A COMPARATIVE ANALYSIS OF THE ENFORCEMENT OF MARKET ABUSE PROVISIONS

HOWARD CHITIMIRA

2012
A COMPARATIVE ANALYSIS OF THE ENFORCEMENT OF MARKET ABUSE PROVISIONS

BY

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Submitted in fulfilment of the requirements for the degree of

DOCTOR LEGUM

at the

FACULTY OF LAW

NELSON MANDELA METROPOLITAN UNIVERSITY

DECEMBER 2012

PROMOTER: PROFESSOR V A LAWACK
DECLARATION

I, Howard Chitimira, do hereby declare, in accordance with Rule G4.6.3, that except for references specifically indicated as such in the text, and any other help as I have acknowledged, this thesis is wholly a product of my own research, opinions, analysis and industry and has not been previously submitted for assessment to another University or for academic examination towards any other qualification.

SIGNATURE: ..........................................................

Port Elizabeth
December 2012
To My Wife, Daughter and My Mother

RACHAEL, ARIANA AND DIANA

You have been and still are my constant source of inspiration
ACKNOWLEDGEMENTS

Completion of this thesis was made possible through the guidance, support and help of many people. In this respect, I would like to express my sincere gratitude to the following persons:

- God Almighty, the source of all good things and blessings. Praise, glory and the entire honor be unto Him.
- Professor V A Lawack, my promoter. Thank you so much for your patience, guidance, kindness, support and constructive criticism. May God richly bless you.
- Professor A Mukheibir, thank you for your kindness, encouragement and support.
- Professor J A Van der Walt and the Research Capacity Development Department, thank you for thesis editorial funding and for the NMMU bursary.
- My mom and dad, thank you so much for bringing me up in love, and in the knowledge of God.
- My dear wife Rachael Tembo-Chitimira, thank you for all the prayers, enduring love, encouragement and support.
- All my pastors, especially Evangelist C Tembo and Pastors N and J Meader, thank you for your encouragement, guidance and prayers.
- Mr Hudson Chitimira, thank you for your love, prayers and valuable support.
- Mrs H Fisher, Secretary to the Dean and Mrs E Strydom. Thank you for all the assistance, encouragement and support.
- Mrs N Terblanche and Mrs D Billie, Faculty of Law Management and Administration Officers. Thank you for your kindness, encouragement and support.
- Mr BN Swart and Mrs E Swart, thank you for your kindness, prayers and support.
- Ms Liana Viljoen, Librarian University of Pretoria. Thank you for the assistance in accessing the Law Library.
- The library staff at the University of Johannesburg and the Nelson Mandela Metropolitan University. Thank you for all the assistance.
Market abuse practices may directly or indirectly give rise to diverse problems such as inaccurate stock market prices, low public investor confidence, reduced market integrity and poor efficiency in the affected financial markets. This thesis reveals that three major forms of market abuse, namely insider trading, prohibited trading practices (trade-based market manipulation) and the making or publication of false, misleading or deceptive statements, promises and forecasts relating to listed securities (disclosure-based market manipulation) are prohibited in South Africa. However, although South Africa has had market abuse legislation for about 30 years, and must be commended for its great effort to enhance market integrity by combating market abuse practices, the enforcement of such legislation is still problematic. Moreover, in spite of the fact that there is no empirical data or accurate figures quantifying the occurrence and extent of market abuse activities in the South African financial markets, this thesis submits that market abuse practices are still to be completely eradicated. Accordingly, this thesis suggests that the aforementioned problem might have been aggravated by *inter alia*, various gaps, flaws and/or inconsistent implementation and enforcement of the market abuse legislation in South Africa. To this end, the anti-market abuse enforcement framework under the Securities Services Act 36 of 2004 is analysed to investigate its adequacy. The cooperation and role of the Financial Services Board, the courts, the Directorate of Market Abuse and other relevant stakeholders is also examined and discussed. Moreover, the cooperation between the Financial Services Board and similar international agencies is discussed to gauge its effectiveness in relation to the combating of cross-border market abuse practices. The adequacy of the awareness and preventative measures in place to curb market abuse practices is also investigated to determine whether such measures are robust enough to combat other new challenges that were posed by the 2007 to 2009 global financial crisis. Furthermore, a comparative analysis is undertaken of the enforcement of the market abuse prohibition in other jurisdictions, namely the United States of America, the United Kingdom, the European Union and Australia. This was done to investigate the relevant lessons that can be learnt or adopted from these jurisdictions. The thesis further discusses the adequacy of the recently introduced provisions of the Financial Markets Bill as well as the subsequent market abuse provisions of the Financial Markets Bill 2012. The thesis highlights that the aforementioned Bills are positive attempts by the policy makers to improve the enforcement
of the market abuse provisions in South Africa. Nonetheless, the thesis reveals that most of the shortcomings contained in the Securities Services Act 36 of 2004 were duplicated in the Financial Markets Bill and the Financial Markets Bill 2012. In light of this, it remains to be seen whether the market abuse provisions contained in the Financial Markets Bill and/or the Financial Markets Bill 2012 will improve the combating of market abuse practices in South Africa. Consequently, it is hoped that the relevant market abuse provisions of the Securities Services Act 36 of 2004, the Financial Markets Bill and/or the Financial Markets Bill 2012 will be comprehensively reviewed in regard to the recommendations made in this thesis. To this end, the thesis proposes a viable anti-market abuse model and policy framework and sets out both policy objectives and provisions which policy makers could use to strengthen some of the market abuse provisions in South Africa.
KEY TERMS AND CONCEPTS

1. Insider trading.

2. Inside information.


5. Securities.


7. Enforcement approaches.

8. Regulated markets.

9. Issuers.

10. Enforcement framework.
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CHAPTER ONE
RESEARCH OUTLINE AND CONTEXT

1 Introduction and Background of the Research

1.1 Introduction

Although South Africa has had market abuse legislation for about 30 years,\(^1\) and must be commended for its effort to enhance market integrity by combating market abuse practices, enforcement of such legislation is still problematic.

Market abuse is a very difficult concept to define. It is generally accepted that there is no comprehensive and satisfactory definition of this concept that exists to date.\(^2\) Market abuse involves the misuse of material information (price-sensitive information), the dissemination of false or misleading information and practices which abnormally or artificially affect, or are likely to affect, the formation of prices or volumes of trading of financial instruments.\(^3\) This definition is nonetheless narrowly limited to market manipulation by way of misuse of price-sensitive information and engaging in prohibited trading practices. It does not clearly state or define insider trading as another form of market abuse. Thus, although the European Union Directive on Insider Dealing and Market Manipulation\(^4\) generally uses the term “market abuse” to refer to transaction and/or trade-based market manipulation as well as disclosure and/or information-based market manipulation and insider trading, it does not expressly define the concept of market abuse to cover all these forms of prohibited trading practices. Moreover, the concept of market abuse is not defined in the United States of America.

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However, in the *Cargil Inc v Hardin* case\(^5\) market abuse was defined as an act involving market manipulation or any activity, scheme or artifice that deliberately influences the price of a financial asset, resulting in a price other than the one that would have resulted in the absence of such intervention. This definition is once again narrow and does not expressly apply to insider trading and hence it has attracted similar criticisms from some scholars.\(^6\) Despite these definitional deficiencies, all the forms of market manipulation and insider trading are generally treated as “market abuse” in the United States of America. This is the same approach adopted in the United Kingdom, where the concept of market abuse was widely defined as behaviour, whether by one person alone or by two or more persons jointly or in concert, which occurs in relation to qualifying investments traded or admitted to trading on a prescribed market or in respect of which a request for admission to trading on such a market has been made and which falls within any one or more types of prohibited behaviour set out under the Financial Services and Markets Act.\(^7\) The term “market abuse” is broadly used to refer to a number illegal practices like insider trading, improper disclosure, misuse of information, manipulating transactions, manipulating devices, dissemination and distortion and misleading behaviour.\(^8\) Notwithstanding the fact that these practices are different from each other, the use of the generic term “market abuse” has reduced confusion to a certain extent and enhanced the enforcement of market abuse prohibition in the United Kingdom.\(^9\) Similarly, in South Africa and for the purposes of this thesis, “market abuse” is used as a generic term referring to insider trading, prohibited trading practices (trade-based market manipulation) and the making or publication of false, misleading or deceptive promises, statements or forecasts (disclosure-based market manipulation).\(^10\) Therefore, although the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 did

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\(^5\) (1971) 452 F2d 1154 1163; 1167-1170.


\(^7\) 2000 (c 8), hereinafter referred to as the Financial Services and Markets Act. See s 118(1)-(8) of the Financial Services and Markets Act 2000. Also see Swan *Market Abuse Regulation* (2006) 29-33; 205.


\(^10\) See Chapter VIII entitled “Market Abuse” of the Securities Services Act 36 of 2004, hereinafter referred to as the Securities Services Act; also see s 73; s 75 & s 76 of the Securities Services Act; also see clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill [B-2011], hereinafter referred to as the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill [B12-2012], hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012 because at the time of writing this chapter, the aforementioned Bills had not yet effectively been passed into law).
not expressly define the concept of market abuse, this thesis employs the term “market abuse” to refer to all the forms of market manipulation and insider trading as outlawed in the relevant legislation in jurisdictions such as South Africa, the United States of America, Australia, the United Kingdom and the European Union for consistency and eradication of unnecessary confusion.

As indicated above, it is clear that market manipulation and insider trading are the two main forms of market abuse that fall under the scope of this research. Insider trading is a practice by which one person armed with price-sensitive non-public (confidential) information, concludes a transaction in securities to which that information relates without sharing that information with others.\(^{11}\) The insider trading debate dates back to the 1920s when its effect was first felt in the United States of America after a heavy crash occurred in its stock markets. In 1933 the United States of America became the first country to enforce legislation on market abuse practices that include insider trading.

In South Africa the prohibition on market abuse practices like market manipulation can be linked back to sections 20 to 23 of the Financial Markets Control Act\(^{12}\) and section 40 of the Stock Exchanges Control Act.\(^{13}\) These provisions were also supplemented by section 162\(^{14}\) of the Companies Act.\(^{15}\) Likewise, the crack down on insider trading can be traced back to section 233 of the Companies Act which was later replaced by section 440F of the same Act in 1990. Section 440F was repealed and replaced by the provisions of the Insider Trading Act\(^{16}\) on 17 January 1999. Market abuse practices were allegedly common in South Africa.\(^{17}\)

\(^{11}\) Osode “Defending the Regulation of Insider Trading on Basis of Sound Legal Orthodoxy: The Fiduciary Obligations Theory” in Okpaluba (ed) Law in Contemporary South African Society (2004) 303. Many countries enacted market abuse legislation. Only a few countries have managed somewhat to enforce such legislation effectively to protect the issuers of securities, while the majority of the countries are still to achieve success in the enforcement thereof. The term “issuer of securities” is used in this thesis to refer to a company or any other issuer of money market instruments. However, the enforcement of market abuse legislation in South Africa has not been able to adequately protect the investors who purchase or sell shares to their disadvantage because they are ignorant of market abuse practices such as insider trading.


\(^{13}\) 1 of 1985, hereinafter referred to as the Stock Exchanges Control Act.

\(^{14}\) This section prohibited the dissemination of false information in a prospectus.

\(^{15}\) 61 of 1973, hereinafter referred to as the Companies Act.

\(^{16}\) 135 of 1998, hereinafter referred to as the Insider Trading Act.

In an attempt to improve the regulation of market abuse practices, the Securities Services Act was enacted as a separate piece of legislation that specifically consolidates\textsuperscript{18} and deals more with market abuse practices.\textsuperscript{19} These provisions could be further repealed by the market abuse provisions contained in the Financial Markets Bill\textsuperscript{20} or the Financial Markets Bill 2012.\textsuperscript{21} The historical development of the market abuse enforcement framework will be dealt with in Chapter Two of this thesis.

This research will explore whether the enforcement framework provided for by the Securities Services Act has been successful in combating market abuse practices. This will be done by investigating the problems associated with ineffective enforcement of market abuse provisions in the South African companies and financial markets. Furthermore, an analysis of the gaps and flaws in the current enforcement framework\textsuperscript{22} will be undertaken. The enforcement problems seem to be far from being solved and technological developments such as the electronic buying and selling (online trading) of securities on the Johannesburg Stock Exchange Limited\textsuperscript{23} might, if not managed properly, lead to more challenges in relation to the detection of abnormal and unscrupulous trading activity. It is still controversial whether the regulation and interpretation of specific market abuse practices like market manipulation and insider trading activity in regulated markets should be done similarly to or differently from each other. However, this research submits that market abuse practices will only be curbed if there is an adequate enforcement framework in place that is effectively implemented and enforced by the courts. To determine the validity of this and other concerns, the following question must be addressed in this research:

\textsuperscript{18} The Securities Services Act came into force on 1 February 2005 and repealed the Stock Exchanges Control Act, the Financial Markets Control Act, the Custody and Administration of Securities Act 85 of 1992 & the Insider Trading Act. It further amended the Companies Act (notably this Act has now been amended by the new Companies Act 71 of 2008) and the Financial Services Board Act 97 of 1990.

\textsuperscript{19} The government and its policy makers have made some efforts to combat market abuse by passing the Securities Services Act which repealed and replaced all previous market manipulation and insider trading provisions. Although a number of activities that are related to market abuse practices are now prohibited, there are inconsistencies in the practical enforcement of the relevant provisions of the Securities Services Act and this will be discussed later in Chapters Two & Three of this thesis.

\textsuperscript{20} See clauses 82; 84; 85; 86 & 87 & other relevant clauses under Chapter X entitled “Market Abuse”.

\textsuperscript{21} See clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012 & also see other relevant clauses under Chapter X entitled “Market Abuse”.

\textsuperscript{22} For purposes of this thesis the terms “enforcement framework” and “legal enforcement framework” are used interchangeably.

\textsuperscript{23} Hereinafter referred to as the JSE. Notably, the JSE was originally established on 8 November 1887 and it was formerly known simply as the Johannesburg Stock Exchange. However, on 8 November 2000 it adopted its new name as the Johannesburg Securities Exchange South Africa, which was later changed to its current name as Johannesburg Stock Exchange Limited on 01 July 2005.
Is the current anti-market abuse legal enforcement framework being successfully implemented by the relevant authorities to combat market abuse practices in South Africa?

The provisions on market abuse have continued to be inconsistently enforced in the South African courts. Although a number of investigations were reported to have been conducted by the Financial Services Board and the Insider Trading Directorate (which is now the Directorate of Market Abuse), the mere fact that only a few settlements in civil cases and no criminal convictions have been recorded in insider trading cases, confirms that assumption. A closer look into the role of the courts, the Financial Services Board, the Directorate for Market Abuse, the Enforcement Committee and the JSE will be carried out. Each of these organs will be discussed.

This research will include a comparative analysis of the enforcement of market abuse practices in other selected countries for the purpose of learning from their enforcement frameworks and bringing the South African enforcement framework in line with the latest developments elsewhere. The discussions in Chapters Five, Six, Seven and Eight will focus on the United States of America (mainly from a federal perspective), the European Union, the United Kingdom and Australia respectively.

1.2 Background of the Research

It is generally agreed that market abuse practices are still prevalent in South African companies and financial markets. It is further submitted that some insider traders and market manipulators are still able to enjoy profits of their illegal practices without incurring any liability, owing to the ineffective enforcement of the Securities Services Act. Furthermore, it is argued that improper use of price-sensitive information, for instance by delaying its publication or disclosure to other relevant parties, is by far one of the most common forms of market abuse in South Africa. Although the Securities Services Act has been a positive

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25 For more information on market abuse cases visit <http://www.fsb.co.za> (accessed 13-07-2008).
26 See par 1.8 of this Chapter for the justification of my selection of each of these jurisdictions for comparative analysis.
attempt to curb various forms of market abuse, much needs to be done to achieve more success in the enforcement of its provisions.\textsuperscript{29} It is therefore a real challenge on the part of the Financial Services Board and other enforcement authorities to ensure that insider traders, market manipulators and any other unscrupulous persons who contravene the relevant provisions of the Securities Services Act are exposed and penalised. Enforcement authorities must further ensure that any person who fall victim to such illicit practices is accorded appropriate remedies.

It is against this background that an analysis into the implementation of the current enforcement framework will be assumed in this research to recommend possible measures that can be employed to combat market abuse practices in South Africa.

1 3 The Case for Regulating Market Abuse

The objective underlying securities laws (market manipulation and insider trading provisions) in various countries is to promote a free and fair market that will competitively attract both domestic and foreign investment. This usually occurs in markets where the price of a security reflects its true value and securities trading is done transparently and efficiently, by prohibiting market abuse practices.\textsuperscript{30} However, a number of commentators have had different views on this matter.\textsuperscript{31} Some commentators, financial analysts and academics argue that the regulation of market abuse activities is economically undesirable in many respects.\textsuperscript{32} On the other hand, other persons allude to the fact that effective regulation of market abuse legislation is key to achieving accurate and internationally competitive financial markets.\textsuperscript{33} In other words, the main objective underlying the regulation of market abuse in the financial markets is to freely promote and maintain the natural forces of supply and demand to

\textsuperscript{29} Luiz 2002 \textit{JBL’s Quarterly Law Review for People in Business} 182-183.

\textsuperscript{30} Henning & Du Toit 2000 \textit{Journal for Juridical Science} 155.

\textsuperscript{31} For purposes of this sub-heading this market manipulation and insider trading debate is presented concurrently. The controversy pertaining to the enforcement of insider trading provisions as well as market manipulation provisions will therefore not be treated separately and differently.


\textsuperscript{33} In order to promote market integrity, protect investors and to keep the markets free from fraud, it is argued that market manipulation and insider trading legislation must be effectively enforced. See related remarks by Anonymous “The Regulation of Insider Trading in the United States of America” (09-03-2008) \texttt{<http://www.sec.gov>} (accessed 08-06-2008).
determine the price of securities; to boost public investor confidence in the integrity of such markets and to protect investors from illicit market abuse activities.\textsuperscript{34}

Although the question of whether it is beneficial and cost effective\textsuperscript{35} to regulate and combat market abuse practices is still to be answered, this research submits that adequate legislation alone is not sufficient; instead, such legislation must be supplemented by effective enforcement of its provisions to curb market abuse activities. Arguments against the regulation of market manipulation and insider trading can be outlined as follows:

It is stated that market abuse legislation in most cases will be too legalistic and difficult to enforce practically.\textsuperscript{36} It is argued further that most countries have enacted some legislation that is fairly good but it is not easily enforceable\textsuperscript{37} and this has contributed more problems than solutions in many securities and financial markets globally.\textsuperscript{38} Furthermore, several market abuse laws have had little or no success in many countries that had enacted them due to the inherent difficult nature of market abuse activities, especially insider trading, to detect, investigate and prosecute.\textsuperscript{39} It is possible that, in some instances, a significant number of these activities will go undetected. Apparently, very few instances of successful prosecutions and settlements have been reported in cases involving market manipulation and insider trading. For instance, it is claimed that prior to 1980 in the United States of America, only 37 cases of insider trading were settled out of court by the United States Securities Exchange Commission and the disgorgement of profits fine was secured only in twelve cases.\textsuperscript{40}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)” 2008 SA Merc LJ 33 39.
\item \textsuperscript{35} Henning & Du Toit 2000 Journal for Juridical Science 155.
\item \textsuperscript{37} Bris “Do Insider Trading Laws Work?” 2005 European Financial Management 267.
\item \textsuperscript{39} See generally the Forum of European Securities Commissions (FESCO) article (19-03-2008) <http://www.europefesco.org> (accessed 10-05-2008).
\end{itemize}
\end{footnotesize}
Another example of a country that had a poor track record in the prosecution of market abuse in the early 1990s is Australia. It is agreed that the low number of successful prosecutions, especially in insider trading cases, was a result of both the ineffectiveness and the unenforceability of insider trading laws.

The same can be said of South Africa. Prosecution of market abuse practices has not been very successful. However, the absence of more successful convictions, especially in insider trading cases, has been viewed by some commentators as a sign or proof that the insider trading provisions are being effectively enforced. For instance, according to the Insider Trading Directorate report as quoted in the Insider Trading Booklet, 80% of the persons interviewed in a survey that was carried out to investigate the impact and effectiveness of the insider trading legislation submitted that insider trading cases were remarkably less prevalent. About 141 cases were provisionally detected during the period between May 1999 and September 2002 but only 115 cases were finally investigated, 15 cases were settled out of court and no criminal prosecution was successfully concluded. This explains why it is argued that market abuse cases are very difficult to prosecute and enforce because the evidentiary burden of proof in such cases is extremely high and difficult to prove.

Another argument against the regulation of market abuse activities is that such regulation will negatively affect market efficiency and the work of securities analysts, stock brokers and other market participants. Manne, as well as Calton and Fischel, purport that the regulation of insider trading will inhibit bona fide transactions and disclosure of information between company employees, financial analysts and other market participants. They contend

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that information plays a pivotal role\textsuperscript{49} in financial and securities markets, hence the regulation of insider trading might interfere with \textit{bona fide} analytical research or any other work of financial analysts. Therefore, the regulation of insider trading will give rise to financial analysts not being able to execute their duties as freely as they would have liked owing to fear of apprehension and contravention of provisions on disclosure of price-sensitive information.

It is further argued that market prices must reflect all relevant information to enhance the markets to have optimal allocation of resources and to enable securities and financial analysts to make accurate analyses.\textsuperscript{50}

Furthermore, it is stated that market abuse laws increase the manager-shareholder conflict and this may give rise to more agency costs.\textsuperscript{51} Therefore, disclosure of price-sensitive information must be restricted only if it is cost effective or when the cost of production, in this case the cost of regulation, is lower than the market value. It is also stated that market participants do not have an incentive to produce information unless they are permitted to trade with it for their personal gain\textsuperscript{52} and this will hinder market efficiency. For instance, various mechanisms are put in place by companies to protect their valuable price-sensitive information from being abused by insiders and other market participants in the course of carrying out their duties. Therefore, if market abuse is not regulated, insider traders and other market participants might be more encouraged to create and collect more price-sensitive information in order to enjoy a trade benefit out of such information.\textsuperscript{53} It is also said that when insiders trade freely on price-sensitive information, obtaining more accurate securities prices and efficient financial markets will be facilitated.\textsuperscript{54}

Another argument is that market abuse practices, especially insider trading, may serve as an efficient disclosure mechanism that is economically cheaper than other means of disclosure,


\textsuperscript{51} Agency costs can be defined as the expenses incurred by a company that hires the services of stock brokers and financial analysts in an attempt to enhance efficiency. Jensen & Meckling “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” 1976 \textit{Journal of Financial Economics} 305.

\textsuperscript{52} Ten Oever 1997 \textit{Yale Law Journal} 1325; 1328.

\textsuperscript{53} Ausubel “Insider Trading in a Rational Expectations Economy” 1990 \textit{American Economic Review} 1022 1025.

\textsuperscript{54} Ausubel 1990 \textit{American Economic Review} 1025.
hence no market abuse laws are needed. Manne\textsuperscript{55} contends that the use of non-public information will, whenever it occurs, cause prices to adjust and to reflect the value of the securities more accurately.\textsuperscript{56}

Market abuse practices, particularly insider trading, may offer an incentive and a legitimate means of compensation.\textsuperscript{57} It is also said that market abuse practices will give an incentive to insiders to innovate and develop new ideas that will give rise to increased productivity for their companies.\textsuperscript{58} Therefore, when market abuse practices are not regulated, companies will reduce expenditure by not paying higher salaries to their employees (insiders) because they will be generating their own profit through their innovative insider trading or market manipulation.\textsuperscript{59}

On the contrary, proponents of the regulation of market abuse practices argue that market abuse laws will increase market fairness and investor confidence.\textsuperscript{60} They contend that market abuse practices may result in several financial problems such as corruption, fraud and poor economies.\textsuperscript{61} They also maintain that the regulation of market abuse will promote market integrity\textsuperscript{62} and efficiency of financial markets.\textsuperscript{63} Therefore, countries\textsuperscript{64} with a good track record of combating market manipulation and insider trading\textsuperscript{65} attract more investment. Their arguments can be summarised as follows:

\textsuperscript{56} For instance it is argued that persons who possess inside information will not trade in securities or financial instruments without practically disclosing it. Hence it is both undesirable and unnecessary to have insider trading provisions because insider trading is a victimless offence.
\textsuperscript{62} Also see Anonymous article “Discussion of the Need for Good Corporate Governance” (31-07-2008) on <http://www.oecd.org> (accessed 02-03-2009).
\textsuperscript{65} Velasquez Business Ethics: Concepts and Cases 454.
Market abuse practices must be prohibited to ensure that all market participants have equal access to correct information and to price-sensitive information.\(^6\) Therefore, those who, by virtue of their positions or professions, have access to such price-sensitive information must be prohibited from manipulating financial markets or from trading with it for their own personal gain.\(^6\) They argue that market abuse activities will expose innocent outside investors to risks such as unexpected fall or rise in stock or share prices.\(^6\) They maintain that the regulation of market abuse will give rise to reduced market integrity and investor confidence.\(^6\) The basis of this argument is that there must not be any disparity between market participants in accessing relevant information.\(^6\) Securities transactions should be concluded on a level playing field to prevent one person from reaping the benefits of such transactions, regardless of whether he owes a fiduciary duty to other persons or not.\(^7\)

Velasquez\(^7\) argues that market abuse practices, especially insider trading, may give rise to misappropriation and theft of a corporation or company’s property. Therefore, market abuse laws must be enacted and adopted to avoid the negative effects that market abuse activities might have on companies and financial markets.\(^7\) This argument asserts that non-public price-sensitive information belongs to a corporation or company and if it is abused through insider trading or market manipulation, the perpetrators must be punished.\(^7\) Dooley\(^7\) further asserts that illegal disclosure of non-public price-sensitive information by insiders or market participants is an offence against their companies or corporations.

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\(^7\) Bergmans Insider Information and Securities Trading: A Legal and Economic Analysis of the Foundations of Liability in the USA and the European Community (1991) 9; 12; 105-106.
Market abuse practices, especially insider trading, amount to a breach of fiduciary duties owed to the companies and shareholders by insiders and other market participants. It is against this background that proponents of the regulation of market abuse contend that practices that amount to breach of fiduciary duties must be strongly discouraged. However, there appear to be divergent views about this fiduciary duty argument. Some commentators argue that insiders or employees owe a fiduciary duty only to the company. On the other hand, other persons maintain that insiders or employees owe fiduciary duties to both the company and the shareholders. This is the so-called manager-shareholder conflict.

Market abuse harms public investor confidence and must be curbed by effective enforcement of market abuse laws. This argument is based on the premise that market abuse activities destroy market integrity, hence effective enforcement of market abuse provisions will help to promote and maintain investor confidence, and enhance efficient and competitive financial markets that attract more investors.

Market abuse practices damage the efficiency, accuracy and proper functioning of securities and financial markets. Therefore, an efficient market must reflect prices of stock or shares at any given time as the best estimate of what they will be in the future. In other words, any publication or forecast must accurately reflect the true value of the securities in question. This is the so-called efficient market hypothesis. It asserts that relevant information should play a crucial role in the determination of share prices. Moreover, it is also said that the time between the production of such information and its dissemination into the financial markets may only be properly managed by regulating and discouraging market abuse practices. It is further stipulated that the more efficient and accurate information about securities is reflected in market prices, the more stable the financial markets would be.

81 Bergmans Insider Information and Securities Trading 105-106.
Market abuse activities reduce market liquidity.\textsuperscript{84} This view is also supported by Kraakman, who argues that financial markets characterised by higher levels of insider trading depict higher trading costs and reduced market liquidity.\textsuperscript{85} These trading costs are then passed on to uninformed investors and market participants, giving rise to lower market liquidity.\textsuperscript{86} Therefore, market abuse practices will lead to the exploitation of financial markets by insiders and other market participants at the expense of the affected company and its shareholders. It is contended that no person will invest in a company or financial market characterised by rampant market manipulation and insider trading. In other words, if the information asymmetry is higher, uninformed investors may reduce their investments or withdraw totally from participating in such a company or financial market. This will negatively affect the chances of companies to generate more capital and the overall liquidity of the financial markets.

1.4 General Enforcement Approaches to Combat Market Abuse

This sub-heading seeks to provide a theoretical analysis of the basic approaches to market abuse enforcement. Selected approaches will be briefly discussed to investigate how they are used in other jurisdictions to combat market abuse effectively, the objective being to recommend, where necessary, those enforcement methods (approaches) that can be incorporated into the Securities Services Act to enhance and improve the enforcement of market abuse in South Africa. The approaches to market abuse enforcement can be outlined as follows:

**Reliance on criminal sanctions.** Market abuse is usually treated as a criminal offence in many jurisdictions. Most countries have enacted significantly high criminal penalties to deter all persons from engaging in market abuse activities.\textsuperscript{87} In South Africa, the criminal sanctions for market abuse have been increased to a fine not exceeding R50 million, or to


\textsuperscript{87} See the discussions that will be later assumed in Chapters Four, Five, Six, Seven & Eight of this thesis.
imprisonment for a period not exceeding ten years, or to both such fine and imprisonment.\textsuperscript{88} The prosecution of criminal cases of market abuse is done by the Director of Public Prosecutions. The Financial Services Board may only prosecute such cases when the Director of Public Prosecutions failed or neglected to prosecute them as required under the Securities Services Act. Notably, in criminal prosecutions the burden of proof is usually imposed on the prosecuting authorities to prove beyond reasonable doubt that the market abuse offence was committed by the accused persons. However, the reliance on criminal sanctions to enforce and combat market abuse has not been very successful in many jurisdictions such as the United States of America,\textsuperscript{89} Australia,\textsuperscript{90} the United Kingdom\textsuperscript{91} and South Africa.\textsuperscript{92}

**Reliance on civil sanctions.** The market abuse regulatory and enforcement frameworks in several countries rely heavily on civil sanctions to discourage market abuse activities.\textsuperscript{93} The legislation in many countries provides civil remedies to prejudiced persons to compensate them for any losses they might have incurred as a result of market abuse activities. This civil action is usually enforced on the behalf of affected persons by authorised independent regulatory bodies. These regulatory bodies are, in most instances, empowered with a wide range of powers to enable them to exercise their functions effectively. Such powers may include powers to administer proof of claims and to distribute payments to successful claimants in civil cases. The civil penalties (depending on a country) are imposed against the offenders for the profit made or the loss avoided as a result of their market abuse practices. In South Africa, the Financial Services Board may impose and recover civil penalties of up to three times the profit made or the loss avoided by the offenders.

\textsuperscript{88} S 115 (a) of the Securities Services Act.
Likewise, in the United States of America, the United States Securities and Exchange Commission may impose civil penalties of up to three times the profit made or the loss avoided as a result of market abuse practices. The United States Securities and Exchange Commission may also effect a payment of up to ten percent of the fine collected (bounty rewards) to anyone who provided information leading to civil penalties. In Australia, the Australian Securities and Investments Commission may impose civil penalties on those who indulge in insider trading under the Corporations Act.

It is must be borne in mind that the enforcement of civil sanctions for market abuse, unlike the criminal sanctions, has been fairly successful in several countries.

**Administrative sanctions.** It is claimed that a few countries have adopted administrative sanctions to discourage market abuse practices. Administrative sanctions are usually enforced by competent and authorised regulatory bodies. As earlier discussed, these bodies are empowered to take administrative action on the behalf of prejudiced persons. Administrative sanctions may include unlimited fines, public censure, revocation of licences, asset freezes, injunctions to restrain wrongful conduct, suspension of listing, disciplinary actions, disqualification of managers or any other person involved in another profession, restitution to affected persons and orders for the disgorgement of profits. Most of these administrative sanctions are also used by the Financial Services Authority in the United Kingdom. On the other hand, the United States Securities and Exchange Commission may also impose civil penalties up to $500,000 to order disgorgement of profits in administrative proceedings and to issue cease and desist orders against offenders. In Australia, the Australian Securities and Investments Commission may impose administrative sanctions on the offenders such as civil non-monetary penalties which include community service orders and disqualification orders.

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95 50 of 2001(Cth) as amended, hereinafter referred to as the Corporations Act. See s 1043L & s 1317K of the Corporations Act.
In South Africa, the Enforcement Committee is mandated to enforce the administrative sanctions in terms of the Securities Services Act.\textsuperscript{100} The Enforcement Committee may only institute civil proceedings in a court of law against persons who contravene sections 73 and 77 on a referral basis and where no compensation was paid by the defendant in terms of section 77.\textsuperscript{101} The Enforcement Committee may impose administrative sanctions on the offenders such as cost orders for the investigation and preparation of cases by the Financial Services Board, compensation orders in cases where there is a link between the unlawful conduct and calculable damages suffered by another party and unlimited fines as provided in the Securities Services Act.\textsuperscript{102}

Administrative sanctions may offer a more expeditious and efficient option for market abuse enforcement in South Africa.

**Establishment of competent regulatory bodies.** As highlighted earlier, several countries, including South Africa, have established and empowered some regulatory bodies to supervise and enforce market abuse provisions. Regulatory bodies like the Financial Services Authority, the Australian Securities and Investments Commission and the United States Securities and Exchange Commission have, to a greater extent, managed to enforce market abuse laws consistently in their respective jurisdictions.

**Detection.** Market abuse activities are extremely difficult to detect, as a result many countries have surveillance systems in place to detect the occurrence of such activities. In the United States of America, the Corporate Finance Division of the United States Securities and Exchange Commission is responsible for operating the electronic market surveillance. In Australia, the Australian Stock Exchange is responsible for operating the electronic market surveillance by way of monitoring market activity and trading patterns through a computerised and sophisticated system called the Surveillance of Market Activity. In South Africa, the electronic market surveillance is offered by the JSE’s Surveillance Division. It is claimed that the JSE’s Surveillance Division has a number of sophisticated proprietary

\textsuperscript{100} S 97 to s 105; no similar provision is expressly made under clauses 105 & 101 of the Financial Markets Bill & the Financial Markets Bill 2012 respectively.

\textsuperscript{101} S 105 of the Securities Services Act; no similar provision is expressly made under clauses 105 & 101 of the Financial Markets Bill & the Financial Markets Bill 2012 respectively.

\textsuperscript{102} No similar provision is expressly made under clauses 105 & 101 of the Financial Markets Bill & the Financial Markets Bill 2012 respectively.
systems in place that are specifically designed to detect suspicious trading volumes and price movements which could be indicative of insider trading or market manipulation. The JSE’s Surveillance Division also uses a scan method to detect suspicious trading patterns by analysing the profits made, say in the top fifty accounts of brokers.\textsuperscript{103} If suspicious trading is detected, it is reported to the Directorate of Market Abuse for further investigation.

**Investigation, surveillance and information gathering.** In most countries, the regulatory bodies are usually responsible for investigating market abuse activities. These bodies are given powers which include carrying out on-site inspections, summoning and interrogating any persons suspected to have violated market abuse provisions and searching and seizing any document or material from any person or premises which is suspected to be relevant to the ongoing market abuse investigations. In spite of the fact that the investigations are sometimes prolonged, it is argued that the United States Securities and Exchange Commission has managed to make its investigations and settlements timeously in many instances.\textsuperscript{104} The United States Securities and Exchange Commission also shares any information gathered from its investigations with the Department of Justice for use in criminal proceedings.

**Bounty rewards and whistle-blowing.** The purpose of these measures is to encourage individuals to expose market abuse activities without fear of reprisals. In the United Kingdom, whistle-blowers are protected against the risk of getting fired or sidelined. In Australia and the United States of America, bounty rewards are used to enhance the enforcement of market abuse. For instance, as earlier stated, the United States Securities and Exchange Commission may effect a payment of up to 10\% of the fine collected to persons who give information relating to market abuse activities. Nevertheless, the whistle-blowing method is not statutorily employed in South Africa.

**Establishment of self-regulatory organisations.** Developed countries such as the United States of America, the United Kingdom, Australia and Canada have managed to incorporate other self-regulatory organisations in their enforcement frameworks to improve and increase market abuse enforcement. The self-regulatory organisations are established to complement

\textsuperscript{103} This information was obtained from an interview that was conducted at the FSB by the researcher, with Mr Gerhard van Deventer (the Executive Director of the DMA) on 05 May 2009; also see Loubser article (10-10-2006) 25 \texttt{<http://www.jse.co.za/public/insider/JSEbooklet.pdf>} (accessed 10-09-2007).

\textsuperscript{104} Palmiter Securities Regulation 459.
the national regulatory bodies in the enforcement. They usually exercise some direct oversight enforcement responsibility in their respective areas of competence and in the financial markets.\textsuperscript{105} The self-regulatory organisations are further required to ensure that the business interests of all market participants are protected by observing standards of fairness and confidentiality when exercising their enforcement powers. In South Africa, the Financial Services Board is mainly responsible for the enforcement of market abuse and no provision was made for the establishment of self-regulatory organisations.

\textbf{Arbitration and alternative dispute resolution.} These measures are not commonly used to curb market abuse in many jurisdictions. They are, however, employed in the United States of America, as another useful method that allows more settlements to be obtained without the parties involved incurring litigation costs.\textsuperscript{106} The arbitration and alternative dispute resolution does not waive compliance with market abuse legislation, but allows the parties (claimants and defendants) to secure agreements timeously on punitive damages as required by the United States Securities and Exchange Commission. The United States Securities and Exchange Commission also requires the arbitrations to be published and the parties involved to avoid concluding arbitration agreements which do not allow other affected parties to get remedies from the offenders.

\textbf{Private rights of action.} This method is used in countries like Canada. Private rights of action include punitive damages and contingent fees dependent on the success of the action taken. They are used to encourage the prejudiced persons (issuers of securities or shareholders) to claim remedies directly from the offenders.\textsuperscript{107}

\textit{1 5 Statement of Problem}

Although there is no empirical data or accurate figures quantifying the extent of market abuse activity in the South African financial markets, the researcher submits that market abuse practices are still common. This might be caused \textit{inter alia} by poor implementation and enforcement of market manipulation and insider trading provisions.\textsuperscript{108} For instance, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{105} Wood \textit{Regulation of International Finance} 38-39; Pettet \textit{Company Law} (2001) 339-341.
\item \textsuperscript{106} Wood \textit{Regulation of International Finance} 599.
\item \textsuperscript{107} Wood \textit{Regulation of International Finance} 596-597.
\item \textsuperscript{108} Luiz 2002 \textit{JBL’s Quarterly Law Review for People in Business} 180-183.
\end{itemize}
\end{footnotesize}
minimal number of convictions and successful civil settlements could suggest that market abuse legislation is still ineffectively\textsuperscript{109} enforced and many issuers of securities are being prejudiced. It is against this background that this research will examine the perceived problems in the enforcement of the Securities Services Act in order to recommend possible solutions needed to overcome such problems. For the purposes of this research, the following problems need to be addressed:

(a) The implementation and enforcement of market abuse provisions in South Africa have not been very successful. Therefore, the adequacy and efficiency of the Financial Services Board in relation to the enforcement of market abuse practices will be discussed.

(b) The low number of convictions and successful settlements in both market abuse and insider trading cases implies that the enforcement authorities’ dependence on severe penalties and deterrence to curb market abuse activity has not been very successful. The adequacy or otherwise of preventative measures in place to curb market abuse practices and the absence of a rigorous anti-market abuse culture will be investigated.

(c) Relevant stakeholders, companies and members of the public should become more aware of market abuse offences and available remedies in respect thereof. Apart from the insider trading and market manipulation booklet\textsuperscript{110} which was published by the JSE, little or no further measures were undertaken to educate the public and other relevant persons about these offences and their consequences. This has also been exacerbated, in part, by the fact that no attempt has been made by the legislature to define the concept of market abuse in the Securities Services Act. Instead, market manipulation and insider trading offences continue to be treated separately and differently.\textsuperscript{111}

(d) The co-operation between the Financial Services Board and other enforcement agencies will be examined. Therefore, the existing co-operation between the

\textsuperscript{109} Crotty “First Insider Trading Case Goes to Court” \textit{Business Report} (2001-10-19).


Financial Services Board and the JSE’s Surveillance Division will be discussed. Moreover, the co-operation between the Financial Services Board and similar agencies at international level will also be considered for purposes of promoting the curbing of cross-border market abuse activities. Apart from the co-operation agreements between the Financial Services Board and the Financial Services Authority, the United States Securities Exchange Commission and the International Organisation of Securities Commissions, very little has been practically achieved to date in the detection and investigation of market abuse practices in South Africa.

(e) Flaws and complexities in the detection, investigation, and proof of occurrence of market abuse activity will be investigated. The evidentiary burden of proof in both civil and criminal cases of market abuse in South Africa will be scrutinised. For example, it is extremely difficult to prove beyond reasonable doubt that an accused person would have knowingly contravened market abuse provisions.

(f) The flaws and inconsistencies in the enforcement of market abuse provisions will also be examined.

16 Aims and Objectives

16.1 Aim

The aim of this research is to examine the Securities Services Act’s market abuse provisions and to give recommendations for the establishment of an effective, sound and efficient anti-market abuse enforcement framework in South Africa. This research submits that the Securities Services Act can only be successful in combating market abuse if it is backed up by rigorous and effective enforcement on the part of all the relevant enforcement authorities.

Therefore, this research seeks to expose the problems or gaps in the current enforcement framework in order to recommend possible solutions to such problems.

162 Objectives

For the purposes of this research, this thesis will investigate the flaws in the enforcement and make recommendations that may be adopted where necessary to improve the enforcement of market abuse in South Africa. To realise this, problems and flaws in the enforcement of the Securities Services Act must be identified and adequately resolved. Furthermore, a critical analysis of the current provisions that deal with the enforcement of market abuse activities will be made to explore the reasons why, if any, so little has been achieved in terms of their enforcement to date. This research will further look incisively into the functions of the Financial Services Board, the Directorate of Market Abuse, the Enforcement Committee, the JSE and the relevant courts in relation to the combating of market abuse practices in South Africa.

17 Rationale for the Study

The problem of ineffective enforcement of market abuse legislation has been evident in many countries of the world. South Africa is no exception. The flaws, disparities and inconsistencies in the enforcement of the market abuse provisions are the core reason for this research, the rationale being the development of a strong enforcement ethics culture in our financial markets, enhancing co-operation between enforcement authorities; promoting market integrity, market efficiency and investor confidence, and increasing education and awareness thereof. Put differently, where market abuse activity is not sufficiently regulated, such activity will harm the efficiency and integrity of the financial markets and this may reduce public investor confidence. Therefore, good market abuse legislation must be supplemented by efficient and effective enforcement to reduce, as much as possible, the problem of market abuse practices in the financial markets. It is contended that South Africa has good market abuse legislation but it is inconsistently implemented and enforced. The mere fact that some companies have been investigated by the Financial Services Board

through the Directorate of Market Abuse is not necessarily an indication of rigorous enforcement of the Securities Services Act but rather that market abuse is still an enigma in South Africa. This evidenced by the paucity of settlements and convictions reported in the relevant South African courts. To substantiate this, the anti-market abuse enforcement framework in the Securities Services Act will be examined to recommend, where necessary, other measures that may be used to enhance enforcement. Furthermore, a comparative analysis of selected foreign legislation that deals with the enforcement of the market abuse ban from the United States of America, the United Kingdom, the European Union and Australia will be carried out for the purposes of drawing some lessons from these jurisdictions.

18 Justifications for Comparative Analysis

Legislation from the United Kingdom will be considered because the South African company law derives from the United Kingdom and again the United Kingdom has, to some extent, managed to develop a strong anti-market abuse culture in its financial markets and has relatively influenced the South African market abuse laws. For instance, the Securities Services Act, like its United Kingdom counterpart, the Criminal Justice Act, has attempted to provide definitions of terms such as “insider” and “inside information”. The European Union market abuse enforcement framework will be considered to explore the different and relevant enforcement approaches adopted by selected member states. The United States of America’s market abuse laws will be examined because it has, to a fair extent, managed to establish an enforcement framework, based on statutory (government) as well as private actions, that enhances compliance with the law and facilitates the levying of sanctions should any violation occur. In this regard, it is said that effective enforcement is the key attribute of the United States of America’s market abuse laws that distinguishes it from similar laws in other countries. Lastly, the Australian experience will be considered because it has

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118 See <http://www.fsb.co.za> (accessed 13 June 2008). Various companies have been investigated and some are still being investigated, especially for insider trading violations but very few convictions in criminal cases and settlements in civil cases have been achieved to date.

119 Steinberg “Insider Trading Regulation–A Comparative Perspective” 2003 The International Lawyer 153-169.

120 1993 (c 36), hereinafter referred to as the Criminal Justice Act.

121 Steinberg 2003 The International Lawyer 169-171.

122 Steinberg 2003 The International Lawyer 169.

123 Steinberg 2003 The International Lawyer 169.
managed to adopt a more expansive enforcement approach which uses other measures such as administrative sanctions, whistle-blowing and self-regulatory organisations to combat market abuse practices. Furthermore, Australia is an example of a modern Commonwealth jurisdiction which incorporated international best practice.

19 Specific Matters to be Examined

(a) The researcher will examine primarily the strengths and weaknesses of the existing provisions dealing with the enforcement of market abuse practices in South Africa.

(b) The framework for co-operation between the South African market abuse enforcement authorities will be examined. The Memorandum of Understanding agreements for co-operation between the Financial Services Board and similar bodies elsewhere will also be investigated.

(c) Various problems associated with the ineffective enforcement of market abuse provisions will be discussed.

(d) The role of the JSE in the prevention, detection and investigation of market abuse activities will be analysed.

110 Limitation of the Study

The research will focus on the provisions of the Securities Services Act and other selected legislation that deals with the enforcement of the market abuse prohibition in South Africa. The provisions of the Securities Services Act and other selected legislation that relates to the definitions and the general regulation of market abuse will not be dealt with in detail because this research is restricted only to the enforcement of the market manipulation and insider trading prohibition. In other words, the study will not discuss all the provisions of the Securities Services Act and other selected legislation, but will be limited to those that are relevant to the topic. However, it is important to note that statutory provisions that dealt with the enforcement of market abuse prohibition prior to 2004 will be discussed to trace the historical development of their enforcement. For the purposes of references and comparative analysis, relevant provisions of other South African statutes will also be discussed.
Moreover, selected foreign legislation that deals with the enforcement of the market abuse prohibition from Australia, the United States of America, the United Kingdom and the European Union will be referred to only for purposes of comparative study and drawing some lessons from their well established anti-market abuse enforcement frameworks. For instance, the market abuse legislation of the United Kingdom and the European Union is somewhat similar to the Securities Services Act and will only be contrasted and/or referred to for comparative purposes and for drawing some relevant enforcement lessons from their experiences.

### 11 Research Methodology

For purposes of addressing the problems as highlighted and making appropriate recommendations to promote the effective enforcement of market abuse provisions in South Africa, the following research methods will be used:

(a) **Primary and Secondary Sources**

A number of libraries will be visited to access relevant books, case law, journals, statutes and other relevant materials. This research will also refer to relevant websites for information. This is important and convenient because it provides the researcher with more access to the opinions of various renowned commentators and authors. The dates referred to, are the dates on which the websites were accessed by the researcher.

(b) **Case Law and Court Decisions**

An examination and analysis of relevant case law and judicial precedents will be conducted.

(c) **Comparative Research Method**

This research will employ comparative studies between the South African anti-market abuse enforcement framework and that of selected countries that may have more effective enforcement structures in place, to learn from their experiences and for purposes of possible application in South Africa. Therefore, comparative analysis of market abuse legislation from
the United States of America, the United Kingdom, the European Union and Australia will be carried out as earlier stated in paragraph 1 8.

(d) Analysis of Relevant Legislation and Statutes

This research will focus on the Securities Services Act. Other relevant statutes from South Africa and other selected countries will be referred to for purposes of historical and comparative analysis.

(e) Historical Analysis

This method will be employed in Chapter Two of this thesis. The main objective is to investigate the adequacy of the South African anti-market abuse enforcement framework prior to 2004 and to compare it with the current enforcement framework.

2 Structure of the Thesis

This thesis has ten chapters, including this chapter.124

Chapter One deals with the general research context. It outlines the aims, objectives, the statement of problem, the rationale of the study, specific matters to be investigated, general enforcement approaches to combat market abuse and the research methodology.

Chapter Two provides a historical overview of the regulation of market abuse practices in South Africa.

Chapter Three examines and provides an overview of the adequacy and effectiveness of the relevant role-playes in the enforcement of the market abuse prohibition in South Africa.

Chapter Four discusses the problems associated with the ineffective enforcement of the market abuse prohibition in South Africa.

124 It is important to note that for purposes of this thesis the researcher uses the masculine to refer also to the feminine.
Chapter Five provides a comparative perspective of the enforcement of the market abuse prohibition in the United States of America and South Africa.

Chapter Six provides a comparative analysis of the enforcement of the market abuse prohibition in the European Union and South Africa.

Chapter Seven provides a comparative analysis of the enforcement of the market abuse prohibition in the United Kingdom and South Africa.

Chapter Eight gives a comparative analysis of the enforcement of the market abuse prohibition in Australia and South Africa.

Chapter Nine provides an overall comparative evaluation and analysis of the enforcement of the market abuse prohibition in the European Union, the United Kingdom, Australia, the United States of America and South Africa.

Chapter Ten provides some guidelines, conclusions and recommendations to improve the enforcement of the market abuse prohibition in South Africa.
CHAPTER TWO
A HISTORICAL OVERVIEW OF THE REGULATION OF MARKET ABUSE IN SOUTH AFRICA

2.1 Introduction

The effects of market abuse have been felt in a number of financial markets globally. South Africa is not an exception. A reputation of high levels of market abuse practices associated with the South African financial markets in the mid 1990s is a case in point.

In an early attempt to combat market abuse practices in South African financial markets, legislation such as the Companies Act, the Financial Markets Control Act and the Stock Exchanges Control Act were enacted. However, these Acts failed to effectively curb market abuse activities that were allegedly rife in the financial markets. As a result, in 1995 the Ministry of Finance appointed “The King Task Group into the Insider Trading Legislation” which recommended further reforms of insider trading and other related laws. The Insider Trading Act was enacted and came into effect on 17 January 1999.

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4 61 of 1973, hereinafter referred to as the Companies Act; see s 162 & s 229 to s 233.

5 55 of 1989, hereinafter referred to as the Financial Markets Control Act; see s 20 to s 23.

6 1 of 1985, hereinafter referred to as the Stock Exchanges Control Act; see s 40.


8 Hereinafter referred to as “The King Task Group” and its report as “The King Report”.


10 135 of 1998; hereinafter referred to as the Insider Trading Act.
While the introduction of the Insider Trading Act brought some confidence in the financial markets, market abuse activities were still not extinguished. The provisions of the Insider Trading Act were to some extent, inadequate and ineffectively implemented. A number of factors contributed to the enactment of the flawed provisions of the Insider Trading Act which were further ineffectively enforced. Such factors include inadequate resources, inadequate sanctions and the inherent difficult nature of investigating and prosecuting market abuse cases. The Securities Services Act was eventually enacted to repeal and replace all the flawed provisions of the Insider Trading Act and improve the regulation and enforcement of market abuse in South Africa. Three major forms of market abuse, namely insider trading, prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive statements relating to listed companies (disclosure-based market manipulation), are prohibited in South Africa.

Although the enactment of Insider Trading Act and the Securities Services Act could be seen as a good attempt on the part of the South African legislature to improve the general regulation of market abuse, more may still need to be done to increase the number of convictions and settlements in cases involving market abuse in South Africa. It is against this background that a detailed analysis of the regulation of market abuse in South Africa would be carried out in this chapter. The analysis and discussion on the regulation of market abuse is divided into three main parts. Firstly, the historical development and regulation of market manipulation prior to 2004 will be examined. Secondly, the regulation and enforcement of insider trading legislation prior to 2004 will be carefully discussed. Lastly, an analysis of the

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14 36 of 2004, hereinafter referred to as the Securities Services Act and it came into effect on 1 February 2005.
15 See s 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill [B-2011], hereinafter referred to as the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill [B12-2012], hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012 because at the time of writing this chapter, the aforementioned Bills were not yet effectively passed into law).
effectiveness of the market abuse regulatory framework under the Securities Services Act will be carried out to find out whether it has managed to enhance market integrity and restore public investor confidence in the South African financial markets. This will be done by cautiously discussing whether the market abuse legislation in South Africa is being properly enforced.\textsuperscript{16} In addition, this chapter will discuss other additional measures that can, where necessary, be incorporated into the current South African market abuse legislation to improve the implementation of its provisions.\textsuperscript{17}

\section{The Regulation of Market Manipulation Prior to 2004}

In order to establish the historical background of the enforcement of market abuse in South Africa, a closer look at previous legislation that dealt with market abuse is necessary.\textsuperscript{18} This will be done by briefly examining the regulation of market manipulation under the Stock Exchanges Control Act and the Financial Markets Control Act.

\subsection{The Regulation of Market Manipulation in terms of the Stock Exchanges Control Act 1 of 1985}

Two forms of market abuse, namely prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive statements (disclosure-based market manipulation) relating to listed securities were prohibited in terms of the Stock Exchanges Control Act.\textsuperscript{19}

The enforcement responsibility was upon the Johannesburg Stock Exchange itself and the courts.\textsuperscript{20} Furthermore, the delayed publication of price-sensitive information relating to listed securities was arguably the most common form of disclosure-based market manipulation in

\begin{itemize}
  \item[16] See the discussion under paragraphs 2 4 & 2 5 of this chapter read with paragraph 3 2 7 in Chapter Three of this thesis.
  \item[17] In spite of the paucity of convictions and settlements in civil and criminal cases involving market abuse, the legislature has relatively managed to improve and raise the South African financial markets up to a level that would make them more comparable to the highest standards of similar markets in the developed world and international best practice by enacting stricter definitions of market abuse practices and introducing civil and administrative sanctions.
  \item[18] It should be borne in mind that prior to 2004 insider trading was regulated separately under the Companies Act and later under the Insider Trading Act while market manipulation was outlawed in the Stock Exchanges Control Act and the Financial Markets Control Act.
  \item[19] See s 40.
\end{itemize}
Publication of ambiguous information, tip-offs (tipping) and rumours also created another challenge for the enforcement authorities.

The Regulation of Market Manipulation in terms of the Financial Markets Control Act 55 of 1989

The enactment of the Financial Markets Control Act was aimed at, among other things, curbing market manipulative practices that were allegedly common in option and term contracts transactions. Two forms of market abuse, namely trade-based market manipulation and the publication of false, misleading or deceptive statements (disclosure-based market manipulation) relating to listed securities were prohibited under the Financial Markets Control Act.

Furthermore, the Financial Markets Control Act prohibited the dissemination or making of statements which a person knew or ought reasonably to have known that such statements were likely to induce other persons to deal in financial instruments or have the effect of altering the price for dealing in financial instruments. The Financial Markets Control Act prohibited the publication or non-publication of information which had the effect of inducing another person to deal in a financial instrument on a financial market. This was further complemented by the Companies Act, which prohibited the dissemination of false information in a prospectus.

Where the contravention of the relevant provisions of the Financial Markets Control Act caused another person to be prejudiced, a statutory action for damages was provided for under the same Act. For example, damages were calculated by looking at the difference between the price at which the dealing takes place and the price at which it would be likely to have taken place if the contravention had not occurred. Claimants were not required to prove that
the price had been altered by the offender’s misrepresentation or market manipulation.\textsuperscript{30} The Financial Markets Control Act further stipulated that prejudiced persons may claim twice the profit gained or likely to be gained or the loss avoided from the contravention of its market abuse provisions.\textsuperscript{31} Prejudiced persons had two years to institute a claim against any person who violated the relevant provisions of the Financial Markets Control Act.\textsuperscript{32}

In addition, the Registrar of Financial Institutions had the responsibility of instituting claims on the behalf of all the prejudiced persons.\textsuperscript{33} In order to get compensation in such instances, the burden of proof was on the claimant to prove that the loss he suffered was caused by the offender’s market manipulative actions.\textsuperscript{34}

\textbf{2 2 3 Evaluation of the Enforcement of the Market Manipulation Prohibition under the Stock Exchanges Control Act and the Financial Markets Control Act}

Both the Stock Exchanges Control Act and the Financial Markets Control Act had little success in combating market manipulation in South Africa.\textsuperscript{35} A minimum number of settlements and prosecutions were achieved in civil and criminal cases involving market manipulation and other market abuse activities in South Africa prior to 2004.\textsuperscript{36} The paucity of successful settlements and prosecutions of market manipulation cases was allegedly caused by the failure on the part of the South African legislature to enact a more appropriate market abuse enforcement framework.\textsuperscript{37} Notably, the Johannesburg Stock Exchange’s enforcement responsibility was not clearly defined, especially in the Stock Exchanges Control Act. The Stock Exchanges Control Act only stated that the Johannesburg Stock Exchange had the responsibility of policing market manipulation provisions without expressly and clearly

\textsuperscript{30} See s 23(2) & (3) of the Financial Markets Control Act. Also see generally Henning & Du Toit 2000 \textit{Journal for Juridical Science} 160.

\textsuperscript{31} See s 23(3) of the Financial Markets Control Act.

\textsuperscript{32} See s 23(4) of the Financial Markets Control Act.

\textsuperscript{33} See s 23(5) of the Financial Markets Control Act.

\textsuperscript{34} Henning & Du Toit 2000 \textit{Journal for Juridical Science} 158-160, for further analysis and related comments.

\textsuperscript{35} Henning & Du Toit 2000 \textit{Journal for Juridical Science} 158-160.

\textsuperscript{36} Henning & Du Toit 2000 \textit{Journal for Juridical Science} 158-160.

\textsuperscript{37} Henning & Du Toit 2000 \textit{Journal for Juridical Science} 158-160, for further analysis and related comments.
defining its powers and functions.38 Furthermore, it is unclear whether the courts or the Johannesburg Stock Exchange was solely responsible for the prosecution of market manipulation cases in South Africa.39 While it may be assumed that the courts were responsible for the prosecution of market manipulation cases, it is unclear whether the Johannesburg Stock Exchange had similar prosecutorial powers, especially in criminal matters. This follows the fact that the Johannesburg Stock Exchange was merely given the general powers to oversee the regulation and detection of the occurrence of market abuse activity in the regulated financial markets in South Africa.40 No express authority was statutorily conferred on the Johannesburg Stock Exchange itself to adjudicate and prosecute market manipulation cases in South Africa prior to 2004.41

Although the penalties for committing market manipulation offences were not clearly stipulated in the Stock Exchanges Control Act and the Financial Markets Control Act, such offences could possibly have led to considerably high civil or criminal sanctions against offenders. Both the Stock Exchanges Control Act and the Financial Markets Control Act overlooked the express provision of administrative or civil monetary penalties, an imprisonment term or any other appropriate penalties that could be imposed on unscrupulous persons who engaged in market manipulation practices in the South African financial markets prior to 2004.42 This ambiguity could have further contributed to the inconsistent enforcement of market manipulation provisions under the Stock Exchanges Control Act and the Financial Markets Control Act.43

The Stock Exchanges Control Act and the Financial Markets Control Act did not provide adequate measures and mechanisms for effective detection, investigation, prosecution and prevention of market manipulation in the South African financial markets. The Stock Exchange was solely responsible for the detection of market manipulation activities in the South African financial markets.44 Other enforcement authorities like the courts and the

38 Also see further Henning & Du Toit 2000 Journal for Juridical Science 159; Van Zyl “Aspekte van Beleggersbeskerming in die Suid-Afrikaanse Reg” 1992 Transactions of the Center for Business Law 231-231.
40 Henning & Du Toit 2000 Journal for Juridical Science 159, for related concerns and criticisms.
43 Henning & Du Toit 2000 Journal for Juridical Science 158-165, for similar comments.
Directorate of Public Prosecutions were probably less co-operative or not involved in the primary investigation, detection and prevention of market manipulation practices in the South African financial markets prior to 2004.\textsuperscript{45} Moreover, the Stock Exchanges Control Act and the Financial Markets Control Act did not expressly provide for the establishment of a surveillance system and other methods such as arbitration and alternative dispute resolution, whistle-blowing and bounty rewards to enhance the detection and investigation of market manipulation in the financial markets.

It appears as if the market manipulation prohibition under the Stock Exchanges Control Act and the Financial Markets Control Act did not have extra-territorial application.\textsuperscript{46} Furthermore, it is unclear whether there were any co-operation agreements between the South African enforcement authorities and similar authorities at an international level to combat cross-border market abuse activities prior to 2004.

\section{The Regulation of Insider Trading Prior to 2004}

The insider trading enforcement framework established under the Companies Act (including all its amendments)\textsuperscript{47} and the Insider Trading Act will be examined below to explore how their regulatory and enforcement frameworks were implemented. However, it is not intended for this sub-heading to discuss all the provisions of these Acts in detail. The focus will be on the provisions that dealt with the regulation and enforcement of the insider trading ban under the mentioned statutes.

\subsection{The Regulation of Insider Trading in terms of the Companies Act 61 of 1973 before its 1989 and 1990 Amendments}

It is generally agreed that the regulation of insider trading was only introduced by the relevant provisions of the Companies Act.\textsuperscript{48} The enactment of these provisions was done in accordance with the recommendations of the Van Wyk de Vries Commission of Inquiry into

\textsuperscript{45} Henning & Du Toit 2000 \textit{Journal for Juridical Science} 158-165.
\textsuperscript{46} See s 40 of the Stock Exchanges Control Act; also see s 20 to s 23 of the Financial Markets Control Act.
\textsuperscript{47} The Companies Act was amended by the Companies Amendment Act 78 of 1989 and the Second Companies Amendment Act 69 of 1990.
\textsuperscript{48} See s 224 & s 229 to s 233. Also see further Jooste “Insider Trading: A New Clamp-Down” 1991 \textit{BML} 248-248; the \textit{Explanatory Memorandum to the Objects of the Companies Second Amendment Bill of 1990 B 119-90 (GA)}; Botha “Control of Insider Trading: A Comparative Analysis” 1991 \textit{SA Merc LJ} 1 4.
the Companies Act of 1973. The relevant provisions of the Companies Act will be briefly outlined, with the emphasis on those that directly and expressly outlawed the practice of insider trading.

Some of the provisions of the Companies Act were enacted to enhance the enforcement of its insider trading prohibition by precluding directors, officers and other employees from dealing in a company’s shares before the inside information relating to such shares was made public. Directors and certain officers were prohibited from dealing in share and debenture options of the company or any associated company.

A number of definitions were introduced for the purposes of enforcing the insider trading and other related provisions of the Companies Act. The term “interest” was defined to include any right to subscribe for, or any right to any shares or debentures or any option in respect of shares or debentures, without derogating from the generality of the word. The term “officer” included any employee who would be in possession of any information consequent to his immediate relationship with directors immediately before public announcement of that information under the general insider trading provision. The use of the phrase “includes” suggests that these definitions were not exhaustive. The definitions of “past director” and “person” respectively had the effect of extending the general insider trading provisions to persons according to whose instructions directors would normally act and to past directors for a period of six months after they had ceased to be directors. “Shares and debentures of the company” included shares and debentures of companies in the same group.

For the purposes of this thesis the Commission is hereinafter referred to as the “Van Wyk de Vries Commission” and its main report as “Van Wyk de Vries Report”. See Van Wyk de Vries Report paragraphs 44.49 & 44.57.

S 224 & s 229 to s 232 will be briefly discussed while more emphasis will be focused on s 233 which generally provided for the regulation of insider trading in South Africa under the Companies Act. The analysis of all the provisions of the Companies Act is, however, beyond the scope of this thesis.

S 224 & s 229 to s 232 which were enacted in a bid to improve the enforcement of the insider trading prohibition that was contained in s 233 of the Companies Act. Also see Botha 1991 SA Merc LJ 5.

See s 224 of the Companies Act.

See further s 229 of the Companies Act which contained several definitions for the purposes of enforcing s 230 to s 233 of the same Act.

See s 233 of the Companies Act.

The term “interest” may for instance also cover the interest of beneficiaries under a trust to receive dividends or which a trustee, executor or guardian might have had in those capacities, in a company’s shares. Likewise, the term “officer” was wider than the definition in s 1o of the Companies Act in the sense that it could include other employees who did not occupy executive positions. Also see Milne, Nathan, Lamont Smith & Meskin Henochsberg on the Companies Act (1975) 404-405.

See s 230 to s 233 of the Companies Act.
Every public company was required to keep a special register of interests of directors and others in shares and debentures of the company.\(^{57}\) Failure to comply with any of these provisions was a criminal offence.\(^{58}\)

Directors, past directors, officers and certain persons were obliged to lodge with the company within a specified period a written notice regarding changes in any material interest in their shareholding in the company concerned.\(^{59}\) In other words, directors were required, as soon as they acquired knowledge of the non-public inside information, to determine forthwith by resolution, names of officers taken to be in possession of that information.\(^{60}\)

Every director, past director, officer or any person who had knowledge of inside information concerning a transaction or proposed transaction or the affairs of the company, which, if it would become publicly known, could be expected to materially affect the price of the shares or debentures, shall be guilty of an offence if he would deal in any way to his advantage, directly or indirectly, in such shares or debentures before public announcement of such information on a stock exchange or in a newspaper or through medium of the radio or television.\(^{61}\) The Companies Act specifically prohibited insider trading in relation to listed shares.\(^{62}\) Insider trading was merely treated as a criminal offence which could be committed by a director, officer or employee of the company or a person in accordance with whose instructions, any director was accustomed to act.


The enforcement of the insider trading prohibition was probably a co-operative responsibility of the Johannesburg Stock Exchange, the Registrar of Companies under the jurisdiction of the Department of Trade and Industry, and the Department of Justice (Attorney-General’s

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\(^{57}\) See s 230(1); (2) & (3) of the Companies Act.

\(^{58}\) See s 231(2) of the Companies Act; see further s 230(4) & s 232 (3) of the same Act.

\(^{59}\) See s 232(1)(b) & (c) read with s 230(2) of the Companies Act. See also subsection (1)(a) that provided for particulars relating to non public inside information at the time the Act came into operation.

\(^{60}\) See s 232(1)(d) & (2) of the Companies Act.

\(^{61}\) See s 233 of the Companies Act.

\(^{62}\) The term “insider trading” was only used in relation to securities listed on a regulated market and it applied only to directors or officers of a company. Moreover, the concept of “insider trading” was not defined under the Companies Act. See s 233 of the Companies Act.
Office). The Johannesburg Stock Exchange was primarily responsible for monitoring and detecting the occurrence of insider trading. The Johannesburg Stock Exchange was further mandated to monitor all trading and request dealing returns from brokers when suspected insider trading activities were detected. In addition, the Johannesburg Stock Exchange was required to submit such dealing returns to the Registrar of Companies when suspected insider trading activities were confirmed by the preliminary investigation. Furthermore, the Registrar of Companies was responsible for further analysis of the relevant data and for referring such data to the Attorney-General’s Office.

In addition, the Attorney-General’s Office was responsible for the prosecution of insider trading cases. However, no successful prosecutions of insider trading cases were brought under the Companies Act. This could have been caused in part by serious flaws that were embedded in its initial insider trading provisions. For example, key terms like “insider”, “tippee” and “tipping” were not statutorily and expressly defined under the Companies Act. Moreover, proving that the accused was a person falling under one of the categories of insiders as was proscribed in the Companies Act was difficult and the onus was on the prosecution to prove beyond reasonable doubt that the person accused was aware of the fact that the information he possessed was non-public confidential information. This may have been extremely difficult to prove and could have impeded the successful prosecution of insider trading cases. Besides, the criminal penalties for insider trading were not sufficient to deter potential offenders, considering the enormous profits that an insider could make from such transactions. In light of this, a provision for civil liability could have been an additional deterrent to potential offenders and a meaningful remedy to victims of insider trading. Nonetheless, no provision was made for directors or other insiders to pay civil monetary fines or compensate shareholders, if, for example, such shareholders had sold their shares.

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63 See generally s 224; s 230 to s 233 & s 440 to s 441 of the Companies Act. Also see Botha 1991 SA Merc LJ 5-7.
64 See further s 224; s 230 to s 233 & s 440 to s 441 of the Companies Act.
65 See further s 230 to s 233 & s 440 to s 441 of the Companies Act. Also see Botha 1991 SA Merc LJ 5.
66 The provisions of s 233 came into operation on 1 January 1974. Also see Botha 1991 SA Merc LJ 5-6.
67 See s 233 & s 441 of the Companies Act.
68 There were no civil penalties for insider trading. See s 441(1)(b) of the Companies Act.
69 Botha 1991 SA Merc LJ 5.
shares to the directors ignorant of the fact that they might suffer prejudice due to insider trading.⁷⁰

Professors Bhana and Botha submit that these shortcomings hindered the general enforcement, detection, investigation and prosecution of insider trading cases in South Africa, especially under the Companies Act.⁷¹ As a result, some unscrupulous directors and employees of companies could have enjoyed an unfair advantage over other persons who were denied the opportunity to compete fairly in the buying and selling of shares.⁷²

### 2.3.2 The Regulation of Insider Trading in terms of the Companies Act 61 of 1973 Subsequent to the 1989 Amendments

The original insider trading provision had several flaws.⁷³ As a result it was repealed and replaced by a new provision in terms of the Companies Amendment Act.⁷⁴ A chapter that dealt with the regulation of securities was added to the Companies Act.⁷⁵ Section 440F formed part of this chapter and contained a prohibition of insider trading in very wide terms. A director, past director or any other person connected with a company who had knowledge of any information which, when published, was likely to affect the price of such securities, would be guilty of an offence if he would deal in such securities within 24 hours after the public announcement of that information on a stock exchange, or in a newspaper or television, or by other means.⁷⁶ Thus, tippees would incur the same liability if they were to deal on the basis of the information received from any of the persons referred to in subsection (2)(a), at any time when the tipper was not allowed to deal.⁷⁷

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⁷⁰ See related views and comments in *Percival v Wright* [1902] 2 Ch 421, were it was inter alia argued that directors do not owe any common law fiduciary duties to individual shareholders hence such shareholders will not sue them for insider trading; *Pretorius and Another v Natal South Sea Investment Trust* 1965 3 410 (W) 417 for further discussion on insider trading enforcement in South Africa prior to 2004.


⁷³ See s 233 of the Companies Act.


⁷⁵ Chapter XVA “Regulation of Securities”.

⁷⁶ Also see s 440F (2)(a) of the Companies Amendment Act 78 of 1989.

⁷⁷ See s 440F (2)(b) of the Companies Amendment Act 78 of 1989.
Nevertheless, the insider trading provisions of the Companies Amendment Act\(^{78}\) in their original form repeated some of the flaws that were discussed in relation to the initial insider trading prohibition that was contained in the Companies Act.\(^{79}\) It came under fire for having largely adopted American principles on insider trading without proper regard to the South African circumstances.\(^{80}\)

### 2321 The Purported Enforcement Framework for Insider Trading under the Companies Act 61 of 1973 Subsequent to the 1989 Amendments

The Companies Amendment Act\(^{81}\) introduced the Securities Regulation Panel as a regulatory body that was required to monitor and enforce the insider trading prohibition.\(^{82}\) Eventually, the Securities Regulation Panel had powers to police insider trading by supervising dealings in securities.\(^{83}\) The Securities Regulation Panel further had powers to subpoena and interrogate any persons accused of insider trading.\(^{84}\) Additionally, certain persons were required to disclose to the Securities Regulation Panel any information regarding their beneficial holding of securities.\(^{85}\) Put differently, the Securities Regulation Panel was *inter alia* entrusted with the main responsibility of monitoring and investigating insider trading activities in South Africa prior to 1998.\(^{86}\) This was clearly stated in the Memorandum on the Objects of the Companies Second Amendment Bill of 1989.\(^{87}\)

Consequently, the maximum sentence was considerably increased. Persons convicted of insider trading were liable to pay the relevant enforcement authorities a fine of R500 000, or to be imprisoned for a period not exceeding ten years, or both. Notwithstanding the efforts on the part of the legislature to outlaw insider trading, the provisions of the Companies Amendment Act 78 of 1989 were still seriously flawed. As a result, the insider trading

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78 of 1989; see the original s 440F of the Companies Amendment Act 78 of 1989.
79 See s 233 of the Companies Act.
81 78 of 1989.
82 See s 440B of the Companies Amendment Act 78 of 1989.
83 See s 440C(1)(b) of the Companies Amendment Act 78 of 1989.
84 See s 440D of the Companies Amendment Act 78 of 1989; also see further s 440C(6)(c) of the same Act.
85 See s 440G of the Companies Amendment Act 78 of 1989.
87 [B 99-89 (GA)].
prohibition under the Companies Amendment Act\textsuperscript{88} never came into operation and will therefore not be discussed in detail. It was replaced by a new insider trading prohibition that was introduced in terms of the Second Companies Amendment Act.\textsuperscript{89}

\textbf{2 3 3 \hspace{0.5mm} The Regulation of Insider Trading in terms of the Companies Act 61 of 1973 Subsequent to the 1990 Amendments}

Due to fears that the insider trading ban under the Companies Amendment Act\textsuperscript{90} was not good enough, the Second Companies Amendment Act\textsuperscript{91} extensively revised the provisions that dealt with insider trading and introduced a number of innovations.\textsuperscript{92} The prohibition on insider trading was expressly made applicable to all dealings in securities. The term “securities” was defined to include company shares as well as stock debentures convertible into shares and any rights or interests in a company or rights or interests in respect of any such shares, stock or debentures including any financial instruments as defined in the Financial Markets Control Act.\textsuperscript{93} This definition was still limited to securities in a company or financial instruments as stated.\textsuperscript{94} Insider trading in relation to interests in other entities, including government and semi-government stock, was therefore not expressly prohibited.\textsuperscript{95} However, the Minister could, on the advice of the Securities Regulation Panel and by notice in the Government Gazette, exempt certain classes of persons from the insider trading provisions.\textsuperscript{96}

The provisions of the Second Companies Amendment Act\textsuperscript{97} were, \textit{inter alia}, targeted at correcting the shortcomings of the Companies Amendment Act.\textsuperscript{98} This was enumerated in the Memorandum on the Objects of the Companies Second Amendment Bill of 1990.\textsuperscript{99}

\textsuperscript{88} 78 of 1989.
\textsuperscript{89} 69 of 1990; see the revised s 440F of the Second Companies Amendment Act 69 of 1990.
\textsuperscript{90} 78 of 1989.
\textsuperscript{91} 69 of 1990.
\textsuperscript{92} See the revised s 440F of the Second Companies Amendment Act 69 of 1990.
\textsuperscript{93} See the definition of “security” in s 440A (1) of the Second Companies Amendment Act 69 of 1990.
\textsuperscript{94} The term “company” in this context entailed entities registered or recognised in terms of the Companies Act. See s 1 to 3 of the Companies Act.
\textsuperscript{95} Luiz “Prohibition Against Trading on Inside Information–The Saga Continues” 1990 \textit{SA Merc LJ} 328 328.
\textsuperscript{96} See s 440F (5) and (6) of the Second Companies Amendment Act 69 of 1990.
\textsuperscript{97} 69 of 1990.
\textsuperscript{98} 78 of 1989.
\textsuperscript{99} \[B 119-90 (GA)]. See further Botha 1991 \textit{SA Merc LJ} 11.
Therefore, any person who would knowingly deal directly or indirectly in a security on the basis of unpublished price-sensitive information\(^{100}\) in respect of that security would be guilty of an offence if he knew that such information had been obtained:

(a) by virtue of a relationship of trust or any contractual relationship, irrespective of whether or not the person concerned was a party to that relationship; or

(b) through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method, irrespective of the nature thereof.\(^{101}\)

This clearly suggested that insiders and their tippees were prohibited from dealing in securities on the basis of unpublished price-sensitive information.\(^{102}\) This can be regarded as a positive development.

Moreover, unpublished price-sensitive information was defined as information which:

(a) related to matters of internal affairs of a company, or to its operations, assets, earning power or involvement as offeror or offeree company in an affected transaction; or

(b) was not generally available to the reasonable investor; or

(c) would reasonably be expected to materially affect the price of such securities if it were generally available.\(^{103}\)

Seemingly, the term “generally available”\(^{104}\) meant available in the sense that such steps had been taken, and such time had elapsed, that it could reasonably be expected that the

\(^{100}\) Information other than financial data that could also lead to insider trading was not considered. Examples may include the incompetence and resignation of a company’s directors. Such information may arguably not be treated as inside information in terms of the Companies Act but it may still have a material effect on the price of securities or financial instruments if investors withdraw their investments in the company concerned. Generally see Myburgh & Davis (25-03-2004) 8 [\texttt{http://www.genesis-analytics.com/public/FSBReport.pdf}] (accessed 09-02-2009); also see Van Deventer (10-06-2008) 1-5 [\texttt{http://www.fsb.co.za/public/marketabuse/FSBReport.pdf}] (accessed 05-05-2009) for further discussion and related analysis.

\(^{101}\) S 440F(1) of the Second Companies Amendment Act 69 of 1990.

\(^{102}\) Botha 1991 \textit{SA Merc LJ} 12.

\(^{103}\) S 440F(2) of the Second Companies Amendment Act 69 of 1990.
information in question should have been known to the reasonable investor in the relevant markets.\footnote{105}

\section*{2 3 3 1 The Enforcement of the Insider Trading Prohibition in terms of the Companies Act 61 of 1973 Subsequent to the 1990 Amendments}

The enforcement of the insider trading ban was now a joint responsibility of the Securities Regulation Panel, the Registrar of Companies and the Department of Justice. As indicated earlier,\footnote{106} the Securities Regulation Panel was responsible for investigating and policing insider trading provisions. Its functions included the supervision of dealings in securities and exercising control over insider trading. In another attempt to improve the enforcement, the Securities Regulation Panel was again given powers to subpoena and to further interrogate witnesses and impose an obligation on certain persons to disclose to the Securities Regulation Panel information relating to their beneficial dealing in securities. This was done by requesting companies to disclose all the details of the amount of equity securities of which a person was a beneficial owner.\footnote{107} It was also responsible for ensuring that persons who suffer harm due to insider trading have a fair platform to lodge their complaints so that they have proper access to a civil remedy. Nonetheless, there was no provision for victims to claim compensation directly from persons who were convicted of insider trading (private rights of action).

Two presumptions were introduced to assist the enforcement and prosecuting authorities in obtaining convictions in matters involving insider trading.\footnote{108} Firstly, if it was proved that the accused, at the time of the alleged dealing, was in possession of unpublished price-sensitive information in respect of the relevant securities, it would be deemed, unless the contrary is proved, that the accused had knowingly dealt in those securities on the basis of such information. Secondly, if proved that the unpublished price-sensitive information was obtained in a manner as stated earlier in the relevant provisions of the Second Companies

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\begin{itemize}
\item \footnote{104}{See s 140A(3) of the Companies Act as introduced in terms of the Companies Amendment Act 37 of 1999; also see explanatory remarks on disclosure requirements in Government Gazette (18868) 8 May 1998.}
\item \footnote{105}{S 440F(2)(b) of the Second Companies Amendment Act 69 of 1990.}
\item \footnote{106}{See paragraph 2 3 2 1 above.}
\item \footnote{107}{S 440B of the Second Companies Amendment Act 69 of 1990; also see s 140A (3) introduced in terms of the Companies Amendment Act 37 of 1999.}
\item \footnote{108}{S 440F(3) of the Second Companies Amendment Act 69 of 1990.}
\end{itemize}
Amendment Act, the accused was deemed to have known that the information had been so obtained, unless the accused could prove the contrary.

