it were generally available, it might have a material effect on the price of the value of those securities' (s1043(1) (b)).

[32] See also s3 of the same Act which defines that 'material information' to a public issuer is information that 'a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of listed securities of the public issuer; and relates to particular securities, a particular public issuer, or particular public issuer, rather than to securities generally or public issuers generally'.

that is not generally available to others, rather than prohibiting insider trading on the basis on any connection between a person and a corporation.

In "connection" Requirement: Practical Difficulties

This paper suggests that due to the limited scope of s59, many familiar insider trading transactions (cases) may easily distort the Fijian Government's purpose behind prohibiting insider trading.

Example Two: Winans (a columnist for the Wall Street Journal) passed prepublication information about the contents and publication dates of his columns to two brokers. Acting on the information the brokers traded profitably by anticipating the likely market effects of information published in the columns, and had an arrangement to share the profits with Winans.

Winans was under no prior fiduciary obligation either to the companies of which the shares were traded, or to the other parties to the trade. However, under the United States law, he was found liable for insider trading by misappropriating his employer's property (information).[33] If this case was under s59 of the CMDA Act, Winans would not be regarded as a defined insider, as per s59(8), because he was not a connected person with the companies or their related companies of which the shares were traded by the brokers. Therefore, if Winans is not a defined insider then he may not be liable for contravening s59(1) or (2) by trading on the information as to the contents of his columns and may not be liable for communicating (tipping) information to the brokers under s59(4). Therefore this means the CMDA Act will not even catch a thief who has stolen the inside information to trade unless and until a person receives inside information from a defined insider, let alone brokers like Winans who may easily posses inside information. The requirement of *connection* is defeating the purpose for prohibiting insider trading, since the current proscription does not prohibit everyone who may very

[33] *Carpenter v US* 484 US 19 (1987) The second Circuit Court of Appeals held that both Winans and the broker had violated Rule 10b-5 under the misappropriation theory, on the basis that Winans had misappropriated information from his employer in breach of a duty of confidence. The US Supreme Court was evenly split on the issue of liability under Rule 10b-5, but upheld a conviction for mail and wire fraud on the ground that Winans had misappropriated information which was the 'property' of his employer.

well possess price sensitive inside information.

In contrast if Winans was tried under either the (new) Australian or New Zealand regime, he would be regarded as an insider since he had in his possession prepublication insider information about the companies, which was not generally available to the public, and Winans knew that that information had potential to affect the price of the stocks of the concerned companies. In Australia Winans will be liable as a tippee under the Corporation Act 2001,s 043A (2). In New Zealand Winans will be liable as a tippee under Securities Market Act 1988, s 8E.

Difficulties in the absence of statutory definition of 'generally available' and 'material' information

It is readily accepted that 'fundamental to the concept of insider trading' is the information 'upon which the insider trades is not generally available to investors in the market' (Black, 1992: 233). The CMDA Act does not define what and when information is 'generally available'. Also the Act does not define the meaning of *likely materially* to affect the price of the securities. It is important to define these two terms because the liability of insider trading under s59 is subject to these two terms. More importantly in the absence of statutory interpretation of these terms, not only does the Act become redundant but the prosecution may find added difficulties in proving the insider trading case.

On one hand, the New Zealand Act regards information as generally available when that information is capable of being '*readily obtained* by the persons who commonly invest in securities' (Partridge and Gully, 2006: 312).[34]

On the other hand, the Australian Corporation regards information as generally available when it is a 'readily observable matter'

[34] In New Zealand, s4 of the Securities Market Act 1988 provides that information is generally available to the market if it is information (a) that has been made known in a manner that either would, or would be likely to, bring it to the attention of those who commonly invest in relevant securities and since it was made known, a reasonable period for it to be disseminated among those persons has expired, (b) or that persons who commonly invest in relevant securities can obtain readily (whether by way of observation, use of expertise, purchase from other persons or any other means, or (c) that is in the form of deductions, conclusions or inferences that are made or drawn from one or both of the types of information in (a)&(b).

(Corporation Act 2001, s1042(C)).[35] One way in which any information may be generally available is if the person who has price sensitive non-public information discloses it to the market. The problem in Fiji is that the CMDA Act does not require disclosure requirement. However the SPSE listing rules(r3A) do obligate listed companies and their officers to mandatory disclosure requirements.

In addition the CMDA Act does not define what 'material' information is while s59 prohibits the use or communication of 'material' information regarding a body corporate. The word 'likely to materially affect' was also present in the old New Zealand Securities Market Act 1988 (prior to the 2006 amendment); this term was judicially discussed in *Re Wilson Neill Limited; Colonial Mutual Life Assurance Society Ltd V Wilson Neill* [1994] 2 NZLR 152, 161. In this case the court defined the word 'likely' as referring to a 'real or substantial risk and not a mere possibility that the information could materially affect the price'.[36] Also in *Re Bank of New Zealand Kincaid v Capital Market Equities Limited* the court said 'the totality of separate pieces of information, not themselves individually material to the market, may well be so when taken cumulatively' ((1995) 7 NZCLC 260,718,260-729).

Exceptions to Insider Trading

The CMDA Act, s59 provides certain exceptions to insider trading. Firstly s59(6) provides an exception to s59(5).[37] New Zealand and Australia have a similar provision, called a Chinese wall arrangement (Corporations Act 2001,s S1043F (Aust); Securities Market Act 1988,s 10 (d) (NZ)). The SPSE Business Rule (1997, Part 1) defines *Chinese wall* as 'systems and procedures designed to ensure that information remains confidential within each line of business undertaken…. and does not become available across lines of business'. In Fiji, the Chinese wall exception is that the arrange-

[35]. In *R v Finns* (2002) 51 NSWLR 548 the Australian courts discussed when information is readily available.

[36] See also Farrar, 2008: 290, 306.

[37] It provides that a body corporate is not precluded from dealing in a security when an officer is in possession of an inside information if: (a) the decision to enter into the transaction was taken on its behalf by a person other than the officer; (b) it had in operation at that time arrangements to ensure 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 so communicated and such advice was not so given.

ment 'ensures' non communication of information, while the requirement in New Zealand and Australia is that it 'could reasonably be expected to ensure' (Corporation Act, s1043F(b); New Zealand Securities Market Act 1988 s10D(a)). Therefore, the requirement for the provision in Fiji is stricter than the Australian and the New Zealand regimes (Zielegaar, 1998: 577, 586).[38]

Secondly, the CMDA Act allows licensed brokers and dealers to deal in securities that are traded on the securities market (s59(9)).[39] This exception may create difficulties in prosecuting licensed brokers and dealers for insider trading. When a defence of s59(9) is raised, the prosecution must prove that the broker did give advice to a person. This may be difficult since there might not be any documentary evidence to prove this.

Regulating Insider Trading Under Common Law and the Companies Act 1985

The common law on insider trading regulates both large, publicly held corporations and small closely held ones with one set of rules. The Companies Act 1985 (s197, s201, s195) has some important provisions that could be useful in insider trading litigation. The Companies Act 1985 requires disclosure, by directors, of their holdings and dealings in the shares of the company in which they hold office. This section first explains and discusses how insider trading is regulated under common law. Then it highlights and examines to what extent the Companies Act 1985 prohibits insider dealing.

Insider Trading Prohibition under the Common Law

Before the securities legislation was enacted to regulate insider trading, those who inadvertently sold shares to, or bought shares from, insiders had no statutory remedy. The common law provided a

[38] This exception to insider trading has been criticized as all Chinese walls are expected to have loopholes. It relies on the integrity of the organization and there are no guidelines as what would be an effective Chinese wall. For this exception to apply is not enough to show that the information was not communicated, there must be presence of a Chinese wall. This would make enforcement easier; otherwise accused persons would always argue that the information was not communicated.

[39] This exception is provided when 'the licensee enters the transaction as an agent for another pursuant to a specific instruction to effect the transaction" and "the licensee has not given any advice on the security, and the other person is not associated with the licensee'.

remedy when one party either negligently or fraudulently induced another to enter into a contract. For example in *Parbhubhai v Prasad,* the defendant was found liable for fraudulently misrepresenting the plaintiff.[40] However, generally the difficulty is the principle found in *Fox v Macreth*.

The rule in *Fox v Macreth* is that silence alone could not amount to a misrepresentation, unless the positive conduct of a party to the contract amounted to as half-truth with disclosure of certain facts or unless there was a positive duty to disclose.[41] Therefore an insider could trade on the South Pacific Stock Exchange without attracting any liability to shareholders because the insider did nothing which misled in the absence of disclosure.

Furthermore, the rules of equity, which were invented and elaborated by the Court of Chancery in the 18th and 19th centuries, impose fiduciary duty upon agents of the company. Fiduciary duty ensures that persons holding assets or who are the representatives for the benefit of other people, will act in good faith to protect the interest of those they represent.

The fiduciary duty, however, does not automatically identify a single class of relationships, nor 'can fiduciary duty be reduced to a single set of rules and principles which apply to all such relationships' (Savage, 1992; Finn, 1977: 2). Therefore, it is important to consider whether different types of insider traders would be regarded as fiduciaries and to whom they are fiduciaries. Also the nature of duty or duties relevant to the imposition of insider trading liability should be considered.

[40]*Parbhubhai v Prasad* (1959) 6 FLR 118,119 (CA) Sir George Finlay J. Here the appellant alleged that the respondent induced him to enter into a sale of business by making fraudulent misrepresentation. The respondent is alleged to have made false declaration of his annual net profit for the year 1955 as £1,500 when in fact the actual net profit for that year was only £785. The court taking into account the fact that the appellant was an illiterate man (a young school leaver entering the business field) held that the respondent did induce the appellant to buy the business by making fraudulent misrepresentation concerning the profit. This case was not an insider trading case, however, since the appellant only alleged fraudulent misrepresentation the court was limited to deliberating on other actions.

[41] See also *Walters v Morgan* (1861) 45 ER 1056, 1059 (HL). Lord Campbell L.C approved the principle found in *Fox v Macreth*. In Fiji *Lallu v Ranchod* (unreported) Court of Appeal, Civ App ABU0053/1995 held that half-truth is an exception to the rule that silence does not amount to misrepresentation.

Insiders as Fiduciaries of the Company

The principle that directors are in a fiduciary relationship with the company (a relationship of trust), is long settled (*Skerlec v Tompkins* [1999] FJHC 134 (HC) Fatiaki J; *Great Eastern Railway Co v Turner* (1882) LR Ch 149, 152 Lord Selborne, and Ahmadu and Hughes, 2006: 243, 253). In *Lawlor v NBF Asset Management Bank* the High Court provided examples of 'presumed fiduciary relationships' as including trustee and beneficiary, agent and principal, solicitor and client, *director and company* and partners. At least the senior company officers who occupy positions of responsibility owe the same duties to the company as directors (Ahmadu and Hughes, 2006: 243, 253). Professional advisers, such as bankers, brokers and lawyers are also regarded as fiduciaries of the company since they undertake to act for or on behalf of the company in some particular matters (Finn, 1977: 201; Bauman, 1984: 838).

However, not all fiduciary relationships fall in these categories as beyond this, the position is somewhat unclear. For example, whether employees of the company would be regarded as fiduciaries is debatable. As Scott J said, in such a situation the liabilities will depend on 'what may be termed ad hoc fiduciary duties may arise from a special nature of a particular relationship' (*Lawlor v NBF Asset Management Bank)*.[42]

Needless to say, company employees owe a general duty of good faith or fidelity which may be sufficient to impose liability for insider trading (Finn, 1977: 266).[43] In addition, parties in a business relationship (supplier or creditor) may not be regarded as being a fiduciary of the company, even though that relationship may well offer opportunities to acquire unpublished information (Lehane, 1985: 95). Therefore, not all parties who could indulge in insider trading will be held liable as fiduciaries to the company. This is not to say that they will escape liability under common law as they may well be caught for breach of confidence.

