

A CONTEMPORARY ANALYSIS OF THE APPLICATION OF SENTENCING FACTORS IN INSIDER TRADING CASES

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Insider trading is a complex issue that involves both corporate and criminal law. Since the introduction of civil penalties, the Australian Securities and Investments Commission (ASIC) has only pursued one civil proceeding against insider trading. ASIC prefers criminal proceedings for their deterrent effects. This paper examines various features of Australian convicted insider trading cases from 2004 to the end of 2015 and provides a broad overview of the distribution of these cases. Further, this paper assesses the consistent application of sentencing factors and the determination of criminalities of different kinds of insider trading activities. Finally, this paper proposes renaming current insider trading laws to 'dealing with privileged information'.

I INTRODUCTION

It is commonly held that insider trading undermines investor confidence in market fairness and market integrity. Investors' confidence in the integrity of the market and in the efficiency of its regulator is of considerable significance to the attractiveness of a stock market. Investors expect the market to be fair and reward innovation, diligence and talent. Therefore, the public expects ASIC to protect them from insider trading because: (1) insiders have informational advantages that cannot be competed away; and (2) investors believe they are the victims of insider trading.

Australian insider trading laws prohibit insiders from trading on,¹ procuring trading on, or communicating inside information (tipping) relating to any financial products that are tradable on a financial market,² subject to various

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¹ Corporations Act 2001 (Cth) s1043A. Section 1043A is the main insider trading provision currently. This provision has been in effect since 11 March 2002. Section 1043A is broadly the same as s 1002G of the previous Corporations Law.

² Ibid s1042A.

exceptions and defences. When acting on this information, insiders must know or ought reasonably to know that such information is not generally available and, if it were made known to the public, would have a material effect on the price of the financial product.³ For convicted insider trading in Australia, the current maximum penalty is imprisonment for 10 years, or a fine of the greater of (i) 4,500 penalty units (\$945,000);⁴ or (ii) three times the total value of the benefits obtained, or both.⁵ In civil penalty proceedings, the maximum civil penalty is \$200,000 for an individual.⁶

This paper analyses various features of all convicted insider trading cases from 2004 to the end of 2015. During the examined period, 37 individuals were convicted and sentenced,⁷ of which nine (29.7%) were jailed. In other words, for every ten convicted insider trading offenders, about three served full-time

³ Ibid.

⁴ One penalty unit is \$210. See *Penalty Units*, Australian Transaction Reports and Analysis Centre <<http://www.austrac.gov.au/enforcement-action/penalty-units>>.

⁵ *Corporations Amendment (No 1) Act 2010* (Cth) Section 20 increased the penalties for criminal breaches of the insider trading and market misconduct provisions. The maximum penalty was increased from 5 years imprisonment and a \$20,000 fine in 2010.

⁶ 1317G(1B): The maximum penalty is \$1 million for a body corporate. The civil penalty for insider trading offences was introduced in 2001. Also, if a court finds that insider trading has occurred, the court may make an order to direct a person to refrain from doing a specific act, or to cancel his/her Australian Financial Services Licence. Further, directors convicted of insider trading are automatically disqualified from managing a company for five years. Unlike director disqualification orders, it is optional for the court and ASIC to suspend or cancel an Australian Financial Services Licence held by the convicted insider trading offender. See *Corporations Act 2001* (Cth), Section 920A, section 1043O, S206B, Section 920A, Section 920(B). So far, among the 18 convicted market intermediaries, two were banned: Colin Hebbard and Rene Rivkin.

⁷ *R v Hannes* [2002] NSWSC 1182 (*Hannes' case*); (*Hannes v DPP (Cth) (No 2)* [2006] NSWCCA 373); *R v Rivkin* [2003] NSWSC 447 (*Rivkin's case*); *R v Rivkin* [2004] NSWCCA 7 (*Rivkin's appeal*); *R v Doff* [2005] NSWSC 50 (*Doff's case*); *R v Doff* [2005] NSWCCA 119 (*Doff's appeal*); *R v Frawley* [2005] NSWSC 585 (*Frawley's case*); *R v Hall* [2005] NSWSC 890 (*Hall's case*); *R v McKay* [2007] NSWSC 275 (*McKay's case*); *R v Woodland* [2007] VCC 1736 (*Woodland's case*); *R v Panchal* [2009] QDC 105 (*Panchal's case*); *R v O'Reilly* [2010] VSC 138 (*O'Reilly's case*); *R v Stephenson* [2010] NSWSC 779 (*Stephenson's case*); *R v De Silva* [2011] NSWSC 243 (*De Silva's case*); *R v Dalzell* [2011] NSWSC 454 (*Dalzell's case*); *R v Bateson* [2011] NSWSC 643 (*Bateson's case*); *R v Hartman* [2010] NSWSC 1422 (*Hartman's case*); *Hartman v DPP (Cth)* [2011] NSWCCA 261 (*Hartman's appeal*); *R v O'Brien* [2011] NSWSC 1553 (*O'Brien's case*); *R v Rietbergen, R v Levi* (Unreported, District Court of New South Wales, Andrew J, 5 December 2012) (*Rietbergen & Levi's case*); *R v Zhu* [2013] NSWSC 127 (*Zhu's case*); *Western Australia v Hebbard* [2013] WASCSE 71 (*Hebbard's case*); *R v Lindskog* ([2013] VSC CR-12-02200) (*Lindskog's case*); *R v Tan* (District Court of New South Wales, 17 April 2013) (*Tan's case*); *DPP v Graham* [2014] VCC, Case No CD-13-00368, 22 May 2013 (*Graham's case*); *R v Glynatsis* [2012] NSWSC 1551 (*Glynatsis' case*); *R v Glynatsis* [2013] NSWCCA 131 (*Glynatsis' appeal*); *R v Gay* (Unreported, Supreme Court of Tasmania, Porter J, 23 August 2013) (*Gay's case*); *R v Khoo* (District Court of New South Wales, 12 July 2013) (*Khoo's case*); *Khoo v R* [2013] NSWCCA 323 (*Khoo's appeal*); *Commonwealth Director of Public Prosecutions v Hill and Kamay* [2015] VSC 86 (*Hill & Kamay's case*); *R v Joffe, R v Stromer* [2015] NSWSC 741 (*Joffe & Stromer's case*); *R v Farris* [2015] WASC 251 (*Farris' case*); *Kamay v The Queen* [2015] VSCA 296 (*Kamay's appeal*). Judgments of the following cases are not available to the public: Mr Ang; Mr Reddell; Mr Luong; Mr Turner; Mr Breen; Mr Jordinson; Mr Farris; Mr Sweetman.

custodial imprisonment. The other 26 individuals were sentenced with intensive correction orders, community service orders, good behaviour bonds or fines.

In terms of the jurisdiction in which these cases were heard, the majority (65%) were heard in New South Wales (NSW). The rest of the cases examined were heard in various states: six in Victoria, three in Queensland, three in Western Australia and one in Tasmania. The high conviction numbers in NSW can be attributed to the following two reasons: (1) traders in Sydney have ample insider trading opportunities; or (2) courts in NSW take a more aggressive approach to convicting insider trading offenders. Due to limitations of resources, the Commonwealth Director of Public Prosecutions can only prosecute appropriate cases when there are reasonable prospects of securing a conviction, and regulators probably have greater chances of securing criminal convictions against insider trading offenders in NSW.

Section 2 of this paper provides a broad understanding of various distributions of these cases. Features examined in this analysis include the distribution of these cases by the year of the first occurrence of alleged insider trading, the distribution of these cases by the year of their final judgment, the time gap between the occurrence of alleged insider trading and the delivery of its final judgment, types of insider trading offences, trading opportunities, and offenders' employment at the time of insider trading.

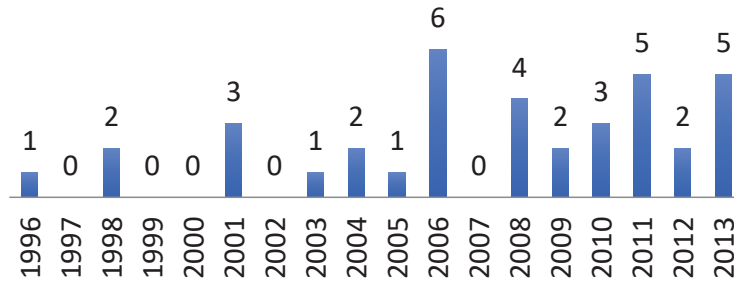
In Australia, the principle of consistency requires consistency in the application of the relevant legal principles. Hence, similar approaches should create similar outcomes. Section 3 examines the consistent application of sentencing factors and the determination of criminalities of different kinds of insider trading activities.

II DISTRIBUTIONS OF ALL CONVICTED INSIDER TRADING CASES IN AUSTRALIA FROM 2004 TO 2015

A *Distribution of Cases*

Figure A presents the distribution of all convicted insider trading cases by the year of the first occurrence of the alleged trading. If an offence took place over a period of time, this study takes the date when such offence first appeared. The graph shows that the majority of the alleged insider trading activities (73%) occurred after 2006, with the highest number (six) of convicted cases taking place in 2006. Out of 37 alleged insider trading activities, 10 trades happened before 2006, which is about one convicted insider trading activity per year between 1996 and 2005; two trades occurred in 2009 and 2012, three trades in 2010, and five in 2011 and 2013.

Figure A: Distribution of Insider Trading Cases Studied by Year of First Occurrence of Alleged Trading



The Global Financial Crisis (GFC) that began in 2006 in the United States and spread around the world, peaked in 2008. Australian's financial market was heavily affected by the crisis. For example, in *O'Brien's case*,⁸ the offender traded on insider trading information with the hope to boost his mother's superannuation fund, which was severely affected by the GFC. As the market deepened, there were more opportunities for insider trading as transactions became more sophisticated and more insiders had access to otherwise confidential information.

Moreover, the sharp increase in the number of cases convicted from 2006 onwards clearly indicates that ASIC began to take a more proactive stance on prosecuting insider traders around that time. Since 1 August 2010, ASIC has assumed responsibility for market supervision and real-time surveillance of trading from the Australian Securities Exchange. The market began to pick up in 2011, and a large number of deals were negotiated in that year, meaning that more insider trading opportunities were available around that time.⁹ Figure B shows the distribution of all convicted insider trading cases from 2004 to 2015 by year of their final judgment.