The maximum sentence for insider trading was a fine of R500 000, or imprisonment for a period of ten years, or both. In spite of these significant changes, the enforcement of insider trading remained problematic in that no person was convicted for insider trading under the Second Companies Amendment Act. Moreover, the Securities Regulation Panel did not have its own surveillance preventative measures to assist in the detection of suspected insider trading activities and it further lacked authority to impose civil penalties that could have increased settlements in civil cases of insider trading. One could still raise some concerns as to whether there was sufficient co-operation between the Securities Regulation Panel, the Registrar of Companies and the Department of Justice in relation to the enforcement of the insider trading prohibition.

234 The Regulation of Insider Trading in terms of the Insider Trading Act 135 of 1998

A novel regime aimed at resolving the tenacious insider trading problem in South Africa was introduced by the Insider Trading Act. The Insider Trading Act repealed and replaced the relevant provisions of the Companies Act in an effort to broaden the scope of the insider trading prohibition. In addition to treating insider trading as a criminal offence, an attempt was made to provide more appropriate civil remedies to those who would suffer prejudice as a result of insider trading activities. Furthermore, more severe criminal sanctions were introduced and the insider trading ban was extended to a wide spectrum of financial instruments other than securities of companies. The provisions of the Insider Trading Act, enforcement methods and the role of the enforcement authorities will be analysed below. This analysis is divided into four parts. Firstly, the provisions that relate to the key concepts of the insider trading prohibition will be briefly discussed. Secondly, the provisions that deal with the enforcement of the insider trading sanctions and penalties will be examined. Thirdly,

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109 69 of 1990.
110 S 440F(1)(a) or (b) of the Second Companies Amendment Act 69 of 1990.
111 69 of 1990.
a closer look at the roles of the enforcement authorities will be carried out. Lastly, the enforcement methods adopted under the Insider Trading Act will be discussed.

2341 The Definition of Selected Key Terms and Concepts under the Insider Trading Act 135 of 1998

The term “insider” was defined as an individual who has inside information through being a director, employee or shareholder of an issuer of securities or financial instruments to which the inside information relates or having access to such information by virtue of his employment, office or profession or where such individual knew that the direct or indirect source of the inside information was a director, employee or shareholder as contemplated in the Insider Trading Act.¹¹⁵

Two categories of insiders were therefore contemplated under the Insider Trading Act. Firstly, there were primary insiders such as the directors, employees or shareholders of an issuer of securities or financial instruments to which the inside information relates, and which may include fortuitous insiders or individuals who have access to the inside information by virtue of their employment, office or profession but who are not officers or employees of the company itself.¹¹⁶ Secondly, there were secondary insiders or tippees, being individuals who know that the direct or indirect source of their inside information is a primary insider.

The focus in the definition on individuals as insiders clearly implies the exclusion of juristic persons. In this context the scope of the definition is too limited.¹¹⁷ Individuals can easily involve themselves in insider trading activities through juristic persons under their control without their entities or companies incurring any liability. The exclusion of companies and other juristic persons from the definition of an “insider” can therefore be regarded as a serious flaw that was contained in the Insider Trading Act and a major compromise on the part of the legislature.

¹¹⁵ S 1 of the Insider Trading Act.
¹¹⁶ In this regard, the pool of individuals who could become insiders was now large and included not only directors, employees and advisors but also many others, like advertising and production professionals engaged to compile and publish inside information for printing.
Inside information was defined as specific or precise information which has not been made public and which is obtained or learned by an individual as an insider and which, if it were made public, would be likely to have a material effect on the price or value of any securities or financial instruments.\textsuperscript{118}

Only accurate and factual non-public inside information would fall in the ambit of the definition.\textsuperscript{119} Information therefore had to meet four requirements to qualify as inside information in terms of the Insider Trading Act. Firstly, the information was required to be factually specific or precise. Inaccurate and any unconfirmed information, speculation about whether information might be true, rumours or promises were excluded. Trading on the basis of rumours or speculation about the value of securities or financial instruments could, however, still occur and harm ignorant outsiders. The terms “specific” or “precise” were not defined and it was left to the courts to determine what would constitute specific or precise information. Although it can be assumed that all persons should have a broad understanding of the general meaning of these terms, everybody might not appreciate the degree of specificity or precision required for information to qualify. This obscurity could have offered other persons an opportunity to engage in insider trading practices without incurring liability.

Secondly, the inside information must have been information which was only obtained from an insider. Instances where the information originated from sources other than the insiders were therefore not expressly included in the definition. This exclusion might also have left room for abuse. Whatever the situation, the fact remains that price-sensitive information that is leaked unintentionally by insiders was not covered by the definition and could still be used by other persons to indulge in insider trading activities.

Thirdly, the information must not have been made public as superficially stipulated in the Insider Trading Act.\textsuperscript{120} The term “publication” was not statutorily defined, but a number of ways in which the non-public inside information was deemed to have been published were enumerated.\textsuperscript{121} Lastly, the non-public inside information was required to be likely to have a

\textsuperscript{118} S 1 of the Insider Trading Act.
\textsuperscript{119} Osode 2000 \textit{Journal of African Law} 248.
\textsuperscript{120} S 3 of the Insider Trading Act.
\textsuperscript{121} S 3 of the Insider Trading Act
material effect on the price or value of the securities after having been made public. Nonetheless, the term “material effect” was not defined. Moreover, although some of the elements of the insider trading offence were merely stated, the concept of “insider trading” was not statutorily and expressly defined under the Insider Trading Act. It could be argued that the failure of the Insider Trading Act to provide adequate definitions of these and other terms contributed to the inconsistent enforcement of its provisions.

2.3.4.2 The Selected Key Elements of the Insider Trading Offence under the Insider Trading Act 135 of 1998

Actual dealing in securities or financial instruments for making a profit or avoiding a loss for oneself as well as for any other person was prohibited. Individuals were only liable if they knew that they had inside information. Therefore, knowledge was a prerequisite for criminal liability under the Insider Trading Act. Consequently, it was very difficult for the prosecuting authorities to prove beyond reasonable doubt that the accused was aware that he was in possession of inside information. Seemingly circumstantial evidence would not suffice for the purposes of the insider trading offence under the Insider Trading Act. This might explain why very little or no success was achieved in the enforcement of the criminal sanctions especially under the Insider Trading Act.

Encouraging or discouraging (tipping) another person to deal or from dealing in securities or financial instruments was prohibited. Nonetheless, what constituted illegal conduct or tipping on the part of the insider was not distinctly and expressly stated. Apparently, it was

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122 See the definition in s 1 of the Insider Trading Act.
123 See the definition in s 1 of the Insider Trading Act.
124 S 2(1)(a) of the Insider Trading Act.
125 S 2(1)(a) of the Insider Trading Act.
128 During the period between January 1999 and January 2002, 28 cases of insider trading were investigated. Only 22 cases were successfully settled for civil penalties and no convictions were obtained in the other six criminal cases. This information was obtained from an interview that was conducted at the Financial Services Board by the researcher, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse or the DMA) on 05 May 2009.
129 This prohibition was aimed at discouraging persons who were privy to non public price-sensitive information to incite others to deal or to refrain from dealing in securities or financial instruments to the detriment of innocent (outside) investors who were at an informational disadvantage. See further s 2(1)(b) of the Insider Trading Act.
130 S 2(1)(b) of the Insider Trading Act.
immaterial for purposes of incurring liability whether the tippee had actually acted on the tip or whether the insider involved had made a profit or avoided a loss.

Improper disclosure of non-public price-sensitive information was further outlawed. The use of the term “individual” once again implied the exclusion of juristic persons and a natural person could only be guilty of the offence if he was fully aware that he was in possession of inside information and failed to prove any of the defences that were provided. Ostensibly, mere disclosure of information by a person who knew that it was inside information was sufficient to constitute an offence in terms of the section, irrespective of whether it was acted upon or not. However, the prohibition did not extend to innocent disclosure by an individual who was ignorant of the fact that the information had not yet been made public. For example, an uneducated individual who was simply employed to clean up the company’s offices (a cleaner in a company) who overheard the directors celebrating the company’s good financial results while performing his duties and later innocently and ignorantly disclosed that information to his friend who then purchased shares on the basis thereof, could not be convicted under Insider Trading Act.

Civil liability could be incurred by any person who dealt in securities or financial instruments for his own account. Such person could be ordered to pay to the Financial Services Board an amount as provided for in the civil provisions of the Insider Trading Act. This enabled the Financial Services Board to assist prejudiced persons to be compensated by individuals who practised insider trading for their own benefit. Nevertheless, the onus of proof was on the Financial Services Board to prove on a balance of probabilities that the defendant knowingly dealt directly or indirectly in the affected securities or financial instruments for his own account.

131 S 2(2) of the Insider Trading Act.
132 S 2(2) of the Insider Trading Act.
133 S 4(2) of the Insider Trading Act.
135 S 6(1)(a) of the Insider Trading Act.
136 S 6(4) of the Insider Trading Act.
137 S 6(1)(a) of the Insider Trading Act.
Any individual who knew that he had inside information and dealt in the affected securities or financial instruments to gain a profit or avoid a loss through such dealing could be ordered to pay to the Financial Services Board an amount as provided for in the relevant provisions of the Insider Trading Act. Additionally, civil penalties for the improper disclosure of price-sensitive information could be imposed on an individual who knowingly disclosed that information to other persons and failed to prove on a balance of probabilities any one of the stipulated defences or any other defence available to him.

Civil liability for encouraging or causing another person to deal in securities or financial instruments was further discouraged under the Insider Trading Act. Furthermore, civil liability could be incurred by any person who dealt in securities or financial instruments for another person’s account. Accordingly, any person who entered into any unlawful dealing on behalf of any other person could therefore incur civil liability jointly and severally with that person irrespective of their relationship.


The contravention of the provisions of the Insider Trading Act attracted criminal and civil sanctions. Likewise, the Financial Services Board, courts, the Insider Trading Directorate and the Directorate of Public Prosecutions were entrusted with responsibility to jointly enforce these provisions. Precisely, the Financial Services Board was given wide powers to monitor and enforce the insider trading prohibition.

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138 S 6(1)(b) of the Insider Trading Act.
139 S 6(4)(a) of the Insider Trading Act. Also see Van Deventer 1999 FSB Bulletin 3 for more discussion on the role of the Financial Services Board.
140 S 6(2)(a) of the Insider Trading Act.
141 S 6(4)(a) of the Insider Trading Act.
142 S 6(2)(b) of the Insider Trading Act.
143 S 6(2)(c) of the Insider Trading Act.
144 S 6(2)(c) of the Insider Trading Act.
147 S 11(1) & (2)(a) to (i) & subsections (3) to (11) of the Insider Trading Act.
Additionally, the Insider Trading Directorate was, as a committee of the Financial Services Board, responsible for exercising all the powers of the Financial Services Board.\textsuperscript{148} It also had powers to decide whether to take civil action or to refer criminal matters to the Directorate of Public Prosecutions or the courts. The Insider Trading Directorate could also institute a prosecution when the Directorate of Public Prosecutions or the courts neglected to prosecute any alleged insider trading case.\textsuperscript{149} The Insider Trading Directorate was further entitled to withdraw, abandon or compromise any civil proceedings in terms of the Insider Trading Act.\textsuperscript{150} The Insider Trading Directorate was nevertheless limited and it relied heavily on the Johannesburg Stock Exchange Limited’s\textsuperscript{151} Surveillance Department, for the tracking and detection of insider trading activities.

Individuals convicted of any insider trading offence could be sentenced to pay the Financial Services Board a fine not exceeding R2 million, or imprisonment for a period not exceeding ten years, or both such fine and such imprisonment.\textsuperscript{152} Be that as it may, the enforcement of the provisions of the Insider Trading Act was still difficult in that only a few civil settlements and criminal convictions were successfully obtained.\textsuperscript{153} The R2 million fine and the ten years term of imprisonment were yet again not sufficient to deter persons from getting involved in insider trading activities.\textsuperscript{154} Furthermore, the courts and the Directorate of Public Prosecutions did not have the capacity to conduct effective and timeous prosecutions. Although the Financial Services Board was empowered in terms of the Insider Trading Act to regulate insider trading, the prosecuting function was mainly vested in the courts. Besides, the everlasting backlog in our criminal courts might also have delayed criminal prosecutions for insider trading and in spite of the fact that South Africa was among the first countries to introduce civil remedies,\textsuperscript{155} the flaws in the civil provisions could have undermined the successful enforcement of the civil sanctions.\textsuperscript{156}

\textsuperscript{148} See s 12 of the Insider Trading Act.
\textsuperscript{149} See s 11(10) of the Insider Trading Act. Also see Luiz “Insider Trading Regulation – If at First You Don’t Succeed…” 1999 SA Merc LJ 139 145.
\textsuperscript{150} See s 11(10) of the Insider Trading Act. Also see Luiz “Insider Trading Regulation – If at First You Don’t Succeed…” 1999 SA Merc LJ 139 145.
\textsuperscript{151} Hereinafter referred to as the JSE.
\textsuperscript{152} S 6; s 12(13) & (14) of the Insider Trading Act.
\textsuperscript{153} In relation to this, generally see Osode 2000 Journal of African Law 239-248; Luiz 1999 SA Merc LJ 139-145.
\textsuperscript{156} S 6 of the Insider Trading Act.
The pioneering provisions in the Companies Act (including all its amendments) were not only inconsistent for the purposes of combating insider trading, but were also not properly enforced. Notably, the enforcement (approaches) methods adopted under the Companies Act as amended were few and restricted to criminal sanctions. By enacting criminal penalties, it appears the legislature relied mainly on the policy goal of deterrence which nonetheless failed to discourage some persons from practising insider trading. Other enforcement approaches such as civil sanctions, bounty rewards and whistle-blowing were not considered.

As indicated earlier, the enforcement bodies established in terms of the Companies Act did not achieve much success in the enforcement of the insider trading prohibition. In light of this, the Second Companies Amendment Act officially launched the Securities Regulation Panel as an independent body with powers to supervise, detect, investigate, and police insider trading in South Africa. The Second Companies Amendment Act further introduced civil sanctions. In spite of this, not much success was achieved in terms of the enforcement of criminal and civil sanctions of insider trading under the Second Companies Amendment Act. This might have been caused by the fact that other enforcement methods such as whistle-blowing, bounty rewards and administrative sanctions were not considered.

The enactment of the Insider Trading Act was therefore welcomed as another attempt to enhance the enforcement of insider trading in South Africa. This Act introduced considerably higher criminal penalties and more elaborate civil remedies. Notably, the Insider Trading Act empowered the Financial Services Board to be solely responsible for the policing of insider trading and established the Insider Trading Directorate as an investigatory

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157 See the discussions in paragraphs 2 3 1 1; 2 3 2 1 & 2 3 3 1 above.
158 See the discussions in paragraphs 2 3 1 1; 2 3 2 1 & 2 3 3 1 above. Also see Jooste “Insider Dealing in South Africa—The Criminal Aspects” 1990 De Ratione 21 21; Botha “Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?” 1990 SALJ 504 504.
159 See the discussions in paragraphs 2 3 1 1; 2 3 2 1 & 2 3 3 1 above. Also see Jooste “Insider Dealing in South Africa—The Criminal Aspects” 1990 De Ratione 21 21; Botha “Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?” 1990 SALJ 504 504.
160 See the discussions in paragraphs 2 3 1 1; 2 3 2 1 above.
161 69 of 1990.
162 See the discussions in paragraph 2 3 3 1 above.
163 69 of 1990.
164 S 440F of the Second Companies Amendment Act of 1990.
165 69 of 1990.
arm of the Financial Services Board. Notwithstanding these developments, various gaps and flaws were still embedded in the provisions of the Insider Trading Act and these, in a way, impeded the proper enforcement of the insider trading ban in South Africa.\textsuperscript{166} Not giving less regard to some key factors like the challenges involving the availability of adequate financial resources in South Africa, the Insider Trading Act, like its predecessors, also failed to provide expressly for other alternative practical enforcement methods like administrative sanctions, whistle-blowing, private rights of action, the establishment of additional self-regulatory organs and specific insider trading courts or tribunals to complement the enforcement efforts of the Financial Services Board.

As summarised above, one can probably assert that the general enforcement of the insider trading prohibition prior to 2004 was not very successful.

The Companies Act was recently repealed by the Companies Act\textsuperscript{167} which \textit{inter alia} broadly deals with the disclosure of relevant information relating to uncertified securities by issuers and Central Securities Depository participants in another attempt to combat illicit trading practices. For instance, the Companies Act\textsuperscript{168} provides that issuers, companies and/or Central Securities Depository participants must timeously record and maintain all the relevant details relating to uncertified securities in their securities registers.\textsuperscript{169} This Act also states that issuers, companies and/or Central Securities Depository participants must have clear guidelines and requirements in place for the inspection of such registers\textsuperscript{170} as well as their own internal audit committees.\textsuperscript{171} Issuers, companies and/or registered shareholders are further required to disclose any of their beneficial interests held in respect of their securities.\textsuperscript{172} Nonetheless, it remains to be seen whether or not the relevant provisions of the Companies Act\textsuperscript{173} are robust enough to prevent insider trading and market manipulation in South Africa.

\textsuperscript{166} See paragraph 2 3 4 3 above.  
\textsuperscript{167} 71 of 2008.  
\textsuperscript{168} 71 of 2008.  
\textsuperscript{169} S 50 & s 52 of the Companies Act 71 of 2008.  
\textsuperscript{170} S 50 & s 52 of the Companies Act 71 of 2008.  
\textsuperscript{171} S 94(7)(i) of the Companies Act 71 of 2008.  
\textsuperscript{172} S 56 of the Companies Act 71 of 2008.  
\textsuperscript{173} 71 of 2008.
2 4 4 The Regulation of Market Abuse under the Securities Services Act 36 of 2004

2 4 1 Definitions of Selected Terms and Concepts

The regulation of market abuse under the Securities Services Act will be briefly examined under this sub-heading by investigating the meaning and application of some selected terms and concepts such as “person”, “participant”, “regulated market”, “market abuse”, “market corner”, and “market abuse rules”.

2 4 1 1 The Concept of Market Abuse

“Market abuse” is not statutorily and expressly defined in the Securities Services Act. However, a number of practices that would give rise to criminal and civil liability for market abuse are simply stated in the Securities Services Act.174 Three major forms of market abuse, namely insider trading, prohibited trading practices (trade-based market manipulation) and the publication of false, misleading or deceptive statements (disclosure-based market manipulation) relating to listed securities are prohibited under the Securities Services Act. Notably, the same types of market abuse are also outlawed in the Financial Markets Bill and the Financial Markets Bill 2012 but nonetheless the concept of market abuse is not defined in these Bills.175

Insider trading is specifically prohibited in the Securities Services Act.176 For example, any person who knows that he has non-public price-sensitive information and who improperly discloses it or encourages or discourages another person from dealing or who deals directly or indirectly for his benefit or for the benefit of any other person in securities to which such information relates or where the price of such securities is likely to be affected by such dealing will incur criminal or civil liability for insider trading.177 The same practices will also give rise to insider trading under the Financial Markets Bill and the Financial Markets Bill 2012.178

174 See s 73; s 75; s 76 & s 77 of the Securities Services Act.
175 Clauses 81; 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
176 S 73 & s 77 of the Securities Services Act; also see clauses 82 & 86 of the Financial Markets Bill & clauses 80 & 84 of the Financial Markets Bill 2012.
177 S 73 & s 77 of the Securities Services Act respectively.
A prohibition against trade-based market manipulation is further stipulated in the Securities Services Act. Examples of activities that are deemed to be manipulative include executing a transaction with no beneficial change of ownership of the securities and entering orders into the market near the close of the market or during the auctioning process for the purpose of creating a deceptive appearance in that market. The same approach is also employed in the Financial Markets Bill and the Financial Markets Bill 2012 and accordingly, similar conduct that amounts to, or that may be deemed to constitute trade-based market manipulation, is outlawed in the aforementioned Bills.

Disclosure-based market manipulation is also prohibited under the Securities Services Act. This prohibition on the making or publication of false, misleading or deceptive statements, promises and forecasts can be welcomed because such information often distorts the market price of securities, giving rise to direct or indirect prejudice to innocent market participants. The same practices are prohibited in the Financial Markets Bill and the Financial Markets Bill 2012, but nonetheless Internet-related manipulative disclosures are still not expressly outlawed in the aforementioned Bills.

In spite of the relatively new changes briefly stated above and the fact that the Securities Services Act was enacted as a separate piece of legislation that specifically consolidates all previous market abuse laws, the regulation and enforcement of the market abuse ban in South Africa have remained scant and inconsistent to date. This could have been inter alia aggravated by the fact that it would only amount to market abuse if the accused person knew that he contravened, directly or indirectly, the relevant provisions of the Securities Services Act. This suggests that the knowledge of the market abuse offence in question is required on the part of the offenders before any liability can be imputed on them. Nonetheless, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have any presumptions which could be used to enhance the prosecution of market abuse cases in South Africa. In light of this, it is suggested that enacting a statutory provision for a

179 S 75 of the Securities Services Act.
180 A brief discussion on each of the sub-sections under s 75 of the Securities Services Act will be carried out later.
182 S 76 of the Securities Services Act.
184 See the analysis that will ensue later in paragraph 3 2 7 in Chapter Three of this thesis.
definition of the concept of “market abuse” involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa. Moreover, notwithstanding the difficulties that might have been previously encountered in relation to factors like repetition of same provisions, double jeopardy and over-criminalisation of market abuse practices in different statutes, the mere consolidation of the market abuse provisions into the Securities Services Act on its own did not sufficiently improve the enforcement of the market abuse ban in South Africa.\footnote{185} Furthermore, given the fact that the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions duplicated some of the flaws previously contained in the Securities Services Act, it remains to be seen whether or not the Financial Markets Bill or the Financial Markets Bill 2012’s market abuse prohibition will enhance the combating of market abuse activities in South Africa.

\textbf{2.4.1.2 The Meaning of “Market Corner” and “Market Abuse Rules”}

The term “market corner” is defined as any arrangement, agreement, commitment or understanding involving the purchasing, selling or issuing of securities listed on a regulated market by which a person, or a group of persons acting in concert, acquires direct or indirect beneficial ownership of, or exercises control over, or is able to influence the price of securities listed on a regulated market; and where the effect of the arrangement, agreement, commitment or understanding is or is likely to be that the trading price of the securities listed on a regulated market, as reflected through the facilities of a regulated market, is or is likely to be abnormally influenced or arbitrarily dictated by such person or group of persons in that the said trading price deviates or is likely to deviate materially from the trading price which would otherwise likely have been reflected through the facilities of the regulated market on which the particular securities are traded.\footnote{186} This definition discourages market manipulation through the creation of a false impression of the volumes traded in securities or abnormal and artificial trading prices in listed securities. Even so, a “market corner” can only be formed after an arrangement or agreement in respect of the selling, issuing or purchasing of securities listed on a regulated market is made by a person or the persons involved. Instances where a “market corner” could have been formed in respect of, and/or influenced by securities traded

\footnote{185}{See the analysis that will ensue later in paragraph 3.2.7 in Chapter Three of this thesis.}
\footnote{186}{S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012.}
in the over the counter markets were not expressly outlawed under the Securities Services Act. The same flaw is retained in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{187}

Furthermore, the term “market abuse rules” is defined to include the duties of the Financial Services Board to make relevant rules concerning the administration of market abuse by the Financial Services Board and the Directorate of Market Abuse; the manner in which investigations of market abuse are to be conducted; the notification of any civil monetary compensatory amounts received; the procedure for the lodging and proof of claims; the administration of trust accounts and the distribution of payments in respect of claims; the meetings of the Directorate of Market Abuse which are generally designed to ensure that the Financial Services Board and the Directorate of Market Abuse are able to perform their functions dealing with the manner in which inside information should be disclosed and with the conduct expected of persons with regard to such information.\textsuperscript{188} Notably, the Financial Services Board has discretion to make such “market abuse rules” only after consulting with the Directorate of Market Abuse. Besides this, no express provision was made in the Securities Services Act to empower the Financial Services Board to make its own market abuse rules pertaining to the enforcement of criminal and administrative sanctions for market abuse offences. This flaw is also retained in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{189}

\textbf{2 4 1 3 The Meaning of “Person” and “Regulated Market”}

The term “person” is defined in the Securities Services Act to include a partnership and any trust.\textsuperscript{190} This implies that market abuse offences can now be committed by an insider or a “person” as defined who misuse inside information through insider trading or market manipulation and not by “individuals” alone. Accordingly, an “insider” means a person who has inside information through being a director, employee or shareholder of an issuer of


\textsuperscript{188} S 82(2)(g)(i) to (vi) of the Securities Services Act; also see clause 91(2)(f)(i) to (vi) of the Financial Markets Bill & clause 86(2)(f)(i) to (vi) of the Financial Markets Bill 2012.

\textsuperscript{189} Clause 91(2)(f)(i) to (vi) of the Financial Markets Bill & clause 86(2)(f)(i) to (vi) of the Financial Markets Bill 2012.

\textsuperscript{190} S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012.
securities listed on a regulated market to which the inside information relates; or having access to such information by virtue of employment, office or profession; or where such person knows that the direct or indirect source of the information was an insider as contemplated in the Securities Services Act. Additionally, inside information means specific or precise information which has not been made public and which is obtained or learned by an insider and which, if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market. However, Jooste argues that the definition of a “person” leaves some doubt as to whether it also includes a corporate or any other legal entity. In relation to this, the researcher agrees in part with Jooste, and further submits that the inconsistence or confusion is caused by the employment of the phrases “he or she” in some market abuse provisions of the Securities Services Act. Accordingly, this employment of the phrases “he or she” could imply that the definition of the term “person” is still limited to natural persons alone. This flaw remains unresolved in the Financial Markets Bill and the Financial Markets Bill 2012.

Likewise, the term “regulated market” means any market, whether domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market. This suggests that market abuse provisions have extra-territorial application. For example, any person who commits market abuse on a regulated foreign market say, by manipulating share prices or dealing on the basis of non public price-sensitive information relating to securities listed on such market while

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191 S 72(a)(i) of the Securities Services Act; also see clause 81(a)(i) of the Financial Markets Bill & clause 79(a)(i) of the Financial Markets Bill 2012.
193 S 72(b) of the Securities Services Act; also see clause 81(b) of the Financial Markets Bill & clause 79(b) of the Financial Markets Bill 2012.
194 S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012.
195 S 332(1) of the Criminal Procedure Act 51 of 1977 in this regard.
196 See the definition of “person” in s 2 of the Interpretation Act 33 of 1957. This doubt was probably caused by the reference to “he or she” in some market abuse provisions such as s 73 & s 77 of the Securities Services Act. Also see Jooste 2006 SALJ 438.
197 For example see s 73 & s 77 of the Securities Services Act.
198 For example see clauses 82 & 86 of the Financial Markets Bill & clause 80 of the Financial Markets Bill 2012.
199 S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012.
domiciled in South Africa, can be prosecuted in South Africa. The application of the market abuse prohibition under the Securities Services Act is surprisingly not limited to situations where there is a territorial link between the actual commission of market abuse offences and South Africa. The same status quo is set to be retained under the Financial Markets Bill and the Financial Markets Bill 2012. Thus, even though this extra-territorial application appears to be a sound move for curbing cross-border market abuse activities, it has not been used more regularly, probably due to lack of adequate resources. From a comparative perspective, one can argue that a restricted and more practical approach should have been adopted to meritoriously combat market abuse in South Africa. In light of this, the prohibition on market abuse should apply to transactions on foreign markets where a territorial link is present by virtue either of the fact that the offender is at the time physically present in South Africa, or was acting through an intermediary who is in South Africa or by virtue of the prohibited conduct occurring in South Africa. Nonetheless, the timeous enforcement and recognition of foreign judgements in cross-border market abuse cases is another challenge that could be associated with the extra-territorial application of market abuse provisions in South Africa. In order to solve this problem, it is submitted that the South African courts or tribunals should recognise, where necessary, the relevant international law and foreign law as enshrined in the constitution. Apparently, if a South African citizen who is an insider but is domiciled in New York, contacted a broker in South Africa to purchase any security listed on the JSE in order to conceal the illegal nature of such dealing, the Financial Services Board and/or the relevant court can co-operatively rely on the United States Securities and Exchange Commission to investigate, interrogate or prosecute such person for market abuse. In this regard, when a judgement relating to such market abuse is handed down in South Africa, it will also have extra-territorial force in the United States of America.

200 For further discussion see Jooste 2006 SALJ 453.
203 Jooste 2006 SALJ 453.
205 See s 39(1)(b) & (c) of the constitution.
2.5 Prohibited Trading Practices and Penalties

The prohibition on trade-based market manipulation, disclosure-based market manipulation, insider trading and the available penalties in respect thereof will be briefly investigated under this sub-heading.

2.5.1 Prohibition on “Trade-based Market Manipulation”

A considerable number of trade-related manipulative practices are prohibited under the Securities Services Act.\footnote{S 75 of the Securities Services Act; also see clause 84 of the Financial Markets Bill & clause 82 of the Financial Markets Bill 2012.} For example, any person who directly or indirectly uses or knowingly participates in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, either for such person’s own account or on behalf of another person, where such practice creates or might create a false or deceptive appearance of the trading activity in connection with or an artificial price for that security will be guilty of an offence.\footnote{S 75(1)(a)(i) & (ii) of the Securities Services Act; also see clause 84(1)(a)(i) & (ii) of the Financial Markets Bill & clause 82(1)(a)(i) & (ii) of the Financial Markets Bill 2012.} In addition, any person who places an order to buy or sell listed securities which, to his knowledge will, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with or an artificial price for such securities will be guilty of an offence.\footnote{S 75(1)(b) & (2) of the Securities Services Act; also see clause 84(1)(b) & (2) of the Financial Markets Bill & clause 82(1)(b) & (2) of the Financial Markets Bill 2012.}

The other examples of trading practices that are deemed to be manipulative include, among others, executing a transaction with no beneficial change of ownership of the securities;\footnote{This practice is sometimes called a “wash trade”. See s 75(3)(a) of the Securities Services Act; also see clause 84(3)(a) of the Financial Markets Bill & clause 82(3)(a) of the Financial Markets Bill 2012. See further Alcock “Market Abuse” 2002 The Company Lawyer 142 143.} entering an order to buy or sell a security on a regulated market knowing of a similar opposite order that has been entered, or will be entered,\footnote{S 75(3)(b) of the Securities Services Act; also see clause 84(3)(b) of the Financial Markets Bill & clause 82(3)(b) of the Financial Markets Bill 2012.} with the intention of creating a deceptive appearance of active public trading in connection with or an artificial market price for that
security;\textsuperscript{211} entering on a regulated market, orders to buy or sell a security listed on that market at successfully higher or lower prices for the purpose of improperly influencing the market price for that security;\textsuperscript{212} entering on a regulated market an order at or near the close of the market to change or maintain the closing price of a security listed on that market;\textsuperscript{213} entering on a regulated market an order to buy or sell a security listed on that market during any auctioning process or pre-opening session and cancelling such order immediately prior to the opening of the market to create a deceptive or false appearance of demand for or supply for that security;\textsuperscript{214} maintaining an artificial price for dealing in securities listed on a regulated market;\textsuperscript{215} employing any device, scheme or artifice to defraud other persons as a result of a transaction effected through the facilities of a regulated market;\textsuperscript{216} engaging in an act, practice or course of business in respect of dealings in any listed securities which is deceptive or which is likely to have such effect\textsuperscript{217} and effecting a market corner.\textsuperscript{218}

The offender is required to know that he is taking part in a prohibited trading practice on a regulated market and the effect or possible effect of such practice before he can incur any liability.\textsuperscript{219} This may imply that persons who engage in trade-based market manipulative practices in respect of any listed securities in South Africa may evade their liability if they prove that they ignorantly dealt in the affected securities.\textsuperscript{220} Moreover, the prohibition on

\textsuperscript{211} The false trading practice need only create the false appearance of trading or artificial price and it need not actually have had the defined effect. See Luiz “Market Abuse - II” 2002 JBL’s Quarterly Law Review for People in Business 180 180 for further review and related comments.

\textsuperscript{212} S 75(3)(c) of the Securities Services Act; also see clause 84(3)(c) of the Financial Markets Bill & clause 82(3)(c) of the Financial Markets Bill 2012.

\textsuperscript{213} S 75(3)(d) of the Securities Services Act; clause 84(3)(d) of the Financial Markets Bill & clause 82(3)(d) of the Financial Markets Bill 2012.

\textsuperscript{214} S 75(3)(e) of the Securities Services Act; also see clause 84(3)(e) of the Financial Markets Bill & clause 82(3)(e) of the Financial Markets Bill 2012.

\textsuperscript{215} S 75(3)(g) of the Securities Services Act; clause 84(3)(g) of the Financial Markets Bill & clause 82(3)(g) of the Financial Markets Bill 2012.

\textsuperscript{216} S 75(3)(h) of the Securities Services Act; clause 84(3)(h) of the Financial Markets Bill & clause 82(3)(h) of the Financial Markets Bill 2012.

\textsuperscript{217} S 75(3)(i) of the Securities Services Act; also see clause 84(3)(i) of the Financial Markets Bill & clause 82(3)(i) of the Financial Markets Bill 2012. Additional comparative analysis of these practices that are deemed manipulative in South Africa will ensue later in Chapters Nine of this thesis.

\textsuperscript{218} S 75(3)(f) of the Securities Services Act; also see clause 84(3)(f) of the Financial Markets Bill & clause 82(3)(f) of the Financial Markets Bill 2012.


\textsuperscript{220} S 75 of the Securities Services Act; also see clause 84 of the Financial Markets Bill & clause 82 of the Financial Markets Bill 2012.
trade-based market manipulation is generally limited to transactions relating to securities listed on a regulated market.\footnote{S 75 of the Securities Services Act; also see clause 84 of the Financial Markets Bill & clause 82 of the Financial Markets Bill 2012.}

Trade-based market manipulative practices are difficult to detect, investigate and prosecute.\footnote{Cassim 2008 \textit{SA Merc LJ} 46-49; also see further Barnes \textit{Stock Market Efficiency, Insider Dealing and Market Abuse} (2009) 19-125.} Enforcement authorities around the world have surveillance systems and other measures in place to detect and combat market manipulation.\footnote{Barnes \textit{Stock Market Efficiency, Insider Dealing and Market Abuse} 19-125.} Likewise, South Africa has mainly empowered the Financial Services Board and other bodies such as the JSE to enforce the prohibition on market manipulation. For example, the JSE requires its members to comply with certain requirements to prevent, among other things, all the forms of market manipulation by mandating them to give consideration to the circumstances of orders placed by clients before entering such orders in the JSE equities trading system and to be responsible for the integrity of such orders.\footnote{See Rule 7.10.1 of the JSE’s Listing Requirements.} The JSE’s Surveillance Division operates a system that identifies unusual price and trading volumes and when possible market manipulation is detected, an initial investigation is carried out and the results are handed over to the Directorate of Market Abuse. Regardless of this, up until now, very little success has been achieved in respect of the settlements and prosecutions of cases involving trade-based market manipulation.\footnote{Statutory administrative sanctions have been successfully obtained in minimal cases of trade-based market manipulation such as iFour Properties Limited (R2 million penalty), SA Retail Properties Limited (R2 million penalty), Stratcorp Limited (R10 000 penalty), New Rand Warrants Limited (R750 000 penalty), Imperial Holdings Limited (R25 000 penalty), King Consolidated Holdings Limited (R10 000 penalty), SilverBridge Holdings Limited (R10 000 penalty) and Sunflower December 2007 to January 2008 Contract (R50 000 penalty). This information was obtained from an interview that was conducted at the Financial Services Board by the researcher, with Mr Gerhard van Deventer (the Executive Director of the DMA) on 05 May 2009.} Moreover, the Securities Services Act does not provide a civil remedy for trade-based market manipulation. Trade-based market manipulation is only treated as a criminal offence. This flaw was addressed by the Financial Markets Bill which now provides a civil remedy for market manipulation\footnote{Clause 87 of the Financial Markets Bill.} but nonetheless this provision is no longer included in the Financial Markets Bill 2012.\footnote{See the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.}
Prohibition on Insider Trading

Criminal Liability for Insider Trading

As earlier stated, the prohibition on insider trading is also contained in the Securities Services Act. Specifically, any person who violates the relevant provisions of the Securities Services Act will be liable for a criminal offence of insider trading. For instance, actual dealing directly or indirectly or through an agent in securities listed on a regulated market by an insider who knows that he has inside information to which such securities relates or which are likely to be affected by it for his own personal benefit will give rise to a criminal offence of insider trading. Nevertheless, it is not certain whether this prohibition further applies to any dealing or unlawful transactions that may be relating to other money market instruments such as derivatives. This obscurity has not been addressed by the Financial Markets Bill and the Financial Markets Bill 2012.

The words “through an agent” were introduced in some insider trading provisions under the Securities Services Act. Therefore, any insider who knowingly and indirectly practises insider trading through an agent for his personal benefit will now be expressly liable for a criminal offence. The extension of the criminal liability to dealing through an agent is a positive development, but it is not clear who exactly may be regarded as an agent for the purposes of this prohibition. This confusion could have enabled other persons who knowingly dealt in listed securities through agents as well as such agents to escape liability for their insider trading offences. The same flaw is retained in the Financial Markets Bill and the Financial Markets Bill 2012.

See paragraph 2 4 1 1 above.

S 73 & 77 of the Securities Services Act; also see clauses 82 & 86 of the Financial Markets Bill & clauses 80 & 84 of the Financial Markets Bill 2012.

S 73 of the Securities Services Act; also see clause 82 of the Financial Markets Bill & clause 80 of the Financial Markets Bill 2012.

S 73(1)(a) of the Securities Services Act; also see clause 82(1)(a) of the Financial Markets Bill & clause 80(1)(a) of the Financial Markets Bill 2012.


S 73(1)(a) of the Securities Services Act; also see clause 82(1)(a) of the Financial Markets Bill & clause 80(1)(a) of the Financial Markets Bill 2012.

S 73(1)(a) of the Securities Services Act; also see clause 82(1)(a) of the Financial Markets Bill & clause 80(1)(a) of the Financial Markets Bill 2012. Also see Cassim 2007 SA Merc LJ 67. The term “agent” is however defined in other jurisdictions like in Australia and the United Kingdom. In relation to this, see s 1042B of the Australian Corporations Act 2001(C’th) & s 62(1) & (2) of the English Criminal Justice Act 1993 (c 36).

Actual dealing in securities for the benefit of another person is further prohibited.\(^{236}\) Therefore, any insider who knows that he has inside information and who deals directly or indirectly for the benefit of any other person in any listed securities to which such inside information relates or which are likely to be affected by it commits a criminal offence.\(^{237}\) Conspicuously, the absence of the words “through an agent”\(^ {238}\) in this regard indicates the inconsistencies found in some of the insider trading provisions contained in the Securities Services Act. This might have also contributed to the skimpy convictions achieved in criminal cases involving insider trading in South Africa to date. The aforementioned flaw is set to be addressed in the Financial Markets Bill and/or the Financial Markets Bill 2012, which now expressly includes the words “through an agent” in its prohibition on dealing in securities for the benefit of another person.\(^ {239}\)

Moreover, an insider who knows that he has inside information and who encourages or causes another person to deal, or discourages or stops another person from dealing in the securities listed on a regulated market to which the information relates or which are likely to be affected by it is liable for a criminal offence.\(^ {240}\) As earlier stated,\(^ {241}\) the accused must know that he has inside information and it is possible for an accused to plead that he was ignorant of the price-sensitive nature of the inside information at the time when he encouraged or discouraged others to deal in the securities concerned. The same status quo is set to be retained in the Financial Markets Bill and the Financial Markets Bill 2012.\(^ {242}\)

An insider who knows that he has inside information and who discloses such information to another person will be liable for a criminal offence.\(^ {243}\) In spite of this, improper disclosure of confidential matters or inside information that relate to juristic persons by their agents who are not necessarily insiders appears not to be expressly covered under the Securities Services

\(^{236}\) S 73(2)(a) of the Securities Services Act; also see clause 82(2)(a) of the Financial Markets Bill & clause 80(2)(a) of the Financial Markets Bill 2012.

\(^{237}\) S 73(2)(a) of the Securities Services Act; also see clause 82(2)(a) of the Financial Markets Bill & clause 80(2)(a) of the Financial Markets Bill 2012.

\(^{238}\) S 73(2)(a) of the Securities Services Act.

\(^{239}\) Clause 82(2)(a) & (3)(a) of the Financial Markets Bill & clause 80(2)(a) & (3)(a) of the Financial Markets Bill 2012.

\(^{240}\) S 73(4) of the Securities Services Act; also see clause 82(5) of the Financial Markets Bill & clause 80(5) of the Financial Markets Bill 2012.

\(^{241}\) See paragraph 2 4 1 1 above.


\(^{243}\) S 73(3)(a) of the Securities Services Act; also see clause 82(4)(a) of the Financial Markets Bill & clause 80(4)(a) of the Financial Markets Bill 2012.
2522 Civil Liability for Insider Trading

Any insider or person who is involved in insider trading activities may incur civil liability. This civil liability can be imposed on an insider who knows that he has inside information and who deals directly or indirectly or through an agent for his own account in securities listed on a regulated market to which the information relates or which are likely to be affected by it and who makes a profit or would have made a profit if he had sold the securities at any stage, or avoids a loss through such dealing unless he proves one of the defences set out in the Securities Services Act. Such a person is then liable at the suit of the Financial Services Board, in any court of competent jurisdiction, for the civil compensatory fine as stipulated in the Securities Services Act. Moreover, an insider who engages in insider trading and makes a profit or avoids a loss for personal benefit or for the benefit of any other person incurs civil liability. Therefore, the person involved will be liable to pay the Financial Services Board an amount equivalent to the profit made or loss avoided or a penalty for compensatory and punitive purposes, but not exceeding three times the amount of the profit made or loss avoided plus any other amount for interest and legal costs as determined by a competent court.

244 S 73(3)(a) of the Securities Services Act.
246 S 77 of the Securities Services Act; also see clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
247 S 77(1) of the Securities Services Act; also see clause 86(1) of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
248 S 77(1) of the Securities Services Act; also see clause 86(1) of the Financial Markets Bill & clause 84(1) of the Financial Markets Bill 2012.
249 S 77(1)(b) & (2)(b) of the Securities Services Act; also see clause 86(1)(b) & (2)(b) of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
250 S 77(1)(c); (2)(c); (3)(b); (4)(a) to (e) read with subsections (5) & (6) of the Securities Services Act; also see clause 86(1)(c); (2)(c); (3)(b); (4)(b); (5)(a) to (e) read with subsections (6) & (7) of the Financial Markets Bill & clause 84(1) & (4) of the Financial Markets Bill 2012.
251 These are the High Courts and regional courts as outlined in s 79 of the Securities Services Act. Notably, the Financial Markets Bill now only provides that a court of competent jurisdiction includes a court within whose jurisdiction the regulated market has its principal place of business or head office or in which any element of the dealing or offence occurred, and there is no need to make any attachment to found or confirm its jurisdiction. See clause 81 of the Financial Markets Bill. However, no similar provision is made in clause 79 of the Financial Markets Bill 2012.
The person or insider who indulges in insider trading activities for the benefit of another person will be jointly and severally liable together with that other person to pay the Financial Services Board a penalty for compensatory and punitive purposes plus interest or costs as determined by the relevant courts.\textsuperscript{252} As a result, this joint and several liability is contingent upon a tippee’s liability as an insider. It appears that there will be no liability for a party who, for instance, deals in the securities in question but is not an insider as defined in the Securities Services Act.\textsuperscript{253} Seemingly, this shortcoming has now been resolved in the Financial Markets Bill\textsuperscript{254} but no similar provision is made in the Financial Markets Bill 2012.\textsuperscript{255}

Civil liability is further imposed on an insider who knows that he has price-sensitive inside information and improperly discloses such information to other persons.\textsuperscript{256} However, the Securities Services Act does not specifically and expressly provide how companies can lawfully disclose price-sensitive inside information to relevant persons such as investment analysts so that they would not be practising or falling victims to insider trading.\textsuperscript{257} This shortcoming is still not resolved in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{258}

In addition, any person who knowingly encourages or causes another person to deal in securities listed on a regulated market will incur civil liability.\textsuperscript{259} The discouragement of others from dealing in such securities by any person who knows that he has inside information is therefore not expressly prohibited under the civil provisions of the Securities Services Act.\textsuperscript{260} Yet again, this disparity leaves room for some persons to evade their civil

\begin{footnotes}
\footnotetext[252]{S 77(5) of the Securities Services Act; also see clause 86(6) & (7) of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.}
\footnotetext[253]{S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012. Also see further Jooste 2006 \textit{SALJ} 454–455.}
\footnotetext[254]{Clause 86(6) & (7) of the Financial Markets Bill.}
\footnotetext[255]{Clause 84 of the Financial Markets Bill 2012.}
\footnotetext[256]{S 77(3) of the Securities Services Act; also see clause 86(4) of the Financial Markets Bill & clause 84(1) of the Financial Markets Bill 2012.}
\footnotetext[258]{Clause 86(4) of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.}
\footnotetext[259]{S 77(4) of the Securities Services Act; also see clause 86(5) of the Financial Markets Bill.}
\footnotetext[260]{S 77(4) of the Securities Services Act; also see clause 86(5) of the Financial Markets Bill. Also see Jooste 2006 \textit{SALJ} 455.}
\end{footnotes}
insider trading liability. Amazingly, this flaw was not resolved in the Financial Markets Bill. However, this flaw could be addressed by the Financial Markets Bill 2012.

253 Prohibition on False or Deceptive Statements, Promises and Forecasts (Disclosure-based Market Manipulation)

Publication of false or deceptive statements, promises and forecasts is further prohibited under the Securities Services Act. Accordingly, any person who directly or indirectly makes or publishes in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know is false, misleading or deceptive will be guilty of an offence. Likewise, any person who directly or indirectly, makes or publishes in respect of listed securities, or in respect of the past or future performance of a public company, any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know is rendered false, misleading or deceptive by reason of the omission of that fact commits an offence. This clearly indicates that disclosure-based market manipulation is discouraged in South Africa. Thus, the issuing of false, deceptive or misleading statements reduces public investor confidence and can harm the integrity of the financial markets and is as such prohibited in South Africa. For example, incorrect published information regarding the financial state of a listed company may discourage or encourage investors to trade in the company’s shares at prices that would not be sustainable when the true facts are later known.

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261 Clause 86(5).
262 Clause 84 of the Financial Markets Bill 2012.
263 S 76 of the Securities Services Act; also see clause 85 of the Financial Markets Bill & clause 83 of the Financial Markets Bill 2012.
266 For further reading see Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)” 2008 SA Merc LJ 177-178.
The making or publication of false statements regarding matters that are not directly associated with the company’s current performance, but which may nevertheless artificially inflate the share price is prohibited under the Securities Services Act. For example, the publication or making of false claims regarding orders purchased or products developed by the company concerned will give rise to an offence under the Securities Services Act. The prohibition on the making or publication of false or deceptive statements also applies to matters relating to the non-publication of price-sensitive information or the omission of material facts, often done to avoid the negative effect it could have on the share prices. Irrespective of this, no provision is made in the Securities Services Act for any presumptions that will provide insight as to when a fact or an omitted fact would be material for the purposes of disclosure-based market manipulation. Furthermore, no such provision is made in the Financial Markets Bill and the Financial Markets Bill 2012.

Further liability is imposed on persons who either intentionally or negligently publish or make incorrect statements. For example, a company director who allows a trading statement to be published without taking reasonable steps to ensure that such statement is correct will be liable for causing a false statement to be made or published negligently and recklessly. Nonetheless, the Securities Services Act does not impose civil liability on persons who make or publish false, misleading or deceptive statements, promises and forecasts. In this regard, the JSE’s Listing Requirements that prohibit false or misleading statements by the JSE’s member companies are usually used to extend civil liability to such companies or other relevant entities and their agents. The aforesaid flaw has been addressed by the Financial Markets Bill which now provides a civil remedy for market manipulation. However, this provision was omitted in the Financial Markets Bill 2012.

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271 S 76 of the Securities Services Act.


273 S 76(1) of the Securities Services Act; also see clause 85(1) of the Financial Markets Bill & clause 83(1) read with subsections (2) & (3) of the Financial Markets Bill 2012.

274 S 76 of the Securities Services Act.

275 See Rules 8.20.2; 8.20.3 and 8.20.6 of the JSE Listing Requirements.

276 Clause 87 of the Financial Markets Bill.

277 See the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
The making or publication of false, misleading or deceptive statements, promises and forecasts on the Internet is not prohibited in the Securities Services Act.\(^{278}\) Therefore, the Internet could be providing unscrupulous persons in South Africa with opportunities to participate in disclosure-based market manipulation activities more easily and faster.\(^{279}\) In addition, the words “directly or indirectly”\(^{280}\) which are employed for the purposes of this prohibition\(^{281}\) do not seem to extend liability to secondary offenders who do not directly engage in the making or publishing of false, misleading or deceptive statements, promises or forecasts but who simply aided and abetted another person to make or publish such statements, promises or forecasts. This obscurity remains unresolved in the Financial Markets Bill and the Financial Markets Bill 2012.\(^{282}\)

**254 Available Penalties**

Criminal penalties can be imposed on all the three main forms of market abuse which are outlawed in South Africa, namely insider trading, trade-based market manipulation and disclosure-based market manipulation.\(^{283}\) Consequently, persons who engage in any of these market abuse activities may be sentenced to a fine not exceeding R50 million or imprisonment for a period not exceeding ten years or both such fine and imprisonment.\(^{284}\) Notably, with regard to insider trading, the criminal sanctions were increased significantly from a fine of R2 million (previously stipulated in the Insider Trading Act)\(^{285}\) to R50 million under the Securities Services Act.\(^{286}\)

While the introduction of new market abuse penalties is a positive improvement, this research submits that standing alone, even the R50 million fine and a 10 years’ imprisonment term

\(^{278}\) S 76 of the Securities Services Act; also see clause 85 of the Financial Markets Bill & clause 83 of the Financial Markets Bill 2012.

\(^{279}\) S 76(1) of the Securities Services Act; also see clause 85(1) of the Financial Markets Bill & clause 83(1) of the Financial Markets Bill 2012. Also see Cassim 2008 *SA Merc LJ* 178.

\(^{280}\) Cassim 2008 *SA Merc LJ* 178.

\(^{281}\) S 76(1) of the Securities Services Act.


\(^{284}\) S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.


\(^{286}\) S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
cannot be an effective deterrent. It is possible that prospects of enormous profits may outweigh the deterring effect of the stipulated fine and/or prison sentence. For example, companies may simply regard it as just another cost of doing business, especially where profits gained exceed the penalty imposed. Moreover, the fact that the actual perpetrators may plead guilty and be convicted of lesser offences may also have a negative effect on any impact a criminal sanction might have. In addition, the difficult burden of proof needed in the criminal prosecution of market abuse offences has, to some extent, marred the prosecution of such offences in South Africa to date and this is unlikely to be different in future.

As discussed earlier, civil penalties for insider trading can be imposed on offenders for the profit made or loss avoided or as a penalty for compensatory and punitive purposes, an amount as determined by a competent court but not exceeding three times the amount of the profit made or loss avoided plus interest and legal costs as determined by the court. Nevertheless, prejudiced persons who prove their claims as provided for in the Securities Services Act will only get their compensation after the Financial Services Board has recouped its costs and expenses in relation to a successful litigation. The same approach is employed in the Financial Markets Bill and the Financial Markets Bill 2012. It is submitted that if not properly executed, this approach may give rise to bureaucracy and unnecessary delays before the affected persons receive their compensation.

In addition to criminal and civil penalties, administrative penalties are provided for all the three forms of market abuse that are prohibited by the Securities Services Act. The Enforcement Committee may, on a referral basis, impose unlimited administrative penalties

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289 Only 32 cases of insider trading, 8 cases of trade-based market manipulation and no cases for disclosure-based market manipulation were reportedly investigated by the Financial Services Board during the period between January 1999 and December 2007. No convictions were obtained in all these criminal cases of market abuse. This information was obtained from an interview that was conducted at the Financial Services Board by the researcher, with Mr Gerhard van Deventer (the Executive Director of the DMA) on 05 May 2009. Also see Jooste 2006 *SALJ* 453–454.
290 See paragraph 2 5 2 2 above.
on persons who indulge in market abuse activities.\textsuperscript{294} Thus, administrative penalties, namely a civil monetary penalty, an order for remedial action, costs orders, separate order for legal costs, remuneration costs orders, a fine for punitive purposes and other appropriate disciplinary sanctions may be imposed on the offenders.\textsuperscript{295} Specifically, the Enforcement Committee may impose an administrative compensatory amount payable to the Financial Services Board for distribution to the victims only in respect of insider trading.\textsuperscript{296} No similar provision is made for trade-based market manipulation and disclosure-based market manipulation. This might be caused by the fact that it would be very difficult to accurately calculate the amount of loss incurred by the victims of market manipulation.\textsuperscript{297} Moreover, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide any specific administrative functions of the Enforcement Committee in detail.\textsuperscript{298} Nonetheless, the introduction of administrative penalties might have the effect of increasing the compliance with, and the enforcement of the market abuse provisions in South Africa.\textsuperscript{299}

\textbf{2.6 Concluding Remarks}

As discussed in this chapter,\textsuperscript{300} it is clear that the various market abuse laws enacted in South Africa were mainly aimed at improving the regulation of market manipulation and insider trading in order to \textit{inter alia} restore public investor confidence in our financial markets. Numerous amendments and changes to the market abuse legislation were introduced from time to time in a bid to improve the regulation of market abuse practices in South Africa. Nonetheless, in relation to this it was indicated that both the Stock Exchanges Control Act and the Financial Markets Control Act had little success in combating market manipulation in South Africa.\textsuperscript{301} It was further stated that the pioneering provisions in the Companies Act (including all its amendments) were not only inconsistent for the purposes of combating

\begin{itemize}
\item \textsuperscript{294} S 94(e) & s 102 to s 105 of the Securities Services Act; generally see clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
\item \textsuperscript{295} S 94(e) & s 102 to s 105 of the Securities Services Act; generally see clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012. Also see Van Deventer “Harnassing Administrative Law in Encouraging Compliance” 2009 \textit{FSB Bulletin} 3-4.
\item \textsuperscript{296} Cassim 2008 \textit{SA Merc LJ} 195.
\item \textsuperscript{297} Cassim 2008 \textit{SA Merc LJ} 195.
\item \textsuperscript{298} See clause 105 & the relevant clauses under Chapter X entitled “Market Abuse” in the Financial Markets Bill & clause 101 & the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
\item \textsuperscript{299} Van Deventer 2009 \textit{FSB Bulletin} 3-4.
\item \textsuperscript{300} See the discussions under paragraphs 2.2; 2.3; 2.4 & 2.5 above.
\item \textsuperscript{301} See paragraph 2.2.3 above.
\end{itemize}
insider trading, but were also not properly enforced.\textsuperscript{302} Notably, the enforcement (approaches) methods adopted under the Companies Act as amended were few and only restricted to criminal sanctions.\textsuperscript{303} Moreover, it was indicated that other enforcement methods such as whistle-blowing, bounty rewards and administrative sanctions were not considered under the Companies Act (including all its amendments).\textsuperscript{304} The Insider Trading Act was eventually enacted and welcomed as another attempt to enhance the enforcement of insider trading in South Africa.\textsuperscript{305} This Act introduced considerably higher criminal penalties and more elaborate civil remedies. However, not giving less regard to some key factors like the challenges involving the availability of adequate financial resources in South Africa, the Insider Trading Act, like its predecessors, also failed to expressly provide for other alternative practical enforcement methods like administrative sanctions, whistle-blowing, private rights of action, the establishment of additional self-regulatory organs and specific insider trading courts or tribunals to complement the enforcement efforts of the Financial Services Board.\textsuperscript{306} As a result, the Securities Services Act was later introduced and it brought more elaborate civil remedies, new criminal penalties, administrative sanctions and additional regulatory bodies such as the Enforcement Committee, the Board of Appeal and the Directorate of Market Abuse in a bid to enhance regulation and enforcement of the market abuse ban in South Africa.\textsuperscript{307} Nonetheless, it was stated that the concept of “market abuse” is not statutorily and expressly defined in the Securities Services Act.\textsuperscript{308} In light of this, it was suggested that enacting a statutory provision for a definition of the concept of “market abuse” involving all the elements of this offence (how it is committed), many types of market abuse and presumptions could improve the enforcement of the market abuse prohibition in South Africa.\textsuperscript{309} It was also highlighted that no express provision was made in the Securities Services Act to empower the Financial Services Board to make its own market abuse rules pertaining to the enforcement of criminal and administrative sanctions for market abuse offences.\textsuperscript{310} This flaw is also retained in the Financial Markets Bill and the Financial

\textsuperscript{302} See the discussions in paragraphs 2 3 1 1; 2 3 2 1 & 2 3 3 1 above.
\textsuperscript{303} See paragraph 2 3 5 above.
\textsuperscript{304} See paragraph 2 3 5 above.
\textsuperscript{305} See paragraph 2 3 5 above.
\textsuperscript{306} See paragraph 2 3 5 above.
\textsuperscript{307} See paragraph 2 3 5 above.
\textsuperscript{308} See the discussions under paragraphs 2 4 & 2 5 above.
\textsuperscript{309} See paragraph 2 4 1 1 above.
\textsuperscript{310} See paragraph 2 4 1 2 above.
Markets Bill 2012.\footnote{311} It was also stated that instances where a “market corner” could have been formed in respect of, and/or influenced by, securities traded in the over the counter markets were not expressly outlawed under the Securities Services Act.\footnote{312} The same flaw is retained in the Financial Markets Bill and the Financial Markets Bill 2012.\footnote{313} It was further indicated that the application of the market abuse prohibition under the Securities Services Act is surprisingly not limited to situations where there is a territorial link between the actual commission of market abuse offences and South Africa.\footnote{314} The same status quo is set to be retained under the Financial Markets Bill and the Financial Markets Bill 2012.\footnote{315} In light of this, it was suggested that the prohibition on market abuse should apply to transactions on foreign markets where a territorial link is present by virtue, either of the fact that the offender is at the time physically present in South Africa, or was acting through an intermediary who is in South Africa or by virtue of the prohibited conduct occurring in South Africa.\footnote{316}

It was also indicated that the Securities Services Act has inconsistently prohibited three major forms of market abuse, namely insider trading, trade-based market manipulation and the disclosure-based market manipulation relating to listed securities in South Africa.\footnote{317} Furthermore, it was stated that the criminal penalties imposed against market abuse offenders are still very little for deterrence purposes.\footnote{318} It was submitted that the fact that prejudiced persons who prove their claims as provided for in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 will only get their compensation after the Financial Services Board has recouped its costs and expenses in relation to a successful litigation may, if not properly executed, give rise to bureaucracy and unnecessary delays before the affected persons receive their compensation.\footnote{319} As indicated above, various gaps are still found in the relevant market abuse provisions in South Africa. Thus, although a general foundation for the regulation of market abuse has been laid in this chapter, the question to be addressed later is whether the current market abuse provisions are robust enough and/or being effectively implemented to prevent insider trading and market

\footnote{311} See paragraph 2 4 1 2 above.\footnote{312} See paragraph 2 4 1 2 above.\footnote{313} See paragraph 2 4 1 2 above.\footnote{314} See paragraph 2 4 1 3 above.\footnote{315} See paragraph 2 4 1 3 above.\footnote{316} See paragraph 2 4 1 3 above.\footnote{317} See paragraphs 2 5 1 ; 2 5 2 ; 2 5 2 1 ; 2 5 2 2 & 2 5 3 above.\footnote{318} See paragraph 2 5 4 above.\footnote{319} See paragraph 2 5 4 above.
manipulation in the South African financial markets. This and other related aspects pertaining to the enforcement of market abuse provisions in South Africa will be carefully discussed and examined in Chapter Three.
CHAPTER THREE
OVERVIEW OF THE ROLE-PLAYERS IN THE ENFORCEMENT OF MARKET ABUSE PROVISIONS IN SOUTH AFRICA

3 1  Introduction

Since the previous chapter has already laid a general foundation for the regulation of market abuse, this chapter will now examine whether the current market abuse provisions are being effectively implemented to prevent insider trading and market manipulation in the South African financial markets.

An overview of the functions of the enforcement authorities, such as the Financial Services Board, Johannesburg Stock Exchange Limited, the Directorate of Market Abuse and the Enforcement Committee will be undertaken below to explore how market abuse practices are detected, investigated, prosecuted and prevented in South Africa.

3 2  The Detection, Investigation and Enforcement of the Market Abuse Prohibition under the Securities Services Act 36 of 2004

3 2 1  The Role of the Financial Services Board

The Financial Services Board is an independent board established to inter alia monitor and enforce the market abuse prohibition in South Africa. Accordingly, the functions of the Financial Services Board under the Financial Services Board Act include:

(a) supervising compliance with laws regulating financial institutions and the provision of financial services;
(b) advising the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the Minister;⁵ and

(c) promoting programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of financial products and services.⁶

Moreover, as earlier discussed,⁷ the Financial Services Board has ostensibly wide powers to ensure the proper supervision and enforcement of the South African market abuse prohibition in terms of the Securities Services Act.⁸ For instance, the Financial Services Board has powers which include to:

(a) supervise and to ensure that all persons comply with the market abuse provisions;⁹

(b) investigate any matter relating to an offence relating to market abuse, including insider trading committed before the repeal of the provisions of the Insider Trading Act and section 440F of the Companies Act;¹⁰

(c) institute proceedings as are contemplated in terms of the relevant market abuse provisions;¹¹

(d) administer proof of claims and distribution of payments in civil cases of insider trading;¹²

(e) summon any person suspected to be in possession of any information or document relevant to an ongoing investigation of the Financial Services Board for interrogation or production of such document;¹³

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⁵ S 3(b) of the Financial Services Board Act.
⁶ S 3(c) of the Financial Services Board Act.
⁷ See paragraph 2 3 4 3 of Chapter Two.
⁸ 36 of 2004, hereinafter referred to as the Securities Services Act; see s 82 of the Securities Services Act.
⁹ S 82(1) of the Securities Services Act.
¹⁰ S 82(2)(a) of the Securities Services Act.
¹¹ S 82(2)(b) of the Securities Services Act.
¹² S 82(2)(c) of the Securities Services Act.
¹³ S 82(2)(d) of the Securities Services Act.
interrogate any such persons under oath or affirmation and examine or retain for further examination any such document unless the copies of any such document have been made;\(^{14}\)

after obtaining a search warrant, enter and search any premises or open any strongroom for the purpose of obtaining any document which it suspects might relate to an ongoing investigation and, if found, to examine, make extracts from and copy the document or remove it temporarily from those premises for that purpose or retain it for as long as it may be required for criminal or other proceedings;\(^{15}\)

make market abuse rules after consultation with the Directorate of Market Abuse;\(^{16}\) require relevant regulated markets to implement such systems as are necessary for the effective monitoring and identification of market abuse activities. This is done after consultation with such markets;\(^{17}\)

subject to conditions it may determine, delegate the power to investigate, interrogate or search premises or persons accused of violating the market abuse provisions to any fit person;\(^{18}\)

publish in the Gazette a notice of any proposed market abuse rule or amendment of such rule and to call all interested persons who have objections to the proposed rule or amendment to lodge their objections with the Financial Services Board within a period of fourteen days from the date of publication of the notice;\(^{19}\)

ensure, after consultation with the Directorate of Market Abuse, that the market abuse rule or amendment to such rule comes into operation on a date determined by the Financial Services Board by notice in the Gazette if there were no objections;\(^{20}\)

amend the proposed market abuse rule after consultation with the Directorate of Market Abuse and ensure that the amended rule comes into operation on a date

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\(^{14}\) S 82(2)(e) of the Securities Services Act.

\(^{15}\) S 82(2)(f) read with sub-section (3) of the Securities Services Act.

\(^{16}\) S 82(2)(g) of the Securities Services Act.

\(^{17}\) S 82(2)(h) of the Securities Services Act.

\(^{18}\) S 82(4) of the Securities Services Act.

\(^{19}\) S 82(5) of the Securities Services Act.

\(^{20}\) S 82(6) of the Securities Services Act.
determined by the Financial Services Board by notice in the Gazette and ensure that such rule is binding on regulated persons and members of the public; 21

(m) prosecute any alleged market abuse offence in any competent court 22 if the Director of Public Prosecutions declines to do so, in terms of the Securities Services Act and the Criminal Procedure Act; 23 and

(n) investigate any matter, summon and interrogate any person in respect of matters relating to market abuse at the request of the Directorate of Market Abuse. 24

As indicated above, these wide powers are relatively similar to the duties that were initially conferred upon the Financial Services Board under the Insider Trading Act. 25 Over and above, the same powers are set to be retained with a few minor changes in the Financial Markets Bill 2011 and the Financial Markets Bill 2012. 26 In relation to this, such changes include new powers that are conferred upon the Financial Services Board to:

(a) assist foreign regulators with investigations pertaining to any cross-border market abuse cases; 27

(b) publish by notice on its official website or by means of other appropriate public media, any outcome, status or details of market abuse investigations (public censure) if such publication is in the public interest; 28 and

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21 S 82(7) & (8) of the Securities Services Act.
22 S 79 of the Securities Services Act.
23 51 of 1977. See s 82(9) of the Securities Services Act; also see s 8(2) & (3) of the Criminal Procedure Act 51 of 1977.
24 S 82(10) of the Securities Services Act.
25 135 of 1998 (hereinafter referred to as the Insider Trading Act); see s 11 of the Insider Trading Act & also see paragraph 2 3 4 3 in Chapter Two of this thesis.
26 See clause 91 of the Financial Markets Bill [B-2011], hereinafter referred to as the Financial Markets Bill; clause 86 of the Financial Markets Bill [B12-2012], hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012 because at the time of writing this Chapter, the aforementioned Bills were not yet effectively passed into law).
enter upon or search any premises in relation to market abuse investigations during the day and ensure that such investigations could be assisted by a police officer, in a orderly justifiable manner with due regard to the accused person’s right to dignity, privacy, freedom and security.\textsuperscript{29}

Nonetheless, it remains to be seen whether the Financial Services Board will be able to consistently and timeously enforce its public censure and other investigation powers introduced by the Financial Markets Bill and the Financial Markets Bill 2012 to combat market abuse activities in South Africa and elsewhere.

The Financial Services Board is staffed with persons who have forensic and prosecutorial skills as well as relevant expertise in relation to the financial markets. Despite this, the Financial Services Board does not have its own sophisticated surveillance equipment in place to detect any suspected illegal trading and to provide the details of the beneficial owners of securities held in nominee accounts.\textsuperscript{30} In most instances, the Financial Services Board relies on the JSE’s Surveillance Division to detect suspicious trading volumes and trading patterns. The Financial Services Board further relies on the broker-dealer accounts system to extract relevant information from other market participants like brokers by investigating their trading history for purposes of detecting market abuse practices.\textsuperscript{31} This enables the Financial Services Board to check a broker’s trading history by scrutinising his telephonic conversations, bank records and other relevant trading records to detect unusual or abnormal trading patterns which could be a signal of market abuse activity. The Financial Services Board also uses the auction process system to curb market manipulation. The Financial Services Board may investigate all the transactions that are carried out at the JSE by examining volumes of securities traded, say at the close of the day, and such transactions are kept in a database for easy identification and detection of illicit trading activities which may give rise to market abuse. This is referred to as the transactions database system, which is

\textsuperscript{29} Clause 91(3)(g); (h) & (i) of the Financial Markets Bill & clause 86(4)(d); (e) & (f) of the Financial Markets Bill 2012.


\textsuperscript{31} This information was obtained from an interview that was conducted at the Financial Services Board by the researcher, with Mr Gerhard van Deventer (the Executive Director of the DMA) on 05 May 2009. Also see a similar interview and analysis in footnotes 128 & 289 as earlier discussed under paragraphs 2 3 4 2 & 2 5 4 of Chapter Two respectively.
reportedly being used by the Financial Services Board in some instances. Additionally, the Financial Services Board may publish or issue a press release to disclose the details of the proposed market abuse rules regarding the affected securities and the culprits involved. This name and shaming practice is used by the Financial Services Board to deter persons from engaging in market abuse activities because of fear of losing their jobs and damaging their reputation.

In order to curb cross-border market abuse activities, the Financial Services Board has forged some multilateral co-operation agreements with similar authorities in the developed world, like the Financial Services Authority of the United Kingdom and the Securities and Exchange Commission of the United States of America. For example, if a South African citizen who is an insider but is domiciled in New York contacted a broker in South Africa to purchase any security listed on the JSE in order to conceal the illegal nature of such dealing, the Financial Services Board can rely on the United States Securities and Exchange Commission to investigate, interrogate or prosecute such person for market abuse. Gerhard van Deventer submits that these multilateral co-operation agreements have been utilised by the Financial Services Board in a number of instances to combat cross-border market abuse.

The Financial Services Board may itself prosecute matters relating to market abuse practices only when the relevant courts decline to do so or where a matter is settled out of court. The same authority is also retained in the Financial Markets Bill and the Financial Markets Bill 2012. Moreover, a civil penalty for the actual profit made or loss avoided in matters relating to insider trading is determined by competent courts. Under the Financial Markets Bill, a similar civil penalty as determined by competent courts is now extended to matters

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32 This information was obtained from an interview that was conducted at the Financial Services Board by the researcher, with Mr Gerhard van Deventer (the Executive Director of the DMA) on 05 May 2009.
33 S 82(5) to (8) of the Securities Services Act.
34 S 82(5) to (8) of the Securities Services Act.
36 Generally see the interview and analysis as earlier discussed under paragraphs 2 & 2 of Chapter Two respectively.
37 S 82(9) of the Securities Services Act.
39 S 77 read with s 79 of the Securities Services Act.
40 See the definition of “court of competent jurisdiction” in s 81 of the Financial Markets Bill.
involving both insider trading\textsuperscript{41} and market manipulation.\textsuperscript{42} However, there is no provision for civil penalties for market manipulation under the Financial Markets Bill 2012.\textsuperscript{43}

Interrogation of persons or search of premises in matters relating to market abuse is only possible when permission or a search warrant is granted upon the application by the Financial Services Board, to a judge or magistrate who has jurisdiction in the area where the persons or premises are located.\textsuperscript{44} This could imply, given the backlog challenges in the South African courts, that not all premises and persons will be promptly searched, interrogated or prosecuted respectively by the Financial Services Board and the competent courts.

The Financial Services Board may only consult with, and request the regulated markets to have systems that are necessary to monitor and detect market abuse practices in such markets.\textsuperscript{45} The same position is also retained in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{46} This may suggest that there is some co-operation between the Financial Services Board and the regulated markets in South Africa. Although more can still be done, one can argue that the Financial Services Board has so far played an important role in the detection, investigation and prevention of market abuse in South Africa.\textsuperscript{47}

### 3 2 2 The Role of the Directorate of Market Abuse

The Directorate of Market Abuse is established as a committee of the Financial Services Board which may perform some of its functions.\textsuperscript{48} Apart from the changing of the name from

\begin{thebibliography}{99}
\bibitem{41} Clause 86 of the Financial Markets Bill.
\bibitem{42} Clause 87 of the Financial Markets Bill.
\bibitem{43} Clauses 82; 83 & other relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
\bibitem{44} S 82(3)(a) of the Securities Services Act; also see clause 91(3)(e) of the Financial Markets Bill & clause 86(4)(b) of the Financial Markets Bill 2012. Also see Crotty “First Insider Trading Case Goes to Court” \textit{Business Report} (2001-10-19); Cokayne “Setback for South Africa’s First Insider Trading Case” \textit{Business Report} (2004-04-28).
\bibitem{45} S 82(2)(h) of the Securities Services Act.
\bibitem{46} Clause 91(2)(g) of the Financial Markets Bill; clause 86(2)(g) of the Financial Markets Bill 2012.
\bibitem{48} S 83(1)(a) of the Securities Services Act; also see clause 92(1)(a) of the Financial Markets Bill & clause 87(1)(a) of the Financial Markets Bill 2012.
\end{thebibliography}
the Insider Trading Directorate to the Directorate of Market Abuse, the functions of the

Specifically, the Directorate of Market Abuse is made up of representatives of the regulated markets, the Share Holders’ Association of South Africa, the fund management industry, the insurance industry, the South African Reserve Bank, the bankers, and the accounting and legal professions. These persons are appointed by the Minister of Finance on the basis of their availability, expertise and knowledge of the financial markets. The same position is replicated in the Financial Markets Bill and the Financial Markets Bill 2012 without any changes.

The Directorate of Market Abuse is empowered to institute any civil proceedings as contemplated in the Securities Services Act and to investigate any matter relating to market abuse. If it obtains an appropriate warrant, it has the powers to summon, interrogate, and search and seize any documents in possession of suspected persons. These powers are also replicated in the Financial Markets Bill and the Financial Markets Bill 2012. Moreover, the Directorate of Market Abuse may withdraw, abandon or compromise any civil proceedings instituted as contemplated in the Securities Services Act. Notably, in terms of the Financial Markets Bill, the Directorate of Market Abuse may withdraw, abandon or compromise any civil proceedings in respect of both insider trading and market manipulation. Nevertheless, any such compromise should be done in terms of an order of court and any compensatory

50 S 83(1)(c);(d) & (e).
51 Clause 92(1)(c); (d) & (e).
52 Clause 87(1)(c) & (d).
54 S 83(3)(a) to (j) of the Securities Services Act.
55 S 83(4) of the Securities Services Act.
56 Clause 92(3)(a) to (j) read with clause 87(4) of the Financial Markets Bill & clause 87(3)(a) to (j) read with clause 87(4) of the Financial Markets Bill 2012.
57 S 83(1)(c) of the Securities Services Act.
58 S 83(1)(c) read with s 82(2) of the Securities Services Act.
60 S 78(1) of the Securities Services Act.
61 Clause 88(1).
amount recovered in terms of the compromise must be made public under the Securities Services Act\textsuperscript{62} as well as the Financial Markets Bill.\textsuperscript{63} No similar provision is made in the Financial Markets Bill 2012.\textsuperscript{64}

Furthermore, the Directorate of Market Abuse may, on behalf of the Financial Services Board, decide whether to refer a matter to the Enforcement Committee or to institute derivative civil proceedings or to refer a matter to the Director of Public Prosecutions.\textsuperscript{65} In addition, the Directorate of Market Abuse may only institute civil proceedings in the name of the Financial Services Board and may settle any matter only after confirmation from the Financial Services Board or a competent court. This may rather indicate that the Directorate of Market Abuse only exercises certain specific powers in the name of the Financial Services Board.\textsuperscript{66}

Although the referral of market abuse cases to the Enforcement Committee does not affect the power of the Directorate of Market Abuse to take a derivative civil action against a person who contravenes the insider trading provisions,\textsuperscript{67} no civil proceedings may be instituted in respect of the same set of facts if such person (respondent) has paid the compensatory amount as stipulated in the Securities Services Act.\textsuperscript{68} This is probably good and justifiable in that it is aimed at reducing the potentially negative effects of over-deterrence and the risk of double jeopardy on the part of the defendant concerned. Strikingly, no similar provision is contained in the Financial Markets Bill and the Financial Markets Bill 2012,\textsuperscript{69} but nonetheless only the Financial Markets Bill states that a court should take into account any award or penalty previously imposed against the offenders in respect of the same cause.\textsuperscript{70}

The Directorate of Market Abuse does not operate in isolation. It may further investigate any suspected market abuse cases forwarded to it by the JSE’s Surveillance Division. Put

\textsuperscript{62} S 78(1) & (2) of the Securities Services Act.
\textsuperscript{63} Clause 88(1) & (2).
\textsuperscript{64} See the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
\textsuperscript{67} S 101(2) of the Securities Services Act.
\textsuperscript{68} S 105(5) of the Securities Services Act.
\textsuperscript{69} Clause 92 read with clauses 86 & 87 of the Financial Markets Bill & clause 87 read with clause 84 of the Financial Markets Bill 2012.
\textsuperscript{70} Clause 89 of the Financial Markets Bill.
differently, the investigation team of the Directorate of Market Abuse undertakes full forensic investigations into alerts on the JSE’s radar screen to detect market abuse activities.\(^{71}\) Irrespective of this, the Securities Services Act does not clearly provide whether the JSE’s Surveillance Division is statutorily obliged to report incidences of market abuse to the Directorate of Market Abuse. This flaw is still not addressed in the Financial Markets Bill and the Financial Markets Bill 2012.\(^ {72}\)

Finally, the Directorate of Market Abuse may, on behalf of the Financial Services Board, publish a list of market abuse cases under investigation and proposed action, if any, in the press after every one of its meetings.\(^ {73}\) Thus, the scope of the mandate and functions of the Directorate of Market Abuse is considerably wider because it deals with all the forms of market abuse as proscribed in the Securities Services Act. Importantly, this situation could still continue under the Financial Markets Bill and the Financial Markets Bill 2012.\(^ {74}\)

### 3.2.3 The Role of the Enforcement Committee

The Enforcement Committee is established as another committee of the Financial Services Board that administers and adjudicates on all the forms of market abuse referred to it by the Directorate of Market Abuse or the Registrar of Securities Services.\(^ {75}\) The Financial Services Board extended the jurisdiction of the Enforcement Committee to all the industries it regulates under the Securities Services Act\(^ {76}\) by the insertion of some of its relevant provisions in the Financial Institutions (Protection of Funds) Act 28 of 2001 as amended.\(^ {77}\) In relation to this, the powers of the Registrar of Securities Services to refer matters to the Enforcement Committee were extended to the Enforcement Committee.\(^ {78}\)

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\(^{72}\) See the functions of the Directorate of Market Abuse as contained in clause 92 of the Financial Markets Bill & clause 87 of the Financial Markets Bill 2012.

\(^{73}\) Generally see Loubser (02-10-2006) 26 \(<\text{http://www.jse.co.za/public/insider/JSEbooklet.pdf}>\) (accessed 10-10-2008). Nineteen cases of insider trading were investigated by the DMA between November 2004 and April 2007. Three of these cases were abandoned (closed) and the remaining sixteen are still pending. See the Directorate of Market Abuse Report \textit{Media Release} \(<\text{http://www.fsb.co.za}>\) (accessed 13-06-2008).

\(^{74}\) Clause 92 read with clauses 86; 87 & 88 of the Financial Markets Bill & clause 87 read with clause 84 of the Financial Markets Bill 2012.

\(^{75}\) See s 94(e) & 97 of the Securities Services Act; see further Luiz “Market Abuse and the Enforcement Committee” 2011 \textit{SA Merc LJ} 151 155-172.

\(^{76}\) S 97 to 105 of the Securities Services Act.