[42]. In America, courts have found company employees liable for insider trading at common law on a fiduciary basis: *Brophy v Cities Services Co*. 70 A (2d) 5 (1949), Chancellor Harrington said that 'if an employee in the course of his employment acquires secret information relating to his employer's business, he occupies a position of trust and confidence toward it, analogous in most respects to that of a fiduciary, and must govern his actions accordingly'.

[43] The duty of duty faith or fidelity was imposed upon employees in *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617, 625, (CA) Neill LJ.

Fiduciaries' duty and no-profit rule

The strict fiduciary duties require the fiduciaries to be honest, to act in good faith and to act in the interest of the company (Lehane, 1985: 95).[44] The most important duty a fiduciary owes to the company is that they will not place themselves in a position where they will have a conflict of interest (Lehane, 1985: 103). Fiduciaries should avoid conflict of interest by honouring the company's interest before their own. Since in Fiji companies are unable to buy their own shares, a fiduciary that purchases or sells shares for its own interests will not appear to be in conflict with the interest of the company. Some of the well-known warnings on the no conflicts rule are found in old case law. As Lord Herschell explained:

> it is an inflexible rule of a court of Equity that a person in a fiduciary position …is not, unless otherwise expressly provided…to put himself in a position where his interest and the duty conflict (*Bray v Ford* (1896) AC 44, 51-52 (CA)).

This liability will continue to apply even where a person has acted honestly or for the benefit of the company (*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL) Lord Wright).[45] Furthermore, in the context of conflict of interest fiduciaries are duty bound not to gain from their position. This rule is of great importance for insider trading liability. The well documented case *Regal (Hastings) Ltd v Gulliver* provides the basis and strictness of the 'no-profit' rule.[46] Also in *Boardman v Phipps*, a solicitor had knowledge about possible profit and used his position of trust to obtain the opportunity to make a profit out of the shares; the solicitor was found liable to account for profit, as Lord Upjohn said:

> the fundamental rule of equity that a person in a fiduciary capacity must not make profit out of his trust which is part of a wider rule that a trustee must not place himself in a position where his duty and interest may conflict (*Boardman v Phipps* [1967] 2 AC 46, 123, para D, Lord Upjohn.)

It is now certain in Fiji that the fiduciaries will be held severely liable to account for any profit gained by virtue of their relationship with the company. The High Court ruling in *Skerlec v Tompkins* [1999] FJHC 134 (HC) Fatiaki J., can be regarded as a clear authority which applied and accepted the principle of *Regal (Hastings) Ltd v Gulliver* that fiduciaries have a duty not to use company assets or business opportunity for secret personal gain. This case concerns a company's (the Union) desperate need of money to survive. At all relevant time the directors of the union were Stinson, Tompkins, Vishnu Prasad and its majority shareholder was Skerlec. One of the Union's directors (Stinson) agreed on an agreement with Barclays Pacific Limited, which was owned by Tompkins, to advance the loan which Stinson borrowed from his wife, so that Barclays could advance the loan to the Union. The loan was advanced to the Union and was secured by a mortgage on the Union's properties for Mrs. Stinson (as a lender to Barclays). Both Stinson and Tompkins conspired to get rid of the Union by buying it off, because they knew as directors how desperately the Union needed cash to survive. The Plaintiff, Skerlec, claimed that Tompkins and Stinson owed a fiduciary and/or general duty of care to the company. Fatiaki J held that both the directors had a conflict of interest against the company and that Stinson owed a fiduciary duty not to gain from his possession with the company which he 'was bound to protect' (*Skerlec v Tompkins*, 152.). Fatiaki J also com-

[44] It is from the duty of good faith, three separate fiduciary duties emerge. First, fiduciaries should not abuse powers or exercise them for an improper purpose. Second, fiduciaries shall not profit (secret profit) from their position. Thirdly, fiduciaries must disclose any interest they have in a contract into which the company is about to enter.

[45]. Furthermore, Lord Cranworth in *Aberdeen Railway Company v Blaiki Bros* [1843] All ER 249, 252 (HL) said: 'A corporate body can only act by agents, and it is of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect'.

[46]. In this case a company who owned cinemas wished to acquire two more cinemas with a view to sell all three as a going concern. A subsidiary company was formed to buy the two additional cinemas but the company had only £2,000 of the required capital of £5,000. As a result, the remaining £3,000 shares were taken up by the directors. Thereafter, the shares in both companies were sold off and the net result was that the shareholders in the subsidiary made a profit of £2.60 per share on their holding. The new owners of the parent company sued the directors to recover the profit which they had made. The House of Lords held directors liable to account to the company because they obtained their profit by reason and in the course of the execution of their office.

mented (p. 154) that despite the fact that the loan was necessary and it was beneficial for the Union to continue operating, Stinson's action were irreconcilable with his personal pecuniary interest in the loan and breached his fiduciary duty to the Union. His honour accepted and cited Lord Russell's decision in *Regal (Hastings) Ltd v Gulliver*, where his Lordship said:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud or absence of bona fides; or upon such considerations as to, ... whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however, honest and well-intentional, cannot escape the risk of being called upon to account (Lord Russell, p. 108, 386 para B&C,).

Furthermore, one can question how Mrs. Stinson came to learn about the Union's financial crisis. Is this not an instance of tipping by Mr. Stinson to his wife? The court did not comment on this any further and neither did the plaintiff allege any action on insider dealing. However, I think the nature in which Mrs. Stinson acquired the information could have been a case of insider trading.

Directors as Fiduciaries of the Shareholders

The questions here are whether a director owes any fiduciary duty to the shareholders, and does a shareholder who is the victim of director's insider trading have any cause of action against that director. The orthodox approach set out in *Percival v Wright* is that directors do not owe any fiduciary duties to individual shareholders.[47]

[47] *Percival v Wright* [1902] 2 Ch 421 Swinfen Eady J. In this case the plaintiff claimed to set aside a sale of shares in a limited company, on the ground that the directors, who were the purchasers, ought to have disclosed to the vendor shareholders about the pending negotiations for the sale of the company. The court held on the facts that directors did not owe any duty of disclosure to the shareholders and could purchase shareholders shares without disclosing the facts of the negotiations. As Swinfen Eady J. said at page 426 'the contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the interest of the company'.

This principle is the major obstacle for shareholders seeking civil remedies against directors. In Fiji, courts have held that directors owe fiduciary duty to shareholders (*Skerlec v Tompkins)*.[48] Directors of a company are regarded as fiduciaries of individual shareholders in special circumstances. There are a number of well recognized circumstances.

Where directors act as agents of shareholders

Directors are presumed to owe fiduciary duty when directors deal directly with shareholders in relation to a specific transaction and act as an agent for the shareholders in connection with the acquisition or disposal of shares. The leading case on this proposition is *Allen v Hyatt* ([1914] 30 TLR 444) where the directors of the company placed themselves in a fiduciary relationship with some of the shareholders when they undertook to sell those individuals shares in an agency capacity.[49]

In distinguishing *Percival v Wright*, the Privy Council held that the directors had held themselves out to the individual shareholders as their agent and, therefore, were held to be trustees of the profit. Also in *Glavanics v Brunnighasen* (1996) 19 ACSR 204, 220 (SC), Broyson J accepted that if directors deal with shareholders for the purpose of purchasing or selling shares, directors will be held fiduciaries of the shareholders.[50]

[48] However, Fijian jurisprudence unlike other commonwealth countries, have neither distinguished nor overruled the principle found in *Percival v Wright*.

[49] See also Pennington 1987:136, 155).

[50] In this the plaintiff alleged that directors owe fiduciary duty to shareholders where a director purchases shares from a shareholder. The plaintiff and defendant were both shareholders of a company which imported ski gear and the defendant was also the director of this company. The plaintiff was also a director of another company which conducted a ski wear business. In due course the relationship between the two deteriorated and the plaintiff company went into competition with the first company. Later both plaintiff and defendant negotiated and agreed to sell the plaintiff's shares to the defendant. Several days prior to the agreement the first defendant was approached with an offer for the purchase of the business by two people to whom the company supplied goods (offeror). Without knowing about the offer the plaintiff sold his shares to the defendant. Just before the sale the plaintiff learnt about the sale of the business and applied to the court for damages for breach of fiduciary duty. The court held that the defendant breached his fiduciary duty as he had advanced knowledge about the negotiation of the sale of business which he should have disclosed to the plaintiff.

Failure to make material disclosure to the shareholders of insider information in the context of a takeover

The courts have been prepared to impose fiduciary duties upon directors towards individual shareholders, if they fail to disclose material information to the shareholders when negotiating for a take-over of the company's business. The sensational New Zealand case of *Coleman v Myers* 1977] 2 NZLR 225 (CA) Woodhouse J, on director's fiduciary duty for shareholders provides a practical example. This case involved the take-over of a family company by a company formed by one of the respondent directors of the family company for less then its actual price. The respondent was a chairman and managing director of the family company. The respondent, without disclosing the true fair value of the shares, had obtained control of the family company by buying out the other shareholders who did not know the true value of the shares. The selling member sued the director for breach of fiduciary duty to the members for non disclosure. The court accepted that director's duty to shareholders does not arise automatically when dealing with shareholders.

However, the court did impose a fiduciary duty on directors because of the special circumstances of the case. The special circumstances present in this case were, the fact that it was a family company, the transactions were face to face negotiation and family members relied on the directors to disclose all material information (330, Cooke J, 330). Also the directors were trusted figures of the family company and they used that trust to persuade shareholders to sell their shares for the take-over while possessing a high degree of inside information.

Furthermore, in *Gething v Kilner* [1972] 1 All ER 1166, 1170 Brightman J considered that directors of the offeree company in a take-over bid, were under a duty to their own shareholders to be honest and not to mislead such shareholders into accepting an inadequate price for their holding. Therefore, in a take-over bid, where director's of an offeree company purchase shares from existing shareholders while in possession of price sensitive information, may owe a fiduciary duty to disclose such material information to the shareholders.

Shareholders' reliance on directors and directors' material representation

Recently courts have accepted that when shareholders rely on information or advice provided by the directors, directors are assumed fiduciaries of the shareholders. As Cook J in *Coleman v Myers* (332) said, the fiduciary relationship:[51]

> tends to arise where someone relies on the guidance or advice of another, where the other is aware of the reliance, and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.

In this case the fact that the directors and the shareholders were in close family relationship was one of the main reason why directors were held fiduciaries of the shareholders.

Directors Fiduciary Duty to Outsiders

It is doubtful whether any fiduciary relationship exists between a director and a party who is not an existing shareholder. This is because there must be a pre-existing relationship between principal and fiduciary to impose fiduciary duty. As explained above, a shareholder can establish that directors owe a duty of disclosure to them under the *special facts* approach and seek redress if a director engages in insider trading. However, a person who deals with a director and is a complete outsider will not have any redress.[52] Therefore, a director will not be liable to a party on the basis of fiduciary relationship when the director engages in insider dealing by selling their shares in advance of an unsatisfactory result to a purchaser who is not an existing shareholder.

Breach of Confidence and Insider Trading

Action based on breach of confidence in relation to insider dealing is an alternative for action based on breach of fiduciary obligation.[53] The restriction on the use of information disclosed in confidence is necessary because 'if a defendant is proved to have used

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[51] *Coleman v Myers*, above n 121, 332.

[52] Nevertheless, in United States court have interpreted their insider trading proscription imposes upon insiders "an affirmative duty to disclose material facts known to them by virtue of their position," to both complete outsiders and existing shareholders: *Re Cady, Roberts & Co*. 40 SEC 907, 911 (1961).