⁸ *O'Brien's case* [32].

⁹ Australian Securities and Investments Commission, *Annual Report 2010–11* (10 October 2011), 63.

Figure B: Distribution of all Convicted Insider Trading Cases by Year of Final Judgment

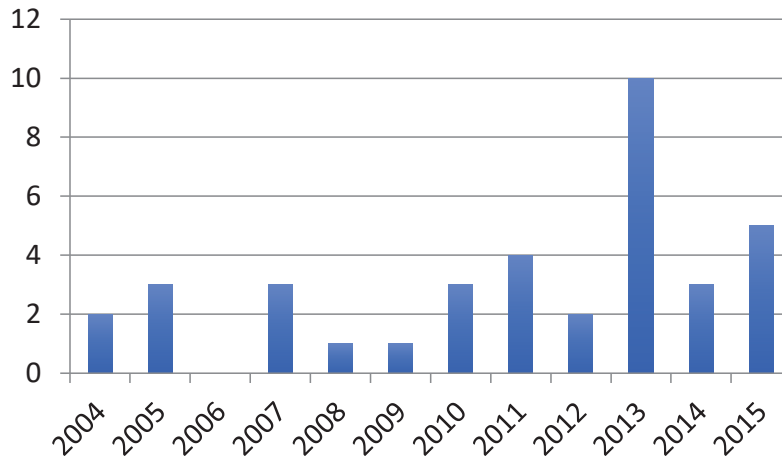


Figure B shows that regulators did not convict anybody of insider trading in 2006, but convicted ten individuals of insider trading in 2013 (the highest number of convictions in a single year). During the GFC, ASIC's primary focus was to stabilise the Australian market and protect investors. In a study of insider trading, Ramsay and Lei considered 79 insider trading cases spanning from 1973 to 25 August 2013.¹⁰ In that paper, they concluded that the number of insider trading cases had been increasing over time.¹¹ However, ASIC Commissioner Cathie Armour rejected the idea that rising numbers of guilty findings reflects increasing illegal activity; as she puts it, it is more a reflection of ASIC's focus on insider trading. Ms Armour went on to explain that 'increased guilty findings ... are ... due to the expertise and faster systems.'¹² The Commissioner stated that ASIC was confident that with the expertise it had developed and the right combination of staff, where appropriate, it could act on information within hours or days of suspicious trading, whereas previously it could have taken months.¹³ Figure C presents the time gap between dates of occurrence of alleged insider trading and dates of the delivery of their final judgments.

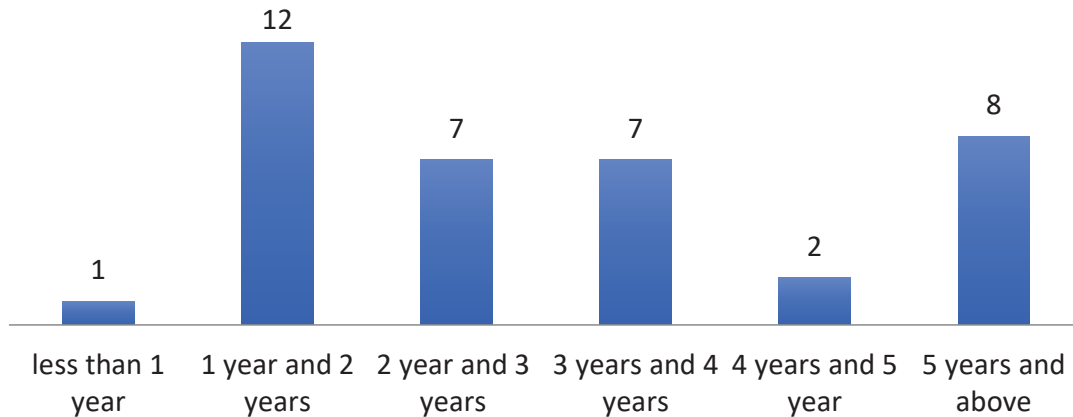
¹⁰ Victor Lei and Ian Ramsay, 'Insider Trading Enforcement in Australia' (2014) 8 *Law and Financial Markets Review* 214.

¹¹ *Ibid.*

¹² Matthew Raggatt, 'Facing Deep Cuts, ASIC Denies Insider Trading Boom', *The Canberra Times* (online) 17 May 2014 <<http://www.canberratimes.com.au/act-news/facing-deep-cuts-asic-denies-insider-trading-boom-20140516-zrfko#ixzz3kouhCT2x>>.

¹³ *Ibid.*

Figure C: Time Gap Between the Date of the Occurrences of Alleged Insider Trading and the Date of the Delivery of Final Judgment



Where the alleged conduct of insider trading took place over time, this study took the date of the first occurrence of such trading. In addition, where the exact date the alleged trading took place is not available, but the month is known, this study took the first day of that month. Figure C shows that twelve cases were finalised within two years, and only one case was concluded within one year after the occurrence of the insider trading. Besides, eight out of 37 cases (22%) took more than five years to finish, but only two cases were finalised in the four to five years range. The graph above clearly demonstrates that most cases took more than one year but less than four years to finalise.

The average time for the regulator to successfully conclude a criminal proceeding against an insider trading offender is about 1315 days, which is roughly three years and seven months. The successful prosecution of Simon Hannes is the longest trial to date, which took more than a decade to finalise (4270 days). Without *Hannes' case*, the average time for a successful prosecution of insider trading is 1199 days (three years and three months) over the 10-year examination period. Mr Hannes abused the appeal process to plead reduction of his penalties, resulting in two trials, two convictions and two appeals. The rejection of Mr Hannes' application for special leave to appeal to the High Court of Australia in 2008 indicated the end of this long-fought legal battle.¹⁴

ASIC claimed that, having assumed the power of market surveillance in 2010, it would be able to act swiftly on insider trading, and it has since improved its detection technology.¹⁵ For cases that occurred after 2011, data shows that, on average, ASIC took about two years and eight months to conclude a successful criminal proceeding. This reduction in time is a significant improvement on the

¹⁴ *Hannes v DPP (No. 2)* (2006) 205 FLR 217.

¹⁵ Australian Securities and Investments Commission, 'ASIC's Next Generation Market Surveillance System Commences' (Media Release, 25 November 2013) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-316mr-asics-next-generation-market-surveillance-system-commences/>>.

regulator's part compared to the total average time taken to prosecute cases over the time frame examined, which is three years and seven months. The natural complexity of carrying out criminal proceedings creates the long gap, including the difficulties in detecting insider trading offences and resolving appeals initiated by defendants or regulators. In general, courts have acknowledged the delay as reasonable due to the challenges involved in investigating insider trading.

B Details of Alleged Insider Trading

Australian insider trading laws prohibit anyone from trading on privileged information, procuring someone else to trade on privileged information, and communicating privileged information (tipping). Commonly, defendants were alleged to have contravened the insider trading laws once, while occasionally defendants faced claims of 20 or more contraventions. Figure D shows the distribution of alleged insider trading activities.

Figure D: Distribution of Alleged Insider Trading Activities

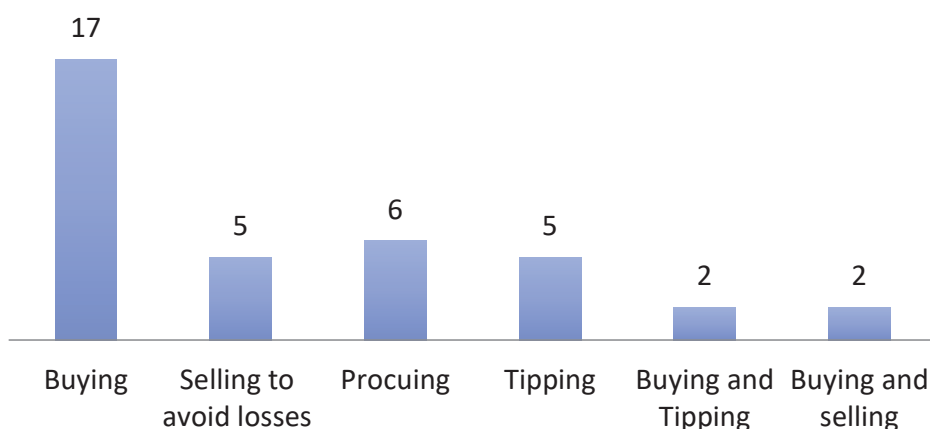


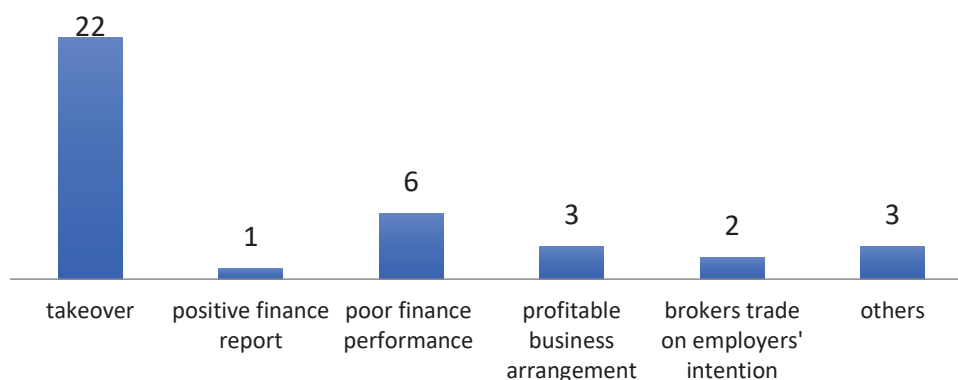
Figure D shows that 33 (89%) cases involved a single contravention, and four cases involved a mixture of two contraventions (buying and tipping, or buying and selling). In 22 cases (59%), trading (buying and selling) was the only activity subject to the insider trading claim. Among the other fifteen cases, six cases involved procuring others to trade on privileged information, five cases related to communication of privileged information (tipping), two cases involved both buying and tipping, and two cases involved buying and selling financial products. From Figure D, it can be concluded that the majority of convicted insider trading offenders were motivated to make profits from purchasing shares. Another explanation is that trading activities prior to announcements of takeover deals might be easier to identify and prosecute. Figure E shows the distribution of trading opportunities.