\(^{77}\) Hereinafter referred to as the Protection of Funds Act; see s 6B to 6l of the Protection of Funds Act. Also see Van Deventer “Harnessing Administrative Law in Encouraging Compliance” 2009 \textit{FSB Bulletin} 3 3-4.
Committee have been reintroduced in the Financial Markets Bill and the Financial Markets Bill 2012.\(^78\)

Moreover, the Enforcement Committee is made up of members who are appointed by the Financial Services Board.\(^79\) At least two of the appointed members must be legally qualified.\(^80\) The Enforcement Committee may further appoint additional members with appropriate knowledge and experience.\(^81\) Any of the members who have investigated or who have an interest in a matter cannot take part in a decision of the Enforcement Committee on that matter.\(^82\) The Financial Services Board may yet again appoint, from the members, a chairperson and deputy chairperson of the Enforcement Committee.\(^83\) Conspicuously, the Financial Markets Bill and the Financial Markets Bill 2012 do not have a specific provision that deals with the general composition of the Enforcement Committee.\(^84\)

The functions of the Enforcement Committee include powers to deal with any matter referred to it in accordance with the relevant provisions of the Securities Services Act.\(^85\) The Enforcement Committee is also required to submit to the Financial Services Board an annual report on the activities of the Enforcement Committee during the preceding calendar year within the period and containing the information specified by the Financial Services Board.\(^86\) However, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide any specific functions of the Enforcement Committee in detail.\(^87\)

Referral of any matter relating to market abuse to the Enforcement Committee may be instituted in terms of the relevant provisions of either the Securities Services Act\(^88\) or the

\(^79\) S 98 of the Securities Services Act.
\(^80\) S 98(1) of the Securities Services Act.
\(^81\) S 98(2) of the Securities Services Act.
\(^82\) S 98(3) of the Securities Services Act.
\(^83\) S 98(4) of the Securities Services Act.
\(^84\) See clause 105 & the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill & clause 101 & the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
\(^85\) S 99 & s 102 to s 105 of the Securities Services Act.
\(^86\) S 99(2) of the Securities Services Act.
\(^87\) See clause 105 & the relevant clauses under Chapter X entitled “Market Abuse” in the Financial Markets Bill; clause 101 & the relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
\(^88\) S 94(e) of the Securities Services Act.
Protection of Funds Act. The referral of any matter to the Enforcement Committee in terms of the Securities Services Act is usually done by the Directorate of Market Abuse. Precisely, the referral of any matter in terms of the Securities Services Act must be instituted in the manner proscribed in its relevant provisions. More to the point, the referral of a matter to the Enforcement Committee in terms of the Securities Services Act may be withdrawn by the Registrar of Securities Services or the Directorate of Market Abuse. Likewise, the referral of any matter to the Enforcement Committee in terms of the Protection of Funds Act may be done by the Registrar of Securities Services or the Directorate of Market Abuse. Nonetheless, cases in which the Registrar of Securities Services has authority to impose penalties cannot be referred to the Enforcement Committee. Moreover, as earlier stated, the Registrar of Securities Services also has powers to refer matters to the Enforcement Committee in terms of the Financial Markets Bill and the Financial Markets Bill 2012.

Each matter referred in terms of the Securities Services Act will be assigned to a panel consisting of the chairperson or deputy chairperson and at least two other members of the Enforcement Committee. This panel determines its own procedure for the performance of its functions and its proceedings are open to the public. The decision of the panel must be given in writing with reasons and the decision of the majority of the members of the panel is regarded as the decision of the Enforcement Committee.

Where any matter relating to market abuse or other related violations is referred to the Enforcement Committee as contemplated in the Protection of Funds Act, the applicant must give a notice with details of the alleged contravention, proposed administrative sanction and an affidavit setting out the facts and documents supporting such notice. The applicant is further required to deliver a copy of the notice and affidavit to the respondent’s residential address.

89 See further s 6A read with s 6B to s 6I of the Protection of Funds Act.
90 S 94(e) of the Securities Services Act.
91 S 102 of the Securities Services Act read with s 94(e) of the same Act.
92 S 101(1) of the Securities Services Act.
93 S 6A(1) & (2) of the Protection of Funds Act.
94 Van Deventer 2009 FSB Bulletin 3.
96 S 100(1) of the Securities Services Act read with s 94(e) of the same Act.
97 S 100(2) & (3) of the Securities Services Act.
98 S 100(4) & (5) of the Securities Services Act; also see s 6D(4) of the Protection of Funds Act.
99 S 6B(1) & (2) of the Protection of Funds Act read further with s 6A of the same Act.
address, registered office or principal place of business and to give the respondent an opportunity to submit an answering affidavit within 30 days of delivery of such notice and affidavit to the respondent.\textsuperscript{100} Thereafter, the respondent is required in any matter relating to market abuse to file a copy of the answering affidavit with the Enforcement Committee and the applicant. This affidavit must state which allegations the respondent admits or denies, as well as the respondent’s version of facts. The applicant must deliver an affidavit in response to the manner stipulated in the Protection of Funds Act\textsuperscript{101} within 30 days of delivery to the applicant of the respondent’s affidavit.\textsuperscript{102} No further affidavits may be filled without permission of the Enforcement Committee.\textsuperscript{103} Nevertheless, the applicant may, after prior notice to the Enforcement Committee and the respondent, withdraw the referral of any matter involving market abuse, or enter into a written settlement agreement with the respondent during or after the proceedings of the Enforcement Committee.\textsuperscript{104}

The hearing of any matter by the Enforcement Committee gives all the parties involved an opportunity to argue their case.\textsuperscript{105} In other words, the Enforcement Committee may order the parties involved or any other person to be examined and cross-examined so as to determine whether any market abuse offence was committed.\textsuperscript{106} The Enforcement Committee may therefore impose administrative sanctions such as a penalty for punitive purposes by ordering the respondent (offender) to pay a sum of money to the Financial Services Board and a compensatory penalty by ordering the respondent (offender) to pay any affected person an amount of money determined by the Enforcement Committee for the damage or patrimonial loss suffered.\textsuperscript{107} The Enforcement Committee may further impose a compensatory penalty by ordering the respondent who engaged in insider trading practices to pay the Financial Services Board an amount of money calculated in accordance with relevant provisions of the Securities Services Act.\textsuperscript{108} This compensatory penalty is usually paid by the insider trading offenders and distributed to the affected persons by the Financial Services Board. Additionally, the Enforcement Committee may impose unlimited administrative penalties on any respondent

\textsuperscript{100} S 6B(2) of the Protection of Funds Act.
\textsuperscript{101} S 6B(2)(a) of the Protection of Funds Act.
\textsuperscript{102} S 6B(4) of the Protection of Funds Act.
\textsuperscript{103} S 6B(5) of the Protection of Funds Act.
\textsuperscript{104} S 6B(6) & (7) of the Protection of Funds Act.
\textsuperscript{105} S 6C(1) & (2) of the Protection of Funds Act.
\textsuperscript{106} S 6C(3) to (5) of the Protection of Funds Act.
\textsuperscript{107} S 6D(2) of the Protection of Funds Act.
\textsuperscript{108} S 77(1); (2); (3) or (4) of the Securities Services Act.
who admits that he contravened the market abuse provisions or when it determines that he actually contravened such provisions.109

Furthermore, the Enforcement Committee may impose compensatory orders on the market abuse offenders in cases where there is a link between the unlawful conduct and calculable damages suffered by the affected party or the applicant.110 The Enforcement Committee may also impose cost orders on the market abuse offenders for the investigation and preparation costs of the Financial Services Board.111 The Enforcement Committee may yet again order such offenders to pay the remuneration costs of its panel members.112 Any order made by the Enforcement Committee has legal force as if it was made by the High Court and may be enforced by the Financial Services Board in cases of non-payment by lodging a certified copy of the order with the High Court or any competent court.113 Any order or sanction imposed on the market abuse offenders by the Enforcement Committee must be made public.114 No member or employee of the Enforcement Committee and the Financial Services Board is allowed to disclose any information acquired in the performance of the functions of the Enforcement Committee and which relates to its decision unless such disclosure is done in accordance with the relevant provisions of the Securities Services Act.115

When determining an appropriate administrative sanction, the Enforcement Committee may give regard to other factors such as the nature, duration, seriousness and extent of the contravention;116 any loss or damage suffered;117 the extent of the profit derived or loss avoided by the respondent;118 the effect of the unlawful conduct on the relevant sector of the financial services industry;119 previous penalties or compensation paid on the same set of facts;120 the degree to which the respondent co-operated with the applicant and the

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109 S 103 & s104 of the Securities Services Act; also see s 6D of the Protection of Funds Act.
111 Van Deventer 2009 FSB Bulletin 3-4.
112 S 6D(5) of the Protection of Funds Act; see further s 105 of the Securities Services Act.
113 S 6E(2) of the Protection of Funds Act.
114 S 6G of the Protection of Funds Act.
115 S 106 of the Securities Services Act.
116 S 6D(3)(a)of the Protection of Funds Act.
117 S 6D(3)(b)of the Protection of Funds Act.
118 S 6D(3)(c)of the Protection of Funds Act.
119 S 6D(3)(d) of the Protection of Funds Act.
120 S 6D(3)(f) of the Protection of Funds Act.
Enforcement Committee;\textsuperscript{121} any mitigating factors submitted by the respondent that the Enforcement Committee considers relevant\textsuperscript{122} and the deterrent effect of the administrative sanction.\textsuperscript{123}

A respondent or any person not happy with the market abuse sanctions or any order made by the Enforcement Committee may appeal to the High Court.\textsuperscript{124} In light of this, the appellant does not need to apply to the Enforcement Committee for the leave to appeal.\textsuperscript{125} Moreover, the launching of the appeal proceedings does not suspend the operation or execution of a decision made by the panel of the Enforcement Committee.\textsuperscript{126} The appellant may still apply to the chairperson of the Enforcement Committee for such suspension.\textsuperscript{127}

The Enforcement Committee’s market abuse proceedings do not affect any person’s right to seek a legal redress in other appropriate forums.\textsuperscript{128} It is therefore possible for a respondent to be penalised by the Enforcement Committee and to be also sued by the affected person in the civil courts. Seemingly, the administrative sanctions imposed by the Enforcement Committee against the market abuse offenders do not limit the possibility of further criminal prosecution or other appropriate disciplinary proceedings to be effected against such offenders.\textsuperscript{129} This does not amount to double jeopardy as the latter court or tribunal is required to take into account any previous administrative sanctions imposed by the Enforcement Committee.\textsuperscript{130}

Lastly, the Enforcement Committee may utilise the administrative sanctions recovered from the market abuse offenders for the purposes of consumer education and the protection of the public by paying them into a trust fund as provided in the Securities Services Act.\textsuperscript{131} Regardless of this, this research maintains that the mere fact that the Enforcement Committee

\begin{footnotesize}
\begin{enumerate}
\item S 6D(3)(h) of the Protection of Funds Act
\item S 6D(3)(i) of the Protection of Funds Act.
\item S 6D(3)(g) of the Protection of Funds Act; also see s 104(7); (8) & (9)(a) to (f) of the Securities Services Act.
\item S 6F of the Protection of Funds Act.
\item S 6F(1) of the Protection of Funds Act.
\item S 6F(2) of the Protection of Funds Act.
\item S 6F(2) of the Protection of Funds Act.
\item Van Deventer 2009 \textit{FSB Bulletin} 3-4.
\item Van Deventer 2009 \textit{FSB Bulletin} 3-4.
\item S 6I of the Protection of Funds Act. Also see Van Deventer 2009 \textit{FSB Bulletin} 3-4.
\item S 77(7); (8) & (9) of the Securities Services Act. See further s 6H of the Protection of Funds Act.
\end{enumerate}
\end{footnotesize}
may only institute appropriate proceedings against the market abuse offenders on a referral basis and where no compensation was paid by such offenders in respect of the same facts could, if not properly managed, have the effect of restricting and impeding the execution of its functions. Moreover, unlike the position under the Securities Services Act and the Protection of Funds Act as indicated above, the Financial Markets Bill and the Financial Markets Bill 2012 do not stipulate any specific procedure that may be followed in respect of any referral of market abuse matters to the Enforcement Committee.

3.2.4 The Role of the Board of Appeal

The Board of Appeal is an independent body established to hear and afford all the aggrieved persons an opportunity to appeal or lodge their complaints against any decisions of the Registrar of Securities Services, the Enforcement Committee or the Financial Services Board regarding market abuse for them to be addressed. For example, under the Securities Services Act, a person aggrieved by any decision of the Registrar of Securities Services may appeal to the Board of Appeal for further adjudication. Moreover, any person who is not satisfied with the decision of the Enforcement Committee to impose an administrative fine or an obligation to pay a compensatory amount to the Financial Services Board or to the affected persons (victims) has the right to appeal to the Board of Appeal. Likewise, any person aggrieved by the decision of the claims officer as contemplated in the Securities Services Act may apply to the Board of Appeal for a redress. Even so, such an appeal must be consistent with the relevant provisions of the Securities Services Act. Apart from changing the name of the Board of Appeal to Appeal Board, the Financial Markets Bill and

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132 S 94(e) of the Securities Services Act; 6A of the Protection of Funds Act.
133 S 6D(3)(f) of the Protection of Funds Act.
136 See s 26A of the Financial Services Board Act.
137 S 111 & 6F of the Securities Services Act & the Protection of Funds Act respectively.
138 S 111(1)(a) of the Securities Services Act.
139 S 111(1)(b) of the Securities Services Act.
140 S 77(7)(b) of the Securities Services Act read with s 77(8) & (9) of the same Act.
141 S 111(1)(i) of the Securities Services Act.
142 S 111 of the Securities Services Act.
the Financial Markets Bill 2012 retain substantially the same functions of this body. For instance, all the persons aggrieved by any decision of the Registrar of Securities Services, independent clearing house, an exchange, claims officer and the central securities depository may now appeal or lodge their complaints with the Appeal Board.

The Board of Appeal hearings must be conducted in public and where an appeal is against a decision of the Enforcement Committee, the Registrar of Securities Services must act as the respondent. Where the respondent does not appeal against the Enforcement Committee within the stipulated period, the Registrar of Securities Services must make the decision of the Enforcement Committee public, unless such publication will be contrary to the Securities Services Act or there are exceptional circumstances that justify the keeping of the decision confidential as stipulated in the Securities Services Act. No similar provisions are found in the Financial Markets Bill and the Financial Markets 2012.

In determining its decision, the Board of Appeal takes into account several factors which include among others, the reasons for the decision appealed against, the grounds of appeal, documentary or verbal evidence submitted or given by any person at the request or with the permission of the Board of Appeal and any other information at the disposal of the Board of Appeal. Furthermore, the Board of Appeal must make its decision within a reasonable time and that decision is binding on the parties to the appeal. Once a respondent has exhausted all the remedies provided under the Securities Services Act, he may still have the decision of the Board of Appeal reviewed by a competent court. However, it is rather amusing that the Financial Markets Bill removed the conditions that used to be taken into account by the Board of Appeal before making any decision pertaining to the aggrieved persons’ appeal.

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146 S 111(2) of the Securities Services Act.
147 S 111(3) of the Securities Services Act.
150 S 111(5) of the Securities Services Act.
151 S 111(6) & 7(a) of the Securities Services Act.
152 S 111(7)(b) of the Securities Services Act.
153 See s 111(5) of the Securities Services Act.
Notwithstanding the Board of Appeal’s enforcement efforts, not many persons have so far utilised its appeal proceedings. This could indicate that some persons are unaware of the role of the Board of Appeal or that no persons are being aggrieved by the decisions or sanctions imposed by the Registrar of Securities Services, the Financial Services Board or the Enforcement Committee. While the latter may be true, it remains to be seen how successful the Board of Appeal will be in relation to the affording of all the aggrieved persons’ appropriate redress timeously. In the same vein, it is still questionable whether the Appeal Board which was re-introduced in the Financial Markets Bill and the Financial Markets Bill 2012 will also be able to provide adequate and timeous redress to all the aggrieved persons.

3.2.5 The Role of the JSE Limited

The JSE plays a pivotal role in the detection, investigation and prevention of market abuse in South Africa. Specifically, the JSE has the Market Practices Department in its Surveillance Division which is mainly responsible for preventing and detecting market abuse activities.

With regard to prevention, the JSE requires all the listed companies to promptly disclose non-public price-sensitive information relating to any securities in order to inter alia, minimise the occurrence of market abuse activities. This is done by ensuring that all the listed companies comply with the JSE Listing Requirements relating to the disclosure of non-public price-sensitive information. For example, the JSE imposes a general obligation of disclosure on all the issuers of securities to make a public announcement, through the JSE’s Stock Exchange News, of any developments or activities that might result in a material effect on the price of the issuer’s listed securities.

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156 See similar criticism by Luiz 2002 JBL’s Quarterly Law Review for People in Business 180-183.


161 See generally s 3 of the JSE Listing Requirements.

162 See s 3.4 of the JSE Listing Requirements.
The JSE further requires, except for trading statements, that an issuer must immediately, unless the information is kept confidential for a limited period, release an announcement providing details of any developments in such issuer’s activities that are not publicly known and which might lead to material movements of the reference price of such issuer’s listed securities or illicit market abuse practices. All issuers other than those who publish quarterly results must comply with the JSE’s disclosure requirements. All issuers are further required to publish a trading statement as soon they are satisfied that a reasonable degree of certainty exists that the financial results for a period to be reported upon next will differ by at least 20% from the most recent of the financial results for a previous corresponding period or of a profit forecast previously provided to the market in relation to such a period in order to curb market abuse activities. The determination of a reasonable degree of certainty referred above is a judgmental decision taken by the issuer and its directors, excluding the JSE itself. However, the JSE provides procedures that must be followed during and after the publication of the trading statements by the issuers to enhance the accurate dissemination of price-sensitive information for the purposes of combating market abuse practices. For instance, the JSE provides that price-sensitive confidential information may not be released to any third party, an analyst, printer or media during the JSE’s trading hours until it is published in accordance with or outside of the JSE’s trading hours or until such information has been authenticated or proved and arrangements have been made before the next business day’s opening of the JSE’s trading hours. Above and beyond, price-sensitive information may only, in the strictest confidence, be disclosed to persons such as government departments, the South African Reserve Bank, the Securities Regulation Panel, the Financial Services Board, investment analysts or any other statutory or regulatory body and may not be published unless there is a breach of confidentiality and the market is made aware of such information.

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163 See s 3.4(b) of the JSE Listing Requirements.
164 See s 3.6 of the JSE Listing Requirements.
165 See s 3.4(a) of the JSE Listing Requirements.
166 See s 3.4(b)(i) to (vi) of the JSE Listing Requirements.
167 See s 3.4(b)(i) of the JSE Listing Requirements.
168 See s 3.4(b)(ii) of the JSE Listing Requirements.
169 See further s 3.4(b)(vii) to (viii) of the JSE Listing Requirements.
170 See paragraphs 6; 7 & 8 of schedule 19 of the JSE Listing Requirements.
171 This provision is subject to s 3.6 to s 3.8 of the JSE Listing Requirements.
172 See s 3.6 to s 3.8 of the JSE Listing Requirements.
The JSE also requires issuers to disclosure cautionary announcements and periodic financial information regarding their listed securities. More to the point, issuers must, by way of notice and in writing, inform the JSE immediately of any proportion of the listed securities in the hands of the public which might have been affected or fallen below shareholder spread requirements. This is probably done to combat insider trading and market manipulation. Issuers must yet again disclose all relevant information to holders of securities to enable them to exercise their rights. Furthermore, issuers must disclose all the details of their transactions in securities relating to the issuer by or on behalf of the director, company secretary, any associate of the issuer or any independent entity, if such issuer may derive a beneficial interest. Issuers who fail to comply with these disclosure requirements, especially to those that deal with the disclosure of annual financial statements, may risk suspension or possible termination or delay of their securities from the JSE.

As earlier stated, with regard to detection, the JSE’s Surveillance Division has in place a number of sophisticated proprietary surveillance systems that are specifically designed to detect suspicious trading volumes and price movements which could be indicative of insider trading or market manipulation. These sophisticated surveillance systems are capable of identifying the names, addresses, telephone numbers and other details of the parties involved in the transactions. Precisely, the staff in the Market Practices Department of the JSE’s Surveillance Division is specifically responsible for detecting any signs of market abuses using such surveillance systems which are updated every 30 minutes. Additionally, the staff in the Market Practices Department of the JSE’s Surveillance Division may analyse the trading history of any account holder in relation to a particular security to detect unusual trading patterns which could be a sign of insider trading activity or market manipulation.

In other words, trading through different accounts at different brokerage firms can be linked,

173 See s 3.9; s 3.11 & s 3.12 to s 3.22 of the JSE Listing Requirements.
174 See s 3.42 & s 3.43 of the JSE Listing Requirements.
175 See s 3.44 of the JSE Listing Requirements.
176 See also paragraph 3.83 of the JSE Listing Requirements.
177 See s 3.23 of the JSE Listing Requirements.
178 See similar remarks in paragraphs 3 2 1; 3 2 2 above & 2 5 1 in Chapter Two of this thesis.
as well as accounts with similar details, such as addresses and telephone numbers to prevent market abuse practices. Where suspicious trading is detected and there appears to be no clarity on the cause, surveillance officers may contact the directors of the affected listed company to find out whether they are aware of any price-sensitive information that is due to be made public. If this is the case, the company concerned is requested to make a relevant announcement as soon as possible through the JSE’s Stock Exchange News. The detected unusual trading activity may further be reported to the Directorate of Market Abuse for further investigation.\textsuperscript{183} When the publication of the suspicious trading announcement is delayed or not done, the JSE may stop trading in the affected company’s shares until the announcement has been made to prevent market abuse activities.\textsuperscript{184} Where the published announcements affect or may affect the prices of the listed securities, the JSE’s Surveillance Division examines the trading activity prior to the announcements to investigate whether there is evidence of possible market abuse.\textsuperscript{185}

Notwithstanding the fact that the JSE and the Financial Services Board have a relatively good co-operation,\textsuperscript{186} this research submits that more may still need to be done to ensure that such co-operation continues to be utilised to combat market abuse activity in South Africa.\textsuperscript{187} In light of this, such co-operation could be further impeded by the absence of a provision in the Financial Markets Bill and the Financial Markets Bill 2012, which statutorily obliges the JSE’s Surveillance Division to report incidences of market abuse to the Financial Services Board.\textsuperscript{188}

\textsuperscript{187} See the discussion that will be held later in paragraph 4 3 1 of Chapter Four of this thesis.
\textsuperscript{188} Clause 91 & other relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill & clause 86 & other relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
The Role of the Courts

Only the competent courts\textsuperscript{189} are responsible for the civil and criminal prosecution of market abuse cases in South Africa. Therefore, the High Courts or regional courts have a prerogative to hear all the market abuse cases referred to them by the Financial Services Board.\textsuperscript{190} Remarkably, unlike the position under the Securities Services Act,\textsuperscript{191} the Financial Markets Bill now only provides that a ‘court of competent jurisdiction’ includes a court within whose jurisdiction the regulated market has its principal place of business or head office or in which any element of the dealing or offence occurred, without any need to make any attachment to found or confirm its jurisdiction.\textsuperscript{192} No similar provision is made in the Financial Markets Bill 2012.\textsuperscript{193} Specifically, the Securities Services Act,\textsuperscript{194} Financial Markets Bill and the Financial Markets Bill 2012\textsuperscript{195} stipulate that the prosecution of all the criminal cases of market abuse rests mainly with the Director of Public Prosecutions.\textsuperscript{196} Even so, the Director of Public Prosecutions may only exercise its prosecutorial powers on a referral basis. In relation to this, under the Securities Services Act any person accused of a civil offence of insider trading may only be liable if he fails to prove on a balance of probabilities that he did not commit that offence.\textsuperscript{197} Similarly, any person accused of a civil offence of insider trading and/or market manipulation may only be liable if he fails to prove on a balance of probabilities that he did not commit that offence.\textsuperscript{198} Likewise, a person accused of a criminal offence of insider trading or market manipulation may only be liable if the Director of Public Prosecutions proves beyond reasonable doubt that he actually committed that offence.\textsuperscript{199} Nonetheless, no appropriate presumptions were provided in the Securities Services Act to enable the Director of Public Prosecutions to obtain more convictions in criminal cases of

\textsuperscript{189} These competent courts include the High Courts and Regional Courts. See further s 79 of the Securities Services Act.
\textsuperscript{190} S 79 of the Securities Services Act.
\textsuperscript{191} S 79 of the Securities Services Act.
\textsuperscript{192} Clause 81.
\textsuperscript{193} Clause 79.
\textsuperscript{194} S 82(9) read with s 79.
\textsuperscript{195} Clause 91(9) read with clause 81 of the Financial Markets Bill & clause 86(10) read with clause 79 of the Financial Markets Bill 2012.
\textsuperscript{197} S 77 of the Securities Services Act.
\textsuperscript{198} Clauses 86 & 87 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
\textsuperscript{199} S 73; s 75 & s 76 of the Securities Services Act; clauses 82; 84 & 85 of the Financial Markets Bill & clause 80; 82 & 83 of the Financial Markets Bill 2012.
market abuse. This flaw was not resolved in both the Financial Markets Bill and the Financial Markets Bill 2012.

Under the Securities Services Act, the competent courts further play a crucial role in the determination and calculation of the appropriate damages in civil cases of insider trading, namely the compensatory or punitive amounts to be paid to the Financial Services Board or to the actual prejudiced persons by the offenders. This enables all the affected (claimants) persons to have an opportunity to get appropriate monetary remedies awarded to them by the courts from the Financial Services Board. On the one hand, the Financial Markets Bill now extends the same role of the competent courts in respect of both insider trading and market manipulation. Nonetheless, this is not the case under the Financial Markets Bill 2012. As indicated earlier, the competent courts may also hear an appeal by any person aggrieved by the decision of the Financial Services Board, Registrar of Securities Services, Enforcement Committee or the Board of Appeal and review such decision. It is important to note that the competent courts also have a similar role under the Financial Markets Bill and the Financial Markets Bill 2012.

3 2 7 Analysis and Recommendations

The success of any piece of legislation in any country is usually determined by the implementation of its provisions. It is against this background that a close examination of the relevant provisions of the Securities Services Act was undertaken to investigate whether

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201 Clauses 82; 84 & 85 of the Financial Markets Bill & clause 80; 82 & 83 of the Financial Markets Bill 2012.
202 See further s 77(1)(c)(i) to (iv); s 77(2)(c)(i) to (v); s 77(3)(b)(i) to (v) & s 77(4)(a) to (e) of the Securities Services Act.
203 S 77(7) to (10) of the Securities Services Act.
204 Clauses 86 & 87.
205 Clause 84 read with other relevant clauses under Chapter X entitled “Market Abuse” of the Financial Markets Bill 2012.
206 See similar comments in paragraph 3 2 4 above.
207 S 111(7)(b) of the Securities Services Act.
209 See the comparative analysis that will be carried out later in Chapters Five, Six, Seven, Eight & Nine of this thesis.
they are being implemented to curb market abuse practices in South Africa. Consequently, the duties of the current market abuse enforcement authorities namely the Financial Services Board, the Directorate of Market Abuse, the Enforcement Committee, the Board of Appeal, the JSE and the courts will be briefly and carefully analysed below.

As earlier discussed, the Financial Services Board still has various challenges with regard to the monitoring and enforcement of the market abuse provisions in South Africa. The fact that the Financial Services Board has limited prosecutorial powers in that it may only prosecute criminal cases of market abuse if the Director of Public Prosecutions or a competent court has declined to prosecute them is a case in point. Given the existing courts backlog challenges in South Africa, it is submitted that not all premises and persons will be promptly searched, interrogated or prosecuted by the Financial Services Board and/or the competent courts. Thus, even though the availability of adequate resources could be problematic, more courts or additional special commercial courts or tribunals should be established to adjudicate on market abuse cases in South Africa. In light of this, the Financial Services Board should further consider having more offices and other divisions of its departments in different regions of South Africa to increase awareness and to enhance the implementation of its functions. It is further submitted that although it might be cheaper for the victims of market abuse to claim their damages through the Financial Services Board, this might have, on the other hand, also deterred other affected persons from claiming their damages through the Financial Services Board because of fears that such a strategy would be too bureaucratic. Moreover, no cross-border market abuse cases have so far been successfully settled with the Financial Services Board, probably as a result of several factors which include, among others, the unavailability of the relevant resources. This could have been further aggravated by the

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210 See the discussions under paragraphs 2.4 & 2.5 in Chapter Two of this thesis.
211 See paragraph 3.2.1 above.
212 See s 82 of the Securities Services Act; clause 91 of the Financial Markets Bill & clause 86 of the Financial Markets Bill 2012 which outlines some of the duties of the Financial Services Board.
213 See s 82(9) of the Securities Services Act; clause 91(9) of the Financial Markets Bill & clause 86(10) of the Financial Markets Bill 2012.
214 Notwithstanding the fact that the Financial Services Board is entitled to publish notices in relation to market abuse offences in terms of s 82(5) of the Securities Services Act to increase awareness, it has not successfully implemented this provision particularly owing to the inadequate availability of resources. Additionally, it remains to be seen whether a similar provision which is contained in clause 91(5) of the Financial Markets Bill & clause 86(6) of the Financial Markets Bill 2012 will be successfully utilised by the Financial Services Board to increase awareness.
215 See related comments in paragraphs 2.5.4 in Chapter Two of this thesis & 3.2.1 above.
216 See paragraph 3.2.1 above.
fact that the Financial Services Board does not have its own surveillance equipment in place to timeously detect any suspected market abuse practices and to provide the details of the beneficial owners of securities held in nominee accounts in South Africa or elsewhere.

Notwithstanding its commendable efforts to curb market abuse in South Africa, the Directorate of Market Abuse is still to achieve more success in relation to the execution of its market abuse duties.\textsuperscript{217} For example, it has restricted authority and does not perform any of its duties without confirmation from the Financial Services Board and the competent courts.\textsuperscript{218} This clearly suggests that the Directorate of Market Abuse does not have the power of its own to make market abuse rules and this could be negatively affecting the execution of its duties. In relation to this, one could have expected that the Directorate of Market Abuse (which is a committee of the Financial Services Board) will be allowed to execute its duties without prior confirmation from the Financial Services Board in order to curb potential bureaucracy. Moreover, the Directorate of Market Abuse does not have its own surveillance systems in place to detect, investigate and prevent the occurrence of market abuse practices in the South African financial markets. Specifically, as stated earlier,\textsuperscript{219} the Directorate of Market Abuse depends on the JSE’s Surveillance Division for its market abuse investigations.\textsuperscript{220} Despite submissions by other commentators like Rob Barrow (the former chief executive officer of the Financial Services Board)\textsuperscript{221} that the Directorate of Market Abuse now has sufficient measures in place and competent personnel to improve the enforcement of the market abuse provisions in South Africa, a few convictions and settlements attained to date may suggest otherwise.\textsuperscript{222}

Although the Enforcement Committee is empowered as a committee of the Financial Services Board which administers the administrative sanctions for market abuse in South Africa, it may only institute administrative or civil proceedings in a court of law against the offenders

\textsuperscript{217} See paragraph 3 2 2 above.
\textsuperscript{218} S 78 & s 83 of the Securities Services Act & clauses 92 & 88 of the Financial Markets Bill; clause 87 of the Financial Markets Bill 2012.
\textsuperscript{219} See generally paragraph 3 2 2 above.
\textsuperscript{221} Barrow Business Report (2004-07-28). Also see generally paragraph 3 2 1 above.
\textsuperscript{222} Chanetsa “Insider Trading is Notoriously Hard to Prosecute” Business Report (2004-04-26). Also see generally paragraph 3 2 2 above.
on a referral basis and where no compensation was paid by the defendant as provided under the Securities Services Act. This referral procedure might have weakened the enforcement functions of the Enforcement Committee and could, if not properly managed, continue to have the effect of restricting or impeding the implementation of the administrative sanctions for market abuse in South Africa. Besides, in spite of the fact that the Enforcement Committee may impose unlimited administrative penalties against the market abuse offenders, not many cases of market abuse have been settled with the Enforcement Committee to date.

The Board of Appeal is statutorily empowered to hear any appeal by persons aggrieved by the decisions or sanctions imposed by the Registrar of Securities Services, the Financial Services Board or the Enforcement Committee. While this may be a good move towards affording justice and equal opportunities to all persons, not many persons have to date employed the Board of Appeal proceedings for their redress. This research contends that this could also indicate that the Board of Appeal might be facing some difficulties in relation to the affording of all the aggrieved persons appropriate redress timeously.

In spite of the fact that the JSE has played a considerable role in the enforcement of market abuse laws in South Africa, its efforts could still be interrupted and hampered by inconsistent co-operation with other regulatory bodies. In light of this, the JSE should continue co-operating with the Financial Services Board, the Securities Regulation Panel and other relevant enforcement authorities in order to curb market abuse practices, especially in relation to over the counter transactions as well as cross-border market abuse activity.

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224 S 77 & s 105(5) of the Securities Services Act.
226 See generally paragraph 3 2 3 above.
227 S 111 of the Securities Services Act & also see clause 111 of the Financial Markets Bill & clause 107 of the Financial Markets Bill 2012. Also see paragraph 3 2 4 above.
229 See further paragraph 3 2 5 above.
Furthermore, the competent courts have played, and are still playing, a significant role in the enforcement of market abuse laws in South Africa. Nonetheless, the backlog and pressure on the part of the South African judicial services and the Director of Public Prosecutions might well be the reason for the absence of many convictions and settlements that have been obtained in market abuse cases in South Africa to date. In this regard, the introduction of additional separate commercial courts manned by specialists to deal with market abuse matters should receive serious consideration in order to improve the enforcement of market abuse provisions in South Africa.

3.3 Concluding Remarks

The enforcement framework established under the Securities Services Act can be welcomed as a better move towards improving the enforcement of market abuse provisions in South Africa and the eradication of a general belief that market abuse practices might be still rife in our financial markets.

Significant progress has been made in the enforcement of the market abuse prohibition in this country. For example, in an attempt to establish a good enforcement framework, more elaborate civil remedies and new criminal penalties were introduced under the Securities Services Act. Likewise, the Directorate of Market Abuse was established as an investigatory arm of the Financial Services Board, while the Enforcement Committee was empowered to hear cases of market abuse and to impose unlimited administrative sanctions against anyone who violates the market abuse provisions in South Africa. The Board of Appeal was also given the mandate to hear appeal matters by persons aggrieved by any decision of the Enforcement Committee, the claims officer of the Financial Services Board or the Registrar of Securities Services. With regard to the detection, prevention and investigation of market abuse activities, the Financial Services Board depends mainly on the JSE’s Surveillance Division.

230 See paragraph 3.2.6 above.
231 See paragraph 3.2.6 above.
232 See the analysis in sub-paragraphs under paragraph 2.2 in Chapter Two of this thesis.
233 See the analysis in paragraphs 2.4.1.1; 2.4.1.2; 2.4.1.3 & 2.5.4 in Chapter Two of this thesis.
Irrespective of this, various shortcomings are still found in the enforcement of the market abuse provisions in South Africa.\textsuperscript{234} Notably, the criminal penalties imposed against market abuse offenders are still very little for deterrence purposes.\textsuperscript{235} Moreover, the same deficiency is still contained in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{236} Furthermore, the establishment of additional structures such as the Enforcement Committee to hear market abuse cases on a referral basis and the introduction of administrative sanctions has not been able to encourage all persons to comply with the market abuse prohibition in South Africa.\textsuperscript{237} In relation to this, it was stated that the aforesaid referral procedure might have weakened the enforcement functions of the Enforcement Committee and could, if not properly managed, continue to have the effect of restricting or impeding the implementation of the administrative sanctions for market abuse in South Africa.\textsuperscript{238} It was also indicated that the Directorate of Market Abuse does not have the power of its own to make market abuse rules and this could be negatively affecting the execution of its duties.\textsuperscript{239} In relation to this, it was suggested that the Directorate of Market Abuse (which is a committee of the Financial Services Board) should be allowed to execute its duties without prior confirmation from the Financial Services Board in order to curb potential bureaucracy.\textsuperscript{240} It was also suggested that both the Directorate of Market Abuse and the Financial Services Board should have their own surveillance systems in place to detect, investigate and prevent the occurrence of market abuse practices in the South African financial markets.\textsuperscript{241}

Moreover, in civil proceedings, the right to claim compensation is exclusively given to the Financial Services Board and no provision is made for the prejudiced persons to claim such compensation directly (a private right of action) from the perpetrators of market abuse.\textsuperscript{242} This could be too rigid and bureaucratic and may, if not carefully enforced, lead to the failure, on the part of the Financial Services Board, to compensate all the affected persons speedily.\textsuperscript{243} Incongruously, the same weakness is replicated in the Financial Markets Bill and the

\textsuperscript{234} See the analysis in paragraph 3.2.7 above.
\textsuperscript{235} S 115(a) of the Securities Services Act.
\textsuperscript{236} Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
\textsuperscript{237} See the analysis in paragraphs 3.2.3 & 3.2.7 above.
\textsuperscript{238} See the analysis in paragraph 3.2.7 above.
\textsuperscript{239} See the analysis in paragraph 3.2.7 above.
\textsuperscript{240} See the analysis in paragraph 3.2.7 above.
\textsuperscript{241} See the analysis in paragraph 3.2.7 above.
\textsuperscript{242} S 82(2)(c) of the Securities Services Act.
\textsuperscript{243} See paragraphs 3.2.1 & 3.2.7 above.
Financial Markets Bill 2012. Additionally, it was submitted that the failure of the Financial Services Board to have its own surveillance equipment that timeously detects any suspected market abuse practices and/or provides the details of the beneficial owners of securities held in nominee accounts in South Africa or elsewhere could be negatively affecting its combating of cross-border market abuse cases. It was further suggested that the Financial Services Board should consider having more offices and other divisions of its departments in different regions of South Africa to increase awareness and to enhance the implementation of its functions. Furthermore, it was stated that the JSE’s enforcement efforts could still be interrupted and hampered by inconsistent co-operation with other regulatory bodies. In light of this, it was submitted that the JSE should continue co-operating with the Financial Services Board, the Securities Regulation Panel and other relevant enforcement authorities in order to curb market abuse practices, especially in relation to over the counter transactions as well as cross-border market abuse activity.

Not giving less regard to some practical considerations such as the current backlog in the courts, severe stress on the judicial resources and the availability of sufficient resources on the part of the Financial Services Board, it is submitted that there is still a need to introduce other alternative enforcement measures as discussed in this chapter to enhance and improve the enforcement of the market abuse provisions in South Africa. In relation to this, it was suggested that even though the availability of adequate resources could be problematic, more courts or additional special commercial courts or tribunals should be established to adjudicate on market abuse cases in South Africa.

Given this background, the next chapter will focus on the current gaps and problems associated with the ineffective enforcement of the market abuse ban in South Africa. The next chapter will also briefly discuss some selected new market abuse practices that manifested during the recent global economic crisis so as to evaluate whether the South African anti-market abuse enforcement framework is able to combat such practices successfully.

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245 See the analysis in paragraph 327 above.
246 See the analysis in paragraph 327 above.
247 See the analysis in paragraph 327 above.
248 See the analysis in paragraph 327 above.
CHAPTER FOUR
OVERVIEW OF PROBLEMS ASSOCIATED WITH INEFFECTIVE ENFORCEMENT OF MARKET ABUSE PROVISIONS IN SOUTH AFRICA

41 Introduction

The enforcement of market abuse laws has been problematic in South Africa.\(^1\) Several factors like the inherent complexities and flaws in the detection, prosecution and prevention of market abuse practices have contributed too many challenges that are associated with the inconsistent enforcement of the market abuse laws in South Africa to date.\(^2\) As stated in Chapter Three, this chapter seeks to explore these enforcement problems by, firstly, taking a closer look at the effectiveness of the Financial Services Board as the market abuse national regulatory body in South Africa. Secondly, the co-operation between the Financial Services Board and other similar local and international enforcement bodies will be examined. Thirdly, the adequacy of the available resources, penalties and remedies will be discussed. Fourthly, the adequacy of the market abuse preventative measures that were adopted in South Africa will be explored and discussed. Finally, the gaps and flaws in the current market abuse enforcement framework in relation to some selected specific aspects of the financial markets in South Africa will be highlighted and briefly discussed.

42 Adequacy and Efficiency of the National Regulator?

As discussed earlier in Chapters Two\(^3\) and Three,\(^4\) the Financial Services Board was established in terms of the Financial Services Board Act\(^5\) as an independent board and a

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2. See the discussions in Chapters Two and Three of this thesis.

3. See paragraphs 2.3 4 3; 2 3 5 of Chapter Two of this thesis.

4. See paragraph 3 2 1 of Chapter Three of this thesis.
national regulator to police, supervise and enforce the market abuse ban in South Africa. The Financial Services Board has ostensibly wide powers to enhance and improve the enforcement of the market abuse prohibition in South Africa. Significant progress in relation to the enforcement of the market abuse prohibition has been made since the inception of the Financial Services Board in 1999. For instance, the Financial Services Board is empowered to investigate all cases of suspected market abuse, including insider trading committed before the repeal of section 440F of the Companies Act and the Insider Trading Act. All incidents of unusual trading patterns are brought to the attention of the Financial Services Board for further investigation. The Financial Services Board is further allowed to interrogate any persons believed to have information relating to an ongoing investigation, and search any person, premises or strongroom in order to seize any document suspected to have information relating to an ongoing investigation. Although not many criminal prosecutions have been successfully obtained, the Financial Services Board has managed to investigate a fair number of suspected market abuse violations to date.

The Financial Services Board is entitled to take civil action against any person who contravenes the relevant provisions of the Securities Services Act and fails to rely on any of

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5 97 of 1990, hereinafter referred to as the Financial Services Board Act.
6 S 82(1) of the Securities Services Act 36 of 2004 (hereinafter referred to as the Securities Services Act).
7 See s 82 of the Securities Services Act; also see clause 91 of the Financial Markets Bill [B-2011], hereinafter referred to as the Financial Markets Bill; clause 86 of the Financial Markets Bill [B12-2012], hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012 because at the time of writing this chapter, the aforementioned Bills were not yet effectively passed into law).
8 61 of 1973, hereinafter referred to as the Companies Act.
11 S 82(2)(f) of the Securities Services Act; also see clause 91(3)(d) of the Financial Markets Bill & clause 86(3)(c) of the Financial Markets Bill 2012.
12 Generally see Myburgh & Davis (25-03-2004) 28 <http://www.genesis-analytics.com/public/FSBReport.pdf> (accessed 09-02-2009). Notwithstanding the fact that this Myburgh & Davis report was published before the Securities Services Act came into effect and the fact that it was somewhat influenced by the opinions of the interviewees, it shall be referred to in this Chapter where necessary, not as the only basis or evidence of the existence of market abuse activity in the South African financial markets but as a pointer on how market abuse laws were enforced in South Africa prior to the enactment of the Securities Services Act.
13 S 77 of the Securities Services Act; also see clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
the defences set out in the same Act. This civil liability applies only to matters relating to insider trading under the Securities Services Act. No similar civil action can be instituted against the market manipulation offenders under the Securities Services Act. This omission on the part of the legislature may, if not promptly addressed, affect the enforcement of the market abuse prohibition by the Financial Services Board. It is anticipated that this flaw could be corrected by the Financial Markets Bill which now extends the civil liability to matters involving market manipulation, if it comes into force. However, the penalty for actual profit or loss avoided in civil cases relating to market manipulation or insider trading is determined by the competent courts and not the Financial Services Board. On the other hand, the Financial Markets Bill 2012 does not give civil penalties for market manipulation. Moreover, no provision is expressly made for the aggrieved persons to institute their own claims for damages (private rights of action), apart from the Financial Services Board, directly against the market abuse offenders. Notably, unlike in criminal cases where the prosecuting authorities have to prove the guilty of the accused beyond reasonable doubt, the Financial Services Board is only required to prove on a balance of probabilities that the defendant violated the relevant provisions of the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 in civil cases of market abuse. Accordingly, the Financial Services Board has to date relatively achieved some success in the enforcement of the civil sanctions of insider trading. For example, the Financial Services Board is believed to have utilised and obtained the following remedies in a number of instances:

(a) recovering the profit made or loss avoided by the offenders;

(b) awarding a penalty for compensatory and punitive purposes of up to three times the profit made or loss avoided; and

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14 S 73 of the Securities Services Act; also see clause 82 of the Financial Markets Bill & clause 80 of the Financial Markets Bill 2012.
15 S 75 & s 76 Securities Services Act.
17 Clause 87 of the Financial Markets Bill.
18 S 77 of the Securities Services Act; also see clauses 86 & 87 of the Financial Markets Bill.
19 See generally clauses 82 & 83 of the Financial Markets Bill 2012.
20 S 77 of the Securities Services Act; also see clauses 86 & 87 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
recouping its legal and investigation costs from the money recovered and distributing the balance to compensate the victims (prejudiced investors) who can prove that they suffered loss as a result of the illegal dealing (insider trading) by the insider concerned.21

Nonetheless, although the Financial Services Board is reported to have sufficient sophisticated equipment in place and persons with the relevant expertise to detect market abuse and enforce the market abuse ban, a minimal number of successful prosecutions and settlements have been obtained in market abuse cases in South Africa to date.22 On the other hand, a survey conducted by the Genesis Analytics (Pty) Ltd on behalf of the Financial Services Board to assess its effectiveness and the impact of the insider trading laws revealed that market abuse activities especially insider trading, have been significantly reduced.23 For example, about 80% of the respondents reported that insider trading has become less acceptable, 77% of the traders and asset managers viewed the insider trading laws as having been successful in reducing insider trading and 59% of the listed companies interviewed had implemented insider trading policies and other measures to curb market abuse activity.24 The same survey indicated that 60% of smaller retail brokerages did not have compliance manuals dealing with insider trading and only 20% had some measures to deal with the protection and disclosure of inside information.25 Furthermore, 18% of the listed companies interviewed were reluctant to implement and comply with the insider trading laws and the relevant requirements of the Financial Services Board.26 The Financial Services Board also stated in its 2005 Annual Report that although there was a steady decline in insider trading cases, insider trading and other related market abuse practices had certainly not been completely eradicated. It remains unclear whether the decline in reported cases is being caused by

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effective enforcement on the part of the Financial Services Board or whether it could be due to the fact that some market abuse activities are not being detected by the Johannesburg Stock Exchange Limited\textsuperscript{27} and/or the Financial Services Board. This survey further revealed that individuals who settled with the Financial Services Board were either guilty or probably guilty according to 80\% of the respondents. It also showed that the fine imposed was the most important reason for consideration when settling with the Financial Services Board, according to 4\% of the respondents.\textsuperscript{28} Other respondents were more concerned about how settling with the Financial Services Board would be perceived within the marketplace. For example, about 75\% of the respondents reported that they will consider the damage to their career, 12\% said that they will look at the shame of being caught, 4\% indicated that they would need to know if their names will be published in the press and 90\% of the respondents said their major concern would be the damage to the company’s reputation.\textsuperscript{29} This implies that there is some stigma associated with settling with the Financial Services Board. The reason for this stigma could be three-fold. Firstly, it may be because the Financial Services Board has managed to change the attitudes of all the relevant persons and market abuse activities are now less acceptable in the South African financial markets. Secondly, listed companies linked to market abuse settlements with the Financial Services Board have sometimes ended up being unsuccessful.\textsuperscript{30} Lastly, other affected persons may be having some doubts as to whether their cases will be successful or timeously settled. This could be due to the fact that only successful claimants will receive compensation after the Financial Services Board had recouped its legal and investigation costs from the money recovered from the offenders.

As highlighted above, notwithstanding the fact that there are still some inconsistencies and loop-holes in its enforcement, the Financial Services Board has to date played a pivotal role in tackling market abuse practices in South Africa.

\textsuperscript{27} Hereinafter referred to as the JSE.


4.3 Co-operation and Adequacy of Resources?

4.3.1 Co-operation between the Financial Services Board and other Local Enforcement Agencies

The Financial Services Board does not operate in a vacuum; it works in association with other enforcement bodies namely the JSE, the Enforcement Committee, the Directorate of Market Abuse, the Board of Appeal and the courts. Firstly, the Financial Services Board houses the Directorate of Market Abuse as its investigatory committee established in terms of the Securities Services Act. Duties and powers which the Directorate of Market Abuse may exercise on behalf of the Financial Services Board are clearly stipulated in the Securities Services Act. For example, the Directorate of Market Abuse may, on behalf of the Financial Services Board, decide whether to take a civil action or to refer a matter to the Enforcement Committee or the Director of Public Prosecutions. Notably, the Directorate of Market Abuse may only institute civil proceedings in the name of the Financial Services Board and may settle any matter after confirmation from the Financial Services Board or the competent courts. This may suggest that there is good co-operation between the Financial Services Board and the Directorate of Market Abuse. In other words, the mere fact that the Directorate of Market Abuse only exercises specific powers in the name of the Financial Services Board and does not function as an independent regulatory body could be viewed as proof of an existing good co-operative relationship between the Financial Services Board and the Directorate of Market Abuse. Secondly, the Financial Services Board works closely with the Enforcement Committee as its committee responsible for adjudicating on all the market abuse cases referred to it by the Directorate of Market Abuse or the Registrar of Securities Services as provided for in the Securities Services Act. The Enforcement Committee is made up of members appointed by the Financial Services Board. Apart from being empowered to impose unlimited administrative penalties against the market abuse

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31 S 83(1)(b); also see clause 92(1)(a) & (b) of the Financial Markets Bill & clauses 87(1)(a) & (b) of the Financial Markets Bill 2012.

32 S 83(1)(c); also see clause 92(1)(c) of the Financial Markets Bill & clauses 87(1)(c) of the Financial Markets Bill 2012.

33 S 83(1)(d); also see clause 92(1)(d) of the Financial Markets Bill & clauses 87(1)(d) of the Financial Markets Bill 2012.


35 S 94(e); also see clause 105 of the Financial Markets Bill & clauses 101 of the Financial Markets Bill 2012 & paragraph 3.2.3 in Chapter Three of this thesis.

36 S 98 of the Securities Services Act; also see paragraph 3.2.3 in Chapter Three of this thesis.
offenders, the Enforcement Committee is obliged to submit annual reports regarding its activities and other relevant information during the preceding calendar year to the Financial Services Board. Moreover, it is reported that there are regular meetings between the members of the Financial Services Board and the members of the Enforcement Committee. This suggests that there is some co-operation between the Financial Services Board and the Enforcement Committee, and, according to Gerhard van Deventer,\textsuperscript{37} such co-operation has improved the enforcement of the market abuse prohibition in South Africa.

Thirdly, there is co-operation between the Financial Services Board and the Board of Appeal. The Board of Appeal was first established in terms of the Financial Services Board Act\textsuperscript{38} to hear and afford all the persons aggrieved with any decision of the executive officer of the Financial Services Board, the Registrar of Securities Services or the claims officer as contemplated in the Securities Services Act, a chance to lodge their complaints for them to be addressed.\textsuperscript{39} The Board of Appeal is an independent tribunal comprising members appointed by the Minister of Finance and who are neither employees of the Financial Services Board nor active participants in the financial industry.\textsuperscript{40} The Financial Services Board is reportedly cooperating with the Board of Appeal in a number of ways, such as providing oral and/or written evidence or any other relevant information required by the Board of Appeal. In order not to interfere with the proceedings and decisions of the Board of Appeal, the Financial Services Board directs all queries relating to an appeal by the aggrieved persons to the secretaries of the Board of Appeal. Nonetheless, the consistency on the part of the Financial Services Board, to comply with the requests from the Board of Appeal remains uncertain.\textsuperscript{41}

Fourthly, the Financial Services Board enjoys much support from the JSE. For example, the Financial Services Board depends on the JSE’s Surveillance Division to monitor, detect and prevent market abuse practices in the South African financial markets.\textsuperscript{42} The JSE further requires all the issuers of listed securities to disclose any developments or activities that might

\textsuperscript{37} Van Deventer (10-06-2008) 1-5 <http://www.fsb.co.za/public/marketa

\textsuperscript{38} S 26 of the Financial Services Board Act.


\textsuperscript{40} See paragraph 3 2 4 in Chapter Three of this thesis.

\textsuperscript{41} In other words, the actual extent or degree of co-operation between the Financial Services Board and the Board of Appeal is not very clear. See paragraph 3 2 4 in Chapter Three of this thesis.

have a material effect on the price of such securities. When an unusual trading activity is
detected by the JSE’s Surveillance Division, it is reported to the Financial Services Board for
further investigation. It is reported that a number of market abuse investigations have in fact
been carried out by the Financial Services Board on the advice of the JSE. In other words,
the JSE has access to significant amounts of information through its surveillance and
monitoring technology systems, which is used to isolate and report all possible market abuse
incidents to the Financial Services Board. The Financial Services Board and the JSE have
further co-operatively played a key role in educating all the relevant persons about market
abuse practices through seminars and workshops in South Africa. Notably, the Financial
Services Board also used to rely on the Bond Exchange of South Africa, before the latter was
consolidated into the JSE, to detect and investigate market abuse activity in relation to the
commodities, bonds and derivatives markets in South Africa. However, the Bond Exchange
of South Africa was reportedly not playing an active role in the surveillance of market abuse
practices and in assisting the Financial Services Board to detect and enforce the market abuse
ban in the South African commodities, bonds and derivatives markets. It remains to be seen
whether this consolidation will enhance and improve the co-operation and effectiveness of the
enforcement of the market abuse prohibition in South Africa by both the Financial Services
Board and the JSE.

Fifthly, the Law Society of South Africa and the Securities Regulation Panel offers further
support to the Financial Services Board. According to Gerhard van Deventer, the Financial
Services Board has good co-operation with these bodies and has, in some instances, utilised
their advice to tackle and/or combat certain market abuse activities in the South African
financial markets. Lastly, the Financial Services Board may rely on the courts. Irrespective
of the fact that the competent courts are empowered to hear market abuse cases referred to

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43 S 3.4 of the JSE Listing Requirements.
   (accessed 09-02-2009), who outlines the role played by the JSE especially in relation to the curbing of the
   insider trading activities prior to 2004.
45 This formal consolidation was finalised on 22 June 2009 & the Bond Exchange of South Africa is now a
   fully owned subsidiary of the JSE.
   (accessed 09-02-2009).
48 S 79 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & generally see
   clauses 86(4)(b) & (10) of the Financial Markets Bill 2012. See further paragraph 3.2.6 in Chapter Three
   of this thesis.
them by the Financial Services Board, some cases have been either withdrawn or abandoned by the courts.\textsuperscript{49} This might imply that there is little or no co-operation between the Financial Services Board and the courts.

\textbf{4 3 2 Co-operation between the Financial Services Board and Listed Companies}

It was revealed in a survey conducted by the Genesis Analytics (Pty) Ltd\textsuperscript{50} that about 72\% of the listed companies had formal policies (internal measures) aimed at discouraging market abuse practices. About 18\% of the listed companies were co-operating with the Financial Services Board by implementing such policies to reduce market abuse practices in South Africa.\textsuperscript{51} Most of the listed companies that implemented anti-market abuse policies were, among others, asset managers, investment banking and corporate finance companies.\textsuperscript{52} The companies that failed to comply with the Financial Services Board’s market abuse policies and requirements were mainly retail brokerages companies and other smaller companies.\textsuperscript{53} Furthermore, there have been very few or no incidents where the employees of the listed companies reported other persons involved or who might be involved in market abuse activities in their companies (whistle-blowing) to the Financial Services Board. It is hoped that the co-operation between the Financial Services Board and the listed companies will continue to be encouraged to improve and enhance the enforcement of the market abuse ban in South Africa.

\textbf{4 3 3 Co-operation between the Financial Services Board and Similar International Enforcement Agencies}

Owing to the increasingly global nature of trading in listed instruments, the Financial Services Board has reportedly entered into some co-operation agreements with similar bodies elsewhere in the world, such as the Financial Services Authority and the United States...

\textsuperscript{49} See related analysis in paragraph 3 2 7 in Chapter Three of this thesis.
Securities and Exchange Commission. The rationale behind these agreements is *inter alia*, to curb and reduce as much as possible all cross-border market abuse activities in the financial markets. For instance, these co-operation agreements allow the Financial Services Board to track the activities of market abuse suspects who use other jurisdictions to contravene the South African market abuse laws, hoping to evade and escape liability. It is further reported that the Financial Services Board has, in some instances, relied on its Financial Services Authority and United States Securities and Exchange Commission co-operative agreements and the Multilateral Memorandum of Understanding it has with regulatory bodies in other jurisdictions to detect and prevent market abuse activities in the South African financial markets. This extra-territorial application of the market abuse prohibition should continue to be promoted and successfully implemented to combat cross-border market abuse practices. However, the Financial Services Board does not seem to have its own sufficient additional resources and measures in place to enable it to co-operate more with similar bodies at an international level. In this regard, the Financial Services Board should continue striving to employ other relevant regulatory approaches from other jurisdictions to enable greater awareness of any enforcement changes that might occur in such jurisdictions and to develop trust and better communication with similar regulatory bodies, especially from the developed world.

### 4.3.4 Adequacy of Available Resources

There has been a growing recognition in recent years of the fact that having adequate market abuse laws alone is not sufficient; instead enforcement authorities should have the relevant

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56 For example the Securities and Exchange Board of India (SEBI) & the International Organisation of Securities Commissions (IOSCO).

57 Generally see Chapter Three read with Chapter Two of this thesis, for an overview discussion on the current market abuse position in South Africa.

resources and other appropriate measures in place in order to effectively enforce such laws to combat market abuse practices. The enforcement authorities in many jurisdictions have resources like surveillance technology and equipment to detect and prevent market abuse activity in the financial markets. Additionally, other enforcement authorities have the much-needed financial resources to train their workers, recruit persons with the relevant expertise and employ the necessary methods to ensure compliance with, and proper enforcement of the market abuse laws in their respective jurisdictions. Likewise, in South Africa, the Financial Services Board is reported to have sophisticated machinery in place and competent persons to detect and enforce the market abuse prohibition.\(^\text{59}\) The Financial Services Board does not rely on the government’s subsidies or other monetary support \textit{per se}; it finances its operations by recouping all the legal and investigation costs it would have incurred from the money recovered from the market abuse offenders.\(^\text{60}\) However, the Financial Services Board does not have its own surveillance systems to detect possible market abuse practices in the South African financial markets. In relation to this, the Financial Services Board is still to mobilise sufficient additional resources for the procurement and establishment of its own surveillance systems and other relevant market abuse preventative measures such as offices or awareness programmes in all the regions of South Africa so that its enforcement efforts may not be hampered by inefficiency and/or bureaucracy.

\textbf{4.4 Complexities and Flaws in the Detection and Prosecution}

\textbf{4.4.1 Frequent Occurrence of Market Abuse Activity Extremely Difficult to Prove}

In the last few years, there has been a decline in the number of prosecutions and reported cases of insider trading and market manipulation in South Africa.\(^\text{61}\) The \textit{prima facie} explanation for this reduction in reported cases and prosecutions may be that there are now very few or no market abuse activities occurring in South Africa. However, the research interviews conducted by Genesis Analytics (Pty) Ltd with traders and asset managers, market advisors, company secretaries of listed companies and financial compliance officers indicated that, although the extent could not be accurately quantified, market abuse activities were still


\(^{60}\) See s 77(7)(a) & s 84 of the Securities Services Act; also see clauses 86(9)(a); 87(3)(a) & 93 of the Financial Markets Bill & clauses 84(2)(a) & 88 of the Financial Markets Bill 2012.

occurring with some frequency in the South African financial markets.\textsuperscript{62} Nevertheless, these research findings and conclusions made by the Genesis Analytics (Pty) Ltd could be criticised in that they were more influenced by opinions and as a result, they lacked a strong accurate basis of empirical data regarding the frequency or degree of occurrence of market abuse activity in the South African financial markets. Be that as it may, this research maintains that the Genesis Analytics (Pty) Ltd’s research findings could be employed because they usefully expose the inherent challenges involving the prosecution and/or detection of market abuse practices in South Africa.\textsuperscript{63} It is submitted that despite the lack of accurate figures or empirical data quantifying the occurrence of market abuse activity in South Africa, there is some anecdotal evidence\textsuperscript{64} indicating that insider trading and other related practices have not been completely eradicated from the South African financial markets.\textsuperscript{65} Therefore, the significant reduction in reported cases and prosecutions could be caused by the fact that the occurrence of market abuse activity is extremely difficult to prove and/or some instances of such activity may be going unnoticed.

\section{4.4.2 Market Abuse Activity Extremely Difficult to Detect}

In spite of the fact that the Financial Services Board is generally believed to have adequate resources and skilled persons to enforce the market abuse prohibition, there are still some challenges and shortcomings in the detection of the market abuse activity in the South African financial markets.\textsuperscript{66} At a glance, one could conclude that the reason underpinning such shortcomings is the inefficiency of the Financial Services Board.\textsuperscript{67} Furthermore, the procedures adopted by the Financial Services Board may be criticised to some extent for being bureaucratic. For example, that the Financial Services Board may only detect or investigate possible market abuse activity after alerts of suspicious price movements and


\textsuperscript{63} See further discussion that will ensue in paragraphs 4.4.2 \& 4.4.3 of this Chapter.


\textsuperscript{66} See paragraphs 3.2.1 \& 3.2.2 in Chapter Three of this thesis.

\textsuperscript{67} See paragraph 4.2 above \& paragraph 3.2.1 in Chapter Three of this thesis.
trading patterns from the JSE’s Surveillance Division. While the flaws mentioned above might have contributed to the inconsistent detection of market abuse in South Africa, other commentators have submitted that insider trading and other related practices are extremely difficult to detect for the enforcement and regulatory bodies globally. The difficulty is sometimes experienced in detecting the identity of the actual perpetrators and thereafter proving their connection to any information relating to the alleged market abuse activity timeously. With regard to insider trading, the need to distinguish the illegal dealing executed by insiders for their own benefit from bona fide insider trading done by such insiders on behalf of their companies poses further obstacles to the successful detection and prevention of market abuse activity in the financial markets. However, one can still conclude that the difficulty in detecting the identity of the perpetrators in matters involving insider trading should be ameliorated because insider trading is usually done by directors or other employees (insiders) who trade in the securities of their own companies or of the companies with whom they have dealings, for example during takeover negotiations.

Although the challenges highlighted above may not be insurmountable, they might in some instances make it very difficult for the Financial Services Board to promptly detect all the market abuse activities occurring in the South African financial markets. This difficulty could further occur because the Financial Services Board does not employ other methods like bounty rewards and whistle-blowing immunity to encourage all the relevant stakeholders to be more involved by providing information relating to any suspected market abuse violations. Moreover, the Financial Services Board does not seem to be using other detection strategies like engaging more brokerages and companies that tape or digitally record telephonic orders and other transactions from clients to their agencies in order to isolate all possible market abuse activities timeously.

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4.4.3 Market Manipulation and Insider Trading Cases Inherently Difficult to Prosecute

Notwithstanding the fact that much ground has been covered with regard to market abuse enforcement,\textsuperscript{71} some loop-holes are still found, especially in the prosecution of market abuse cases in South Africa. The Financial Services Board may only prosecute criminal cases of market abuse if the Director of Public Prosecutions neglects to prosecute them.\textsuperscript{72} This clearly shows that, unless if a matter is settled out of the courts, only the Director of Public Prosecutions has the prerogative to prosecute any market abuse cases referred to it by the Financial Services Board. Nonetheless, a minimum number of market abuse cases have been successfully prosecuted by the courts to date.\textsuperscript{73} This could have been caused by the fact that market abuse cases are reportedly difficult to prosecute.\textsuperscript{74} Another explanation that has been given for the paucity of successful prosecutions is the complexities involving the burden of proof required, especially in criminal cases of market abuse. Notably, the burden of proof required in civil cases is for the defendant to prove, on a balance of probabilities, that he did not commit the market abuse practice in question.\textsuperscript{75} As a result, the Financial Services Board has managed to obtain a fair number of settlements in civil cases of market abuse because the standard of proof required of the balance of probabilities is generally lower and more flexible.\textsuperscript{76} The reason for the low number of civil cases of market abuse that have been successfully settled in South Africa could be that the required burden of proof of the balance of probabilities might be inconsistently applied.\textsuperscript{77} On the other hand, the burden of proof required in criminal cases of market abuse is for the prosecuting authorities to prove beyond reasonable doubt that the accused person contravened the market abuse provisions in

\textsuperscript{71} See paragraphs 3.2.1 & 3.2.7 in Chapter Three of this thesis.

\textsuperscript{72} S 82(9) of the Securities Services Act; also see clause 91(9) of the Financial Markets Bill & clauses 86(10) of the Financial Markets Bill 2012.

\textsuperscript{73} Only 32 cases of insider trading, eight cases of trade-based market manipulation and no cases for disclosure-based market manipulation were reportedly investigated by the Financial Services Board during the period between January 1999 and January 2008. No convictions were obtained by the courts in all the criminal cases of market abuse. This information was obtained from an interview that was conducted at the Financial Services Board by the researcher, with Mr Gerhard van Deventer (the Executive Director of the Directorate of Market Abuse) on 05 May 2009.

\textsuperscript{74} Chanetsa “Insider Trading is Notoriously Hard to Prosecute” Business Report (2004-04-26)

\textsuperscript{75} S 77 of the Securities Services Act; also see clauses 86 & 87 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.


question. However, it is onerous on the part of the prosecuting authorities to prove beyond reasonable doubt that the accused person knowingly committed the market abuse offence in question. This might have contributed to the minimum number of successful prosecutions obtained by the courts or the Director of Public Prosecutions to date. Furthermore, the backlog associated with the competent courts and much pressure on the part of the Director of Public Prosecutions could have caused other criminal cases of market abuse to be delayed, withdrawn or abandoned.

4.4.4 Enforcement of Market Manipulation and Insider Trading Prohibition Treated Separately and Differently

Another challenge and/or problem associated with the enforcement of the market abuse prohibition in South Africa is the fact that insider trading and market manipulation offences are inconsistently defined and treated separately and differently. As discussed in Chapter Two, the Financial Services Board does not impose a derivative civil action against market manipulation offenders. Furthermore, the Enforcement Committee may only impose an obligation to pay the Financial Services Board a civil compensatory amount for distribution to the prejudiced persons in respect of insider trading offences. In other words, although administrative sanctions may be imposed on all the forms of market abuse, the Enforcement Committee may statutorily impose on behalf of the victims a compensatory fine only in matters involving insider trading. Seemingly, the Securities Services Act treats market manipulation only as a criminal offence. This flaw could be resolved if the provisions of the Financial Markets Bill, which now seeks to extend civil liability compensation orders also to cases involving market manipulation, comes into effect. Ironically, these provisions have been omitted in the Financial Markets Bill 2012. Moreover, the concepts of insider trading

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79 See paragraphs 3.2.1; 3.2.6 & 3.2.7 in Chapter Three of this thesis; also see Luiz 2002 JBL’s Quarterly Law Review for People in Business 182-183.
80 See paragraph 3.2.7 in Chapter Three of this thesis.
82 See paragraphs 2.5.1; 2.5.2 & 2.5.3 in Chapter Two of this thesis.
83 Cassim 2008 SA Merc LJ 192.
84 Cassim 2008 SA Merc LJ 195; Luiz 2002 JBL’s Quarterly Law Review for People in Business 183 & paragraph 2.5.3 in Chapter Two of this thesis.
86 Clause 87 of the Financial Markets Bill.
87 Generally see clauses 82 & 83.
and market manipulation are both not expressly defined under Chapter VIII of the Securities Services Act.\(^88\) Some key terms relating to market abuse practices other than insider trading such as “market manipulation”, “market participant”, “making” or “publication” of false statements and “deceptive statements” are not expressly defined.\(^89\) This flaw was not corrected in both the Financial Markets Bill and the Financial Markets Bill 2012.\(^90\) Additionally, unlike in cases relating to insider trading, not many defences are provided for market manipulation.\(^91\) Only a price-stabilisation defence is provided for in the Securities Services Act.\(^92\) In this regard, this research concurs with Cassim\(^93\) that the Securities Services Act did not provide other additional defences for market manipulation, for example Chinese walls or the defence that the accused person believed on reasonable grounds that his behaviour did not amount to market manipulation so as not to discourage legitimate trading and to avoid unfair convictions of innocent accused persons.\(^94\) Moreover, this flaw is still not addressed in the Financial Markets Bill and the Financial Markets Bill 2012.\(^95\)

4.4.5 Adequacy of Available Penalties and Remedies

Although there may be a general assumption that there is no amount and/or number of penalties that can stop the occurrence of market abuse in the global financial markets, it is submitted that Cassim\(^96\) correctly argues that the market abuse penalties and remedies stipulated in the Securities Services Act somehow fall short when it comes to deterrence purposes.\(^97\) This flaw is also not addressed in the Financial Markets Bill and the Financial Markets Bill 2012.\(^98\) Administrative and criminal penalties can be imposed on all the forms of market abuse in South Africa. Moreover, all the persons who contravene the Securities Services Act’s market abuse provisions may be sentenced to a fine not exceeding R50 million.

\(^{88}\) For example, only a few terms like “market abuse rules” and “market corner” are expressly defined.
\(^{89}\) See s 72 read with s 75 & s 76 of the Securities Services Act.
\(^{90}\) Clause 81 read with clauses 84 & 85 of the Financial Markets Bill & clause 79 read with clauses 82 & 83 of the Financial Markets Bill 2012.
\(^{91}\) Cassim 2008 SA Merc LJ 183.
\(^{92}\) S 75.
\(^{93}\) Cassim 2008 SA Merc LJ 199.
\(^{94}\) Cassim 2008 SA Merc LJ 183-191.
\(^{96}\) Cassim 2008 SA Merc LJ 191-195.
\(^{97}\) S 115(a) of the Securities Services Act.
\(^{98}\) Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
or imprisonment for a period not exceeding ten years or both such fine and imprisonment.\footnote{S 115(a) of the Securities Services Act.} With regard to insider trading, the accused persons would only incur criminal liability if they fail to rely on any of the defences provided in the Securities Services Act. On the other hand, a statutory civil remedy is only available to matters involving insider trading.\footnote{Cassim 2008 \textit{SA Merc LJ} 193; also see related remarks in paragraph 4.4.4 above.} While the new market abuse criminal sanctions of a R50 million maximum fine and imprisonment for a period not exceeding ten years may be fairly dissuasive, this research submits that reliance on these sanctions alone cannot be an effective deterrent.\footnote{See s 115(a) of the Securities Services Act; also see clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012. See further paragraph 2.5.4 in Chapter Two of this thesis; Cassim 2008 \textit{SA Merc LJ} 194.} As discussed in paragraph 4.4.3 above, a criminal remedy alone may give rise to a few convictions to be obtained in market abuse cases because the criminal standard of proof beyond reasonable doubt is difficult to meet compared to the relatively lighter civil standard of proof on a balance of probabilities.\footnote{Cassim 2008 \textit{SA Merc LJ} 193.}

Apart from the criminal and civil penalties, the Securities Services Act provides administrative penalties for all the forms of market abuse.\footnote{See paragraph 2.5.4 in Chapter Two of this thesis.} As earlier pointed out in Chapter Two,\footnote{See paragraph 2.5.4 in Chapter Two of this thesis.} the Enforcement Committee may impose unlimited administrative penalties on the perpetrators of market abuse activities and a compensatory amount payable to the Financial Services Board only in matters relating to insider trading.\footnote{S 105 read with s 77 of the Securities Services Act; also see generally clause 105 of the Financial Markets Bill. & clause 101 of the Financial Markets Bill 2012. See further Cassim 2008 \textit{SA Merc LJ} 195 & paragraph 4.4.4 above.} Consequently, under the Securities Services Act, persons who fall victim to market manipulation practices will have to find their own compensatory remedies. These disparities and the fact that the Enforcement Committee may only impose administrative penalties on a referral basis could have the effect of undermining the effectiveness of administrative sanctions in South Africa. Other measures such as enacting a specific provision for a separate maximum criminal penalty for individuals and companies or other juristic persons, with a much higher maximum penalty to be imposed on such juristic persons are not provided for in the Securities Services Act.\footnote{See s 115(a) of the Securities Services Act; also see clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012. Cassim 2008 \textit{SA Merc LJ} 194.} Unlike the
Financial Services Authority,\textsuperscript{107} the Financial Services Board and other enforcement authorities may only impose a limited or fixed number of criminal penalties against the market abuse offenders as contemplated in the Securities Services Act.\textsuperscript{108}

4 4 6 Awareness of Market Abuse Practices?

Market abuse activities are very difficult to detect or measure directly. As a result, many victims seldom know that market abuse activities are illegal or when they have been prejudiced by such activities.\textsuperscript{109} It is against this background that the Financial Services Board and other enforcement authorities will be discussed here to examine whether if they have managed to increase awareness regarding the nature and consequences of market abuse among the relevant stakeholders in South Africa. It is generally submitted that the enforcement of the market abuse prohibition has not been very successful in South Africa, partly because some small companies and other relevant persons are still unaware of the nature and effects of market abuse.\textsuperscript{110} According to a survey conducted by the Genesis Analytics (Pty) Ltd, the Financial Services Board and the JSE have played an important role in educating all the market participants and other relevant persons about the pervasiveness of market abuse since 1999.\textsuperscript{111} For example, both the Financial Services Board and the JSE have conducted some market abuse awareness presentations to the market participants and in 2002 the JSE published the Insider Trading Booklet to provide a guide on matters involving insider trading to all the relevant stakeholders.\textsuperscript{112} The same survey also indicated that some persons in the work places were fairly aware of market abuse practices, especially insider trading.\textsuperscript{113} For example, 93\% of the respondents stated that their fellow workmates were quite aware of insider trading and its regulations. Moreover, company secretaries reported
that 89% of their associates were very aware of insider trading. About 88% of the market advisors interviewed submitted that the awareness of insider trading laws and regulations had increased significantly in the South African financial markets.\textsuperscript{114}  This survey further revealed that the JSE’s Insider Trading Booklet was read by 54% of the respondents and 42% of the respondents had attended a presentation by either the Financial Services Board or the JSE.\textsuperscript{115}  This survey also revealed that 82% of the listed companies had increased the amount of education regarding insider trading during the period between 1999 and 2004. It is further stated that the JSE’s Insider Trading Booklet was used by 27% of the listed companies to educate their employees and 53% of the listed companies developed or derived their own internal regulatory rules from the JSE’s Insider Trading Booklet during the same period.\textsuperscript{116}

However, the awareness efforts of the Financial Services Board and the JSE, as discussed above, were mainly focused on insider trading. It seems as if very few or no measures were employed by the Financial Services Board and the JSE to provide awareness regarding other market abuse practices like market manipulation. Moreover, the Financial Services Board does not employ a more expansive awareness strategy, involving the posting of comprehensive market abuse news on the Internet and the establishment of other divisions of its departments in all the provinces of South Africa. Likewise, the Financial Services Board does not usually empower other market participants like lawyers or financial markets advisors to make presentations to educate the relevant persons about market abuse on its behalf. Additionally, there is no specific market abuse curriculum that has been developed or taught at least from grade ten in high schools up to tertiary level to increase awareness and to improve the enforcement of market abuse provisions in South Africa. Put differently, there is no specific provision in the Securities Services Act which expressly provides for awareness or extensive education on market abuse from grassroots level in order to change the illicit norms and attitudes among the market participants and to help all the relevant persons to comply

with the market abuse prohibition in South Africa. The same shortcoming was not resolved in the Financial Markets Bill and the Financial Markets Bill 2012.

4.4.7 Development of Anti-Market Abuse Culture?

Although several measures aimed at discouraging and combating market abuse, like the enactment of market abuse laws, were introduced in South Africa, market abuse activity is reportedly still common in the South African financial markets. This could raise some questions and doubts in the minds of potential investors as to whether the Financial Services Board has done enough to develop strong anti-market abuse norms and attitudes among all the relevant stakeholders in South Africa. A survey conducted by the Genesis Analytics (Pty) Ltd on behalf of the Financial Services Board to assess the impact of South Africa’s insider trading laws indicated that insider trading was more socially acceptable until the late 1990s. According to 90% of the market participants who were interviewed, the attitudes across the South African financial markets had changed and insider trading was now less acceptable, especially after 1999. Nonetheless, the Financial Services Board and lawyers advising the accused persons asserted that these accused persons were far less willing and reluctant to settle their market abuse cases with the Financial Services Board. Furthermore, 71% of the respondents submitted that insider trading was unacceptable in the South African financial markets. They also alluded to the fact that the insider trading laws and other adopted anti-market abuse measures had changed the attitudes of the market participants in the South African financial markets to a fair extent. Moreover, such changes in the attitudes were believed to have increased positively the stigma associated with practising or being involved in insider trading activities among all the relevant persons. However, a significant minority of 22% of the respondents reported that insider trading was still acceptable in some

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117 See s 73; s 75; s 76 & s 77 of the Securities Services Act.
118 Clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
companies and in South African financial markets. For instance, only 72% of the companies had some internal anti-market abuse policies to discourage their employees from indulging in market abuse activities.\textsuperscript{124}

While these efforts on the part of the Financial Services Board could be welcomed as a positive attempt to develop a strong anti-market abuse culture, more may still need to be done to ensure that such a culture is fully developed and utilised to combat market abuse in South Africa. In relation to this, it is unclear whether the Financial Services Board has also managed to change the pervasive attitudes of the market participants with regard to market abuse practices other than insider trading. The Financial Services Board and the JSE seem to have given more attention only to insider trading at the expense of other market abuse practices like market manipulation.\textsuperscript{125} In other words, the legislature, the Financial Services Board, the JSE and other relevant stakeholders did not adopt a holistic approach with regard to the development of a strong anti-market abuse culture in South Africa. For instance, other enforcement approaches like incentives, bounty rewards, allowing the Financial Services Board to impose unlimited criminal penalties on all the market abuse offences and whistle-blower immunity\textsuperscript{126} are not used to combat market abuse practices in South Africa.

\textbf{4.5 Adequacy of Preventative Measures?}

The regulatory bodies globally must be statutorily empowered to have sufficient preventative measures in place to combat market abuse practices. These preventative measures should be adequately defined in order for them to be properly enforced. Given this background, this sub-heading will investigate whether the JSE and the Financial Services Board have such appropriate preventative systems in place to discourage and curb market abuse activity in South Africa. A survey conducted by the Genesis Analytics (Pty) Ltd on behalf of the Financial Services Board, revealed that very few companies had some internal procedures and policies to discourage and prevent market abuse practices.\textsuperscript{127} The same survey showed that 72% of the companies (mainly larger companies) had some policies to prevent insider trading

\begin{footnotes}
\item[126] See paragraph 4.4.2 above.
\end{footnotes}
while smaller companies with fewer than 5000 employees did not have such policies.\footnote{See Myburgh & Davis (25-03-2004) 20 <http://www.genesis-analytics.com/public/FSBReport.pdf>(accessed 09-02-2009); Ojah, Muhanji & Myburg “Market Reaction and Equity Market Efficiency: A Survey of Insider Trading Law in South Africa” 2008 The African Finance Journal 19.} Moreover, this survey revealed that 58\% of the companies had some systems aimed at stopping all their employees (insiders), especially senior employees like directors, from trading in the company’s shares without permission and when a cautionary announcement was made.\footnote{See Myburgh & Davis (25-03-2004) 20 <http://www.genesis-analytics.com/public/FSBReport.pdf>(accessed 09-02-2009).} According to other respondents, 35\% of the companies required their senior employees and/or all the employees to get written permission to trade in the company’s shares.\footnote{See Myburgh & Davis (25-03-2004) 20 <http://www.genesis-analytics.com/public/FSBReport.pdf>(accessed 09-02-2009).} This survey further showed that some companies had procedures to stop inside information from leaving their companies or being illegally disclosed. For example, about 96\% of the companies had rules to control the flow of inside information by imposing restrictions on who among their employees was allowed to speak to financial analysts. Nevertheless, 50\% of the companies interviewed did not take any record of the conversations between their employees and the financial analysts.\footnote{See Myburgh & Davis (25-03-2004) 21 <http://www.genesis-analytics.com/public/FSBReport.pdf>(accessed 09-02-2009).} Only 75\% of the companies were in compliance with the JSE’s rules requiring any leaked inside information during a company’s annual general meetings to be timeously communicated to the financial markets through the JSE’s Securities Exchange News Service.\footnote{See Myburgh & Davis (25-03-2004) 21 <http://www.genesis-analytics.com/public/FSBReport.pdf>(accessed 09-02-2009).} However, only 67\% of the institutional financial companies like investment banking divisions had compliance manuals and 80\% of these companies obliged their employees to sign them before making any transaction. Other institutional financial companies had a blacklist of shares that their employees were not allowed to trade in and about 90\% of these companies had measures to stop their employees from entering their trading divisions or to physically separate employees with inside information from those who did not have it.