[53] The obligation of confidence can arise through a contract either expressed or implied and can be imposed even where there is no contractual relationship: *Thomas Marshall (Exports) limited v Guinle* [1979] Ch 227, 248 Sir Robert Megarry V.C. See also McVea (1996: 344, 347).

confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's right' (*Saltman Engineering Company Limited v Campbell Engineering Co Limited* [1963] 3 All E.R 413, 414 (HL) Lord Greene M.R.) The plaintiff has the burden to prove that the defendant has breached his duty of confidence by using or disclosing confidential information. The necessary elements of breach of confidence are that the information had the necessary quality of confidence; it must have been imparted in circumstances importing an obligation of confidence; and there must have been an unauthorised use to the detriment of the plaintiff (*Coco v. A.N. Clark (Engineers) Ltd.* [1969] RPC 41, 47 Megarry J.)

Accordingly, in *Coco*, Lord Greene said the acid test is whether the information had 'the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge' (415). Therefore, it is vital that there is an unauthorised use of the confidential information in order to establish a breach of confidence. The breach of confidence in the Fijian context is discussed in *Fijian Holdings Ltd v Baba* [2001] FJHC 170 (not an insider trading case). In this case, Byrne J accepted *Coco v. A.N. Clark (Engineers) Ltd* case, as settled law on breach of confidence and explained the essential elements of breach of confidence. However, the defendants were not liable in this case because the plaintiff failed to prove all the required elements to prove breach of confidence (quality of confidence and unauthorised use). Therefore, consideration must be given to whether these requirements would be difficult to prove in the insider trading context.

Directors' Duties and Insider Trading under Companies Act 1985

This part of the paper examines the prohibitions on directors' share dealing, transactions in which directors have an interest, and the restrictions on the use of company information provided under the Companies Act 1985 (s197, 201, 195).[54] The primary source of company law and procedure is largely based on the United Kingdom 1948 Companies Act; the 'replication is fairly exact' (Hughes and Ahmadu 2005: 15). However, the Fijian Act in many respects has

[54] The interpretation provided on the relevant section of the Companies Act 1985 and the Capital Market Development Act 1996 is based on author's views in the absence of Fijian cases or literature, therefore all interpretations are open for future debate.

not kept pace with the modern principles of company law development. One of the major problems in the Fijian Act is that of directors' duties and obligations. Today directors' duties are worked out exclusively from the rules of common law and equity. S195 and s197 are concerned with disclosure obligations which are of vital importance in detecting and prohibiting insider trading. For example listed companies are subject to strict disclosure requirements under the South Pacific Stock Exchange Listing Rules. Therefore, what I explain below is that the Fijian law contains strong principles, but weak procedures to prohibit insider dealing, importantly by the fiduciaries.

Disclosure by directors of their share dealing

At common law it is widely accepted that unless there exist *special circumstances*, directors owe no duty to individual shareholders but to the company as a whole. Directors are not allowed to use, for their own benefit, anything entrusted to them on behalf of the company. This principle applies not only to property rights but also includes trade secrets and confidential information (Gower, 1957: 495). Therefore, this principle is wide enough to catch cases like *Percival v Wright*. The Cohen Committee (reviewing the Companies Act 1929 (UK)) recognized the principle in *Percival v Wright* as out of step and recommended that directors should be disbarred from using the company's information for personal benefit.[55]

Subsequently the Cohen Committee (para 87) suggested that 'the best safeguard against improper transactions by directors and against unfounded suspicions of such transactions is to ensure that disclosure is made of all their transactions in the share or debentures of their companies'. Therefore, s195(UK), which is similar to s197 Fijian Companies Act, was enacted to protect outsiders who purchase shares from directors. However, the remedies provided by section s197 (FJ) are entirely inadequate. Under s197 companies are only required to maintain a register disclosing particulars of all di-

[55] Report of the Committee on Company Law Amendment (1945) Cmnd 6659, para 86. The Cohen Committee where of the view that: 'whenever directors buy or sell shares of the company of which they are directors they must normally have more information than the other party to the transaction and it would be unreasonable to suggest that they were thereby debarred from such transaction; but the position is different when they act not on their general knowledge but on a particular piece of information known to them and not at the time known to the general body of shareholders…'

rectors' holdings of, and transactions in securities of their company, and of its subsidiaries, holding company and fellow subsidiaries.

Directors must reveal the necessary information in writing, disclosing all the dealing that has taken place. A failure to comply with this provision attracts a fine of $1000 (s197(8)). The disclosure is only open for inspection for a limited period, normally at the general meeting or if requested by the registrar, and it is only available to any member or holder of debentures of the company and to the registrar (s197(5)). There are a number of problems which were recognized by the Jenkins committee. Firstly, s197 only requires disclosure by directors; there can be situations when substantial shareholders can possess confidential price sensitive information.[56]

Secondly, it is doubtful whether it will restrain insider trading in stock exchange gambles (para 89).[57] In addition third parties who are not existing shareholder will face difficulties proving that they were dealing with a director. This problem will normally be difficult in the case of transactions through South Pacific Stock Exchange because of the settlement method (normally the parties to the trade are unknown to each other). Insider trading in Fiji, as explained earlier, is regulated under s59 of the CMDA Act. As recommended by the Jenkins committee (para 89), the 'law should protect a person whether or not a member of the company or companies concerned who suffer loss because of directors insider trading'.

Fiji can learn from New Zealand because New Zealand once had the same provisions and same problems. Today s149 of the Companies Act (1993) has strengthened the rules on directors' share dealing but still suffer from inconsistency (*Thexton v Thexton* [2001] 1 NZLR 237) which Fiji can address. New Zealand's Macarthur Committee (para 312), reviewing their 1955 Companies Act, accepted the Jenkins committee's suggestions regarding insider trading. Therefore, now s149 represents a special prohibition on directors' share dealing as it requires directors to ensure that in any share dealing the person they acquire shares from or sell shares to, pay or

[56] Report of the Company Law Committee (1962) Cmnd 1749, para 88-91.The Jenkins committee recommended that shareholders with 10 per cent. Shares should be obligated under the disclosure requirements.

[57] This is because, the principle of *Percival v Wright* is an obstacle and thus the result is 'that a director who has by reason of his office acquired in confidence a particular piece of information materially affecting the value of the securities of his company will incur no liability to the other party if he buys or sells such securities without disclosing that piece of information'.

receive fair value (Watson, 2008: 331, 377).

Statutory prohibition on secret profits

Just as equitable principles have received statutory amplification in relation to directors' contracts, as explained above, so has it in connection to secret profits. For example, the statutory rules relate to circumstance where there is a transfer of company's undertaking or of its capital such as in a take-over bid. There are a number of ways one can obtain the control of the target company. Most often directors represent the sale undertaken by the company and any such payment directors received (normally by the bidder), must be accounted for to the company. This rule was always present when equitable principles *(Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, 386 para B&C, Lord Russell) were applied, which is now codified in s195 of the Companies Act (FJ). S195 requires a director receiving any payment for loss of office or retirement which is connected to the transfer of any share in the company to disclose details of the payment to any shareholders involved in an offer for the shares (s195(1)). Any director who fails to follow s195, will be counted to be held on trust for the company under the rules of equity directors receivables (s195(2)).

A more serious difficulty arises when consideration is given to sale of shares. For example in a take-over bid where directors are requested by another company to forward an offer to their shareholders to purchase their shares at a specific price.[58] Normally there will be prior negotiations with the directors to a favourable price they are prepared to accept and to recommend to the shareholders. It is difficult to assume that directors are acting on behalf of their company, as directors can be seen as a mere 'convenient channel of communication between the bidder and the shareholders' (Gower, 1957: 490). Although on the basis of this method all shareholders should receive the same price, the problem occurs when directors bargain for additional payment to themselves from the bidder. Therefore, s195(FJ) is enacted to prevent this.

Furthermore, s212 of the Companies Act (FJ) can act as relief for shareholders if directors act oppressively against the interest of the company. S212 enables a shareholder who 'complains that the affairs of the company has been…conducted in a manner that

[58] While the offer being expressed to be conditional on acceptance by holders of 90 percent of the shares.

is…unfairly discriminatory, or unfairly prejudicial to him…' to apply to the High Court for relief. The court is given a very wide discretion to make 'such order as it thinks fit' including 'the purchase of the shares of any members of the company by other members of the company…'

However, the most formidable question is, whether insider trading by a company director could come within the scope of s212 (FJ). Since there is no case law on this proposition in Fiji, New Zealand's High Court decision in *Cotterall v Fidelity Life Assurance Company Ltd* (1987) 3 NZCLC 100 Thorp J., can be of help.[59] The court in this case considered the question whether insider trading by a company director could come within the scope of s209 (Fiji's equivalent is s212).

In this case, the director and also the major shareholder of the company learnt that another company was interested in acquiring a controlling shareholding and was prepared to pay 10 dollars per share. The director approached the plaintiff (also a shareholder) and without disclosing the information about the take-over bid he learnt, arranged to purchase all her shares at 5.90 per share. The plaintiff upon discovering what had just happened applied to the High Court for relief under s209. The director argued that the plaintiffs claim was against the actions of the director in his personal capacity as a shareholder, thus s209 had no application.[60] The court showed strong doubts on the director's argument by citing, *Re The Great Outdoors Company Limited*[61] and *Thomas v HW Thomas Limited*[62] and held (p.96):

> both [cases] suggest that in a situation where the share transaction in question proceeds from the basis of inside knowledge obtained by the transferee director, and enables him to obtain control of the company's affairs, there may well be an argument, depending upon the detailed evidence…

[59] S212 of the Fijian Act is the same as s209 of the New Zealand Act.
[60] Also see Patterson (1987: 171).
[61] *Re The Great Outdoors Company Limited* (1984) 2 NZCLC 99, 260. Gallen J. held that 'section 209 is sufficiently wide to consider the right of shareholders or groups of shareholders inter se, and that an overriding consideration is the question of fair dealing in relation to the importation of equitable standards'.
[62] *Thomas v HW Thomas Limited* (1984) 2 NZCLC 99, 148. Richardson J. held that 'section 209 is a remedial provision designed to allow the Court to intervene where there is a visible departure from the standards of fair dealing'.

The plaintiff had no cause of action in this case since she was a former shareholder and s209 was only available to existing shareholders. Therefore, this meant that a person will only have a remedy when he becomes a shareholder where a director who posses inside information and is anxious to sell, but a person who has no share retained in a company will not have any remedy (Patterson, 1987: 181).

This rule is a strange company law principle which needs legislative attention. In addition, s393 of the Companies Act (FJ) states that company directors are constrained from making any false or misleading statements to a member of the company.[63] Also directors are constrained by the general provisions of criminal law from making false statements which induce persons to buy or sell shares under s121 of the Penal Code (FJ).[64]

Enforcement Regime: Should Civil Penalties be Introduced

Penalties and Remedies for Insider Trading

The offence of insider trading by its nature is difficult to detect, because it involves use of secret information. The complexity of the current insider trading law creates uncertainty in its interpretations. When considering the content of an insider trading case an important question is what penalty should apply for the breach of the insider trading proscriptions? A country like Fiji which has high corruption among white collar professionals (Macwilliam, 2002: 138, 142), should have appropriate and effective penalties that promote deterrence and are effectively enforced. As Lyon and Plessis argue 'the object of proving a contravention of insider trading provi-

[63] Companies Act 1985 (FJ) s393: 'If any person in any return, report, certificate, balance sheet or other document, required by or for the purposes of any of the provisions of this Act specified in the Eleventh Schedule, wilfully makes a statement false in any material particular, knowing it to be false, he shall be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding $1,000, or to both'
[64] 'Any person who knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular and the statement is made-(a) in a statutory declaration; or(b) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return or other document which he is authorised or required to make, attest or verify by any Act for the time being in force; or
(c) in any oral declaration or oral answer which he is required to make by, under or in pursuance of any Act for the time being in force,

sion and perhaps the true measure of the effectiveness of those provisions, lies in the legislation's ability to redress the wrong or the harm caused (2005: 107).[65] The Fijian enforcement provisions can be regarded as distinctive among legislative proscriptions of insider trading.[66]

The Fijian insider trading regime (CMDA Act, s59(11) relies simply on criminal sanctions, requiring guilt to be proven *beyond reasonable doubt*.[67] In practice this means that if there was any doubt about an alleged offence, successful prosecution is unlikely. This section, therefore, highlights several obstacles and difficulties for criminal enforcement of insider trading and suggests that civil sanctions should be introduced. The Act (s64(2)) does provide civil remedy but requires the defendant to be first convicted for an offence.