1 Trading Opportunities

Figure E indicates that 22 share-purchasing activities (almost 60%) were associated with takeover deals. From the remaining 15 cases, six involved selling shares due to corporations' poor financial performance, three were related to

profitable business arrangements, two involved employees trying to take advantage of their employers' trading intentions, one related to the release of positive finance reports, and three cases concerned other reasons, such as the announcement of a major sell-down of shares by a corporation's major shareholders and directors, and trading on highly confidential official documents. It is found that insider trading incidences commonly coincided with takeover activities; this observation is supported by the results presented in Figure E.

Figure E: Insider Trading Opportunities



To understand the positive correlation between insider trading and takeover deals, a brief explanation of the acquisition process in stock markets is a prerequisite. When a firm acquires another entity, the acquiring company typically pays a substantial premium to acquire control of the target company. This premium is treated as a small incentive to encourage shareholders of the target company to sell their shares to the acquiring company. Consequently, the target company's stock price goes up. Insiders tend to purchase shares of the target company before the announcement of the proposed takeover and speculate its share price to rise later.

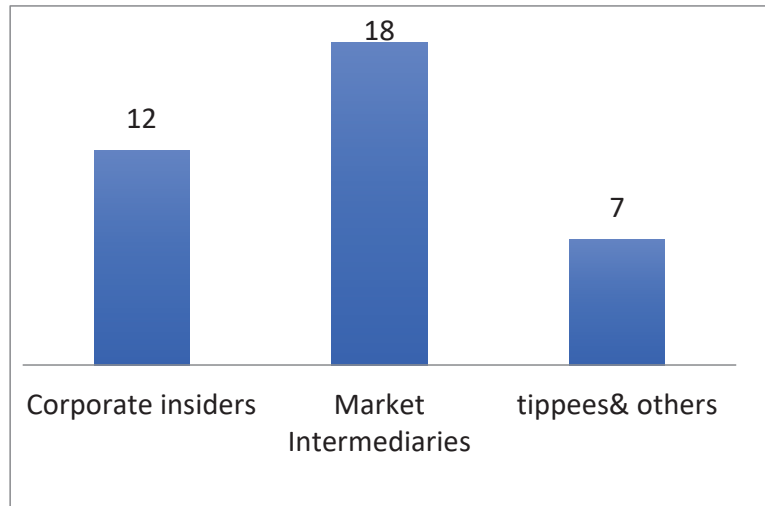
People involved in preparing takeovers, including senior corporate insiders and the employees of financial advisors, gain access to the acquisition information well before their formal announcements and this information is classified as privileged information. Exposure to this information alone may induce greedy insiders to misuse this information illegally to enrich themselves, increasing the chances that they will commit insider trading offences. The next section explores the employment of convicted insider trading offenders at the time of alleged insider trading.

2 *Likely Insider Trading Offenders*

All cases examined here involved individual offenders. This study groups offenders into three categories: corporate insiders, market intermediaries and others. 'Corporate insiders' include all employees and directors of any corporation; 'market intermediaries' involve those who are participating in financial transactions and have access to privileged information, such as research analysts and accountants; and 'others' include tippees, short-term technology

consultants, and any person who happened to know the privileged information. Tippees are generally friends and family members.

Figure F: Offender's Employment at the Time of Alleged Insider Trading



As shown in Figure F, 18 offenders (49%) were market intermediaries and 12 offenders were corporate insiders. The seven other offenders included an employee of the Australian Bureau of Statistics, a computer consultant, a real estate agent to whom was made known a piece of privileged information involuntarily during a business meeting, and several relatives and friends as tippees.

The corporate insiders are further divided into directors, middle management and junior employees. Surprisingly, there were no junior employees convicted for insider trading offences; this might partly be because of the difficulties involved in proving a junior employee has committed insider trading. Not only do junior employees have limited access to inside information, but also their trading values are usually small and hardly traceable in the securities market.

In the corporate insiders group, 11 out of 12 were company directors, and the most high-level executive convicted of insider trading in Australia was a chairman (Mr Gay). This result is not surprising, as directors receive and review insider information about their companies and other business partners from time to time as part of their responsibilities, thus creating more opportunities for them to take advantage of this knowledge to make profits or avoid losses from trading in stock markets. Additionally, compared to employees, directors stand to gain greater financial advantages in dealing with privileged information, which are likely to draw more attention from the regulator.

Only one medium-ranked manager was convicted. This was not because middle-ranked managers do not have a great deal of access to insider trading information, but rather because middle-ranked managers may be more concerned with the future of their career.

III CONSISTENCY EVALUATION: ASSESSING THE APPLICATION OF EACH SENTENCING FACTOR

After examining various features of insider trading cases, this section carries out a horizontal analysis of each sentencing factor by analysing the application of each factor across different kinds of sentencing options.¹⁶ In addition, it examines the validity of different claims and interpretations made by courts and prosecutors in relation to studied insider trading convictions, such as the claim that the criminality of tipping is higher than that of trading.

A *Horizontal Analysis of Sentencing Factors*

Insider trading offenders are to be sentenced in accordance with Part IB of the Crimes Act 1914 (Cth). Division 2 in Part IB of the Crimes Act 1914 (Cth) sets out general sentencing principles when passing sentence in relation to federal offences, particularly in section 16 (A). The sentencing factors examined in this section is a combination of the list provided in s16(A)(2) and Overland's work.¹⁷

1 *Profit Made Versus Money Invested*

It is consistent that the amount of profit made and the amount of money invested involved in each offence plays a role in assessing the objective criminality of the offence. However, it is worth noting that 'these particular values are simply two among many considerations relevant to determining the seriousness of the offending.'¹⁸ Some cases considered the profit derived as the appropriate determinant of the objective criminality of the offending,¹⁹ but other cases held that the amount of money invested provides a better indicator of the objective criminality of the offending.²⁰ Generally speaking, when these two factors are significantly different, courts have taken the view that the higher amount is a more accurate indicator of an offender's criminality. When these two figures are similar, courts tend to take both values into account and do not comment on which factor is more accurate in estimating an offender's criminality.²¹

When the amount of money invested is higher than the profit derived, prosecutors have argued and courts have accepted that the amount of money invested is a product of design,²² that 'the damage to the integrity of the market occurs when

¹⁶ Non-custodial sanctions, suspended sentences, Periodic Detention Orders and Intensive Correction Orders, imprisonment, and civil proceedings

¹⁷ Juliette Overland, 'Towards Better Deterrence of Securities Fraud: Promoting Consistency in Sentencing Insider Traders' (2008) 5 *Macquarie Journal of Business Law* 191.

¹⁸ *Kamay's appeal* 296 [28].

¹⁹ *Stephenson's case; de Silva's case; Hartman's case; Hill & Kamay's case.*

²⁰ *Doff's case; Lindskog's case; Dalzell's case; Glynatsis' case; Zhu's case.*

²¹ *Woodland's case; Joffe & Stromer's case.*

²² *Glynatsis' appeal* [51]–[53].

the investment is made',²³ and also that the criminality of an insider trading offender could not be considered as trivia if he/she ventured but lost.²⁴

The profits generated become the more appropriate indicator of criminality in two scenarios: (i) when an offender sells shares to avoid losses; and (ii) when an offender trades in the derivatives market. An example of the first scenario is *Stephenson's case*. Since the offender did not invest any money in his attempted insider trading, the amount of losses avoided became the more suitable indicator of Mr Stephenson's criminality. In the second scenario, some offenders traded in derivatives markets, and some traded in the open stock market. For offenders who traded in the open stock market, the amount of money invested can be considered an accurate indicator of their criminality, as it is a product of design. However, for offenders who trade in the derivatives market, due to the nature of these financial products, the amount of profit made provides a relatively accurate view of the size of their trading.²⁵ Mr Kamay traded in the margin FX trading market, which is a high-leveraged market. In other words, Mr Kamay was able to make a large profit on a very small investment.²⁶

Despite this discrepancy in the criteria used to determine criminality, the ultimate question courts were trying to answer is which factor reflects the real value of the offending. It is arguable that the nature of the financial product traded should determine which factor reflects the true value of the offending.

When a monetary value is involved in assessing criminality, there is a risk that some offenders may be unfairly disadvantaged by their relatively privileged financial position. For instance, to compare the amounts of money invested and profited in Mr Doff's and Mr Rivkin's cases, Mr Doff invested \$55,855 in acquiring 20,000 Qantas shares, while Mr Rivkin spent \$139,000 on 50,000 Qantas shares. Clearly, Mr Rivkin ventured two and a half times the amount Mr Doff did. However, these nominal numerical measurements can hardly quantify one's criminality. The amount of money an offender can afford and is willing to spend (or has at their disposal) depends on each offender's financial position at the time of trading. Mr Doff may have invested 5% of his total assets in acquiring the 20,000 Qantas shares, while the \$139,000 spent by Mr Rivkin may have represented less than 1% of his total assets. Offenders' financial states vary. It is very difficult to propose that one offender is less criminally culpable than another because he or she has ventured less money. Moreover, in *Rietbergen and Levi's case*, it was considered a relevant sentencing factor that Mr Levi did not spend all his money on insider trading. Mr Levi only purchased enough shares to cover his previous capital losses.

This paper takes the view that a relatively modest monetary worth of shares traded does not equate to lower criminality. Further from this idea, when assessing insider trading offenders' criminality, the amount of money involved in each case

²³ *Ibid.*

²⁴ *Doff's case* [31].

²⁵ Front-running: *Hartman's case*, *de Silva's case*; *Hill & Kamay's case*.

²⁶ *Kamay's appeal* [33], [35].

should be given only limited weight. An offender's trading behaviour is a more appropriate indicator of his/her criminality.

2 Source and Quality of Information

The sources of the relevant inside information were considered in all cases; these sources also affected the quality of that information. If the information is reliable, offenders can trade with confidence and certainty. Further, it was considered an aggravating factor where an offender had actively sought out the information. If the information was involuntarily communicated to an offender, it was regarded as a mitigating factor.