As highlighted above, it is clear that other companies had some internal rules and systems in place to prevent insider trading. The measures adopted by the companies seem not to be targeted at preventing market manipulation. Moreover, apart from relying on its powers to
make market abuse rules\textsuperscript{133} and the JSE’s Surveillance Division to detect and prevent market abuse, the Financial Services Board does not seem to employ other preventative methods like public censure to discourage market abuse practices in South Africa. This may give rise to non-compliance on the part of the market participants; for example, some listed companies and small retail brokerage companies do not have any internal measures to curb market abuse practices.\textsuperscript{134} Other listed companies do not comply with the JSE’s Listing Requirements which require all companies to enter into confidentially agreements with service providers like printing companies to prevent the illicit use of inside information for market abuse activities.\textsuperscript{135}

Additionally, the Securities Services Act does not have specific provisions\textsuperscript{136} for other market abuse preventative measures like:

(a) the use of Chinese walls between the company’s trading divisions and the non-trading divisions;

(b) trading restrictions on the company itself, company directors and shareholders;

(c) more stringent methods that will force all companies, especially listed companies, to have internal codes of conduct and procedures that will stop their employees from committing market abuse offences;

(d) unlimited criminal penalties for market abuse offences; and

(e) a prohibition on the illicit disclosure of price-sensitive information on the Internet to curb and prevent the illegal use of inside information since the Internet is one of the main conduits of much information globally.\textsuperscript{137}

\textsuperscript{133} S 82(2)(g) of the Securities Services Act; also see clause 91(2)(f) of the Financial Markets Bill.


\textsuperscript{136} S 73; s 75; s 76 & s 77 of the Securities Services Act.

\textsuperscript{137} Cassim 2008 \textit{SA Merc LJ} 182.
This flaw was not addressed in both the Financial Markets Bill and the Financial Markets Bill 2012.¹³⁸

4.6 Poor Reputation and Low Investor Confidence

Generally, the inconsistent enforcement of the market prohibition in any country may give rise to a host of other problems like reputational loss, low investor confidence, poor market integrity, inefficiency and poor liquidity of the financial markets.¹³⁹ In South Africa, a survey that was carried out by the Genesis Analytics (Pty) Ltd on behalf of the Financial Services Board once again indicated that the reputational effects of insider trading were being felt by a number of South African companies.¹⁴⁰ This survey further stipulated that the employees of the companies that were linked to insider trading activities also suffered reputational losses and damage to their carriers according to 75% of the respondents.¹⁴¹ Moreover, 79% of the traders and asset managers interviewed reported that companies involved in insider trading lacked integrity. Notwithstanding the Financial Services Board’s anti-market abuse enforcement efforts, the same survey showed that some companies were still indulging in market abuse practices and were associated with underperformance.¹⁴² For instance, where sixteen shares of different companies were involved in a settlement with the Financial Services Board, eight companies would have suspended their trading by the time such settlement was announced. Of the eight remaining shares, only one company would have registered a share price increase during the period between the announcement of the

¹³⁸ Clauses 82; 84; 85; 86; 87 & 115(a) of the Financial Markets Bill & clauses 80; 82; 83; 84 & 111(a) of the Financial Markets Bill 2012.


investigation and the settlement.\textsuperscript{143} The average share price at the time of settlement with the Financial Services Board was about 27\% of the value at the beginning of the insider trading investigation in the companies concerned.\textsuperscript{144} Other market participants like asset managers alluded to the fact that they would be less or much less likely to buy securities in a company that settled with the Financial Services Board over suspected insider trading activity.\textsuperscript{145} The Financial Services Board and other relevant enforcement authorities should continue to step up their anti-market abuse enforcement efforts to avoid and to reduce as much as possible the problems highlighted above and the volatility and inefficiency of the South African financial markets that could result from market abuse practices.\textsuperscript{146}

4.7 Gaps and Flaws in the Current Market Abuse Enforcement Framework in Relation to Selected Aspects of the Financial Markets?

The enforcement of the market abuse prohibition in relation to some specific aspects of the South African financial markets as well as selected market abuse practices that manifested during the recent global financial crisis\textsuperscript{147} will be highlighted and briefly discussed below to


\textsuperscript{146} Ojah, Muhanj & Myburg 2008 The African Finance Journal 5; 19-23.

\textsuperscript{147} The recent global financial crisis began in the subprime mortgage market (the so-called housing bubble) of the United States of America (US) approximately during the period between 2005 and 2006. Notably, increased loan incentives like the provision of relatively easy initial loan terms caused many borrowers to mistakenly believe that they would be able to repay their loans quickly at more favourable terms. Nonetheless, high default rates on subprime and adjustable rate mortgages increased sharply thereafter. Subprime mortgages were a type of loan which gave access to housing to people who did not have the required guarantees to be eligible for ordinary loans and as such, they were high yield mortgages which attracted enormous risks of defaults on the part of the borrowers. The US’s subprime mortgages were further classified into securitisation issues, known as mortgage-backed securities which were later sold on the financial markets. In this regard, securitisation refers to a financial operation which enables the sharing of financial risks. Surplus inventory houses and increased interest rates led to a relative drop in the housing prices in the US in 2006 to 2007, and refinancing became a tall order. Defaults and foreclosures soared from around 11\% at the beginning of 2006 to over 20\% in 2008. About US$8 trillion losses were recorded by owners of stock in the US corporations while losses in other countries were averagely estimated at about 23\% and 40\%. The US subprime owned houses were now lower than their initial mortgage loan by September 2010. In a nutshell, the 2007 to 2009 global financial crisis was \textit{inter alia} triggered in part by the inability of the borrowers (new home owners) to repay their subprime mortgages primarily because of their alleged overextending; the resetting of higher interest rates on adjustable rate mortgages; predatory lending and speculation; bad monetary and housing policies; flawed government regulation as well as financial products that distributed and/or concealed the risk of high mortgage defaults. See Swart \textit{The Legal Framework Pertaining to Selected Segments of the Financial Market} LLM Dissertation, Nelson Mandela Metropolitan University (2011) 98; Paulo “Europe and the Global Financial Crisis Explained in 10 Sheets: Taking Stock of the EU’s Policy Response” April 2011 Fondation Robert Schuman 3 <http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf> (accessed
investigate whether the current South African anti-market abuse enforcement framework is robust enough to deal with such aspects and practices across all the South African financial markets.

4.7.1 Market Transparency

Transparency is a key element for robust financial markets regulation and good corporate governance in any country. According to the Oxford English Dictionary, the term “transparent” may be literally defined to denote something that is easily seen through, recognised, understood or detected, manifest, evident, obvious and clear. In relation to this, the transparent and timeous publication of all the relevant information is thus an essential ingredient for efficient and free financial markets. Likewise, for the purposes of this sub-heading, market transparency is defined to include the extent or degree at which the relevant non-public information pertaining to dealing or trading in the financial markets is accurately and timeously published to the financial markets by market participants and the regulatory authorities concerned. This research concurs with Kaufmann and Weber’s contribution that transparency in the financial markets provides legal certainty, establishes some trust among the stakeholders involved, promotes the good values and goals of financial policy and regulation, and enhances accountability of the regulatory authorities. The 2007 to 2009 global financial crisis exposed some flaws in market transparency regulation. These flaws were prevalent in the secondary financial markets. Consequently, in the wake of the global financial crisis, market transparency has now become a major priority among several regulators and other enforcement authorities globally. Given this background, selected

aspects of the International Best Practice on market transparency will be briefly highlighted and later contrasted with the South African anti-market abuse enforcement framework below to investigate whether it is comparable to such International Best Practice.

4.7.1.1 Overview of the International Best Practice

Financial markets are regulated by different authorities globally and there is no specific regulatory board that enforces market transparency principles and rules at an international level. As a result, a number of international non-binding instruments, treaties, codes, best practices and guidelines such as the World Trade Organisation, the International Monetary Fund, the Financial Stability Board, the International Accounting Standards Board, the Basel Committee on Banking Supervision and the International Organisation of Securities Commissions have promulgated some rules and guidelines on market transparency and other related aspects of financial markets regulation.

The International Organisation of Securities Commissions *Objectives and Principles of Securities Regulation* proposed that there should be post-trade transparency for structured financial products. Put simply, the International Organisation of Securities Commissions contends that financial markets regulation should endeavour to increase the transparency of trading in such markets. Moreover, the International Organisation of Securities Commissions Technical Committee Standing Committee 2 on *Regulation of Secondary Markets* submits that secondary market reporting systems for different types of structured finance products should be efficient and viable. In light of this, in order to approve the establishment of new trading systems or exchanges, the International Organisation of Securities Commissions considers the reliability of the regulatory authorities’ arrangements for monitoring; surveillance; supervision of their participants to promote fairness, efficiency,

transparency, confidence and investor protection in the financial markets, as well as the viability of the measures for compliance with the securities laws. The global financial crisis further revealed that there was a lack of transparency in the over the counter derivative markets. This could have been exacerbated by the fact that over the counter derivatives are not traded on stock exchanges; instead they are negotiated privately between likeminded buyers and sellers. This research submits that there is still a great need for transparency in over the counter markets as well as in commodity derivatives markets. For instance, the majority of the credit transactions involving equities, corporate bonds, credit derivatives and cash market instruments are conducted on the over the counter markets where there is little or no centralised sharing of relevant trading information. This gap led to some difficulties in the detection of insider trading and market manipulation involving credit default swaps and credit derivative markets. In response to this gap, the International Organisation of Securities Commissions recommended increased transparency in credit default swaps to promote accurate dissemination of information pertaining to prices, trading volumes and trading platforms to assist regulatory authorities to combat market abuse. Market transparency will promote fairness, competitiveness, efficiency as well as investor confidence in the financial markets. In this regard, the International Organisation of Securities Commissions further proposed the establishment of adequate secondary market trading reporting systems to give the relevant stakeholders more accurate information regarding the frequency with which certain securities trades plus the latest information on those trades. In other words, these reporting systems are required to be applicable to both the secondary markets and over the counter transactions.

On the other hand, the Basel Committee on Banking Supervision\textsuperscript{165} revised its Basel II Accord framework to provide, among other things, market transparency guidelines on banking regulation by adopting the Basel III Accord framework in 2010.\textsuperscript{166} Similarly, the Financial Stability Board\textsuperscript{167} has recently indicated in its \textit{Enhancing Market and Institutional Resilience Report} the need for market transparency to restore and maintain confidence in the financial markets by encouraging financial institutions to develop appropriate rules on sharing trading information.\textsuperscript{168} In the same vein, the International Accounting Standards Board recommended the adoption of the \textit{International Financial Reporting Standards} to allow timeous disclosure of relevant financial information to the public and to all the relevant stakeholders.\textsuperscript{169} It is submitted that sharing such information will enable both the market participants and the regulatory authorities to promptly detect and prevent the occurrence of market abuse activities in the financial markets.\textsuperscript{170} Additionally, the World Trade Organisation has various general rules on transparency under the General Agreement on Tariffs and Trade, the Agreement on Technical Barriers to Trade and the General Agreement on Trade in Services.\textsuperscript{171} For purposes of this sub-heading, only the General Agreement on Trade in Service’s rules on transparency will be briefly discussed. The General Agreement on Trade in Services transparency rules, unlike those of the Bank for International Settlements, requires member states to publish all the relevant measures and review mechanisms on transparency.\textsuperscript{172} The General Agreement on Trade in Services further requires all market participants and relevant stakeholders to be given information on the applicable trade requirements before they enter into any agreement.\textsuperscript{173} Nevertheless, these transparency rules are not binding and they are only adopted by the World Trade Organisation member states on a voluntary basis.

\textsuperscript{165} The Basel Committee on Banking Supervision (BCBS) was formed in 1974 by the Group of Ten (G10) central bank governors as an international cooperation forum that deals with banking supervision.


\textsuperscript{167} The Financial Stability Board replaced the Financial Stability Forum which was formed by the Group of Seven (G7) finance ministers and central bank governors in 1999 to promote financial stability, see Paulo 2011 \textit{Fondation Robert Schuman} 8 <http://www.robert-schuman.eu/frs-fichecrisefi-qe200-en.pdf> (accessed 04-07-2011).

\textsuperscript{168} Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 780.

\textsuperscript{169} Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 782.

\textsuperscript{170} Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 782.

\textsuperscript{171} Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 786.

\textsuperscript{172} Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 786.

\textsuperscript{173} Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 786.
4 7 1 2 Evaluation of the South African Anti-Market Abuse Enforcement Framework

The Financial Services Board,\(^\text{174}\) the Directorate of Market Abuse, the Board of Appeal and the Enforcement Committee do not have specific legally binding guidelines and rules on financial markets transparency.\(^\text{175}\) Apparently, financial markets transparency issues are dealt with by the JSE. Notably, the JSE requires all issuers of listed securities to timeously disclose non-public price-sensitive information relating to any securities to *inter alia* promote transparency in the regulated financial markets and to prevent market abuse practices.\(^\text{176}\) The JSE Listing Requirements further oblige issuers of securities to disclose information relating to trade statements and other activities that may affect the price of securities during or prior to their listing to prevent unusual price movements which could result in insider trading or market manipulation.\(^\text{177}\) Put differently, issuers of securities other than those who publish quarterly results\(^\text{178}\) are obliged to publish trading statements as soon as they are satisfied that a reasonable degree of certainty exists that the financial results for a period to be reported upon next will vary by at least 20% from the most recent of the financial results of the previous corresponding period or of a profit forecast previously provided to the market in relation to that period.\(^\text{179}\) This was probably intended at discouraging market abuse practices. Notably, before its consolidation into the JSE, the Bond Exchange of South Africa had its own market transparency rules and obligations, especially for inter-dealer brokers.\(^\text{180}\) In fact, the Bond Exchange of South Africa Rules mandated inter-dealer brokers\(^\text{181}\) to disclose some information such as the identity, price of securities and the nature of securities transactions to

\(^\text{174}\) The Financial Services Board (FSB) may only require the regulated markets to adopt relevant measures to effectively monitor and detect market abuse violations after prior consultation with such markets and it may disclose the status or final outcome of its investigations if such disclosure is in the public interest, see clause 91(2)(e) & (g) of the Financial Markets Bill & clause 86(2)(e) & (g) of the Financial Markets Bill 2012. These Bills, like the Securities Services Act, do not expressly empower the FSB to make mandatory binding rules on market transparency to combat illicit trading and other market abuse activity in the South African financial markets.

\(^\text{175}\) For a more detailed discussion on the role of each of this regulatory bodies, see Chapter Three of this thesis.

\(^\text{176}\) S 3 of the JSE Listing Requirements; also see paragraph 3 2 5 in Chapter Three of this thesis.

\(^\text{177}\) S 3.4 of the JSE Listing Requirements; also see paragraph 3 2 5 in Chapter Three of this thesis.

\(^\text{178}\) These issuer must comply with s 3.4(b)(i) to (vi) of the JSE Listing Requirements while those who publish quarterly results must comply with s 3.4(b)(vii) and may elect to comply with s 3.4(b)(i) to (vi) of the JSE Listing Requirements. It is however submitted that this disparity on the part of the issuers’ requirements could weaken the JSE’s market transparency regulation.

\(^\text{179}\) S 3.4(b) of the JSE Limited Listing Requirements.

\(^\text{180}\) Bond Exchange of South Africa (BESA) Rule D.13

\(^\text{181}\) These are registered authorised users who act as matched principals (facilitators) in securities transactions between such authorised users and their clients in accordance with the relevant markets as provided in the BESA Rules.
enhance transparency in commodity derivatives markets. Additional measures were further employed by the Bond Exchange of South Africa to mandate a market association to enforce sound trading standards such as the central discovery system to increase transparency and stability in the financial markets. In spite of this, it remains to be seen whether these Bond Exchange of South Africa transparency rules are going to continue to be utilised and employed by the JSE to curb market abuse activity, especially in over the counter transactions and commodity derivatives markets.

It is submitted that the Financial Services Board should consider establishing its own mandatory legally binding guidelines on market transparency to prevent relevant trading information asymmetry problems associated with issuers and market abuse activity. It is further acknowledged that the JSE Listing Requirements have addressed some aspects of market transparency to a fair extent but nonetheless it is suggested that the determination of a reasonable degree of certainty in terms of these Listing Requirements should not be only contingent upon the issuers of listed securities and their directors to avoid possible subjectivity and/or bias which could hamper the market transparency enforcement efforts of the JSE. It is also suggested that the JSE should continue to promote the Bond Exchange of South Africa Rules on market transparency to discourage market abuse practices in commodities derivatives markets. Additionally, the JSE should adopt new secondary market trading report systems in line with those proposed by the International Organisation of Securities Commissions to enable all relevant persons to timeously have accurate trading information relating to both listed securities and over the counter transactions. In relation to this, both the Financial Services Board and the JSE should carefully develop additional viable measures for the clearing of over the counter commodities and commodities derivatives transactions as recommended by the International Organisation of Securities Commissions.

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182 BESA Rules D13.1.1.1.1; D13.1.1.1.2 & D13.1.1.1.3.
183 BESA Rule C1.1.3.3; also see Swart The Legal Framework Pertaining to Selected Segments of the Financial Market 120.
184 S 3.4(b)(i) of the JSE Listing Requirements.
185 See paragraph 4 7 1 1 above.
186 See paragraph 4 7 1 1 above; similarly in the US, the Treasury recommended the amendment of the federal commodities and securities laws to accommodate a clearing system of all standardised over the counter (OTC) derivatives by the central counterparties, see the US Treasury Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation Report 17 June 2009; see further the IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee Final Report 2009 35 <http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf> (accessed 07-07-2011).
These measures could increase the sharing of trading information and market transparency in unregulated over the counter commodities and commodities derivatives markets.187

The Securities Services Act does not have a provision that specifically enforces market transparency best practices in relation to over the counter commodities and derivatives markets. This Act does, however, require exchange rules to provide efficient, honest, transparent and fair measures in which, and terms and conditions subject to which transactions in listed securities must be effected by authorised users, whether for own account or on behalf of other persons.188 A similar requirement is retained in the Financial Markets Bill and the Financial Markets Bill 2012,189 but it still does not directly address issues on market transparency in over the counter commodities and derivatives markets. In an attempt to increase financial markets transparency, the Securities Services Act obliges financial institutions to disclose their transactions in listed securities to the Registrar of Securities if they result in a change of beneficial ownership in relation to such securities or to those concluded not via an exchange.190 In turn, the Registrar of Securities is required to disclose such transactions to the relevant exchange and to the public unless if the disclosure will be contrary the objects of Securities Services Act.191 This provision did not, however, provide clear guidelines regarding the reporting of transactions which could give rise to a change of beneficial ownership outside of an exchange. Consequently, the Financial Markets Bill and the Financial Markets Bill 2012 seek to tackle this obscurity and inconsistency by providing that only principal trades in listed securities between financial institutions192 and corporate actions concluded outside of an exchange and resulting in a change of beneficial ownership of those securities must be reported to the Registrar of Securities by that financial institution or parties to the corporate action in question.193 The Financial Markets Bill and the Financial Markets Bill 2012 now expressly require the Registrar of Securities to disclose these

187 Although the Securities Services Act provides for the establishment of a clearing house in terms of s 65 & s 66 to assist an exchange with settlement and clearing services as well as the establishment of a central securities depository in terms of s 33 read with s 42, it does not expressly provide for market transparency particularly in OTC transactions. Also see clauses 48 & 49 read with clauses 30 & 38 of the Financial Markets Bill & clauses 47 & 48 of the Financial Markets Bill 2012.
188 S 18(2)(d).
190 S 21(1) & (2).
191 S 21(3).
192 As defined in see clause 1 of the Financial Markets Bill & clause 1 of the Financial Markets Bill 2012 to include organisations such as collective schemes, pension funds, friendly societies and banks,
193 Clause 25(1); (2) & (3)(a) of the Financial Markets Bill & clause 24(1); (2) & (3)(a) of the Financial Markets Bill 2012.
transactions to the public only if such disclosure will promote regulatory effectiveness and/or market transparency.\textsuperscript{194} Despite this, both the Financial Markets Bill and the Financial Markets Bill 2012, like the Securities Services Act,\textsuperscript{195} omit to impose a mandatory obligation on the exchange or the JSE to publish any information disclosed to it to increase transparency in the financial markets.\textsuperscript{196}

\section*{4 7 2 \hspace{1em} Investor Due Diligence}

Investor due diligence can be defined to include appropriate measures such as internal standards or code of conduct that must be observed by investors to enable them to have a proper understanding of the nature of transactions as well as the risks involved before they venture into any investment opportunity.\textsuperscript{197} Given the impact of the recent global financial crisis, it is prudent to investigate the gaps exposed by this crisis in relation to investor due diligence.\textsuperscript{198}

\section*{4 7 2 1 \hspace{1em} Overview of the International Best Practice}

Several institutions and investors did not embrace the notion of investor due diligence; instead they depended too much on credit rating agencies.\textsuperscript{199} This led international organisations like the International Monetary Fund\textsuperscript{200} to recommend that regulators should adopt strict measures to encourage less reliance on the credit rating agencies by investors and the relevant financial institutions.\textsuperscript{201} In other words, the International Monetary Fund proposed that member states

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  \item[\textsuperscript{194}] Clause 25(3)(b) of the Financial Markets Bill & clause 24(3)(b) of the Financial Markets Bill 2012.
  \item[\textsuperscript{195}] S 21(4).
  \item[\textsuperscript{196}] Clause 25(4) of the Financial Markets Bill & clause 24(4) of the Financial Markets Bill 2012.
  \item[\textsuperscript{200}] The International Monetary Fund (IMF) was set up by the Bretton Woods Agreements in 1944 initially to ensure the proper functioning of the Bretton Woods monetary regime, see Paulo 2011 \textit{Fondation Robert Schuman} 7-8 <http://www.robert-schuman.eu/frs-fichecrisefi-qq200-en.pdf> (accessed 04-07-2011).
\end{itemize}
\end{footnotesize}
should develop interventions to encourage investor due diligence before commencing with the rescue or bailout process of the affected financial institutions.\textsuperscript{202} The Financial Stability Board also stipulates that the flaws in investor due diligence regulation should be addressed.\textsuperscript{203} Specifically, the Financial Stability Board submits that investor due diligence should be employed particularly in credit default swaps transactions.\textsuperscript{204} If correctly enforced, this recommendation could curb operational risks and market abuse activity in the financial markets. Other organisations like the World Bank, the Group of Thirty, the Group of Twenty and the United States Senate Congressional Oversight Panel have further reiterated the need to revisit investor due diligence rules and regulations to avert possible systemic risks and other related problems.\textsuperscript{205} Additionally, the International Organisation of Securities Commissions \textit{Technical Committee, Standing Committee 5 on Investment Management} was formulated to review the degree at which investment managers who offer collective investment schemes to retail investors have invested in structured financial products.\textsuperscript{206} This committee was also tasked to investigate the type and degree of due diligence employed by such investors and investment managers.\textsuperscript{207} Lastly, this committee was mandated to review the measures, if any, taken by the investment managers to protect retail investors from incurring losses in their structured financial products during the global financial crisis.\textsuperscript{208} In July 2009, the International Organisation of Securities Commissions published its \textit{Good Practices in Relation to Investment Managers’ Due Diligence When Investing in Structured Finance Instruments} guidelines which advocate for the establishment and enforcement of adequate systems by all investors in order for them to understand whatever transactions and

\textsuperscript{202} This is might be targeted at preventing the recurrence of events and consequences that eventually led to the bankruptcy of Lehman Brothers in the US. See Kaufmann & Weber 2010 \textit{Journal of International Economic Law} 781.


investment financial products they trade in.\textsuperscript{209} Despite this, these guidelines were still restricted to structured financial products and other types of financial instruments remain unregulated. As a result, some of the flaws that were exposed by the global financial crisis, for instance in the securitisation process and the barriers to effective investor due diligence regulation, have remained largely unresolved.\textsuperscript{210}

\textbf{4 7 2 2 Evaluation of the South African Anti-Market Abuse Enforcement Framework}

The market abuse provisions contained in the Securities Services Act do not expressly regulate matters involving investor due diligence.\textsuperscript{211} Enforcement of investor due diligence standards is apparently left to the issuers of securities and investors themselves to develop their own guidelines and then abide by such guidelines. Similarly, both the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions do not address this investor due diligence regulatory flaw.\textsuperscript{212} These Bills, however, merely impose some general requirements on clearing house license holders to ensure that the “fit and proper requirements prescribed by the Registrar of Securities Services are met by the applicant, its directors and senior management”.\textsuperscript{213} No specific provision is made for the clearing house license holders to mandate their applicants and/or investors to comply with investor due diligence best practice guidelines. In relation to this, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to accommodate new adequate provisions specifically dealing with investor due diligence to prevent insider trading, market manipulation and other possible financial risks in the South African financial markets. This research further submits that the aforementioned provisions should be carefully drafted to include unambiguous and practical investor due diligence measures which must be mandatorily observed by all investors, issuers of securities and other relevant market participants. These measures must expressly discourage financial institutions, investors, the

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\textsuperscript{211} See s 73; s 75; s 76 & s 77 and other related provisions under Chapter VIII of the Securities Services Act.

\textsuperscript{212} See clauses 82; 83; 84; 85; 86 & 87 & other related provisions under Chapter X of the Financial Markets Bill & clauses 80; 82; 83 & 84 & other related provisions under Chapter X of the Financial Markets Bill 2012.

\textsuperscript{213} See clause 48(1)(b) of the Financial Markets Bill & also see clause 47(1)(c) of the Financial Markets Bill 2012.
\end{footnotesize}
JSE and other relevant persons from over-relying on credit rating agencies and must stipulate appropriate penalties to be imposed on the offenders in line with the International Organisation of Securities Commissions proposals.\textsuperscript{214} Giving due regard to the applicable International Organisation of Securities Commissions Good Practices in Relation to Investment Managers’ Due Diligence When Investing in Structured Finance Instruments guidelines,\textsuperscript{215} it is hoped that a specific statute solely dealing with market transparency, issuer transparency and investor due diligence will be enacted in future to enhance and enable the Financial Services Board and the JSE to enforce investor due diligence best practices and to curb systemic risks and possible cross-border market abuse activity in the South African financial markets.

4 7 3 Issuer Transparency

As opposed to market transparency,\textsuperscript{216} issuer transparency can be defined to include the degree or extent at which relevant non-public price-sensitive information relating to securities or financial instruments is accurately and timeously disclosed by the issuers of such securities or financial instruments to the financial markets, investors and other relevant persons. During the global financial crisis, the International Organisation of Securities Commissions published its Subprime Crisis Final Report which argued that the global financial crisis was caused, in part, by flawed and lax enforcement of issuer transparency rules.\textsuperscript{217}

4 7 3 1 Overview of the International Best Practice

After the global financial crisis, the International Organisation of Securities Commissions established a Technical Committee, Standing Committee 1 on Multinational Disclosure and Accounting to review the adequacy and enforcement of issuer transparency as well as investor due diligence guidelines.\textsuperscript{218} This Committee recommended the development of new

\begin{footnotesize}
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\item \textsuperscript{215} See paragraph 4 7 2 1 above; also see the IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee Final Report 2009 10 <http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf> (accessed 07-07-2011).
\item \textsuperscript{216} See paragraph 4 7 1 above.
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principles pertaining to the disclosure requirements for public offerings of asset-backed securities in order to align the International Organisation of Securities Commissions issuer disclosure guidelines to the ever-changing financial economic climate and to address the challenges posed by the global financial crisis. The International Organisation of Securities Commissions established a Technical Committee, Standing Committee 2 on Regulation of Secondary Markets which also recommended that issuers should be encouraged to develop their own additional guidelines and internal disclosure requirements to increase post-trade transparency, particularly in structured financial products. As is the case in the United States of America, the International Organisation of Securities Commissions recommended that such disclosure requirements must be applicable whenever an issuer makes a public offering, irrespective of whether the financial products in questions are listed on a regulated financial market or traded in over the counter markets. Furthermore, the International Organisation of Securities Commissions, on behalf of the Financial Stability Board, recommended that issuers and other market participants should provide full, accurate and prompt disclosure of their financial results, possible trading risks and any information which could be relevant to the investors and other interested persons. According to the International Organisation of Securities Commissions, failure to comply with any of the disclosure guidelines and requirements could attract appropriate administrative, criminal and civil sanctions on the part of the offenders. Notably, these penalties will not be imposed on issuers in event of their non-disclosure of certain information to protect trade secrets or where such disclosure could be detrimental to the investors concerned. The International Organisation of Securities Commissions further recommended that issuers...

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223 Administrative sanctions that could be imposed on the offenders include suspensions from trading, injunctions and mandatory court orders to disclose the required information to investors.
should be mandated to disclose all the relevant information on securities or related financial
transactions, including initial and ongoing information pertaining to such transactions.226

The Group of Twenty published a document entitled the *G-20 Working Group on Enhancing
Sound Regulation and Strengthening Transparency*227 which provided a general roadmap and
guidelines to be adopted by issuers to promote greater transparency, particularly in the over
the counter markets. This could have been targeted at combating market manipulation,
insider trading and other illegal trading practices in the over the counter markets. Lastly, the
European Securitisation Forum published its *Residential Mortgage-Backed Securities Issuer
Principles for Transparency and Disclosure Principles*228 to enhance and enforce consistency
and ongoing transparency by issuers to investors across the European Union member states.229

### 4 7 3 2 Evaluation of the South African Anti-Market Abuse Enforcement Framework

There is no legislation that solely regulates issuer transparency standards in South Africa.
Furthermore, the Securities Services Act’s market abuse provisions do not specifically
stipulate any rules or regulations pertaining to issuer transparency.230 This Act nonetheless
in-exhaustively deals with some of the issues that relate to issuer transparency. For example,
it requires an exchange to make listing requirements with which issuers of listed securities
and of securities which are intended to be listed, as well as such issuers’ agents, must
comply;231 the standards of conduct that issuers of listed securities and their directors, officers
and agents must meet232 and the standards of disclosure and corporate governance that issuers
of listed securities must meet.233 The same requirements are replicated in the Financial

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228    This was largely influenced by the Ten Industry Initiatives to Increase Transparency in the European Securitisation Markets released by nine European and global trade associations; also see the IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee Final Report 2009 23 <http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf> (accessed 07-07-2011).
229    Also see generally the American Securitisation Forum’s Project Restart Proposals which can be obtained at <http://www.americansecuritization.com/story.aspx?id=2657> (accessed 08-08-2011).
230    See s 73; s 75; s 76 & s 77 and other related provisions under Chapter VIII of the Securities Services Act.
231    S 12(1)(b).
232    S 12(1)(c).
233    S 12(1)(d).
Markets Bill and the Financial Markets Bill 2012.\textsuperscript{234} Despite this, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide sufficient clarity on whether the stated standards of conduct and/or standards of disclosure and corporate governance with which the issuers of listed securities are required to comply refer also to issuer transparency standards. The Securities Services Act also provides that the issuers of listed securities may be mandated by an exchange to disseminate certain information where such dissemination is necessary to achieve the objects of this Act.\textsuperscript{235} An identical provision is made in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{236} Where the issuer unduly withhold information or refuses to disclose information to the exchange and/or the registered holder of securities, the exchange may temporarily suspend trading in those securities until the disclosure is made.\textsuperscript{237} The same provision is stipulated in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{238} While this measure may assist the exchange to prevent illicit trading and possible market abuse activities, it is submitted that a fixed time period for such suspension of trading in the affected securities should have been clearly stipulated in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 to encourage more compliance on the part of the issuers of listed securities. On the other hand, when the issuer of listed securities discloses information that could affect the prices of securities to the registered holders of securities, the issuer concerned is required to make the information in question available immediately to the public.\textsuperscript{239} A similar provision is also made in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{240} If successfully complied with, this provision may aid the Financial Services Board, the JSE and other enforcement authorities in curbing the abuse of material information through insider trading and market manipulation in the South African financial markets.

\textsuperscript{234} Clause 11(1)(b);(c) & (d) of the Financial Markets Bill & clause 10(1)(b);(c) & (d) of the Financial Markets Bill 2012.

\textsuperscript{235} S 15(1)(a). An exchange may oblige the issuer of securities to disclose any information pertaining to the securities in question and the details of the affairs or trading history of that issuer to registered holders of securities within a period specified by the exchange, see 15(1)(b) of the Securities Services Act and also see a similar provision in clause 14(1)(b) of the Financial Markets Bill & clause 13(1)(b) of the Financial Markets Bill 2012.

\textsuperscript{236} Clause 14(1)(a) of the Financial Markets Bill & clause 13(1)(a) of the Financial Markets Bill 2012.

\textsuperscript{237} S 15(1)(c).

\textsuperscript{238} Clause 14(1)(c) of the Financial Markets Bill & clause 13(1)(c) of the Financial Markets Bill 2012.

\textsuperscript{239} S 15(2).

\textsuperscript{240} Clause 14(2) of the Financial Markets Bill & clause 13(2) of the Financial Markets Bill 2012.
Additionally, issuers and other persons dealing with inside information and/or who may have privileged information relating to securities are prohibited from sharing or disclosing any such information which they may have obtained while executing their duties in terms of the Securities Services Act unless the disclosure will be deemed necessary as stipulated in the same Act.  

It is submitted that this provision does not hamper issuer transparency; instead it assists the Financial Services Board and other regulatory authorities in discouraging insider trading and market manipulation by issuers of securities and other persons who misuse non-public price-sensitive information for their own profit. The similar provision is made in the Financial Markets Bill and the Financial Markets Bill 2012, but it now only permits the Directorate of Market Abuse to share information concerning any market abuse or related matter with the Takeover Regulation Panel, the South African Reserve Bank, the Independent Regulatory Board for Auditors, all self-regulatory organisations, the Financial Intelligence Centre, the National Treasury, the Finance Minister and with the persons, whether inside the Republic or elsewhere, responsible for regulating, investigating or prosecuting insider trading, prohibited trading practices and other market abuse activities. In turn, the Takeover Regulation Panel, the South African Reserve Bank, the Independent Regulatory Board for Auditors, all self-regulatory organisations and the Financial Intelligence Centre are mandatorily required to disclose to the Financial Services Board all information in their possession relating to an alleged violation or market abuse offence in question. Although both the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically impose this mandatory duty to disclose relevant information on the issuers of securities, it is submitted that the issuers’ mandatory, cautious and prompt sharing of such information with the Directorate of Market Abuse and other related enforcement authorities may prevent some dishonest issuers from engaging in market abuse activity. The Financial Markets Bill and the Financial Markets Bill 2012 also introduced a trade repository which is obliged to employ timely and efficient record-keeping procedures; publish aggregate positions of classes of unlisted securities reported to it, including but not limited to, classes of derivatives contracts reported to it and make the necessary information available to the registrar of securities services and other relevant supervisory authorities. This mandatory duty on the part of the trade repository, to disclose required information to the registrar of securities services and

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241 S 86 read with s 106.
243 Clause 95(2) of the Financial Markets Bill & no similar provision is made under the Financial Markets Bill 2012.
where applicable, to the public may give rise to the effective transparent reporting of relevant trading information including over the counter derivatives transactions relating to the issuer of securities.

In addition, the issuer transparency issues are dealt with in the Listing Requirements of the JSE which enables it, when it is deemed to be in the public interest, to request by notice in writing, that all applicant issuers publicly disclose all the information as disclosed to registered holders of securities and the financial markets. Failure to comply with this requirement will result in the JSE publishing the information in question after having heard the applicant issuer’s representations or after having given that issuer the opportunity to make representations. This provision was most likely targeted at discouraging issuers of listed securities from concealing material non-public information which, when later published, will have a negative effect on the price of the securities concerned, possibly because of market abuse activities. The same provision does not, however, clearly stipulate the conditions for protecting confidential information such as trade secrets and penalties that could be imposed on issuers who unduly refuse to comply with its issuer disclosure requirements. The JSE’s Equity Rules further require all its members to provide their clients with accurate, correct, unambiguous and adequate information regarding relevant aspects like fees, remuneration, values, charges and sums that are not objectively predetermined. Put simply, the JSE Equity members are required to disclose to their clients and/or investors accurate and adequate information, excluding confidential information acquired from other clients unless consent is given by such clients concerning charges, fees, prohibited disclosures or restrictions placed on certain information. This provision will, if effectively enforced, increase issuer transparency in the South African financial markets. It is further suggested that the Bond Exchange of South Africa Listing Disclosure Requirements

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245 S 1.25 of the JSE Listing Requirements.
246 S 1.26 of the JSE Listing Requirements.
247 S 1.26 of the JSE Listing Requirements.
248 S 8.10.3.1.2 of the JSE Equity Rules.
249 S 8.10.3.1.1 of the JSE Equity Rules.
250 S 8.10.3.1.2 of the JSE Equity Rules.
251 S 8.10.3.1.3 of the JSE Equity Rules.
252 S 8.10.3.1.4 & 8.10.3.1.5 of the JSE Equity Rules.
253 S 8.10.3.2.1 to 8.10.3.2.3 of the JSE Equity Rules.
which required investors to disclose information regarding the nature and state of business should be carefully amended and fused with the JSE Equity Rules to promote issuer transparency even in the over the counter commodities derivatives transactions to combat market abuse practices.

The Financial Advisory and Intermediary Services Act\textsuperscript{254} proposed the drafting and adoption of a code of conduct which provides for adequate disclosure of relevant information by the financial services providers and this code of conduct was published in 2003.\textsuperscript{255} The stated code of conduct requires financial services providers to disclose full and accurate information that would be expected to enable all investors and market participants to make informed decisions.\textsuperscript{256} Lastly, to remedy the flaws earlier stated above, it is suggested that a specific legislation should be enacted in line with the International Organisation of Securities Commissions and the Group of Twenty proposals,\textsuperscript{257} to deal solely with issuer transparency, investor due diligence and market transparency in both the regulated and unregulated financial markets.\textsuperscript{258} This legislation must provide a mandatory continuous disclosure requirement on the part of the issuers for them to disclose initial and ongoing information pertaining to their securities\textsuperscript{259} to enable the Financial Services Board, the JSE and other relevant enforcement bodies to combat insider trading, market manipulation and other related cross-border market abuse practices.

\textsuperscript{254} 37 of 2002; hereinafter referred to as the Financial Advisory and Intermediary Services Act.

\textsuperscript{255} Also see the \textit{General Code of Conduct for Authorised Financial Services Providers and Representatives}, as published in the Financial Services Board Notice 80 of 2003; also see s 15(1) & 16(1) of the Financial Advisory and Intermediary Services Act.

\textsuperscript{256} S 3(1)(a) read with s 7(1) of the Financial Advisory and Intermediary Services Act. Likewise, the Consumer Protection Act 68 of 2008, hereinafter referred to as the Consumer Protection Act, seeks \textit{inter alia} to protect consumers from dishonest issuers of services by requiring such issuers to disclose appropriate information to the members of the public to enable them to make informed decisions, s 3 of the same Act (a detailed discussion of all the provisions of this Act is beyond the scope of this thesis). Nevertheless, both the Financial Advisory and Intermediary Services Act and the Consumer Protection Act do not have provisions that expressly regulate and enforce issuer transparency standards, especially in the over the counter markets.

\textsuperscript{257} See paragraph 4 7 3 1 above.

\textsuperscript{258} This legislation should further provide adequate measures that protect investors’ confidential information like trade secrets as well as appropriate civil, criminal and administrative penalties that can be imposed against those that do not comply with such measures.

\textsuperscript{259} The IOSCO Task Force on Unregulated Financial Markets and Products Technical Committee \textit{Final Report} 2009 28 <http://www.iosco.org/library/pbdocs/pdf/IOSCOPD301.pdf> (accessed 07-07-2011); also see paragraph 4 7 3 1 above.
474 Credit Rating Agencies

Credit rating agencies perform, on behalf of investors and market participants, a pivotal role in credit worthiness assessment and the detection of various risks relating to investment instruments and/or financial products in order for such investors or market participants to make informed and sound investment decisions.\(^\text{260}\) Put differently, credit rating agencies may serve as an eligibility criterion on the part of the financial institutions for accepting the rated organisation or company’s liquidity, solvency and financial strength.\(^\text{261}\) Despite this, during the global financial crisis credit rating agencies’ rating quality and models were found to be flawed because they could not detect risks, especially in relation to complex financial products and transactions in the over the counter financial markets.\(^\text{262}\)

474.1 Overview of the International Best Practice

The International Organisation of Securities Commissions proposed that the financial institutions should meticulously adopt their own internal regulatory models to assess possible systemic financial risks and to be less dependent on credit rating agencies.\(^\text{263}\) Additionally, the International Organisation of Securities Commissions proposed that credit rating agencies should be adequately regulated to allow registration of their ratings and ongoing supervision so as to enhance greater oversight cooperation and information sharing among the regulatory

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The International Organisation of Securities Commissions published its *Good Practices in Relation to Investment Managers’ Due Diligence When Investing in Structured Finance Instruments* guidelines which recommended the establishment of independent third parties other than credit rating agencies to evaluate risks in securitised products and monitor the rating methodologies of credit rating agencies in relation to securitised products. In another attempt to resolve various problems posed by credit rating agencies, especially with regard to accountability, transparency and misleading credit ratings relating to some financial products, a revised *Code of Conduct Fundamentals for Credit Ratings Agencies* was issued in 2008. This International Organisation of Securities Commissions Code of Conduct further addresses issues pertaining to the responsibility of investment managers (their own due diligence) when using ratings; reliability and integrity of the rating process and independence and avoidance of conflicts of interest in the rating of structured products. Moreover, the International Organisation of Securities Commissions has reportedly completed an assessment of appropriate methodology for checking compliance with its *Code of Conduct Fundamentals for Credit Ratings Agencies* in September 2008 and has set out some measures to enhance the international monitoring and supervision of credit rating agencies. Likewise, the Global Joint Initiative recommended the adoption of

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relevant measures to restore market confidence in the credit rating agencies by increasing transparency in their rating process.\textsuperscript{271} The European Commission has also published some guidelines for credit rating agencies dealing with matters that include improvement of transparency, corporate governance registration and the overall supervision of credit rating agencies.\textsuperscript{272} More specifically, these guidelines are entitled the \textit{European Union Regulation on Credit Rating Agencies} and they are further targeted at mitigating possible conflicts of interest and increasing competition among the credit rating agencies.\textsuperscript{273} In addition, the European Commission published a document entitled \textit{Driving European Recovery}\textsuperscript{274} which seeks to improve the confidence in the European financial markets through the enforcement of adequate rules that regulate credit rating agencies. In 2009, the European Union adopted a specific regulation which set out certain requirements for transparency and internal review mechanisms which must be complied with by credit rating agencies across Europe.\textsuperscript{275} The initial regulation of 2009 was further revised in June 2010 to strengthen the supervision of credit rating agencies by giving a more central enforcement role to the European Securities and Markets Authority to supervise credit rating agencies across Europe.\textsuperscript{276} This proposal allows the European Securities and Markets Authority to obtain information from issuers of structured financial instruments about their credit rating agencies transactions in order to discourage non-disclosure of unrequested ratings; temporarily prohibit or suspend the issuing of credit ratings by a specific credit rating agency and to impose pecuniary penalties upon the offenders.\textsuperscript{277} The European Commission is reportedly proposing another revision of the

\begin{footnotesize}
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\item Comprises of the American Securisation Forum (ASF), Securities Industry & Financial Markets Association (SIFMA), Australian Securitisation Forum (AuSF) & the European Securitisation Forum (ESF).
\item Global Joint Initiative Report 63.
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credit rating agencies rules in a bid to resolve the financial challenges in Greece, Portugal, Spain, Ireland and Italy by, for instance, creating a single European Rating Agency.278

The Group of Twenty has endorsed the International Organisation of Securities Commission’s proposals for credit rating agencies regulation and further proposed the development of new independent models for surveillance and coordination of the oversight regulation of credit rating agencies.279 In the same light, the Financial Stability Board issued its own proposal document entitled Principles for Reducing Reliance on Credit Rating Agencies which discourages the perverse complexity of credit ratings through the development of effective internal credit risk management policies.280 As indicated above, some investors, financial institutions and regulatory authorities relied too heavily on credit rating agencies without carefully evaluating the information given by these agencies regarding the AAA rated securities which eventually led to the financial collapse of Merrill Lynch, Lehman Brothers, AIG and other companies.281 Flawed financial models employed by credit rating agencies and the overall credit rating agencies regulation, especially in the United States of America, contributed to the recent global financial crisis.282 Consequently, in an attempt to solve this


282 The global financial crisis was characterised by corporate fraud, insider trading, market manipulation and other related market abuse practices. For instance, Moody’s Investors Service Inc & Standard & Poor’s Financial Services LLC (S&P) gave misleading AAA ratings for residential mortgage backed securities which later plummeted and contributed in part to the global financial crisis. See the United States Senate Permanent Subcommittee on Investigations Wall Street and the Financial Crisis 243-256; also see generally Buiter Lessons From the Global Financial Crisis for Regulators and Supervisors (2009) paper presented at the Global Financial Crisis: Lessons and Outlook Workshop, at Kiel, 2009-05-8 6-8.
problem, the United States of America has recently downgraded its credit rating agency standards from AAA to AA+.

4742 Evaluation of the South African Anti-Market Abuse Enforcement Framework

There is no specific market abuse provision in the Securities Services Act283 and the Companies Act284 that regulates and enforces credit rating agencies standards and requirements. The same gap still exists in the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions.285 The Financial Markets Bill and the Financial Markets Bill 2012, however, proposes the establishment of independent clearing houses286 and trade repositories287 to provide adequate licensing procedures, internal controls and general requirements with which the trade repositories and clearing house members must comply, so as to protect investors by increasing the reliability, confidentiality and integrity of the trading information they receive from all the financial markets and/or other relevant market participants. Apparently, the independent clearing houses and trade repositories may impliedly perform some functions of credit rating agencies under the Financial Markets Bill and the Financial Markets Bill 2012. However, trade repositories are precluded from outsourcing any of their operational functions without the prior written approval of the registrar of securities services.288 While this may prevent conflicts of interests, it is submitted that investors should not over-rely on trade repositories alone to avoid making subjectively influenced investment trading decisions. Moreover, there is no specific regulatory body in both the Securities Services Act and the Companies Act 2008 that oversees the regulation of credit rating agencies. Thus, unlike the position held in other international jurisdictions like the United States of America, Australia and the European Union, where the United States Securities and Exchange Commission, the Australian Securities and Investments Commission and the European Securities and Markets Authority regulate and enforce credit rating agencies

283 See Chapter VIII entitled market abuse.
284 71 of 2008, hereinafter referred to as the Companies Act 2008.
285 See clauses 82; 83; 84; 85; 86 & 87 & other related provisions under Chapter X of the Financial Markets Bill & clauses 80; 82; 83 & 84 & other related provisions under Chapter X of the Financial Markets Bill 2012.
288 Clause 58(1) of the Financial Markets Bill & no similar provision is expressly made in clause 56(4) & other related clauses of the Financial Markets Bill 2012.
standards respectively. Credit rating agencies are self-regulated in South Africa. No oversight regulatory body is tasked to monitor these self-regulatory organisations to check their compliance with the International Organisation of Securities Commissions’ Code of Conduct Fundamentals for Credit Ratings Agencies as earlier discussed. Consequently, it remains uncertain whether this self-regulation is comparable to the international best practices pertaining to credit rating agencies. In fact, the Banking Sector Education and Training Authority contends that some standards provided in the International Organisation of Securities Commissions’ Code of Conduct Fundamentals for Credit Ratings Agencies might be complexly difficult to implement in South Africa because compliance with this Code of Conduct is merely contingent upon the self-regulatory organisations themselves. In relation to this, notwithstanding the challenges involving the availability of adequate financial resources, the South African Finance Minister indicated that a Credit Rating Services Bill should be drafted in line with the Group of Twenty recommendations. Consequently, the legislature introduced the Credit Rating Services Bill on 26 July 2011, in a bid to improve investor protection, fairness, efficiency and transparency of financial markets, and reduce systemic risk. Nonetheless, it is submitted that both the Credit Rating Services Bill and the Credit Rating Services Bill 2012 should also have been drafted in accordance with the applicable proposals in the International Organisation of Securities Commissions’ Code of Conduct Fundamentals for Credit Ratings Agencies and the Financial Stability Board’s Principles for Reducing Reliance on Credit Rating Agencies proposals. However, it is

289 See paragraph 4.7.4.1 above.
290 Swart, The Legal Framework Pertaining to Selected Segments of the Financial Market 103.
291 See further paragraph 4.7.4.1 above. This research submits that the Financial Services Board or any other independent regulatory body should be statutorily empowered to enforce the credit rating agencies standards in South Africa.
294 [B-2011], hereinafter referred to as the Credit Rating Services Bill.
295 See clause 2 of the Credit Rating Services Bill; also see similar provisions in clause 2 of the Credit Rating Services Bill [B8-2012], hereinafter referred to as the Credit Rating Services Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Credit Rating Services Bill & the Credit Rating Services Bill 2012 because at the time of writing this Chapter, the aforementioned Bills were not yet effectively passed into law).
296 See paragraph 4.7.4.1 above.
important to note that both the Credit Rating Services Bill and the Credit Rating Services Bill 2012 have some provisions that deal indirectly with credit rating agencies’ transparency and that prohibit such agencies from engaging in other related commercial or financial services activities to avoid conflicts of interest.\textsuperscript{297} It is submitted that the relevant provisions of the Credit Rating Services Bill or the Credit Rating Services Bill 2012 should come into force speedily to provide adequate requirements for the registration\textsuperscript{298} and disclosure\textsuperscript{299} of relevant information regarding the ratings of securities and other financial products as well as appropriate civil, criminal and administrative sanctions against those that do not comply.\textsuperscript{300} Additionally, the relevant provisions of the Credit Rating Services Bill or the Credit Rating Services Bill 2012 should be applicable to credit ratings of securities and financial instruments in both the regulated and unregulated financial markets to discourage the misuse of price-sensitive information through market abuse activities in these markets.

\section*{475 Remuneration Structures and Crisis Management}

Crisis management includes the development of effective and adequate methods and framework to regulate the rescuing of financial institutions facing bankruptcy and other economic-related problems without necessarily disrupting the financial markets or the economy of the country concerned. On the other hand, remuneration structures include long-term and short-term measures employed by financial institutions to compensate their employees and other relevant stakeholders without triggering economic risks.\textsuperscript{301} During the global financial crisis, various gaps were highlighted in the remuneration and crisis management structures involving several financial institutions.\textsuperscript{302}

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\begin{footnotesize}
\begin{enumerate}
\item 297 Clauses 12; 13; 14; 15 & 16 of the Credit Rating Services Bill & clauses 12; 13; 14; 15 & 16 of the Credit Rating Services Bill 2012.
\item 298 Clauses 5 & 6 read with clause 19 of the Credit Rating Services Bill & clauses 5 & 6 read with clause 18 of the Credit Rating Services Bill 2012.
\item 299 Clauses 10; 13; 14 & 15 of the Credit Rating Services Bill & clauses 10; 13; 14 & 15 of the Credit Rating Services Bill 2012.
\item 300 Clauses 29; 32 & 33 read with clauses 20 & 31 of the Credit Rating Services Bill & clauses 28; 31 & 32 read with clauses 19 & 30 of the Credit Rating Services Bill 2012.
\end{enumerate}
\end{footnotesize}
\end{flushleft}
4751 Overview of the International Best Practice

In October 2010, the European Commission\(^{303}\) published its crisis management recommendations dealing with preparatory and preventative measures; provision of early intervention powers to supervisors when problems are detected and the adoption of harmonised rules relating to the resolution of a bank.\(^ {304}\) More specifically, the European Commission recommended the adoption of common rules for preventative measures such as recovery and resolution plans for banks and allowing supervisors to request affected banks to change their business operations and corporate structure. The European Commission further recommended that supervisors should intervene once they are certain that a bank is likely to fail to meet its capital requirements in order to prohibit the payment of dividends as well as to force the affected bank to stop some specific business activities.\(^ {305}\) Apart from the harmonising rules which only apply when a financial institution in question has no prospect of recovery, the European Commission proposed the improvement of cross-border cooperation in the preparation and management of a bank crisis.\(^ {306}\) If adopted, this proposal could prevent cross-border market abuse practices which might occur as a result of flawed crisis management structures in the European Union. Accordingly, the European Union heads of states and government further proposed the establishment of a new permanent crisis management mechanism which will become effective in 2013.\(^ {307}\) The International Organisation of Securities Commissions recommended the establishment of appropriate measures to address any risks that may arise in the financial markets in order to protect investors.\(^ {308}\) In addition, the International Monetary Fund has, on behalf of the Group of Twenty, published its proposal document called Crisis Management and Resolution for a European Banking System which inter alia provides a cross-border regulatory and enforcement framework for insolvent financial institutions.\(^ {309}\) This document recommended

\(^{303}\) See the European Commission Communication on an EU Framework or Crisis Management in the Financial Sector 20 October 2010 Final Com 579.


\(^{309}\) International Monetary Fund A Fair and Substantial Contribution by the Financial Sector-Interim Report for the G20 2010 13; Verhelst 2010 17 <http://www.egmontinstitute.be.ep39.pdf> (accessed 08-07-2011); South African Reserve Bank Annual Report Bank Supervision Department 2009 24 & also see the
the development of an adequate crisis management regulatory framework that deals with failing banks and other cross-border financial institutions facing insolvency. It also stipulated that bail-out funds for banks and other institutions facing bankruptcy should continue to be carefully and timeously employed for crisis management to prevent them from being abused and used as an insurance premium by banks or financial institutions.

Moreover, the Basel Committee on Banking Supervision recommended some cross-border crisis resolutions which include cross-border cooperation and information sharing; exit strategies and market discipline; adoption of sound national resolution powers; frameworks for coordinated resolution of financial groups; strengthening risk mitigation mechanisms and reduction of complexities and inter-connectedness of group structures and operations.

Nevertheless, it appears that most of these recommendations were only applicable to banks and no specific reference is made to other financial institutions. Again, no reference was made on crisis management measures that could be employed in the event of systemic risks caused by market abuse practices. Similarly, in April 2009, the Financial Stability Board proposed some principles that tackle poor management of crisis by promoting effective coordination of regulators and cross-border information sharing among likeminded regulators to combat cross-border market abuse activities.

With regard to remuneration structures, the European Commission recommended some measures to regulate the remuneration of directors in general, as well as directors of financial institutions across the financial industry to prevent too high bonuses being paid to these directors at the expense of investors. These recommendations were nonetheless less effective because they were not legally binding. To remedy this flaw, the European Union

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Capital Requirements Directive III\textsuperscript{315} adopted legally binding rules dealing with the governance of remuneration policies, independent control of remuneration in financial institutions, remuneration committee and transparency rules that mandate financial institutions to publish information on their remuneration polices and methodologies.\textsuperscript{316} These rules seek to strengthen corporate governance and remuneration standards in the European Union by promoting internal risk management measures and long-term transparent remuneration policies.\textsuperscript{317} Additionally, in 2010, the European Commission proposed amendments to the rules governing investor compensation schemes. These amendments include introducing a fixed €50 000 compensation for financial institutions that are affected by risks such as fraud, negligence and market abuse, new funding arrangements, and compliance with Deposit Guarantee Schemes’ new rules and mandatory Insurance Guarantee Schemes.\textsuperscript{318} Likewise, the United States Securities and Exchange Commission adopted new compensation rules to promote prompt disclosure of information relating to key areas of risk, compensation, corporate governance and director qualifications.\textsuperscript{319} The stated new rules now oblige financial institutions and companies to disclose their remuneration policies and practices of all their employees whenever such policies or practices might have a negative effect on certain financial products of the company or financial institution concerned.\textsuperscript{320}

According to Schapiro, “short-term compensation incentives can drive long-term risk” and “management and boards of directors should be more accountable” for any asymmetric remuneration packages which result in their employees being paid unreasonably large sums of money during the short-term period, especially when such packages might give rise to market abuse and other long-term systemic risks to the investors.\textsuperscript{321} The International Monetary Fund recommended that companies and financial institutions should employ risk-based


\textsuperscript{319} Schapiro \textit{Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis} 14 January 2010 18.

\textsuperscript{320} Schapiro \textit{Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis} 14 January 2010 18.

\textsuperscript{321} Schapiro \textit{Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis} 14 January 2010 18-19.
remuneration structures. The Basel Committee on Banking Supervision also issued its Compensation Principles and Standards Assessment Methodology to increase transparency and compliance on the part of the financial institutions. In the same light, the Financial Stability Board proposed a review of compensation structures to align them with possible systemic risks and promote transparent supervision and involvement of all relevant stakeholders in the drafting of compensation policies. It is reported that the Group of Twenty has already adopted these proposals. However, it remains uncertain whether these compensation and crisis management proposals will be successfully enforced at an international level, especially with regard to combating possible cross-border market abuse practices.

4.7.5.2 Evaluation of the South African Anti-Market Abuse Enforcement Framework

As is the case in some countries, the responsibility of crisis management in South Africa is vested in the South African Reserve Bank as opposed to the Financial Services Board. The South African Reserve Bank is reportedly in the process of enforcing the relevant FSF Principles for Cross-border Cooperation on Crisis Management in its own regulatory framework. However, the same cannot be said regarding other crisis management recommendations from the Basel Committee on Banking Supervision, the International Monetary Fund and the International Organisation of Securities Commissions. Notwithstanding its ongoing enforcement efforts, the South African Reserve Bank should consider amending its crisis management policies in accordance with the applicable international best practice and other practices by similar international regulatory authorities. In this regard, it is suggested that the South African Reserve Bank should consider adopting the newly revised crisis management rules employed in the European

328 It is unclear whether the South African Reserve Bank has also considered or commenced enforcing crisis management proposals from these organisations as discussed in paragraph 4.7.5.1 above.
Union and the United States of America. 330 Although the South African Reserve Bank pledged to create new vibrant cross-border crisis management forums and new requirements for crisis interventions, this research submits that the crisis management responsibility should be removed from the South African Reserve Bank and placed in an independent self-regulatory body like the Financial Services Board to promote transparency, less bureaucracy and less governmentally induced bias. 331 If effectively enforced in South Africa, this approach could prevent the financial risks posed by cross-border market abuse activities. In relation to listed companies, the Strate Limited’s Participant Failure Manual seeks to prevent some of the systemic risks as part of its crisis management strategy in regulated markets. 332

There is no express provision under the market abuse Chapter VIII in the Securities Services Act 333 and Chapter X in both the Financial Markets Bill and the Financial Markets Bill 2012 334 which deals with market abuse-related crisis management. Despite this, the Financial Markets Bill and the Financial Markets Bill 2012 have other provisions which may be enforced to prevent systemic financial risks. For example, an exchange, 335 central securities depository, 336 clearing house 337 (including an independent clearing house) 338 and/or a trade repository 339 are now required to inform the registrar of securities services or the Governor of the South African Reserve Bank as soon as they become aware of any matter that may pose systemic risks to the financial markets. Additionally, the Financial Markets Bill now requires an exchange, 340 central securities depository (including an external central securities depository), 341 clearing house 342 (including an independent clearing house) 343 and a trade

330 See paragraph 4 7 5 1 above.
331 This approach is also employed in the United States of America where the Securities and Exchange Commission and not the Treasury Department or the Federal Reserve Bank, deals mainly with crisis management, see generally paragraph 4 7 5 1 above.
333 See s 73; s 75; s 76 & s 77.
334 See clauses 82; 83; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
337 Clause 48(1)(d) read with (e); (f) & (g) of the Financial Markets Bill & also see clause 49(1)(b) read with clause 47(1)(e); (f); (g) & (h) of the Financial Markets Bill 2012.
338 Clause 50(1)(c) read with (n) & (m) of the Financial Markets Bill & clause 49(2)(c) read with clause 52 of the Financial Markets Bill 2012.
339 Clause 56(1)(b) read with (a); (d) & (e) of the Financial Markets Bill & clause 55(1)(b) read with (a); (d) & (e) of the Financial Markets Bill 2012.
340 Clause 8(1)(e) read with (c) of the Financial Markets Bill & clause 7(1)(g) read with (d) & (e) of the Financial Markets Bill 2012.
repository\textsuperscript{344} to maintain security and back-up procedures to ensure the integrity of the records of transactions effected, cleared or settled through them to address and prevent possible systemic financial crisis.

With regard to remuneration measures, there is no legislation that expressly and specifically deals with remuneration issues in South Africa to discourage companies and other financial institutions from triggering systemic risks by adopting flawed remuneration policies that encourage market abuse practices in the financial markets. Apart from some compensation regulatory rules employed by the JSE,\textsuperscript{345} the market abuse provisions as contained in the Securities Services Act,\textsuperscript{346} the Financial Markets Bill and the Financial Markets Bill 2012\textsuperscript{347} do not expressly provide for the regulation and enforcement of compensation measures. In relation to this, an adequate and comprehensive national statute should be enacted to provide an enforcement framework for crisis management and compensation measures across the financial industry and all financial markets in South Africa. This statute should be modeled on the applicable proposals as earlier stated\textsuperscript{348} from the Financial Stability Board, the International Monetary Fund, the European Union and the Bank for International Settlements.\textsuperscript{349} The proposed legislation should provide:

(a) appropriate minimum compliance requirements for relevant persons;

(b) measures for coordination and information sharing;

(c) strict capital requirements;

\textsuperscript{343} Clause 50(1)(n) & (m) of the Financial Markets Bill & no similar provisions are expressly made in the Financial Markets Bill 2012.

\textsuperscript{344} Clause 56(1)(e) of the Financial Markets Bill & clause 55(1)(e) of the Financial Markets Bill 2012. In line with the G20 recommendations, a trade repository is obliged to maintain a centralised electronic database of the records of transactions (including the over the counter derivative transactions) reported to it to enhance transparency, risk assessment and market surveillance in over the counter derivative markets to combat market abuse and other illicit activities, see clause 1 of the Financial Markets Bill & clause 1 of the Financial Markets Bill 2012.

\textsuperscript{345} The JSE Annual Report 2009 39.

\textsuperscript{346} See s 73; s 75; s 76 & s 77.

\textsuperscript{347} See clauses 82; 83; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.

\textsuperscript{348} See paragraph 4 7 5 1 above.

(d) liability for persons who create long-term systemic risks;

(e) a designated independent national regulator responsible for the enforcement of its provisions in both the regulated and unregulated financial markets;

(f) specific provisions for compensation and crisis management dealing with possible financial systemic risks caused by market abuse practices;

(g) a mandatory disclosure requirement on the part of companies and other financial institutions to disclose their quarterly remuneration policy reports; and

(h) appropriate civil, criminal and administrative penalties against the offenders.\(^3\)

4.7.6 Management of Risk

Management of risk involves identifying, evaluating, understanding and adopting appropriate rules and measures that help to mitigate and/or ameliorate possible risks that may negatively affect the integrity, safety, soundness, viability and profitability of an organisation or company.\(^4\) It is reported that flawed risk management and overall risk oversight measures employed by many financial institutions and regulatory bodies also influenced the global financial crisis.\(^5\)

4.7.6.1 Overview of the International Best Practice

The European Commission has, on the basis of the Larosière group recommendations, proposed a new framework of European financial supervision. This framework includes the development of the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority and the European Systemic Risk Board to tackle systemic financial risks through enhanced macro and micro

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\(^3\) This could prevent perverse governmental incentives and asymmetric remuneration policies or bailouts that favour big companies facing bankruptcy over smaller companies (the so-called “too big to fail” phenomenon) and possible systemic risks and market abuse activities in the South African financial markets. See further Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 2.

\(^4\) See the United States Senate Permanent Subcommittee on Investigations *Wall Street and the Financial Crisis* 182.

\(^5\) Schapiro *Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis* 14 January 2010 2.
prudential supervision as well as coordinated cooperation and information sharing among the regulatory bodies.  

The European Commission further proposed:

(a) the adoption of less complex measures and less opacity of financial products, especially with regard to securitisation;

(b) less reliance on credit rating agencies;

(c) increased transparency in regulated markets and over the counter derivatives markets to combat market abuse;

(d) revision of remuneration schemes; and

(e) measures that restore good corporate governance by reviewing the supervisory role of senior management and reviewing the role of shareholders, financial supervisors and external auditors.

Furthermore, an “early warning system” was adopted by the European Systemic Risk Board to *inter alia* identify dangers in the entire financial system, issue warnings and recommendations regarding the measures to be taken by the European Union Council as a whole or by a specific member state, and to publish any possible risks. The European Commission also proposed the reviewing of the Market Abuse Directive in order to provide strict sanctions for market abuse practices and extend its scope to cover over the counter derivative markets and new financial instruments.  

In the United Kingdom, it is stated that the Bank of England will replace the Financial Services Authority in risk management.

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while in the United States of America, the Unites States Securities and Exchange Commission introduced several changes in an attempt to revamp its risk management strategies. According to Schapiro, “consistent and vigorous enforcement is a vital part of risk management and crisis avoidance particularly in time and areas of substantial financial innovation”. In line with this, the Financial Crisis Inquiry Commission was mandated to investigate the causes of the global financial crisis and to recommend appropriate measures to avoid the recurrence of such crisis in future. This Commission requested the United States Securities and Exchange Commission to enhance its securities laws enforcement to combat fraud and market abuse practices. In response to this mandate, the United States Securities and Exchange Commission’s Enforcement Division introduced measures such as strict enforcement of all securities laws and the adoption of even-handed enforcement methods to promote fair and proper functioning of the financial markets. It further enforced strict requirements pertaining to the transparent disclosure of possible risks and non-public material information to ensure timely dissemination of accurate information to investors and avoidance of systemic risks. Other measures employed by the United States Securities and Exchange

358 Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 2.
359 Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 2.
360 Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 2.
361 Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 2.
362 Consequently, it is reported that the United States Securities and Exchange Commission opened 2 610 investigations and brought 1 991 cases involving various securities violations like fraud, insider trading, market manipulation and other related misconduct by broker-dealers, investment advisors and transfer agents in the 2009 financial year. Additionally, the United States Securities and Exchange Commission reportedly brought 664 enforcement actions; ordered offenders to disgorge US$2.09 billion in ill-gotten gains; ordered offenders to pay penalties of about US$256 million; sought 71 emergency temporary restraining orders to stop ongoing misconduct and market abuse practices as well as 82 asset freezes to protect investors in 2009 after the global financial crisis. See Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 2-3. Although this United States Securities and Exchange Commission enforcement history alone cannot prove its effectiveness in risk management, this research submits that the Financial Services Board should consider implementing some relevant and applicable risk management measures from the United States Securities and Exchange Commission to improve its enforcement of market abuse in South Africa.

363 Accordingly, the United States Securities and Exchange Commission managed to obtain some landmark enforcement actions involving six broker-dealer companies who allegedly misrepresented the liquidity of auction rate securities; brought similar actions against the managers of the Reserve Primary Fund for failing to disclose material facts regarding US$620 billion value of its money market fund’s investments in Lehman Brothers following its bankruptcy on 05 May 2009; sought an enforcement action against the Bank of America Corporation for misleading investors about the bonuses that were being paid to Merrill Lynch and company executives during its US$50 billion acquisition of Merrill Lynch; Countrywide Financial executives were also charged with fraud and insider trading and other high profile companies charged with market abuse or other securities violations include Credit Suisse; Bear Stearns &
Commission to curb the occurrence of systemic risks include working closely with the Financial Fraud Enforcement Task Force and the Special Inspector General for the Troubled Asset Relief Program and establishing an Office of Market Intelligence in its Enforcement Division to investigate and to address complaints or tips regarding the combating of systemic risks.  

The International Organisation of Securities Commissions Technical Committee Standing Committee 3 on Regulation of Market Intermediaries recommended rigorous risk management and prudential supervision of the best practices by originators of assets and their due diligence as well as investor suitability issues with regard to the intermediaries’ distribution to complex financial products investors. This Committee further proposed the reviewing of liquidity risk management and liquidity standards in order to supplement the proposals of the Bank for International Settlements as well as the capital charges for risks listed in its trading book. Moreover, this Committee proposed a mandatory requirement on the part of service providers and issuers to maintain the currency of reports, where possible, over (a) the life of securitised products in question; and (b) the establishment of independent service providers, engaged by or on behalf of, an issuer where an opinion or service provided by such providers may influence investors’ decisions to acquire securitised products. The Basel Committee on Banking Supervision has, on behalf of the Bank for International Settlements, revised its risk management measures and in the same vein, the Technical Committee Standing Committee 3 on Regulation of Market Intermediaries proposed a review of the Senior Supervisors Group’s risk management standards. Similarly, the

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368 This review addressed risk management issues such as the use of appropriate incentives; corporate governance; reliance on effective internal controls; mitigation of risks and information sharing, see the Financial Stability Board Senior Supervisors Group Report on Risk Management Lessons from the Global Banking Crisis of 2008 March 2008 <http://www.financialstabilityboard.org/publications/r_0910a.pdf?Frames=0> (accessed 28-08-2011).
Counterparty Risk Management Policy Group-III recommended that bigger financial intermediaries should prevent systemic risks caused by perverse incentives by taking appropriate risk management measures.369

4 7 6 2 Evaluation of the South African Anti-Market Abuse Enforcement Framework

There is no specific provision in Chapter VIII of the Securities Services Act and Chapter X of both the Financial Markets Bill and the Financial Markets Bill 2012 which deals with risk management measures to expressly combat market abuse related systemic risks in all the South African financial markets. However, the Securities Services Act,370 the Financial Markets Bill and the Financial Markets Bill 2012371 stipulate that an exchange must provide rules that prudently deal with capital adequacy, guarantee and risk management requirements with which all the different categories of authorised users or different activities of an authorised user’s business must comply. Unlike the Financial Markets Bill and the Financial Markets Bill 2012, the Securities Services Act does not provide clear examples and/or types of risk management measures that could be employed by such authorised users.372 Furthermore, the Securities Services Act’s risk management requirements are apparently restricted to exchange rules relating to listed securities and, as a result, possible market abuse systemic risks that are perpetrated in the over the counter derivative transactions are not covered.373 On the other hand, the Financial Markets Bill and the Financial Markets Bill 2012 have,374 in line with the recommendations of the Group of Twenty and the International Organisation of Securities Commissions, introduced new definitions of “securities”; “external central securities depository” to enable cost-effective cross border settlement of securities; “trade repository” and two types of clearing houses, namely an “independent clearing

370 S 18(2)(b).
371 Clause 17(2)(c) of the Financial Markets Bill & clause 16(2)(c) read with clause 7(1)(d) of the Financial Markets Bill 2012.
372 S 18(2)(b).
373 S 18(2)(b). In this regard, policy makers should consider enacting risk management provisions that has clear minimum compliance requirements and that are applicable to risks in both the regulated and unregulated markets, in line with the European Commission risk management proposals. See paragraph 4 7 6 1 above.
house with its own rules and clearing members, and the “associated clearing house” appointed by an exchange and regulated by the rules of the relevant exchange. Notably, an independent clearing house is not appointed by an exchange and may act as a central counter party in the clearing of unlisted securities in line with the recommendations of the Group of Twenty and the International Organisation of Securities Commissions in order to reduce systemic risks, especially in the over the counter derivatives markets. In addition, as earlier stated, an exchange, central securities depository, clearing house (including an independent clearing house) and/or a trade repository are now required, as soon as they become aware of any matter that may pose systemic risk to the financial markets, to inform the registrar of securities services and to maintain security and back-up procedures to ensure the integrity of the records of transactions which they effected, cleared or settled to address and prevent possible systemic financial risks. Both the Financial Markets Bill and the Financial Markets Bill 2012 also require the central securities depository (including an external central securities depository), exchange, clearing house (including an independent clearing house) and the trade repositories to establish and maintain effective, efficient, reliable, secure systems and sustainable infrastructure to perform the securities services for which they are licensed so as to prevent systemic financial risks. It is reported that the registrar of securities services will take appropriate administrative enforcement action against those that fail to comply with these requirements. The Companies Act provides that companies should have their own internal rules to assess and promote the effective

375 Clause 53(2)(c) of the Financial Markets Bill & generally see clause 47(1)(f), nonetheless there is no similar provision in respect of independent clearing house under the Financial Markets Bill 2012.


378 See paragraph 4.7.5.2 above.

379 Clause 10(1)(e) read with clause 8(1)(e) of the Financial Markets Bill & clause 9(1)(e) read with clause 7(1)(d) & (g) of the Financial Markets Bill 2012.

380 See clause 28(1)(d) read with (e) & (c) of the Financial Markets Bill & clause 27(1)(d); (f); (g) & (h) of the Financial Markets Bill 2012.

381 See clause 48(1)(d) read with (e); (f) & (g) of the Financial Markets Bill & also see clause 49(1)(b) read with clause 47(1)(e); (f); (g) & (h) of the Financial Markets Bill 2012.

382 See clause 50(1)(c) read with (n) & (m) of the Financial Markets Bill & clause 49(2)(c) read with clause 52 of the Financial Markets Bill 2012.

383 See clauses 7(1)(d); 10(1)(l); 28(1)(c); 30(1)(d) & (f); 48(1)(e); 50(1)(n) & 56(1)(d) & (e) of the Financial Markets Bill & clauses 7(1)(d);(e) & (f); 8(1)(a) read with (c) & (e); 27(1)(c); 29(1)(u); 47(1)(e) & (f); 49(1)(a) & 55(1)(d) & (e) of the Financial Markets Bill 2012.

384 See clauses 8(1)(d); 10(1)(l); 28(1)(c); 30(1)(d) & (f); 48(1)(e); 50(1)(n) & 56(1)(d) & (e) of the Financial Markets Bill & clauses 7(1)(d);(e) & (f); 9(1)(a) read with (c) & (e); 27(1)(c); 29(1)(u); 47(1)(e) & (f); 49(1)(a) & 55(1)(d) & (e) of the Financial Markets Bill 2012.

enforcement of their risk management measures. However, this Act does not clearly provide whether its risk management measures are applicable to governmental departments, non-governmental organisations and other institutions across the entire financial sector. Likewise, the Strate Limited’s Enterprise Risk Management Division offers the initial investigation, detection, assessment, isolation and prevention of potential systemic risks that could occur in the financial markets to the detriment of investors. Nonetheless, these risk management rules are only internally applicable to the functions of the Strate Limited and as such, they may not be legally binding on other companies. The South African Reserve Bank has its own internationally comparable Risk Management Policy which provides the steps and procedures to be followed to prevent systemic risks in the financial markets and the economy at large. Nevertheless, it is unclear whether this Risk Management Policy is statutorily binding upon all the companies and relevant persons at a national level in South Africa.

The JSE’s Equity Rules, the Derivatives Rules, the Yield-X Rules and the Equities Directives deal with the minimum requirements and internal measures to identify, control and curb risks such as financial loss, fraud, professional misconduct, counterparty credit risks, maladministration and non-disclosure of material information. It is hoped that the JSE has incorporated into its own risk management framework the Bond Exchange of South Africa’s Rule C10.3 which provided some risk management measures like internal disclosure of accurate financial statements, adoption of high ethical standards and continuous monitoring of authorised users by appointed compliance officers. Similarly, the Financial Services Board’s Audit Risk Management Committee deals with its own risk assessment and policy measures. However, unlike the United States Securities and Exchange Commission, the Financial Services Board is not statutorily empowered to oversee the issuers’ risk management measures to prevent market abuse related systemic risks in the South African

386 S 94(7)(i) of the Companies Act 2008.
388 This policy was modeled in part, on the Committee of Sponsoring Organisations Enterprise Risk Management Framework and not on the G20 or the IOSCO recommendations, see the South African Reserve Bank Annual Report 2008/2009 15 & 16.
389 Equities Rules 4.70.1 to 4.70.5.
390 Derivative Rules 16.10.9.
391 Yield-X Rule 10.220.9.
392 Equities Directive DA2.1 to 2.2.
393 Financial Services Board Annual Report 2010 93 & 94.
394 See paragraph 4 7 6 1 above.
financial markets. In relation to this, it hoped that the policy makers will, in line with the European Commission proposals,\textsuperscript{395} statutorily empower an independent regulatory agency to enforce the risk management measures across all the South African financial sectors and financial markets.

\textbf{4 7 7 Accounting Standards}

Accounting standards can be defined to include the issuing of financial statements, auditing and reporting measures and the accurate and timeous disclosure of all relevant financial information by companies or financial institutions to the investors.\textsuperscript{396}

\textbf{4 7 7 1 Overview of the International Best Practice}

Following the Enron Corporation’s collapse, the recent bankruptcy of Lehman Brothers and other related cases that manifested during the global financial crisis, the International Accounting Standards Board revised its regulations to \textit{inter alia} enhance the adequacy of accounting standards.\textsuperscript{397} Consequently, in an attempt to effectively discourage the propagation of complex or misleading value of assets and liabilities held in the balance sheets and managerial dissimulation especially in relation to financial products that are traded unregulated financial markets, the International Accounting Standards Board adopted new regulatory standards to reclassify some securities (excluding credit default swaps derivatives) into investment categories when they comply with certain requirements.\textsuperscript{398} Similarly, the Generally Accepted Accounting Principles proposed the adoption of adequate and flexible accounting standards to enable fair pricing of financial instruments globally.\textsuperscript{399} The Financial Accounting Standard Board also issued proposals for prompt disclosure and increased

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\textsuperscript{395} See paragraph 4 7 6 1 above.
\textsuperscript{396} See generally Buiter \textit{Lessons From the Global Financial Crisis} 25-26.
\textsuperscript{397} Buiter \textit{Lessons From the Global Financial Crisis} 25-26.
\textsuperscript{398} The International Accounting Standards Board (IASB) has now established three categories of securities or assets classification, namely the assets “held for trading”; assets “available for sale” and assets “held for investment”. Nevertheless, concerns have been raised that the assets “held for investment” category’s market prices are rigidly disclosed only through balance sheets as opposed to the profit and loss account, giving rise to market manipulation by financial institutions and other related companies. Buiter \textit{Lessons From the Global Financial Crisis} 24-26.
\textsuperscript{399} Ceresney, Eng \& Nuttall “Regulatory Investigations and the Credit Crisis: The Search for Villains” 2009 \textit{American Criminal Law Review} 225 247.
comparability in fair value of market prices. The International Organisation of Securities Commissions Technical Committee Standing Committee 1 on Multinational Disclosure and Accounting proposed that the issuer’s accounting practices pertaining to financial statements, balance sheets and reporting systems should be comparable to the international best practice. The European Commission proposed a review of the role of auditing companies in assessing the accuracy, financial position and financial statements of their audited companies to curb conflicts of interest and market abuse. It also proposed that companies should appoint their own supervisors who will select the auditing companies to contract and change such companies on a regular basis to prevent market abuse and conflict of interests. Additionally, it recommended the adoption of measures that increase competition among the auditing companies globally in order to prevent systemic risks. The European Commission also recommended that auditing companies operating in a member state should be given a European passport to operate across the other European member states. While this could increase competition among auditing companies across Europe, it is submitted that the latter recommendation may, if not effectively enforced, create serious cross-border market abuse supervisory challenges for the regulatory bodies. The Group of Twenty proposed that the International Financial Reporting Standards and other related accounting institutions should develop standarised accounting standards that are commonly applicable internationally.