Enforcement of Insider Trading

The South Pacific Stock Exchange (SPSE) plays an important role together with the CMDA in detecting insider trading and in regulating the stock market. The Securities Exchange has two main sets of rules which regulate the operation of the Exchange.[68] The

[65] In Securities crime, there are few factors that affect the degree to which general deterrence will be encouraged. For example, whether there is enough evidence to prove the burden of an offence; capability of the detection system; availability of resources for the enforcement agency; and the penalties that are sufficiently high to deter such behaviours. The CMDA has very little resources to promote its own affairs let alone its ability to invest in complex securities litigation; also see Ministry of Economic Development, 2002.

[66] Nearly all countries, with securities law, insider trading regimes allow criminal and civil proceedings to be taken against insiders. For example Papua New Guinea and Maldives with fairly similar securities market like Fiji, provide both civil and criminal sanctions against insider trading. Papua New Guinea has 16 listed companies while Maldives has only five; they both are developing nations, with same economy status. Also see Securities Act 1997 (PNG), s102; Maldives Securities Act 2006 (Mald), s54 (q).

[67] The paucity of academic analysis and research into securities law with zero prosecution of insider trading in Fiji makes it difficult to assess the current enforcement regime. Nonetheless, in Fiji there has been negligible socio-legal research on issues of regulation and law enforcement generally. To date there has not been any research completed on securities law of Fiji, which leaves the present research the first academic research on the Fijian Securities Industry.

[68] The Listing Rules which regulate the affairs of listed companies and the Business Rules which regulate the affairs of the Exchange members. The listing rules of the SPSE make stringent disclosure requirements on the listed companies. The rules require a company to disclose information likely to materially affect the price of its securities to the SPSE with immediate effect.

SPSE monitors the securities market through a Stock-Watch Program. This program relies heavily on price and volume change and human accuracy to detect insider trading. If the SPSE identifies that there has been an unusual and otherwise unexplained spike in the price and volume of the securities traded - for instance a 10 per cent change in the securities – it automatically calls for an investigation.

The SPSE enforcement department then prepares a report on any unusual or irregular trading pattern and serious irregularities are reported to the CMDA for investigation. The SPSE has powers under its business rules to inspect, or appoint an agent to inspect, the records of its members.[69] On the one hand, if the CMDA fails to take action on a particular matter for some reason, for example lack of resources, there is little the SPSE can do. On the other, if the SPSE fails to act against a member or a listed company, the CMDA can pursue the claim (CMDA Act, s37(3)). However, commentators in other jurisdictions have argued that 'lack of surveillance in itself should not be the cause of the lack of insider trading prosecution….' (Ziegelaar, 1994: 677, 698).

In addition the CMDA contains powers to successfully carry out its functions and to regulate the Market (s15). In the enforcement and investigation of prohibited conducts the authority has two options. First, the authority under the CMDA Act can appoint investigating officers to carry out investigations of any offence under the Act (s55).[70] Second, the CMDA either through its officers or by appointing a lawyer can prosecute any offence under the Act (s66(2)). However, it should be noted that prosecution can not be instituted without the consent of the Director of Public Prosecutions (s66).

Penalties and remedies available under the CMDA Act

An insider is only subject to remedies if the insider is found guilty of insider trading - under section 59(11) if a person contravenes insider trading provisions the person will be guilty of an offence and will be liable upon conviction to:

the consideration for securities; or three times the

[69] Members include brokers, dealers, investment advisers and representatives.

[70] The investigation officers have all the power to carry out the investigation of any offence under this Act. But the Act does not provide the investigation officer to bring prosecution of an offence.

amount of gain made or the loss avoided by the insider in buying or selling the securities whichever is greater; and in addition- in the case of a person being a body corporate, to a fine not exceeding $20,000; in the case of any other person, including a director and officer of a body corporate, to a fine not exceeding $10,000 or to a term of imprisonment not exceeding 5 years or both.

Moreover, any person, who entered into a securities transaction with the offender or with a person acting on behalf of that person and suffered a loss, may recover compensation from the offender. S64(2) provides that 'any person guilty of an offence under this Act shall be liable to pay compensation…' S64 is similar to s130 of the Securities Industry Act (SIA) 1980.[71]

One may rightly assume that s64(2) of CMDA Act anticipated a narrower scope than the equivalent Australian provision. While the Australian provision specifically provided for a private right of action whether or not the defendant has been convicted of an offence, the Fijian provision conditioned the private right upon the defendant having first been convicted.

Therefore, this formulation, it is proposed here, may have been an attempt to minimize the scope of the private right of action, exactly what this paper is arguing against, by adopting the more economical measure of damages. The compensation is the amount of the loss sustained by the persons claiming compensation and in cases of harm done to the market as a whole the liability is the amount of the illegal gains received or the loss averted, as determined by the courts (s64(3)).

Since the CMDA Act only has Criminal sanctions it creates two major problems. Firstly, the Criminal law procedures such as the burden of proof, are difficult to establish. Secondly, in the absence of civil action provisions it means that an aggrieved person

[71] Securities Industry Act 1980 (commonwealth) (Australia), s130 repealed by Corporation Act 2001. S130(2) states: 'A person who contravenes section 123, 124, 125, 126 or 127 (whether he has been convicted of an offence in respect of the contravention or not) is liable to pay compensation to any other person who, in a transaction for the sale or purchase of securities entered into with the first-mentioned person or with a person acting for or on behalf of the first-mentioned person, suffers loss by reason of the difference between the price at which the securities were dealt in that transaction and the price at which they would have been likely to have been dealt in such a transaction at the time when the first-mentioned transaction took place if the contravention had not occurred.'

will only be compensated if the insider is convicted or the person can pursue a civil claim under the common law.

Difficulties in getting remedies under common law

Common law liabilities for insider dealing are breach of fiduciary duty, misrepresentation, and breach of confidence. Common law certainly provides a number of remedies such as compensations for breach of fiduciary duty (Lawrence, 1985: 9, 13). However, many uncertainties and difficulties lie in the path of a successful action by an aggrieved person. The main obstacle is the principle found in *Percival v Wright* [1902] 2Ch 421, 426 Swinfen Eady J., that directors owe no fiduciary duty to the shareholders but to the company as a whole. Some countries have regarded *Percival v Wright* as a bad company law, and have accepted that directors in *special circumstances* do owe fiduciary duty to the shareholders. [72]

The *special circumstances*[73] doctrine provides an exception to the *Percival v Wright* principle but these common law principles mainly apply and prohibit insider dealing in face-to-face transactions. As Mahon J in *Coleman v Myers* [1977] 2 NZLR 225, 278 (SC) Mahon J., clearly said directors fiduciary duties owed to shareholders in a special circumstance are confined to private companies and not to transaction of public or listed companies. Therefore, it was recommended by Mahon J that the regulation of insider trading involving sale and purchase of shares on a stock exchange should be left on the legislature.

Moreover, it is unclear under the common law that 'whether an insider who sells shares on the basis of inside information which he has acquired by virtue of his position is liable to account if he sells in order to avoid a loss' (Hanningan, 1988: 105-6). Also when shareholders bring an insider trading action in the name of the company 'any profits recouped go to the company and not directly to aggrieved shareholders' (McVea, 1996: 344, 346).[74] However, shareholders do indirectly benefit from an action against an insider.

[72] In New Zealand for example the court in *Coleman v Myers* [1977] 2 NZLR 225, 278 (SC) Mahon J held that directors fiduciary duty is both to the company and the shareholders. For further details see part five of this paper.

[73] The special circumstance principles are explained in part five of this paper.

[74] In *Skerlec v Tompkins* [1999] FJHC 134 (HC) Fatiaki J: the court reorganized that derivative action by shareholders will be costly avenue to seek redress.

Are Criminal Penalties Necessary?

Those that support criminal convictions argue that criminal law provides a far more significant deterrence than civil penalties for insider trading, because of its perceived stigma. A rational assumption is that making insider trading a criminal offence, carrying the threat of imprisonment provides the greatest deterrent to commission of the offence. This may be true. Providing stiff criminal penalties for insider trading sends a message to the community that the government considers insider trading to be a serious offence.

Economists believe that societies use criminal sanctions to 'prevent people from bypassing the system of voluntary, compensated exchange – the "market"'(Posner, 1985: 1193). Moreover, if the civil liabilities and extra punitive damages are not greater than the benefits to the offender and fail to deter the offender from bypassing the market, then the deterrence effect will be ineffective. Why then do societies need criminal penalties for offences like insider trading? As mentioned, criminal penalties are necessary where the optimal penalties are higher than the penalties imposed by the civil (tort) system. For example, where the criminal has no assets; where the effect of insider trading is higher and requires a higher penalty to protect the society and the detection and conviction of insider trading is low, a civil monetary penalty will have little or no deterrent effect (McVea, 1996).[75] Therefore, in these situations to achieve optimal penalty levels and deter offenders, criminal penalties should be retained for insider trading under the CMDA Act.

Criminal penalty: enforcement difficulties

As mentioned above insider trading in Fiji is only a criminal offence. Experiences from other jurisdictions suggest that obtaining criminal penalties for insider trading creates nearly insurmountable difficulties for the prosecution. For example, the Securities Exchange Commission of United States, which has the longest history of prosecuting insider trading, have experienced numerous difficulties in proving criminal burden of proof and admitting circumstantial evidence in criminal prosecution of insider trading (Newkirk, 1998; Engelen, 2006). If all the definitional problems in the CMDA Act can be overcome, another significant difficulty arises because

[75] Also Posner stated: 'Insider trading laws to this extent do not differ from the use of public prosecution to enforce other limitations on the use of intellectual property, such as trade secrets, trademarks and copyrights' (1991: 220, 271).

insider trading is a crime in Fiji.

One of the biggest obstacles is the criminal law burden of proof. It is well recognized that in criminal cases:

> … it is the duty of the prosecution to prove the prisoner's guilt…if, at the end of and the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…the prosecution has not made out the case and the prisoner is entitled to an acquittal (*Woolmington v DPP* [1935] AC 462, 481- 482 (HL) Viscount Sankey L).

This is also the law in Fiji (Findlay, 1996: 27-8). The obligation on the CMDA Act to prove beyond reasonable doubt that the insiders breached the insider trading provisions, is difficult since insider trading is a secretive crime (Naylor 1990: 68). This is because, often insiders while in possession of price sensitive-information use it for their own benefit, with no one able to detect such activity until one carefully reviews the company's books. The secretive nature of insider trading is more problematic in securities traded on SPSE, because most often the parties at both end of the transaction are unknown to each other. According to Welsh 'the evidentiary requirements of criminal law and the need to prove complex cases beyond reasonable doubt have greatly reduced the effectiveness of regulation and policing of the companies and securities area' (2004: 4).[76] The high burden of proof required in criminal matters was one of the main reasons why New Zealand did not criminalise insider trading until recently (Securities Commission, 1987: 72).