In terms of quality, information about takeovers is of the highest degree because it can have immediate effects on the relevant companies' share prices. Moreover, the quality of information about imminent takeovers is higher than that about possible takeovers.²⁷ This does not mean that other information is of low quality. For example, information only available to the Board was held to be of high quality,²⁸ a letter received from an auditor concerning the company's ability to remain solvent was held to be of high quality,²⁹ and unpublished official data was held to be of high quality.³⁰ Moreover, if an offender did not have full access to the information,³¹ or if the information was known by a couple of people, then the quality of that information decreases.³²

3 Course of Conduct

If an offender has committed several acts of insider trading over a period of time, it is considered an aggravating factor. In other words, the offence is less serious if an offender has committed only one act of insider trading.³³ Roll-up charges involve more than one incidence of criminal conduct, and hence the criminality involved in this kind of charge is greater than that for a charge with only a single episode of criminal conduct.³⁴ Another aggravating factor is active concealment. If an offender planned elaborate structures to conceal their trades, the criminality of his/her offence increases.

4 Breach of Trust

If the inside information was acquired in a professional setting, it generally involves a breach of trust, which is an aggravating factor. The importance of the principles of confidentiality and trust was stated in *Hartman's case* as follows:

²⁷ *Joffe & Stromer's case* [101].

²⁸ *Gay's case; Vizard's case*.

²⁹ *Hall's case*.

³⁰ *Hill & Kamay's case*.

³¹ *Dalzell's case*.

³² *O'Brien's case*.

³³ *Doff's case; Stephenson's case; Tan's case; Hebbard's case; Graham's case; Reddell's case; Ang's case; Gay's case; Luong's case; Turner's case; Breen's case*.

³⁴ *Hill & Kamay's case* [37]; *Woodland's case*.

The principles of confidentiality and trust are fundamental to the operation of many commercial transactions. As the applicant's employer recognised, advance knowledge by its employees of proposed trades of a significant kind required, as a matter of trust, that they remain in the realm of confidentiality.³⁵

People who receive inside information are expected to conform to 'exactingly standards of honesty'.³⁶ Hence, the criminality of an offence increases when the offender's action demonstrates a significant departure from professional standards.³⁷

5 *Definition of 'True Insider'*

A subset of this group of offenders who are deemed to have breached the trust associated with their profession is known as 'true insiders'. However, courts have not been clear about the definition of 'true insider'. Some courts treated the term to mean only people who were entrusted with the inside information,³⁸ while other courts treated it to include everybody who was in a position of trust.³⁹ The latter is generally known as corporate insiders or corporate employees. The confusion is partly caused by the name of the provision, 'the insider trading prohibition', which prevents anyone (not only corporate insiders) from trading on privileged information. The reason why true insiders can cause greater damage to the market is because they have greater access to inside information.⁴⁰ Therefore, the author suggests the adoption of the definition that only those people who are entrusted with the inside information are true insiders. This clarification helps to distinguish insiders who are entrusted with the inside information from insiders who accidentally overhear the inside information.

Also, the level of involvement of different types of true insiders and the seniority of an employee are both relevant considerations. For example, a corporate director has access to the full range of information about the operation of a company, and his/her misconduct represents a more serious breach of trust.⁴¹

6 *The Offender's Relationship with the Securities Industry*

Offenders who had existing relationships with the securities industry were held more culpable than others because they deliberately acted against the law. This consideration is to ensure that professionals in the financial industry are punished proportionately.⁴² For example, Mr Rivkin deliberately acted on the inside information, which represented a 'significant departure from proper standards', even though his trading did not involve a breach of trust and the inside

³⁵ *Hartman's appeal*.

³⁶ *Rivkin's case*.

³⁷ *Stephenson's case* [44].

³⁸ *Hannes' case; de Silva's case*.

³⁹ *Glynatsis' appeal*.

⁴⁰ *Rietbergen & Levi's case*, 29–30.

⁴¹ *Dalzell's case; O'Brien's case; Zhu's case*.

⁴² *Rivkin's case*.

information was acquired in a private setting.⁴³ This element partly overlaps with the ‘breach of confidence’ factor and ‘knowledge of the insider trading prohibition’: the ‘breach of confidence’ factor concerns corporate insiders and true insiders; the ‘relationship with the securities industry’ factor concerns professionals in the financial service industry; and the ‘knowledge of the insider trading prohibition’ factor concerns all offenders.

7 *Background and Circumstances of the Offender*

The law requires the court to consider the personal circumstances of the offender. Courts have considered the age, antecedents, family relationships, health and mental conditions of the offender, as well as the health of the offender’s family members and other circumstances. As the strength of the punishment increases, the offender’s personal circumstances are examined in more detail.

(i) *Age*

Age was considered in various cases. For offenders around 60 years old, courts held that sentencing them to full-time imprisonment would make the situation more severe for them.⁴⁴ However, for offenders in their twenties, youth was not given any weight in terms of the determination of the seriousness of the crime and general deterrence.⁴⁵ Courts held that youth does not equate to immaturity;⁴⁶ rather, it was held that the younger offenders were well-educated and ‘operating in the adult sphere of business and commerce in every respect’.⁴⁷ Moreover, it is crucial for courts to consider the need for general deterrence of other young adults.⁴⁸

(ii) *Financial Circumstances*

Different kinds of financial difficulties were considered in various cases, including personal financial stress, family financial crisis and illness-related financial difficulties. Some were considered as influential and mitigating factors,⁴⁹ and others were not.⁵⁰ For example, Glynatsis committed insider trading amid his father’s financial crisis. Reference was made to the offender’s cultural background in that he felt the pressure to help his father through financial difficulties. There are no clear cut guidelines as to what kinds of financial circumstances qualify as a mitigating factor.

⁴³ *Ibid.*

⁴⁴ *O’Reilly’s case; Hall’s case*; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) [6.89].

⁴⁵ *Hartman’s case; Zhu’s case; Kamay’s appeal.*

⁴⁶ Zhu was considered young but mature.

⁴⁷ *Kamay’s appeal; Hartman’s case.*

⁴⁸ *Ibid.*

⁴⁹ *Glynatsis’ case; Lindskog’s case; O’Reilly’s case.*

⁵⁰ *De Silva’s case.*

(iii) *Mental Illness*

In many cases, offenders' mental health issues were considered.⁵¹ A custodial sentence may be more onerous for an offender who is suffering from mental illness. In *Hartman's appeal case*, the New South Wales Court of Criminal Appeal (NSWCCA) considered the offender's mental illness in detail. The court referred to the observations made by McClellan CJ at CL in *Director of Public Prosecutions (Cth) v De La Rosa* regarding principles developed and applied in cases where an offender has a mental illness, intellectual handicap or other mental problems.⁵² Among the five principles summarised by McClellan CJ at CL, two aspects were found to be relevant in *Hartman's case*:

Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently, the need to denounce the crime may be reduced with a reduction in the sentence. [Authorities omitted.]

It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed. [Authorities omitted.]

Although motivated by self-enrichment, Mr Hartman was found to be partly motivated by his gambling addiction. NSWCCA acknowledged that the offender was suffering from long-term depression throughout the period in which he conducted insider trading. Additionally, it was held that the offender sought relief from his depression in gambling and trading activity, which 'was in fundamental respects a form of highly leveraged gambling akin to the other types of gambling in which he had engaged'.⁵³ Therefore, the offender was not an ideal representative for general deterrence. Similar conclusions were drawn in *Joffe's case* and *Woodland's case*.

Moreover, the difficulties involved in obtaining adequate psychiatric treatment for inmates were detailed in *Hartman's appeal case*.⁵⁴ For Mr Rivkin, it was submitted that a full-time custodial sentence would be life threatening. Sadly, the offender still committed suicide shortly after he was released from periodic detention. In fact, he attempted suicide several times while in custody and spent most of his sentences in prison hospital.⁵⁵

Mental illness cannot be used as an excuse to escape imprisonment. Only when there is a causal link between an offender's mental condition and his/her trading do that offender's mental issues become relevant. Subsequently, the need for

⁵¹ *Woodland's case*; *Mr Joffe*; *Rivkin's case*; *Hartman's case*; *de Silva's case*; *Zhu's case*.

⁵² *Hartman's appeal* [81]; *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194.

⁵³ *Hartman's appeal* [91].

⁵⁴ *Hartman's appeal*.

⁵⁵ Kate McClymont and Jordon Baker, 'Stockbroker Rene Rivkin Found Dead', *The Age* (online) 2 May 2005 <<http://www.theage.com.au/news/National/Stockbroker-Rene-Rivkin-found-dead/2005/05/01/1114886254817.html>>.

general deterrence is moderated, since that offender is an inappropriate vehicle for general deterrence.

(iv) *HIV and Resulting Mental Health Issues*

In *de Silva's case*, the offender was tested as HIV positive. Prior to his sentencing, Mr de Silva served six months in jail for having breached his restraining order.⁵⁶ The offender described his experience of prison as 'frightening',⁵⁷ 'stressful',⁵⁸ and 'he was constantly concerned that he would be target[ed] because of his sexuality and his HIV status'.⁵⁹ Buddin J referred to observations made in *R v Penalosa-Manoz* in which NSWCCA held that an offender with HIV 'is likely to be subjected to harassment from other prisoners'.⁶⁰ Moreover, 'imprisonment creates considerable stress for inmates',⁶¹ which can 'significantly comprise the body's immune system and its capacity to resist the spread of the illnesses'.⁶² In that case, NSWCCA recognised that imprisonment for a person who has HIV will be more onerous than would otherwise be the case.⁶³ It was recognised by Buddin J that the fear of being mistreated by other inmates causes anxiety.⁶⁴

Besides HIV, Mr de Silva suffered from severe depression to the point of hospitalisation, as well as anxiety and sleep disturbances.⁶⁵ The offender's statement about his experience in jail indicated that, after becoming aware of his illness in 2005, his psychological distress became most prevalent. It was reported that he did not know how to cope with his HIV diagnosis, and he realised he could not pay for medical treatment. In addition, the offender feared that his HIV status might affect his ability to become an Australian permanent resident. Mr de Silva came to Australia in September 2004, and was diagnosed in September 2005 with HIV.⁶⁶ In January 2006, Dr Sternhill at St Vincent's Hospital diagnosed him as 'suffering from a prolonged Adjustment Disorder with anxious and depressed mood'.⁶⁷ The offender also had both narcissistic and obsessional personality traits, and the doctor observed that the offender's panic symptoms related to the HIV diagnosis.⁶⁸ A report detailed the management process for inmates who have HIV,⁶⁹ which is a relatively involved and costly process. Further, evidence showed that other inmates had harassed Mr de Silva during his earlier sentence and 'nurses did not appreciate his condition where he was sent.'⁷⁰ The offender was to be deported immediately upon release. Nevertheless, the Supreme Court

⁵⁶ *De Silva's case*.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid* [69].