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403 For instance, when the contracted auditing company also offers other none auditing services to the same company that it audits, see Verhelst 2010 25-27 <http://www.egmontinstitute.be.ep39.pdf> (accessed 08-07-2011).

404 In other words this proposal discourage companies from only depending on KPMG, Deloitte, Ernst &Young and Pricewater House Coopers alone as this monopoly may give rise to insider trading or the misuse of material information relating to the securities of the companies involved.

before the end of 2011. The impetus of the Group of Twenty, the International Monetary Fund recently revised its lending rules and bilateral and multilateral surveillance measures to promote transparent and standardised accounting standards in order to detect and prevent market abuse and other related financial markets risks. The Basel Committee on Banking Supervision’s Guiding Principles for the Replacement of IAS 39 recommended inter alia that accounting companies, supervisors and regulators should develop and enforce their own transparent accounting standards extra-territorially. It is submitted that this recommendation should be cautiously and effectively enforced to avoid conflicts of interest on the part of the regulators as well as violating the autrefois acquit or autrefois convict doctrine to the detriment of the offenders.

4 7 7 2 Evaluation of the South African Anti-Market Abuse Enforcement Framework

There is no legislation that solely and expressly provides an enforcement framework for market abuse-related accounting standards violations in South Africa. However, accounting standards violations are generally outlawed under different legislations, for example, the Companies Act 2008 provides that companies must keep: (a) correct, accurate and complete accounting records; (b) financial statements that are consistent with the financial reporting standards in any of the official languages at their registered offices; and (c) annual financial statements that show the present state of affairs of their business transactions. It further stipulates that accounting regulations and reporting standards must be sound and comparable to the international best practice. These provisions do not seem to prohibit illicit accounting and auditing standards by companies that also operate their businesses in other jurisdictions. This gap could be providing a safe hub for such companies to engage in cross-border market abuse activities without incurring liability. The Financial Advisory and

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408 These principles were largely influenced by the G20 proposals, see further the Bank for International Settlements Guiding Principles for the Replacement of IAS 39 2009 2 <http://www.bis.org/publ/bcbs161.pdf> (accessed 28-08-2011).

409 S 28 & s 29(1).

410 S 29(5)(a) & (b) read with subsection (4); s 30 & s 31.
Intermediary Services Act\textsuperscript{411} has accounting standards that are nonetheless only applicable to financial services and companies that offer such services.\textsuperscript{412} Likewise, the Financial Services Board Act stipulates that the chief executive officer and other relevant persons should take appropriate measures to enforce compliance with the international accounting standards.\textsuperscript{413} Neither of these Acts has designated regulatory agencies to enforce their accounting standards to combat fraud and market abuse or penalties that could be imposed on the offenders in such instances. In addition, the Securities Services Act stipulates that regulated persons should appoint an auditor who does not deal directly or indirectly in their business affairs and who complies with the generally accepted auditing and accounting standards in relation to the disclosure of annual financial statements, accounting records and the maintenance of other accounting or auditing requirements prescribed by the registrar of securities services.\textsuperscript{414} Similar provisions are also made in the Financial Markets Bill and the Financial Markets Bill 2012, to \textit{inter alia} provide certainty as regards the accounting standards that apply in respect of financial statements and to mandate a clearing house and its members, nominees of regulated persons and trade repositories to comply with the generally accepted auditing and accounting standards.\textsuperscript{415} The JSE Listing Requirements obliges all listed companies to develop adequate and accurate reporting and accounting standards that are consisted with the South African Statements of Generally Accepted Accounting Practice and the International Financial Reporting Standards.\textsuperscript{416} It is hoped that the JSE will continue to employ the Bond Exchange of South Africa Listing Disclosure Requirements which provided accounting rules for bonds and related derivatives companies to combat commodity-based market abuse practices.\textsuperscript{417} Furthermore, it is hoped that a specific legislation will be enacted in future to enforce auditing, accounting and financial reporting standards uniformly across the financial industry to combat fraud and market abuse-related accounting violations in South Africa.\textsuperscript{418}

\begin{flushleft}
\textsuperscript{411} 37 of 2002, hereinafter referred to as the Financial Advisory and Intermediary Services Act.
\textsuperscript{412} S 19.
\textsuperscript{413} S 17.
\textsuperscript{414} S 88; s 89 & s 90(1).
\textsuperscript{415} Clauses 96 to 100 read with clause 56(1)(f) of the Financial Markets Bill & clauses 91 to 95 read with clause 55(1)(f) of the Financial Markets Bill 2012; also see s 45(1)(a);(3)(c) & similar provisions in the Auditing Professions Act 26 of 2005.
\textsuperscript{416} S 18.13 of the JSE Listing Requirements.
\textsuperscript{417} S 5.13 of the BESA Listing Disclosure Requirements.
\textsuperscript{418} See paragraph 4 7 7 1 above.
\end{flushleft}
Front running is a technique employed by market participants like brokers to anticipate the effect and/or impact of upcoming trading transactions on the price of certain securities.\(^{419}\) Although illegal front running is outlawed in both the United States of America and the United Kingdom, it became more prevalent in their financial markets during the global financial crisis.\(^{420}\) Some persons took advantage of the fact that front running is not always illegal to engage in market manipulation by buying stock just before large institutional stock orders caused a quick increase in the prices of that stock.\(^{421}\) Prohibition on illegal front running was difficult to enforce in the United States of America while such prohibition was implemented fairly in the United Kingdom by the Financial Services Authority which investigated and arrested about seven persons for allegedly perpetrating unlawful front running activities during the global financial crisis.\(^{422}\) In the United Kingdom, illegal front running by brokerage companies, fund managers, and financial analysts or advisors who were privy to non-public inside information was strictly outlawed and these key market participants were required to get permission from the Financial Services Authority’s Compliance Department before they buy stock for their own account.\(^ {423}\)

Quote stuffing is a manipulative tactic which involves the prompt entering and withdrawing of large stock orders by any person in order to flood the market with quotes that other persons have to process, thereby causing them to lose their fair competitive advantage in such stocks.\(^{424}\) During the global financial crisis, quote stuffing transactions were executed through high frequency trading computerised programs that are capable of distorting and speedily


transferring large stocks to the markets. The so-called “flash crash” which occurred in the United States of America’s financial markets is a case in point.425

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Trade-based market manipulation activities such as quote stuffing and front running are not prohibited under the Companies Act 2008. However, these activities are outlawed in the Securities Services Act.426 Although this Act does not directly employ the terms “quote stuffing” and “front running”, it has similar provisions which discourage these manipulative activities.427 This approach is also employed in both the Financial Markets Bill and the Financial Markets Bill 2012.428 Nonetheless, it is submitted that these Bills should be amended in order for them to: (a) expressly apply to possible “quote stuffing” and “front running” that might occur in the over-the-counter commodity and commodity derivatives transactions; and (b) provide a mandatory requirement on the part of the financial analysts or advisors, brokers and other market participants to hold onto their orders openly for specific minimum periods in order not to prejudice investors through quote stuffing or front running.429 This could enable the Financial Services Board and the JSE to combat quote stuffing and front running in the relevant financial markets in South Africa.

425 It is reported that the SEC has, after the 06 May 2010 ‘flash crash’ adopted strict measures such as requiring market participants to openly hold-on to their orders for specific minimum periods in order not to prejudice investors and by regulating the use of high frequency trading to engage in quote stuffing especially when large numbers of orders to buy or sell stocks are quickly placed and immediately cancelled thereafter, to prevent the recurrence of the effects of flash orders that contributed to the Dow Jones Industrial Average to tumble by about 700 points within a few minutes on 06 May 2010. See further Lauricella & Strasburg “Quote Stuffing” <http://www.investopedia.com/terms/q/quote-stuffing.asp> (accessed 04-07-2011).

426 S 75.
427 S 75(1) & (2); s 75(3)(b) which prohibits any person from entering an order to buy or sell a listed security while aware that the same or opposite order will be entered by the same or different person to create a false artificial market price of that security. This is similar to front running which is also outlawed in the US & United Kingdom (UK) & also see s 75(3)(e) prohibits the entering of orders to buy or sell a listed security during auction process or pre-opening session and immediate cancellation of such orders to create a false demand and supply of that security in order to gain profit and an affair advantage over other investors. This is similar to quote stuffing which is outlawed in the US & other developed jurisdictions.

428 Clause 84(3)(b) & (e) of the Financial Markets Bill & clause 82(3)(b) & (e) of the Financial Markets Bill 2012.

429 See related remarks in paragraph 4781 above.
4782 Dark Pools and Flash Orders

Dark pools involve more than one person colluding to buy or sell a security in a bid to create an artificial market activity. After the global financial crisis, in October 2009, the United States Securities and Exchange Commission proposed new rules to increase the transparency of dark pools of liquidity and non-public trading interest in the listed stocks by requiring timeous disclosure of actionable indications of interest except when specific conditions relating to large orders that promote size discovery are met. This is targeted at minimising market manipulation of interest indications by privately owned dark pools and selective trading which prejudice other investors. On the other hand, a flash order is a practice that allows a person who has not yet disclosed a stock quote to quickly view other stock orders before the public and other interested persons are given a chance to trade in those stocks. According to Schapiro, flash orders were perpetrated through highly computerised and automated trading devices which gave an unfair advantage to such perpetrators.

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Trade-based market manipulation provisions contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically prohibit dark pools and flash orders. Dark pools and flash orders are also not expressly prohibited in the Companies Act 2008. Given the challenges posed by the computerised electronic trading in securities, the South African policy makers should consider enacting additional provisions to prohibit flash orders and dark pools expressly in all the relevant financial markets. In addition, the Financial Services Board and the JSE should impose a strict mandatory

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430 It is stated that the new alternative trading systems allows the stock trading volume threshold to display stock orders only between 5% & 0.25%. Anonymous “Part II: What is Meant by Market Manipulation and Should it be Regulated?” (29-11-2005) 6-7 <http://www.med.govt.nz/templates/MultipageDocumentPage6861.aspx> (accessed 14-06-2011).
431 See further Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 21.
432 Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 21.
433 Flash orders led some investors to become sceptical about complying with the SEC’s disclosure rules owing to fears that they could fall victim to manipulative flash orders after they have disclosed material information relating to their securities, see Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 21-22.
434 S 75.
requirement on the issuers of securities, brokers and other relevant market participants to disclose their trading interests in certain securities promptly and cautiously in order to detect and curb manipulative dark pools and flash orders.

4 7 8 3 Hedge Funds Insider Trading and High Yield Securities Investment Fraud

Securities fraud violations such as Ponzi schemes, asset-backed securities market misrepresentations, corporate accounting fraud, prime bank investment fraud involving the fake issuing of certain financial instruments like notes of well-known financial institutions and the pump and dump manipulative schemes were committed increasingly during the global financial crisis. A Ponzi scheme is a type of high yield investment fraud which attracts persons by low risk investment offers and a guarantee of unusually high and fast profit. During the global financial crisis, this scheme was used to deceive investors to unwittingly conclude investment deals which later made them to lose their money. For instance, in the United States of America, Bernard Madoff was arrested on 11 December 2008 and charged with securities fraud after he admitted that he had operated a US$50 billion Ponzi scheme through one of his companies. Hedge funds insider trading also posed enforcement challenges to several regulatory agencies during the global financial crisis. This was caused, in part, by the fact that hedge funds were insufficiently regulated in many jurisdictions. For example, in the United States of America hedge funds were not fully subjected to any disclosure requirements under the federal securities laws while they were totally unregulated in Australia. Consequently, the United States Securities and Exchange Commission’s

436 Named after an early 20th century criminal called Charles Ponzi.
438 He allegedly misrepresented to his investors that they were going to get profits, yet these profits were principal deposits from new investors. He was later sentenced to a 150 years’ imprisonment term on 29 June 2009; also see SEC v Stanley Chais (2009) 09 Civ 5681(SDNY) were Stanley Chais was charged for misrepresenting to fund investors that he was managing their investments and, as a result, the SEC brought permanent injunctions, disgorgement of profits and civil penalties against him, for this and other related cases, see Morgan Lewis “2009 Year in Review: SEC and SRO Selected Enforcement Cases and Developments Regarding Broker-Dealers” 2010 56 <http://www.morganlewis.com/lit_SECandYearlyReviewWP_Jan2010.pdf> (accessed 10-06-2011).
439 Hedge funds are privately owned investment funds from different investors (usually wealth individuals or big financial institutions like banks) which are cooperatively managed by an appointed investment manager. Securities Law Practice Center “Spotlight on Insider Trading in Hedge Funds and M & A” <http://seclawcenter.edu/201106/09/spotlight-on-insider-trading-in-hedge-funds-and-ma/> (accessed 21-06-2011).
440 D’Aloisio speech entitled The New ASIC: Addressing Today’s Challenges and Building for the Longer Term 7 November 2008 17; Shadab “Mercatus on Policy, Hedge Funds and The Financial Crisis” 2009
Enforcement Division created a Market Abuse Unit which is, \textit{inter alia}, required to combat fraudulent market manipulation schemes and has, together with the Financial Industry Regulatory Authority, the New York Stock Exchange, the Financial Fraud Enforcement Task Force and the Financial Crisis Inquiry Commission begun to investigate hedge funds-related insider trading extensively.\(^{441}\) Likewise, the United Kingdom and Australia stepped up reforms to combat hedge funds insider trading. For example, the United Kingdom Treasury published its proposal document entitled \textit{A New Approach to Financial Regulation: Judgement, Focus and Stability} on 26 July 2010 which recommends the establishment of the Financial Policy Committee, the Consumer Protection and Markets Authority and the Prudential Regulation Authority to replace the Financial Services Authority in a bid to effectively combat fraud and market abuse activities.\(^{442}\) In Australia, although the Australian Securities and Investments Commission is responsible for the general oversight of hedge funds, the debate on whether to regulate hedge funds in line with the International Organisation of Securities Commissions’ proposals is still ongoing.\(^{443}\) In the European Union, the Market Abuse Directive was revised to \textit{inter alia} extend harsher penalties to the persons who engage in market manipulation and insider trading (including hedge funds insider trading) in over the counter derivatives markets.\(^{444}\)

\(^{441}\) See \textit{SEC v Arthur J Cutillo and others} (2009) 09 Civ 9208 (SDNY) were Wall Street traders and hedge funders gained over US$20 million through insider trading by trading ahead of acquisition announcements; \textit{SEC v Galleon Management and others} (2009) 09 Civ 8811 were the perpetrators gained over US$33 million in profits and losses avoided through insider trading ahead of corporate announcements and to date 21 individuals have been charged with hedge funds insider trading and seven of them pleaded guilty, see \textit{Morgan Lewis} 2010 2-9; \(<\text{http://www.morganlewis.com/lit_SECandYearlyReviewWP_Jan2010.pdf}>\) (accessed 10 -06-2011); also see Bray “The Galleon Case: Kumar Says He Was Paid for Tips” 2010 \textit{The Wall Street Journal} C3.

\(^{442}\) These new regulatory bodies are expected to come into force in 2012. Generally see related analysis by Dyer “Overhauling the Regulation of Global Financial Services” 2010 \(<\text{http://www.dorsey.com/dyer.caroline.pdf}>\) (accessed 07-07-2011).

\(^{443}\) In relation to this, insider trading and market manipulation cases for example the Tricom & Allco & Rubicom cases were successfully enforced in Australia during the global financial crisis, see the ASIC’s \textit{Annual Report 2007-2008}; D’Aloisio speech entitled \textit{The New ASIC: Addressing Today’s Challenges and Building for the Longer Term} 7 November 2008 17.

The Securities Services Act’s market abuse provisions do not expressly prohibit hedge funds insider trading and high yield investment fraud. Nevertheless, the Securities Services Act provides that a central securities depository may hold securities of the same kind collectively in a separate central account, similar to hedge funds which are also separately managed. A similar provision is also contained in the Financial Markets Bill and the Financial Markets Bill 2012. However, apart from mandating the central securities depository to disclose certain information from its participants to the registrar of securities services and to conduct its services in a prudent manner, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly empower the Financial Services Board to combat hedge funds insider trading and commodities derivatives insider trading. The Companies Act 2008 does not expressly prohibit hedge funds insider trading and high yield securities investment fraud but it does, however, prohibit companies from engaging in reckless trading and executing their business under insolvent circumstances and/or with gross negligence in order to defraud investors. No clarity is given as regards the types of companies that are specifically targeted by this anti-fraud provision. Accordingly, it is hoped that additional provisions will be enacted in accordance with other applicable reforms and proposals that were introduced elsewhere to expressly prohibit hedge funds market abuse activities and other securities violations, especially in over the counter markets.

**High Frequency Trading**

High frequency trading is a manipulative practice that involves persons like brokers, issuers and financial analysts who act in a proprietary capacity to employ sophisticated computerised algorithmic decision-making systems in order to obtain advantage from some minute discrepancies in the financial markets stock prices and then quickly trade in such stocks in

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445 See s 73; s 75; s 76 & s 77.
446 S 33(e).
447 See paragraph 4 7 8 3 1 above.
449 S 33.
451 S 22(1).
452 See paragraph 4 7 8 3 above.
large quantities to gain profit.\(^{453}\) It is stated that high frequency trading by investment banks and hedge funds contributed about 60% to 70% of all stock trades in the United States of America’s financial markets during the global financial crisis and in relation to this, high frequency trading profits between US$8 billion and US$21 billion were recorded in 2008. The Commodity Futures Trading Commission and the Securities and Exchange Commission formed a committee which recommended the adoption of minimum regulatory requirements such as restrictions on direct access and co-location, the imposition of penalties for rapid order cancellation and basic quoting requirements for high frequency trading related practices.\(^{454}\) However, it is reported that the enforcement of high frequency trading regulations remains challenging for many regulators because the offenders usually have highly sophisticated and automated algorithmic trading mechanisms that are capable of offering high speed stock order responses and to trade on such stock price movements after a certain threshold is reached. It is submitted that lax or inconsistent regulation of high frequency trading can unfairly allow large financial institutions to engage in market abuse activities and related financial markets systemic risks to the detriment of small investors. The financial markets flash crash of 06 May 2010 is a case in point. In response to this flash crash, the United States Securities and Exchange Commission proposed rules to combat risks associated with high frequency trading related practices like erroneous flash orders and naked accesses.\(^{455}\) Nonetheless, as is the case in the European Union and Australia,\(^{456}\) the United States Securities and Exchange Commission has not yet adopted a specific rule to curb high frequency trading related market abuse activities.

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455 Also see SEC Rule 15c3-5 which requires a broker-dealer that has market accesses to establish, document and maintain risk management controls and supervisory measures designed to manage the financial, regulatory and other legal or operational risks related to such market access; also see Bhupathi 2010 North Carolina Journal of Law and Technology 391-393; 397 & 400.

Notwithstanding their fairly wide market abuse prohibition, the Securities Services Act,\textsuperscript{457} the Financial Markets Bill and the Financial Markets Bill 2012\textsuperscript{458} do not specifically discourage high frequency trading, Internet-based market manipulation, program trading and other related technologically perpetrated market abuse activities. Likewise, the Companies Act 2008 does not specifically discourage the high frequency trading and other related practices. Although the Securities Services Act,\textsuperscript{459} the Financial Markets Bill and the Financial Markets Bill 2012\textsuperscript{460} provide inexhaustible instances where some practices may be deemed to be trade-based market manipulation, it is submitted that additional provisions should be enacted to expressly prohibit high frequency trading, Internet-based market manipulation and program trading to enable the Financial Services Board to combat technologically related market abuse activities in the South African financial markets. The JSE has reportedly boosted its information technology department to enhance its efficiency especially with regard to its clearing systems, Yield-X interest transactions and Equities derivatives by requiring its members to use the Broker Deal Accounting system\textsuperscript{461} to enable it to detect market abuse practices involving certain beneficial ownership trades. Nonetheless, it is suggested that the JSE and the Financial Services Board should consider employing practically applicable proposals from other jurisdictions such as the back testing process, real-time risk monitoring and market surveillance measures to combat high frequency trading related market abuse activities.

\textbf{4.7.8.5 Credit Default Swaps}

Credit default swaps are “bilateral contracts designed for credit hedging or speculative investment and issues relating counterparty risk, operational risk and market transparency”.\textsuperscript{462} During the global financial crisis most of the credit default swaps derivatives were traded on the over the counter markets by bond holders to transfer debt default risk from the buyer to

\textsuperscript{457} See s 73; s 75; s 76 & s 77.
\textsuperscript{458} Clauses 82 to 87 of the Financial Markets Bill & clauses 80 to 84 of the Financial Markets Bill 2012.
\textsuperscript{459} S 75(3).
\textsuperscript{460} Clause 84(3) of the Financial Markets Bill & clause 82(3) of the Financial Markets Bill 2012.
\textsuperscript{461} This system keeps the securities records and books of brokerage companies; also see further Loubser “CEO’s Statement” \texttt{<http://www.jse.co.za/ceo/statement/public.JSE.pdf>} (accessed 10-10-2008).
the seller.\textsuperscript{463} It is further argued that the complexity and opaqueness of credit default swaps exacerbated systemic risks involving market manipulation and insider trading, particularly in the over the counter markets during the global financial crisis.\textsuperscript{464} Both the Group of Thirty and the International Organisation of Securities Commissions submit that credit default swaps were largely used for speculative purposes giving rise to market abuse activities, increased counterparty risk, operational risk and lack of transparency in the over the counter credit default swaps derivatives markets.\textsuperscript{465} In response to these challenges the International Organisation of Securities Commissions proposed the establishment of an adequate central counterparties’ regulatory framework to: (a) promote cooperation and relevant information sharing among the regulators; and (b) mandatorily require financial institutions and market participants to work on standardised credit default swaps to facilitate central counterparties clearing.\textsuperscript{466} In the same light, on 08 June 2010 the European Commission president, Jose Manuel Barosso, submitted that member states should consider prohibiting naked short selling and naked credit default swaps in order to empower their regulators to prevent market abuse activities.\textsuperscript{467} The European Commission further proposed that regulators should require all market participants to disclose relevant information in order to increase transparency and to ensure that sellers of credit default swaps are in actual possession of the asset to be sold at the

\textsuperscript{463} This created counterparty risk especially with regard to defaults involving mortgage related securities asset-backed securities which affected a number of financial institutions such as AIG, Merrill Lynch, Morgan Stanley, Goldman Sachs, Bear Stearns, Lehman Brothers and General Motors. See Mazumder & Ahmed 2010 \textit{Studies in Economics \\& Finance} 116-118; Shadab “Guilty by Association? Regulating Credit Default Swaps” 2010 \textit{Entrepreneurial Business Law Journal} 408 441-452.


time when it will be due to be delivered.\textsuperscript{468} In Australia, the Australian Securities and Investments Commission and other regulators formed a working group to study international developments in order to review the Australian credit default swaps market in line with such developments to promote transparency and to curb counterparty risk and market abuse activity.\textsuperscript{469} In the same light, in July 2009 the United States Treasury proposed: (a) the implementation of data repositories for uncleared transactions to enhance transparency by mandating central counterparties to report or disclose relevant information to a regulated trade repository, regulators and the public; (b) the establishment of a central counterparty to clear standardised over the counter credit default swaps derivatives.\textsuperscript{470} Credit default swaps are not regulated under federal commodities laws but are nonetheless, partially regulated in accordance with the United States Securities and Exchange Commission’s restricted jurisdiction over security-based swaps and federal bank regulators.\textsuperscript{471} Accordingly, the United States Securities and Exchange Commission adopted exemptions requirements to allow local credit default swaps users to employ central counterparties and exchange traded credit default swaps.\textsuperscript{472} Nevertheless, these requirements are merely contingent upon the central counterparties and/or market participants to choose whether or not to comply with them.

\textbf{4 7 8 5 1 Evaluation of the South African Anti-Market Abuse Enforcement Framework}

The Financial Markets Bill, the Financial Markets Bill 2012 and the Securities Services Act’s market abuse provisions apply only to trades conducted on a regulated market and they do not directly or indirectly prohibit illicit or naked credit default swaps derivatives transactions in


\textsuperscript{469} D’Aloisio speech entitled The New ASIC: Addressing Today’s Challenges and Building for the Longer Term 7 November 2008 16.


\textsuperscript{471} Only security-based swaps (a type of credit default swaps) are subject to anti-fraud and market manipulation contained in s 17(a) of the Securities Act of 1933 15 USC 77q(a) (2006) as amended by PL-111-229 (approved 11-08-2010) & Rule 10b-5; s 9(a)(2) to (5) & s 10b of the Securities Exchange Act of 1934 15 USC 78q(a)(2)-(5) (2006) as amended by PL-111-257 (approved 05-10-2010); In relation to this, contract law private rights of action can be imposed on over the counter (OTC) market trades (including credit default swaps), see Shadab 2010 Entrepreneurial Business Law Journal 419-421.

\textsuperscript{472} Shadab 2010 Entrepreneurial Business Law Journal 452.
the over the counter markets. These provisions, unlike the position in Australia and the United States of America, do not specifically empower the Financial Services Board and the JSE to develop their own measures to clear standardised credit default swaps and to cautiously allow exchange traded credit default swaps in the regulated markets to prevent market abuse related counterparty risk. Likewise, the Companies Act 2008 does not prohibit naked credit default swaps. On the contrary, the Financial Markets Bill and the Financial Markets Bill 2012 provide some general provisions which require an exchange, central securities depository (including an external central securities depository), a trade repository, participant and clearing house to employ security and back-up procedures and necessary measures to ensure that market participants will use an independent clearing house as a central counterparty to clear unlisted securities as suggested by the Group of Twenty and the International Organisation of Securities Commissions. Nonetheless, it is not clear whether the unlisted securities that can be cleared by an independent clearing house will also include credit default swaps derivatives. On the other hand, the JSE now regulates both the Equities and commodity derivatives markets. However, in contrast to the position in other jurisdictions, the JSE uses a non-standardised derivative instruments system called Can-Do Derivatives which is largely dependent on the terms of investors but traded and/or valued by the JSE and cleared by its own clearing house called Safcom (Proprietary) Limited. It is suggested that the JSE should combat naked credit default swaps by allowing over the counter credit default swaps derivatives to be standardised and cleared by an independent central counterparty.

473 S 73; s 75; s 76 & s 77 of the Securities Services Act & clauses 82 to 87 of the Financial Markets Bill & clauses 80 to 84 of the Financial Markets Bill 2012.
474 See paragraph 4 7 8 5 above.
475 This is the same position under the National Credit Act 34 of 2005.
479 Clause 32(h) & (i) of the Financial Markets Bill & clause 31(h) & (i) of the Financial Markets Bill 2012.
481 Clause 50 read with clause 54 of the Financial Markets Bill & clause 49(2) read with clause 53 of the Financial Markets Bill 2012.
482 All commodities including metals and oil are now traded on the JSE and this was made through cooperation with related bodies like the Chicago Board of Trade and the CME Group (world’s largest derivatives exchange).
483 See paragraph 4 7 8 5 above.
Short selling is a practice which involves selling securities or assets such as derivatives by the seller without owning them at the time of the transactions, with the intention of buying them back at a later stage but at a much lower price. Where the value of the asset or security in question depreciates during the period between the time of the sale and its actual delivery, the seller will illicitly gain profit. This is sometimes referred to as “covered” short selling. An overview of how short selling transactions are executed is reflected in the figure 1 that follows, which shows that the short seller usually borrows the securities to be sold and later buys them back from the relevant persons or financial markets in order to return such securities to the initial lender. The short seller will then make a profit when the price of securities in question falls and loses when the price of securities rises to new margins than were previously anticipated. The parties involved in short selling may include an initial lender (original owner of the securities), a broker, a short seller (borrower of the securities), a buyer, securities lender or an exchange and a clearing agency which oversees the clearing of all the securities transactions as indicated in figure 1 below:


In contrast to covered short selling as illustrated above, “naked” short selling occurs when a seller agrees to short sell a security within a stipulated period without taking prior measures to repurchase it at a later stage. Comparatively speaking, it is submitted that naked short selling is riskier than covered short selling because the seller is not assured of getting the security sold back at a later period. There has not been any consensus regarding the regulation of short selling. Some commentators argue that short selling is detrimental to financial markets stability while others maintain that prohibiting short selling negatively affects the liquidity and efficiency of the financial markets. Be that as it may, this research...
submits that naked short selling should be adequately prohibited to prevent market abuse related systemic risks. In the United States of America short selling has been regulated as early as the 1938 through the price test prohibition (uptick rule). Before the global financial markets crisis, broker-dealers were restricted from short selling through the Regulation SHO. In September 2008 the United States Securities and Exchange Commission enforced a temporary short selling ban on options markets to combat naked short selling and other market abuse activities. Moreover, the Regulation SHO was amended to permanently extend the short selling restrictions, especially with regard to equity securities to discourage naked short selling and other market abuse activities. The European Commission also proposed reforms to: (a) increase transparency in short selling practices; (b) harmonise rules regarding whether to ban short selling permanently; and (c) discourage short selling across the European Union member states. The European Commission further submitted that short sellers must now be in actual possession of the security or asset which they intend to sell and that the European Securities and Markets Authority may, in exceptional cases, impose a restriction or absolutely prohibit naked short selling to curb speculative market manipulation. The researcher concurs with Culp and Heaton, Goldstein and Guembel


Culp & Heaton “The Economics of Naked Short Selling” 2008 Regulation 46 46-51.

Also see Goldstein & Guembel “Manipulation and the Allocational Role of Prices” 2008 Review of Economic Studies 133 135-164.
and Shkilko, Van Ness and Van Ness\textsuperscript{501} that naked short selling may increase market abuse activity in the financial markets\textsuperscript{502} and further submits that short selling must be regulated by independent bodies to maintain financial markets efficiency and stability.

4 7 8 6 1 Evaluation of the South African Anti-Market Abuse Enforcement Framework

The current South African anti-market abuse enforcement framework primarily deals only with insider trading and market manipulation.\textsuperscript{503} Accordingly, there are no market abuse provisions which explicitly prohibit short selling under the Securities Services Act,\textsuperscript{504} the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{505} Therefore, in contrast to the position in the United Kingdom,\textsuperscript{506} the United States of America and Europe,\textsuperscript{507} the decision to ban short selling has not yet been statutorily considered in South Africa. It is submitted that this gap could give some devious persons an easy conduit to commit market abuse offences without incurring liability. After the global financial crisis, the JSE, in addition to its Broker Deal Accounting system and other surveillance systems, introduced some restrictions on short selling in September 2008.\textsuperscript{508} These restrictions were targeted at restoring investor confidence in the JSE Equity derivatives and securities by combating possible short selling related market abuse activities.\textsuperscript{509} However, it remains uncertain whether these short selling restrictions are enforced by the JSE itself, or by the courts and the Financial Services Board. Given this obscurity, it is hoped that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 will be fastidiously amended, giving regard to relevant applicable developments in other jurisdictions\textsuperscript{510} to expressly prohibit naked short selling.

\begin{footnotes}
\item[503] Paragraph 2 5 in Chapter Two of this thesis; clauses 82 to 87 of the Financial Markets Bill & clauses 80 to 84 of the Financial Markets Bill 2012.
\item[504] See s 73; s 75; s 76 & s 77.
\item[505] Also see clauses 82 to 87 of the Financial Markets Bill & clauses 80 to 84 of the Financial Markets Bill 2012.
\item[507] See paragraph 4 7 8 6 above.
\item[508] Loubser “CEO’s Statement” \textless http://www.jse.co.za/ceo/statement/public.JSE.pdf\textgreater (accessed 10-10-2008).
\item[509] Loubser “CEO’s Statement” \textless http://www.jse.co.za/ceo/statement/public.JSE.pdf\textgreater (accessed 10-10-2008).
\item[510] See paragraph 4 7 8 6 above.
\end{footnotes}
Although South Africa, like several other countries, has made numerous efforts to combat market abuse practices, a lot may still need to be done to reduce and eradicate the negative effects caused by such practices in the South African financial markets.\(^{511}\) As discussed above, significant progress has been made with regard to the co-operation between the Financial Services Board and other local enforcement bodies like the JSE.\(^{512}\) Nevertheless, the same cannot be said regarding the co-operation of the Financial Services Board with listed companies and similar international regulatory bodies.\(^{513}\) Moreover, the Financial Services Board does not provide private rights of action for the prejudiced persons and other enforcement measures like bounty rewards and whistle-blowing immunity to encourage all the relevant stakeholders to *bona fide* report any suspected market abuse activities to itself or to other relevant enforcement authorities.\(^{514}\) Moreover, it was noted that the Financial Services Board does not seem to be using other detection strategies like engaging more brokerages and companies that tape or digitally record telephonic orders and other transactions from clients to their agencies in order to isolate all possible market abuse activities timeously.\(^{515}\) It was acknowledged that another challenge associated with the enforcement of the market abuse prohibition in South Africa is that insider trading and market manipulation offences are inconsistently defined and treated separately and differently.\(^{516}\) It was further noted that market manipulation and insider trading cases are inherently difficult to prosecute.\(^{517}\) It was also acknowledged that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide specific provisions for a separate maximum criminal penalty for individuals and juristic persons, with a much higher maximum penalty to be imposed on such juristic persons.\(^{518}\) It was further noted that there is no specific provision in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 which expressly provides for awareness and extensive education on market abuse from the grassroots level in order to change the illicit norms and attitudes among all the

\(^{511}\) Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (part 1)” 2008 *SA Merc LJ* 33 33-36.

\(^{512}\) See paragraph 4 3 1 above.

\(^{513}\) See paragraphs 4 3 2 & 4 3 3 above.

\(^{514}\) See paragraphs 4 2; 4 4 7 & 4 5 read with paragraph 4 3 3 above.

\(^{515}\) See paragraph 4 4 2 above.

\(^{516}\) See paragraph 4 4 4 above.

\(^{517}\) See paragraph 4 4 3 above.

\(^{518}\) See paragraph 4 4 5 above.
market participants in South Africa.\footnote{519} It was noted that the legislature, the Financial Services Board, the JSE and other relevant stakeholders did not adopt a holistic approach with regard to the development of a strong anti-market abuse culture in South Africa.\footnote{520} Moreover, it was acknowledged that apart from relying on its powers to make market abuse rules and the JSE’s Surveillance Division to detect and prevent market abuse, the Financial Services Board does not seem to employ other preventative methods like public censure to discourage market abuse practices in South Africa.\footnote{521} Moreover, it was submitted that the Financial Services Board should consider establishing its own mandatory legally binding guidelines on market transparency to prevent relevant trading information asymmetry problems associated with issuers and market abuse activity.\footnote{522} It was also submitted that the determination of a reasonable degree of certainty in terms of the JSE Listing Requirements should not be only contingent upon the issuers of listed securities and their directors to avoid possible subjectivity which could hamper the JSE’s market transparency enforcement efforts.\footnote{523} In addition, it was noted that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have provisions that specifically enforce market transparency best practices in relation to over the counter commodities and derivatives markets.\footnote{524} It was noted that the market abuse provisions contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly regulate matters involving investor due diligence.\footnote{525} In relation to this, it was stated that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to accommodate new adequate provisions specifically dealing with investor due diligence to prevent market abuse-related financial risks in the South African financial markets.\footnote{526} It was also submitted that another option could be the enacting of a specific statute that solely deals with market transparency, issuer transparency and investor due diligence to enable the Financial Services Board and the JSE to curb systemic risks and possible cross-border market abuse activity in the South African financial markets.\footnote{527} Moreover, it was also suggested that such legislation should be enacted in line with the International Organisation of
Securities Commissions and the Group of Twenty proposals.\textsuperscript{528} It was further submitted that such legislation should provide a mandatory continuous disclosure requirement on the part of the issuers for them to disclose initial and ongoing information pertaining to their securities to enable the Financial Services Board and the JSE to combat cross-border market abuse practices.\textsuperscript{529}

It was further acknowledged that there are no specific market abuse provisions in the Securities Services Act, the Companies Act 2008, the Financial Markets Bill and the Financial Markets Bill 2012 that regulate and enforce credit rating agencies standards and requirements.\textsuperscript{530} Moreover, there is no specific regulatory body in the Securities Services Act, the Companies Act 2008, the Financial Markets Bill and the Financial Markets Bill 2012 that oversees the regulation of credit rating agencies.\textsuperscript{531} It was accordingly submitted that the Credit Rating Services Bill and/or the Credit Rating Services Bill 2012 should be applicable to credit ratings of securities and/or financial instruments in both the regulated and unregulated financial markets to discourage market abuse activities in these markets.\textsuperscript{532} Likewise, it was noted that the responsibility of crisis management in South Africa is vested in the South African Reserve Bank as opposed to the Financial Services Board.\textsuperscript{533} In relation to this, it was submitted that the crisis management responsibility should be removed from the South African Reserve Bank and placed in an independent self regulatory body like the Financial Services Board to promote transparency, less bias and less bureaucracy.\textsuperscript{534} It was additionally stated that an adequate and comprehensive statute should be enacted to provide an effective enforcement framework for crisis management and compensation measures across the financial services industry and all financial markets in South Africa to curb market abuse activities.\textsuperscript{535}

It was noted that there is no specific provision in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012, which deals with the enforcement of risk

\textsuperscript{528} See paragraph 4 7 3 2 above.
\textsuperscript{529} See paragraph 4 7 3 2 above.
\textsuperscript{530} See paragraph 4 7 4 2 above.
\textsuperscript{531} Paragraph 4 7 4 2 above.
\textsuperscript{532} See paragraph 4 7 4 2 above.
\textsuperscript{533} See paragraph 4 7 4 2 above.
\textsuperscript{534} See paragraph 4 7 5 2 above.
\textsuperscript{535} See paragraph 4 7 5 2 above.
management measures to expressly combat market abuse related systemic risks in all the South African financial markets. 536 It was accordingly submitted that the policy makers should, in line with the European Commission proposals, 537 statutorily empower an independent regulatory agency to enforce the risk management measures across all the South African financial sectors and financial markets. 538 Moreover, it was noted that there is no legislation that solely and expressly provides an enforcement framework for market abuse related accounting standards violations in South Africa. 539 However, it was stated that accounting standards violations are generally outlawed under different legislations, for example, the Companies Act 2008, the Financial Advisory and Intermediary Services Act and the Financial Services Board Act. 540 It was also noted that these Acts neither have designated regulatory agencies to enforce their accounting standards to combat fraud and market abuse nor penalties that could be imposed on the offenders in such instances. 541 It was further acknowledged that there is no uniformity as regards the adopted accounting and auditing standards. Accordingly, it is hoped that a specific legislation will be enacted in future to uniformly enforce auditing, accounting and financial reporting standards across the financial industry to combat fraud and market abuse-related accounting violations and to enhance comparability with international accounting best practice. 542 It was suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to enact provisions that directly and expressly apply to possible quote stuffing and front running that might occur in the over the counter commodity and commodity derivatives transactions. 543 It was further submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to provide a mandatory requirement on the part of the financial analysts or advisors, brokers and other market participants to openly hold onto their orders for specific minimum periods in order not to prejudice investors through quote stuffing or front running. 544 Moreover, it was noted that the Companies Act 2008, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically prohibit dark pools and flash

536     See paragraph 4762 above.
537     See paragraph 4761 above.
538     See paragraph 4762 above.
539     See paragraph 4772 above.
540     See paragraph 4772 above.
541     See paragraph 4772 above.
542     See paragraph 4772 above.
543     See paragraph 47811 above.
544     See paragraph 47811 above.
It was submitted that additional provisions should be enacted to expressly prohibit flash orders and dark pools in all the relevant financial markets. In addition, it was submitted that the Financial Services Board and the JSE should strictly impose a mandatory requirement on the issuers of securities, brokers and other relevant market participants to disclose their trading interests in certain securities promptly and cautiously in order to detect and curb manipulative dark pools and flash orders. It was further noted that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions do not expressly prohibit hedge funds insider trading and high yield investment fraud. It was accordingly noted that the Companies Act 2008, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly empower the Financial Services Board to combat hedge funds insider trading and commodities derivatives insider trading. It was also submitted that additional provisions should be enacted in accordance with other applicable reforms and proposals that were introduced elsewhere to expressly prohibit hedge funds market abuse activities and other securities violations, especially in the South African over the counter markets. Furthermore, it was stated that the Companies Act 2008, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically discourage high frequency trading, Internet-based market manipulation, program trading and other related technologically perpetrated market abuse activities. It was further suggested that the JSE and the Financial Services Board should consider employing practically applicable proposals from other jurisdictions such as the back testing process, real-time risk monitoring and market surveillance measures to combat high frequency trading-related market abuse activities. It was noted that the Companies Act 2008, the Financial Markets Bill, the Securities Services Act and the Financial Markets Bill 2012’s provisions do not directly or indirectly prohibit naked credit default swaps derivatives transactions in the over the counter markets. In line with this, it was submitted that the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to provide a specific prohibition on naked credit default swaps and

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545 See paragraph 47821 above.
546 See paragraph 47821 above.
547 See paragraph 47821 above.
548 See paragraph 47831 above.
549 See paragraph 47831 above.
550 See paragraph 47831 above.
551 See paragraph 47831 above.
552 See paragraph 47841 above.
553 See paragraph 47851 above.

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appropriate penalties against the offenders.\textsuperscript{554} It was also noted that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions do not explicitly prohibit short selling.\textsuperscript{555} Consequently, it was suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be fastidiously amended, giving regard to relevant applicable developments in other jurisdictions\textsuperscript{556} to prohibit naked short selling expressly.\textsuperscript{557} Although the JSE was rated as the number one stock exchange by the World Federation of Exchanges with regard to regulation in 2010,\textsuperscript{558} it is submitted that the various gaps in the enforcement of the market abuse prohibition in relation to some specific aspects of the South African financial markets and in relation to some selected market abuse practices that occurred during the global financial crisis as earlier discussed\textsuperscript{559} could weaken the stability and integrity of the South African financial markets in future. In line with this, it was submitted that some flaws in the detection, prosecution and the general enforcement of the market abuse prohibition could have, to some extent, contributed to poor reputation and low of investor confidence to be associated with some South African companies and financial markets.\textsuperscript{560} In this regard, it is hoped that the market abuse problems as stated in this chapter will be appropriately resolved for the purposes of combating market abuse activities in South Africa.

Now that the current gaps and problems associated with the enforcement of market abuse laws in South Africa have been highlighted, the next chapter will comparatively focus on the enforcement of the market abuse prohibition in the United States of America in order to recommend, where applicable, measures or principles that could be incorporated in the South African anti-market abuse enforcement framework.

\textsuperscript{554} See paragraph 4 7 8 5 1 above.
\textsuperscript{555} See paragraph 4 7 8 6 1 above.
\textsuperscript{556} See paragraph 4 7 8 6 above.
\textsuperscript{557} See paragraph 4 7 8 6 1 above.
\textsuperscript{559} See the discussion in sub-paragraphs under paragraph 4 7 above.
\textsuperscript{560} See sub-paragraphs under paragraph 4 4 above & also see paragraph 4 6 above.
CHAPTER FIVE
THE ENFORCEMENT OF MARKET ABUSE PROVISIONS IN UNITED STATES OF AMERICA: A COMPARATIVE PERSPECTIVE

5.1 Introduction

The United States of America has developed one of the most progressive and effective anti-market abuse enforcement frameworks in recent years.\(^1\) Notably, market abuse is outlawed both at a federal and state level. Consequently, a brief overview of the enforcement of the market abuse prohibition in California, Delaware and Washington states will be undertaken first and thereafter more emphasis will be focused on the discussion of the federal position. The aforementioned states are selected not only because of their unique and relatively consistent anti-market abuse enforcement approaches,\(^2\) but also because of the potential enforcement lessons that could be adopted from such approaches. On the other hand, at a federal level, the anti-market abuse enforcement framework involves self-regulatory organisations as well as private actions that enhance compliance with the law and facilitate the levying of sanctions against offenders.\(^3\) Steinberg argues that rigorous enforcement is the key component of the United States of America’s market abuse regulation that makes it unique from similar regulation in other countries.\(^4\) As a result, the United States of America’s anti-market abuse enforcement approaches have influenced the regulation of market abuse in a number of countries, including South Africa.\(^5\)

This chapter will examine whether the integration of some of the United States of America’s anti-market abuse enforcement approaches like bounty rewards and whistle-blower immunity will improve the enforcement of the market abuse prohibition in South Africa. Furthermore, the detection, prosecution and preventative measures adopted in the United States of

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America\(^6\) will be discussed and, where necessary, contrasted with similar enforcement methods in South Africa. Relevant provisions and cases from the United States of America will be contrasted with similar provisions and cases in South Africa in order to identify and recommend, where necessary, possible anti-market abuse enforcement approaches that could be incorporated in the South African enforcement framework.

5 2  Overview of the State Prohibition on Market Abuse\(^7\)

5 2 1  Prohibition on Insider Trading in California

Insider trading is statutorily prohibited under the California Corporations Code.\(^8\) Put differently, an issuer or any other person who is an officer, director or controlling person of such issuer or any person who knowingly has access directly or indirectly, to material non-public information that relates to any securities by virtue of his relationship with the issuer is prohibited from dealing in such securities in order to prevent insider trading.\(^9\) Notably, there is a requirement of knowledge on the part of the accused person that the material non-public information he obtained will significantly affect the market price of the securities in question before incurring any insider trading liability.\(^10\) Moreover, such liability can only be imposed upon the accused if he fails to prove that the affected person was aware of the non-public information in question; or that the affected person would have purchased or sold the securities in question at the same price even if the material non-public information was made public.\(^11\)

California’s insider trading prohibition is limited only to officers, directors, controlling shareholders of an issuer (primary insiders) and/or any other person who obtains non-public

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6 In relation to this, the discussion on the prohibition, penalties and enforcement of insider trading will be done separately from market manipulation practices.

7 Notably, this overview of the market abuse prohibition in selected states will be briefly undertaken ahead of the federal position because this chapter is focused mainly on the prohibition and combating of market abuse practices in the United States of America at a federal level.

8 Also known as the Corporate Securities Law of 1968 (California Statutes 1968, Chapter 88), hereinafter referred to as the California Corporations Code. See s 25402 & 25502.5 read with s 25502.

9 S 25402 California Corporations Code.

10 S 25402 read with s 25110; s 25210 & s 25230 (which prohibits investment advisors and broker-dealers from dealing in securities without licensure or exemption) of the California Corporations Code.

material information by virtue of his relationship with primary insiders. Consequently, violations by other persons who fortuitously obtain non-public material information not on the basis of their relationship with any of the primary insiders are not expressly covered under California’s insider trading prohibition. Nonetheless, California’s insider trading prohibition has an extra-territorial application that covers any violations that are perpetrated in California by primary insiders of a corporation incorporated in another state or country (foreign corporations). In relation to this, accessorial liability can also be imposed on individuals who tip, induce or assist others to contravene any California’s insider trading provisions.

5 2 2  Prohibition on Market Manipulation in California

Disclosure-based market manipulation, trade-based market manipulation, Internet-based market manipulation and commodity-based market manipulation practices are statutorily prohibited under the California Corporations Code. Trade-based market manipulation practices include:

(a) the use of a device, scheme or artifice to defraud or manipulate the price of a security;¹⁶

(b) effecting a transaction in a security which involves no change in the beneficial ownership;

(c) entering orders for the sale or purchase of any security with the knowledge that similar orders have been entered at the same price and/or at the same time for that security by the same or different persons; and

¹² S 25402 of the California Corporations Code. Also see Langevoort 2006 University of San Francisco Law Review 886.
¹³ S 25402 of the California Corporations Code.
¹⁴ Friese v Superior Court (2005) 36 Cal Rptr 3d 558 (Cal Ct App) 563-568, where it was held that although the internal affairs doctrine (as codified under s 2116) stipulates that only the state of incorporation may adjudicate on insider trading and/or any other violations, the defendants’ breach of s 25502.5 of the California Corporations Code did not merely give rise to fiduciary duties violations but to insider trading and as such it was not rigidly subject to the internal affairs doctrine.
¹⁵ S 25403 of the California Corporations Code.
¹⁶ S 25541 of the California Corporations Code.
(d) effecting alone, or with other persons, a series of transactions in any security to create actual or apparent active trading in such security in order to raise or depress the price of that security for the purposes of inducing its sale or purchase by others.\(^{17}\)

Disclosure-based market manipulation practices include the dissemination of false or misleading material information pertaining to the sale or purchase of a security by a broker-dealer or any other person so that the price of such security will or is likely to rise or fall (raising or depressing its market price) for the purposes of inducing others to purchase or sell that security.\(^{18}\) In line with this, disclosure-based market manipulation practices also include the oral or written communication of false or misleading statements that relate to the sale or purchase of securities by any offenders.\(^{19}\) Liability for both disclosure-based market manipulation and trade-based market manipulation requires proof on the part of the prosecution that the offenders wilfully participated, directly or indirectly in the effecting of a manipulative transaction or in the making or dissemination of a false and misleading statement of a material fact relating to any security; or that they omitted to state such material fact in order to make the statement, in light of the circumstances it was made, not misleading.\(^{20}\)

Commodity-based market manipulation practices that are outlawed include:

(a) wilful engagement by any person, in the making of a false report;

(b) entering any false record or untrue statement of a material fact and/or omitting to make the material fact in order to make any statement relating to a commodity, commodity contract or option false and misleading.\(^{21}\)

Additionally, engaging in any transaction, act, practice or course of business which operates or would operate as fraud or deceit upon commodities investors and the employing of any

\(^{17}\) S 25400(a) & (b) of the California Corporations Code.

\(^{18}\) S 25400(d) read with s 25400(c) & (e) & s 25401 of the California Corporations Code.

\(^{19}\) S 25400 & s 25401 read with s 25404 of the California Corporations Code.

\(^{20}\) S 25400; s 25401; 25541 read with s 25404; 25500 & 25501 of the California Corporations Code.

\(^{21}\) S 29536(b) of the California Commodity Law of 1990 (hereinafter referred to as the California Corporations Code).
device, scheme or artifice to defraud or manipulate the sale or purchase of any commodity is prohibited.\textsuperscript{22}

Internet-based market manipulation as well as franchise-related touting and manipulative practices are statutorily prohibited in California.\textsuperscript{23} For example, the intentional making of any untrue statement of a material fact relating to the sale or purchase of a franchise is a felony under the California Corporations Code.\textsuperscript{24} Moreover, the California Department of Corporations established the Internet Compliance and Enforcement Team to oversee the prohibition of Internet-based market manipulation by \textit{inter alia} requiring all persons to obtain a permit before issuing any securities.\textsuperscript{25}

\textbf{5 2 3 \ Available Market Abuse Penalties and Remedies in California}

An issuer or any person who wilfully engages in insider trading or market manipulation and fails to rely on the defences as earlier discussed\textsuperscript{26} will be liable for a fine not more than $10 million upon conviction or be imprisoned in a state prison (or pursuant to the California Penal Code)\textsuperscript{27} for a period between two and five years, or be liable for both the fine and imprisonment.\textsuperscript{28} Moreover, an issuer as defined in the Public Company Accounting Reform and Investor Protection Act of 2002\textsuperscript{29} who commits insider trading, market manipulation or who violates any rule or order that prohibits market abuse will be criminally liable for a fine not more than $25 million upon conviction, or imprisonment in a state prison, or in terms of

\begin{itemize}
\item \textsuperscript{22} S 29536(a); (c) & (d) of the California Corporations Code read with s 29520; 29535 & 29538 of the same Code, which prohibits any person from purchasing or selling commodities without licensure or exemption and/or from concealing evidence or making untrue statements to the California Department of Corporations.
\item \textsuperscript{23} S 31200 to 31204 of the California Corporations Code.
\item \textsuperscript{24} S 31200 to 31204 read with s 31210; 31211 & 31220 of the California Corporations Code.
\item \textsuperscript{26} See paragraph 5 2 1 above.
\item \textsuperscript{27} S 1170(h) of the California Penal Code.
\item \textsuperscript{28} S 25540(b) of the California Corporations Code.
\item \textsuperscript{29} Public Law 107-204, 116 Stat 745 (as codified in scattered sections of 15; 28 USC), hereinafter referred to as the Sarbanes-Oxley Act and its relevant provisions will be referred to only where necessary. See s 2 of the Sarbanes-Oxley Act; also see Palmiter \textit{Securities Regulation: Examples and Explanations} (2005) 23.
\end{itemize}
the California Penal Code, for a period between two and five years and/or be liable for both such fine and imprisonment. The California Corporations Code specifically imposes a fine not exceeding $10 million, or imprisonment in a state prison for a period between two and five years, or both such fine and imprisonment upon any person who willfully employs, directly or indirectly, a device, scheme or artifice to defraud or manipulate the offer, purchase or sale of securities. Similarly, an issuer as defined in the Sarbanes-Oxley Act who willfully employs, directly or indirectly, a device, scheme or artifice to defraud or manipulate the offer, purchase or sale of a security will be liable for a fine not exceeding $25 million, or imprisonment in a state prison for a period between two and five years, or both such fine and imprisonment.

Persons who violate the insider trading provisions will be directly liable to the person who sold or purchased the affected security for the damages equal to the difference between the price at which such security was sold or purchased and the market value which such security would have acquired at the time of the purchase or sale if the information known to the defendant had been publicly disseminated prior to that time. This civil liability also includes interest at a legal rate accruing to the plaintiff (affected person) provided that a reasonable period of time has lapsed for the market to absorb the publicly disclosed material information, or that the defendant failed to rely on any available defences. In addition, any person other than the issuer who commits insider trading will be liable to the issuer or anyone acting derivatively on behalf of the issuer for civil damages of up to three times the profit gained or loss avoided as a result of the insider trading in question.

Any person (defendant) who commits market manipulation will be liable for compensatory damages to any other person (plaintiff) who purchased or sold securities at an affected or

30 S 1170(h) of the California Penal Code.
31 S 25540(c) read with s 25540(a) of the California Corporations Code.
32 S 25541(a) of the California Corporations Code.
33 S 2 of the Sarbanes-Oxley Act.
34 S 25541(b); s 25542 of the California Corporations Code read with s 1170(h) of the California Penal Code.
35 S 25502 of the California Corporations Code. It is important to note that this provision gives private rights of action to the affected persons in order for them to recover their insider trading damages directly from offenders.
36 S 25502.5 of the California Corporations Code. These treble insider trading damages are determined by calculating the difference between the price at which the security was purchased or sold and the market value that it would have gained at the time of the sale or purchase if the non public information known to the defendant or the offender was publicly disseminated, Friese v Superior Court 563-568.
manipulated price as a result of such defendant’s illicit act or transaction. This civil liability seems not to be limited to the plaintiff who initially bought or sold the securities that were affected by the defendant’s market manipulation. In the same vein, any person who wilfully disseminates false or misleading statements which relate to any securities will be liable to the affected person, for rescission or compensatory damages. It is not required that the plaintiff should have actually relied on the false or misleading statements in question before the defendant is held liable for such recessionary or compensatory damages plus interest at a legal rate. Furthermore, there is secondary civil liability for controlling persons, aiders and abettors who participated in disclosure-based market manipulation.

The California Corporations Code further imposes separate criminal penalties on any person who commits commodities-based market manipulation offences. Such a person will be liable for a fine not more than $250 000 or imprisonment in a state prison, or pursuant to the California Penal Code for a period between two and five years or for both such fine and imprisonment. With regard to civil liability, there are no private rights of action for the affected persons to recover their damages directly from those who commit commodities-based market manipulation offences. Nevertheless, any person who aids or assists another person to contravene any commodities-based market manipulation provisions will be jointly and severally liable with any such person for damages.

Any person who wilfully engages in franchise-related touting and market manipulation will be liable to a fine not exceeding $100 000 or imprisonment in a state prison for a period not exceeding one year, or imprisonment pursuant to the California Penal Code, or both such

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38  S 25500; 28900 & 28901 of the California Corporations Code.
39  On the other hand, market manipulation offenders are apparently exempted from any liability that could arise from routine statements such as press releases and quarterly reports that are not intended to induce others to sale or purchase any securities, see s 25500 read with s 25400 of the California Corporations Code.
40  S 25501 read with s 25501.5 of the California Corporations Code.
41  S 25501 read with s 25501.5 of the California Corporations Code.
42  S 25501 read with s 25504 & 25504.1 of the California Corporations Code.
43  S 29550 of the California Corporations Code.
44  S 29550(b) & (c); read with s 29551 of the California Corporations Code, which stipulates that the California State may also bring criminal charges against the offenders under any other statute. Also see s 1170(h) of the California Penal Code.
45  S 29555 of the California Corporations Code.
46  S 29552 read with s 29553 & 29554 of the California Corporations Code.
47  S 1170(h) of the California Penal Code.
fine and imprisonment.48 Such a person will also be liable to the franchisee, franchisor or any other affected person for compensatory damages.49 A controlling person or every partner in a company who aids or abets another person to commit franchise-related touting and market manipulation offences will be jointly and severally liable with such person for actual damages suffered by the affected person and/or a temporary and permanent injunctive relief.50

The California Department of Corporations can also impose administrative penalties such as public censure, suspension, revocation of licenses, civil injunctions and administrative orders against any person who engages in fraudulent and manipulative Internet-based offering of investments and financial services.51 Additionally, the California Department of Corporations can impose remedies such as rescission, restitution, civil penalties and administrative penalties against any person who commits Internet-based market manipulation offences.52 Lastly, the California Department of Corporations can issue investigation orders against Internet-based market manipulation offenders and/or refer any such related criminal matters to the relevant courts for further investigation or prosecution.53

524 Analysis and Evaluation of the California Anti-Market Abuse Enforcement Framework

The California Department of Corporations, the Commissioner of Corporations and the relevant courts are responsible for the enforcement of market abuse provisions in California.54 As earlier stated,55 California employs criminal, civil and administrative sanctions to combat market abuse activities. These sanctions are enforced by the California Department of Corporations through the Commissioner of Corporations and the courts. In relation to this, it is must be noted that there is no specific regulatory body established to oversee the enforcement of market abuse laws in California. Consequently, the Commissioner of Corporations has a variety of powers which include:

48 S 31410; 31411 read with s 31412 of the California Corporations Code.
49 S 31300 read with 31301 of the California Corporations Code.
50 S 31302 & 31302.5 of the California Corporations Code.
52 S 25535 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 30.
53 S 25533 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 30.
55 See paragraph 5 2 3 read with paragraphs 5 2 1; 5 2 2.

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(a) imposing fees and penalties;

(b) cease and desist orders;

(c) revocation orders;

(d) restitution orders;

(e) civil injunction orders;

(f) investigation orders;

(g) public censure against the offenders; and

(h) issuing permits to all persons who seek to offer or sell investments, commodities or securities in California.56

The Commissioner of Corporations has further powers to make, amend or rescind any rules and/or orders for the purposes of effectively enforcing the securities and market abuse provisions.57 Similarly, the Financial Services Board is empowered to make market abuse rules in South Africa.58 Notwithstanding the fact that there is no specific regulatory body that policies the enforcement of market abuse laws in California, it is submitted that the Commissioner of Corporations has, from time to time, consistently exercised his powers to curb market abuse activities.59

With regard to Internet-based market manipulation, the California Department of Corporations relies on the Internet Compliance and Enforcement Team to investigate and prosecute any activities that amount to unlicensed securities, franchises or commodities

56 S 25111 to 25113 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 28-30.

57 S 31502 & 31503 of the California Corporations Code.

58 S 82(2)(g) of the Securities Services Act 36 of 2004 (hereinafter referred to as the Securities Services Act); also see clause 91(2)(f) of the Financial Markets Bill [B-2011], hereinafter referred to as the Financial Markets Bill & clause 86(2)(f) of the Financial Markets Bill [B12-2012], hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012 because at the time of writing this Chapter, the aforementioned Bills were not yet effectively passed into law).

offerings, and fraud and market manipulation. The Internet Compliance and Enforcement Team also ensures that there is extensive investigation and surveillance of Internet-based market manipulation. Accordingly, if any violation is detected, it will be reported to the Commissioner of Corporations who then determines whether it was fair and justifiable. Put differently, when the Commissioner of Corporations receives some leads from the Internet Compliance and Enforcement Team’s surveillance, junk mail and public complaints and referrals from other enforcement bodies, he may impose damages or other applicable remedies against the offenders. In contrast to this, there is no specific regulatory body that prohibits and investigates Internet-based market abuse practices in South Africa.

The district courts have to date enabled the California Department of Corporations to enforce the market abuse prohibition consistently in California. For example, the California Department of Corporations has successfully filed for a number of civil remedies such as the disgorgement of profits, damages and civil injunctions in the courts.

As briefly highlighted above, one can conclude that California has managed to develop a relatively consistent market abuse enforcement framework that effectively discourages a

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62 S 25140(c) of the California Corporations Code; Crandall 2001 Legislation & Public Policy 24.
63 S 25535 of the California Corporations Code; also see paragraph 5 2 3 above. This has enabled California to curb Internet-based market manipulation successfully since 1998 to date, see Crandall 2001 Legislation & Public Policy 26-31.
64 In other words, all Internet-based market abuse practices are not expressly prohibited under the Securities Services Act, the Financial Markets Bill & the Financial Markets Bill 2012 as well as the Consumer Protection Act 68 of 2008; also see the discussion in Chapters Two, Three & Four of this thesis.
65 Friese v Superior Court 561, where the court held that the civil derivative cause of action for disgorgement of insider trading profits was also applicable to companies that were not incorporated in California; also see Langevoort 2006 University of San Francisco Law Review 886-887; Medifast v Minkow (2011) 10 CV 382 (JLS BGS), where the court held that defendants were not liable for civil remedies for their alleged market manipulation; Louisiana Pacific Corporation v Money Market Institutional Investment Dealer and others (2011) 09-CV-03529 (JSW), where market manipulation damages were granted against the defendants; Williams v Gaylord (1902) 186 US 157, where it was inter alia held that a corporation that issues securities in any State is protected from possible market abuse liability that may arise from another State under the internal affairs doctrine; Clothesrigger Inc v G T E Corporation (1987) 191 Cal App 3d 605, where it was held that California’s market abuse laws may be enforced whenever necessary to prevent fraud and other deceptive or manipulative practices; Diamond Multimedia Systems Inc v Superior Court (1999) 19 Cal 1036, the court held that California’s securities and market abuse laws should be consistently enforced to promote financial markets that are fair and free from fraud and market abuse practices; Desai, Lamb, Long and Christopher Long v Deutsche Bank Securities Limited, Deutsche Bank Securities Inc and others (2009) 08-55081 US App Lexis 16704 (US App 9th Cir), the court held inter alia that the defendants were not liable for stock price manipulation because the appellants failed to establish a motion for class certification in terms of Rule 23(b)(3) of the federal rules.
number of market abuse practices (including franchise-related, capital markets related as well as Internet-related market abuse violations).

525 Prohibition on Insider Trading in Delaware

Insider trading is mainly outlawed as a breach of fiduciary duties by directors, officers or other employees (primary insiders) of an issuer who sell or purchase the issuer’s securities or commodities on the basis of non-public inside information. Apparently, this fiduciary-related insider trading liability may be imposed upon any offenders who violate Delaware’s securities and market abuse laws even if the issuer or any other affected persons did not suffer actual damages as result of the offender’s alleged insider trading. Likewise, a corporation may not repurchase its own shares if such repurchase will affect its payment of debts or cause capital impairment.

In addition, any sale or purchase of securities on the basis of non-public material information by a beneficial owner, director or officer of an insurer is also treated as insider trading. This prohibition on insurance-related insider trading allows the insurer to recover any damages suffered within a period of less than six months unless the sale or purchase of the affected securities was done in good faith. Intention on the part of the offenders is not required for the purposes incurring insurance-related insider trading liability. On the other hand, there is

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66 See generally s 144 read with s 160 to 162; s 122(17); s 271 & s 174 under Title 8 of the Delaware General Corporation Law (hereinafter referred to as the Delaware General Corporation Law); s 73-202 read with s 73-203 & s 73-204 in Title 6 of the Delaware Code, under Chapter 73 of the Delaware Securities Act as amended (hereinafter referred to as Delaware Securities Act); also see Langevoort 2006 University of San Francisco Law Review 881 & Brophy v Cities Service Co (1949) 70 A2d 5 (Del Ch), where it was inter alia held that the defendants’ breach of fiduciary duty of loyalty was tantamount to insider trading.

67 Brophy v Cities Service Co 5; Kahn v Kohlberg, Kravis, Roberts & Co LP (2010) CA No 436 (Del SC) & Guth v Loft Inc (1939) 5A2d 503 (Del) 510, where it was held that an employee occupying a position of trust and confidence towards his employer who nonetheless abuses non-public material information relating to the employer’s securities to gain profit will be liable for insider trading regardless of whether the employer suffered actual loss.

68 In other words, a corporation may not repurchase its own shares while in possession of non public material information that relates to any securities to prevent insider trading, see s 160 of the Delaware General Corporation Law.

69 S 5104 & 5105 in Title 18, under Chapter 51 of the Delaware Insurance Code (hereinafter referred to as the Insurance Code).

70 S 5104 (a) of the Insurance Code.

71 S 5104 (a) read with 5104(b) & (c) of the Insurance Code.

5 2 6  Prohibition on Market Manipulation in Delaware

Any person who employs a device, scheme or artifice to defraud or manipulate the offer, sale or purchase of a security will be liable for market manipulation. In addition, any person who make or omits to make a statement of a material fact in order to deceive or mislead others to purchase or sale a security will be liable for fraud and/or market manipulation. In the same light, any persons who are not registered with the Securities Commissioner are prohibited from offering to sell or purchase any securities. Moreover, misleading filings and unlawful purchase or sale of securities by broker-dealers, shareholders or any other person are prohibited. This was probably targeted at preventing securities or stock price market manipulation by professional persons like broker-dealers, investment advisors, shareholders and other relevant stakeholders.

Under the Delaware courts, a breach of fiduciary duty of disclosure by directors who issue misstated financial statements or misleading public statements to defraud, induce or manipulate others to purchase or sell any securities may give rise to monetary damages against such directors.


73 This indicates that trade-based market manipulation practices are also prohibited in Delaware, see s 73-201(1) of the Delaware Securities Act.

74 S 73-201(2) & (3) of the Delaware Securities Act.

75 S 73-202 read with s 73-203 & 73-204 of the Delaware Securities Act.

76 S 73-209; s 73-301 of the Delaware Securities Act & s 610 read with s 612 & 616 in Title 8 (Delaware General Corporation Law) under Chapter 6, which is also known as the Delaware Professional Service Corporations Act (hereinafter referred to as the Professional Service Corporations Act).

77 S generally s 220(d) read with s 220(b) & (c) of the Delaware General Corporation Law, which gives shareholders the right to seek and/or inspect financial statements in order to inter alia prevent fraud and market manipulation; also see Malone v Brincat (1998) CA No 15510 WL 919123 (Del Supr. Ct); Malone v Brincat (1998) 722 A2d 5 (Del) where it was held that the director or defendant who filed or disseminated false information in a financial statement could be held liable for a breach of general fiduciary duties of care, loyalty or good faith and not for common law prohibited fraudulent and market abuse activities & Seinfeld v Verizon Communications Inc (2006) 909 A2d 717 (Del), the court held that shareholders are entitled to inspect or seek relevant information from a corporation to detect and prevent fraud and disclosure-based market manipulation.
Although it appears that there is no statutory provision that expressly prohibits commodities-based market manipulation in Delaware, a number of deceptive or unfair commerce, trade and insurance practices are outlawed to *inter alia* combat market abuse activities.\(^{78}\) Delaware also prohibits racketeering and other forms of organised crime in order to discourage all persons from engaging in market abuse activities.\(^{79}\) In contrast to this, there is no provision that specifically prohibits racketeering and/or commerce and trade-related market abuse activities in South Africa.\(^{80}\)

### 527 Available Market Abuse Penalties and Remedies in Delaware

Any person who engages in fraudulent market manipulation which results in investors losing $50 000 or more will be liable per violation to a fine not exceeding $200 000 upon conviction, or imprisonment for a period not more than five years at level V incarceration, or both such fine and imprisonment.\(^{81}\) In the same way any person who engages in fraud or market manipulation which results in investors losing $10 000 or more but less than $50 000, will be liable per violation for a fine not more than $100 000 upon conviction, or imprisonment for a period not more than three years at level V incarceration, or both such fine and imprisonment.\(^{82}\) Furthermore, any person who wilfully violates any related fraud or securities provisions of the Delaware Securities Act will be liable for a fine of not more than $100 000, or imprisonment for a period no more than two years, or both such fine and imprisonment.\(^{83}\) The Securities Commissioner may impose injunctions, administrative remedies and stop orders to prohibit market abuse violations by the offenders by suspending or revoking the purchase or sale of any affected security.\(^{84}\)

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\(^{78}\) S 2303 & s 2304(1) to (12) in Title 18, under Chapter 23 of the Insurance Code; also see s 2532(a) to (c) in Title 6, under Chapter 25 of the Delaware Code which is also known as the Delaware Uniform Deceptive Trade Practices Act (hereinafter referred to as the Uniform Deceptive Trade Practices Act).

\(^{79}\) S 1503 in Title 11, under Chapter 15 of the Delaware Criminal Code.

\(^{80}\) See s 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.

\(^{81}\) S 73-604(a) of the Delaware Securities Act.

\(^{82}\) S 73-604(b) of the Delaware Securities Act.

\(^{83}\) S 73-604(c) of the Delaware Securities Act. The Supreme Court may also order the offenders to restore any profits they obtained from the affected investors, see s 73-604(d) & (e) of the Delaware Securities Act.

\(^{84}\) S 73-206 read with s73-601 & s 73-602 of the Delaware Securities Act.
A broker-dealer, broker-dealer agent, issuer agent, investment advisor, investment advisor’s representative or any other person who offers, sells or purchases securities by means of an untrue statement or any other market manipulation practices will be liable for civil compensatory damages. Moreover, the courts may impose upon the insider trading offenders, orders for damages, disgorgement of illicit profits and other applicable remedies. The courts may further impose a fine of up to $5 million or imprisonment for a period not exceeding 20 years upon the insider trading offenders.

With regard to prohibited manipulative trade practices, the offenders may be ordered by the relevant courts through an injunction to pay legal costs, compensatory damages or to disgorge any profits gained to the affected persons. Moreover, any persons who engage in insurance related market abuse activities will be ordered by the courts to disgorge any profits they gained at the expense of the insurers. The Commissioner of Insurance may also issue cease and desist orders and penalty orders against any person who commits insurance-related market abuse offences.

5 2 8 Analysis and Evaluation of the Delaware Anti-Market Abuse Enforcement Framework

Like California, Delaware does not have a specific regulatory body that enforces its market abuse laws. Nonetheless, Delaware has established a consistent system of reliance on judicial law standards, as well as well-developed common law and private enforcement measures to combat market abuse activities. Consequently, the Delaware Supreme Court, the Delaware Chancery Court, the Delaware General Assembly, the Delaware Corporate Law Council, the

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85 S 73-605(a) & (b) of the Delaware Securities Act.
86 Brophy v Cities Service Co 5; Kahn v Kohlberg, Kravis, Roberts & Co LP 436, where the defendants were mandated to pay damages and to disgorge their insider trading profits to the affected persons (plaintiffs) even if such persons did not suffer actual damages.
87 The United States Department of Justice District of Delaware “Newark Man Pleads Guilty to Insider Trading Charges” Press Release 25 March 2011, where Jeffery Temple of Newark DE was convicted of insider trading in March 2011 and was consequently liable for a fine not exceeding $5 million or imprisonment for a period of up to 20 years.
88 S 2533(b) & (c) read with subsections (d) & (e) of the Uniform Deceptive Trade Practices Act.
89 S 5104 of the Insurance Code.
90 S 2308 read with s 2311 of the Insurance Code.
91 Paragraph 5 2 4 above.
Delaware Division of Securities and the Delaware Division Corporations bear the responsibility of enforcing the Delaware’s securities and market abuse laws.93

As stated earlier,94 Delaware generally treats any securities dealing that is based on non-public inside information by primary insiders as a breach of fiduciary duties that also amounts to insider trading. Thus, although Delaware does not have a statutory provision that expressly prohibits insider trading, it has to date successfully relied on common law principles on fiduciary duties to combat insider trading.95 This success has prompted other commentators to conclude that Delaware was effectively combating insider trading and market manipulation because it cedes other areas of its laws that involve insider trading enforcement to the federal government.96 Unlike the position in Delaware, insider trading liability is not limited to instances where there is a breach of a fiduciary duty by primary insiders in South Africa.97

On the other hand, Delaware’s fiduciary-related insider trading remedies were controversially applied in some few cases.98 Be that as it may, one fact which is certain is that Delaware

94    Paragraph 5.2.5 above.
95    Brophy v Cities Service Co 5, the defendants were ordered to pay compensatory insider trading remedies to the plaintiffs regardless of whether such plaintiffs suffered actual damages; Kahn v Kohlberg, Kravis, Roberts & Co LP 436, where the plaintiffs (stockholders) were allowed to institute a derivative action against the defendants (corporate fiduciaries) for their alleged insider trading violations without proof of any actual damages suffered by such plaintiffs or their corporation & Guth v Loft Inc 503-510, the court held that any breach of fiduciary duties through insider trading was against public policy.
98    In re Oracle Corporation Derivative Litigation (2003) WL 21396449 (Del Ch); In re Oracle Corporation Derivative Litigation (2004) 867 A2d 904 (Del Ch) 934; In re Oracle Corporation Derivative Litigation (2005) 872 A2d 960 (Del Ch), the court held that the fiduciaries (defendants) should have traded on the basis of non public inside information they possessed to the detriment of their corporation before any disgorgement of profits can be paid to the affected plaintiff. Nonetheless, the court denied the defendants’ motion to dismiss the plaintiff’s derivative action for breach of fiduciary duties and/or insider trading; Gutman v Huang (2003) 823 A2d 492 (Del Ch) 499-507; In re American International Group Inc (2009) 965 A2d 763 (Del Ch) 813; Paddy Wood v Baum, Berndt, Brown & others (2007) CA 621 (Del Supr. Ct); Pfeiffer v Toll Brother Inc & others (2010) 989 A2d 683 (Del Ch), where the court inter alia held that the plaintiff must prove that he suffered actual harm as a result of the defendant’s breach of fiduciary duty through insider trading. This ruling was later reversed by the Delaware Supreme Court citing its unduly restricted approach and the defendants were ordered to pay compensatory damages regardless of whether the plaintiff suffered actual loss through breach of fiduciary duties or insider trading.
relies heavily on its courts’ judicial law standards and private enforcement to monitor and enforce its insider trading prohibition.  

In addition to the Delaware specialised corporate bar, courts and judicial law standards, the Delaware Division Corporations’ Securities Commissioner has powers to investigate, subpoena any suspects and issue stop orders, injunctions and other administrative remedies against any persons who commit insider trading or market manipulation. Likewise, the Commissioner of Insurance may issue investigation orders, cease and desist orders, penalty orders and judicial review orders against any market abuse offenders. This has enabled Delaware Division Corporations to effectively complement the relevant courts in tackling and addressing market abuse challenges. Unlike California, Delaware further has a specialised commercial court and whistle-blower immunity provisions to encourage employees or any person to report any securities and market abuse violations without fear of reprisals from their employers or other offenders. In relation to this, South Africa relies mainly on the Financial Services Board rather than judicial law standards to enforce its market abuse prohibition. Moreover, South Africa’s market abuse laws do not have a specific whistle-blower immunity provision to encourage all persons to report market abuse violations without fear of reprisals from their employers or other offenders.  

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102 S 2306 to 2309 & 2311 of the Insurance Code.

103 *Nacco Industries Inc v Applica* (2009) 997 A2d 1 (Del Ch) 23, the court held that common law remedies were available against those who engage in Schedule 13D misstatements filing and other related disclosure-based market manipulation practices.

104 Paragraph 5.2.4 above.

105 See S 1703 & 1704 in Title 19, under Chapter 17 of the Delaware Code, also known as the Delaware Whistleblowers’ Protection Act (hereinafter referred as the Whistleblowers’ Protection Act).
to the Financial Services Board or other relevant authorities without any fear of victimisation.106

Given the above analysis, one can conclude that Delaware has to date managed to flexibly and consistently develop effective and robust common law as well as judicial law standards to increase the private enforcement of its market abuse prohibition. Perhaps this explains why some commentators allude to the fact that Delaware is the “corporate haven” of the United States of America107

5 2 9 Prohibition on Insider Trading in Washington

Unlike California,108 Washington does not have a specific provision that directly and expressly prohibits insider trading. Nevertheless, insider trading is indirectly outlawed by discouraging directors, officers or employees from using non-public information filed with or

106 See s 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012. Put differently, although s 159 of the Companies Act 71 of 2008; the Protected Disclosures Act 26 of 2000; s 9 of the South African constitution & the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 can be employed to protect shareholders, directors and other employees from occupational reprisals, there are no specific provisions in the Securities Services Act, the Financial Markets Bill & the Financial Markets Bill 2012 that can be used to encourage and/or protect market abuse whistleblowers from such reprisals.


108 Paragraph 5 2 1 above.
obtained from the Department of Financial Institutions to deal in any security or commodity for personal gain.\textsuperscript{109} In contrast to the position in Delaware,\textsuperscript{110} liability for insider trading is apparently not restricted only to instances where there is a breach of fiduciary duties by primary insiders in Washington. Moreover, Washington does not clearly provide whether it is required that the offenders should have profited or benefited from their alleged insider trading before incurring any liability.\textsuperscript{111} The prohibition on insider trading is primarily restricted to directors, officers or other employees of a company.\textsuperscript{112} Despite this, Washington prohibits broker-dealers, investment advisors and any other person from offering or selling any security or commodity without being registered to prevent insider trading and other related illicit practices.\textsuperscript{113}

\textbf{5 2 10 \hspace{1em} Prohibition on Market Manipulation in Washington}

Any person who employs a device, scheme or artifice to manipulate the offer, sale or purchase of securities will be liable for fraud and/or market manipulation.\textsuperscript{114} Similarly, any person who received a consideration from another person is prohibited from employing a scheme, device, an act, practice or course of business and/or a dishonest practice for the purposes of influencing or advising other persons to purchase or sale any security.\textsuperscript{115} Accordingly, an investment advisor, broker-dealer or any other person who knowingly and manipulatively purchases or sells any security for his own account or for another person will be liable for market manipulation.\textsuperscript{116} This also indicates that trade-based market manipulation practices are statutorily outlawed in Washington.

\begin{footnotesize}

\textsuperscript{109} See s 21.30.160 in Title 21, under Chapter 21.30 of the Revised Code of Washington Commodity Transactions 1986 c 14, s 46 (hereinafter referred to as the Commodity Transactions Act) & s 21.20.480 in Title 21, under Chapter 21.20 of the Revised Code of Washington 1951 c 5, s 2 as amended by 1959 c 282, s 69 (hereinafter referred to as the Securities Act of Washington); also see s 21.20.140 of the Securities Act of Washington, which requires all persons to register with the Department of Financial Institutions before offering to sell any security or commodity.