In the Australian context, Tomasic suggested as a solution that, rather than lowering the standard of proof the onus of proof should be reversed (1989:70).[77] This suggestion in Fiji will not have any ground as it will contradict the basic principles of the Fijian legal system. For example the Constitution (s28(1a)) provides that a person is innocent until proven guilty. Also the accused or a witness can claim privilege against self incrimination and may refuse to an-

[76] In addition, Eads suggested that obtaining criminal penalties for insider trading 'frequently creates nearly insurmountable proof problems for the prosecution' (1991: 1423).

[77] According to Tomasic 'the matters raised by way of defence are usually peculiarly within knowledge of the accused'; and that 'serious proposition may be advanced by the defence which almost any amount of prosecutorial resources not be able to negate' (1989: 70).

swer or give evidence that could expose the person to criminal charges or civil penalty (Ministry of Economic Development, 2002). The CMDA Act can remove or preserve this privilege for the purpose of gathering information, but the CMDA Act is silent on this. Therefore, only future cases on insider trading will determine how an accused or witnesses can exercise this privilege.

Another problem associated with the investigation of insider trading is the 'need to prove that the person who engaged in the irregular trading did so while in possession of inside information' (Rubenstein, 2002: 106). For example, assuming the act took place on Stock Exchange, there are no *smoking guns* or physical evidence that can be scientifically linked to a perpetrator. Unless the insider confesses his knowledge in some admissible form, or a whistleblower comes forward with uncontroverted evidence, or the aggrieved person has information that can prove insider trading by the insider, evidence may be entirely circumstantial. The investigation of the case and the proof presented to the fact-finder is a matter of putting together pieces of a puzzle. For example, it requires examining innately innocuous events and trading patterns and then drawing reasonable inferences based on their timing, surrounding circumstances to prove that it was the defendant who with the benefit of inside information bought or sold stock. These requirements may not be exhaustive but the time and effort required to come to a conclusion is a very hard and a costly process. It will be interesting to monitor how in future Fiji manages such difficult procedures.

In United States, South Africa, Malaysia, United Kingdom, Australia and New Zealand insider trading is a crime, punishable by monetary penalties and imprisonment. These countries are far more advanced with modern technologies, compared to Fiji. Nevertheless they experience difficulties prosecuting insider trading under criminal procedures. Therefore, the CMDA, which has difficult legislation, limited resources and little expertise in securities law, will definitely find prosecuting and satisfying criminal procedures very hard to manoeuvre. Lack of resources was another reason why New Zealand's legislature voted against public enforcement for insider trading at the first place (Roche Report, para 4.18(b)(c)). The Roche Report noted that where insufficient resources are provided to enforcement agencies, they may be forced to 'ration' enforcement activities, resulting in criticism of their effectiveness and their integrity. Moreover, lack of resources was one of the main factors leading to the ineffectiveness of the Australian regulatory agency re-

sponsible for detecting and prosecuting insider trading (Ziegelaar, 1994: 698).

Thus, given evidential difficulties in proving whether insider trading has occurred due to high burden of proof, it is unlikely that the CMDA will take a criminal proceeding unless it was very clear that the requisite burden of proof could be satisfied. Hence, this will significantly decrease the deterrent value of criminal penalties.

Should Civil Sanctions be Introduced?

In light of the difficulties explained above, providing both civil and criminal, sanctions is vital to an effective insider trading legislation. There is a unique distinction between civil and criminal law under common law, including the rules of discovery, the burden of proof and the admissibility of evidence. Criminal law addresses those who harm the society by imposing punishments and deterring offenders from committing similar offence again (Kennedy, 2004).[78] Civil law provides remedies 'requiring a return to the way things was', and provides compensation to the injured party (Kennedy, 2004; Mansfield 1776).

One of the main reasons why Fiji should have civil sanctions is that 'proceedings that are civil in nature are likely to be cheaper and more efficient than criminal proceedings' (*Australia Securities and Investments Commission v John Petsas and Marc* [2005] FCA 88, para 2 (FC) Finkelstein J.). This is because the rules of evidence are less stringent, a defendant does not have great protection and the standard of proof required to secure a conviction is lower. Moreover, it can be argued that the sole reliance on criminal law blunts the incentives for companies and regulatory authorities to search for alternative devices to protect the investors. Furthermore, while it is possible to prove beyond a reasonable doubt that a defendant engaged in insider trading based entirely on circumstantial evidence, it poses significant challenges.

Proving the mental element in a criminal case is a subjective matter and usually the area where the prosecution will fail to meet the burden required to prove guilt.[79] In proving any insider trading

[78] Lord Mansfield in *Atcheson v Everitt* (1776) 98 ER 1142, 1147 said 'Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecution and civil actions'.

[79] For example the Australian court in *CAC v Bain* Unreported (30 August 1988) interpreted s128 of the Securities industry Act 1980 (Aust) which has

case, normally the mental element is the defendant's knowledge that he is an insider and the defendant's knowledge that the information he acquired is in fact an inside information. This is regarded as an important element. In addition, the information should not relate to general securities but to a particular security and it must be shown that the information is not generally available or made public and if made public will be likely to significantly affect the price of that security.

The burden of proving a purely circumstantial case is less onerous in the civil context, where guilt needs to be shown only by preponderance of the evidence, rather than beyond a reasonable doubt. Also the use of presumption may shift the burden of proof to the defendant under certain circumstances. Having two options available to the CMDA (Criminal law or Civil Law) to impose on insiders if criminal penalty fails, the CMDA will be more inclined to take action in doubtful or potentially doubtful cases. Civil sanctions may therefore 'fulfil a symbolic function, since their existence could serve to further the goal of investor confidence' (Anderson, 1982, cited in McVea, 1996: 351).

In addition, civil measures can also be used to strengthen the deterrence of conduct which is criminal in nature. As James J in *R v Hannes* (2002) 43 ACSR 508, 529 (FC) held 'the imposition of a fine can properly serve the purpose of supplementing a sentence of imprisonment, so that the total sentence is an appropriate one'. For example the courts can send a message to the community that conducts such insider trading that this is not tolerated by imposing compensation and pecuniary penalties.

Civil punitive sanction for example can act as the middle ground for criminal sanction and civil compensation. Mann argues that the middle ground prevents under-enforcement by imposing punitive sanction for conducts which falls short of a criminal sanction and it avoids over-enforcement by providing a non criminal punitive sanction for conduct that otherwise would be punished by criminal law because of its severity (1992: 1865; C and Coffee Jr, 1992: 1893).

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similar wordings as s59 of the CMDA Act, rejected that s128 is a strict liability offence and held that the 'prosecution must prove the mental element of the offence, and in doing so may rely on evidence of the relationships between the parties to the transaction, the way in which information was received by the accused…' See also Black (1992: 214-249).

Who should have a private cause of action for breaches of insider trading law?

The most formidable question for Fijian legislators is: who should have a private cause of action for breach of insider trading law? There are two potential answers. The first is to grant the CMDA an additional power, enabling it to bring civil proceedings against insiders and to recover civil penalty liability. This option is better known as public enforcement by the regulatory agency. The second is to empower private individuals to proceed with civil action (private enforcement). It is difficult to assume which (public or private) enforcement will best suit Fiji. However in economic terms public enforcement is often preferable because:

> law enforcement results in costs and benefits which are external to the immediate parties to the enforcement action and which are incommensurable and not subject to market internalisation. These factors strongly militate in favour of an enforcement system which is, at least in part, public funded even with respect to private action (Dugan, Welington, 1990: 92).

Fiji is in a unique position because it already has a centralised regulatory body, the Capital Market Authority with staff to carry out its functions. The CMDA has powers to investigate and suppress any market misconduct. In Fiji the difficulty is that the CMDA Act failed to provide the CMDA with powers to bring civil action but allows criminal sanctions. Introducing civil sanction will not add extra cost to the government since Fiji already has an established centralised regulatory authority, therefore, it will be just the matter of providing the CMDA with extra powers to instigate civil sanction. This is quite different from establishing a new body to regulate such misconduct, as in New Zealand where the government was faced with the problem of delegating centralised enforcement authority to an agency or body responsible as until 2007 New Zealand only had decentralised system (Ministry of Economic Development, 2000). This means that the benefits of providing the CMDA with an additional option to initiate proceedings against insider trading will outweigh the cost of establishing that power. One may argue that the CMDA arguably has limited resources. However, its willingness to bring criminal action should not be impeded by its inability to rely on alternative recourse if criminal action fails.

There are other concrete justifications on why public enforcement is better than private enforcement. First, there is a concern that private enforcers are 'motivated to prosecute claims primarily by the prospect of monetary reward' (Rose, 2008: 1337-1338). This is because, unlike public enforcement, the magnitude of the sanction and the amount spent on enforcement cannot be set independently; rather 'the level of the defendant's liability determines the extent of enforcement (whether a suit will be brought and how much will be spent by the parties on litigation) (Polinsky, 2003: 146). This means that, the higher the sanction, 'the higher the payoff from suit; the higher the payoff, the more people will spend investigating and bringing suits' (Easterbrook and Fischel, 1985: 621).

Second, this situation creates concern that private enforcers might cause excessive enforcement and thus will create over-deterrence (Rose, 2008: 1331). For example, if A successfully obtains considerable monetary verdict against an insider, the next person (B), without considering its cost and benefit and the potential outcome of the case may desire to bring a doubtful case, even if the end result is likely to be against B. This will not only create a floodgate of cases but can also deny justice to persons who have justified cause of action against an insider if vexatious and frivolous cases are continuously brought before the courts.

Third, it can be argued that relying only on private enforcement will create under-deterrence since there are many reasons why private enforcers will not initiate any proceeding against an insider. For example, under-deterrence is common in face-to-face transactions, where insiders are themselves in control of the company and they may not want to bring an action against each other (board room bias) for insider trading. Even if shareholders and counter parties decide to bring a case against an insider they will face a number of difficulties. For instance, lack of evidence and the uncertainty of a favourable verdict in the case may not justify the cost of the court. Also complainants may find that when bringing an initial court action the complexity of court procedures are hard to manoeuvre without professional help (lawyers). Plaintiffs usually lack the knowledge and the ability to digest complex information about insider trading efficiently and promptly. It is not only the cost of court proceedings that is an issue, but also the technical skills needed to come to grips with the insider trading law and the procedures (Financial Intermediaries Task Force…Wellington, 2004: 25).

Fourth, both economists and law enforcers argue that 'public

enforcer's interests are better aligned with the public interest in achieving optimal deterrence than are the private enforcer's' (Rose, 2008: 1340). For example since private enforcers are profit driven they are only concerned with their rights and protection, not those of the whole society. However, public enforcers have wider goals in prosecuting insiders because public enforcers value market efficiency and fairness as they focus on a wrong against the market rather than the individual.

Special factors, however, can justify private enforcement. For instance, if the private party happens to possess information about insider trading that is difficult for a public enforcer to obtain. In addition private enforcement will be a desirable alternative when the CMDA might not want to prosecute a particular case or may have a limited budget. Finally, since shareholders, public issuers and counterparties suffer losses from insider trading, they should have the right to sue to recover their losses.

But relying only on private enforcement has its own consequences. New Zealand's experience of sole private enforcement gives some excellent examples of many difficulties. Cox (1990), evaluating New Zealand's decentralized enforcement regime, identified several reasons why private enforcers will have little incentive to take private action against an insider.[80] Firstly, most private enforcers will have little or no information that could possibly indicate the existence of insider trading. In Fiji with only a few general public investors with a small volume of trade, it would be difficult for them to recognize when insider trading has occurred based on inside information. Second, often it will not be financially viable for private enforcers to institute private proceedings. For example if the private enforcers have to pay legal costs, it is possible that the cost of proceeding may exceed the damages awarded. Also there is a risk of no award of damages.