⁶⁵ *Ibid* [42].

⁶⁶ *Ibid* [34].

⁶⁷ *Ibid.*

⁶⁸ *Ibid* [35].

⁶⁹ *Ibid* [44].

⁷⁰ *Ibid* [43], [70].

of New South Wales (NSWSC) held that Mr de Silva was motivated to enrich himself, which took precedence over his personal circumstances.

(v) *Physical Health*

Similarly, offenders' physical health issues were considered in various cases. Mostly, physical health issues were not considered as a mitigating factor, even in the case of Mr de Silva, who, as described above, was HIV positive.

(vi) *Serving Sentence in a Foreign Country*

Three cases involved issues of residency: *O'Reilly's case*, *Lindskog's case*, and *de Silva's case*. Mr Lindskog, originally from Sweden, was married with a child in Australia. Hence, this consideration did not concern him. In *O'Reilly's case* and *de Silva's case*, both offenders' family members lived outside Australia. The offenders were to be jailed in Australia, living amidst a foreign culture and isolated from any outside contact.⁷¹ This issue was considered in both cases, but with different outcomes. In *O'Reilly's case*, the Supreme Court of Victoria (VSC) held that a term of actual imprisonment in Australia would be more burdensome since the offender could not receive any emotional support from his family.⁷² In *de Silva's case*, Buddin J considered the fact that the offender 'will be serving his sentence in a foreign country away from the support of his family'.⁷³ However, the sentencing judge subsequently referred to the observations made in *R v Ferrer-Esis*. When offenders deliberately come to Australia to commit a serious crime, '[they are] obliged to remain incarcerated in this country'.⁷⁴ The author believes that this finding does not apply to *de Silva's case*. Mr de Silva did not deliberately come to Australia to commit insider trading. Given Mr de Silva's health condition, incarceration in a foreign country without any outside contact would certainly be distressing.

(vii) *Education*

Offenders' education levels are not taken as relevant factors in sentencing insider trading offences. However, offenders' initiative to attend training programs while in custody is regarded as an indication that they are making progress in prison. In Hartman's appeal case, the kinds of activities Mr Hartman participated in while in custody were listed in detail. Mr Hartman, among other activities, completed a TAFE real estate course and joined a prison-based addiction program. Mr Hartman's good behaviours provide first-hand evidence regarding how insider trading offenders are likely to behave while in jail.

⁷¹ *R v Ferrer-Esis* (1991) 55 A Crim R 231, 239.

⁷² *O'Reilly's case*.

⁷³ *De Silva's case*.

⁷⁴ *R v Ferrer-Esis* (1991) 55 A Crim R 231, 239.

8 *Previous Good Character of an Offender*

The majority of insider trading offenders demonstrated prior good character. A couple of offenders had old charges against them, which were mostly considered irrelevant.⁷⁵ Unlike in traditional criminal cases, an offender's good character is given only limited weight in insider trading cases. Courts have consistently held that it should not be given significant weight as a mitigating factor because it is offenders' previous good character that enabled them to occupy a position of trust.⁷⁶

For most convicted offenders, their offences were characterised as 'a moment of madness in an otherwise exemplary life', 'out of character behaviour', and 'only a blemish'. However, as noted, it is an offender's prior good character that has placed them in positions of trust that enable them to carry out insider trading. If their offences breach that trust, their prior good character should not be given any considerable weight. Sometimes, their good character can be an aggravating factor 'where victims have been led to trust the offender because of his or her good character or reputation'.⁷⁷ However, a problem arises when an offence did not involve a breach of trust of a position that the offender had attained through his/her good character. This is the case for most tippees.⁷⁸

In *Vizard's case*, the Federal Court referred to findings made in *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2—Distribution Transformers)*:

Corporate crimes are usually committed to accumulate wealth and power and are almost always the result of deliberate and calculated conduct ... [F]or this kind of offence, it is the nature of the offence rather than the character of the offender that should be the principal consideration for the punishment to be imposed.⁷⁹

Even though insider trading offenders have usually obtained their positions due to good character, this does not mean that good character is less important in the white-collar criminal sentencing process. Prior good character means that they were law-abiding citizens who paid their taxes and made their contributions to the society; not to mention most insider trading offenders demonstrated charitable personalities. Had they committed traditional crimes in the same subjective circumstances, it is certain that their prior good character would have been given sufficient weight. Why should insider trading be different? Nevertheless, an offender's breach of trust has already been considered an aggravating factor in previous considerations.

⁷⁵ *O'Brien's case*; Mr Levi in *Rietbergen & Levi's case*; *Bateson's case*; *Hall's case*. Kirby J considered Mr Hall's previous charge that he was found to have acted dishonestly in the exercise of his powers in a previous civil proceeding brought by ASIC.

⁷⁶ *Kamay's appeal*.

⁷⁷ Australian Law Reform Commission, *Same Crime, Same Time*, above n 45 [6.90].

⁷⁸ Tippees: Mr Tan, Mr Luong, Mr Levi, Mr Stromer, Mr Hill.

⁷⁹ *Vizard's case* [37] cited *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2—Distribution Transformers)* (2002) ATPR 41–872.

Another aspect of insider trading offenders' good character is their discipline. Most, if not all, achieved highly in school, both academically and in sport, demonstrating their discipline and persistence. Hartman's behaviours in jail demonstrates that insider trading offenders do not need to be rehabilitated in jail.

The author believes that all offenders should be entitled to the benefit of their previous good character. Concerns were expressed in *Vizard's case* that if all such factors were to be taken into account, the sentence imposed might be too lenient. This concern links to extra-curial punishments; if collateral punishments are recognised, there is no such thing as a too-lenient sentence for convicted white-collar criminals.

9 Motivations of the Offender

Three types of motivations for committing insider trading were considered: maximising personal wealth,⁸⁰ protecting family interests,⁸¹ and acting in the interests of a third party.⁸² When an offender acted on inside information to maximise his/her wealth, this was considered the most serious motivation. If an offender was convicted on the 'ought to have known' basis for trading on the inside information, his/her offending was considered less serious than that of a deliberate offending.⁸³ However, in *Khoo's case*, the fact that Mr Khoo was sentenced on the basis that he should have known that his friends would act on the inside information was not regarded as a mitigating factor.

When an offender acted to protect the interests of a family member, courts held differently in various scenarios. While two cases held that it was in the offenders' favour that they acted in the interests of their family members,⁸⁴ the other two cases found that the offenders' positions were similar to self-enrichment.⁸⁵ In *Glynatsis's case*, NSWCCA held that the commission of offences for the benefit of others 'can indicate a less serious level of criminality',⁸⁶ and accepted the lower court's finding that '[t]he distinction between an offence committed for motives of personal greed and committed for the benefit of some other person is real.'⁸⁷ In *Hall's case*, Kirby J concluded that the offender put his own interests and the interests of his family ahead of market integrity.⁸⁸ Hoeben CJ at CL in *Glynatsis's case* pointed out the difference among these cases and stated that, in *Hall's case* and *Mackay's case*, beneficiaries indirectly benefited from the offender's actions.⁸⁹

⁸⁰ Hartman acted in maximising his personal wealth, but his crime was held as partly motivated by his gambling addiction.

⁸¹ *O'Brien's case; McKay's case; Hall's case; Glynatsis's case.*

⁸² *Graham's case; Ms Rietbergen in Rietbergen & Levi's case; Khoo's case.*

⁸³ *Hebbard's case; Gay's case.*

⁸⁴ *O'Brien's case; Glynatsis's appeal.*

⁸⁵ *Hall's case; McKay's case.*

⁸⁶ *Glynatsis's appeal* [48]; *Dalzell's case; O'Brien's case; Lindskog's case.*

⁸⁷ *Glynatsis's appeal* [48].

⁸⁸ *Hall's case.*

⁸⁹ *Glynatsis's appeal* [47].

For tippers and others who acted in the interest of a third party, courts held differently in different cases. For an offender who acted in the interests of his clients,⁹⁰ it was held as a mitigating factor because he was not motivated by self-enrichment. However, it is not necessary for the prosecutor to establish that tippers received any financial gain from communicating the inside information.⁹¹ In *Khoo's case*, NSWCCA clarified that 'that is not to say that the commission of offences for the benefit of others is a mitigating factor,'⁹² despite the fact that NSWCCA previously found in *Glynatsis's case* that 'trading on behalf of the offender's relatives in an attempt to restore his family's fortunes was a factor operating in his favour'.⁹³ For Ms Rietbergen, the fact that the offender did not seek any financial gain for herself was held in favour of the offender.

Among the three types of motivations, self-enrichment is considered the most culpable motivation. In addition, the commission of offences for the benefit of others is not always a mitigating factor.

10 *Hardship of Sanctions*

When sentencing a person to jail, courts are obliged to consider whether a term of imprisonment would impose exceptional hardship on a third party. To qualify for this criterion, offenders need to show that the hardship to the third party is extreme and goes beyond the hardship commonly suffered by the spouse or children of a person sent to jail. None of the cases examined in this study qualified for this element.

The sentencing judge in *Hall's case* examined the requirement established regarding 'the sort of hardship that must be present before it can have an impact upon the sentence imposed'.⁹⁴ Only exceptional cases can qualify for this consideration.⁹⁵ That a family is deprived of the 'breadwinner' does not constitute a sufficiently extreme situation.⁹⁶

11 *The Offender's Knowledge of the Law*

Courts also examined the offender's knowledge of the law. The majority of convicted offenders were aware of the insider trading prohibition. When offenders acted on the information knowing their trading was wrong, courts held that their awareness of the law was an aggravating factor. Given insider trading offenders' average education and work background, courts are unlikely to be persuaded that offenders were not aware of the insider trading provisions. Even when an offender is found to be unaware of insider trading laws, that offender

⁹⁰ *Graham's case*.

⁹¹ *Khoo's case* 33–34; *Salman v United States* (Supreme Court of the United States, No 15-628, 6 December 2016); *Rietbergen & Levi's case*.

⁹² *Khoo's appeal*.