\textsuperscript{110} Paragraph 5 2 5 above.


\textsuperscript{114} S 21.20.010(1) & (3) of the Securities Act of Washington.

\textsuperscript{115} S 21.20.020 of the Securities Act of Washington.


\end{footnotesize}
Likewise, disclosure-based market manipulation practices such as the making of false or misleading statements of a material fact or omitting to make a material fact in relation to any filed documents for the purposes of influencing the purchase or sale of any securities are prohibited.\textsuperscript{117} In relation to this, offering or selling unregistered securities by any person is expressly prohibited in Washington.\textsuperscript{118} This prohibition is mainly aimed at discouraging all persons from deliberately engaging in unlawful fraudulent or market manipulation activities.

Commodity-based market manipulation is also prohibited in Washington. For example, no person may directly or indirectly employ a device, scheme or artifice to defraud or influence others to purchase or sale any commodity contract or commodity option.\textsuperscript{119} Additionally, any person who engages in a transaction, act, practice, or course of business that will deceive others,\textsuperscript{120} or who makes a false or misleading report, record or statement of a material fact by omission or otherwise\textsuperscript{121} in order to induce others to purchase or sell any commodity or commodity option will be liable for market manipulation. Notably, any person who deliberately omits to state a material fact in relation to the purchase or sale of any commodity contract or commodity option will be liable for such omission and/or market manipulation.\textsuperscript{122} Moreover, no person may purchase or sell a commodity contract or commodity option, or engage in a trade, business or other act as a commodity merchant unless he is registered, licensed or exempted by the Commodity Futures Trading Commission.\textsuperscript{123} This preventative measure is employed to combat commodity-based market manipulation. In contrast to Washington, South Africa’s market abuse laws do not have a specific provision that directly and expressly prohibits commodities-based market abuse practices.\textsuperscript{124}

5.2.11 Available Market Abuse Penalties and Remedies in Washington

Any person who commits insider trading, market manipulation or other related securities violations will be liable upon conviction for a fine not exceeding $5,000, or imprisonment for

\textsuperscript{117} S 21.20.010(2) & 21.20.350 of the Securities Act of Washington.


\textsuperscript{119} S 21.30.060(1) of the Commodity Transactions Act.

\textsuperscript{120} S 21.30.060(3) of the Commodity Transactions Act.

\textsuperscript{121} S 21.30.060(2) of the Commodity Transactions Act.


\textsuperscript{124} See s 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
a period of not more than ten years, or both such fine and imprisonment.\textsuperscript{125} Similarly, any person who alters, destroys, shreds or conceals a record or document and/or who knowingly attempts to make a false or misleading statement of a material fact will be liable for a class B felony or a fine not exceeding $500,000, or both such fine and class B felony.\textsuperscript{126} The Director of Financial Institutions may refer any criminal matters to the attorney general for further investigation and prosecution.\textsuperscript{127}

Furthermore, any person who commits fraud, market manipulation or other related securities violations will be liable to the person buying or selling the affected securities for civil damages and reasonable legal costs plus 8% interest per annum.\textsuperscript{128} Every person who directly or indirectly controls another person and who commits or aids another person to commit market manipulation and other related securities violations will be jointly and severally liable with such person for civil damages and reasonable legal costs plus 8% interest per annum.\textsuperscript{129}

The Director of Financial Institutions may also institute administrative actions such as restraining orders, administrative fines, injunctions, orders for judicial review and stop orders against the securities and market abuse offenders.\textsuperscript{130} Accordingly, any person who filed a false or misleading report or statement of a material fact in order to engage in market abuse activities or any other related securities violations will be liable to the affected persons for damages and reasonable legal costs.\textsuperscript{131} The Director of Financial Institutions may further suspend the sale or trading of the affected securities by or through a broker-dealer, until the false or misleading statements or reports are corrected.\textsuperscript{132}

Persons who perpetrate commodity-based market abuse and other related violations will be liable to a fine not exceeding $20,000 upon conviction, or imprisonment for a period not more than ten years, or both such fine and imprisonment.\textsuperscript{133} However, no liability will be imputed

\textsuperscript{125} S 21.20.400 (as amended by 2003 c 53) of the Securities Act of Washington.
\textsuperscript{126} S 21.20.400 (as amended by 2003 c 288) of the Securities Act of Washington & s 9A.20.021(1)(b) of the Revised Code of Washington which deals with the punishment of the class B felony.
\textsuperscript{127} S 21.20.410 read with s 21.20.420 of the Securities Act of Washington.
\textsuperscript{128} S 21.20.430(1) & (2) of the Securities Act of Washington.
\textsuperscript{129} S 21.20.430(3) of the Securities Act of Washington.
\textsuperscript{131} S 21.20.745 of the Securities Act of Washington.
\textsuperscript{132} S 21.20.750 of the Securities Act of Washington.
\textsuperscript{133} S 21.30.140 of the Commodity Transactions Act.
upon any accused person if he proves that he had no knowledge of the violated rule or order or that he acted in good faith.\textsuperscript{134} The prosecuting attorney may further impose criminal proceedings against any person who wilfully commits fraud, market manipulation or any other commodities-related violations.\textsuperscript{135} The Director of Financial Institutions may, through the courts, issue compliance orders, declaratory judgments, cease and desist orders, summary orders, suspension orders, restitution orders, order for civil penalties, injunctions and other civil or administrative remedies against those who contravene the commodities provisions through fraud or market abuse practices.\textsuperscript{136}

### 5.2.12 Analysis and Evaluation of the Washington Anti-Market Abuse Enforcement Framework

The Director of Financial Institutions, courts (including the attorney general’s office) and the Department of Financial Institutions share the responsibility of enforcing the market abuse prohibition in Washington.\textsuperscript{137} As stated earlier,\textsuperscript{138} Washington does not have a specific provision that prohibits insider trading. Accordingly, this could be creating some enforcement challenges for both the courts and the Department of Financial Institutions. For instance, it is extremely difficult to prove whether the accused person has knowingly committed any insider trading violations because the insider trading offence is not clearly defined.\textsuperscript{139}

A number of civil, criminal and administrative penalties may be employed by the Director of Financial Institutions against any market abuse offenders. For example, the Director of Financial Institutions may impose administrative penalties such as public censure, suspension or revocation of the license of any broker-dealer, salesperson, investment advisor’s representative, investment advisor or any other person who commits market abuse and other related securities violations.\textsuperscript{140} Remarkably, unlike the position in Washington, the Financial

\textsuperscript{134} S 21.30.140 read with s 21.30.150 of the Commodity Transactions Act.
\textsuperscript{135} S 21.30.360 read with s 21.30.370 of the Commodity Transactions Act.
\textsuperscript{137} Conspicuously, Washington does not have a specific regulatory body that enforces its market abuse prohibition.
\textsuperscript{138} Paragraph 5.2.9 above.
\textsuperscript{139} Notwithstanding the advantages of this broad and unrestricted insider trading enforcement approach, it is submitted that Washington should consider enacting an adequate provision that expressly define and prohibit the insider trading offence to enhance enforcement.
\textsuperscript{140} S 21.20.110(1) read with (2) to (9); s 21.20.120 & s 21.20.130 of the Securities Act of Washington.
Services Board is not statutorily and expressly empowered to use public censure against the market abuse offenders in South Africa.¹⁴¹ The Director of Financial Institutions has further powers to investigate (publicly or privately) market abuse and other related violations.¹⁴² In line with this, the Director of Financial Institutions may *subpoena* witnesses in relation to any ongoing investigation which pertains to securities or market abuse violations.¹⁴³ Unlike Delaware,¹⁴⁴ Washington statutorily empowers its Director of Financial Institutions to publicly disseminate any information concerning an ongoing market abuse investigation and/or any other securities or commodities violations, if such dissemination is in the public interest.¹⁴⁵ The Director of Financial Institutions may also impose administrative sanctions like injunctions, mandamus, cease and desist orders, restraining orders and restitution orders against any person who commits market abuse offences or violates any provision of the Securities Act of Washington.¹⁴⁶

The Director of Financial Institutions relies on the relevant courts to enforce its administrative sanctions or other court actions against the market abuse offenders and those who violate the relevant rules.¹⁴⁷ The courts play a key role in judicial review hearings involving any person aggrieved by an order or decision of the Director of Financial Institutions.¹⁴⁸

Unlike Delaware¹⁴⁹ and California,¹⁵⁰ Washington statutorily empowers the Director of Financial Institutions to cooperate with other State and federal enforcement authorities in order to effectively combat fraud, market abuse and other related securities or commodities violations.¹⁵¹ Another advantage of Washington is the statutory availability of non-exclusive common law penalties and private rights of action for the prejudiced persons to claim their

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¹⁴⁴ Paragraph 5.28 above.
¹⁴⁸ S 21.20.440 of the Securities Act of Washington & s 21.30.400 of the Commodity Transactions Act, which states that the Director of Financial Institutions has powers to make, amend or rescind any rules, forms and orders relating to commodities transactions.
¹⁴⁹ Paragraph 5.28 above.
¹⁵⁰ Paragraph 5.24 above.
damages directly from the market abuse offenders.\textsuperscript{152} This has enabled Washington to have some influence on corporate law making (including the development and enforcement market abuse laws) both at State and federal levels in the United States of America.\textsuperscript{153} On the contrary, the Securities Services Act does not have any provision that directly empowers the Financial Services Board to cooperate with other local and international regulatory bodies in order to enhance the enforcement of the market abuse prohibition in South Africa.\textsuperscript{154} In relation to this, it is hoped that this flaw will be ameliorated by the Financial Markets Bill and/or the Financial Markets Bill 2012 which seeks to empower the Financial Services Board to assist foreign regulators with investigations pertaining to any cross-border market abuse cases.\textsuperscript{155}

\textbf{5 3  Historic Overview of the Federal Prohibition on Market Abuse}\textsuperscript{156}

\textbf{5 3 1  Overview of the Development of the Insider Trading Prohibition}

The regulation of insider trading at a federal level in the United States of America was introduced by the Securities Exchange Act of 1934.\textsuperscript{157} Before the Securities Exchange Act, cases dealing with insider trading were reportedly inconsistently decided on the basis of existing common law.\textsuperscript{158} The Securities Exchange Act discouraged insider trading and other related practices in the United States of America both directly\textsuperscript{159} and indirectly.\textsuperscript{160} Nonetheless, its direct prohibition on insider trading applied only to directors or officers


\textsuperscript{154} See paragraph 3 2 1 in Chapter Three as well as paragraphs 4 2; 4 3 1 & 4 3 3 in Chapter Four of this thesis.


\textsuperscript{156} The overview of the market abuse prohibition at a federal level is undertaken after the States position because this Chapter is focused mainly on the prohibition and combating of market abuse practices in the United States of America at a federal level.

\textsuperscript{157} Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended (hereinafter referred to as the Securities Exchange Act). See s 16(a) & (b) as well as s 10(b); also see Hazen Federal Securities Law (2003) 1-4.

\textsuperscript{158} Godwin v Agassiz (1933) 186 NE 659 (Mass), where the plaintiff who had ignorantly sold his own shares to his detriment after having read a newspaper report stating that the company had stopped operating as a result of insider trading was denied relief by the Supreme Court of Massachusetts.

\textsuperscript{159} S 16(b) prohibited short-swing profits (profits obtained in less than 6 months) by corporate insiders in the corporation’s stock except when it was in the best interests of that corporation or its shareholders.

\textsuperscript{160} S 10(b) prohibited any person to use or to employ in the purchase or sale of any securities registered on a securities exchange or any unregistered securities, a deceptive device for the purpose of contravening any rules and regulations of the United States Securities and Exchange Commission (SEC).
(primary insiders) of a company who held more than a 10% stake in the company.\textsuperscript{161} In other words, this prohibition did not apply to other persons like tippees. Moreover, the Securities Exchange Act’s indirect prohibition on insider trading was generally employed as an anti-fraud provision which prohibited insiders from defrauding other innocent investors by trading in their own company’s stock while in possession of advance knowledge of a forthcoming earnings disclosure.\textsuperscript{162} Notably, the Securities Exchange Act imposed a mandatory disclosure requirement on all insiders.\textsuperscript{163} They had to file with the United States Securities and Exchange Commission any requested statements and/or transactions, including those that could amount to insider trading, within ten days after they were concluded.

The initial insider trading provisions of the Securities Exchange Act were, however, flawed in some respects. For example, they did not give sufficient authority to the United States Securities and Exchange Commission\textsuperscript{164} to enforce and recover profits that were illegally obtained by those who practised insider trading.\textsuperscript{165} This function was merely left to a company’s own managers, directors and shareholders.\textsuperscript{166} Additionally, the United States Securities and Exchange Commission introduced other anti-fraud provisions such as Rule 10b-5\textsuperscript{167} but they nonetheless remained deficient. Neither section 10(b) nor Rule 10b-5 expressly prohibited illicit insider trading by insiders or other unscrupulous persons. The successful prosecution or settlement of insider trading cases was contingent upon the interpretation of the courts.\textsuperscript{168} It is clear that non-disclosure by an insider of material facts that were not known to the other party during the negotiations could probably amount to other market abuse practices like market manipulation. In 2000 the United States Securities and Exchange Commission adopted Rule 10b5-1\textsuperscript{169} in an attempt to define insider trading and provide defences to any person charged with insider trading if such person purchases or sells

\textsuperscript{161} S 16(b) read with subsection (a).
\textsuperscript{162} S 10(b) read with subsection (a). Also see generally related remarks in SEC v Lipson (2001) No 97–CV-2661 129F Supp.2d 1148.
\textsuperscript{163} S 16(a).
\textsuperscript{164} This body was established in 1934 as an independent board to enforce the federal securities laws so as to combat market practices like insider trading in the United States of America.
\textsuperscript{165} S 16(a) & (b).
\textsuperscript{166} Steinberg 2003 The International Lawyer 169-171.
\textsuperscript{167} 17 CFR, s 240.10b-5 (2007); Rule 10b-5 can be downloaded at <http://www.sec.gov> (accessed 01-10-2009).
\textsuperscript{169} 17 CFR, 240.10b5-1; Rule 10b5-1 can be downloaded at <http://www.sec.gov> (accessed 01-10-2009).
securities before acquiring material non-public information. The United States Securities and Exchange Commission further adopted Rule 10b5-2 to provide clarity on when a breach of a fiduciary duty or otherwise gives rise to liability under the misappropriation theory of insider trading in order to increase the consistent enforcement of the federal insider trading prohibition. In the same light, the United States Securities and Exchange Commission adopted Rule 100 and Regulation Fair Disclosure in a bid to discourage companies from selectively disclosing material non-public information to market professionals and favoured shareholders in another attempt to combat insider trading.

The Securities Exchange Act was amended and introduced provisions that granted the United States Securities and Exchange Commission the authority to make rules that are appropriate and necessary for the enforcement of the securities laws. Therefore, the United States Securities and Exchange Commission adopted Rule 14e-3 which applied only in tender offer situations. Rule 14e-3 prohibited “any person who has obtained directly or indirectly, material confidential information” regarding a tender offer from the offeror (bidder), target company or an intermediary, to trade or tip another person to trade in that offer before making an adequate public disclosure of such information. Furthermore, a tippee who knew or should have known that such information had come from an insider was prohibited from trading with it until an adequate public disclosure was made. Rule 14e-3 applied to all persons (even juristic persons) but nevertheless it was not easily enforced in practice. Besides being a basis for some of the United States Securities and Exchange Commission’s enforcement actions,

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171 17 CFR, 240.10b5-2; Rule 10b5-2 can be downloaded at <http://www.sec.gov> (accessed 01-10-2009).
174 S 23(a)(1).
175 S 14(e).
Rule 14e-3 has been very difficult to enforce and in some instances it is confusingly interpreted to create an implied private action against the offenders.\textsuperscript{177}

Various shortcomings of the Securities Exchange Act led the Congress to enact the Insider Trading Sanctions Act of 1984\textsuperscript{178} at the request of the United States Securities and Exchange Commission. This Act for the first time empowered the United States Securities and Exchange Commission to bring a civil action in the federal districts courts against persons who engage in insider trading activities.\textsuperscript{179} Therefore, the United States Securities and Exchange Commission could impose civil penalties on anyone who practised insider trading through tipping or other related practices to pay an amount of up to three times the profit made or loss avoided for the benefit of all the persons who were prejudiced by it. The Insider Trading Sanctions Act further empowered the courts to impose a criminal penalty on any person who violated the insider trading provisions.\textsuperscript{180} In spite of these developments, the Insider Trading Sanctions Act still failed to provide a lasting solution to the enforcement problems in the United States of America. It did not expressly define insider trading and its provisions applied only to a few persons (primary insiders); other persons like “controlling persons”\textsuperscript{181} were not specifically prohibited from committing insider trading offences.\textsuperscript{182}

In a bid to improve the regulation of insider trading, the Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988.\textsuperscript{183} This Act stipulated that public companies, broker-dealers and investment advisors should adopt appropriate policies to monitor and prohibit their employees from practising insider trading.\textsuperscript{184} Moreover, the Securities Fraud Enforcement Act modified the wording of section 21A to make it clear that tippers could be liable for civil penalties when their tip resulted in insider trading, even if they are not not

\textsuperscript{177} Palmiter \textit{Securities Regulation: Examples and Explanations} 368. Also see United States \textit{v} O’Hagan (1997) 117 (SCt) 2199; United States \textit{v} Chestman (1991) 947 F2d 551 (2d Cir).


\textsuperscript{180} S 21A.

\textsuperscript{181} A “controlling person” includes not only employers but also any person with the power to influence or control the direction or the management policies or activities of another person. Gaillard \textit{Insider Trading: The Laws of Europe, the United States and Japan} 308.

\textsuperscript{182} Pearson 2009 \textit{Review of Banking & Financial Law} 194.

\textsuperscript{183} Public Law 100-704, 102 Stat. 4677, hereinafter referred to as the Securities Fraud Enforcement Act.

technically aiders and abettors. The Securities Fraud Enforcement Act broadened the treble penalty for insider trading and further imposed liability on “controlling persons” for insider trading activities of their employees. This Act also permitted the United States Securities and Exchange Commission to pay bounties to informants of up to 10% of the civil penalties recovered in order to promote and enhance the enforcement of insider trading in the United States of America. These bounties were not paid to members, officers or employees of federal regulatory agencies, Department of Justice and self-regulatory organisations. The Securities Fraud Enforcement Act further empowered the United States Securities and Exchange Commission to investigate upon the request of similar regulatory bodies elsewhere any insider trading practices, regardless of whether such practices violated the United States of America’s federal insider trading laws. In spite of the notable improvements brought by the Securities Fraud Enforcement Act, some persons were still able to contravene its insider trading provisions. For example, as a result of poor auditing and insider trading activities on the part of Enron’s directors, its net income was reduced by $600 million and its debt increased to about $628 million.

In 2000, the Commodities Futures Modernization Act was enacted to inter alia repeal the ban on single-stock futures, enhance the regulation futures exchanges and empower both the Commodity Futures Trading Commission and the United States Securities and Exchange Commission to share the responsibility of regulating insider trading in the single-stock futures markets. This Act, unlike the Commodity Exchange Act of 1936, further enabled the

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185 S 21A(d).
187 S 21A as amended.
190 See s 6(b)(2) of the Securities Fraud Enforcement Act, which amended s 21(a)(2) of the Securities Exchange Act; also see Pearson 2009 Review of Banking & Financial Law 195.
191 Palmer Securities Regulation: Examples and Explanations 24.
192 Public Law 106-554, 114 Stat.2763A-365, hereinafter referred to as the Commodities Futures Modernization Act.
194 7 USC 1 et seq. (1994). Hereinafter referred to as the Commodity Exchange Act and it came into effect on 15 June 1936.
Commodity Futures Trading Commission to prohibit insider trading by discouraging market regulators’ employees and other professionals like brokers from trading ahead of a client or other investors while in possession of non-public material information. The aforementioned insider trading prohibition was, however, not extended to other persons who are not market professionals or employees per se.

In 2002 the Congress enacted the Sarbanes-Oxley Act in response to several landmark corporate scandals like World Com and Enron. This Act brought a more rigorous regulatory and enforcement structure for accounting companies and professionals to combat corporate fraud, insider trading and other market abuse practices. For example, in order to prevent insider trading, the Sarbanes-Oxley Act prohibits employees (primary insiders) from trading in their company’s stock relating to its pension plan funds during closed periods.

In the wake of the 2007-2008 global financial crisis, the Congress recently enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to inter alia enhance and broaden the United States Securities and Exchange Commission’s ability to enforce insider trading and other securities laws. For instance, this Act now allows the United States Securities and Exchange Commission and/or the Commodity Futures Trading Commission to institute appropriate proceedings against any employee or agent of an agency or department of the federal government who purchases or sells a commodity while in possession of non-public material information which relates to that commodity. In relation to this, the Dodd-Frank Act empowers the United States Securities and Exchange Commission to enforce the federal

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197 See further Palmiter Securities Regulation: Examples and Explanations 23.


199 This heading discusses mainly the United States of America’s federal statutes on insider trading. Other statutes that specifically regulate and prohibit fraud such as the Racketeer Influenced and Corrupt Organization Act of 1970 (RICO) will not be discussed for purposes of this thesis because it is limited only to the enforcement of the insider trading and market manipulation prohibition.

200 S 306(a).

201 Public Law 111-203, 124 Stat.1376 (codified at 12 USC, s 5301 et seq.), hereinafter referred to as the Dodd-Frank Act.


203 S 746 of the Dodd-Frank Act.
anti-fraud securities and insider trading prohibition extra-territorially.\textsuperscript{204} The Dodd-Frank Act now provides incentives of up to 30\% and immunity to whistleblowers who report insider trading and related violations to the United States Securities and Exchange Commission or the Commodity Futures Trading Commission.\textsuperscript{205}

### 5.3.2 Available Penalties for Insider Trading

The United States of America’s enforcement framework uses civil, criminal and administrative penalties to discourage insider trading. This can be traced back to the Securities Act of 1933\textsuperscript{206} which provided that any person who contravened its provisions was criminally liable for a fine of $10,000, or imprisonment for a period not exceeding five years, or both such fine and imprisonment.\textsuperscript{207} Moreover, the Securities Exchange Act allows the United States Securities and Exchange Commission to impose any other appropriate administrative penalties on broker-dealers who involve themselves in insider trading practices.\textsuperscript{208} As earlier stated,\textsuperscript{209} the United States Securities and Exchange Commission was empowered to impose treble civil penalties on insider trading offenders for the profit made or loss avoided as a result of their illicit trading.\textsuperscript{210} However, these sanctions were still insufficient for deterrence purposes and it was generally assumed that many persons benefited from insider trading without any fear of incurring liability. This might have been influenced by the fact that insider trading activity is inherently difficult to detect and enforce.\textsuperscript{211}

Additionally, the Congress introduced the Insider Trading Sanctions Act to improve inter alia the enforcement of the insider trading ban. The Insider Trading Sanctions Act imposed separate criminal penalties for natural and juristic persons. This Act further increased the

\textsuperscript{204} S 929P(b) read with (c) of the Dodd-Frank Act; also see Morrison & Foerster 2010 Year End Review 14-15.

\textsuperscript{205} See s 922 of the Dodd-Frank Act which enacted s 21F to repeal and replace s 21A(e) of the Securities Exchange Act; see further Morrison & Foerster 2010 Year End Review 12-14.

\textsuperscript{206} Public Law 22, 48 Stat.74 15 USC 77a-77mm et seq. (2000) as amended, hereinafter referred to as the Securities Act.


\textsuperscript{208} For example the United States Securities and Exchange Commission (SEC) was permitted to impose the so-called “watchdog” penalties on offenders. Palmiter Securities Regulation: Examples and Explanations 370.

\textsuperscript{209} See paragraph 5.3.1 above.

\textsuperscript{210} S 21A of the Securities Exchange Act.

criminal penalties for insider trading to a fine of $100,000 for natural persons and $500,000 for juristic persons. The maximum imprisonment term for natural persons remained five years and the civil penalties were unchanged, in spite of the broad powers conferred upon the United States Securities and Exchange Commission to claim treble damages from the offenders. These penalties did not deter all persons from knowingly practising insider trading. It remained possible for some unscrupulous persons to benefit from their insider trading practices after paying the stipulated fine or after serving their imprisonment terms.

The Securities Fraud Enforcement Act was adopted and a further amendment especially to criminal sanctions was made in order to improve the enforcement of the insider trading prohibition. The maximum criminal penalties were increased to a fine of $1 million for natural persons and to $2.5 million for juristic persons. Furthermore, the imprisonment sentence was significantly increased to a period not exceeding ten years. Notably, the prior version of the criminal fines for insider trading applied only to matters relating to stock exchanges. The Securities Fraud Enforcement Act enabled the United States Securities and Exchange Commission to continue paying bounty rewards to anyone who bona fide provided information leading to civil penalties in order to encourage all persons to expose insider trading activities. The Securities Fraud Enforcement Act further expanded civil penalties to cover not only insiders or tippers, but also to apply to “controlling persons” to prevent potential insider trading and tipping by their employees. In other words, this Act empowered the United States Securities and Exchange Commission to impose civil penalties on “controlling persons” who are not broker-dealers per se or investment advisors like banks, accounting firms and financial publishers. Civil penalties imposed on “controlling persons” could differ to some extent from those that may be imposed on “controlled

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213 Hazen Federal Securities Law 137-138; also see s 32(a) of the Securities Exchange Act as amended.
214 Palmiter Securities Regulation: Examples and Explanations 370.
215 Palmiter Securities Regulation: Examples and Explanations 370.
217 S 21A(e) which was later repealed and replaced by s 21F of the Securities Exchange Act as amended. Also see Palmiter Securities Regulation: Examples and Explanations 370; Hazen Federal Securities Law 137-138 & Morrison & Foerster 2010 Year End Review 12-14.
219 S 21A(a)(1); (2) & (3) read with s 21A(b) of the Securities Exchange Act as amended. Also see Friedman 1990 North Carolina Law Review 466-494 & Hazen Federal Securities Law 137-138.
persons”. The civil or administrative penalties that could be imposed on “controlling persons” were generally limited to a fine not exceeding $1 million.

Furthermore, the Sarbanes-Oxley Act increased the insider trading sanctions to a maximum fine of $5 million for natural persons and up to $25 million for juristic persons and a maximum imprisonment sentence of 20 years. The criminal sanctions and the civil remedies are enforced by the Department of Justice and the United States Securities and Exchange Commission respectively. This resulted in more successful criminal prosecutions and civil settlements to be obtained by the courts and the United States Securities and Exchange Commission respectively.

In 2010, the Dodd-Frank Act empowered the United States Securities and Exchange Commission to recover monetary penalties in cease-and-desist administrative proceedings involving commodities or securities (including insider trading) violations. Nonetheless, the Dodd-Frank Act does not have specific penalties for insider trading practices.

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220 This usually refers to employees or any other persons influenced or managed by another person.


222 Notably, this Act was named after its sponsors Senator Paul Sarbanes and the United States of America Representative, Michael G Oxley. Moreover, the Sarbanes-Oxley Act was enacted in response to major corporate and accounting scandals involving companies such as Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom. In addition, the Sarbanes-Oxley Act was enacted in bid to restore public investor confidence, especially after the aforesaid scandals had caused the share prices of the affected companies to collapse, giving rise to a number of investors losing their profits. Also see generally related analysis by Anonymous “History and Context of the Events Contributing to the Adoption of the Sarbanes-Oxley Act” <http://en.wikipedia.org/wiki/Sarbanes%E2%80%93Oxley_Act#History_and_context:_events_contributing_to_the_adoption_of_Sarbanes-Oxley> (accessed 12-06-2012).

223 S 306(a); s 1348 to s 1350. Also see Palmiter Securities Regulation: Examples and Explanations 369-370.

224 The increase in settlements and prosecutions were also enhanced in part by the fact that the courts have the discretion to impose, in light of the facts and relevant circumstances other additional penalties. See for example SEC v Texas Gulf Sulphur Company (1968) 401 F2d 833 (2d Cir); Dirks v SEC (1983) 463 US 646-655; United States v O’Hagan 2199; United States v Falcone [2001 Transfer Binder] 91 489 Fed Sec L Rep CCH (2d Cir) & SEC v Yun (2003) 327 F3d 1263 (11th Cir).


226 See s 746 of the Dodd-Frank Act.
5.3.3 Available Remedies for Insider Trading

One of the most far reaching insider trading regulatory developments in the United States of America is the availability of a wide range of remedies to all the affected persons.\(^{227}\) For example, a private right of action is available to contemporaneous purchasers or sellers of securities against insider trading offenders.\(^{228}\) The affected persons may claim damages not exceeding the profit gained or loss avoided by the defendant (offender) or his tippees.\(^{229}\) It is clear that tippers and tippees are jointly and severally liable for insider trading damages.\(^{230}\) Nevertheless, any losses incurred or amounts used in a United States Securities and Exchange Commission injunction action relating to any civil penalty transaction for contemporaneous traders are deducted from the damages recovered.\(^{231}\) No limit or condition is imposed on any person who brings an action to enforce the provisions of the Securities Exchange Act or on the availability of any implied right of action under the same Act.\(^{232}\)

In addition, the United States Securities and Exchange Commission can bring a judicial enforcement action seeking a court order that enjoins insiders or tippees from indulging in insider trading activity and that mandates them to return or disgorge all the profits gained or losses avoided.\(^{233}\)

Another remedy available in the United States of America is the civil action for recovery or compensation for “defrauded” owners of non-public confidential information. Such persons are statutorily allowed to take a private action against any persons who practise insider trading


\(^{228}\) S 20A of the Securities Exchange Act as amended by s 5 of Securities Fraud Enforcement Act. Also see Blue Chip Stamps v Manor Drug Stores (1975) 421 US 723, where the actual affected persons were allowed to bring a private action in terms of Rule 10b-5 against the insider trading offenders.

\(^{229}\) Elkind v Liggett and Myers Inc (1980) 635 F2d 156(2d Cir) 172-173; FMC Corp v Boesky (1988) 852 F2d 981 (7th Cir), the court held that the affected company was entitled to claim its damages from the insider trading offenders, but nevertheless the tippee was controversially not found guilty because such company did not suffer actual loss. Also see Friedman 1990 North Carolina Law Review 466-494.

\(^{230}\) S 20A(c) of the Securities Exchange Act; also see Friedman 1990 North Carolina Law Review 466-494.

\(^{231}\) S 20A(b)(2) of the Securities Exchange Act; also see Friedman 1990 North Carolina Law Review 466-494 & Palmiter, Securities Regulation: Examples and Explanations 369.


\(^{233}\) SEC v Texas Gulf Sulphur Company 833. In this case it was inter alia postulated that a separate fund be established from which the prejudiced shareholders and other contemporaneous traders could recoup their losses or be compensated from any money recovered from the offenders. Also see generally Palmiter, Securities Regulation: Examples and Explanations 369-370.
and other similar activities. The entities like companies are also allowed to recover any losses suffered as a result of insider trading from the offenders. There is no explicit statutory limitation that applies to the period on which private actions may be instituted under Rule 10b-5. Instead, the courts have been required to determine the appropriate limitation periods on private civil actions giving regard to any other relevant factors.

The United States Securities and Exchange Commission may also claim treble civil damages from any person who violates its insider trading rules. These damages, like any other remedies, are usually paid into the federal treasury. It is possible for offenders to disgorge their profits in a private or United States Securities and Exchange Commission action and still pay a treble damage penalty without any concerns of double jeopardy violation. The Dodd-Frank Act further allows the United States Securities and Exchange Commission to pay bounty rewards to whistle-blowers who report insider trading and related violations that results in the successful disgorgement of profits, monetary penalties and prejudgment interest exceeding $1 million in any judicial or administrative proceedings.

534 Prohibition on “Market Manipulation”

Although the concept of market abuse is not expressly and statutorily defined in the United States of America, the regulation and prohibition of market abuse practices can be linked back to the so-called “New Deal” legislation that was enacted after a heavy crash occurred in its stock markets in 1929. The most important “New Deal legislation” was the Securities Act of 1933 and the Securities Exchange Act of 1934.

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234 Rule 10b-5. See further Palmiter Securities Regulation: Examples and Explanations 369.
235 Palmiter Securities Regulation: Examples and Explanations 369. Also see FMC Corp v Boesky 981.
237 Rules 10b-5 & 14e-3.
240 Avgouleas The Mechanics and Regulation of Market Abuse 104.
241 Avgouleas The Mechanics and Regulation of Market Abuse 174-175.
The Securities Act prohibits the making of corporate misstatements that will lead to the defrauding of innocent investors. This is mainly done to protect investors against corporate false or misleading statements in the context of new issues and to safeguard the adequate and continuous flow of issuer-specific information.

In addition, the Securities Exchange Act expressly prohibits market manipulation. This Act, for instance, prohibits any person from willingly creating misleading appearances of active trading in securities listed on a stock exchange. Put differently, the Securities Exchange Act discourages and prohibits a number of activities that create or that might create a misleading appearance of trading in listed securities like wash sales and matched orders (when the same person or affiliate is essentially both the buyer and the seller of the securities in question), a series of transactions to induce the purchase or sale by others and the false or reckless “touting” or spreading of rumours by broker-dealers or other traders to induce trading in such securities.

The Securities Exchange Act further prohibits any person from directly or indirectly using manipulative and other deceptive devices to purchase or sell any listed securities to the detriment of investors. In addition, any such persons who violate the rules and regulations proscribed by the United States Securities and Exchange Commission will also be liable for an offence. In relation to this, the United States Securities and Exchange Commission is authorised to make any other appropriate rules and regulations to combat market manipulation in the United States of America. The United States Securities and Exchange Commission introduced a rule that discourages any person from employing any device, scheme or artifice to defraud or to engage in an act, practice or course of business that will deceive other

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242 S 17.
244 S 9(a). Also see Palmiter Securities Regulation: Examples and Explanations 266.
245 S 9(a).
246 S 10(b) read with subsection (a). See further Friedman 1990 North Carolina Law Review 466-494; Avgouleas The Mechanics and Regulation of Market Abuse 104.
247 S 9(b) & (c) read with subsection (a) of the Securities Exchange Act.
248 For example the United States Securities and Exchange Commission promulgated Rule 10b-5 in order to effectively enforce the provisions of s 10(b) of the Securities Exchange Act. See further Avgouleas The Mechanics and Regulation of Market Abuse 104.
persons. This rule further prohibits all persons from making untrue and misleading statements relating to the material facts of any securities.

Moreover, the United States Securities and Exchange Commission introduced Regulation M which, among other aspects, prohibits market manipulation during a public distribution (public offering of securities) and allows price-stabilisation activities only in some specific circumstances. The United States Securities and Exchange Commission further adopted Rule 10a-1 (the so-called up-tick rule) to prevent market manipulation and free falls in stock prices due to short selling in a falling market. This rule has been criticised as too narrow because it did not cover short sales and other manipulative activities in over the counter markets and in sales of derivatives. Regulation SHO was then enacted to combat naked short selling and market manipulation in all the United States of America’s financial markets and in broker-dealer transactions.

The Securities Exchange Act further prohibits the making of false or misleading statements of any material fact or engagement in any fraudulent, deceptive or manipulative practices in connection with tender offers. Additionally, the Securities Exchange Act allowed the United States Securities and Exchange Commission to define “fraudulent, deceptive or manipulative practices” and to make appropriate rules designed to prevent such manipulative practices. This Act does not expressly prohibit market manipulation in over the counter markets.

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249 See Rule 10b-5 which prohibits three types of market manipulation, namely false dissemination of material information relating to securities, distortion and misleading behaviour and the use of manipulative devices that negatively affect the price of securities and create a false appearance in the market activity. Also see Palmiter Securities Regulation: Examples and Explanations 316-317 & Barnes Stock Market Efficiency, Insider Dealing and Market Abuse (2009) 132.

250 Rule 10b-5. Also see Palmiter Securities Regulation: Examples and Explanations 306; 308-309.


252 Palmiter Securities Regulation: Examples and Explanations 268-269.

253 Palmiter Securities Regulation: Examples and Explanations 269.


255 For example the United States Securities and Exchange Commission adopted Rule 14e-3 to enhance the enforcement of the provisions of s 14(e) of the Securities Exchange Act and a number of measures that discourage market manipulation were introduced. Rule 14e-3(a) & (d). Also see Friedman 1990 North Carolina Law Review 466-494.

In an effort to avoid the recurrence of corporate scandals and to reassure investors that the United States of America financial markets will be free from market abuse practices, the Sarbanes-Oxley Act was enacted. This Act prohibits any person (including a juristic person) or employee from engaging in an act or practice that will improperly influence the conduct of audits or the falsification of books, records and accounts. The Sarbanes-Oxley Act further prohibits senior officers of a company from selling stocks during certain pension “black-out” periods if they received that stock as compensation during their employment with the company in question in order to prevent possible market abuse activities like insider trading and market manipulation.

The United States Securities and Exchange Commission enacted a specific rule that prohibits officers, directors and persons acting under their direction from knowingly coercing, manipulating, misleading or fraudulently influencing the auditor of the issuer’s financial statements.

5 3 4 1 Prohibition on Commodity Market Manipulation

Market manipulation with respect to commodities futures and other kinds of derivatives is principally regulated under the Commodity Exchange Act. Thus, the Commodity Futures Trading Commission, and not the United States Securities and Exchange Commission, is the main regulatory body that deals with the enforcement of commodity market manipulation in the United States of America. Actual or attempted market manipulation of any commodity

257 SEC v WorldCom Inc (2003) 02 Civ 4963(JSR).
258 Mossos “Sarbanes-Oxley goes to Europe: A Comparative Analysis of United States and European Union Corporate Reforms after Enron” 2004 Currents International Trade Law Journal 9 9-10. See Anonymous <http://en.wikipedia.org/wiki/Sarbanes%E2%80%93Oxley_Act#History_and_context:_events_contributi ng_to_the_adoption_of_Sarbanes.E2.80.93Oxley> (accessed 12-06-2012), who also submits that the Sarbanes-Oxley Act was inter alia enacted in bid to restore public investor confidence in the aftermath of several corporate and accounting scandals which affected companies such as Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom in the United States of America.
259 S 303(a).
260 S 306(a)(1).
261 The Sarbanes-Oxley Act empowers the United States Securities and Exchange Commission to make further rules that it may deem necessary for the purposes of enforcing the market abuse provisions, see Rule 13b-2; Rule 13b2-2(b)(1). Also see Mossos 2004 International Trade Law Journal 9-11.
or future or option is prohibited under the Commodity Exchange Act as amended. Consequently, any conduct or practice that results in the misleading of investors and the creation of an artificial price of commodities is prohibited. The Commodity Exchange Act further prohibits intentional aiding, abetting and inducement of other persons to commit market abuse offences. Under this Act, the Commodity Futures Trading Commission could bring a civil action or any other appropriate action against the offenders if it has a reason to believe that such offenders have a specific intent to create an artificial price or to influence the price of the commodities or that an artificial price that exists has been caused by their manipulative practices.

The Commodities Futures Modernization Act prohibits commodities-based market manipulation in the single-stock futures markets and over the counter derivative transactions. Accordingly, under this Act both the Commodity Futures Trading Commission and the United States Securities and Exchange Commission have the authority to institute appropriate proceedings against any person who commits market manipulation and other related activities. Notably, the United States Securities and Exchange Commission’s authority is only limited to violations relating to single-stock futures transactions, not “broad-based” security futures transactions which are exclusively covered by the Commodity Futures Trading Commission. Nonetheless, if there is a rule violation or market manipulation in the sale or purchase of a single-stock future, either the Commodity Futures Trading Commission or the United States Securities and Exchange Commission may, after consultation, bring an enforcement action against the offenders.

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264 S 9(a)(2).
265 All persons are prohibited from entering into or confirming the execution of a transaction that is misleading in nature (wash sales) to create a fictitious sale of any commodities. s 4(c). Also see Swan Market Abuse Regulation (2006) 192-194.
266 S 13(a); s 6(c) to (d) & 9(a)(2). Also see Avgouleas The Mechanics and Regulation of Market Abuse 104.
267 Avgouleas The Mechanics and Regulation of Market Abuse 104; Swan Market Abuse Regulation 192-194.
269 See generally s 251 of the Commodities Futures Modernization Act; also see Knepper 2004 Pierce Law Review 36.
270 S 201 of the Commodities Futures Modernization Act; also see Knepper 2004 Pierce Law Review 37.
271 S 204; 251 of the Commodities Futures Modernization Act; also see Knepper 2004 Pierce Law Review 37-38.
Recently, the Dodd-Frank Act broadened the authority of the Commodity Futures Trading Commission to make appropriate rules and prohibit both trade-based market manipulation and disclosure-based market manipulation practices. In addition, the Dodd-Frank Act introduced the prohibition on fraud-based market manipulation practices in relation to any purchase or sale of a swap or commodity contract in interstate commerce or for future delivery and/or subject to the rules of any registered entity. The Dodd-Frank Act further introduced a broad prohibition on direct or indirect swap or commodity-based market manipulation as well as attempted swap or commodity-based market manipulation.

5.3.5 Available Penalties for Market Manipulation

A variety of penalties such as criminal, civil and administrative sanctions are used to combat market manipulation practices in the United States of America.

The Securities Act imposes criminal penalties of up to five years imprisonment and a $10 000 fine on any person who knowingly violates its anti-fraud and market manipulation provisions. Furthermore, the Securities Exchange Act imposes a maximum criminal penalty fine of $100 000, or imprisonment for a period not exceeding five years, or both on natural persons who willfully engage in prohibited trade practices and other related market manipulation offences. The Securities Exchange Act further imposes a separate fine not exceeding $5 million, or imprisonment for a period of up to 20 years on individuals as well as a $25 million fine for juristic persons (companies and other entities) that intentionally engage in disclosure-based market manipulation and other related practices. This distinction is believed to have been made to increase deterrence and improve the general enforcement of

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272 See the Commodity Futures Trading Commission Proposed Rules 180.1 & 180.2; also see Morrison & Foerster 2010 Year End Review 15.

273 S 753 of the Dodd-Frank Act which amended s 6(c) of the Commodity Exchange Act. It is stated that s 753 of the Dodd-Frank Act was originally modeled upon the Derivatives Market Manipulation Prevention Act of 2009 which was introduced by Senator Cantwell in 2009, see Cantwell “Senate Passes Cantwell Anti-Manipulation Amendment” (06-05-2010) <http://cantwell.senate.gov/news/record.cfm?id=324761> (accessed 26-11-2011).

274 S 753 of the Dodd-Frank Act which amended s 6(c) of the Commodity Exchange Act.

275 S 753 of the Dodd-Frank Act which amended s 6(c) of the Commodity Exchange Act; also see Morrison & Foerster 2010 Year End Review 15.

276 S 24. Also see Palmiter Securities Regulation: Examples and Explanations 452.

277 S 32(c)(2)(A) read with subsection (a) of the Securities Exchange Act; also see Palmiter Securities Regulation: Examples and Explanations 451-454.

278 These criminal penalties are mainly enforced by the Department of Justice. S 32(a) of the Securities Exchange Act as amended by the Sarbanes-Oxley Act.
the market abuse provisions in the United States of America.\textsuperscript{279} Importantly, both the Securities Act and the Securities Exchange Act criminalised false and misleading registration statements and the filing of misleading documents with the United States Securities and Exchange Commission respectively.\textsuperscript{280}

With regard to civil penalties, the Securities Exchange Act has empowered the United States Securities and Exchange Commission to impose civil penalties on any person who wilfully or recklessly aided, abetted, counseled, commanded or induced another person to commit market abuse practices like filing false and misleading documents with the United States Securities and Exchange Commission.\textsuperscript{281} Although there is no explicit provision for a civil penalty for the contravention of Rule 10b-5, a private right of action for such contravention is available to all prejudiced actual purchasers and sellers of securities on the basis of equity.\textsuperscript{282}

In relation to administrative penalties, the United States Securities and Exchange Commission is further authorised to administer and impose unlimited administrative penalties upon the market manipulation offenders. It may issue a refusal or stop order (cease and desist orders) to prevent an already existing registration statement from being effective or to stop the filing of a false or misleading statement.\textsuperscript{283} The United States Securities and Exchange Commission may also claim the disgorgement of any profits made by a person who violates the securities and market abuse provisions.\textsuperscript{284} In addition, the United States Securities and Exchange Commission may impose a judicial order for civil monetary penalties on the alleged offenders if it reasonably believes that such penalties will be in the public interest.\textsuperscript{285}

\begin{thebibliography}{99}
\bibitem{Palmiter} Palmiter \textit{Securities Regulation: Examples and Explanations} 451- 455.
\bibitem{SecuritiesRegulation} S 32 of the Securities Exchange Act & s 24 of the Securities Act; also see Palmiter \textit{Securities Regulation: Examples and Explanations} 452- 453.
\bibitem{SecuritiesManipulation} S 21(d)(3) of the Securities Exchange Act; see further s 20(d) of the Securities Act.
\bibitem{SecuritiesAbuse} For example, the United States Securities and Exchange Commission may impose a cease and desist order compelling any alleged offender to stop committing further market abuse violations. S 8A; 8(b) & (d) of the Securities Act & s 21C of the Securities Exchange Act. Also see Palmiter \textit{Securities Regulation: Examples and Explanations} 436-444.
\bibitem{SecuritiesPenalties} S 8A(e) of the Securities Act; s 21B(e) of the Securities Exchange Act. Also see further Palmiter \textit{Securities Regulation: Examples and Explanations} 438.
\bibitem{SecuritiesOrder} S 21(d)(3) of the Securities Exchange Act; see further s 20(d) of the Securities Act; also see Palmiter \textit{Securities Regulation: Examples and Explanations} 441-442.
\end{thebibliography}
On the other hand, the Commodities Futures Modernization Act provides criminal penalties against any commodities-based market manipulation offenders in the single-stock futures markets, over the counter commodities derivatives and other related markets in the United States of America. Similarly, the Commodity Exchange Act imposes a criminal penalty fine of up to $100,000 on individuals and up to $500,000 on entities that indulge in fraudulent and/or other prohibited commodities-based market manipulation practices. Individuals could also be liable to imprisonment for up to five years, or both such fine and imprisonment. In addition, the Commodity Exchange Act imposes civil penalties against any commodities-based market manipulation offenders. This Act allows the Commodity Futures Trading Commission to take appropriate civil action against any persons who aids, abets, counsels, induces or procures the commission of market manipulation offences. The Commodity Futures Trading Commission may, therefore, claim any disgorgement profits and civil monetary penalties of up to $1 million or three times the profits gained by offenders and distribute them to the affected persons.

Additionally, the Sarbanes-Oxley Act introduced significantly higher criminal penalties for market manipulation and other related offences. It imposes a maximum criminal fine of $5 million and imprisonment sentence of up to 20 years for individuals. A separate maximum criminal fine not exceeding $25 million is also imposed on entities that are involved in market manipulation and other related activities. The Sarbanes-Oxley Act further provides civil penalties against any person who knowingly executes or attempts to execute a scheme or artifice to defraud or to manipulate by means of false pretenses, representations or promises, any money or property in connection with the securities of a public company. This suggests that there is an attempted market manipulation offence in the United States of America. The Sarbanes-Oxley Act permits the United States Securities and Exchange Commission to seek civil compensatory penalties against any person who presents manipulative, fraudulent, false or misleading statements with regard to the conduit of audits,

286 See generally s 13(a) read with subsection (c)(a) of the Commodity Exchange Act.
287 S 25(a)(1).
288 S 6(c)(10)(C) as amended by s 753(a) of the Dodd-Frank Act. The profits disgorged and the penalties recovered are normally kept in a fund or trust controlled by the Commodity Futures Trading Commission for purposes of offering compensatory aid to all the prejudiced persons.
289 S 807.
290 Palmiter Securities Regulation: Examples and Explanations 452.
291 Avgouleas The Mechanics and Regulation of Market Abuse 458.
books, records and accounts of a company. The United States Securities and Exchange Commission may impose other civil and administrative penalties necessary to enforce and discourage market manipulation activities.

5 3 6 Available Remedies for Market Manipulation

A wide range of remedies such as criminal, civil and administrative remedies are available to all the persons affected by market manipulation in the United States of America. Apart from these remedies, a private right of action, damages, injunctions, disciplinary sanctions and suspension orders may be employed by the victims of market manipulation to recover their losses from the offenders.

Criminal remedies may be obtained from any person who contravenes market manipulation provisions or the United States Securities and Exchange Commission rules, including the making of a false or misleading statement in a filing submitted to the United States Securities and Exchange Commission. If the offenders refuse or delay to pay up their fines, the United States Securities and Exchange Commission will refer such cases to the Department of Justice for further criminal prosecution.

In addition, a statutory derivative civil remedy for market manipulation violations is permitted in the United States of America on grounds of equity. The United States Securities and Exchange Commission may, therefore, claim disgorgement of profits and other civil compensatory remedies from any person who contravenes its rules or other market manipulation provisions. Likewise, the Commodity Futures Trading Commission may

292 S 303(a). See further Rule 13b2-2(b)(1) & Rule 13b2-2(b)(2).
293 There is no express statutory limitation on United States Securities and Exchange Commission’s enforcement actions. Palmiter Securities Regulation: Examples and Explanations 436-444.
294 The affected persons may obtain criminal remedies of up to $5 million and $25 million fines for individuals and entities respectively from the offenders. See 32(a) of the Securities Exchange Act (as amended); s 24 of the Securities Act. Also see Palmiter Securities Regulation: Examples and Explanations 452-454.
295 The fines or monetary remedies recovered by the United States Securities and Exchange Commission or the Department of Justice are paid into the treasury account for distribution to all the persons who fall victim to market manipulation and other related market abuse practices. Palmiter Securities Regulation: Examples and Explanations 370; 441.
297 The offenders will be liable to pay the United States Securities and Exchange Commission civil remedies of up to three times the profit gained or loss avoided as a result of their illicit practices. See s 308 of the Sarbanes-Oxley Act. Also see FMC Corp v Boesky (1987) 673 F2d 272 (ND 111); Blue Chip Stamps v
institute court orders for civil monetary fines, restitution, disgorgement of profits, rescission and actual damages against any commodities-based market manipulation offenders. 298

The United States Securities and Exchange Commission and the Commodity Futures Trading Commission are further empowered to take appropriate administrative action against any persons who violate the relevant market manipulation provisions in the United States of America. In relation to this, the United States Securities and Exchange Commission may issue cease and desist orders compelling any alleged offenders to stop or refrain from violating its market abuse rules. 299 If the alleged offender fails to comply with the cease and desist order, the United States Securities and Exchange Commission may enforce the order in a federal court. 300 Furthermore, the United States Securities and Exchange Commission may impose a compliance order with regard to any misleading tender offer statements or where a registrant’s filing is defective, manipulative or misleading. 301 The United States Securities and Exchange Commission can further suspend trading and offering of securities traded publicly for up to ten days pending a hearing. 302 In line with this, the United States Securities and Exchange Commission can take disciplinary action against broker-dealers and other persons who contravene the market abuse provisions. 303 In the same way, the Commodity Futures Trading Commission may seek rescission or permanent injunction orders against persistent commodities-based market manipulation offenders. 304

Manor Drug Stores (1975) 421 US 723; also see Palmiter Securities Regulation: Examples and Explanations 369-370.

298 S 13a-1(a); (b) & (d)(1) read with s 22 & 25 of the Commodity Exchange Act; see further s 6(c)(10)(C) as amended by s 753(a) of the Dodd-Frank Act.


300 The federal courts may impose their own additional civil monetary penalties for non-compliance. The United States Securities and Exchange Commission may further impose a cease and desist order to prevent the registration or filing of any documents which contains false, deceptive or misleading statements, see Palmiter Securities Regulation: Examples and Explanations 437.


302 S 12(k) of the Securities Exchange Act. The United States Securities and Exchange Commission can suspend trading in the affected securities for up to twelve months or revoke the registration of the alleged offender in cases of persistent market abuse violations and non-compliance, see s 12(j) of the Securities Exchange Act; also see SEC v Sloan (1978) 436 US 103 & Palmiter Securities Regulation: Examples and Explanations 437.

303 Such action includes claiming monetary administrative fines, revocation of registration and temporary suspension. See further s 21B read with s 21C of the Securities Exchange Act. The United States Securities and Exchange Commission may also seek temporary restraining orders, preliminary injunctions, temporary judicial asset freeze of up to 45 days as well as permanent asset freeze against any alleged offenders. See generally s 21(a) to (i) of the Securities Exchange Act. Also see Palmiter Securities Regulation: Examples and Explanations 438-439; 441.

304 S 13a-1(a) & (b); 13a-1(d)(1) of the Commodity Exchange Act.
As stated earlier, a private right of action is available to all the persons who are prejudiced by market manipulation, insider trading and other related practices to claim their damages directly from the offenders. For instance, any prejudiced person may have a private right of action against brokers, exchanges and related organisations that commit commodities-based market manipulation offences. Nonetheless, where the costs of bringing such action are too high, the Commodity Futures Trading Commission may claim remedies on behalf of the prejudiced persons. It is possible that the offenders who engage in trade-based or disclosure-based market manipulation and/or commodities-based market manipulation may be subjected to the United States Securities and Exchange Commission or Commodity Futures Trading Commission action as well as another private action from the actual prejudiced persons.

5.4 Detection, Prosecution and the Enforcement of the Market Abuse Prohibition

5.4.1 The Role of the United States Securities and Exchange Commission

The responsibility for civil and administrative enforcement of the market abuse prohibition rests primarily with the United States Securities and Exchange Commission. Nevertheless, the Commodity Futures Trading Commission has the prerogative to oversee and enforce the prohibition relating to commodities derivatives and futures market abuse practices.

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305 See paragraph 5.3.5 above.
307 S 25(a) of the Commodity Exchange Act. Although the actual damages that may be imposed against the offenders are not clearly stipulated, it is generally believed that such offenders will be liable to pay the Commodity Futures Trading Commission compensatory damages for the actual loss avoided or profit gained. Therefore, in successful cases, the affected persons will recover their damages from offenders through the Commodity Futures Trading Commission. See Comm’n v Heffernan (2003) 274 FSupp2d 1375 (SDGa); also see Pearce “Broadening Actual Damages in the Context of the Commodities Exchange Act” 2007 Journal of Law and Policy 449 449; 480 & 483.
308 This is not viewed as a violation to the double jeopardy clause of the United States of America constitution which asserts that no person may be subjected to multiple prosecutions or punishment of the same conduct. See Palmer Securities Regulation: Examples and Explanations 460-461.
310 For the purposes of this sub-heading, the discussion will be mainly focused on the roles of the United States Securities and Exchange Commission regarding the enforcement of the market abuse prohibition in the United States of America. Avgouleas The Mechanics and Regulation of Market Abuse 104; 106.
Notwithstanding the fact that there are several other regulatory bodies, the United States Securities and Exchange Commission was established as an independent quasi-judicial and legislative regulatory board responsible for the enforcement of federal securities laws through the regulation of the stock market and securities industry in the United States of America. The United States Securities and Exchange Commission’s legislative powers include promulgating rules and regulations that have the force of law. The United States Securities and Exchange Commission may, for instance, issue interpretive letters and the so-called no-action letters to express its views and provide guidance to all the relevant persons regarding any market abuse violations. Moreover, the United States Securities and Exchange Commission’s judicial functions include acting as an original tribunal regarding disciplinary actions against securities professionals subject to its supervision who violate securities laws or commit market abuse offences.

In addition to its quasi-judicial and legislative functions, the United States Securities and Exchange Commission further exercises administrative and supervisory authority over the key participants in the securities industry to prevent and combat market abuse activities in the United States of America. The United States Securities and Exchange Commission is also responsible for protecting investors, maintaining fair, orderly and efficient financial markets through facilitating capital formation and effectively enforcing securities laws to curb fraud, insider trading, market manipulation and other related market abuse practices. For purposes of effectiveness, the United States Securities and Exchange Commission is divided into four

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311 Such regulatory bodies include the Commodity Futures Trading Commission and other self-regulatory organisations.
312 S 4 of the Securities Exchange Act. Apart from enforcing the provisions of the Securities Exchange Act, the United States Securities and Exchange Commission enforces the relevant provisions of the Securities Act, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisors Act of 1940, the Public Utility Holding Company Act of 1935, the Sarbanes-Oxley Act and other related statutes. The United States Securities and Exchange Commission does not work in isolation. Other institutions under its authority include the New York Stock Exchange (NYSE) as well as self-regulatory organisations like the National Association of Securities Dealers (NASD) and the Municipal Securities Rule Making Board (MSRB). Palminter Securities Regulation: Examples and Explanations 402-415.
313 S 4; s 4A & 4C of the Securities Exchange Act, also see Hazen Federal Securities Law 4-7.
314 Generally see s 14(a) to (e) of the Securities Exchange Act. Also see Palminter Securities Regulation: Examples and Explanations 29; 415; 433-444.
315 Furthermore, United States Securities and Exchange Commission may act as an appellate tribunal to review disciplinary decisions or actions taken by the stock exchanges, the National Association of Securities Dealers (NASD) and other self-regulatory organisations against their members. Palminter Securities Regulation: Examples and Explanations 29; 415; 433-444.
316 Palminter Securities Regulation: Examples and Explanations 29.
main divisions, namely the Corporate Finance, Market Regulation, Investment Management and Enforcement Divisions.

The Corporate Finance Division polices compliance with the mandatory disclosure requirement as well as registration by public companies of transactions such as mergers. It additionally operates an online Electronic Data Gathering Analysis and Retrieval system to ensure equal access to non-public inside information for all relevant persons. This system has been successfully utilised to prevent possible insider trading and market manipulation in the United States of America’s financial markets.\textsuperscript{317}

Moreover, the Market Regulation Division regulates the New York Stock Exchange, the National Association of Securities Dealers, the Municipal Securities Rule Making Board and other self-regulatory organisations. In relation to this, Market Regulation Division interprets any proposed changes to regulations, publicises investment-related topics for public education and monitors operations of the industry. In practice, the United States Securities and Exchange Commission delegates most of its enforcement and rulemaking authority to the New York Stock Exchange and the National Association of Securities Dealers.\textsuperscript{318} Notably, these two self-regulatory organisations merged to form the Financial Industry Regulatory Authority in 2007.\textsuperscript{319}

The Investment Management Division oversees investment companies and their advisory professionals. It further administers federal security laws to improve the disclosure of non-public inside information and to minimise prejudice to investors without imposing an undue burden on regulated companies. Therefore, the United States Securities and Exchange

\textsuperscript{317} The Electronic Data Gathering Analysis and Retrieval system has been used in a number of instances to assess, review and obtain misleading, manipulative or deceptive information regarding any filings with the United States Securities and Exchange Commission. Palmeter \textit{Securities Regulation: Examples and Explanations} 31.

\textsuperscript{318} Consequently, all trading persons or companies not regulated by other self-regulatory organisations are obliged to be registered with the National Association of Securities Dealers in order to curb all possible market abuse activities.

\textsuperscript{319} Notwithstanding the existence of this merger, it is stated that the New York Stock Exchange still maintains its autonomous oversight and enforcement responsibility regarding any securities and market abuse violations which are effected on its facilities and systems by the offenders. See generally Morgan Lewis 2010 4-6 \texttt{<http://www.morganlewis.com/lit_SECandYearlyReviewWP_Jan2010.pdf>} (accessed 10-06-2011).
Commission can interpret such laws and make rules to reduce the occurrence of market abuse practices in the relevant financial markets as much as possible.  

Likewise, the Enforcement Division investigates any violation of the laws and rules that govern insider trading, market manipulation and other related practices. Its extensive investigatory powers include issuing *subpoenae* for the production of relevant evidence such as documents, and compelling suspects and others to testify in the courts. Furthermore, it has powers to:

(a) enforce civil remedies;

(b) institute administrative orders;

(c) recover any illegally obtained profits from guilty persons (disgorgement of profits);

(d) extra-territorially enforce the federal anti-fraud securities and market abuse prohibition;  

(e) provide greater incentives and immunity to whistle-blowers who report market abuse violations to the United States Securities and Exchange Commission;  

(f) impose punitive penalties on such persons and refer criminal matters to the Department of Justice.  

In 2009, the Enforcement Division created the Office of Market Intelligence, the Asset Management Unit, the Market Abuse Unit, the Structured and New Products Unit, the Foreign Corrupt Practices Act Unit and the Municipal Securities and Public Pensions Unit. This enabled the Enforcement Division to successfully minimise securities law violations by *inter alia* analysing and monitoring tips, complaints or referrals received by the United States

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320 Palmiter *Securities Regulation: Examples and Explanations* 28-31.

321 S 929P(b) read with (c) of the Dodd-Frank Act; also see Morrison & Foerster 2010 *Year End Review* 14-15.

322 See s 922 of the Dodd-Frank Act which enacted s 21F to repeal and replace s 21A(e) of the Securities Exchange Act; see further Morrison & Foerster 2010 *Year End Review* 12-14.

Securities and Exchange Commission each year and to obtain enforcement actions and/or settlements consistently in a number of market abuse cases as indicated in the table 1 below.\footnote{Notably, this table was adapted from the United States Securities and Exchange Commission website \url{http://www.sec.gov/about/secstats2010.pdf} (accessed 30-11-2011). Over and above, the aforesaid consistent enforcement of the market abuse prohibition is supported, in part, by the fact that the United States Securities and Exchange Commission has established eighteen offices and eleven of these offices are regional and district offices throughout the United States of America with approximately 3100 competent staff. Over half of the estimated 3100 United States Securities and Exchange Commission employees are in the Enforcement Division. This suggests that the United States Securities and Exchange Commission gives top priority to the effective enforcement of securities laws and combating of market abuse practices. As a result a significant number of settlements and prosecutions have to date been obtained in some landmark market abuse cases like \textit{SEC} v \textit{Texas Gulf Sulphur Company} 833; \textit{Dirks} v \textit{SEC} 646-655; \textit{Chiarella} v \textit{United States} 222; \textit{US} v \textit{Martha Stewart and Peter Bacanovic} (2006) 433 F3d 273; \textit{SEC} v \textit{Galleon Management & others} (2009) 09 Civ 8811(SDNY); \textit{SEC} v \textit{Arthur J Cutillo & others} (2009) 09 Civ 9208 (SDNY) & \textit{SEC} v \textit{Anthony Fareri & others} (2009) 09 Civ 80360 (SDFla); generally see further related analysis and/or discussion of the United States Securities and Exchange Commission’s enforcement statistics as summarised in Morgan Lewis 2010 2-4 & 7-13 \url{http://www.morganlewis.com/lit_SECandYearlyReviewWP_Jan2010.pdf} (accessed 10-06-2011).}

Table 1: Overview of the United States Securities and Exchange Commission’s annual anti-market abuse enforcement statistics from 2001 to 2010.

<table>
<thead>
<tr>
<th>Enforcement Actions by Fiscal Year</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
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<tr>
<td>Financial Disclosure / Reporting</td>
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<td>163</td>
<td>199</td>
<td>179</td>
<td>185</td>
<td>138</td>
<td>219</td>
<td>154</td>
<td>143</td>
<td>126</td>
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<tr>
<td>Broker-Dealer</td>
<td>65</td>
<td>82</td>
<td>137</td>
<td>140</td>
<td>94</td>
<td>75</td>
<td>89</td>
<td>67</td>
<td>109</td>
<td>70</td>
</tr>
<tr>
<td>Investment Adviser/Investment Co.</td>
<td>40</td>
<td>52</td>
<td>72</td>
<td>90</td>
<td>97</td>
<td>87</td>
<td>79</td>
<td>87</td>
<td>76</td>
<td>113</td>
</tr>
<tr>
<td>Securities Offering</td>
<td>95</td>
<td>119</td>
<td>109</td>
<td>99</td>
<td>56</td>
<td>61</td>
<td>68</td>
<td>115</td>
<td>141</td>
<td>144</td>
</tr>
<tr>
<td>Delinquent Filings</td>
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<td>n/a</td>
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<td>n/a</td>
<td>91</td>
<td>52</td>
<td>113</td>
<td>92</td>
<td>106</td>
</tr>
<tr>
<td>Insider Trading</td>
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<td>59</td>
<td>50</td>
<td>42</td>
<td>50</td>
<td>46</td>
<td>47</td>
<td>61</td>
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<tr>
<td>Market Manipulation</td>
<td>40</td>
<td>42</td>
<td>32</td>
<td>39</td>
<td>46</td>
<td>27</td>
<td>36</td>
<td>53</td>
<td>39</td>
<td>34</td>
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<tr>
<td>Other</td>
<td>75</td>
<td>81</td>
<td>80</td>
<td>50</td>
<td>98</td>
<td>49</td>
<td>65</td>
<td>21</td>
<td>27</td>
<td>35</td>
</tr>
<tr>
<td>Total Enforcement Actions</td>
<td>484</td>
<td>598</td>
<td>679</td>
<td>639</td>
<td>630</td>
<td>574</td>
<td>655</td>
<td>671</td>
<td>664</td>
<td>681</td>
</tr>
</tbody>
</table>

Adapted from the United States Securities and Exchange Commission website.\footnote{<http://www.sec.gov/about/secstats2010.pdf> (accessed 30-11-2011).}

In order to combat cross-border market abuse activities, the United States Securities and Exchange Commission entered into non-binding co-operative agreements (Memoranda of Understanding) with similar foreign securities regulatory bodies. These Memoranda of Understanding permit the United States Securities and Exchange Commission to request such foreign regulators to investigate and provide it with certain information in circumstances in
which the United States Securities and Exchange Commission will not be able to do so itself.\(^{326}\)

Likewise, the United States Securities and Exchange Commission can also aid other foreign regulators’ investigations even when no United States of America legislation would have been violated by the occurrence of the illicit conduct in question in the United States of America’s financial markets.\(^{327}\) The United States Securities and Exchange Commission may further sanction market participants who engage in activities that are deemed illegal in other countries, even if such activities are not illegal or deemed manipulative, misleading or deceptive in the United States of America.\(^{328}\) Additionally, the United States Securities and Exchange Commission’s international co-operation and extra-territorial enforcement powers are enhanced by the fact that it is a member of the International Organisation of Securities Commissions.\(^{329}\)

As indicated above, the United States Securities and Exchange Commission has been very instrumental in the enforcement of the market abuse ban in the United States of America. For instance, apart from being tasked with the responsibility to enforce the civil and administrative sanctions, the United States Securities and Exchange Commission supervises other participants in the securities industry and the self-regulatory organisations. This enabled the United States Securities and Exchange Commission to score a number of victories in the civil enforcement of market abuse in the United States of America to date.\(^{330}\) Moreover, the United States Securities and Exchange Commission recently tightened and improved its

\(^{326}\) This co-operative enforcement at an international level has allowed the United States Securities and Exchange Commission to track down illicit trading and market abuse practices like offshore insider trading, secret and manipulative bank accounts in other foreign jurisdictions. See Palmiter *Securities Regulation: Examples and Explanations* 501-502.

\(^{327}\) S 21(a)(2) of the Securities Exchange Act.


\(^{329}\) The International Organization of Securities Commissions (IOSCO) was founded in 1974 and is an organisation which provides guidelines on various aspects of securities enforcement and regulation to its more than 170 members. The United States Securities and Exchange Commission’s IOSCO membership has equipped it to investigate and combat Internet-based fraud, insider trading, market manipulation and other illicit cross-border market abuse practices. See Palmiter *Securities Regulation: Examples and Explanations* 502.

\(^{330}\) The United States Securities and Exchange Commission recovered civil penalties and disgorgement fines of about $3.3 billion from the market abuse offenders in 2006. During the period between 2002 and 2005, the United States Securities and Exchange Commission recovered total monetary sanctions in civil cases for market abuse ranging from approximately $5.3 billion to $11.5 billion. Coffee “Law and the Market: The Impact of Enforcement” 2007 *University of Pennsylvania Law Review* 229 230-311.
enforcement in the aftermath of the World Com, Enron and other related market abuse cases. For example, it imposed a civil monetary fine of $2, 25 billion on World Com in 2005 for the misuse of inside information and other related securities law violations, like corporate financial fraud.\textsuperscript{331} The United States Securities and Exchange Commission further imposed civil monetary fines of $250 million on Qwest Communications, $100 million on the Royal Dutch/Shell company and $100 million in the Bristol-Myers Squibb case for insider trading and other related securities law violations like financial misrepresentation.\textsuperscript{332} The United States Securities and Exchange Commission further imposed 987 administrative sanctions (cease or desist orders, censures and suspension orders) against market abuse offenders during the period between 1978 and 2004.\textsuperscript{333} The United States Securities and Exchange Commission has also successfully and consistently managed to bring several enforcement actions against the insider trading offenders during the period between 2004 and 2010 as evidenced in figure 1 below.\textsuperscript{334}

Figure 1: Overview of the United States Securities and Exchange Commission’s annual insider trading enforcement statistics from 2004 to 2010.

Adapted from the United States Securities and Exchange Commission website.\textsuperscript{335}

\textsuperscript{331} In re World Com Inc Sec. Litig (2005) 388 F Supp 2d 319 322-335 (SDNY), where the total settlement amount for market abuse and other related securities law violations was approximately $6 133 000 000 plus interest. See further Coffee 2007 University of Pennsylvania Law Review 230-311.

\textsuperscript{332} Coffee 2007 University of Pennsylvania Law Review 230-311.


\textsuperscript{334} Figure 1 was adapted from <http://www.sec.gov/spotlight/insidertrading.shtml> (accessed 30-11-2011).

\textsuperscript{335} <http://www.sec.gov/spotlight/insidertrading.shtml> (accessed 30-11-2011); notably, figure 1 indicates a relatively high number of insider trading enforcement actions that were successfully and consistently
The Role of the Department of Justice and the Courts

The Department of Justice or the federal courts have the prerogative to enforce the criminal sanctions for market abuse in the United States of America. Notably, the Department of Justice may only prosecute any criminal cases for market abuse referred to it by the United States Securities and Exchange Commission.

In spite of this referral procedure, the Department of Justice and the federal courts play a very important role in the enforcement of the market abuse prohibition in the United States of America. This is supported in part by the current rigorous enforcement and prosecution of such practices in the United States of America’s competent courts. In other words, the significant number of reported cases indicates that such courts are effectively enforcing the market abuse prohibition in the United States of America. For example, in the Drexel Burnham Lambert scandal of 1990, Kimba Wood J sentenced Michael Milken to ten years imprisonment or a criminal fine of $200 million and ordered him to pay a $400 million civil disgorgement of profits fine. Dennis Levine was sentenced to two years in prison, or a fine of $11, 5 million while Ivan F. Boesky was sentenced to three years imprisonment, or a fine of $50 million. Milken eventually paid the criminal fine of $200 million and $400 million civil disgorgement profits fine. Dennis Levine paid the $11, 5 million civil disgorgement of profits fine and Ivan F. Boesky later paid the $50 million civil disgorgement fine and an additional $50 million civil penalty.

In *US v O’Hagan* the accused person’s plea of not guilty to insider trading charges was rejected and it was held that the breach of a fiduciary duty by corporate insiders could further

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336 Put differently, the Department of Justice oversees the enforcement of the criminal sanctions for market abuse by the competent federal courts. Such competent courts include the United States of America’s federal district courts, High courts and Supreme courts. Palmiter *Securities Regulation: Examples and Explanations* 370.

337 This implies that the Department of Justice may only institute criminal proceedings against any person who knowingly engages in market abuse practices on a referral basis. See further s 32(a) of the Securities Exchange Act.


339 (1997) 521 US 642, O’Hagan was convicted on all counts of fraud, securities violation and money laundering and sentenced to prison. Nonetheless, this conviction was later reversed by the Supreme
involve the breach of a duty of trust and confidence on the part of such insiders or other shareholders of a corporation whose securities are traded. Moreover, in *The Trane Company v O’Connor Securities* the breach of a duty of trust and confidence on the part of such insiders or other shareholders of a corporation whose securities are traded. Moreover, in *The Trane Company v O’Connor Securities* \(^{340}\) it was held that market manipulation should be discouraged and prohibited to promote open and free markets which allow natural forces of supply and demand to determine the prices of securities. This was also echoed in *United States v Brown*, \(^{341}\) which postulated that market manipulation negatively affects the price of listed securities and, in so doing, it misleads and prejudices outside investors.

The successful prosecution of market abuse practices involving World Com, Martha Stewart, Tyco, Parmalat and Enron cases is further testimony of the effectiveness and competence of the United States of America’s federal courts. \(^{342}\) For example, the former Enron Executives, Jeffrey Skilling and Ken Lay, were convicted for insider trading and other market abuse violations. On 26 May 2006 Ken Lay was convicted on six counts of conspiracy and fraud and sentenced to 45 years in prison while Jeffrey Skilling was found guilty on 19 counts of conspiracy, fraud, making false statements and insider trading and sentenced to 185 years in prison. \(^{343}\) On 23 October 2006, Skilling was criminally convicted on further counts of insider trading and sentenced to an additional imprisonment term of 25 years. The effectiveness of these courts has been made possible, in part, by the necessary governmental support and the availability resources, as well as the fact that competent personnel were allocated to them. \(^{344}\)

As highlighted above, the Department of Justice and the competent courts play a major role in enforcing the market abuse ban in the United States of America. \(^{345}\) Federal courts have to date managed to radically and rigorously prosecute a number of cases involving market abuse.

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\(^{340}\) *Securities Regulation: Examples and Explanations* 361-362.

\(^{341}\) See further Cassim 2008 *SA Merc LJ* 37.

\(^{342}\) *The Mechanics and Regulation of Market Abuse* 171; 210.

\(^{343}\) See the judgement of the United States District Court SD Texas Houston Division in the case of in *Enron Corporation Securities Derivative and “ERISA” Litigation Plaintiffs v Enron Corp Oregon Corporation Defendants* (2006) WL 2795321 (SD Tex).

\(^{344}\) The federal courts have also successfully prosecuted market manipulation practices. See *US v Milken* (1990) 759 F Supp 109 (SDNY); *US v Mulheren* (1991) 938 F2d 364 (2nd Cir).

\(^{345}\) Also see paragraph 5 5 1.
practices like insider trading and market manipulation. The courts have further imposed about 2262 permanent injunctions against individuals and another 321 injunctions against companies (juristic persons) between the years 1978 and 2004. About 574 executive persons were barred from working as officers and directors of public corporations and 415 were barred from serving as financial professionals by both the United States Securities and Exchange Commission and the courts during the same period. Furthermore, about 755 individuals and 40 companies were indicated, 543 of the individuals were convicted and only ten were acquitted. In the same vein, the Department of Justice formed the Corporate Fraud Task Force and consequently, a number of market abuse activities have been successfully detected and prosecuted to date. In light of this, one can conclude that the United States of America has so far been fairly successful in combating market abuse and other illicit practices. Nonetheless, there is no empirical evidence that explicitly indicates that market abuse activities have either been significantly reduced or completely eradicated in the United States of America’s financial markets as a result of deterrence and/or effective enforcement.

5.4.3 The Role of Other Selected Self-Regulatory Organisations

Although individual persons are entitled to claim their damages directly from the offenders in private litigation, the self-regulatory organisations have to date played a key role in the civil enforcement of the market abuse prohibition and speedy provision of appropriate remedies to all the affected persons in the United States of America.

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346 This is evidenced in part, by the successful criminal prosecution of the World Com case, where the Department of Justice recovered a criminal fine of $27 million and prosecuted its CEO (Bernard Ebbers), its CFO (Scott Sullivan) and four others, resulting in combined in imprisonment terms of 32.4 years and $49.2 million in restitution.


349 The Corporate Fraud Task Force was formed in 2002 and since its inception over 1300 persons have been charged with insider trading, fraud or other related market abuse activities and about1000 were convicted. Coffee 2007 *University of Pennsylvania Law Review* 230-311; also see related comments and analysis contained in the press release by the Department of Justice “US Department of Justice, Fact Sheet: Corporate Fraud Task Force” (2006) <http://www.usdoj.gov/opa/pr/2006/August/06_odag_525.html> (accessed 12-09-2009).

As stated earlier, the United States Securities and Exchange Commission, through its Market Regulation Division, has a broad Congressional mandate to oversee the day-to-day regulation of securities market participants by the self-regulatory organisations like the New York Stock Exchange, the National Association of Securities Dealers, the Municipal Securities Rule Making Board and other broker-dealer companies and investment houses. Therefore, the United States Securities and Exchange Commission inspects the self-regulatory organisations and performs targeted oversight examinations of their broker-dealer members to determine whether such self-regulatory organisations are effectively supervising the financial regulations and business practices of their members.

The National Association of Securities Dealers administers the registration of new issuers of securities and has the authority to promulgate rules governing voluntary membership of broker-dealers in over the counter markets such as the National Association of Securities Dealers Automated Quotation System. In order to improve the enforcement of securities laws and to curb market abuse activity among its members, the National Association of Securities Dealers divided itself into two subsidiaries, namely the National Association of Securities Dealers Regulation Inc and the National Association of Securities Dealers Automated Quotation System Public Market Inc. Each of these subsidiaries has its own independent board of directors. The National Association of Securities Dealers has further authority to make rules aimed at preventing market abuse activities by market participants like research and financial market analysts.

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351 See paragraph 541 above.
353 In other words, the United States Securities and Exchange Commission may approve or amend the rules of the self-regulatory organisations in accordance with the public interest and/or to enhance the combating of illicit market abuse activities like insider trading, market manipulation and the deceptive or misleading filing with the United States Securities and Exchange Commission, of any statements, documents or accounts. Palmiter Securities Regulation: Examples and Explanations 433-434 & 439.
354 S 15(b)(8) read with s 15A of the Securities Exchange Act (as amended). Also see Palmiter Securities Regulation: Examples and Explanations 404.
355 The National Association of Securities Dealers Regulation Inc oversees the regulatory functions of the National Association of Securities Dealers.
356 Likewise, the National Association of Securities Dealers Automated Quotation System Public Market Inc runs the National Association of Securities Dealers Automated Quotation System.
358 National Association of Securities Dealers Rule 2711. Also see Palmiter Securities Regulation: Examples and Explanations 414.
Moreover, the New York Stock Exchange is the largest securities exchange in the United States of America responsible for monitoring the public trading of listed securities to minimise the occurrence of potential market abuse practices in the United States of America’s financial markets. This is done by operating special computerised devices and surveillance systems to detect and prevent market abuse practices. The New York Stock Exchange is further empowered to make rules or to take other action reasonably necessary to discourage market abuse activities in the United States of America’s financial markets.\(^{359}\)

The New York Stock Exchange and the National Association of Securities Dealers merged to form the Financial Industry Regulatory Authority in 2007.\(^{360}\) In 2009, the Financial Industry Regulatory Authority created the Office of Fraud Detection and Market Intelligence, the Office of the Whistle-blower, the Office of Disciplinary Affairs and the Central Review Group for the speedy investigation of any suspected violations and to review tips from whistle-blowers in order to root out fraud, insider trading, market manipulation and other related market abuse practices in the United States of America’s financial markets.\(^{361}\)

The Municipal Securities Rule Making Board was established in 1975 to supervise the companies involved in the underwriting and trading of municipal securities. Although its rules are usually monitored and enforced by the United States Securities and Exchange Commission, the Municipal Securities Rule Making Board is authorised to make its own additional market abuse enforcement rules and to impose any appropriate action against the securities laws (including State Blue Sky Laws) and market abuse violators.\(^{362}\)

As highlighted above, it is clear that the self-regulatory organisations have contributed immensely towards the effective enforcement of securities laws to curb market abuse and other illicit trading practices in the United States of America. In addition to the self-
regulatory organisations, there are currently more than ten federal, state and industry regulatory bodies in the United States of America. This suggests that there is good competition among the regulators to regulate certain securities products and the industry effectively and efficiently. Accordingly, self-regulatory organisations like the Commodity Futures Trading Commission, the National Association of Securities Dealers, the New York Stock Exchange and the Financial Industry Regulatory Authority may impose their own civil or administrative penalties against any person who violates the federal securities laws by engaging in market abuse and other illegal activities. This allows the United States of America’s market abuse regime to bring multiple enforcement actions against the offenders in all its financial markets.