Therefore, in light of these difficulties, this paper recommends that the CMDA should be given the ability (power) to apply to the court for civil sanctions. The CMDA should have the power to apply for civil liabilities on behalf of public issuers and those who have suffered loss for breaches of the CMDA Act 1996. As mentioned, the CMDA has government funding to investigate such secretive offences and has superior motive (market efficiency and

[80] Here Cox only commented on shareholders, however counter parties will also face these problems.

fairness) to protect the whole industry from insider trading. Shareholders and counterparties should also have a right to recover their losses. In this context civil remedy (compensation) should not, as currently it is under s64(2) of the CMDA Act, be conditional upon the defendant having first been convicted.

Principle Recommendations

The fundamental difficulty Fijian society faces is that not all securities and company law in Fiji are codified in legislation but has to be discerned from case law, which in many important respects is difficult and unclear. The following are some of the critical and major reforms the Fijian legislators need to encompass in the Fijian securities regulation regime in order to successfully prohibit and combat insider trading related market misconduct.

Simplify the Capital Market Development Authority Act 1996

In carefully examining the scope and the applicability of insider trading proscription in the CMDA Act 1996, the paper proposes immediate redrafting and simplification of the legislation as essential. The current law on insider trading lacks definitional clarity and has limited scope that does not fulfil the purpose behind enacting the CMDA Act, and so undermines the policy objectives of the Fijian securities market. The following are some needed reforms that legislators would need to consider when reforming the CMDA Act 1996.

First, the definition of insider should be amended. The Act should define an informed insider as any person who possesses price sensitive inside information that is not generally available to the market; and that the person knows or ought to have known that the information is material information and is not generally available to the market; and if it were generally available to the market, it would materially affect the price of the securities.[81] By adopting this definition the restrictive 'connection requirement' in s59(1) which currently applies only to defined insider (s59(8)) will be simplified.

Second, before the above suggested definition of insider is adopted the current policy justification of fiduciary basis which only applies to certain class of persons, should be changed to market efficiency and market fairness rationale which applies to everyone.

[81] The information must relate to particular securities rather than to the general securities. This definition is adopted from Australia and New Zealand proscription on insider trading.

Third, the Act should define what information is inside information and when information is regarded as generally available to the market.

Fourth, the Act should include a civil sanction regime to recover civil penalty liability and provide powers to the CMDA to initiate civil penalty liability either as a substitute for already existing criminal sanction or on behalf of the aggrieved person.

Fifth, in order to clarify the liability of tipper and tippee, the Act should define the terms 'associated' and 'arrangement' found in s59(2). However, the definition of tippee should not be confined to the categories of 'associated persons'.

Sixth, the Act must remove the exception granted to brokers in s59(9). Brokers may easily obtain price-sensitive inside information and they can undermine the stock market by trading on that information.

Reform the Companies Act 1985

While this paper does not examine the Companies Act, some urgent reforms in this legislation are also needed. The reforms discussed in this paper are a matter of urgency as the present Act lacks accessible and intelligible company law. Some important rules of company law are based on outdated or out of step policies compared to modern practice. The following are some of the major reforms that are necessary for the Companies Act 1985.

Those directors' duties should be included in the Companies Act. In doing so the Act must spell out what the directors' duties are and to whom these duties are owed. The present Act fails to provide directors' duties clearly.

Second, Companies Act 1985 should include provision(s) to prohibit insider trading in the securities of unlisted companies. The CMDA Act 1996 regulates insider trading, but applies only to securities in listed companies. There is no such complementary provision in the Companies Act 1985 for unlisted companies. Therefore, this paper recommends the inclusion of a similar provision in the Companies Act that does not overlap with the CMDA Act. It is possible that Fijian legislators can either adopt or base the insider trading provision on the New Zealand's Companies Act 1993 (s149).[82]

[82] s149 states: '(1)If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being in-

S149 of the New Zealand Companies Act requires a director with inside information not to deal in the shares or securities of the company or a related company unless the consideration is of not less than fair value for an acquisition and for a consideration of not more than fair value for a disposition. 'Fair value' is determined on the basis of all the information that is known to the director or publicly available at that time.[83] S149 imposes liability on directors to pay the purchaser or seller of the shares, the consideration paid or received and the fair value if the director fails to ensure that the consideration reflects the fair value.[84] S149 does not impose criminal

formation that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other securities issued by the company or a related company, the director may acquire or dispose of those shares or securities only if,—(a) In the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or (b) In the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.
(2) For the purposes of subsection (1) of this section, the fair value of shares or securities is to be determined on the basis of all information known to the director or publicly available at the time.'

[83] *Thexton v Thexton* [2001] 1 NZLR 237, affirmed on appeal *Thexton v Thexton* [2002] 1 NZLR 780; (2002) 9 NZCLC 262,777 (CA). This case was about a family business, where the son was the director (D) of the family business and the father had 20% shares in the company. Some time along D negotiated a takeover of Cerebs Greggs and around this time David Senior (father) agreed to sell his shares to D. D claimed that there was a contract between his father and the price for the share was fixed at $250,000. Later David senior made a deed stating that his shares were held on trust for D. After David senior's death P (mother) claimed that the purchase price of the shares did not reflect the fair value of the shares and that D breached his fiduciary duty. (There were other claims too). The court deliberating on s149 of the 1993 Companies Act said that s149 was enacted to deal with the abuse of inside information. (s149 applies only to non-listed companies). While court accepted that insider trading is restricted by two ways – i.e. that insider should disclose the information to the other party, or the insider should trade at a price that reflects the values of the information. But the court was of the view that s149 only required the insider to trade on a fair value and does not require disclosure. AND the fair value of the shares is to be determined by the information available to the director and that is publicly available (objective test). Also the court viewed that s149 didnot provide an exception that information was available to both parties.

[84] Companies Act 1993,s149 (4) 'Where a director acquires shares or securities in contravention of subsection (1)(a) of this section, the director is liable to the person from whom the shares or securities were acquired for the amount by which the fair value of the shares or securities exceeds the amount paid by the director. (5) Where a director disposes of shares or securities in contravention

penalty as does the CMDA Act and provides no exception even when the information is known to both parties.

Conclusion

The paper argues that the insider trading proscription in Fiji, through the Capital Market Development Authority Act 1996, suffers from many difficulties and that it was not effective in detecting and suppressing insider trading activities. The CMDA Act is outdated compared with the modern corporate and security law principles. This is the major obstacle the Fijian regime faces in their pursuit to achieve an efficient and transparent stock market. The failure of the CMDA Act and the Companies Act 1985 to prohibit insider trading in securities of unlisted companies means private closely-held companies must rely on common law principles in order to bring a cause of action against an insider. It is argued that common law rules regulating insider trading are limited in their application, and that proving a cause of action under common law principles will be difficult. In addition, insider trading under the CMDA Act is a criminal offence. Proving a criminal case in the absence of an alternative cause of action will be very complicated and will require huge resources and expertise which the CMDA does not have.

This paper has made some recommendations that should be considered when reforming the legislation on this. The main suggestion is to prohibit anyone who possesses non-public price-sensitive inside information from trading on the basis of the inside information they possessed regardless of their connection with the corporation. Also, there should be a provision inserted in the Companies Act to prohibit insider trading activities in the securities of unlisted companies. Given the potential difficulties and inherent criticisms in applying criminal law to insider trading enforcement, civil sanctions should be allowed to act as a substitute. Finally, the developing nature of the Fijian stock market needs protection and the CMDA will only be able to effectively and successfully monitor the stock market if the legislators carefully address the deficiencies and difficulties.

of subsection (1)(b) of this section, the director is liable to the person to whom the shares or securities were disposed of for the amount by which the consideration received by the director exceeds the fair value of the shares or securities'.

Appendix One

Table A1: Ownership Structure of Publicly Listed Companies; 2008

Company	Year Listed	Largest shareholder (%)	Number of shareholders
Atlantic & Pacific Packaging Company Ltd (APP)	1998	60.0	132
Amalgamated Telecom Holding Ltd (ATH)	2002	58.2	892
Communications Fiji Ltd (CFM)	2001	87.0	154
Foster's Group Ltd (FGP)	2005	89.6	646
FijiCare Insurance Ltd (FIL)	2000		
Flour Mills of Fiji Ltd (FMF)	1979	86.1	432
Fiji Sugar Corporation Ltd (FSC)	1997	94.6	2,026
Fiji Television Ltd (FTV)	1979	51.0	475
Kontiki Growth Fund Ltd (KGF)	2004	28.9	156
Pacific Green Industries (Fiji) Ltd (PGI)	2001	64.0	76
R B Patel Group Ltd (RGB)	2001	74.2	247
The Rice Company of Fiji Ltd (RCF)	1997	75.0	104
Toyota Tsusho (South Seas) Ltd (TTS)	1979	94.0	157
VB Holding Ltd (VBL)	2001	76.5	88
Yaqara Group Ltd (YGL)	1997	55.0	173
Fijian Holding Ltd (FHL)	2005	67.3	238

Data Source: Company Annual Reports

Table A2: Volume and Value of Shares Traded, 1996 to 2008

Year	Volume of Shares Traded (m)	Value of shares traded (4m)
1996	0.2	0.4
1997	2.1	2.9
1998	4.6	9.7
1999	3.4	4.9
2000	2.5	8.1
2001	2.6	4.4
2002	6.8	7.1
2003	3.6	4.3
2004	7.8	12.7
2005	5.9	7.9
2006	2.3	5.7
2007	2.7	3.6
2008	18.4	26.0

Table A2 shows the trends in volume and value of trade on the SPSE from the year 1996 to year 2008. Generally the trend mainly fluctuated between 1996 and 2008. However, the volume and value of shares trades are much higher than 1996

Data Source: South Pacific Stock Exchange

Appendix Two

The Insider trading Prohibition under the Capital Market Development Authority Act 1996

PART X - PROHIBITED DEALING

Insider Trading

59.-(1) A person who is, or at any time connected with a body corporate shall not deal in any securities of any body corporate if by reason of his so being, or having been, connected with the first mentioned body corporate he is in possession of information that-

(a) is not generally available but, if it were, would be likely materially to affect the price of those securities; and

(b) relate to any transaction (actual or expected) involving both bodies corporate or involving one of them and securities of the other.

(2) Where a person is in possession of any such information as is mentioned in subsection (1) that if generally available would be likely materially to affect the price of securities but is not precluded by either of those subsections from dealing in those securities, he shall not deal in those securities if-

(a) he has obtained the information, directly or indirectly, from another person and is aware, or ought reasonably to be aware, of facts or circumstances by virtue of which that other person is himself precluded by subsection (1) from dealing in those securities; and

(b) when the information was so obtained, he was associated with that other person or had with him an arrangement for the communication of information of a kind to which those subsections apply with a view to dealing insecurities by himself and that other person or either of them.

(3) A person shall not, at anytime when he is precluded by subsections (1), or (2) from dealing in any securities, cause or procure any other person to deal in those securities.

(4) A person shall not, at any time when he is precluded by subsections (1), or (2)) from dealing in any securities by reason of his being in possession of any information, communicate that information to any other person if-

(a) trading in those securities is permitted on any securities exchange; and

(b) he knows, or has reason to believe, that the other person will make use of the information for the purpose of dealing or causing or procuring another person to deal in those securities.

(5) Without prejudice to subsection (2) but subject to subsections (6)

and (7), a body corporate shall not deal in any securities at a time when any officer of that body corporate is precluded by subsections (1), or (2) from dealing in those securities.

(6) A body corporate is not precluded by subsection (5) from entering into a transaction at any time by reason only of information in the possession of an officer of that body corporate if-

(a) the decision to enter into the transaction was taken on its behalf by a person other than the officer;

(b) it had in operation at that time arrangements to ensure 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 so communicated and such advice was not so given.