⁹³ *Khoo's appeal* [78], [92].

⁹⁴ *Hall's case* [114].

⁹⁵ *R v Hinton* (2002) 134 A Crim R 286 [31].

⁹⁶ *R v Maslen & Shaw* (1995) 79 A Crim R 199, [20].

most likely has breached his/her company policy by trading on or communicating that information.⁹⁷ For the few offenders who argued that they did not appreciate that insider trading was a criminal offence,⁹⁸ the courts rejected their arguments and held that it had no impact on the seriousness of their offending. In *Zhu's case*, the offender argued, and the court rejected, that 'Chinese culture' influenced his actions. Mr Zhu claimed that, in Chinese culture, he would be deemed a fool if he did not act on the inside information to enrich himself.

12 *The Influence of Poisonous Work Culture*

The influence of poisonous work culture was touched upon in two cases: *Zhu's case* and *Hartman's case*. However, this factor was not considered as a mitigating factor in either case. In relation to the offender's employment environment in Hanlong Mining, the sentencing judge in *Zhu's case* referred to the point made by Simpson J in *R v Agius; R v Zerafa* that a morally unhealthy work environment is relevant to the assessment of the offender's culpability, but the extent of the effect differs in each case.⁹⁹ In *Hartman's case*, NSWCCA commented on the lower court judge's criticism of the practices and values of the finance industry:

His Honour was critical of that segment of the business world that allowed a person of the applicant's youth and immaturity to be beguiled by the enormous salaries and rewards that were given to him for what was, as his Honour described it, a 'responsible clerical position'. His Honour adopted Dr Hartman's description of the world in which his son was employed as 'plastic'. ... While the applicant was still at university, [this world] corrupted his values and resulted in him pursuing 'the high life' without regard for whether or not he was committing criminal offences. His Honour was also critical of the lack of effective supervision provided to the applicant. He said [authority omitted]:

The temptations are so great and the potential rewards so significant that the fall into criminality of individuals is a significant risk.¹⁰⁰

Mr Hartman, at the age of 20, began working as an equities dealer at Orion Asset Management Limited, and was paid a total of \$350,000 in salary and bonuses in his last year in employment.¹⁰¹ The enormous compensation was paid for carrying out clerical works.¹⁰² The sentencing judge further criticised the culture in the financial industry:

Overseas holidays and gambling trips to Las Vegas and other casinos, together with an expensive luxury motor vehicle, became part of his life ... Paying \$350,000 to a recent graduate in his early twenties carrying out a task of modest responsibility underlines the extent to which the values [that] underpin our society can be compromised. The values of productive endeavour and

⁹⁷ *Zhu's case*.

⁹⁸ *Stephenson's case; Dalzell's case; Bateson's case; Khoo's case; Zhu's case*.

⁹⁹ *R v Agius; R v Zerafa* [2012] NSWSC 978.

¹⁰⁰ *Hartman's case* [53].

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

integrity in dealings and business can easily be lost. This is what happened in the case of the offender.¹⁰³

13 *Guilty Plea and Offenders' Co-operation*

Except for three offenders,¹⁰⁴ all other offenders pleaded guilty. While courts encourage guilty pleas, offenders are treated equally before the criminal law regardless of whether or not they plead guilty. A guilty plea can be given a 15% to 25% discount in the sentence imposed, depending on the quality of that plea. The importance of a guilty plea is multi-fold: (i) insider trading cases are difficult to prosecute; (ii) an early guilty plea frees ASIC's time and resources from a lengthy investigation; (iii) a guilty plea saves the community the time and costs of a trial. Hence, a plea of guilty demonstrates an offender's willingness to facilitate the course of justice. In some cases, a further 10% discount was added when an offender pleaded guilty to an offence that was otherwise unlikely to have been discovered.¹⁰⁵

14 *Expression of Remorse*

According to the definition of contrition stated in *the Australian Law Reform Commission's Report on Sentencing of Federal Offenders*,¹⁰⁶ offenders can demonstrate contrition in various ways, such as a guilty plea, reparation of damages and co-operation with the authorities.¹⁰⁷ In all but one case, remorse flowed from a guilty plea. The timing of the guilty plea is relevant to the assessment of remorse: a late plea can mean little or no contrition on the offender's part.¹⁰⁸ Kirby J emphasised the interdependency relationship between remorse and acceptance of responsibility: there cannot be any real finding of remorse without an acceptance of responsibility. However, in *Graham's case*, despite the fact that the offender entered a guilty plea at the earliest practicable opportunity, the County Court of Victoria held that there was no evidence of remorse. Another way to demonstrate contrition is through some practical act:¹⁰⁹ NSWCCA held that participation in long-term charity work is a practical way to show remorse.¹¹⁰

15 *Pecuniary Penalty Orders or Fines*

Courts can impose a fine or a pecuniary penalty (based on the benefits gained from the insider trading) on offenders. For tippers who did not receive any financial benefits from tippees' trading, courts did not impose any form of monetary penalty.¹¹¹ Otherwise, courts are likely to impose some form of

¹⁰³ *Hartman's case* [50].

¹⁰⁴ *Doff's case; Rivkin's case; Hannes' case*.

¹⁰⁵ *Hartman's case; Khoo's case*.

¹⁰⁶ Australian Law Reform Commission, *Same Crime, Same Time*, above n 45.

¹⁰⁷ *Ibid* [6.50].

¹⁰⁸ *Woodland's case; Frawley's case; Hall's case*.

¹⁰⁹ Australian Law Reform Commission, *Same Crime, Same Time*, above n 45, [6.46].

¹¹⁰ *Hartman's case*.

¹¹¹ *Ms Rietbergen in Rietbergen & Levi's case; Joffe's case; Khoo's case*.

monetary fine, or the forfeiture of profits, except where offenders' financial positions do not allow for the imposition of fines.¹¹²

16 *Delay in the Prosecution*

Delay in the prosecution of insider trading offenders is common and reasonable, and was considered in various cases.¹¹³ A wide variety of reasons can trigger delay, such as appeal¹¹⁴ and companion actions for civil penalties.¹¹⁵ Although the delay between the commission of the offence and the laying of charges can cause severe stress, courts generally extend a limited degree of leniency to offenders because the delay in prosecuting insider trading offenders has been regarded as reasonable. In some cases, greater consideration was given to the delay, especially when such delay had caused psychological impacts on offenders who were suffering from mental illness. In that case, the delay was considered as a form of punishment.¹¹⁶

17 *Extra-curial Punishment*

'Extra-curial' means beyond court.¹¹⁷ Extra-curial punishments mean punishments that are not imposed by the sentencing court.¹¹⁸ This type of punishment can take place in various forms, such as adverse publicity, loss of professional license, adverse effects on personal and family lives, damage to offender's reputation and professional standings, physical health issues and mental stress.¹¹⁹ Moreover, it is not uncommon that convicted insider trading offenders tend to withdraw from social circles.¹²⁰ While in some cases, offenders were held to have already been punished for their offending through extra-curial punishments,¹²¹ in most cases the public humiliation experienced by offenders was considered as a 'by-product' of their offending that could never substitute for formal condemnation by society through its courts.¹²² In other words, the adverse publicity suffered by insider trading offenders does not constitute 'exceptional circumstances'.¹²³

The author observes that, as the criminality of offending increases, the weight given to extra-curial punishment decreases. If the extra-curial punishment is recognised, the sentence passed tends to be on the lighter side of the sanction scale. For most offenders sentenced with non-custodial alternatives, extra-curial

¹¹² *Dalzell's case*.

¹¹³ See the analysis of Figure 3.

¹¹⁴ *Hannes' case*.

¹¹⁵ *Hall's case*.

¹¹⁶ *Joffe & Stromer's case*.

¹¹⁷ The Law Dictionary <<http://www.thelawdictionary.org/>>.

¹¹⁸ *Einfeld v R* (2010) 266 ALR 598 [86].

¹¹⁹ See, Sandeep Gopalan, *Skilling's Martyrdom: The Case for Criminalization without Incarceration*, 44 *University of San Francisco Law Review* 459 (2010).

¹²⁰ *Graham's case*; *Joffe's case*.

¹²¹ *O'Brien's case*; *Graham's case*

¹²² *O'Reilly's case*; *Rietbergen & Levi's case*.

¹²³ *Einfeld v R* (2010) 266 ALR 598 [98]–[99].

punishments suffered by them were recognised as a form of punishment. However, for offenders who were sentenced with custodial sanctions, collateral consequences suffered by them were seen as unexceptional and a by-product of their offending.¹²⁴

Basten JA examined the meaning of extra-curial punishment and its application in *Einfeld v R*.¹²⁵ According to the analysis by Basten JA, extra-curial punishment should not include any ‘consideration of the conditions of imprisonment and the impact of imprisonment on the particular offender’.¹²⁶ Should legal consequences that flow directly from the conviction or the sentence, such as disqualification orders, be included in the consideration of extra-curial punishments? Basten JA concluded that the answer to this question was unclear.

A typical extra-curial punishment could usually refer to punishment suffered by offenders in Aboriginal communities.¹²⁷ Basten JA found that the use of the phrase ‘in an expanded sense’ by Whealy J in *Rivkin’s case* was partly inappropriate.¹²⁸ Disagreeing with Whealy J, Basten JA held that the following three factors should not be considered under the heading of ‘extra-curial punishment’: (i) loss of previous good standing in the community; (ii) inevitable economic impact the conviction may have on one’s livelihood; and (iii) impact on one’s family members. Basten JA held that these factors may give rise to the issue of double counting and favour those who were previously employed.¹²⁹ Therefore, Basten JA concluded that only ‘specific changes in one’s legal status may properly be considered as extra-curial punishment’.¹³⁰ The sentencing judge further held that ‘the loss of reputation and standing in the community’ resulting from ‘the revocation of his commission as Queen’s Counsel and the removal of [the appellant’s] entitlement to remain on the roll of barristers’ was the most significant loss under extra-curial punishment.¹³¹

In some cases, the likely consequences of a finding of guilt or a conviction in relation to the offence were recognised. The concern with this consideration is that it may favour powerful and well-known individuals.