5 5  Co-operation between Enforcement Authorities and the Adoption of Adequate Preventative Measures
5 5 1  Co-operation between the United States Securities and Exchange Commission, Department of Justice and the Courts

The success and effectiveness of the United States of America’s market abuse regime has been attributed to a number of factors including inter alia the excellent co-operative enforcement effort of the United States Securities and Exchange Commission, Department of Justice and the courts. As earlier discussed, the United States Securities and Exchange Commission and the Department of Justice are mainly responsible for the civil and criminal enforcement of the market abuse prohibition respectively. The Department of Justice may prosecute all criminal cases of market abuse referred to it by the United States Securities and Exchange Commission. This prima facie indicates that there is some co-operation between the United States Securities and Exchange Commission and the Department of Justice. The

363 This multi-functional regulatory approach has to date resulted in far greater market abuse enforcement in the United States of America.
364 Paragraph 5 5 2 above; also see Coffee 2007 University of Pennsylvania Law Review 230-311.
366 Paragraph 5 4 2 above.
367 The Department of Justice and/or the relevant courts are further required to prosecute any criminal cases involving market abuse in private litigation.
competent courts in the United States of America have, in most instances and on the advice of the United States Securities and Exchange Commission, successfully instituted criminal proceedings against the persons accused of committing market abuse offences.  

The Department of Justice revised its rules of engagement for pursuing suspected securities law offenders in 2003 and its focus was now mainly on improving the skills and expertise of prosecutors and other officials of the courts, especially with regard to the combating of corporate crimes such as market abuse. Furthermore, the Department of Justice revised its co-operation-credit policies to enhance co-operation with the United States Securities and Exchange Commission and to guide its members of staff on how to investigate, charge or prosecute securities law violations and market abuse cases referred to it by the United States Securities and Exchange Commission. The United States Securities and Exchange Commission further released its enforcement manual in 2008 which, inter alia, seeks to increase the investigations and prosecutions of market abuse cases by both the Department of Justice and the United States Securities and Exchange Commission. This eventually improved the sharing of information between the United States Securities and Exchange Commission and the Department of Justice as well as the parallel enforcement of the market abuse prohibition in the United States of America.

Although the Department of Justice has the exclusive authority over the criminal enforcement of the federal securities laws, it often acts with the guidance and assistance from the United States Securities and Exchange Commission. In relation to this, the United States Securities and Exchange Commission’s staff members are sometimes assigned to the Department of Justice or the courts to facilitate and help in the preparation of market abuse or other corporate criminal cases for trial.

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368     Paragraph 5 4 2 above.
369    Prior to this, the United States Securities and Exchange Commission released the so-called Seaboard Report in 2001 in order to improve the disclosure of information regarding the results of any investigation carried by itself or by the Department of Justice. Saikin “SEC, DOJ Clarify Cooperation” <http://www.executivelegaladvisor.com/docs/SEC-DOJ-Clarify-Cooperation.htm> (accessed 28-09-2009).
370   This is commonly referred to as “The Red Book”.
371   Nevertheless, this co-operative relationship does not allow either the United States Securities and Exchange Commission or the Department of Justice to circumvent the enforcement actions employed by other regulatory bodies like the Commodity Futures Trading Commission.
372   This clearly shows that the United States Securities and Exchange Commission and the Department of Justice have a good co-operative relationship towards the curbing and prevention of all possible federal securities law violations in the United States of America. As a result the United States of America has
552 Co-operation between the United States Securities and Exchange Commission and Self-Regulatory Organisations

In order to curb illicit trading practices, the United States Securities and Exchange Commission has entered into several co-operative relationships with similar enforcement bodies both at a local and international level. As stated earlier, the United States Securities and Exchange Commission supervises the regulation and enforcement of securities laws by the self-regulatory organisations in the United States of America. The United States Securities and Exchange Commission has authority to approve, amend or revoke any rule or enforcement action imposed by the self-regulatory organisations. This could indicate that the United States Securities and Exchange Commission and the self-regulatory organisations have some co-operative relationship which focuses mainly on the enforcement of the federal securities laws to combat market abuse and other related illicit activities.

The United States Securities and Exchange Commission and the Commodity Futures Trading Commission have both entered into a co-operative agreement with the futures and securities self-regulatory organisations regarding the joint in-field examinations and sharing of relevant information in a bid to improve the efficiency and effectiveness of securities law enforcement in the United States of America. This agreement provides, on a voluntary basis, the opportunity for the United States Securities and Exchange Commission and the self-regulatory organisations to review each other’s work papers and to share and exchange certain work papers or final investigation reports on any suspected market abuse and/or securities law violations. Likewise, the United States Securities and Exchange Commission and the Commodity Futures Trading Commission have both proposed to operate a Joint Advisory Committee, a Joint Agency Enforcement Task Force, a Joint Information Technology Task Force and a joint cross-agency training programme for their staff members. This is aimed at increasing the sharing of relevant information and/or market surveillance data to enhance

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374 Paragraph 543 above.
enforcement and market oversight by developing solutions to emerging and ongoing regulatory risks in the futures and securities markets.\textsuperscript{376}

Furthermore, the United States Securities and Exchange Commission has forged a co-operation agreement with the Intermarket Financial Surveillance Group\textsuperscript{377} to enhance and expand co-operation among all the self-regulatory organisations and the United States Securities and Exchange Commission in order to combat market abuse in both securities and futures markets. This co-operative agreement has to date increased the financial surveillance and investigation of illicit trading activities by the United States Securities and Exchange Commission, self-regulatory organisations and other regulatory agencies in the United States of America and abroad.

As indicated earlier,\textsuperscript{378} the United States Securities and Exchange Commission is a member of the International Organisation of Securities Commissions and has further adopted and signed international co-operative agreements (Memoranda of Understanding) with regulators and self-regulatory organisations in various foreign countries to discourage and combat illegal cross-border securities violations.\textsuperscript{379} The United States Securities and Exchange Commission has also entered into approximately 20 bilateral enforcement Memoranda of Understanding with countries in other jurisdictions to enhance its ability to gather the relevant foreign-based information necessary to any ongoing investigation or prosecution regarding securities law violations.\textsuperscript{380} Although these Memoranda of Understanding are non-binding

\begin{itemize}
\item \textsuperscript{377} The Intermarket Financial Surveillance Group (IFSG) was formed in 1987 as an independent body comprising the self-regulatory organisations of the United States of America’s securities and commodities exchanges.
\item \textsuperscript{378} Paragraph 5.4.1 above.
\item \textsuperscript{379} The countries include the United Kingdom, Japan, Italy, Brazil, Switzerland, Netherlands, France, Mexico and Canada. Hopt & Wymeersch European Insider Dealing--Law and Practice 354.
\item \textsuperscript{380} These bilateral Memoranda of Understanding (MOUs) are largely used by the United States Securities and Exchange Commission to share bank or audit work papers, Internet service provider information, brokerage records, beneficial ownership records and other relevant information regarding the investigation and enforcement of illicit securities law violations. See s 24(d) read with subsection (f) of the Securities Exchange Act which allows the United States Securities and Exchange Commission to keep confidential any information it obtains from similar foreign regulatory bodies or self-regulatory organisations. Furthermore, the International Organisation of Securities Commissions Multilateral MOU permits the United States Securities and Exchange Commission to share with other regulatory bodies elsewhere specific information relating to an ongoing civil, administrative or criminal investigation of cross-border market abuse cases. This implies that the United States Securities and Exchange Commission may rely on other foreign regulatory bodies to investigate any suspected cross-border
\end{itemize}
statements of intent between like-minded regulators, the United States Securities and Exchange Commission has fairly managed to utilise them to track and combat market abuse practices which are perpetrated in other countries.  

5 5 3  Adoption and Establishment of a Good Enforcement Ethics Culture

As several other countries, the United States of America has made numerous efforts to develop a strong anti-market abuse culture among the relevant persons in all its securities and financial markets. Various methods like the use of civil, criminal and administrative sanctions have been employed to discourage market abuse practices in the United States of America.

Apart from relying on appropriate sanctions as earlier discussed, the United States of America employs other methods like incentives and bounty rewards to encourage all persons to report any suspected illicit trading practices to the United States Securities and Exchange Commission or other relevant enforcement agencies. Furthermore, in the wake of the Enron scandal, the United States of America introduced more incentives and whistle-blower immunity provisions to enable all persons with information regarding securities market manipulation, insider trading or other market abuse practices to register such information with the United States Securities and Exchange Commission without any fear of reprisals or victimisation.

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381 See for example SEC v Levine 3276, where the United States Securities and Exchange Commission managed to track Levine’s insider trading activities involving securities of about 54 companies and other illicit trading in securities relating to secret accounts and in the names of Panamanian corporations located in the Bahamian branch of Bank Leu International Limited. The United States Securities and Exchange Commission was, through the help of other foreign regulators, able to detect and identify Levine as the beneficial owner of these accounts and he was consequently charged with insider trading. See further SEC v Kerherve (1988) No 88 Civ 0227 (SDNY); Hopt & Wymeresch European Insider Dealing–Law and Practice 348-351.

382 See paragraphs 5 3 5 & 5 3 6 above.

383 As earlier highlighted, the United States Securities and Exchange Commission may pay bounty rewards of up to 30% of the civil compensatory penalties recovered to all bona-fide informants. See s 21F of the Securities Exchange Act; also see paragraph 5 3 1 above & Palmiter Securities Regulation: Examples and Explanations 370.

384 S 21F of the Securities Exchange Act; s 922 of the Dodd-Frank Act & s 806 & s 406 of the Sarbanes-Oxley Act which requires all issuers of securities and companies to disclose their code of ethics to detect reporting violations and to ensure compliance and fairness in the United States of America’s securities markets. Also see Mossos 2004 Currents International Trade Law Journal 9-11.
The United States of America also tightened and improved its corporate governance laws through the Sarbanes-Oxley Act\textsuperscript{385} to discourage and avoid a recurrence of the Enron, WorldCom and Arthur Andersen cases.\textsuperscript{386} The Sarbanes-Oxley Act, for instance, prohibits a public company to give a personal loan directly or indirectly to a director or an executive officer of that company in order to discourage fraud and insider trading.\textsuperscript{387} In addition, this Act provides some guidelines on the supervision of the relationship between issuers and auditors to prevent market abuse practices.\textsuperscript{388} Moreover, the Sarbanes-Oxley Act introduced the Public Company Accounting Oversight Board to supervise the activities of the accounting profession in order to combat fraud and other market abuse practices.

Moreover, the United States of America’s market abuse regime is based on the so-called multi-functional regulatory model. This multi-functional regulatory model entails that the federal securities law enforcement and regulatory authority does not rest on the United States Securities and Exchange Commission alone.\textsuperscript{389} Thus, apart from the United States Securities and Exchange Commission, other self-regulatory organisations also have the authority to make their own rules and to enforce the federal securities laws.\textsuperscript{390} As a result, the United States of America has so far been able to investigate and prosecute a number of market abuse cases.\textsuperscript{391}

In addition to the enforcement by the United States Securities and Exchange Commission, the Department of Justice or the self-regulatory organisations, the United States of America’s market abuse regime allows the prejudiced persons to bring the so-called class actions and claim their damages directly from the offenders in private litigation. This parallel

\begin{itemize}
  \item This Act requires all companies registered with the United States Securities and Exchange Commission to comply with its anti-market abuse provisions. See s 406(c) of the Sarbanes-Oxley Act.
  \item Mossos 2004 \textit{Currents International Trade Law Journal} 9-11; also see Palmiter \textit{Securities Regulation: Examples and Explanations} 390-392.
  \item S 402(a) read with s 306(a) of the Sarbanes-Oxley Act.
  \item The Sarbanes-Oxley Act requires all the United States Securities and Exchange Commission filings to provide accurate and detailed financial information. See s 302 & s 201 to s 209. The Sarbanes-Oxley Act further requires all companies to develop their own standards or measures (code of ethics) that are designed to deter all persons from engaging in illicit trading activities. See s 406 & s 407.
  \item It comprises other enforcement agencies like the Commodity Futures Trading Commission, Department of Justice, Federal Reserve Board and other self-regulatory organisations. See paragraphs 5.4.1; 5.5.1 & 5.5.2 above.
  \item This has been so crucial to the effectiveness of the United States of America’s anti-market abuse laws in that the United States Securities and Exchange Commission as well as other regulatory bodies may take any appropriate enforcement action against the market abuse offenders.
  \item Paragraphs 5.4.1; 5.5.1 & 5.5.2 above.
\end{itemize}
enforcement permits the imposition of multiple sanctions (civil, criminal or administrative penalties) on a certain defendant in a private litigation or in the United States Securities and Exchange Commission and/or the Department of Justice enforcement action. It is worth noting that during the period between 2004 and 2005, the civil monetary penalties awarded in the United States Securities and Exchange Commission enforcement actions and private class actions of the affected persons ranged from about $5, 3 billion to $11, 5 billion. In many instances, the United States Securities and Exchange Commission’s enforcement actions were accompanied by a private class action. For example, in the World Com scandal, a parallel private settlement was approximately $6, 2 billion. Furthermore, in 2005 alone, private class actions for market abuse violations produced settlements between $3, 5 billion and $9, 7 billion.

5.6 Concluding Remarks

The impropriety of market abuse in the United States of America is generally accepted by the public, judiciary, market participants and all the relevant stakeholders in that country both at a State and federal level. This is supported, in part, by the fact that the regulation and enforcement of market abuse is a co-operative effort involving the United States Securities and Exchange Commission, private litigants, self-regulatory organisations, the Commodity Futures Trading Commission and the Department of Justice at a federal level as well as the relevant financial or corporation departments at the states level.

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392 See SEC v Palmisiano (1998) 135 F3d 860 (2d Cir) the court held that the offender was guilty of defrauding clients in a false investment scheme and sentenced him to fifteen years in jail and to pay $3, 8 million restitution to the actual prejudiced persons (in private litigation) plus $700 000 criminal fines. The same offender was also liable to disgorge profits of $9, 2 million plus interest and to pay a $500 000 civil penalty to the United States Securities and Exchange Commission. See further Palmiter Securities Regulation: Examples and Explanations 440-441; 459-461.


395 See the discussion under paragraphs (including sub-paragraphs) 5 2; 5 3; 5 4 & 5 5 above; also see Steinberg 2003 The International Lawyer 169-171.

396 In other words, the prevalent attitudes in the United States of America favour a rigorous enforcement of the market abuse prohibition. Paragraphs (including sub-paragraphs) 5 4 1; 5 4 2; 5 4 3 & 5 5 above; SEC v Sargent (2000) 229 F 3d 68-75 (1st Cir) which display the determination of the judiciary in enforcing insider trading provisions by upholding convictions based on circumstantial evidence. See s 32(a) of the Securities Exchange Act. Also see Bergmans Inside Information and Securities Trading: A Legal and Economic Analysis of the Foundations of Liability in the US and the European Community (1991) 41-60.

397 See the discussion under paragraphs (including sub-paragraphs) 5 2 above.
As earlier discussed, it is clear that both the United States of America and the South African market abuse regimes maintain similar enforcement goals and missions. In spite of this, they adopt and implement very different approaches to achieve their enforcement goals or targets. Notably, the most important characteristic of the regulatory framework in the United States of America, namely a co-ordinated (joint) effort between the courts, self-regulatory organisations and the United States Securities and Exchange Commission to combat illicit practices like insider trading is relatively minimal or absent in South Africa due to the differences in relation to the financial markets sizes and enforcement approaches. Put differently, the United States of America’s anti-market abuse enforcement framework employs the multi-functional regulatory approach which offers competition among the regulatory authorities at a federal level as well as the relevant financial or corporation departments at a state level, but nevertheless resulting in far greater and effective enforcement. Moreover, the United States of America’s anti-market abuse enforcement framework provides the much needed resources, competent personnel in the courts and the United States Securities and Exchange Commission as well as better technological surveillance mechanisms to detect illicit trading practices. On the other hand, the South African market abuse regime relies mainly on the Financial Services Board to police and enforce the market abuse ban. This approach has so far not been able to achieve more settlements and prosecutions in cases involving market abuse in South Africa.

Although the South African market abuse legislation was relatively influenced by the corresponding legislation in the United States of America, it sometimes lacks a rigorous practical enforcement approach and infrastructure to combat insider trading and other related

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398 Generally see paragraphs 5 3 1; 5 3 4; & 5 3 4 1 above; also see paragraphs under 5 2 above & relevant comparative analysis in Chapter Nine of this thesis.

399 See paragraphs 5 4 1; 5 5 1 & 5 5 2 above; also see paragraphs 5 3 1 & 5 3 4 above.

400 See the discussions that will be assumed later in Chapter Nine of this thesis, highlighting that there is little or no co-operation between the courts and the Financial Services Board (FSB) and very few successful prosecutions or civil claims that have been obtained, especially in the courts.

401 See paragraphs under 5 3 above.

402 See paragraphs under 5 2 above.

403 This enhanced and contributed significantly to the success achieved by the United States of America in the enforcement of the market abuse laws as indicated by a considerable number of cases that were reported and successfully settled or prosecuted to date. See further SEC v Texas Gulf Sulphur Company 833; Dirks v SEC 646-655; United States v O’Hagan 2199; United States v Falcone 91 489 & SEC v Yun 1263; SEC v One or more purchasers of call options for the Common Stock of CNS INC (2006) US District Court 3004875 WL (EDPa) & Dolgopolov “Insider Trading and the Bid-Ask Spread: A Critical Evaluation of Adverse Selection in Market Making” 2004 Capital University Law Review 83 84.

404 Paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis & relevant comparative analysis in Chapter Nine of this thesis.
activities. This could be evidenced in part, by many delays in investigations, settlements and the inherent paucity of successful criminal prosecutions obtained in market abuse cases in South Africa to date.\(^{405}\) While the adoption of some principles from the United States of America’s anti-market abuse enforcement framework shows a significant effort by the legislature to provide an adequate market abuse proscription in South Africa, deficiencies such as the inconsistent application of the market abuse provisions and the use of few enforcement measures have directly impeded these efforts.\(^{406}\)

It was submitted that the South African legislature should not have blindly adopted some of the United States of America’s market abuse regulatory principles without proper measures in place to enforce them.\(^{407}\) Notably, the current South African market abuse legislation does not explicitly empower the Financial Services Board to operate its own separate and specific technological surveillance machinery in order to supplement the significant surveillance efforts of the JSE. Moreover, the Financial Services Board is still to employ sufficient measures for the training of competent personnel and educational awareness programmes in order to prevent market abuse practices in the South African financial markets.\(^{408}\) Furthermore, it was noted that unlike the position in the United States of America,\(^{409}\) most of the market abuse rules that could be made by the Financial Services Board are only limited to the general manner in which its administrative powers and roles should be conducted.\(^{410}\)

On the other hand, in California, it was noted that when the Commissioner of Corporations receives some leads from the Internet Compliance and Enforcement Team’s surveillance, junk mail and public complaints, and referrals from other enforcement bodies, he may impose damages or other applicable remedies against the offenders.\(^{411}\) It was further acknowledged that California has managed to develop a relatively consistent anti-market abuse enforcement

\(^{405}\) See paragraphs 4 2; 4 4 3; 4 4 4 & other related remarks in Chapter Four of this thesis; also see relevant comparative analysis in Chapter Nine of this thesis.

\(^{406}\) See paragraphs 4 2; 4 4 3; 4 4 4 & other related remarks in Chapter Four of this thesis; also see relevant comparative analysis in Chapter Nine of this thesis.

\(^{407}\) See relevant comparative analysis in Chapter Nine of this thesis.

\(^{408}\) See paragraphs 4 2 & 4 5 in Chapter Four of this thesis; also see relevant comparative analysis in Chapter Nine of this thesis.

\(^{409}\) See paragraph 5 4 1 above.

\(^{410}\) S 82(2)(g) of the Securities Services Act; clause 91(2)(f) of the Financial Markets Bill & clause 86(2)(f) of the Financial Markets Bill 2012. See further paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.

\(^{411}\) See paragraphs 5 2 3 & 5 2 4 above.
framework that effectively discourages a number of market abuse practices (including franchise-related, capital markets-related as well as Internet-based market abuse violations).412

Likewise, it was noted that, although Delaware does not have a statutory provision that expressly prohibits insider trading, it has to date successfully relied on common law principles on fiduciary duties to combat insider trading.413 It was accordingly noted that this success has prompted other commentators to conclude that Delaware was effectively combating insider trading and market manipulation because it cedes other areas of its laws that involve insider trading enforcement to the federal government.414

Furthermore, in Washington, it was noted that the Director of Financial Institutions may impose administrative penalties such as public censure and suspension or revocation of the license of any broker-dealer, salesperson, investment advisor’s representative, investment advisor or any other person who commits market abuse and other related securities violations.415 It was further noted that the advantage of Washington is inter alia the statutory availability of non-exclusive common law penalties and private rights of action for the prejudiced persons to claim their damages directly from the market abuse offenders.416

It was acknowledged that, like the United States of America,417 South Africa also prohibits three main forms of market abuse, namely insider trading, trade-based market manipulation and disclosure-based market manipulation.418 It was also noted that, like the United States of America,419 South Africa relies on civil, criminal and administrative sanctions to deter and discourage unscrupulous persons from engaging in market abuse activities.420 Nevertheless, unlike the position in the United States of America,421 the Securities Services Act’s market

412    See paragraph 5.2.4 above.
413    See paragraph 5.2.8 above.
414    See paragraph 5.2.8 above.
415    See paragraph 5.2.12 above.
416    See paragraph 5.2.12 above.
417    See paragraphs 5.3.1; 5.3.4 & 5.3.4.1 above.
419    Paragraphs 5.3.2; 5.3.5; 5.3.6 & 5.5.3 above.
420    See the relevant comparative analysis in Chapter Nine of this thesis & see further paragraph 4.4.7 in Chapter Four of this thesis.
421    Paragraphs 5.3.2; 5.3.5; 5.3.6 & 5.5.3 above.
abuse civil sanctions are only limited to cases involving insider trading.422 This flaw could be addressed by the Financial Markets Bill as it now extends civil sanctions to market manipulation offences.423 However, no similar provision was made in the Financial Markets Bill 2012.424 It was further noted that, unlike the position in the United States of America where there are no specific statutory limitations for criminal actions,425 the competent courts in South Africa do not seem to have express statutory authority or discretion to impose any other additional penalties (apart from those stipulated in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012) upon the market abuse offenders without violating the autrefois acquit or autrefois convict doctrine.426

It was also noted that in contrast to the position in the United States of America,427 little or no consideration was given to the introduction of specific civil penalties for commodities-based market manipulation practices in South Africa.428 It was further noted that, unlike the United States Securities and Exchange Commission,429 the Financial Services Board does not have a specific unit that prohibits Internet-based market abuse activities.430

Furthermore, in light of the flaws indicated above, it is submitted that the recommendations431 stipulated and summarised below could improve the enforcement of the market abuse ban in South Africa:

Firstly, it is submitted that the Financial Services Board should enter into specific binding co-operation agreements with more local self-regulatory organisations such as the JSE and the

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422 See s 77 of the Securities Services Act; also see relevant comparative analysis in Chapter Nine of this thesis.
423 Clause 87 read with clauses 84 & 85 of the Financial Markets Bill; also see related remarks and comparative analysis in Chapter Nine of this thesis.
424 Generally see clauses 82 & 83 of the Financial Markets Bill 2012.
425 Palmiter Securities Regulation: Examples and Explanations 451-454; 460-461; also see paragraphs 5.3.2 & 5.3.5 above & relevant comparative analysis in Chapter Nine of this thesis.
426 S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012; also see paragraph 5.3.2 & 5.3.5 above & relevant comparative analysis in Chapter Nine of this thesis.
427 Paragraph 5.3.5 above.
428 S 75; s 76 & s 115(a) of the Securities Services Act; see further clauses 84; 85; 87 & 115(a) of the Financial Markets Bill & clauses 82 & 83 read with clause 111(a) of the Financial Markets Bill 2012.
429 The United States Securities and Exchange Commission (SEC) introduced the Office of Internet Enforcement to combat internet based market abuse practices.
430 See further Cassim 2008 SA Merc LJ 182-183.
431 Notably, a detailed analysis of these recommendations is earmarked for the last Chapter.
Securities Regulation Panel to combat market abuse practices in the South African financial markets;

Secondly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact specific provisions for separate and distinct criminal penalties that can be imposed upon any juristic person or individual who commit or attempts to commit insider trading or market manipulation offences in South Africa (with higher criminal penalties being imposed on such juristic persons);

Thirdly, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to provide specific market abuse whistle-blower immunity provisions and bounty rewards for the purposes of encouraging all the persons to report market abuse activities to the Financial Services Board and/or other relevant enforcement authorities in South Africa;

Fourthly, it is suggested that the Securities Services Act should be amended to statutorily and expressly empower the Financial Services Board to use public censure against the market abuse offenders in South Africa; or the provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which seeks to empower the Financial Services Board to publish by notice on its official website or by means of other appropriate public media, any outcome, status or details of market abuse investigations (public censure or name and shame approach) if such publication is in the public interest should speedily come into force;

Fifthly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to establish a specific regulatory body that prohibits and investigates Internet-based market abuse practices in South Africa;

Sixthly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that specifically prohibit insurance-related insider trading in South Africa;

Seventhly, the Securities Services Act should be amended to enact a provision that expressly empowers the Financial Services Board to cooperate with other local and international regulatory bodies in order to enhance the enforcement of the market abuse prohibition in
South Africa; or the provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which seeks to empower the Financial Services Board to assist foreign regulators with investigations pertaining to any cross-border market abuse cases should speedily come into force;

Eighthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to explicitly provide a statutory private right of action for the aggrieved or prejudiced persons to claim their market abuse damages directly from the offenders;

Ninthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that statutorily define the concept of market abuse in South Africa;

In the tenth place, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly prohibit a person who inadvertently aided or abetted another person to make or publish a false, misleading or deceptive statement, promise or forecast that relates to any security in South Africa;

In the eleventh place, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly prohibit commodity-based market manipulation in South Africa;

In the twelfth place, the Securities Services Act should be reviewed to expressly provide civil penalties for market manipulation offences and/or the provisions of the Financial Markets Bill which now empowers the Financial Services Board to claim from the market manipulation offenders, legal costs and civil compensatory penalties of up to three times the profit gained or loss avoided plus interest should speedily come into force;

In the thirteenth place, the Financial Institutions (Protection of Funds) Act,\textsuperscript{432} the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended.

\textsuperscript{432} 28 of 2001 as amended, hereinafter referred to as the Protection of Funds Act.
reviewed to enact provisions that expressly empower the Enforcement Committee to make or enact its own market abuse rules to enhance the combating of market abuse practices in South Africa;

In the fourteenth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to introduce a specific commodities-based anti-market abuse enforcement commission or a regulatory body like the Commodity Futures Trading Commission,\(^{433}\) to deal effectively and exclusively with the commodities-based market manipulation violations in South Africa;

In the fifteenth place, the Director of Public Prosecutions should introduce more specialised courts or tribunals that are staffed with judges and other persons with the relevant expertise to hear and/or prosecute market abuse cases in South Africa timeously and effectively;

In the sixteenth place, notwithstanding the potentially negative effects of bureaucracy, balkanisation, conflict of interests and confusion that may be associated with many regulatory bodies, it is submitted that more self-regulatory organisations should be statutorily empowered to impose their own penalties or take any other appropriate action against market abuse offenders in South Africa;

In the seventeenth place, it is submitted that the Financial Services Board should be statutorily mandated to assist the Director of Public Prosecutions and the relevant courts with the necessary information regarding ongoing market abuse cases in South Africa, by assigning certain persons with the relevant expertise to assist the Director of Public Prosecutions and/or the relevant courts in the prosecution of such cases in South Africa;

In the eighteenth place, it is submitted, as is the position in Delaware (where there is a system in place for periodic revisions of the Delaware Codes), that the South African policy makers should seriously consider appointing a National Market Abuse Commission to examine and review all the matters and laws pertaining to market abuse in South Africa;

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\(^{433}\) See paragraphs 5.3.4.1 and 5.4.1 above.
In the nineteenth place, the South African policy makers should consider introducing provincial market abuse statutes to: (a) create regulatory competition among the provinces to attract investors by effectively combating market abuse activities (b) promote dual or concurrent regulation and enforcement of the market abuse ban both at a provincial and national level. This should, however, be managed well to avoid creating potential problems such as balkanisation and/or violating the *autrefois* acquit or *autrefois* convict doctrine;

In the twentieth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that mandate companies and all the relevant persons to have market abuse codes of conduct and to appoint market abuse compliance officers;

In the twenty-first place, it is submitted that the legislature should consider enacting specific provisions which empower the Financial Services Board and the JSE to jointly form, fund, and operate a Joint Market Abuse Advisory Committee that would be tasked with considering and developing solutions to emerging and ongoing market abuse issues of common interest involving commodity and commodity derivatives and futures or securities traded in both the regulated and over the counter markets in South Africa. In other words, the afore-mentioned Joint Market Abuse Advisory Committee should identify emerging regulatory risks, assess and quantify their implications for investors and other market participants, and recommend possible solutions to the Financial Services Board and the JSE;

In the twenty-second place, it is suggested that the legislature should consider enacting specific provisions which empower the Financial Services Board, the Securities Regulation Panel, the JSE and other relevant stakeholders to create a Joint Anti-Market Abuse Enforcement Task Force in order to harness synergies from shared market surveillance data, to improve market oversight, to enhance enforcement and to reduce duplicative regulatory burdens and/or balkanisation. The Joint Anti-Market Abuse Enforcement Task Force should prepare and offer training programmes for the employees of all the relevant enforcement authorities, develop practical market abuse investigation and enforcement measures, and timeously coordinate the sharing of relevant market abuse information. Moreover, the Joint Anti-Market Abuse Enforcement Task Force should oversee the general execution of the day-to-day duties by the employees of all the relevant enforcement agencies to enhance the enforcement of the market abuse ban in South Africa;
In the twenty-third place, it is submitted, as is the position in the United States of America, that regulatory agencies such as the Financial Services Board and the JSE should establish a Joint Market Abuse Cross-Agency Training Programme for their employees to increase the enforcement of the market abuse provisions in South Africa. This could be achieved by developing a training programme to increase the consistent and/or regular sharing of relevant information and rotating of employees between the Financial Services Board and the JSE. This programme, could each year, give the employees of both the Financial Services Board and the JSE the opportunity to work at the other agency temporarily for a specified period of time to enhance greater collaboration and coordination between these two agencies;

Lastly, it is submitted, as is the position in the United States of America, that the Financial Services Board and the JSE should consider developing a Joint Market Abuse Information Technology Task Force to link their relevant information pertaining to on-going market abuse investigations if they consider such information to be jointly useful and/or in the public interest. This could promote transparency and facilitate the use and understanding of such information by providing a comprehensive, consolidated database on persons and entities investigated by both the Financial Services Board and the JSE in order to combat market abuse activities in the South African regulated financial markets.

Now that the position in the United States of America has been discussed, the next chapter will, from a comparative perspective, focus on the enforcement of the market abuse prohibition in the European Union in order to recommend, where possible, measures and/or principles that could also be incorporated in the South African market abuse laws to enhance the curbing of market abuse practices in the relevant financial markets.
CHAPTER SIX
THE ENFORCEMENT OF MARKET ABUSE PROVISIONS IN THE
EUROPEAN UNION: A COMPARATIVE PERSPECTIVE

6 1 Introduction

The increasingly global market has given rise to increased interaction and interdependence among national regulators as well as investors in different jurisdictions.\(^1\) As a result, cross-border trading in securities has caused a great number of challenges among various national regulators, especially with regard to the enforcement of market abuse laws. Accordingly, the need for strong co-operation and co-ordination between such regulators became crucial and inevitable.\(^2\) Consequently, the European Union\(^3\) became the first body to establish multinational market abuse laws in order to enhance the detection and combating of cross-border market abuse practices.\(^4\)

Following a series of consultations which dates back to as early as 1976, the Commission of the European Union proposed that a common insider trading legislation be adopted by all the member states.\(^5\) The European Union Insider Dealing Directive\(^6\) was subsequently adopted in 1989 and was the first law that harmonised the insider trading ban among the European Union member states. However, owing to various concerns from the member states that the Insider Dealing Directive was not applicable to other forms of market abuse, the so-called Lamfalussy process and the Committee of the Wiseman were launched to implement the European Union’s Action Plan for Financial Services and to enhance a further level of harmonisation with regard to the enforcement of market abuse laws across the European

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2 Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 263-266.
3 Hereinafter referred to as the EU.
Union member states. As a result, the European Union Directive on Insider Dealing and Market Manipulation\(^7\) was adopted in a bid to combat all the forms of market abuse in the European Union’s securities and financial markets.

It is against this background that the European Union’s market abuse laws will be carefully analysed in this chapter. Moreover, the European Union’s anti-market abuse enforcement framework will be scrutinised in order to isolate and identify relevant principles which could also be employed in South Africa, especially with regard to the coordination and co-operation between the regulatory authorities in the European Union member states as well as the detection and prosecution of cross-border market abuse activities.\(^8\)

6.2 Historical Overview of Insider Trading Prohibition

As stated earlier,\(^9\) the Insider Dealing Directive offered the pioneering insider trading provisions which were applicable in the European Union member states. Put differently, insider trading practices were expressly outlawed under the Insider Dealing Directive to include any conduct by an insider who took advantage of inside information with full knowledge of the facts by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, transferable securities\(^10\) of the issuer or issuers to which that information relates.\(^11\) Therefore, other related violations like fraud could not give rise to insider trading. Seemingly, the prohibition on insider trading under the Insider Dealing Directive was not solely based on a fiduciary duty but rather on the actual tipping\(^12\) or dealing

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\(^8\) Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 263-266.

\(^9\) See further paragraph 6.1 above.

\(^10\) The Insider Dealing Directive broadly defined transferable securities to include shares, debt securities, financial futures, futures contracts, options and index contracts in respect of securities. Thus, transferable securities could further include any rights related to such securities and/or any rights in respect of fixed term financial instruments, when admitted to trading on a market which is regulated and supervised by public authorities and which operates regularly and is accessible directly or indirectly to the public. Article 1(2) of the IDD.

\(^11\) Article 2(1) of the IDD.

\(^12\) Tipping constituted *inter alia* the recommending or disclosure of inside information by an insider to any third party, to acquire or dispose of transferable securities unless such disclosure is made in the normal course of the exercise of his employment, profession or duties. Article 3 of the IDD.
in the affected securities by an insider while in possession of inside information. Selected disclosure and other related tipping activities were also prohibited under the Insider Dealing Directive.

In addition, the provisions of the Insider Dealing Directive were heterogeneously implemented in most member states either through the promulgation of administrative regulations like voluntary codes of conduct or the enactment of legislation that outlaws insider trading. For instance, the United Kingdom enacted the Criminal Justice Act 1993 to implement the provisions of the Insider Dealing Directive. Thus, although the United Kingdom already had legislation in place to combat insider trading as early as 1980, the amendments necessary to implement the provisions of the Insider Dealing Directive were only adopted in 1993. Specifically, Part V of the Criminal Justice Act implemented the provisions of the Insider Dealing Directive and treated insider trading as an abuse of the market rather than a breach of an insider’s fiduciary obligations to the company. Furthermore, any violation of the insider trading provisions attracted only criminal sanctions under the Criminal Justice Act. Furthermore, the enforcement of the provisions of the Insider Dealing Directive did not give rise to similar (harmonised) regulations in some member states. Notably, one of the main inconsistencies was found in relation to the definition of “insider”, where other member states such as the United Kingdom maintained that a person would be an insider only if he knew (the so-called requirement of knowledge) that he had inside information either by virtue of being a director, shareholder or employee of a company.

Similarly, there were different approaches in some European Union member states with regard to the way in which “inside information” was defined, especially in relation to the required degree of publicity before information could be said to have been made public and in

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13 Article 2(1); (2) & (3) read with articles 3 & 4 of the IDD; also see generally Hazen 1992 Law and Contemporary Problems 236.
14 In light of this, this sub-heading will briefly discuss the implementation of the Insider Dealing Directive mainly in the United Kingdom.
15 The Criminal Justice Act 1993 (c 36), hereinafter referred to as the Criminal Justice Act.
16 See the related discussion in Chapter Seven of this Thesis.
17 See further related analysis in Chapter Seven of this Thesis.
18 On the other hand, a different approach was employed in other member states like France, Germany, Spain and the Netherlands. Welch, Pannier, Barrachino, Bernd & Ledeboer “Comparative Implementation of the EU Directives (I)–Insider Dealing and Market Abuse” 2005 British Institute of International and Comparative Law City Research Series 1 8-9; 16-17 & 19.
determining whether inside information was price-sensitive in nature for the purposes of the Insider Dealing Directive. The Insider Dealing Directive did not give clear guidelines as to when information was regarded as having been made public. As a result some member states like the United Kingdom regarded that inside information could be considered as having been made public even though it was published only to a section of the public or if it could be acquired only by persons exercising due diligence and/or expertise. There was further discord regarding the actual degree of specificity and/or required effect of inside information on the price of the affected securities for the purposes of the Insider Dealing Directive among some member states.

Member states also differed on some elements (requirements) of the insider trading offence itself. For instance, while the Insider Dealing Directive required the insider to take advantage of inside information with the full knowledge of the facts when dealing, an insider could only incur liability if he knowingly dealt in the affected securities on the basis of inside information in the United Kingdom. Furthermore, the Insider Dealing Directive left it up to the member states to provide appropriate sanctions and to establish competent regulatory bodies that oversee the enforcement of the insider trading prohibition. In nutshell, despite the fact that the Insider Dealing Directive defined key terms like “inside information”, “transferable securities”, “tipping” and “insider”, there were confusingly different types of sanctions and enforcement approaches adopted in all the member states. Consequently, the Insider Dealing Directive was repealed and replaced by the EU Market Abuse Directive.

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20 S 58(3) of the Criminal Justice Act. On the other hand, other member states like France did not regard the publication of inside information to a section of the public or market professionals alone as sufficient. Article 1 of the Commission des Operations de Bourse Regulation 90-08; also see Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 British Institute of International and Comparative Law City Research Series 10-11 & 44.
21 For instance, the United Kingdom, France, Germany and the Netherlands employed different approaches in this regard. See Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 British Institute of International and Comparative Law City Research Series 10-11.
22 For instance, there was confusion especially around the interpretation of articles 2(4) & 7 of the IDD.
23 S 57 read with s 52 of the Criminal Justice Act; also see Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 British Institute of International and Comparative Law City Research Series 11; 16-17 & 19.
24 The IDD failed to provide specific types of penalties (criminal, civil or administrative sanctions) as well as the severity of such penalties for the purposes of its insider trading ban.
25 For example, there was confusion regarding the interpretation and enforcement of article 13 of the IDD.
26 Consequently, the implementation of the provisions of the IDD will not be analysed in detail.
6 3 Overview of Selected Definitional Concepts under the Market Abuse Directive

6 3 1 Inside Information

The EU Market Abuse Directive offers a more comprehensive definition of inside information than the one which was contained in the Insider Dealing Directive.\(^{27}\) In line with this, it should be noted that under the Insider Dealing Directive, inside information was only defined as information which has not been made public and is of a precise nature relating directly or indirectly to one or several issuers of transferable securities or to one or several transferable securities and which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question.\(^{28}\) Accordingly, information was required to meet three main requirements, namely, not to have been made public, to be precise in nature and to give rise to a significant effect on the price of the securities which it concerns, for it to be regarded as inside information. Put differently, the publication of inside information was required to be consistent with the Insider Dealing Directive and other similar legislation in the European Union member states. In this regard, it must be noted that the Insider Dealing Directive imposed a mandatory disclosure requirement on all the issuers of securities that were publicly traded in regulated markets to disclose to the public as soon as possible any inside information which relates to such issuers.\(^{29}\) Moreover, inside information was required not only to be confidential but also to be accurate and precise in nature. Thus, rumours, speculations and other inauthentic information could not be regarded as inside information. Lastly, inside information was required to have a significant effect on the price of the affected securities. Therefore, not all information unknown to the public was treated as inside information for the purposes of the Insider Dealing Directive.\(^{30}\) On the other hand, the EU Market Abuse Directive gives a general definition of inside information and other two special or complementary definitions which relate to trading in derivatives on commodities and to persons charged with the execution of orders concerning financial instruments.\(^ {31}\) Accordingly, inside information is generally defined as information of a precise nature which

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27 Article 1(1) of the IDD.
28 Article 1(1) of the IDD.
has not been made public, relating, directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of such financial instruments or on the price of related derivative financial instruments.32

In relation to derivatives on commodities, inside information is defined in the EU Market Abuse Directive, as information of a precise nature which has not been made public, and which relates directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with the accepted market practices on those markets.33

With regard to the persons charged with the execution of orders concerning financial instruments, inside information means information conveyed by a client and related to the client’s pending orders, which is of a precise nature and which relates directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.34

Seemingly, the general definition of inside information is broadly applicable to all persons who have inside information and to classes of financial instruments other than commodity derivatives. On the other hand, the first special or complementary definition of inside information applies only to derivatives on commodities and is consequently not applicable to other classes of financial instruments.35 The second special or complementary definition of inside information applies to intermediate or executing brokers (or any other person charged with the execution of orders concerning financial instruments) who have client information

32 Article 1(1) of the EU Market Abuse Directive.
33 Article 1(1) & (5) of the EU Market Abuse Directive; also see article 4 of the Commission Directive 2004/72/EC of 29 April 2004 on accepted market practices; definition of inside information in relation to derivatives on commodities; the drawing up of lists of insiders and the notification of managers’ transactions and suspicious transactions [2004] OJ L162/70 (hereinafter referred to as the Accepted Market Practices Directive), which states that users of the markets on which commodity derivatives are traded are deemed to expect to receive inside information, when it relates directly or indirectly to one or more commodity derivatives and when it is routinely made available to those users of the markets and/or is required to be disclosed in accordance with any regulatory provisions, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market. See further Avgouleas The Mechanics and Regulation of Market Abuse 254; 307-308.
34 Article 1(1) of the EU Market Abuse Directive.
35 Article 1(1) of the EU Market Abuse Directive.
regarding their pending orders. This definition seem to be targeting the so-called front running and other related market abuse practices by intermediate and/or executing brokers, who use privileged information contained in client orders by placing orders to be executed ahead of the relevant client orders in order to achieve their own manipulative benefits at the detriment of such clients. However, the second special or complementary definition of inside information has been criticised as constituting a duplication of requirements that are already regulated by other member states and thus creating the overlapping of some definitions and unnecessary confusion in relation to its application.

In addition, the general definition of inside information and the second special or complementary definition relating to persons charged with the execution of orders concerning financial instruments contains an element of price sensitivity, namely, that the relevant information must further have a significant effect on the prices of financial instruments or on the price of related derivative financial instruments. In contrast to this criterion, the first special or complementary definition relating to trading on derivatives on commodities substitutes the element of price-sensitivity with relevant information that the users of commodity derivatives markets would expect to receive in accordance with accepted practices.

632 Insider

An insider is defined as any person who possesses inside information by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or by virtue of his holding in the capital of the issuer; or by virtue of having access to the information through the exercise of his employment, profession or duties; or by virtue of his criminal activities. As enumerated above, this definition clearly provides approximately

36 Avgouleas The Mechanics and Regulation of Market Abuse 263.
37 Avgouleas The Mechanics and Regulation of Market Abuse 263.
38 Article 1(1) of the EU Market Abuse Directive.
39 Article 1(1) of the EU Market Abuse Directive; also see Avgouleas 2004-2005 The Transnational Lawyer 204.
40 Article 2(1)(a) of the EU Market Abuse Directive.
41 Article 2(1)(b) of the EU Market Abuse Directive.
42 Article 2(1)(c) of the EU Market Abuse Directive.
43 Article 2(1)(d) of the EU Market Abuse Directive.
four categories of the so-called primary insiders. In addition, if a primary insider is a legal person, the prohibition extends to the natural persons (corporate insiders) who take part in the decision to carry out any transactions on behalf of the legal person concerned.

The aforementioned categories of primary insiders are almost identical to the classes of primary insiders that were provided under the Insider Dealing Directive. Notably, under the Insider Dealing Directive the term “insider” was defined to include any person who, with full knowledge of the facts, acquired inside information as a result of his employment, profession, duties or other direct positional access to the original source of the information (primary insider) or otherwise than as a result of a special relationship from the original source or from a source who is, directly or indirectly a primary insider (secondary and/or corporate insiders). Precisely, this definition of insider extends to all outsiders who possessed inside information by virtue of their status or position and who would include, apart from primary insiders, all persons who accessed such information by any other means. However, the Insider Dealing Directive was unclear on the question of whether the mere fact that a person was an executive or director could suffice as sufficient proof to presume that such person possessed inside information or whether insider trading required proof on the part of the prosecuting authorities that the director or the executive person in question was actually in possession of inside information. Be that as it may, the EU Market Abuse Directive has nonetheless added a new category of primary insiders who acquire inside information by virtue of their criminal activities. This new category was probably introduced to curb organised crime and to discourage terrorist market abuse activities in the European Union securities markets. On the other hand, the term “insider” could also mean any person other than the persons who fall in the primary insiders’ category, who possess inside information

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44 Article 2(1) of the EU Market Abuse Directive; also see generally Avgouleas 2004-2005 The Transnational Lawyer 202; see further Wood Regulation of International Finance 166.
45 Article 2(2) of the EU Market Abuse Directive.
46 Article 2(1) of the IDD.
47 Article 2(1) of the IDD.
49 Articles 2 & 4 of the IDD.
51 Article 2(1)(d) of the EU Market Abuse Directive.
52 Such activities could include theft of inside information and the running of extortion rackets aimed at the acquisition of inside information. See generally Avgouleas 2004-2005 The Transnational Lawyer 202.
while that person knows or ought to have known that it is inside information. This category is usually referred to as secondary insiders. In relation to this, it appears as if secondary insiders may be exempted from any liability if they prove that they did not know or should not have known that they were in possession of inside information. Nevertheless, this defence of lack of actual knowledge or of lack of an objective obligation to know that the information in question was inside information is not expressly available to primary insiders. However, it should be noted that the prosecution and regulatory authorities do not have to prove that the person under investigation had an intention to use inside information for personal gain or for the benefit of another person.

6.3.3 Insider Trading

The concept of insider trading is not expressly defined under the EU Market Abuse Directive. However, the EU Market Abuse Directive enumerates various practices that could give rise to insider trading to include dealing (acquiring or disposing or attempting to acquire or dispose of financial instruments) directly or indirectly in financial instruments on the basis of inside information, for own account or for account of a third party, by primary insiders or any other person who possesses such information and who knows or ought to have known that it is inside information, or the disclosure of inside information by a primary or secondary insider to third parties, unless such disclosure is made in the normal course of his employment, profession or duties; and the recommendation or inducement of another person by primary or secondary insiders on the basis of inside information, to deal (acquiring or disposing of financial instruments) in financial instruments to which the information relates. This prohibition does not, however, apply to any transactions conducted by a person in the discharge of an obligation that has become due to acquire or dispose of financial

53 Article 4 of the EU Market Abuse Directive.
54 Article 4 of the EU Market Abuse Directive.
55 For example, article 2(1) & (2) & article 3 of the EU Market Abuse Directive do not have such a defence for primary insiders.
57 Article 2(1) read with subsection (2) & article 4 of the EU Market Abuse Directive.
58 Article 3(a) read with article 4 of the EU Market Abuse Directive.
59 Article 3(b) read with article 4 of the EU Market Abuse Directive. Also see Avgouleas 2004-2005 The Transnational Lawyer 201; Wood Regulation of International Finance 552-555.
instruments\textsuperscript{60} where that obligation results from an agreement conducted before the person concerned possessed inside information.\textsuperscript{61}

It is therefore clear that the prohibition on insider trading under the EU Market Abuse Directive expressly discourages approximately three main types of conduct, namely (a) actual dealing (acquiring or disposing or attempting to acquire or dispose of financial instruments) in financial instruments by primary insiders on the basis of inside information; (b) improper disclosure of inside information by either primary or secondary insiders to other persons (third parties); and (c) recommending or inducement (tipping) of other persons by primary or secondary insiders to deal in financial instruments on the basis of inside information.\textsuperscript{62} In relation to this, the EU Market Abuse Directive extends the prohibition on insider trading to financial instruments if they are admitted to trading on a regulated market in at least one member state or when a request for admission to trading on such market has been made, regardless of whether the transaction in question occurred on a regulated market or on over the counter markets.\textsuperscript{63} Furthermore, the prohibition on insider trading under the EU Market Abuse Directive applies to over the counter financial instruments which are not admitted to trading on a regulated market in a member state and for which no request for admission to trading has been made, if their value depends on admitted financial instruments or instruments for which admission is pending.\textsuperscript{64}

\textbf{6 3 4 Market Manipulation}

The concept of market manipulation is expressly defined in the EU Market Abuse Directive to include:

\begin{footnotesize}
\begin{enumerate}
\item Article 2(3) of the EU Market Abuse Directive.
\item Wood \textit{Regulation of International Finance} 552-555.
\item Articles 1(3) \& 9 of the EU Market Abuse Directive; also see Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 262.
\item Such instruments could include over the counter (OTC) stock index contracts or contracts of differences, where the underlying or reference financial instrument is traded or is about to be traded on a regulated market in the European Union. Articles 1(3) \& 9 of the EU Market Abuse Directive; also see Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 262-263.
\end{enumerate}
\end{footnotesize}
transactions or orders to trade which give or are likely to give false or misleading
signals as to the supply of, demand for or price of financial instruments or which
secure, by a person or persons acting in collaboration, the price of one or several
financial instruments at an abnormal or artificial level, unless the person who entered
into the transactions or issued the orders to trade establishes that his reasons for so
doing are legitimate and that these transactions or orders to trade conform with the
accepted market practices\(^65\) on the regulated market concerned;\(^66\)

(b) transactions or orders to trade which employ fictitious devices or any other form of
deception or contrivance;\(^67\) and

(c) the dissemination of information through the media, including the Internet, or by any
other means which gives or is likely to give false or misleading signals as to financial
instruments, including the dissemination of rumours and false or misleading news,
where the person who made the dissemination knew or ought to have known that the
information was false or misleading.\(^68\)

A closer look at the aforementioned definition of market manipulation shows that the EU
Market Abuse Directive has attempted, as much as possible, to dispense with the rigid
requirement of proving intent (on the part of offenders) for the purposes of the market
manipulation offence in order to enhance and increase the number of successful prosecutions
and settlements by the relevant regulatory authorities in the member states.\(^69\) Seemingly,
market manipulation is treated as an objective (effect-based) offence.\(^70\)

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\(^{65}\) Accepted practices are defined as practices that are reasonably expected in one or more financial markets
and are accepted by the competent authority in accordance with the guidelines adopted by the
Commission in accordance with the procedure laid down in Article 17(2) of the EU Market Abuse
Directive. See further Article 1(5) & read with subsection (3) of the EU Market Abuse Directive

\(^{66}\) Article 1(2)(a) of the EU Market Abuse Directive.

\(^{67}\) Article 1(2)(b) of the EU Market Abuse Directive.

\(^{68}\) Article 1(2)(c) of the EU Market Abuse Directive.

\(^{69}\) Avgouleas *The Mechanics and Regulation of Market Abuse* 104-111; Avgouleas 2004-2005 *The
Transnational Lawyer* 206.

\(^{70}\) Avgouleas *The Mechanics and Regulation of Market Abuse* 104-111; Hansen “The New Proposal
In addition, the EU Market Abuse Directive outlines a number of practices which could amount to market manipulation as defined above, to include inter alia:

(a) conduct by a person or persons acting in collaboration to secure a dominant position over the supply of, or the demand for a financial instrument which has the effect of fixing, directly or indirectly, the purchase or sale prices or creating other unfair trading conditions;

(b) the buying or selling of financial instruments at the close of the market with the effect of misleading investors who act on the basis of closing prices; and

(c) taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.71

Accordingly, as highlighted above, it is clear that the EU Market Abuse Directive discourages about three main forms of market manipulation, namely (a) artificial (fictitious) transactions and wash sales; (b) disclosure-based manipulations effected by disseminating false and misleading information,72 and (c) trade-based (misleading trades) manipulations.73

6 4 Overview of the Implementation of the Market Abuse Directive

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71 Article 1(2)(c) of the EU Market Abuse Directive. Other examples of market manipulation activities that are prohibited under the EU Market Abuse Directive includes a conspiracy to defraud, which the relevant market does not know about; fictitious (wash sales) transactions that are conducted to create a misleading appearance of active trading; false maintenance of the price by guarantees, indemnities or loss-sharing agreements unknown to the market in order to distort the price of financial instruments; short sales done with the intention to deceive and induce others to buy certain financial instruments; dishonest statements of financial prospects issued with a view to deceive innocent purchasers and false recommendations by financial analysts, journalists and others holding the stock (the so-called scalping) done to deceive and make a profit. See further Wood Regulation of International Finance 534-544.


73 Avgouleas The Mechanics and Regulation of Market Abuse 276-279.
An analysis of the implementation of the EU Market Abuse Directive in selected European Union member states will be carried out under this sub-heading. This will be done by, *inter alia*, discussing the approaches or methods employed in such member states to enforce and implement the provisions of the EU Market Abuse Directive. In addition, the role of the Forum of European Securities Commissions, the Committee of European Securities Regulators, the Committee of the Wise Men, the Lamfalussy Process and the European Union’s Action Plan for Financial Services will be briefly discussed below.

### 6 4 1 The Role of the Forum of European Securities Commissions

The Forum of European Securities Commissions was introduced in December 1997 as an independent organisation which oversees the public supervisory (regulatory bodies) authorities in the European Union member states.\(^74\) The Forum of European Securities Commissions was among the first proponents for a common administrative regime on market abuse across the European Union capital markets.\(^75\)

However, the Forum of European Securities Commissions was replaced by the Committee of European Securities Regulators.\(^76\) Consequently, the role of the Forum of European Securities Commissions will not be discussed in much detail here, as more emphasis will be focused on the role of its successor, the Committee of European Securities Regulators, which will be analysed below.

### 6 4 2 The Role of the Committee of European Securities Regulators

Unlike its predecessor, the Committee of European Securities Regulators was formed in June 2001 by the European Commission as an independent committee which policies the enforcement of the EU Market Abuse Directive’s market abuse provisions by the relevant


securities regulators in the European Union member states. Additionally, the Committee of European Securities Regulators is one of the committees which were incorporated in the final report of the Committee of the Wise Men, on the regulation of the European Union securities markets.

The functions of the Committee of European Securities Regulators are outlined in its Charter, and they include, among others, to improve co-ordination between different securities regulators in the member states. This further involves developing effective operational network mechanisms to improve the day-to-day consistent supervision and enforcement of the single market for financial services in the member states. In relation to this, it should be pointed out that the Committee of European Securities Regulators has been instrumental in the signing by all member states of a Multilateral Memorandum of Understanding regarding, inter alia, the sharing of relevant information and the co-operation between the regulatory authorities in order to combat cross-border market abuse activities.

In addition, the Committee of European Securities Regulators acts as an advisory group that assists the European Union Commission. Thus, the Committee of European Securities Regulators advises the European Union Commission on its preparatory draft implementing measures for the European Union framework directives relating to securities. This has, in a way, enhanced the integration and harmonisation of the European Union securities markets and the promotion of flexible adjustment of the relevant laws in the member states to conform to the requirements of the EU Market Abuse Directive.

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77 See the European Commission’s decision of 6 June 2001/527/EC which was repealed and replaced by the Commission’s decision of 23 January 2009 (2009/77/EC).

78 This committee was chaired by Baron Alexandre Lamfalussy and its final report was adopted by the Heads of State in the European Council (Stockholm) conference on 23 March 2001 and the European Parliament (European Parliament Resolution of 5 February 2002); also see the article by the Committee of European Securities Regulators (CESR) “The Committee of European Securities Regulators” <http://www.cesr-eu.org/index.php?page=cesrinshort> (accessed 09-02-2010).

79 The policing of the implementation of legislation consistent with the EU Market Abuse Directive is usually carried by the Review Panel chaired by the CESR vice chairman, the CESR-Pol and CESR-Fin. The chair and vice-chair of the CESR are elected from the member states for a period of two years.

80 The CESR implements the so-called Level 2 measures which deal with some of the technical requirements necessary to achieve objectives of the EU Market Abuse Directive and other related securities legislation as well as the Level 3 measures which are aimed at ensuring the common and uniform enforcement of the requirements of the EU Market Abuse Directive in the member states. See CESR’s Advice on Level 2 Implementing Measures for the Proposed Market Abuse Directive, CESR/02-089d (CESR, Paris, December 2002) 34; also see Avgouleas The Mechanics and Regulation of Market Abuse 264-265; Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 83-84 & see further CESR article <http://www.cesr-eu.org/index.php?page=cesrinshort> (accessed 09-02-2010).
The Committee of European Securities Regulators also runs some operational groups and special expert groups which carry out certain mandates on behalf of the European Commission. Specifically, such operational groups include the Committee of European Securities Regulators-Pol which promotes co-operation between the supervisory authorities of the European Union member states. The Committee of European Securities Regulators-Pol has people with specialist skills and ensures that securities regulators exchange relevant confidential information. On the other hand, the Committee of European Securities Regulators-Fin provides guidance on the harmonised supervision of accounting standards in the European Union and the Review Panel promotes the effective implementation of the requirements of the Committee of European Securities Regulators in the member states.  

In a nutshell, the Committee of European Securities Regulators has to date played a key role in the formulation of a number of harmonised approaches for the European Union securities regulators in order for them to implement the relevant securities legislation and in the promotion of a common interpretation and application of the provisions of the EU Market Abuse Directive in all member states. For example, the Committee of European Securities Regulators has successfully enumerated a number of administrative sanctions and measures applicable to all the member states. The Committee of European Securities Regulators has, on a number of occasions, invited competent regulatory bodies from the member states and other relevant stakeholders (academics and market participants) to exchange and share their experience and views regarding the practical implementation of the EU Market Abuse Directive. This enabled the role of the European Securities Committee to be reviewed and replaced by the European Securities and Markets Authority which now oversees the


84 For example, in February 2008, member states were invited to a conference in order for them to respond to various concerns regarding the operation of the EU Market Abuse Directive; also see <http://www.ec.europa.eu/internal_market/securities/docs/esme/mad_070706_en.pdf> (accessed 24-02-2009), for further information regarding the role of the CESR.
regulation and enforcement of the market abuse ban by the European Union member states.\textsuperscript{85} In addition, on 2 November 2006 the Committee of European Securities Regulators published a comprehensive Level 3 consultation document addressing various concerns regarding the definition of inside information, client orders constituting inside information and the recording of insider lists.\textsuperscript{86}

\textbf{6.4.3 The Role of the European Union’s Action Plan for Financial Services}

The European Union’s Action Plan for Financial Services was perhaps one of the most ambitious programmes of legislative activity, aimed at formulating a common securities capital market in Europe.\textsuperscript{87} Accordingly, the European Union’s Action Plan for Financial Services was formally proposed by the European Union Commission in 1998.\textsuperscript{88}

Consequently, due to the fact that a larger part of the financial services activity in the European Union has been effected in different jurisdictions (on a cross-border basis) and the fact that some investors have taken advantage of opportunities offered by the Internet to trade in the financial instruments directly or through an intermediary regulated market (including Alternative Trading Systems) based in other member states to engage in cross-border market abuse practices, the European Union’s Action Plan for Financial Services recommended the adoption of the EU Market Abuse Directive.\textsuperscript{89}

The European Union’s Action Plan for Financial Services further recommended the integration of the European Union financial markets, the combating of cross-border market abuse activities and the repealing of the Investment Services Directive of 1996.\textsuperscript{90} Substantial

\textsuperscript{85} See similar remarks in paragraph 6.4.4 of this Chapter.
\textsuperscript{86} See CESR \textit{Level 3 Consultation Document CESR/06-562.}
\textsuperscript{87} Blair & Walker \textit{Financial Services Law} (2006) 760-761, where the EU Commission realised even 40 years after the Treaty of Rome that the legislation dealing with the capital markets remained very different in all the member states. Also see generally Ferrarini “The European Market Abuse Directive” 2004 \textit{Common Market Law Review} 711 737-741.
\textsuperscript{89} Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 245-246 & 250-251.
\textsuperscript{90} Blair & Walker \textit{Financial Services Law} 760-761; Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 245-246 & 250-251.
amendments were therefore introduced by the EU Market Abuse Directive, especially in relation to:

(a) the regulation of listed securities;
(b) dissemination of investment recommendations;
(c) disclosure of documents regarding public offers;
(d) prohibition of market manipulation;
(e) prohibition of insider trading;
(f) the measures for Alternative Trading Systems;
(g) the required conduct for periodic and continuous disclosures by the issuers of listed securities; and
(h) the required conduct for stabilisations of new issues and share buy-backs.\(^{91}\)

644 The Role of the Lamfalussy Process and the Committee of the Wise Men

In order to fully implement the European Union’s Action Plan for Financial Services, the Committee of the Wise Men\(^ {92}\) recommended the establishment of the European Securities Committee and the Committee of European Securities Regulators\(^ {93}\) which have regulatory and advisory functions respectively. The European Securities Committee was later replaced by the European Securities and Markets Authority.\(^ {94}\) In line with this, the European Securities and Markets Authority was given a more central enforcement role to supervise credit rating agencies across Europe in June 2010.\(^ {95}\) This allows the European Securities and Markets Authority to obtain information from issuers of structured financial instruments

\(^{91}\)Avgouleas 2004-2005 The Transnational Lawyer 184-185.

\(^{92}\)As earlier stated in paragraph 752 above, this Committee was chaired by Baron Alexandre Lamfalussy.

\(^{93}\)These Committees were introduced in June 2001.


\(^{95}\)See related remarks in paragraphs 4741 & 4761 in Chapter Four of this thesis.
about their credit rating agencies transactions in order to prevent possible market abuse practices by discouraging the non-disclosure of unrequested ratings and temporarily prohibiting or suspending the issuing of credit ratings by a specific credit rating agency offender.\textsuperscript{96} Furthermore, the Committee of the Wise Men proposed the adoption of the so-called Lamfalussy process in an attempt to fast-track the enactment and implementation of the legislation that deals with the securities and market abuse regulation in the European Union\textsuperscript{97} in order to comply with the European Union’s Action Plan for Financial Services.\textsuperscript{98} Consequently, a four-level regulatory approach was introduced under the Lamfalussy process, namely:

(a) Level 1 which consists of the framework measures and objectives that the securities legislation in the member states must achieve;\textsuperscript{99}

(b) Level 2 which contains some technical requirements and implementing measures necessary to attain the objectives enumerated in Level 1;\textsuperscript{100}

(c) Level 3 contains measures, guidelines and standards agreed by regulators as stipulated in the requirements of the Committee of European Securities Regulators. In addition, such measures are intended to enhance co-operation and common interpretation of the accepted market practices as well as the format for reporting suspicious transactions by regulatory authorities in member states;\textsuperscript{101} and

\textsuperscript{96} See related remarks in paragraphs 4 7 4 1 & 4 7 6 1 in Chapter Four of this thesis.


\textsuperscript{98} See paragraph 6 4 3 above.

\textsuperscript{99} Such measures include enacting and enforcing the provisions of the Market Abuse Directive.


\textsuperscript{101} CESR’s Report on Accepted Market Practices, CESR/04-505b; see paragraph 6 4 2 above & also see further <http://www.ec.europa.eu/internal_market/securities/transposition/index_en.htm> (accessed 21-02-2009).
(d) Level 4 deals with the actual consistent enforcement and implementation of the enacted securities and market abuse legislation in the member states.\(^{102}\)

The Lamfalussy process has so far been utilised to draft the provisions of the EU Market Abuse Directive, the Markets in Financial Instruments Directive,\(^{103}\) the Transparency Directive\(^ {104}\) and the Public Offers and Prospectus Admissions Directive.\(^{105}\)

6.4.5 Synopsis of the Implementation of the Market Abuse Directive in Selected Member States

About 27 member states have successfully enacted laws to implement the requirements of the EU Market Abuse Directive.\(^{106}\) However, for the purposes of this sub-heading, a comparative overview of the implementation of the EU Market Abuse Directive in the United Kingdom as well as the new EU Market Abuse Proposals which were introduced in 2011 in a bid to \textit{inter alia} improve such implementation will be briefly discussed below.\(^{107}\)

The United Kingdom enacted the Financial Services and Markets Act\(^{108}\) and the Financial Services and Markets Act 2000 (Market Abuse Regulations 2005)\(^{109}\) to implement the provisions of the EU Market Abuse Directive. The United Kingdom market abuse regime has

\(^{102}\) Avgouleas 2004-2005 \textit{The Transnational Lawyer} 185-186; Blair & Walker \textit{Financial Services Law} 760-765 & generally see Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 245-251.


\(^{107}\) Despite the current Euro-zone debt crisis, it is important to note that the United Kingdom is among the biggest economies in the European Union and as such a brief overview of its implementation of the EU Market Abuse Directive will be considered under this sub-heading. For further related analysis on how the EU Market Abuse Directive was implemented in the United Kingdom, see Chapter Seven of this thesis.

\(^{108}\) 2000 (c 8), hereinafter referred to as the Financial Services and Markets Act; see s 118 of the Financial Services and Markets Act & see further analysis in paragraph 7.3 in Chapter Seven of this thesis.

\(^{109}\) 2005 SI 2005/381 (hereinafter referred to as the Market Abuse Regulations 2005); also see related remarks in paragraph 7.3 in Chapter Seven of this thesis.
not only enacted the provisions that are similar to those of the EU Market Abuse Directive in relation to insider trading, but its prohibition has, in some instances, gone beyond the requirements of the EU Market Abuse Directive in an attempt to discourage all the forms of market abuse activities.\textsuperscript{110} The definition of inside information in the Financial Services and Markets Act\textsuperscript{111} is almost identical to the definition of inside information provided in the EU Market Abuse Directive.\textsuperscript{112} However, the Financial Services and Markets Act defines inside information as information which is not generally available\textsuperscript{113} as opposed to a similar definition in the EU Market Abuse Directive which refers to inside information as information of a precise nature which has not been made public.\textsuperscript{114} The EU Market Abuse Directive\textsuperscript{115} and the Financial Services and Markets Act\textsuperscript{116} also have relatively similar definitions of inside information in relation to commodity derivatives. Likewise, the EU Market Abuse Directive\textsuperscript{117} and the Financial Services and Markets Act\textsuperscript{118} have an almost identical definition of inside information in relation to agents and/or intermediaries, which is mainly aimed at combating front running (dealing ahead of investors’ orders). Moreover, in line with Recital 31 of the EU Market Abuse Directive, the Financial Services Authority issued its Code of Market Conduct which, \textit{inter alia}, enumerates a number of factors which must be considered to determine whether information is generally available.\textsuperscript{119}

There is no material difference between the definition of insider contained in both the EU Market Abuse Directive\textsuperscript{120} and the Financial Services and Markets Act.\textsuperscript{121} Notably, both the

\textsuperscript{110} S 118B & 118C read with s 118A of the Financial Services and Markets Act; read with articles 2; 3 & 4 of the EU Market Abuse Directive; article 4 of the Accepted Market Practices Directive & paragraph 6 3 3 above.

\textsuperscript{111} S 118C of the Financial Services and Markets Act.

\textsuperscript{112} Article 1(1) of the EU Market Abuse Directive & also see paragraph 6 3 1 above.

\textsuperscript{113} S 118C of the Financial Services and Markets Act.

\textsuperscript{114} Article 1(1) of the EU Market Abuse Directive & also see paragraph 6 3 1 above.

\textsuperscript{115} Article 1(1) & also see article 4 of the Accepted Market Practices Directive.

\textsuperscript{116} S 118C(3) read with s 118C(7).

\textsuperscript{117} Article 1(1).

\textsuperscript{118} S 118C(4).

\textsuperscript{119} This indicates that s 118C of the Financial Services and Markets Act fully implements article 1(1) of the EU Market Abuse Directive and the Directive on the Public Disclosure of Inside Information. See further Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 \textit{British Institute of International and Comparative Law City Research Series} 21.

\textsuperscript{120} Article 2(1); also see paragraph 6 3 2 above.

\textsuperscript{121} S 118B.
EU Market Abuse Directive\textsuperscript{122} and the Financial Services and Markets Act\textsuperscript{123} distinguish primary insiders from secondary insiders. Likewise, both the EU Market Abuse Directive\textsuperscript{124} and the Financial Services and Markets Act\textsuperscript{125} prohibit corporate insiders (legal or juristic persons) from indulging in market abuse offences. Both the EU Market Abuse Directive\textsuperscript{126} and the Financial Services and Markets Act\textsuperscript{127} specifically prohibit insider trading and market manipulation. Be that as it may, the United Kingdom has somewhat delayed and/or inconsistently implemented the provisions pertaining to the financial instruments that are covered by the EU Market Abuse Directive.\textsuperscript{128}

In other words, as evidenced above, the EU Market Abuse Directive was adopted to ensure that a common approach as regards the co-operation and enforcement of the market abuse prohibition is employed across the European Union member states.\textsuperscript{129} Subsequently, the general concepts and practices regarding the combating of market abuse have to date been adopted into the relevant national legislation by most member states, including the United Kingdom. In relation to this, it is reported that there have been relatively few suspicious transactions before issuers’ regulatory announcements over the last few years in the United Kingdom.\textsuperscript{130}

\begin{footnotesize}
\begin{enumerate}
\item Article 2(1) applies to primary insiders & article 4 applies to secondary insiders; also see paragraph 6 3 2 above.
\item S 118B(a) to (d) applies to primary insiders and it is not necessary for such insiders to know that the information in their possession is inside information before they can incur market abuse liability and s 118B(e) applies to secondary insiders and such persons will incur market abuse liability if they know or ought to have known that they obtained information from a primary insider and/or if they know or ought to have known that it is inside information. See further Welch, Pannier, Barrachino, Bernd & Ledeboer\textit{ 2005 British Institute of International and Comparative Law City Research Series 25.}
\item Article 2(2) which applies directly to corporate insiders.
\item S 118B which applies to both individuals and bodies corporate (companies) as opposed to the provisions of the Criminal Justice Act which only applies to individuals.
\item Articles 1(2); 2; 3; 4 & 5.
\item S 118.
\item For instance, most of the key amendments such as the Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, SI 2001/1996 as amended by Regulation 10 of the Market Abuse Regulations 2005, to include all financial instruments as stated in article 1(3) the EU Market Abuse Directive & to include all regulated markets as defined in article 1(13) of the Investment Services Directive 93/22/EEC \cite{1993} OJ L141/27, were only introduced after year 2000.
\end{enumerate}
\end{footnotesize}
Notwithstanding the remarks above, there are some flaws which could still impede the implementation of the EU Market Abuse Directive in the United Kingdom and other European Union member states. For instance, the provisions of the EU Market Abuse Directive are mainly limited to market manipulation and insider trading in financial instruments that are admitted to trading on regulated markets in the European Union or for which a request for admission to trading on such markets has been made, irrespective of whether the transaction itself actually took place on those markets.\textsuperscript{131} With regard to insider trading, the EU Market Abuse Directive’s prohibition further applies to financial instruments not admitted to trading on a regulated market, but the value of which depends on the value of the financial instruments admitted to trading on a regulated market.\textsuperscript{132} However, due to the significant increase in the volume of, and/or the varied nature of transactions traded on the multilateral trading facilities,\textsuperscript{133} organised trading facilities and the over the counter markets (outside the regulated markets) and the entry into force of the Markets in Financial Instruments Directive some European Union member states like the United Kingdom have already extended the application of the EU Market Abuse Directive to certain non-regulated markets.\textsuperscript{134} This has created confusion and different approaches regarding the implementation of the EU Market Abuse Directive across the member states. For example, the Markets in Financial Instruments Directive, unlike the EU Market Abuse Directive, applies to a much broader spectrum of financial instruments that are traded on the regulated markets as well as on the multilateral trading facilities.\textsuperscript{135} In other words, the EU Market Abuse Directive does not apply to other financial instruments such as derivatives and credit risk transfers instruments, spot commodity contracts, emission allowances, broker crossing systems and credit default swaps that are traded outside the regulated markets.\textsuperscript{136} Moreover, the United Kingdom and other European Union member states have developed various and different interpretations as regards the actual types of financial instruments that should be covered in terms of the EU

\textsuperscript{131} Articles 1(3) & 9 of the EU Market Abuse Directive; also see the analysis by the European Commission (2009) 4-5 <http://www.ec.europa.eu/internal_market/securities/transpositionindex_en.htm> (accessed 22-02-2010).
\textsuperscript{132} See paragraph 6 3 3 above, for further related analysis.
\textsuperscript{133} See generally articles 4(15) & 26(2) of the MiFID.
\textsuperscript{134} This is also the case for example, the Alternext in France; unofficial markets in Germany; Spain & Luxembourg.
\textsuperscript{136} Article 1(3) of the EU Market Abuse Directive.
Market Abuse Directive, especially considering the fact that the Markets in Financial Instruments Directive has broadly defined financial instruments to, *inter alia*, include credit default swaps, climatic derivatives, contract for differences and emission allowances derivatives. According to some European Union member states, the scope of application of the EU Market Abuse Directive in relation to the financial instruments currently traded in the European Union financial markets should be broadened to cover the financial instruments as stipulated under the Markets in Financial Instruments Directive. Accordingly, some European Union member states have proposed that the definition of the financial instruments under the EU Market Abuse Directive should be amended, the fact remains that the EU Market Abuse Directive has, in this regard, been flawed and inconsistently enforced in the financial markets in the United Kingdom and across the European Union member states. Consequently, it is suggested that the EU Market Abuse Directive’s market abuse prohibition should be carefully amended, not only to enable it to be applicable to all the financial instruments that are traded outside the regulated markets but also to ensure that adequate practical measures are put in place to promote its uniform application by the member states to avoid balkanisation and/or other potential overregulation problems.

There is also discord among the European Union member states regarding the interpretation of the definition of inside information for commodity derivatives purposes. This could be caused by the fact that the definition of inside information for commodity derivatives does not expressly apply to emission allowances, spot commodity contracts and derivative contracts. Moreover, market participants and regulatory bodies in some European Union member states have taken divergent approaches in relation to the operation and interpretation of the general definition of inside information for the purposes of the EU Market Abuse Directive. This is caused by the fact that the EU Market Abuse Directive’s general definition of inside information does not expressly provide whether it is required that the

137 See the MiFID Level 2 Regulation 1287/2006.
139 Particularly regarding the meaning of, and/or what constitutes financial instruments for the purposes of article 1(3) of the EU Market Abuse Directive.
140 Article 1(1) of the EU Market Abuse Directive.
141 Article 1(1) of the EU Market Abuse Directive; also see article 1 of the Directive on the Public Disclosure of Inside Information, which deals with the definition and public disclosure of inside information and the definition of market manipulation. See related analysis on the definition of inside information as adopted in the United Kingdom above; also see Chapter Seven of this thesis.
offenders should have the knowledge of the inside information which they possess and/or the intention to commit market abuse offences before they can incur any liability. As a result, some countries, like the United Kingdom, have advocated that it is not necessary to prove the intention on the part of the offenders while other countries, like Spain, argue that only proof of the intention or use of inside information on the part of the market abuse offenders should suffice. Furthermore, the EU Market Abuse Directive’s general definition of inside information does not clearly distinguish between inside information for the purposes of determining when (actual time) issuers have an obligation to make such information public and inside information as it is applies to the obligation on the part of such issuers to stop committing market abuse offences. In this regard, it is suggested that the EU Market Abuse Directive’s general definition of inside information should be amended to provide more clarity on the use and interpretation of inside information across the European Union member states to enable issuers and other relevant persons to execute their mandatory disclosure obligations effectively without intentionally or erroneously committing market abuse offences.

The dissemination of inside information has been another complex and problematic matter in the United Kingdom and other European Union member states, especially with regard to the requirements for the prompt and/or deferred disclosure obligation which is imposed on the issuers. The mandatory duty on the part of the issuers of financial instruments to inform the public as soon as possible of any inside information which specifically concerns the said issuers as well as the deferred disclosure of inside information only in certain conditions, could be welcomed as a giant step towards combating market abuse activities in the European Union financial markets. However, national regulatory bodies in some European Union

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142 Article 1(1) of the EU Market Abuse Directive
143 This debate is worsened by the controversial decision that was employed in Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank, Financie-en Assurantiewezen [2009] EUECJ C-45/08 (CBFA), where the court held that article 1(1) read with articles 2; 3; 4 & 5 of the EU Market Abuse Directive merely prohibited insiders from using inside information to commit market abuse offences and therefore proof of intention on the part of offenders was not required; also see Shearman & Sterling “Twice as MAD: Legislative Proposals to Amend the European Regulation of Market Abuse” 2011 Financial Institutions Advisory & Financial Regulatory Client Publication 1 3-4.
144 Article 1(1) of the EU Market Abuse Directive; also see further the European Securities Markets Expert Group (ESME)’s Report on Market Abuse EU Legal Framework Brussels, 06 July 2007, 5-7.
145 Article 6(1) & (2) of the EU Market Abuse Directive; also see Article 3 of the Directive on the Public Disclosure of Inside Information.
146 Article 6(1) of the EU Market Abuse Directive.
147 Article 6(2) of the EU Market Abuse Directive.
member states like the United Kingdom have been struggling to enforce the aforementioned issuer’s mandatory duty of disclosure consistently.\(^\text{148}\) In particular, the challenge is around the specific conditions under which the disclosure of inside information should be immediately disclosed and requirements which must be met by issuers to ensure that their deferred disclosure would not mislead the public and that the confidentiality of the inside information in question is preserved.\(^\text{149}\) It appears as if this issuer’s mandatory duty of disclosure employs the same broad definition of inside information that is used for the purposes of the insider trading prohibition under the EU Market Abuse Directive.\(^\text{150}\) Accordingly, different approaches have been adopted in the United Kingdom and other European Union member states.\(^\text{151}\) In view of the flaws stated above, it is submitted that the EU Market Abuse Directive should be amended to provide a specific definition of inside information for the purposes of the issuers’ prompt and/or deferred disclosure obligation. Such definition should provide clear guidelines on the conditions under which price-sensitive information may be required to be deferred or promptly disclosed to the public for the purposes of combating market abuse activities across the European Union member states without imputing undue pressure on the issuers.

European Union member states have also taken varying approaches regarding the definition and prohibition on insider trading and market manipulation.\(^\text{152}\) The United Kingdom has extended the prohibition on insider trading to any insider who actually trades or attempts to trade in the qualifying investments on the basis of the non-public inside information he knowingly possess.\(^\text{153}\) On the other hand, some countries have interpreted the EU Market Abuse Directive’s insider trading prohibition to be applicable whenever a person in

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\(^\text{150}\) Article 1(1) of the EU Market Abuse Directive.