(7) A body corporate is not precluded by subsection (5) from dealing in securities of another body corporate at any time by reason only of information in the possession of an officer of that first-mentioned body corporate, being information that was obtained by the officer in the course of the performance of his duties as an officer of that first-mentioned body corporate and that relates to proposed dealings by that first-mentioned body corporate in securities of that other body corporate.

(8) For the purpose of this Section, a person is connected with a body corporate if, being a natural person-

(a) he is an officer of that body corporate or of a related body corporate;

(b) he is a substantial shareholder in that body corporate or in a related body corporate; or

(c) he occupies a position that may reasonably be expected to give him access to information of a kind to which subsection (1) apply by virtue of-

(i) any professional or business relationship existing between himself (or his employer or a body corporate of which he is an officer) and that body corporate or a related body corporate; or

(ii) his being an officer of a substantial shareholder in that body corporate or in a related body corporate.

(9) This Section does not preclude the holder of a broker's or dealer's licence from dealing in securities, or rights or interests in securities, of a body corporate, being securities or rights or interests that are permitted by a securities exchange to be traded on the stock market of that securities exchange, if-

(a) the holder of the licence enters into the transaction concerned as agent for another person pursuant to a specific instruction by that other person to effect that transaction;

(b) the holder of the licence has not given any advice to the other person in relation to dealing insecurities, or rights or interests insecurities, of that body corporate that are included in the same class as the first-mentioned securities; and

(c) the other person is not associated with the holder of the licence.

(10) For the purpose of subsection (7), "officer", in relation to a body corporate, includes-

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

(b) a receiver, or receiver and manager, of property of the body corporate;

(c) an official manager or a deputy official manager of the body corporate;

(d) a liquidator of the body corporate; and

(e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons.

(11) A person who contravenes this Section shall be guilty of an offence and shall be liable on conviction to-

(a) the consideration for securities; or

(b) three times the amount of gain made or the loss avoided by the insider in buying or selling the securities whichever is greater; and in addition-

(c) (i) in the case of a person being a body corporate, to a fine not exceeding $20,000;

(ii) in the case of any other person, including a director and officer of a body corporate, to a fine not exceeding $10,000 or to a term of imprisonment not exceeding 5 years or both.

(12) An action under this Section for the recovery of a loss shall not be commenced after the expiration of 7 years after the date of completion of the transaction in which the loss occurred.

(13) Nothing in subsection (11) affects any liability that a person may incur under any other Section of this Act or any other law.

Penalties and Compensation

64.-(1) Any person who is guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 7 years or both.

(2) In addition to the penalties provided for elsewhere in this Act, any person guilty of an offence under this Act shall be liable to pay compensation to any person, who in a transaction for the purchase or sale of securities, entered into with the first-mentioned person or with a person acting on his behalf, suffers loss, by reason of the difference between the price at which securities were transacted and the price at which they would likely have occurred if the offence had not been committed.

(3) The amount of compensation for which a person is liable under subsection (2) is-

(a) the amount of the loss sustained by the person claiming the com-

pensation; or

(b) in the event the harm has been done on the market as a whole, the liability shall be the amount of illegal gains received or the loss averted as a result of the illegal action as determined by the court:

Provided the court should limit compensation to those who traded substantially contemporaneously with the person or corporation that acted illegally giving rise to the loss.

(4) To the extent that a person found guilty of an offence under subsection (1) profited by that offence but those harmed cannot reasonably and practicably be determined, the payment under subsection (2) shall be made to the Investor Compensation Fund established under this Act.

The Disclosure Requirements under the South Pacific Stock Exchange Listing Manual 1979.

Section 3a - Continuing Listing Requirements

Section 3. While a Company remains on the official list it shall comply with the following requirements and such requirements may be introduced from time to time at the discretion of the Exchange and provide forthwith any explanation requested by the Exchange.

3.1 Immediate Announcements to be made up to the Exchange for release

3.1.1 A listed company shall supply the Exchange with immediate effect, any information concerning the company or any of its subsidiaries necessary to avoid the establishment of a false market in the Company's securities or which would be likely to materially affect the price of its securities.

3.1.2 Any acquisition or disposal which are in the nature of trade investments and which in the opinion of the Directors is material, the fact of such disposal or acquisitions and the possible or estimated effects of such disposal and acquisitions on the performance and the profitability of the Company shall be communicated to the Exchange and to the shareholders simultaneously.

3.1.3 Any proposed change in the general character or nature of business of the Company or of any subsidiary thereof and particulars of any offer or proposals for the purchase or sale of any controlling interest or any substantial part of the assets of the Company or of any subsidiary thereof and of the decisions of the Board in that regard.

3.1.4 Any intention to fix a books closing date and the reason thereof, stating the books closure date, which shall be at least 14 days after the date of notification to the exchange and the address of share registry at which documents will be accepted for registration.

3.1.5 Any recommendation or decision that a dividend will not be declared.

3.1.6 (a) Any recommendation or declaration of a dividend (including bonuses if any) the rate and amount per share and date of payment which shall be before the expiry of 21 market days from the date of declaration. (b) Any decision to change the Capital Structure of the Company by way of a Rights or a Bonus Issue. Such information should be communicated to the Exchange by telephone no sooner the meeting is held to consider or recommend such entitlement and confirmed by letter immediately afterwards. Once the books closing date is announced, the Company shall not make any subsequent alteration to the dividend entitlement.

3.1.7 In the case of an interim – dividend declared before the close of a financial year, such announcement to the Exchange shall be accompanied by a statement showing comparative figures, based on which the declaration was made for such period of the current Financial Year and the corresponding period of the previous year.

3.1.8 When a dividend (Interim or Final) is declared after the close of a Financial Year, such announcement to the Exchange shall be accompanied by a statement showing comparative figures of the following: (a) Turnover figures / Gross operating profit; (b) Gross profit; (c) Income from other sources; (d) Provision for taxation; (e) Net profit after taxation.

3.1.9 2(a) The Company shall make available to the Exchange and to all shareholders in the form set out in Appendix 4 & 5 of this section a half yearly Financial Statement before the expiry of 8 weeks from the half year period. Such Financial Statement shall be signed by the Chairman or Chief Executive and Finance Director or in his absence the Chief Accountant. 2(b) The Company shall make available to the Exchange a Financial Statement before the expiry of 3 Months from the end of each Financial Year in the form as set out in Appendix 4 and 5 of this Section even if the figures are provisional and subject to audit.

3.1.10 Any intention to pass a resolution at any member's meeting shall be notified to the Exchange at the same time that it is conveyed to the shareholders and within 3 days after the date of the meeting whether or not such resolution was carried. Companies shall send duly stamped proxy forms to shareholders and debenture holders in all cases where proposals other than those of a purely routine nature are to be considered at a meeting of the Company's shareholders and debentures holder may be eligible to vote either for or against each resolution.

3.1.11 Any change of address of the registered office of the Company or of any offices at which the register of the securities of the Company is kept.

3.1.12 Any change in the Directors, Company Secretary, Registrars or Auditors of the Company.

3.1.13 Any change of substantial share holding of the Company and details thereof.
3.1.14 Any application filed with a court to wind up the company or any of its subsidiaries. The appointment of receiver or liquidator of the Company or any of its subsidiaries.
3.1.15 Any acquisition of shares of any company or any transaction resulting in such Company becoming a subsidiary of the company.

3.2 The Company shall forward to the Exchange at the same time as despatched to the shareholders: (a) 3 copies of the statutory and annual report and accounts. (b) 3 copies of all resolutions increasing the capital and all notices relating to further issues of capital, call letters and other circulars of importance to shareholders. (c) 3 copies of all resolutions passed by the Company in General Meeting for the purpose of adopting the report and accounts declaring dividends and re-electing Directors and Auditors.

References

Primary Sources

Legislation

Capital Market Development Authority Act 1996 (FJ), s59.
Companies Act 1948 (UK) as repealed by Companies Act 1985 (UK).
Companies Act 1985 (FJ), s197, s201, s195.
Corporation Act 2001 (Cth), s 1042.
Interpretation Act 1978 (FJ).
Maldives Securities Act 2006 (Mald), s54 (q).
Penal Code (FJ), s121.
Securities Act 1997 (PNG), s102.
Securities Industries Act 1980 (Cth) as repealed by Corporation Law 2001 (Cth).
Securities Industry Act 1970 (NSW) repealed by Securities Industries Act 1980 (Cth).
Securities Market Act 1988 (NZ), s3 (1) as amended by Securities Amendment Act 2006 (NZ).

Regulations

Capital Market Development (Securities Exchange and Licensing) Regulations 1997 (Fiji).
Capital Market Development Authority Rules 1997(CMDA Rules).
CMDA (Securities Exchanges and Licensing) Regulations 1997, s 3.
South Pacific Stock Exchange Business Rule 1997 (FJ), part1.
South Pacific Stock Exchange Listing Rules 1997 (Fiji), r 3A.

Bills

Securities Industry Bill 1975 (Cth), cl 123.

Constitutional Documents

The Constitution of the Republic of Fiji Islands 1997, s 28 (1a).

International Agreements

Pacific Agreement on Closer Economic Relations (Nauru, 2001).
Pacific Island Countries Trade Agreement (Nauru, 2001).

Government Publications

Asian Development Bank (2006) *Private Sector Assessment For Fiji Islands*: *"Promise Unfulfilled"*. Washington; pp. 11.
Attorney General 'Annual Report 2002' (14 December 2002) PP 6/04.
Corporations and Markets Advisory Committee *Insider trading: Discussion Paper* (Sydney, 200), 13.
Financial Intermediaries Task Force Option for Change: Consultation paper (Wellington, 2004) 25.
Macarthur Committee Final Report of the Special Committee to Review the Companies Act (Wellington, 1973). Para 312.
Ministry of Economic Development (2000) *Insider Trading: Discussion Document.* Wellington.
Ministry of Economic Development (2002) 'Reform of Securities Trading Law Vol 1'. Insider Trading Law Fundamental Review: Discussion Document. Wellington.
Ministry of Economic Development Reform of Securities Trading Law: Penalties, Remedies and the Application of Securities Law: Discussion Document (Wellington, 2002)
Report of the Committee on Company Law Amendment (1945) Cmnd 6659, para 86.
Report of the Company Law Committee (1962) Cmnd 1749, para 88-91.
Report of the Ministerial Working Group on Securities Law Reform (Wellington, 1991) ("Roche Report") par 4.18 (b) and (c).
The World Bank Financial Sector "Financial Sector Assessment Fiji" (01 July 2007) 41436, para 20.

Table of Cases

Aberdeen Railway Company v Blaiki Bros [1843] All ER 249, 252 (HL) Lord Cranworth.
Allen v Hyatt [1914] 30 TLR 444.
Atcheson v Everitt (1776) 98 ER 1142, 1147.
Australia Securities and Investments Commission v John Petsas and Marc [2005] FCA 88, para 2 (FC) Finkelstein J.
Boardman v Phipps [1967] 2 AC 46, 123, para D, Lord Upjohn.
Bray v Ford (1896) AC 44, 51-52 (CA) Lord Herschell.
Brophy v Cities Services Co. 70 A (2d) 5 (1949), Chancellor Harrington.
CAC v Bain Unreported (30 August 1988).