18 Prospects of Rehabilitation and Specific Deterrence

An offender’s prospects of rehabilitation and his/her need for specific deterrence are inter-linked. Except for Mr Rivkin, all other offenders were found to have good prospects of rehabilitation and were unlikely to re-offend. Those convicted of insider trading are unlikely to secure a similar position where they can again

¹²⁴ *Kamay’s appeal* [53].

¹²⁵ *Einfeld v R* (2010) 266 ALR 598 [86].

¹²⁶ *Ibid.*

¹²⁷ *R v Daetz* [2003] NSWCCA 216.

¹²⁸ *Einfeld v R* (2010) 266 ALR 598 [88]–[98].

¹²⁹ *Ibid* [88]–[90].

¹³⁰ *Ibid* [92].

¹³¹ *Ibid* [97].

have access to price-sensitive information. Hence, there is no need to consider specific deterrence for most convicted insider trading offenders.¹³²

Personal deterrence was found to be relevant only in *Rivkin's case*, in which he pleaded not guilty. The sentencing judge held that specific deterrence was necessary to ensure Mr Rivkin's rehabilitation because he had refused to accept responsibility for his wrongdoing. As Australian Law Reform Commission stated in its sentencing report, the 'degree to which the person has shown contrition ... may be relevant to the prospect of rehabilitation of ... [and] it is also relevant to ... the purpose of specific deterrence.'¹³³

Since contrition generally flows from a plea of guilty, the absence of a guilty plea usually equates to no contrition, which subsequently can affect the assessment of the offender's rehabilitation prospect. Among the three offenders who pleaded not guilty, two were found to have good prospects of rehabilitation.¹³⁴ For Mr Hannes, the sentencing judge rejected the Crown's submission that the offender did not have good prospects of rehabilitation. The Crown based its argument on the nature of Mr Hannes' offence in that it involved 'a high level of deceit', and the offender had tried to frustrate the investigation into his offence. Since '[t]he futurity of specific deterrence is highlighted ... by the fact that it relates to the offender's conduct after release',¹³⁵ the court was correct in holding that Mr Hannes had good prospects of rehabilitation.¹³⁶

19 General Deterrence

General deterrence has a central role in sentencing law and practice.¹³⁷ General deterrence means that sentences imposed on one type of offence can deter others from committing the same offence. In other words, if the incidence of one offence has been declining since the imposition of a series of heavy sentences on that offence, then there has been a general deterrence effect.¹³⁸ Courts consider general deterrence as one of the most important factors in sentencing insider trading offenders, for its purposes of protecting market integrity and investors' interests.

The importance of general deterrence in insider trading cannot be more highly emphasised by the courts. VSC held that white-collar criminals are mostly first-

¹³² Australian Law Reform Commission, *Same Crime, Same Time*, above n 45 [4.10].

¹³³ *Ibid* [6.49].

¹³⁴ Mr Doff; Mr Hannes.

¹³⁵ Australian Law Reform Commission, *Same Crime, Same Time*, above n 45 [6.131].

¹³⁶ For details, see *Hannes' case*.

¹³⁷ Mirko Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 32; Mirko Bagaric and Sandeep Gopalan, 'Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties,' 60 *Saint Louis University Law Journal* (2015).

¹³⁸ Australian Law Reform Commission, *Same Crime, Same Time*, above n 45 [4.6] [6.131].

time offenders who ‘fear the prospect of incarceration’.¹³⁹ They are rational, profit seeking, and ‘can weigh the benefits of committing a crime against the costs of being caught and punished’.¹⁴⁰ Therefore, general deterrence is likely to ‘have a more profound effect on white collar criminals’.¹⁴¹ In *Khoo’s case*, the sentencing judge acknowledged the effects of general deterrence on insiders and stated:

one might properly assume that given the increase in prosecutions for insider trading offences in recent years and the attendant publicity that goes with those prosecutions a true insider may be reluctant to personally trade whilst in possession of inside information, because to do so may significantly increase the chance that they will be detected by the authorities.¹⁴²

In *Graham’s case*, the County Court of Victoria held that general deterrence had already been largely achieved by the public humiliation and adverse publicity.¹⁴³ The importance of recording a conviction in order to achieve general deterrence and public protection was emphasised in various cases.¹⁴⁴ However, some courts held that ‘the real bite’ of general deterrence takes place only with an actual term of imprisonment.¹⁴⁵ So far, only mental illness has been used to moderate the need for general deterrence.¹⁴⁶

However, the author believes that general deterrence has been used as an ultimate justification for almost any kind of sentence for insider trading. Glynatsis was first sentenced with an Intensive Correction Order, which was deemed inadequate on the basis of general deterrence by NSWCCA. This was despite the fact that the assessment report described Mr Glynatsis ‘as being at low risk of reoffending with his criminogenic needs being in the area of his mental health’.¹⁴⁷ Further, in *Kamay’s appeal*, his counsel submitted that Mr Kamay had been ‘sacrificed on the altar of general deterrence’.¹⁴⁸

When it comes to insider trading, ASIC has been particularly fond of criminal prosecutions for their additional deterrent effects. Moreover, the regulator has staked its credibility on its ability to maximise deterrence effects for white-collar

¹³⁹ *Kamay’s appeal* [53] cited *DPP v Gregory* (2011) 34 VR 1. For an argument distinguishing incarceration from conviction in such cases, see, Sandeep Gopalan, *Skilling’s Martyrdom: The Case for Criminalization without Incarceration*, 44 *University of San Francisco Law Review* 459 (2010).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* For a contrary view offering an economics based theory, see, Sandeep Gopalan, *Skilling’s Martyrdom: The Case for Criminalization without Incarceration*, 44 *University of San Francisco Law Review* 459 (2010).

¹⁴² *Khoo’s case*, 33–34.

¹⁴³ For details, see *Graham’s case*

¹⁴⁴ *Hebbard’s case; Reitbergen & Levi’s case; Bateson’s case.*

¹⁴⁵ *McKay’s case; Zhu’s case; Kamay’s case.* For critique of these tendencies, see Mirko Bagaric and Sandeep Gopalan, *Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-defeating) Society*, 40 *Seattle Law Review* 57–114 (2016)

¹⁴⁶ *Joffe & Stromer’s case; Hartman’s case.*

¹⁴⁷ *Glynatsis’ case* [182].

¹⁴⁸ *Kamay’s appeal’* [27].

criminals. The Financial Services Reform Act 2001 introduced civil penalty provisions for insider trading offences.¹⁴⁹ However, ASIC has proceeded with only a few civil penalty proceedings because the regulator believes that civil proceedings have lesser deterrent effects and that ‘the public expect [ASIC] to take strong actions against corporate wrongdoers’,¹⁵⁰ including insider trading offenders. Further, ASIC began actively pursuing criminal charges against insider trading offenders after the GFC, partly because regulators worldwide were criticised for being too soft on the financial sector. As demonstrated in Figures 1 and 2 of this paper, the majority of convicted cases that occurred after 2006 and were finalised after 2010.

In addition, the author believes the over-publicising of insider trading cases is to demonstrate to the public that ASIC has been acting effectively to ‘catch all the bad guys’ in the commercial world. However, recent scandal in the Australian banking sector certainly proves that general deterrence is not as efficient as it claims to be for white-collar crimes. This is not to say that absolute general deterrence is completely useless. The author believes that general deterrence is effective. For the minority who are still contemplating insider trading, however, general deterrence does not work.

After examining the consistency in the application of sentencing factors, the following section looks at consistency in the determination of criminality regarding different kinds of insider trading activities.

B Criminality

Prosecutors’ submissions reflect their understandings of the seriousness of each offence, which can be observed in the kinds of sanctions the Crown requested for each offender in the cases reviewed in this study. This study revealed a high matching rate between what the Crown requested for each offender and what the Court imposed in the least serious (non-custodial) and the most serious (imprisonment) sanction forms.

In terms of the criminality involved in different trading activities, it was held that the criminality of transferring loss is worse than that of making a profit.¹⁵¹ Selling shares before the announcement of bad news causes harm not only to the integrity of the market, but also to those investors who bought shares in good will. Further, communicating inside information is the most serious insider trading offence.

1 Insider Trading Versus Tipping

It is held that tipping is more serious than actual trading on non-public information. Courts have held that tipping could cause greater damage to the

¹⁴⁹ Gregory Lyon and Jean du Plessis, *The Law of Insider Trading in Australia* (Federation Press, 2005), 140–42.

¹⁵⁰ D’Aloisio, Tony, ‘Chairman Australian Securities and Investments Commission’ (Speech delivered at the Supreme Court of Victoria Law Conference, Melbourne, 13 August 2010), [1].

¹⁵¹ This conclusion was drawn by the author after reviewing all relevant documents.

market than merely trading on that information (while otherwise keeping it secret), because the tipper loses control of the information once it is communicated. Hence, in a market where information equality is encouraged and protected, the dissemination of information to a tippee presents a greater threat to market integrity than insider trading does.¹⁵² This view was confirmed by the National Companies and Securities Commission in their report, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives*:

[B]ecause of the ready transmissibility of information, tipping is arguably a more serious threat to the integrity of the securities market than trading, for the more widespread it becomes the greater will be the potential for trading.¹⁵³

For example, in *Joffe's case*, the sentencing judge cited Bellew J in *Khoo v R* and stated that after the tipper 'had divulged the information he had no control over what happened to it or how it was used'.¹⁵⁴ NSWCCA concluded that unequal dissemination of information caused by tipping affects the attractiveness of the Australian securities market, which depends on the perception held by investors (local and international investors) that the market is an 'effective regime protecting [market] integrity'.¹⁵⁵ In *R v Fysh (No 4)*, McCallum J stated that:

Public trust in a fair and transparent market can only be served by immunising the market from the prospect of any trading by people on the inside, who have the unfair advantage of knowing something the market cannot know.¹⁵⁶

For insiders who possess privileged information, they do not commit any insider trading offence unless they trade on that information. However, for insiders who accidentally pass inside information to others, they commit insider trading offences even if the recipients never trade on that information or talk to anyone else about that information. The latter is because, as described above, courts have held that communicating inside information poses a greater threat to the market than actually trading on that information, as it risks that the information will 'go wild' in the market. This characterisation of tipping is a clear misunderstanding of the basic concept of share trading. One of the alleged benefits of insider trading, proposed by Henry Manne, is that, by disseminating the information, it moves share prices towards their accurate value.¹⁵⁷ In addition, there is no concrete evidence that insider trading harms the attractiveness of the securities market.¹⁵⁸ When information is known by a large group of people who subsequently trade on that information, their trading results in adjustments to share prices and eliminates the advantages associated with non-public

¹⁵² *Khoo's appeal* [7].