Carpenter v US 484 US 19 (1987).
Coco v. A.N. Clark (Engineers) Ltd. [1969] RPC 41, 47 Megarry J.
Coleman v Myers [1977] 2 NZLR 225 (CA) Woodhouse J.
Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd [1994] 2 NZLR 152,161.
Cotterall *v Fidelity Life Assurance Company Ltd* (1987) 3 NZCLC 100 Thorp J.
Driks v Securities Exchange Commission 463 US 646, 658 (1983).
Faccenda Chicken Ltd v Fowler [1986] 1 All ER 617, 625, (CA) Neill LJ.
Fijian Holdings Ltd v Baba [2001] FJHC 170. John Byrne J.
Fox v Macreth (1788) 39 ER 148, 149 (HL) Lord Thurlow L.C.
Gething v Kilner [1972] 1 All ER 1166, 1170 Brightman J.
Glavanics v Brunnighasen (1996) 19 ACSR 204, 220 (SC) Broyson J.
Great Eastern Railway Co v Turner (1882) LR Ch 149, 152 Lord Selborne.
Hooker Investment PTY Limited v Baring Bros Halkerston (1986) 10 ACLR 462,646 (SC) Young J.
In Lawlor v NBF Asset Management Bank [2001] FJHC 122, (HC) Scott J.
Lallu v Ranchod (unreported) Court of Appeal, Fiji.
Parbhubhai v Prasad (1959) 6 FLR 118,119 (CA) Sir George Finlay J.
Percival v Wright [1902] 2Ch 421, 426 Swinfen Eady J.
R v Finns (2002) 51 NSWLR 548.
R v Hannes (2002) 43 ACSR 508, 529 (FC) James J.
Re Bank of New Zealand Kincaid v Capital Market Equities Limited (No 2) (1995) 7 NZCLC 260,718,260-729.
Re Cady, Roberts & Co. 40 SEC 907, 911 (1961).
Re The Great Outdoors Company Limited (1984) 2 NZCLC 99, 260. Gallen J.
Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378 (HL) Lord Wright.
Saltman Engineering Company Limited v Campbell Engineering Co Limited [1963] 3 All E.R 413, 414 (HL) Lord Greene M.R.
Skerlec v Tompkins [1999] FJHC 134 (HC) Fatiaki J.
Thexton v Thexton [2001] 1 NZLR 237.
Thexton v Thexton [2002] 1 NZLR 780.
Thomas Marshall (Exports) limited v Guinle [1979] Ch 227, 248 Sir Robert Megarry V.C.
Thomas v HW Thomas Limited (1984) 2 NZCLC 99, 148. Richardson J.
Walters v Morgan (1861) 45 ER 1056, 1059 (HL) Lord Campbell L.C.
Woolmington v DPP [1935] AC 462, 481- 482 (HL) Viscount Sankey LC.

Secondary Materials

Ahmadu, M, and R. Hughes (2006) *Commercial Law and Practice in the South Pacific.* Cavendish Publishing Limited; pp. 243-53.
Anderson, A.G. (1982) ‘Fraud, Fiduciary and Insider Trading’. *Hofstra L Review* 10: 341-71.
Bainbrige, S. (1986) ‘The insider trading prohibition: A Legal and Economic enigma’. *U.Fla. L. Rev*. 38: 35.
Bauman, T. A. (1984) ‘Insider Trading At Common Law’. *Chi U LR* 51(3): 838.
Bergmans, B. (1991) *Inside information and Securities Trading: A Legal and Economic Analysis of the Foundation of the Liability in the USA and European Community.* London: Grahan &Trotman; pp. 99-103.

Black, A. (1992) ‘The Reform of insider Trading Law in Australia’. *UNSW LJ* 15(1): 214-33.
Brazier, G. (1996) *Insider Dealing: Law and Regulation.* London: Routledge; pp. 92, 93-94.
Brigulio, L. (1995) ‘Small Island Developing States and their Economic Vulnerabilities’. 23 *World Development* 1615, 1619; http://www.sciencedirect.com (last accessed 19 April 2008).
Carlton, D. and D. Fischel (1983) “The Regulation of Insider Trading”. *Stan L Rev.* 35: 857.
Ciriklyasawa, P. (2007), ‘Fiji island Background Country Report: Winning National Strategies for Export Development’. Paper presented to the World Export Development Forum, Montreux Switzerland, 8-11 October 2007)..
CMDA (Capital Market Development Authority) (2008) *Annual Report 2007.* Suva; pp. 1-6.
CMDA (Capital Market Development Authority) (2008) www.cmda.com.fj, accessed 28th June 2008).
CMDA (Capital Markets Development Authority) (2007) *Annual Report.* Suva; pp. 2.
Cox, J. (1990) ‘An Economic Perspective of Insider Trading Regulation and Enforcement in New Zealand’. *Cant L Rev*. 4: 268-81.
Dugan, R. (1990) ‘Insider Trading and Trade Practices: Private versus Public Enforcement of the Law’, in R. Dugan and P. Gorringe (eds), *Fairness and Incentives: Economics and Law Reform* Wellington: Victoria University Press: 81-92.
Dyer, B. (1992) ‘Economic Analysis, Insider Trading and Game Markets’. Utah L Rev. 1: 3-64.
Eads, Linda (1991) ‘From Capone to Boesky: Tax Evasion, insider Trading, and Problems of Proof’. *Calif L Rev.* 9: 1421-3.
Easterbrook, F. and D. Fischel (1985) “Optimal Damages in Securities Cases”. *U. Chi. L. Rev*. 52: 611-621.
Engelen, Peter-Jan (2006) ‘Difficulties in the criminal prosecution of insider trading-A clinical study of the *Bekaert* case’. *EJLE121* 22*:* 141.
Farrar, J. (2008) *Corporate Governance: Theories, Principles and Practice* (3rd ed). Oxford University Press; pp. 290-306.
Fiji Islands Bureau of Statistics (2009) www.statsfiji.gov.fj (lasted accessed 11 January 2009).
Fiji Law Reform Commission (2004) *Annual Report 2002-2003.* Suva; pp. 5.
Findlay, M. (1996) *The Criminal Laws Of The South Pacific: Text and Materials on Criminal Law and Procedures in the South Pacific.* Suva: Institute of Justice and Applied Legal Studies.
Finn, P. D. (1977) *Fiduciary Obligations.* Sydney: Law Book Co.; pp. 2.
Freeman, M. and M. Adams (1999) ‘Australian Insiders: Views on Insider Trading’. *AJLC* 10: 148 & 156.
Freeman, S. and Adams (1999) ‘Is insider Trading a Necessary Evil for Efficient markets? An International Comparative Analysis’. *C&SLJ* 17: 221.
Gower, L. C. B. (1957) *The Principles of Modern Company Law* (2nd ed). Lon-

don: Stevens & Sons Limited; pp. 1957-490.
Hanningan (1988) *Insider Dealing*. London: Kluwer; pp. 105-106.
Hughes, R. and M. Ahmadu (2005) *Company Law of the South Pacific*. Cavendish Publishing Limited.
Jacobs, A. (2005) 'Time is Money: Insider Trading from a Globalisation Perspective'. *C & SLJ* 23: 231-3.
John, C. and C. Jr. (1992) 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models and What Can Be Done about it'. *YLJ* 101(8): 1875-93.
Kennedy, A. (2004) 'Justifying the Civil Recovery of Criminal Proceeds'. *Journal of Financial Crime* 12(1): 8-9.
Lawrence, M. (1985) *Duties and Responsibilities of Company Directors in New Zealand* (3rd ed). Auckland: Commerce Clearing House; pp. 9-13.
Lehane, L. (1985) 'Fiduciaries in a commercial context', in P. D. Finn (ed) *Essays in Equity*. Sydney: Law Book Co Ltd; pp. 95.
Levi, W. (1947) 'South Pacific Region'. 16 Far Eastern Survey 18; available at http://www.jstor.org/stable (last accessed 25 April 2008).
Lyon, G. and J. J. du Plessis (2005) *The Law of Insider Trading in Australia.* Sydney: The Federation Press; pp. 107.
MacWillam, S. (2002) 'Poverty, corruption and governance in Fiji'. *Pacific Economic Bulletin* 7(1): 138-42.
Mala, R. (2007) 'Factors Leading to the Development of Stock Market - a Case study of Fiji Islands: an Emerging Market' PhD thesis, University of the South Pacific.
Mann, K. (1992) 'Punitive Civil Sanctions: The Middlegroud between Criminal and Civil Law'. *YLJ* 101(8): 1795-865.
Manne, H. (1966a) 'In Defence of Insider Trading'. *HBR:* 113.
Manne, H. (1966b) *Insider trading and the stock market.* New York: Free Press; pp. 89.
McVea, H. (1996) 'Fashioning a System of Civil Penalties for Insider Dealing: Sections 61 and 62 of the Financial Service Act 1986'. *JBL:* 344-347.
Namasivayam (1992) *Survey of the Suva Stock Exchange and Recommendations for Reform.* Suva: University of the South Pacific; pp. 10-2.
Naylor, J. (1990) 'The Use of Criminal Sanctions by UK and US Authorities for Insider Trading: How Can the Two System Learn fro Each Other? Part I'. *Co Law* 11(3): 53-68.
Newkirk, T. (1998) 'Insider Trading-A U.S. Perspective'. Speech to 16th international Symposium on Economic Crime Jesus College; Cambridge: England; 19 September 1998.
Padilla, A. (2008) 'How do we Think About Insider trading? An Economist Perspective on the insider Trading Debate and its Impact'. *JLEP* 4: 239.
Partridge, R. and B. Gully (2006) 'Insider Trading Reform'. (2006) *NZLJ*: 311-12.
Patterson, C. (1987) 'Insider Trading and the director', in John Farrar (ed) *Contemporary issues in Company Law*. Auckland: Commerce Clearing House; pp. 171.
Pennington, R. (1987) *Directors Personal Liability.* London: BSP Professional Books; pp. 136-55.
Polinsky, M. (2003) *An Introduction to law and Economics* (3rd ed). New York,

America: Aspen Publishers; pp. 125-46.
Posner, R. (1985) 'An Economic Theory of the Criminal Law'. *CLMLR* 85: 1193.
Posner, R. (1991) 'Optimal Damages', in F. Easterbrook and D. Fischel (eds), *The Economic structure of Corporate Law*. Boston: Harvard University Press: 220-71.
Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs *(1990) Fair Shares For All: Insider Trading In Australia.* Canberra: Australian Government Publishing Service; pp.19-58.
Reserve Bank of Fiji (2007) *Annual Report.* Suva; pp. 12-5.
Rose, A. M. (2008) 'Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10B-5'. *Col L Rev*. 108(6): 1301; 1337-8.
Rubenstein, S. (2002) 'The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanction for Insider Trading'. *C&SLJ* 20: 89-106.
Savage, J. P. (1992) 'An Analysis of the Common law Causes of Action for Breach of Fiduciary Duty and Breach of Confidence in the Context of Insider Trading'. LLM Research Paper, Victoria University of Wellington.
Securities Commission (1987) *Insider Trading* 1(72). Wellington.
South Pacific Stock Exchange (2006) Annual Report www.spse.com.fj (Accessed 20/7/08).
Strudler, A. and E. W. Orsts (1999) 'Moral principle in The Law of Insider Trading'. *TLR* 78: 376-90.
The National Business Review (2000) 'Let's Jump Over the Ditch, Local Investors Tell Stock Exchange'. The National Business Review 9(2): 16. Auckland: New Zealand.
Tigerstrom, G. L. B. V. (ed) (2005) *International Law Issues in the South Pacific.* England: Ashgate Publishing Limited; pp. 233.
Tomasic, R. (1989) 'The Prosecution of insider Trading: Obstacles to Enforcement'. *AJC* 22: 65-70.
Watson, S. 'Duties of Directors: Duties of Honesty and Loyalty', in J. Farrar (ed) *Company Law and Securities Law in New Zealand*. Wellington: Thomson Brookers; pp. 331-77.
Welsh, M. (2004) 'Eleven years on-an examination of ASIC's use of an expanding civil penalty regime'. *JCL* 17: 4.
Ziegelaar, M. (1994) 'Insider Trading Law in Australia', in G. Walker and B. Fisse (eds), *Securities Regulation in Australia and New Zealand.* Auckland: Oxford University Press: 677-98.

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