¹⁵³ National Companies and Securities Commission, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives* (1986) ('Anisman Report') 62.

¹⁵⁴ *Joffe & Stomer's case* [106].

¹⁵⁵ *Khoo's appeal*.

¹⁵⁶ *R v Fysh (No 4)* [2012] NSWSC 1587 [47].

¹⁵⁷ Henry G Manne, *Insider Trading and the Stock Market* (The Free Press, 1966)

¹⁵⁸ *Ibid.*

information. In other words, the information becomes public, which increases market efficiency.

2 *Tipper Versus Tippee*

Courts have uniformly held that the criminalities of tippers are higher than those of tippees because their conduct usually involves breaches of trust.¹⁵⁹ In *Khoo's appeal case*, Bellew J of NSWCCA listed seven factors relevant to an assessment of the objective seriousness of tipping:

- the nature and importance of the information which was disclosed;
- the extent of the disclosure;
- whether the offender knew that the person(s) to whom the information was disclosed would use it for the purposes of trading and/or profit taking;
- the nature and extent of any breach of trust involved in such disclosure;
- whether such disclosure involved any element of sophistication or subterfuge;
- whether the offending involved a course of conduct; and
- the extent of any profit made, be it by the offender or by those to whom the information was disclosed.

However, in *Kamay and Hill's case*, it was held that Mr Kamay, the tippee, instigated the insider trading scheme and convinced Mr Hill, the tipper, to share information with him. From the tipper's perspective, people create inner social circles on trust;¹⁶⁰ if tippers unintentionally share inside information with close friends, and their friends then exploit that information, tippees should be equally or more culpable than the tipper. Therefore, the essence of the argument is that 'breach of trust' is the aggravating factor. In a case involving tippers and tippees, it is important to examine the motivations of both parties and determine whether or not the tippee instigated the tipper's breach of trust.

3 *When Insider Trading does not Distort the Market*

In many cases, the prosecutor conceded that the trading was 'too modest to have any adverse effect on the market.'¹⁶¹ If insider trading does not distort the market, then what kind of harm does it do to individual victims? In *Kamay v the Queen*,¹⁶² it was submitted that general deterrence becomes the main sentencing factor to 'protect the integrity of the market' when 'the insider trading had no distorting effect on the market'.¹⁶³ Moreover, the criminality and penalty will increase if insider trading is found to have distorted the market. This argument stems from

¹⁵⁹ *O'Reilly's case; Joffe & Stromer's case; Tan's case.*

¹⁶⁰ One of contractarian's perspectives on insider trading law: theory of enforceable promises. See Kim Lane Scheppelle, "'It's Just Not Right": The Ethics of Insider Trading' (1993) 53(3) *Law and Contemporary Problems* 123, 161.

¹⁶¹ *Rietbergen & Levi's case; O'Brien's case; Kamay's appeal.*

¹⁶² *Kamay's appeal* [44].

¹⁶³ *Ibid.*

the market fairness theory.¹⁶⁴ Given the fact the law encourages market fairness, the prosecutor only needs to prove the person acted on privileged information.

C Summary

This section reviewed the consistency of application of related sentencing factors and assessed relevant propositions pertaining to the criminalities of different kinds of insider trading. After evaluating the application of each sentencing factor across different types of sanction options, this study revealed several inconsistencies and ambiguities in the practice of sentencing insider trading offenders, such as the inconsistency in the weight given to the monetary value of shares in determining the seriousness of the offending and the definition of true insider trading. Moreover, it is not uncommon for insider trading offenders to suffer from some form of mental illness, but each case needs to be examined closely to decide whether the illness contributed to the commission of the offence. Another problem revealed is the over-reliance on general deterrence.

IV CONCLUSION AND REFORM PROPOSAL

By undertaking a thorough review of the sentencing remarks of 40 insider trading cases (37 criminal and 3 civil cases), this paper presented an overview of the distribution of convicted insider trading during the examination period, assessed the consistency in the application of each sentencing factor in convicted insider trading cases and civil cases, reviewed the determination of criminalities of different kinds insider trading activities, and discusses a number of issues in current sentencing practice including (i) the criminalities of trading and tipping; (ii) *mens rea* of tippers and tippees; (iii) the weight given to the amount of profit made and the amount of money invested; (iv) the definition of true insider; (v) mental and physical health of the offender; (vi) previous good character of the offender; (vii) recognisance of extra-curial punishment. The key problem revealed is the over-reliance on general deterrence, which is expensive and contributes to the problem of over-criminalisation. Furthermore, this paper pointed out another key issue in insider trading laws and proposed that the name of the prohibited activity, ‘insider trading’, be changed to ‘dealing with privileged information’.

A Reforming the Title of ‘The Insider Trading Prohibitions’

In the Corporations Act 2001, Part 7.10 of Chapter 7 deals with various kinds of market misconduct relating to financial products and financial services. The insider trading prohibitions are set out in Division 3 of Part 7.10 and consist of

¹⁶⁴ *Rietbergen & Levi’s case; O’Brien’s case; Kamay’s appeal*. See also Mirko Bagaric, Jean Du Plessis and Jaelyn Silver, ‘Halting the Senseless Civil War Against White-Collar Offenders: “The Conduct Undermined the Integrity of the Markets” and Other Fallacies’ [2016] 4 *Michigan State Law Review* 1019.

three prohibitions: the trading prohibition, the procuring prohibition and the communication prohibition. Australian law on insider trading applies to insiders and outsiders. In other words, defendants do not need to be corporate insiders. As Ramsay and Lei stated in their paper, ‘the name “insider trading” has become a misnomer ... It has been described as more a law about “trading with informational advantages”’.¹⁶⁵

The definition of ‘insider trading’ varies among different disciplines. In legal research, insider trading means any trading based on or any communication of privileged information.¹⁶⁶ In economics and finance, insider trading means that corporate insiders trade on their company shares,¹⁶⁷ which can be legal or illegal depending on the circumstances.¹⁶⁸ To avoid confusion, the author proposes that the name of Division 3 of Part 7.10 of the *Corporations Act 2001* (Cth) be amended from ‘The insider trading prohibitions’ to ‘Dealing with privileged information’.

First, the word ‘insider’ has different meanings in different social and academic settings. The discrepancy in the definitions of insider has caused great confusion in the understanding of insider trading among the general public, and hinders cross-disciplinary applications of empirical studies involving insiders and insider trading. The dictionary definition of the word ‘insider’ is ‘a person within a group or organisation, especially someone privy to information unavailable to others’.¹⁶⁹ That is to say that an insider is a member of a group or organisation. However, in legal dictionary, the definition of ‘insider’ is ‘a director or officer of a corporation or the person with at least 10 per cent of the stock’,¹⁷⁰ which is almost identical to the financial definition of ‘insider’. In finance, insider means ‘a director or senior officer of a company, as well as any person or entity that beneficially owns more than 10 per cent of a company’s voting shares’.¹⁷¹ Most economic and finance studies employ the term of ‘corporate insider’ to avoid confusion.

Second, Australian insider trading prohibitions are not concerned with ‘who provided the information’.¹⁷² In addition, the ‘connection to the company requirement’ is not required in establishing a contravention against the insider trading prohibitions.¹⁷³

¹⁶⁵ Lei, Victor and Ian Ramsay, ‘Insider Trading Enforcement in Australia’ (2014) 8 *Law and Financial Markets Review* 214, cited in Robert P Austin and Ian M Ramsay, *Ford’s Principles of Corporate Law* (LexisNexis Australia, 2013), [9.600].

¹⁶⁶ This definition is similar to the economic definition of informed trading.

¹⁶⁷ In general, corporate insiders means directors, officers and 10% shareholders.

¹⁶⁸ Most empirical studies use self-reported trading by corporate insiders. Illegal trading by corporate insiders is a subset of illegal insider trading.

¹⁶⁹ *Oxford Dictionaries* (online) <<http://www.en.oxforddictionaries.com/>>.

¹⁷⁰ *Insider*, The Law Dictionary <<http://www.thelawdictionary.org/insider/>>.

¹⁷¹ *Insider*, Investopedia <<http://www.investopedia.com/terms/i/insider.asp>>.

¹⁷² *Mansfield and Kizon v The Queen*, HCA 49 [35]–[36].

¹⁷³ *Ibid.*

Finally, the term ‘insider trading’ is a loaded phrase, charged with negative emotions, and implicitly directed at trading in the securities market by a person who is a member of the corporate world. However, this emotional loading is not the intention of the law.¹⁷⁴ Australian insider trading law seeks to ensure market fairness, that is, ‘all participants having equal access to relevant information’.¹⁷⁵ Therefore, the title ‘dealing with privileged information’ is more consistent with the legislative purpose and it switches the focus from corporate insiders to all people who have access to privileged information.

The author makes the following three suggestions regarding the insider trading prohibition in the Corporations Act 2001:

1. Change the title of Division 3 of Part 7.10 to ‘Dealing with privileged information’;
2. Substitute ‘inside information’ with ‘privileged information’;¹⁷⁶
3. Remove the term ‘the insider’ and, if necessary, use the term ‘the information possessor’.¹⁷⁷

Insider trading law is a controversial area. Due to the covert nature of insider trading, it is difficult to assess the effectiveness of the law. We cannot know the real scope of the practice of insider trading and are unable to accurately identify the potential offenders. In future research, it would be beneficial to interview convicted insider trading offenders to gain their feedback on the long-term impact of ASIC’s action on their lives, and to determine whether or not the law deterred them from committing insider trading.

¹⁷⁴ See Sandeep Gopalan, *Skilling’s Martyrdom: The Case for Criminalization without Incarceration*, 44 *University of San Francisco Law Review* 459 (2010) for a discussion of the dangers of negative emotions such as envy and resentment against powerful corporate elites.

¹⁷⁵ *Mansfield and Kizon v The Queen* [2012] HCA 49 [45].

¹⁷⁶ *Corporations Act 2001* (Cth) s1042A; s1043A.

¹⁷⁷ *Corporations Act 2001* (Cth) s1043A; s1043L.