\(^\text{151}\) For example, in Spain issuers are required to seek permission before they can defer any disclosure of inside information from the regulatory authorities. On the other hand, some European Union member states like France do not require issuers to seek any formal permission to delay or defer the disclosure of inside information from the regulatory authorities, provided that such delay is necessary to protect or maintain the confidentiality of the financial transactions in question. See the European Securities Markets Expert Group (ESME)’s Report on Market Abuse EU Legal Framework Brussels, 06 July 2007, 8.

\(^\text{152}\) Articles 1(2); 2; 3; 4 & 5 of the EU Market Abuse Directive.

\(^\text{153}\) See related remarks in paragraphs 62 above; also see Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 British Institute of International and Comparative Law City Research Series 9-11; 24-25 & 27.
possession of inside information trades or attempts to trade in the financial instruments to which such information relates. With regard to the prohibition on market manipulation, attempted market manipulation is not expressly outlawed in the EU Market Abuse Directive. This has forced the United Kingdom and several other the European Union member states to adopt the definition of market manipulation which is similar to that contained in the EU Market Abuse Directive although it is somewhat restricted because it does not cover attempted market manipulation practices. Moreover, different interpretations have been adopted in the United Kingdom and other European Union member states, especially with regard to what constitutes accepted market practices as opposed to prohibited market manipulation practices, for the purposes of the EU Market Abuse Directive. It is submitted that the EU Market Abuse Directive should be amended to outlaw attempted market manipulation activities. The EU Market Abuse Directive should also be amended to enact a specific provision which clearly enumerates the market practices or conduct that will be uniformly regarded as accepted market practices across the European Union financial markets to avoid unjustifiably imputing market abuse liability upon the issuers who deal in the financial instruments that are traded in more than one country (dual listed issuers).

Notwithstanding some general interpretation problems, the requirement that issuers or their agents must draw up and update their insider lists, report suspicious transactions and the right on the part of the regulatory bodies to access telephone and existing data traffic records have been fairly utilised in the United Kingdom and other European Union member

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154 For example in Spain; also see Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 British Institute of International and Comparative Law City Research Series 9-12; 66-69.


156 Articles 1(2)(a) & (5) of the EU Market Abuse Directive; see further CESR’s Report on Accepted Market Practices, CESR/04-505b; the European Securities Markets Expert Group (ESME)’s Report on Market Abuse EU Legal Framework Brussels, 06 July 2007, 16 & the report and analysis by the European Commission (2009) <http://www.ec.europa.eu/internal_market/securities/transpositionindex_en.htm> (accessed 22-02-2010). Consequently, very few member states, namely France; Spain; Austria and Portugal have to date successfully formulated such accepted market practices.

157 Article 6(3) of the EU Market Abuse Directive; also see article 5 of the Accepted Market Practices Directive.

158 See article 6(9) of the EU Market Abuse Directive; also see article 7(11) of the Accepted Market Practices Directive.

159 Article 12(2)(d) of the EU Market Abuse Directive.
states to detect and combat market abuse activities.\footnote{See the CESR \textit{The 3rd set of CESR Guidance and Information on the Common Operation of the MAD to the Market, Consultation Paper}, May 2008; the CESR Report “CESR-Pol Statistics shared with DG Market Services” \texttt{<http://www.cesr.eu/index.php?docid=4853>} (accessed 24-02-2010).} Nevertheless, the managers of the issuers and other relevant persons’ transaction reporting and/or disclosure to the regulatory authorities, of any information pertaining to their own transactions which relates to the said issuers’ financial instruments or derivatives\footnote{Article 6(4) of the EU Market Abuse Directive; also see article 6 of the Accepted Market Practices Directive.} has caused unnecessary administrative burden on the part of such managers and other regulatory authorities in some countries.\footnote{Also see further related discussion and analysis by the European Commission (2009) 13-14 \texttt{<http://www.ec.europa.eu/internal_market/securities/transpositionindex_en.htm>} (accessed 22-02-2010).} It is submitted that the EU Market Abuse Directive should be reviewed to increase the threshold for transactions that must be reported by issuers, managers of issuers and/or their agents to prevent the risk of the regulatory bodies negatively interfering with the proper execution of their duties. It is further submitted that the EU Market Abuse Directive should be reviewed to provide greater clarity on the issuers’ obligation to draw up lists of their insiders (employees) in order to minimise the risk of imposing excessive administrative burden, particularly on large multinational companies.

Seemingly, with regard to the exemption of buy-back programmes and stabilisation activities, the United Kingdom has followed the EU Market Abuse Directive approach.\footnote{Article 8 of the EU Market Abuse Directive; also see the European Commission Regulation on Share Buy-backs and Stabilisations.} Nonetheless, a wide range of approaches (measures) have been adopted by some European Union member states on whether short selling should be prohibited.\footnote{Generally see further related discussion and analysis by the European Commission (2009) 17 \texttt{<http://www.ec.europa.eu/internal_market/securities/transpositionindex_en.htm>} (accessed 22-02-2010).} It is submitted that the EU Market Abuse Directive should be amended to provide a uniform prohibition on short selling as well as adequate guidelines on share buy-back programmes and stabilisation activities that may be exempted from the market abuse prohibition by the European Union member states.

As discussed above, it is evident that the implementation of the EU Market Abuse Directive in the United Kingdom was relatively successful. Precisely, Levels 1, 2 and 3 of the Lamfalussy process have so far been successfully implemented by almost all the European Union member states. However, divergent approaches and some inconsistencies still exist, especially with regard to the interpretation and enforcement of some provisions of the EU
Market Abuse Directive and the imposition of market abuse penalties by other European Union member states. This has consequently culminated in the drafting of various proposals aimed at repealing the EU Market Abuse Directive in 2011. To this end, the European Commission has isolated some gaps in the EU Market Abuse Directive which include:

(a) gaps in the regulation of new markets, trading platforms (including multilateral trading facilities and organised trading facilities) and over the counter instruments;

(b) gaps in the regulation of commodities and commodity derivatives;

(c) regulators lacking certain information and powers;

(d) scope of the EU Market Abuse Directive mainly restricted to financial instruments traded on regulated markets;

(e) sanctions either inadequate or less dissuasive for market abuse deterrence purposes;

(f) lack of clarity on certain key concepts giving rise to legal uncertainty; and

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166 See the European Commission Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse) COM (2011) 651 Final, 2011/0295 (COD), Brussels, 20 October 2011 (hereinafter referred to as the Market Abuse Regulation Proposal), which will be directly effective in the EU member states from two years after the date when it is passed or when it enters into force, on a par with national laws & the European Commission Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation (Market Abuse) COM (2011) 654 Final, 2011/0297 (COD), Brussels, 20 October 2011 (hereinafter referred to as the Criminal Sanctions Market Abuse Directive Proposal), which will require separate national implementing legislation in each EU member state within two years of its coming into force.


excessive administrative burdens for issuers whose financial instruments are
admitted to trading on small and medium-sized growth markets.

Accordingly, the European Commission’s key proposals to combat the gaps stated above will be briefly discussed below.

The Market Abuse Regulation Proposal seeks to extend the scope of the EU Market Abuse Directive\textsuperscript{169} to cover a wide range of:

(a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;\textsuperscript{170}

(b) financial instruments traded on a multilateral trading facility or other new types of organised trading facilities in at least one member state,\textsuperscript{171} and

(c) other behaviour or transactions involving financial instruments whose value relate to or depend on the financial instruments traded on a regulated market, multilateral trading facility or organised trading facilities, irrespective of whether the behaviour or transactions actually take place on a regulated market, multilateral trading facility or organised trading facility.\textsuperscript{172}

This is aimed at combating market abuse activities involving credit default swaps, climatic derivatives, contract for differences, derivatives and credit risk transfers instruments, spot commodity contracts, emission allowances and broker crossing systems traded in new markets, platforms (including multilateral trading facilities and organised trading facilities) and over the counter markets.\textsuperscript{173} The researcher acknowledges and supports the fact that

\begin{itemize}
\item \textsuperscript{169} Article 1(3) read with article 1(1).
\item \textsuperscript{170} Article 2(1)(a) of the Market Abuse Regulation Proposal.
\item \textsuperscript{171} Article 2(1)(b) of the Market Abuse Regulation Proposal.
\item \textsuperscript{172} Article 2(1)(c) read with (d) & subsections (2); (3) & (4) of the Market Abuse Regulation Proposal.
\item \textsuperscript{173} Also see the European Commission Proposal for a Directive of the European Parliament and of the Council on Markets in Financial Instruments Repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast) COM (2011) 656 Final, 2011/0298 (COD), Brussels, 20 October 2011 (hereinafter referred to as the Markets in Financial Instruments Directive Proposal), which also inter alia seeks to amend the organisational requirements for trading venues, authorisation and ongoing obligations applicable to data services providers and powers of regulators to enable them to combat market abuse involving a wide range of financial instruments in new markets and trading platforms, see further the Markets in Financial Instruments Directive Proposal’s Explanatory Memorandum 1-11 & articles 16 to 20; 32 to 34; 53 to 54; 27; 59 & 60 Markets in Financial Instruments Directive Proposal; also see the European Commission Proposal for a Regulation of the European Parliament and of the
\end{itemize}
these amendments are necessary to prevent market abuse and regulatory arbitrage in over-the-counter markets and/or other trading platforms. Nonetheless, it is suggested that the Market Abuse Regulation Proposal should be further reviewed so that it provides adequate practical measures or guidelines regarding the uniform application of its extended scope in the European Union member states to avoid balkanisation and other potential overregulation problems. In relation to this, it is further submitted that the Market Abuse Regulation Proposal’s extended scope should be carefully revised to reduce as much as possible the risk of creating new transaction reporting administrative burdens and/or cross-border enforcement-related problems for regulators and other relevant stakeholders in the European Union member states. Notwithstanding these concerns, it is submitted that adopting a similar and adequate extended scope of the market abuse ban in South Africa could, if consistently enforced, enable its relevant regulatory authorities to combat market abuse challenges posed by high frequency trading and other related illicit practices that are generally associated with the new trading platforms.

In order to ensure legal certainty, provide adequate information for investors and remedy the gaps in the regulation of commodities and commodity derivatives, the Market Abuse Regulation Proposal enacted a new definition of inside information for commodity derivatives to enable the regulators to have powers to request relevant information on spot commodity markets. This allows the regulators to combat market abuse in spot commodity derivatives or related spot commodity contracts. However, it remains to be seen whether this new definition for commodity derivatives will be successfully utilised by regulators to

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174 See the definitions of multilateral trading facilities and organised trading facilities in article 2(1)(6) & (7) of the Markets in Financial Instruments Regulation Proposal respectively.

175 Article 6(1)(b) read with article 2(3) of the Market Abuse Regulation Proposal; however, this definition does not clearly provide whether an issuer or market participant’s own bona fide privileged measures and strategies for trading should be regarded as inside information for market abuse purposes.

176 Article 17(2)(c) & (3) read with article 16 of the Market Abuse Regulation Proposal.

177 Articles 8 & 10 of the Market Abuse Regulation Proposal.
curb market abuse without discouraging legitimate derivative and spot commodity contracts transactions.\(^{178}\) It is submitted that the Market Abuse Regulation Proposal should be reviewed to ensure that it provides specific guidelines on how regulators in the European Union member states can oversee the regulation of spot commodity markets and derivative markets without imposing undue excessive pressure on the issuers or other relevant market participants. Moreover, the Market Abuse Regulation Proposal does not expressly apply to insider trading relating to underlying derivative and spot commodity contracts transactions\(^{179}\) and wholesale energy products admitted to trading in the European Union member states’ trading platforms.\(^{180}\) Seemingly, the Market Abuse Regulation Proposal targets cross-market manipulation between derivative markets and spot commodity markets.\(^{181}\) The enactment of the Wholesale Energy Market Integrity and Transparency Regulation is a positive step towards combating market abuse in the physical commodities markets across the European Union member states.\(^{182}\) Be that as it may, it is submitted that this Wholesale Energy Market Integrity and Transparency Regulation should be amended so that it may provide a clear roadmap on its application in the European Union member states and how it will dovetail with the Market Abuse Regulation Proposal and the Markets in Financial Instruments Directive Proposal to prevent potential negative effects of overregulation and/or double jeopardy on the part of the market abuse offenders. Despite these shortcomings, it is further submitted that the Securities Services Act,\(^{183}\) the Financial Markets Bill\(^{184}\) and/or the subsequent provisions of

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\(^{179}\) Article 2(3) read with articles 8 & 10 of the Market Abuse Regulation Proposal; Clifford Chance Markets Abuse: European Commission Proposes New EU Regime 2011 1 3-4.


\(^{181}\) For example, instances where a person concludes derivative transactions on derivative markets in order to manipulate the price of related spot commodity contracts transactions that are concluded on spot commodity markets or engaging in spot commodity contracts transactions for the purposes of manipulating the price of related commodity derivatives that are traded on derivative markets; also see Katz & Millar “Amendments to the Market Abuse Directive-10 Key Points” 2011 Orrick European Financial Markets Alert 1 1-2.

\(^{182}\) See the Market Abuse Regulation Proposal’s Explanatory Memorandum 7.

\(^{183}\) 36 of 2004, hereinafter referred to as the Securities Services Act.

\(^{184}\) [B-2011], hereinafter referred to as the Financial Markets Bill.
the Financial Markets Bill 2012\textsuperscript{185} should be amended in line with the Market Abuse Regulation Proposal and the Wholesale Energy Market Integrity and Transparency Regulation to provide a specific definition of inside information for commodity derivatives, spot commodity derivatives and related spot commodity contracts to curb insider trading and cross-market manipulation in the South African physical (non-financial markets) commodities markets. In relation to this, another option is enacting separate, adequate and specific commodity derivatives regulations or legislation that targets market abuse activities involving commodity derivatives, spot commodity derivatives and related spot commodity contracts in the South African commodities markets.

The Market Abuse Regulation Proposal introduced a new specific definition of inside information for emission allowances.\textsuperscript{186} This is aimed at extending the market abuse prohibition to financial instruments covered under the Markets in Financial Instruments Directive Proposal\textsuperscript{187} and to address concerns that the scope of the EU Market Abuse Directive is mainly restricted to financial instruments traded on regulated markets.\textsuperscript{188} The prohibition on emission allowances is also targeted at curbing market abuse activities in the spot secondary markets and the European Union emission allowances markets.\textsuperscript{189} Accordingly, emissions allowance markets participants who hold the relevant information suitable for ad-hoc and/or periodic disclosure will now have a duty to create insider lists, report managers’ transactions and publicly disclose inside information.\textsuperscript{190} Apparently, these obligations are not imposed on small participants (emitters) whose transactions may not significantly affect the market price of emission allowances in question and/or give rise to market abuse and issuers of emission allowances that holds responsibilities for development

\textsuperscript{185} [B12-2012], hereinafter referred to as the Financial Markets Bill 2012.

\textsuperscript{186} Article 6(1)(c); also see the Market Abuse Regulation Proposal’s \textit{Explanatory Memorandum} 8-9.

\textsuperscript{187} Section C of Annex 1 of the Markets in Financial Instruments Directive Proposal; also see articles 2(1)(8); 9; 17 & 20 of the Markets in Financial Instruments Regulation Proposal & the Markets in Financial Instruments Regulation Proposal’s \textit{Explanatory Memorandum} 12.

\textsuperscript{188} Article 1(3) of the EU Market Abuse Directive.


\textsuperscript{190} Articles 12; 13 & 14 of the Market Abuse Regulation Proposal.
and implementation of European Union’s climate policies.\textsuperscript{191} It is, however, submitted that the Market Abuse Regulation Proposal should be reviewed in accordance with the Markets in Financial Instruments Directive Proposal and the EU Emissions Trading System Directive\textsuperscript{192} so that it may provide an optimal threshold for emissions or thermal input or a combination thereof, to enhance the effective combating of market abuse in spot carbon markets, and to prevent the potential risk of smaller emission allowances participants circumventing their market abuse liability unjustifiably. Not giving less regard to the stated shortcoming, the adoption of a similar prohibition on emission allowances should be considered in South Africa to discourage market abuse activities in the spot secondary markets and/or related emission allowances markets in line with the Kyoto Protocol.

Additionally, the Market Abuse Regulation Proposal provides a new broad definition of market manipulation to cover all actual manipulative and attempted manipulative conduct involving strategies such as algorithmic trading (including high frequency trading) and related activities like quote stuffing, layering and spoofing of spot commodity derivatives or contracts and other financial instruments.\textsuperscript{193} This suggests that cancelling or amending pending transactions by any person who has price-sensitive inside information is now prohibited and consequently the possibility of such person relying on a defence based on accepted market practices (subject to a one year transitional period for previously notified practices) is removed.\textsuperscript{194} Additionally, a number of instances that are deemed to constitute market manipulation are enumerated to empower the regulators to consistently adopt a common approach for the enforcement of the market manipulation provisions and to address concerns that the EU Market Abuse Directive lacked clarity on certain key concepts such as the elements of the attempted insider trading, actual and/or attempted market manipulation offences, giving rise to legal uncertainty.\textsuperscript{195} In view of this, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be

\textsuperscript{191} Articles 12(2); (3) & (8); 13(2) & (3) & 14(3) of the Market Abuse Regulation Proposal; Shearman & Sterling “Twice as MAD: Legislative Proposals to Amend the European Regulation of Market Abuse” 2011\emph{ Financial Institutions Advisory & Financial Regulatory Client Publication} 7; Shearman & Sterling 2011\emph{ Financial Institutions Advisory & Financial Regulatory Client Publication} 1\textsuperscript{8-9} & Clifford Chance\emph{ Markets Abuse} 2011 3.

\textsuperscript{192} Another option is to put all the provisions dealing with emission allowances in a single rulebook or legislation to minimise problems associated with the overlapping of related provisions and to efficiently discourage market abuse activities in emission allowances markets.

\textsuperscript{193} Articles 8 &10 of the Market Abuse Regulation Proposal.

\textsuperscript{194} Articles 8 &10 of the Market Abuse Regulation Proposal.

\textsuperscript{195} See the Market Abuse Regulation Proposal’s\emph{ Explanatory Memorandum} 8.
amended to enact adequate, separate and specific provisions for both attempted insider trading
and attempted market manipulation offences to enhance market integrity and improve the
combating of market abuse in South Africa.

The Market Abuse Regulation Proposal gives regulatory bodies in the European Union
member states the power to enter private premises, search and seize documents after having
obtained permission from the relevant courts, where a reasonable suspicion exists that such
documents are relevant to an ongoing market abuse investigation.196 The regulatory bodies are
also given powers to request existing telephone and data traffic records held by
telecommunication operators if a reasonable suspicion exists that such records are required in
an ongoing market abuse investigation.197 For the purposes of this and other related
functions, the regulatory bodies are obliged to cooperate with the European Securities and
Markets Authority, other relevant authorities and with each other.198 The regulatory bodies’
supervisory and sanctioning powers were revamped; for example, such bodies are now able to
impose upon the market abuse offenders, civil or administrative pecuniary sanctions of not
less than the profit made or loss avoided from the market abuse transactions in question
and/or a maximum fine of not less than twice the value of any such profit gained or loss
avoided.199 As a result, the regulatory bodies may impose a maximum fine of not less than
five million euros on natural persons200 and civil or administrative pecuniary sanctions of up
to 10% of the total annual turnover in the preceding business year, on legal persons.201 The
regulatory bodies may further impose other additional higher sanctions upon the market abuse
offenders.202 The European Union member states are also required to put in place adequate
mechanisms to encourage whistle-blowers to report suspected market abuse activities to the
regulatory bodies and/or other relevant authorities without the fear of being victimised.203 All
these new developments are, among other things, targeted at addressing the fears that the
regulators were lacking certain information and powers under the EU Market Abuse
Directive, especially with regard to spot commodity markets and over the counter markets.204

196 Article 17(2)(e) read with articles 16; 18 to 20 of the Market Abuse Regulation Proposal.
197 Article 17(2)(f) read with articles 16; 18 to 20 of the Market Abuse Regulation Proposal.
198 Articles 18 to 20 of the Market Abuse Regulation Proposal.
199 Article 26(1)(k) of the Market Abuse Regulation Proposal.
200 Article 26(1)(l) of the Market Abuse Regulation Proposal.
201 Article 26(1)(m) of the Market Abuse Regulation Proposal.
202 Article 26(2) read with article 27 of the Market Abuse Regulation Proposal.
203 Article 29 of the Market Abuse Regulation Proposal.
204 See the Market Abuse Regulation Proposal’s Explanatory Memorandum 10-13.
It is, however, submitted that the new regulators’ investigatory powers and whistle-blower immunity provisions should be utilised carefully and uniformly in the European Union member states to minimise the risk of discouraging or deterring potential investors, which is generally associated with overregulation. Even so, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in accordance with the Market Abuse Regulation Proposal to provide specific market abuse whistle-blower immunity provisions205 for the purposes of encouraging all the persons to report market abuse activities to the Financial Services Board and/or other relevant enforcement authorities in South Africa.

The Criminal Sanctions Market Abuse Directive Proposal provides new criminal sanctions for market abuse206 in a bid to address concerns that the EU Market Abuse Directive’s market abuse sanctions are either inadequate or less dissuasive for deterrence purposes.207 This also follows the European Commission’s submission that criminal sanctions, especially imprisonment, could be able to increase the dissuasiveness and/or deterrent effect of the market abuse sanctions across the European Union member states.208 Consequently, the Criminal Sanctions Market Abuse Directive Proposal requires the European Union member states to impose “effective, proportionate and dissuasive” criminal sanctions upon any person who intentionally engage or attempts to engage in insider trading or market manipulation activities.209 This might also have been targeted at clarifying the concerns raised in Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank, Financie-en

205 Put differently, although s 159 of the Companies Act 71 of 2008; the Protected Disclosures Act 26 of 2000; s 9 of the South African constitution & the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 can be employed to protect shareholders, directors and other employees from occupational reprisals, there are no specific provisions in the Securities Services Act, the Financial Markets Bill & the Financial Markets Bill 2012 that can be used to encourage and/or protect market abuse whistle-blowers from such reprisals.

206 Articles 1 to 8 of the Criminal Sanctions Market Abuse Directive Proposal; these provisions does not apply to buy backs and stabilisation programmes, monetary policy and debt management activities and emission allowances activities conducted in pursuit of climate policy, see article I(2) of the Criminal Sanctions Market Abuse Directive Proposal.


209 Articles 3 & 4 read with article 6 the Criminal Sanctions Market Abuse Directive Proposal.
Assurantiewezen, on whether it was required to prove the intention of the accused person involved who used inside information in his possession to engage in market abuse practices. Criminal sanctions can also be imposed upon any person who incites, aids and abets or attempts to incite, aid and/or abet another person to commit insider trading and market manipulation offences. This implies that legal persons can now incur criminal liability for insider trading and market manipulation. It is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions for separate and specific criminal sanctions that can be imposed upon any juristic person or individual who commits or attempts to commit insider trading or market manipulation offences. It is further submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions for separate and specific criminal sanctions that can be levied against any person (including juristic persons) who incites, aids and abets or attempts to incite, aid and abet another person to commit market abuse offences in South Africa. After the entry into force of the Criminal Sanctions Market Abuse Directive Proposal, the European Union member states are given two years to transpose its provisions into their respective national laws while the European Commission is given four years to report to the European Parliament and the Council on the application and effectiveness of the criminal sanctions. Nevertheless, it is submitted that the Criminal Sanctions Market Abuse Directive Proposal should be amended to remove the requirement of intention on the part of the offenders because it is very difficult to prove and this may, if not properly enforced, give rise to the ineffective enforcement of its criminal sanctions. It is further submitted that the Criminal Sanctions Market Abuse Directive Proposal should be reviewed to ensure that it clearly provides separate and different criminal sanctions for natural and juristic persons that will be homogeneously enforced across the European Union member states.

210 [2009] EUECJ C-45/08 (CBFA), in this case the court inter alia held that the EU Market Abuse Directive’s insider trading prohibition applies to anyone who merely deals in securities or financial instruments while in possession of inside information even if such information did not influence his trading decision. In other words, as earlier stated, the court held that there was no need to prove the intention of the offenders in question for them to incur market abuse liability; see articles 1(1); 2; 3 & 4 of the EU Market Abuse Directive; Gide Loyrette Novel “Market Abuse Directive II: New Regulations and Criminal Sanctions for Market Abuse” 2011 The Brief Financial Regulation 1 3-4 & Clifford Chance Markets Abuse 2011 2.

211 Article 5 read with article 6 of the Criminal Sanctions Market Abuse Directive Proposal.

212 Articles 7 & 8 of the Criminal Sanctions Market Abuse Directive Proposal.


The Market Abuse Regulation Proposal stipulates that the precise data to be included in insider lists should be defined in delegated acts and implementing technical standards adopted by the European Commission.\footnote{Article 13(4) & (6) of the Market Abuse Regulation Proposal; also see the Market Abuse Regulation Proposal’s Explanatory Memorandum.} However, issuers whose financial instruments are admitted to trading on a small and medium-sized growth market and issuers who have not requested or approved admission of their financial instruments to trading on a regulated market, multilateral trading facilities and/or organised trading facilities are exempted from drawing up insider lists.\footnote{Article 13(2) & (3) of the Market Abuse Regulation Proposal; also see the Market Abuse Regulation Proposal’s Explanatory Memorandum.} This is, inter alia, aimed at removing national heterogeneous differences which were causing excessive administrative burdens on issuers and improving the investigation of market abuse activities by the competent authorities. Nonetheless, it suggested that the Market Abuse Regulation Proposal should be reviewed to provide adequate measures or provisions on the content of insider lists and/or conditions under which issuers will have an obligation to draw up such lists. In other words, the fact that the duty to provide adequate measures on the content of insider lists and conditions under which issuers are required to draw up such insider lists is solely and merely vested with the European Commission could, if not carefully enforced, lead to a duplication of the existing problems associated with excessive administrative burdens being imposed particularly on multinational companies and/or the heterogeneous application of the provisions on insider’s lists across the European Union member states. In spite of these concerns, it is submitted that the drawing of insider lists by issuers and other relevant persons could, if assiduously adopted, enhance the prevention and combating of market abuse practices in South Africa.

Any transaction made by a person executing managerial responsibilities on behalf of the issuer or whereby the manager lends or pledges financial instruments is now required to be disclosed to the regulators and the public.\footnote{Article 14 of the Market Abuse Regulation Proposal; also see the Market Abuse Regulation Proposal’s Explanatory Memorandum.} It is submitted that a similar provision should be introduced in South Africa to deter managers, directors and other relevant persons from committing market abuse offences. The Market Abuse Regulation Proposal has also stipulated that managers’ transactions less than €20,000 per calendar year may not be
reported. This clarifies the scope of reporting obligations in relation to managers’ transactions and increases the deterring effect on such managers from wilfully engaging in market abuse activities.

Inside information relating to issuers of a financial instrument whose financial instruments are admitted to trading on a small and medium-sized growth market may be posted by the trading venue on its website and/or in accordance with a standardised content and format defined in the implementing technical standards adopted by the European Commission. Such issuers also benefit from the new threshold for the reporting of managers’ transactions stated above. This is done to ensure that the disclosure requirements for issuers whose financial instruments are admitted to trading on small and medium-sized growth markets are proportionate in order to remove excessive administrative burdens for such issuers. Moreover, such issuers, like any other issuers, will be required to seek permission from the competent authorities if they want to delay the prompt disclosure of inside information. However, it remains to be seen whether this provision for the delayed disclosure of inside information will be homogeneously implemented in the European Union member states to prevent market abuse without being exploited by other devious issuers who might deliberately delay the disclosure of inside information to perpetrate market abuse activities and then circumvent their liability. Despite this concern, it is suggested that a similar mandatory prompt disclosure obligation should be adopted in South Africa to enhance the combating of market abuse in regulated markets, over the counter markets and/or other small and medium-sized growth markets.

As highlighted above, it is clear that the practical implementation and enforcement of the provisions of the EU Market Abuse Directive rests with the member states. This has, in some instances, resulted in the different interpretation of the requirements of the EU Market Abuse Directive, especially with regard to the definition of “inside information”, “insider”

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219 Article 14(3) of the Market Abuse Regulation Proposal; also see the Market Abuse Regulation Proposal’s Explanatory Memorandum 10.
220 This refers to a system or facility for trading as defined in article 5(5) of the Market Abuse Regulation Proposal.
221 Article 12(7) read with subsection (1) of the Market Abuse Regulation Proposal; also see the Market Abuse Regulation Proposal’s Explanatory Memorandum 9-10; also see Linklaters EU ‘Gets Tough’ on Market Abuse 20 October 2011 1 1-8 & Gide Loyrette Novel 2011 The Brief Financial Regulation 3.
222 Article 12(4) & (5) read with subsection (9) of the Market Abuse Regulation Proposal; also see the Market Abuse Regulation Proposal’s Explanatory Memorandum 9-10.
and the “disclosure of inside information”. The fact that the United Kingdom enacted a specific definition of inside information in relation to professional intermediaries to *inter alia* curb front running while other European Union member states do not have such definitions is a case in point. Moreover, it remains to be seen whether the new EU Market Abuse Proposals will promote the homogeneous implementation of the market abuse prohibition by all the European Union member states.

### 6.5 Concluding Remarks

As previously stated, the EU Market Abuse Directive was probably one of the most ambitious regulatory frameworks ever to be adopted regarding the prohibition of market abuse activities in the European Union. In this respect, it is important to note that broader definitions of “accepted market practices”, “regulated market”, “financial instruments”, “inside information” and “market manipulation” were introduced by the EU Market Abuse Directive. Furthermore, the EU Market Abuse Directive brought stringent measures, for example:

(a) a mandatory duty is imposed upon the issuers to promptly disclose inside information to the public;  

(b) issuers or their agents are required to compile lists of their insiders (employees);  

(c) persons in managerial positions are further required to report suspicious transactions which relate to their shares, derivatives or other financial instruments linked to them;  

(d) any professional person who objectively suspects that certain transactions might give rise to insider trading or market manipulation is required to report (whistle-blowing)

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224 For instance, Spain and the Netherlands do not have specific definitions of inside information in relation to professional intermediaries.  
225 See paragraphs 6.4.3; 6.4.4 & 6.4.5 above.  
226 Articles 1(1) to (5); article 2 read with articles 3; 4 & 5 of the EU Market Abuse Directive; also see related discussions in paragraphs 6.3.1; 6.3.2; 6.3.3 & 6.3.4 above.  
227 Article 6(1) read with subsections (2) & (3) of the EU Market Abuse Directive.  
228 Article 6(3) of the EU Market Abuse Directive.  
229 Article 6(4) of the EU Market Abuse Directive.
them immediately to the competent regulatory authorities in the European Union member states.\textsuperscript{230}

These measures are clearly targeted at improving the detection and prevention of market abuse activities in the European Union financial markets.

However, the EU Market Abuse Directive’s regulatory framework has a considerable number of flaws. As earlier pointed out,\textsuperscript{231} such flaws include, \textit{inter alia}, the failure on the part of the EU Market Abuse Directive to provide the specific types (whether civil, criminal or administrative sanctions) of market abuse penalties that are commonly applicable across the European Union member states and/or the various disparities that are found in relation to the interpretation and implementation of some of the provisions of the EU Market Abuse Directive in such member states.\textsuperscript{232} In relation to this, the researcher chose to analyse and demonstrate the implementation of the EU Market Abuse Directive in the United Kingdom.\textsuperscript{233} The United Kingdom was considered because it is generally regarded as one of the major economies in the European Union.\textsuperscript{234} Accordingly, it was demonstrated that although the United Kingdom has implemented most of the provisions of the EU Market Abuse Directive, it has sometimes inconsistently applied heterogeneous enforcement approaches to combat market abuse in its financial markets.\textsuperscript{235}

In addition, some key proposals that were brought by the Criminal Sanctions Market Abuse Directive Proposal and the Market Abuse Regulation Proposal in a bid to address the flaws contained in the EU Market Abuse Directive were discussed. For instance, it was indicated that the Market Abuse Regulation Proposal seeks to extend the scope of the EU Market Abuse Directive to cover a wide range of:

(a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;

\textsuperscript{230} Article 6(9) read with subsection (5) of the EU Market Abuse Directive.
\textsuperscript{231} See paragraph 6.4.5 above.
\textsuperscript{232} See paragraph 6.4.5 above.
\textsuperscript{233} See paragraph 6.4.5 above.
\textsuperscript{234} Welch, Pannier, Barrachino, Bernd & Ledeboer 2005 \textit{British Institute of International and Comparative Law City Research Series} 6-83; also see paragraph 6.4.5 above.
\textsuperscript{235} See paragraph 6.4.5 above.
(b) financial instruments traded on a multilateral trading facility or other new types of organised trading facilities in at least one member state; and

c) other behaviour or transactions involving financial instruments whose value relate to or depend on the financial instruments traded on a regulated market, multilateral trading facility or organised trading facilities, irrespective of whether the behaviour or transactions actually take place on a regulated market, multilateral trading facility or organised trading facility.  

It was also indicated that this extended scope is intended for curbing the gaps in the regulation of new markets, trading venues or platforms (including multilateral trading facilities and organised trading facilities) and over the counter instruments. Despite this, it is suggested that the Market Abuse Regulation Proposal should be further reviewed so that it provides adequate practical measures or guidelines regarding the uniform application of its extended scope in the European Union member states to avoid balkanisation and other potential overregulation problems. It is further suggested that the aforementioned extended scope should be carefully revised to reduce as much as possible the risk of creating new transaction reporting administrative burdens and/or cross-border enforcement-related problems for regulators and other relevant stakeholders in the European Union member states.

The Market Abuse Regulation Proposal’s new definition of inside information for commodity derivatives which seeks to enable the regulators to have the powers to request relevant information on spot commodity markets in order to combat market abuse practices involving spot commodity derivatives or related spot commodity contracts was discussed. Although this research does not totally disregard this new definition for commodity derivatives, it is submitted that the Market Abuse Regulation Proposal should be reviewed to ensure that it provides specific guidelines on how regulators in the European Union member states can oversee the regulation of spot commodity markets and derivative markets without discouraging legitimate derivative and spot commodity contracts transactions and/or imposing

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236 See paragraph 645 above.
237 See paragraph 645 above.
238 See paragraph 645 above.
239 See paragraph 645 above.
240 See paragraph 645 above.
undue pressure on the issuers or other relevant market participants.\textsuperscript{241} It is further submitted that the Wholesale Energy Market Integrity and Transparency Regulation should be amended so that it may provide a clear roadmap on its application in the European Union member states and how it will dovetail with the Market Abuse Regulation Proposal and the Markets in Financial Instruments Directive Proposal to prevent potential negative effects of overregulation and/or double jeopardy on the part of the market abuse offenders. The Market Abuse Regulation Proposal’s new definition of inside information for emission allowances aimed at extending the market abuse prohibition to financial instruments covered under the Markets in Financial Instruments Directive Proposal and to address concerns that the scope of the EU Market Abuse Directive is mainly restricted to financial instruments traded on regulated markets was also examined.\textsuperscript{242} Accordingly, it was noted that emissions allowance markets participants, except small participants (emitters) whose transactions may not significantly affect the market price of emission allowances in question, will be mandated to create insider lists, report managers’ transactions and publicly disclose inside information.\textsuperscript{243} While giving due regard to the relevant provisions of the Markets in Financial Instruments Directive Proposal and the EU Emissions Trading System Directive, it is has been submitted that the Market Abuse Regulation Proposal should be reviewed to provide an optimal threshold for emissions or thermal input or a combination thereof to curb market abuse in spot carbon markets and to prevent the potential risk of smaller emission allowances participants circumventing their market abuse liability unduly.\textsuperscript{244}

Moreover, the Market Abuse Regulation Proposal’s new definition of market manipulation which covers both actual and attempted manipulative conduct involving strategies such as algorithmic trading, high frequency trading and related activities like quote stuffing, layering and spoofing of spot commodity derivatives or contracts and other financial instruments was discussed.\textsuperscript{245} It was further argued that the rationale for this new definition is, \textit{inter alia}, targeted at empowering regulators to adopt a common approach to enforce the market manipulation ban across the European Union member states and/or addressing concerns that the EU Market Abuse Directive lacked clarity on certain key elements pertaining to the

\textsuperscript{241} See paragraph 6.4.5 above.
\textsuperscript{242} See paragraph 6.4.5 above.
\textsuperscript{243} See paragraph 6.4.5 above.
\textsuperscript{244} See paragraph 6.4.5 above.
\textsuperscript{245} See paragraph 6.4.5 above.
attempted insider trading and attempted market manipulation offences giving rise to legal uncertainty.\textsuperscript{246}

The regulatory bodies’ powers to enter private premises, search and seize documents after having obtained permission from the relevant courts in the European Union member states were analysed.\textsuperscript{247} Likewise, the regulatory bodies’ powers to request existing telephone and data traffic records held by telecommunication operators if a reasonable suspicion exists that such records are required in an ongoing market abuse investigation were discussed.\textsuperscript{248} It was also acknowledged that the regulatory bodies’ supervisory and sanctioning powers were revamped, for example, such bodies are now able to impose upon the market abuse offenders, civil or administrative pecuniary sanctions of not less than the profit made or loss avoided from the market abuse transactions in question and/or a maximum fine of not less than twice the value of any such profit gained or loss avoided.\textsuperscript{249} Put differently, it was noted that the regulatory bodies may impose a maximum fine of not less than five million euros on natural persons and civil or administrative pecuniary sanctions of up to 10% of the total annual turnover in the preceding business year, on legal persons.\textsuperscript{250} It was also noted that the European Union member states are required to put adequate mechanisms in place to encourage whistle-blowers to report suspected market abuse activities to the regulatory bodies and/or other relevant authorities without the fear of being victimised.\textsuperscript{251} It is nonetheless submitted that the new regulators’ investigatory powers and whistle-blower immunity provisions should be carefully and uniformly utilised in the European Union member states to minimise the risk of discouraging potential investors, which is generally associated with overregulation.\textsuperscript{252}

The Criminal Sanctions Market Abuse Directive Proposal’s new criminal sanctions for market abuse were analysed.\textsuperscript{253} It was noted that the European Union member states are obliged to impose “effective, proportionate and dissuasive” criminal sanctions upon any

\begin{itemize}
\item \textsuperscript{246} See paragraph 6.4.5 above.
\item \textsuperscript{247} See paragraph 6.4.5 above.
\item \textsuperscript{248} See paragraph 6.4.5 above.
\item \textsuperscript{249} See paragraph 6.4.5 above.
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\item \textsuperscript{252} See paragraph 6.4.5 above.
\item \textsuperscript{253} See paragraph 6.4.5 above.
\end{itemize}
person who intentionally engages or attempts to engage in insider trading or market manipulation activities.\textsuperscript{254} It was further stated that criminal sanctions can be imposed upon any person who incites, aids and abets or attempts to incite, aid and/or abet another person to commit insider trading and market manipulation offences.\textsuperscript{255} Nevertheless, it was submitted that the Criminal Sanctions Market Abuse Directive Proposal should be amended to remove the requirement of intention on the part of the offenders because it is very difficult to prove and this may, if not properly enforced, give rise to the ineffective enforcement of its criminal sanctions. It was further submitted that the Criminal Sanctions Market Abuse Directive Proposal should be reviewed to ensure that it clearly provides separate and different criminal sanctions for natural and juristic persons that will be homogeneously enforced across the European Union member states.

It was noted that the Market Abuse Regulation Proposal provides that the precise data to be included in insider lists should be defined in delegated acts and implementing technical standards adopted by the European Commission.\textsuperscript{256} It was also noted that issuers whose financial instruments are admitted to trading on a small and medium-sized growth market and issuers who have not requested or approved admission of their financial instruments to trading on a regulated market, multilateral trading facilities and/or organised trading facilities are exempted from drawing up insider lists.\textsuperscript{257} Moreover, it was acknowledged that any transaction made by a person executing managerial responsibilities on behalf of the issuer or whereby the manager lends or pledges financial instruments shall be required to be disclosed to the regulators and the public, unless it is less than €20,000 per calendar year.\textsuperscript{258} Nonetheless, it was submitted that the Market Abuse Regulation Proposal should be reviewed to provide adequate measures or provisions on the content of insider lists and/or conditions under which issuers shall have an obligation to draw up such lists to reduce administrative burdens, particularly on multinational companies.

New measures were considered; for instance, inside information relating to issuers of a financial instrument whose financial instruments are admitted to trading on a small and

\textsuperscript{254} See paragraph 645 above.
\textsuperscript{255} See paragraph 645 above.
\textsuperscript{256} See paragraph 645 above.
\textsuperscript{257} See paragraph 645 above.
\textsuperscript{258} See paragraph 645 above.
medium-sized growth market may now be posted by the trading venue on its website and/or in accordance with a standardised content and format defined in implementing technical standards adopted by the European Commission. Nevertheless, it was argued that such issuers, like any other issuers, will be required to seek permission from the competent authorities if they want to delay the disclosure of inside information. It is submitted that the aforementioned delayed disclosure of inside information might be very difficult to implement homogeneously in the European Union member states to prevent market abuse without being exploited by other unscrupulous issuers.

Notwithstanding the aforementioned shortcomings, the EU Market Abuse Directive’s regulatory framework and the subsequent provisions of the Market Abuse Regulation Proposal and the Criminal Sanctions Market Abuse Directive Proposal could become more valuable to South Africa in several respects. In a nutshell, although a detailed analysis of the recommendations is earmarked for the last chapter, it is concluded and submitted that the proposed provisions stipulated and summarised below could improve the enforcement of the market abuse ban in South Africa:

Firstly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions which broadly extend the scope of the market abuse ban to cover securities or financial instruments traded on regulated markets, over the counter markets, organised trading facilities or multilateral trading facilities in South Africa or elsewhere, to enable the Financial Services Board and other relevant regulatory authorities to curb the market abuse challenges posed by high frequency trading and other related illicit activities associated with the new trading platforms;

Secondly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed in line with the Market Abuse Regulation Proposal and the Wholesale Energy Market Integrity and Transparency Regulation to enact a specific definition of inside information for commodity derivatives, spot commodity derivatives and related spot commodity contracts to curb insider trading and cross-market manipulation in the South African physical (non-financial markets) commodities markets; and/or enacting separate, adequate and specific commodity derivatives regulations or

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259 See paragraph 645 above.
260 See paragraph 645 above.
legislation that targets market abuse activities involving commodity derivatives, spot commodity derivatives and related spot commodity contracts in the South African commodities markets;

Thirdly, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact adequate provisions on emission allowances in order to discourage cross-border market abuse activities in the spot secondary markets or related emission allowances markets in South Africa and elsewhere;

Fourthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact adequate, separate and specific provisions that distinguish and prohibit both actual and attempted insider trading and market manipulation offences to enhance market integrity and improve the combating of market abuse in South Africa;

Fifthly, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in accordance with the Market Abuse Regulation Proposal to provide specific market abuse whistle-blower immunity provisions for the purposes of encouraging all the persons to report market abuse activities to the Financial Services Board and/or other relevant enforcement authorities in South Africa;

Sixthly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact specific provisions for separate and different criminal sanctions that can be levied against any person (including juristic persons) who incites, aids and abets or attempts to incite, aid and/or abet another person to commit market abuse offences in South Africa;

Seventhly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that oblige issuers and other relevant persons to draw and update insider lists to enhance the detection and prevention of market abuse practices in South Africa;

Eighthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that mandate managers, directors and other relevant persons to disclose to the Financial Services Board and the public any transaction
(including their lending or pledging of securities or financial instruments) executed on behalf of the issuers, in order to deter such persons from indulging in market abuse activities;

Lastly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to introduce a mandatory prompt disclosure obligation on the part of the issuers, for them to disclose inside information relating to securities or financial instruments traded on regulated markets, over the counter markets and/or other small and medium-sized growth markets so as to combat possible market abuse activity in both the regulated and unregulated markets and/or other trading platforms in South Africa.

The next chapter will, from a comparative perspective, focus on the enforcement of the market abuse prohibition in the United Kingdom in order to recommend, where possible, measures and/or principles that could also be incorporated in the South African market abuse laws to enhance the curbing of market abuse practices in the relevant financial markets.
CHAPTER SEVEN
THE ENFORCEMENT OF MARKET ABUSE PROVISIONS IN UNITED KINGDOM: A COMPARATIVE PERSPECTIVE

7.1 Introduction

Like several other countries, the United Kingdom has a regulatory and enforcement framework in place to combat insider trading, as well as other forms of market manipulation practices. In this regard, it is important to note that the United Kingdom’s market abuse regime has a separate and specific statute that deals with insider trading\(^1\) and another statute which broadly deals with market manipulation and other related market abuse activities.\(^2\) The market abuse legislation in the United Kingdom has further been carefully formulated to incorporate some of the provisions of the 2003 European Directive on market abuse.\(^3\) Consequently, this broad and extensive regulatory approach has led countries in other jurisdictions, including South Africa, to follow some of the enforcement approaches of the United Kingdom’s market abuse regime, especially with regard to the prohibition on insider trading.\(^4\)

It is against this background that this chapter will undertake a comparative analysis of the regulation and enforcement of market abuse legislation in the United Kingdom and South Africa to explore their similarities and differences. Therefore, a general historical overview of the insider trading legislation will be discussed first, followed by a similar discussion on the prohibition of market manipulation practices. This is not done only to explore the historical development of the anti-market abuse enforcement framework in the United Kingdom, but also to explore the strengths and weaknesses of the enforcement approaches adopted by such framework. In relation to this, the detection, prosecution, and preventative

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1. The Criminal Justice Act 1993 (c 36), hereinafter referred to as the Criminal Justice Act.
4. Other countries that were also influenced by the United Kingdom’s insider trading legislation include Germany, Italy, Canada, Mexico and France. See further Steinberg “Insider Trading Regulation–A Comparative Perspective” 2003 *The International Lawyer* 153 154-171.
measures employed in the United Kingdom will be investigated and, where necessary, contrasted with similar enforcement approaches in South Africa. Accordingly, only relevant United Kingdom market abuse provisions and cases will be discussed and contrasted with similar provisions and cases in South Africa for the purposes of identifying enforcement methods that could possibly be integrated in the South African anti-market abuse enforcement framework.

7.2 Historical Overview of Insider Trading Prohibition

A brief overview of the provisions of the insider trading legislation in the United Kingdom will be discussed here, with the principal focus on those that deal with the enforcement. Thereafter a comparative analysis with similar developments in South Africa will be carried out.

The United Kingdom’s insider trading regime has a relatively short history. Until 1980, insider trading was not statutorily prohibited in the United Kingdom. Prior to this, two legislative attempts to outlaw insider trading in the early 1970s were unsuccessfully made. This was further worsened by the fact that the common law failed to provide clear opportunities for the prejudiced persons to seek their redress in the civil courts.

Consequently, the legislature enacted the Companies Act 1980. However, this Act made insider trading a criminal offence only in certain specified circumstances. Moreover, the Companies Act 1980 provided some requirements for directors, members of their families and

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5 Avgouleas The Mechanics and Regulation of Market Abuse 308.
6 Barnes Stock Market Efficiency, Insider Dealing 125.
7 For instance in 1973, the Conservative government published a Companies Bill that would have prohibited insider trading, but it collapsed when the said government was defeated in the February 1974 general election. A similar Bill was proposed by the Labour government in 1978 and it suffered the same fate when the Labour government lost the May 1979 general election.
8 In other words, the use of inside information without some affirmative obligation to disclose it did not give rise to civil liability for insider trading. See further Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing (2009) 44.
9 (c 22), hereinafter referred to as the Companies Act 1980.
10 Also see s 68 to s 73 of the Companies Act 1980. Also see generally Blair & Walker Financial Services Law (2006) 267.
substantial shareholders to report any dealings in shares of their companies to discourage the misuse of non-public inside information.\textsuperscript{11}

In an attempt to improve the prohibition of insider trading in the United Kingdom, the provisions of the Companies Act 1980 were revised and consolidated into the Companies Act 1985.\textsuperscript{12} These provisions banning insider trading were further revised and re-branded as the Company Securities (Insider Dealing) Act 1985.\textsuperscript{13} The Insider Dealing Act prohibited individuals (insiders)\textsuperscript{14} who had access to material non-public inside information by virtue of their position within a company from dealing in the securities of the company while having such information. Furthermore, these insiders were prohibited from making a selective disclosure of non-public inside information to others (tipping) and it also prohibited the tippees from dealing in securities on the basis of such information.\textsuperscript{15} In addition, individuals with non-public information about a suggested takeover of a company were prohibited from dealing in that company’s stock. However, the provisions of the Insider Dealing Act applied only to individuals who knowingly dealt in the affected securities while in possession of material non-public inside information.\textsuperscript{16} Furthermore, the provisions of the Insider Dealing Act provided only criminal sanctions for insider trading violations. As a result, the scope and impact of this Act was somewhat restricted and narrow.\textsuperscript{17}

Owing to a considerable uncertainty on the effectiveness of the provisions of the Insider Dealing Act, the legislature introduced the Financial Services Act 1986.\textsuperscript{18} The provisions of the Financial Services Act were \textit{inter alia} aimed at supplementing and strengthening the enforcement of the insider trading ban in the United Kingdom.\textsuperscript{19} However, the provisions of

\textsuperscript{11} Notwithstanding the fact that these disclosure and reporting duties were probably useful and justified in many respects, it is debatable whether such duties had the practical effect of prohibiting insider trading and other related illicit trading practices. See further Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing 44.}
\textsuperscript{12} (c 6), hereinafter referred to as the Companies Act 1985.
\textsuperscript{13} (c 8), hereinafter referred to as the Insider Dealing Act; also see Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing 44.}
\textsuperscript{14} Such insiders included directors, officers, employees and various kinds of agents of the company.
\textsuperscript{15} See further Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing 45.}
\textsuperscript{16} Thus, possible insider trading violations by juristic persons were not covered. Generally see s 10(b).
\textsuperscript{17} In spite of the fact that the insider trading prohibition was effective since 1980, there were no convictions under the Insider Dealing Act until the late 1980s. See further Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing 45.}
\textsuperscript{18} (c 60), hereinafter referred to as the Financial Services Act.
\textsuperscript{19} S 173 to s 178 of the Financial Services Act. Also see further Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing 44.}
this Act were still applicable only to individuals and offered no civil remedy for such individuals who were prejudiced by insider trading.

The provisions of the Insider Dealing Act (as amended by the Financial Services Act) were therefore, superseded by the Criminal Justice Act. Thus, the provisions of the Criminal Justice Act were, among other things, targeted at removing the loopholes that were contained in its predecessors by incorporating some recommendations from the European Council Directive on insider trading and extending the application of the prohibition on insider trading to a wider class of securities and individuals. Specifically, three classes of individuals (insiders) that are statutorily prohibited from committing insider trading include firstly, a person who has direct knowledge of non-public inside information (primary insider) by virtue of being a director, employee or shareholder of an issuer of securities or by virtue of their employment or office. Secondly, the Criminal Justice Act prohibits an individual (secondary insider) who obtains non-public inside information either directly or indirectly from a primary insider from committing insider trading offences. Lastly, the Criminal Justice Act further discourages any secondary insider’s tippees from indulging in insider trading.

Furthermore, the Criminal Justice Act prohibits individuals from engaging in approximately three forms of conduct that would amount to insider trading. Firstly, individuals are prohibited from dealing in price-affected securities on the basis of non-public material inside information. Secondly, individuals are prohibited from encouraging (tipping) other persons to deal in price-affected securities on the basis of non-public material inside information.
Lastly, the Criminal Justice Act prohibits individuals from knowingly and improperly disclosing non-public material inside information to other persons. No individual (insider) may be convicted of insider trading unless he knew that he was in possession of non-public inside information and dealt in the affected securities on the basis of such information.

Although the Criminal Justice Act introduced a number of significant changes such as a wider definition of securities, its provisions are still flawed in some respects. For instance, its prohibition may only give rise to criminal sanctions against individuals who practise insider trading. Put differently, the definition of “individual” only covers unincorporated partnerships or corporations comprising a collection of individuals. This is arguably one of the main weaknesses of the insider trading ban contained in the Criminal Justice Act. Moreover, individuals will only be liable for insider trading when they deal in affected securities on a regulated market or where such dealing is conducted on the over the counter markets through a professional intermediary.

Apart from the Criminal Justice Act, the insider trading practice is also indirectly prohibited in the Companies Act 2006. For instance, the directors of a company are prohibited from accepting benefits from third parties and dealing in such company’s securities if they have a direct or indirect interest that contradicts the interests of the company, especially with regard to their use of privileged inside information to avoid possible conflicts of interests and/or insider trading. Moreover, circumstances in which a company can deal in its own securities

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29 S 52(2)(b). It is of interest to note that individuals could be liable for insider trading in terms of s 52 if the prosecuting authorities prove that such accused individuals are insiders as stipulated in s 57 and that they were in possession of non-public inside information as proscribed in s 56 of the Criminal Justice Act. See Part V of the Criminal Justice Act. See further Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 46-51.

30 This definition of securities included shares, debentures and derivatives in companies as well as gilts and local authority stock in both local and foreign public bodies and their derivatives. See Schedule 2 of the Criminal Justice Act.

31 This could suggest that other corporations and entities like public companies are exempted from insider trading liability. Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 46.

32 See further Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 46.

33 Face to face over the counter (OTC) transactions between non-professional intermediaries are excluded from insider trading liability under the Criminal Justice Act. Also see Avgouleas The Mechanics and Regulation of Market Abuse 320 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 46.

34 (c 46), hereinafter referred to as the Companies Act 2006.

35 S 176 of the Companies Act 2006.

36 See s 175 of the Companies Act 2006 & s 177; s 182; s 187 read with s 178(2) of the same Act which imposes a duty on the directors to disclose their interests in proposed or ongoing transactions. See further Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 20.
or capital to repurchase, cancel stock, or redeem preference shares are carefully regulated to prevent the abuse of non-public price-sensitive information through insider trading.37

### 7.3 Historical Overview of Market Manipulation Prohibition

Notwithstanding the fact that market abuse also constitutes insider trading activity,38 this sub-heading will mainly discuss market manipulation and other forms of market abuse that do not necessarily amount to insider trading.

Market manipulation and other related market abuse activities have been statutorily prohibited in the United Kingdom, probably since the early 1860s.39 The initial attempt to prohibit market manipulation in the United Kingdom was made by the Larceny Act 1861. This Act criminalised fraudulent misrepresentations intended to create a false market.40 The second attempt to regulate market manipulation in the United Kingdom was possibly introduced under the Prevention of Fraud (Investments) Act 1939.41 However, this Act was repealed by the Prevention of Fraud (Investments) Act 1958.42 The Prevention of Fraud (Investments) Act 1958 prohibited dishonest concealment of material non-public inside information relating to any securities for personal gain or the benefit of others.43 However, its purported market abuse ban was extremely difficult to enforce, especially where the wrongful conduct was committed outside the United Kingdom.

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37 Also see generally Part 18 of the Companies Act 2006 & s 170(4) of the same Act which states that the general duties of directors shall be interpreted and applied in the same way as common law rules or equitable principles. This is probably aimed at affording equitable damages or redress to any persons prejudiced by insider trading. Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 12-13 &17-18.

38 In light of this, it is essential to note that about seven types of market abuse practices are statutorily prohibited in the United Kingdom. Barnes Stock Market Efficiency, Insider Dealing 132; Russen Financial Services Authorisation, Supervision and Enforcement: A Litigator’s Guide (2006) 206-208.

39 S 84 of the Larceny Act 1861 (24 and 25 Vict c 96). Also see Avgouleas The Mechanics and Regulation of Market Abuse 314.

40 S 84 of the Larceny Act 1861; also see R v Kylsant [1932] 1 KB 442, where the court employed s 84 of the Larceny Act 1861 and convicted Lord Kylsant for misrepresentations made in his company’s prospectus & see further related remarks in Avgouleas The Mechanics and Regulation of Market Abuse 314.

41 (c 16); see s 12(1).

42 (c 45); also see Avgouleas The Mechanics and Regulation of Market Abuse 314; Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 44.

43 This was mainly aimed at discouraging market manipulation and other related market abuse practices. See further s 13 of the Prevention of Fraud (Investments) Act 1958.
As a result the legislature enacted a new market manipulation prohibition under the Financial Services Act.\textsuperscript{44} A two-fold market manipulation prohibition was formulated under the Financial Services Act. Firstly, it prohibited the making of misleading statements or concealment of material non-public inside information relating to any securities.\textsuperscript{45} Secondly, the Financial Services Act prohibited the perpetration of market manipulation through misleading conduct or practices.\textsuperscript{46}

The market manipulation prohibition under the Financial Services Act was, however, flawed in some areas. For instance, it failed to obtain more convictions against the market manipulation offenders. This could have been triggered by its heavy reliance on the criminal sanctions alone to combat market manipulation or similar market abuse activities.\textsuperscript{47}

In order to improve and align the United Kingdom’s market abuse legislation with the international best standards, the legislature enacted the Financial Services and Markets Act.\textsuperscript{48} The Financial Services and Markets Act came into effect on 1 December 2001. This Act defined and treated market manipulation and other market abuse practices both as criminal and civil offences. The initial civil provisions of the Financial Services and Markets Act discouraged three conducts, namely the misuse of information, the making or publishing of false or misleading impressions and market distortion or manipulation.\textsuperscript{49} These provisions were extensively revised on 1 July 2005 after the adoption of the Treasury’s Market Abuse\textsuperscript{50} and Investment Recommendation (Media) Regulations\textsuperscript{51} to implement the European Union Market Abuse Directive\textsuperscript{52} and its so-called Level 2 Implementing Measures.\textsuperscript{53}

\textsuperscript{44} Also see generally Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 314; Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 44.

\textsuperscript{45} S 47(1).


\textsuperscript{47} Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 308.

\textsuperscript{48} Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 307.

\textsuperscript{49} See the original s 118(2)(a) to (c). Also see Russen \textit{Financial Services Authorisation, Supervision} 185.


\textsuperscript{51} 2005 SI 2005/382.

\textsuperscript{52} See Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16 (hereinafter referred to as the EU Market Abuse Directive); also see Avgouleas \textit{The
The new civil provisions under the Financial Services and Markets Act provided a broader and comprehensive definition of various conducts that could amount to market manipulation and other related market abuse practices.54 These provisions also retained civil offences for engaging in conduct that will give rise to the misuse of material inside information55 and creation of a false or misleading impression or distortion of the financial markets.56 The new civil offence under the Financial Services and Markets Act is now applicable to both natural and juristic persons.57 Moreover, this civil offence need only be proved on the balance of probabilities. It is not necessary to prove intention on the part of the alleged offenders; negligent action or inaction may be sufficient for such offenders to incur liability.58

In addition, as earlier indicated, there are seven types of market abuse practices in the United Kingdom and these practices will each now be briefly discussed. Firstly, insider dealing59 is expressly outlawed in the Financial Services and Markets Act. Consequently, any person or insider who deals or attempts to deal in qualifying and related investments on the basis of non-public price-sensitive inside information relating to the investments in question will incur

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54 S 118(1) to (8); also see the initial Part VIII of the Financial Services and Markets Act.

55 S 118(2) to (4) of the Financial Services and Markets Act.

56 See s 118(5) to (8) of the Financial Services and Markets Act. These civil offences are enforced parallel to the criminal offences contained in the Criminal Justice Act.

57 See s 150 read with s 90; s 380; 382; s 118(1); s 118B & s 118C of the Financial Services and Markets Act. Additionally see Avgouleas The Mechanics and Regulation of Market Abuse 391-446 for related analysis.

58 It is only primarily important to establish whether the alleged market abuse conduct occurred in relation to any qualifying investments on a prescribed market before imposing any liability on the alleged offenders. Prescribed markets include but are not limited to markets listed under the rules of the United Kingdom recognised investment exchange such as the London Stock Exchange, the International Petroleum Exchange, the London Metal Exchange, EDX London, Euronext-LIFFE and Virt-x. Qualifying investments include financial instruments like options, bonds and other forms of securities debt, derivatives on commodities, company shares (and securities equivalent to company shares), money market instruments, financial futures contracts, forward interest rate agreements, interest rate, equity swaps and other securities giving right to acquire shares or bonds. See s 118(1)(a) & (b) of the Financial Services and Markets Act; also see Russen Financial Services Authorisation, Supervision 206-208; Barnes Stock Market Efficiency, Insider Dealing 129-132 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 74-75.

59 This conduct is also criminally prohibited under the Criminal Justice Act. See paragraph 7 2 above.
civil liability under the Financial Services and Markets Act. Secondly, improper disclosure is also prohibited in the Financial Services and Markets Act. Accordingly, the disclosure of non-public price-sensitive information by an insider or any individual to another person in instances other than for the proper performance of his employment, profession or duties will give rise to a civil offence on the part of that individual under the Financial Services and Markets Act. Thirdly, any misuse of information is discouraged under the Financial Services and Markets Act. Therefore, conduct based on information that is not generally available but that would affect the decision of the investors to deal or not to deal in certain qualifying investments could amount to market manipulation or other market abuse offences. Such conduct must also be based on information which a “regular user” of the market or the person in the position of the alleged offender would consider relevant in determining the terms on which to deal before civil liability can be imputed against any accused persons.

Fourthly, manipulating transactions are further prohibited in the Financial Services and Markets Act. As a result, any behaviour or dealing that gives a false or misleading impression of the supply of or demand for one or more investments to raise the price of the investments in question to abnormal or artificial levels amounts to a civil offence of market manipulation. Such behaviour also includes the making of false or misleading transactions so as to give a false impression of the volume of trade in the affected securities. Manipulating transactions further includes price positioning. This usually occurs when a

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60 S 118(2). Also see further Barnes Stock Market Efficiency, Insider Dealing 132-133 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 72-73 & 78.
61 S 118(3). In other words, the disclosure of inside information by a director of a company to another person in mere social context or selective briefing of market participants like financial analysts by directors or other persons with managerial positions will suffice for such persons to incur liability for improper disclosure of inside information.
62 S 118(4).
63 S 130A read with s 118A & s 118C of the Financial Services and Markets Act.
64 Factors that are considered when determining whether the information in question is relevant to a “regular user” includes the extent to which the information is reliable (including how close the person or offender involved is to the tipper or the person who is the original source); whether such information is not already generally available to market participants and whether the information is fresh and different from information which is generally available or that would lead to a disclosure to be made in the future. Also see Barnes Stock Market Efficiency, Insider Dealing 134 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 78-80 & Avgouleas The Mechanics and Regulation of Market Abuse 344-345.
65 S 118(5).
66 For example, wash trades; buying qualifying investments at the close of the market to mislead investors who act at closing prices; buying and selling a specific security by persons among themselves to create an illusion (painting the tape) of high volumes of trading.
person enters small orders into an electronic trading system at prices which are higher than the previous bid or lower than the previous offer, in order to move the price of the qualifying investments in question.\textsuperscript{67} Fifthly, manipulating devices are also prohibited under the Financial Services and Markets Act. Accordingly, any persons who trade or place orders to trade through employing fictitious devices or any other form of deception or contrivance will incur civil liability for market manipulation.\textsuperscript{68} Examples of conduct that involve the use of manipulative devices include “flipping” or disclosing conflicting statements about certain qualifying investments through the Internet and engaging in transactions that are aimed at concealing the ownership of a qualifying investment to avoid compliance with the disclosure requirements.

Sixthly, illicit dissemination of information is prohibited in the Financial Services and Markets Act. Put differently, an insider or any person who knowingly gives information that conveys or is likely to convey a false or misleading impression about an investment or the issuer of an investment will be liable for market manipulation.\textsuperscript{69} Lastly, distortion and misleading behaviour is also outlawed in the Financial Services and Markets Act. In other words, any conduct that gives a false or misleading impression of either the demand for or the supply of investments and behaviour that distorts or is likely to distort the market in such investments leads to civil liability on the part of the offenders.\textsuperscript{70}

A separate civil prohibition against persons who encourage or require others to engage in market manipulation or other market abuse activities is also proscribed in the Financial Services and Markets Act.\textsuperscript{71} The requirement or encouragement offence is committed where, by taking or refraining from taking any action,\textsuperscript{72} a person in question has required or encouraged others to indulge in market manipulation or other related market abuse activities.

\textsuperscript{67} Other examples of price positioning involve the so-called abusive squeezes, where a person has a position (directly or indirectly) in an investment under which quantities of qualifying investment or related investment are deliverable.

\textsuperscript{68} S 118(6).

\textsuperscript{69} S 118(7); also see further Barnes \textit{Stock Market Efficiency, Insider Dealing} 138 & Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 78.

\textsuperscript{70} S 118(8); also see Russen \textit{Financial Services Authorisation, Supervision} 206-207 & Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 332-358 for further related analysis.

\textsuperscript{71} S 123; also see Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 78.

\textsuperscript{72} Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 78; the Financial Services Authority (hereinafter referred to as the FSA), see the FSA’s Code of Market Conduct 1.8.2.
This may indicate that the Financial Services and Markets Act has a broader market abuse civil prohibition than its predecessors.

Market manipulation is also treated as a criminal offence under the Financial Services and Markets Act.\(^{73}\) Precisely, any person who makes misleading statements or who dishonestly conceals material facts relating to qualifying investments for the purpose of inducing or who is reckless as to whether they may induce other persons to enter or exercise or refrain from exercising any rights conferred by the relevant investments will be criminally liable for market manipulation.\(^{74}\)

Furthermore, engaging in misleading practices and conduct which creates a false or misleading impression in respect of the market or the value of any qualifying investments for the purposes of creating that impression and inducing other persons to acquire, dispose of, subscribe for, or underwrite such investments or to refrain from doing so is criminalised under the Financial Services and Markets Act.\(^{75}\) This presupposes that misleading statements or omissions and other forms of market manipulation such as artificial transactions and trade-based manipulations are further prohibited and criminalised under the Financial Services and Markets Act.\(^{76}\)

Market manipulation has further been indirectly made a criminal offence under the Fraud Act.\(^{77}\) This Act introduced a new general offence fraud which discourages false representations, failure to disclose non-public material inside information and fraud by abuse of position.\(^{78}\) Thus, although it is most likely that violations for market manipulation or other related activities may be prosecuted under the Financial Services and Markets Act or the Criminal Justice Act, such violations may also fall under the general offence of fraud as stipulated in the Fraud Act.\(^{79}\)

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73 S 397. This section replicates s 47(1) of the Financial Services Act.

74 S 397(1) & (2). Also see Avgouleas The Mechanics and Regulation of Market Abuse 314-316.

75 See s 397(3). While the prohibition under s 397(1) & (2) requires proof of dishonest or recklessness, liability in terms of s 397(3) may suffice even where mere misleading acts were executed by the accused persons. Also see Avgouleas The Mechanics and Regulation of Market Abuse 314-318.

76 S 397(3). Also see Avgouleas The Mechanics and Regulation of Market Abuse 318-320.

77 2006 (c 35), hereinafter referred to as the Fraud Act.

78 A person may be regarded as having abused their position to commit market abuse even when their conduct consisted of an omission rather than an actual act. See s 4 read with s 3.

79 Barnes Stock Market Efficiency, Insider Dealing 128-129.
Civil, criminal and administrative penalties are employed in the United Kingdom to combat and discourage market abuse practices. However, it is important to note that the discussion under this sub-heading will mainly focus on penalties as proscribed in the Criminal Justice Act and the Financial Services and Markets Act.

Criminal penalties may be imposed on all persons who knowingly engage in market abuse practices in the United Kingdom. Thus, the contravention of the insider trading provisions contained in the Criminal Justice Act and other market abuse provisions contained in the Financial Services and Markets Act will give rise to criminal penalties in the United Kingdom. Criminal penalties for insider trading under the Criminal Justice Act may only be imposed on individuals. However, the criminal penalties for insider trading under the Financial Services and Markets Act are now applicable to both natural and juristic persons. Criminal penalties that may be imposed on individuals for insider trading or market manipulation include a fine or imprisonment for a term not exceeding six months, or both on summary conviction; or upon conviction on indictment, a fine or imprisonment for a term not exceeding seven years, or both.

The perpetrators of market abuse in the United Kingdom may also be liable for civil penalties. Although these penalties apply to both juristic and natural persons under the Financial Services and Markets Act, there are no civil penalties for insider trading under the Criminal Justice Act. Civil penalties that may be imposed on the perpetrators (offenders) of market abuse under the Financial Services and Markets Act comprise unlimited monetary fines, disgorgement of profits and/or the payment of compensation to the prejudiced persons. A

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80 See Part V read with s 52 & s 61 of the Criminal Justice Act.
81 S 402 read with s 397 of the Financial Services and Markets Act; also see Part V of the Criminal Justice Act.
82 See paragraphs 72 & 73 above.
83 S 402; also related remarks in paragraph 73 above.
84 S 402 of the Financial Services and Markets Act; also see Avgouleas The Mechanics and Regulation of Market Abuse 323-324 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 93-94.
85 S 402; also see similar analysis in paragraph 73 above.
86 See Part V; also see related analysis in paragraph 72 above.
87 S 123(1).
88 Also see further Avgouleas The Mechanics and Regulation of Market Abuse 375; Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 94.
number of factors have to be considered when determining the appropriate amount of the fine to be imposed on the offenders. Such factors are provided for in the Financial Services and Markets Act as well as in the enforcement section of the Financial Services Authority’s Enforcement (Manual) Handbook. The factors include the following: (a) the adverse effect of the behaviour on the market in question; (b) whether the person on whom the penalty is to be imposed is an individual or a juristic person; (c) the amount of profits accrued or loss avoided; (d) the degree to which the conduct in question was deliberate or reckless and (e) the conduct following the behaviour of the alleged offender in question.

With regard to the last factor, the Financial Services Authority may further consider the degree of co-operation that the accused person gave during the investigations of the wrongful conduct and whether any remedial steps were taken by that person from the time that behaviour was initially identified.

The courts may, at the request of the Financial Services Authority, further impose monetary fines on a person who violates any market abuse provisions. This usually follows after an application to the court by the Financial Services Authority for an injunctive or restitution relief.

In addition, a number of administrative penalties are used to curb market abuse in the United Kingdom. For example, disciplinary sanctions such as variation of (withdrawal of authorisation) Part IV permission; injunctions (including cease or desist orders) to take remedial steps, secure or freeze assets and to discourage a certain conduct. These court injunctions can be imposed on any person who commits market abuse practices, regardless of

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89. Release 064 April 2007, which is hereinafter referred to simply as the “ENF”.
91. See ENF 14.7.4.G(5). Also see Swan Market Abuse Regulation 113-123.
92. See s 129 of the Financial Services and Markets Act.
93. See s 384 read with s 381 & s 383 of the Financial Services and Markets Act; also see Russen Financial Services Authorisation, Supervision 147-151.
94. Swan Market Abuse Regulation 112.
95. See s 53 & s 54 read with s 63 of the Financial Services and Markets Act; also see ENF 3, 4 & 5.
96. See s 380 & s 381 of the Financial Services and Markets Act. Also see ENF 6.1.1.G; ENF 6.2.1.G; ENF 6.6.1.G; ENF 6.3.2.G & ENF 6.3.7.G.
whether such person is regulated by the Financial Services Authority. Other administrative penalties that can be levied against market abuse offenders are public censure, withdrawal of approval on former approved persons who are not fit to perform their initial authorised functions, prohibition of individuals who engage in illicit trading activities from dealing or carrying out functions related to regulated activities and imposing restitution and redress orders on any persons who commit market manipulation and/or other market abuse offences. It should be borne in mind that these administrative penalties are applicable to all persons (natural and juristic persons) especially under the Financial Services and Markets Act.

The Financial Services and Markets Act further confers a private right of action to the Financial Services Authority to apply to the courts for a restraining order or restitution order against any person who knowingly contravenes its relevant market abuse provisions. In addition, the Financial Services Authority may also seek a court order against any alleged offenders to disgorge the profits gained or directly pay compensation to the persons affected by their market abuse activities. Although a civil private right of action is available as indicated above to the persons who suffer losses due to other forms of market abuse, there is no such express private right of action for persons affected by market manipulation as contained in the Financial Services and Markets Act and insider trading as contained in the Criminal Justice Act.

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97 ENF 6.1.1.G. A person who disobeys or fails to comply with an injunction may be held in contempt of court and could be liable to imprisonment, monetary fine or seizure of the assets. S 206 of the Financial Services and Markets Act; also see ENF 6.2.5.G & see further Swan Market Abuse Regulation 125.

98 S 205 of the Financial Services and Markets Act; also see ENF 12.

99 S 59 read with s 66 & s 210 of the Financial Services and Markets Act. Also see ENF 7.5.1.G.

100 S 56(2) of the Financial Services and Markets Act. See generally ENF 8.1.2.G.

101 S 382; s 383 & s 384 of the Financial Services and Markets Act. Also see ENF 9.1.2.G; ENF 9.4.2.G & ENF 9.5.1.G. See further Russen Financial Services Authorisation, Supervision 136-166.

102 In this regard, it should be noted that administrative penalties under the Criminal Justice Act are possibly still limited to individuals (natural persons) alone.

103 S 150; s 380 & s 382. The court orders for a private right of action do not however, apply to market abuse violations regarding s 397 of the Financial Services and Markets Act.

104 Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 94.

105 S 397 of the Financial Services and Markets Act; also see Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 94.

The Financial Services Authority was established as the main single body which administers an integrated regulatory system for all the financial services and markets in the United Kingdom. This further suggests that the Financial Services Authority has the main responsibility of administering and enforcing the prohibition on market abuse in the United Kingdom.

Although there are a number of other regulatory bodies, the Financial Services Authority has the sole responsibility and powers to police the enforcement of the market abuse prohibition in the United Kingdom. These powers include to investigate or refer a matter to its Regulatory Decisions Committee; impose unlimited monetary penalties; make a public statement that a person has engaged in market abuse, and to apply to the courts for an injunction to claim restitution or restrain continued market abuse. The Financial Services Authority may further make market abuse rules and determine the general policy and principles to govern the performance of particular functions in the relevant financial markets.

In order to enhance its enforcement, the Financial Services Authority is divided into several divisions such as the Supervision, Markets and Enforcement Divisions. The Supervision Division’s sub-divisions within the Financial Services Authority that can make referrals to the Enforcement Division consist of major retail groups, retail firms, contact revenue and information management groups and the financial markets. The Financial Services Authority is further equipped with extensive interrogatory and investigatory powers which it

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107 The FSA was introduced on 27 October 1997 as the main regulatory body which replaced all earlier and similar regulatory agencies in the United Kingdom. See Blair & Walker *Financial Services Law* 3.

108 This is the so-called single regulator model which in this context entails that only one regulatory body (the FSA) has the main authority to supervise the regulation and enforcement of the market abuse ban in the United Kingdom. It is, however, not the purpose of this sub-heading to discuss all the merits and demerits of this so-called single regulator model.

109 S 2(4) of the Financial Services and Markets Act which stipulates the general functions of the FSA. Also see Barnes *Stock Market Efficiency, Insider Dealing* 138-139.

110 S 138 to s 158. For further analysis, check Blair & Walker *Financial Services Law* 14-17.

111 Swan *Market Abuse Regulation* 88.

112 Therefore, supervisors are responsible for isolating market abuse cases in order to submit them to the Enforcement Division or the Crown Prosecution Services (CPS) or the Director of Public Prosecutions (DPP) for further investigation and prosecution.
may objectively exercise against any persons who violate the market abuse provisions.\textsuperscript{113} It may, for example, by written notice require an authorised person to provide specific information and other specified documents relevant to an ongoing investigation.\textsuperscript{114} Moreover, the Financial Services Authority may appoint additional persons as investigators of certain market abuse cases.\textsuperscript{115}

The Financial Services Authority can also act as a quasi-judicial and quasi-legislative regulatory body. Consequently, the Financial Services Authority may seek judicial and quasi-judicial remedies from the High Courts, namely issuer freezing orders or restitution orders against market abuse offenders, in order to stop a particular market abuse conduct. Moreover, the Financial Services Authority’s legislative role comprises, \textit{inter alia}, powers to promulgate relevant rules regarding market abuse to guide all market participants in the United Kingdom.\textsuperscript{116} In light of this, as earlier indicated,\textsuperscript{117} the Financial Services Authority issued a Code of Market Conduct which provides guidance regarding conduct that amounts to market abuse in the United Kingdom.\textsuperscript{118}

In addition, the Code of Market Conduct outlines in more detail the standards required of all participants in the United Kingdom’s financial markets. It broadly defines three categories of conduct that amount to market abuse, namely misuse of information, dissemination of false or misleading information and market distortion. Misuse of information is defined to involve behaviour (action or inaction) that is based on information which is not generally available but which would be relevant to an investor’s dealings in a particular investment and which is ordinarily disclosed to the market. Dissemination of false or misleading information is defined to involve behaviour that gives rise to or that is likely to give rise to false or misleading impression as to the supply or demand, price or value of an investment.\textsuperscript{119} Distortion of the market is defined in the Code of Market Conduct to include conduct that

\textsuperscript{113} S 165 to s 169 & s 284 of the Financial Services and Markets Act.
\textsuperscript{114} S 165(1); (2) & (3) of the Financial Services and Markets Act; also see further Avgouleas \textit{The Mechanics and Regulation of Market Abuse} 368-370.
\textsuperscript{115} S 97; s 167; s 168; s 173 & s 175 of the Financial Services and Markets Act. In addition, see Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 189-190.
\textsuperscript{116} S 119 read with s 122 of the Financial Services and Markets Act.
\textsuperscript{117} See discussion in paragraphs 7.3 & 7.5.1 above.
\textsuperscript{118} See the FSA Handbook (Code of Market Conduct) released on 19 July 2001.
\textsuperscript{119} The FSA has to date utilised the Internet bulletin boards to disclose relevant information relating to a number of qualifying investments. This is aimed at preventing market manipulation activities like the so-called pump and dump schemes which often prejudice innocent investors.
interferes with the normal process of supply and demand and which manipulates the market price of an investment.\textsuperscript{120}

Information gathering and relying on competent companies or skilled persons is another tool that is used by the Financial Services Authority. This enables the Financial Services Authority to gather information from both authorised persons and in certain instances, from non-regulated persons to prevent possible market abuse activity from occurring. Specifically, this is done by the use of skilled person’s reports to identify or track market abuse practices in the United Kingdom’s financial markets.\textsuperscript{121}

The Financial Services Authority may impose disciplinary sanctions on persons who commit market abuse offences. As earlier stated,\textsuperscript{122} such disciplinary sanctions comprise injunctions to disgorge the profits gained or stop certain market abuse activity, issuing warning notices, cancelling or withdrawing of Part IV permission, and prohibiting certain individuals from carrying out their functions that relate to regulated activities.\textsuperscript{123}

With regard to detection, the Financial Services Authority in conjunction with the London Stock Exchange relies on the Stock Exchange Automated Quotation market marking system to detect all possible market abuse activities in the relevant financial markets.\textsuperscript{124} Moreover, all listed United Kingdom equities and other investments listed on a subsidiary market known as the Alternative Investment Market could further rely on the Stock Exchange Alternative Trading System or Stock Exchange Automated Quotation or another trading system known as the Stock Exchange Alternative Trading System Plus to detect and curb market abuse practices.

In order to combat cross-border market abuse practices, the Financial Services Authority has brokered some co-operation with similar bodies in other jurisdictions. It has, for instance,

\textsuperscript{120} For example, when a person purchases large amounts of a particular share at or near the end of the day to mislead other investors.

\textsuperscript{121} The FSA is manned by about 2500 to 3000 competent persons (staff). This could further imply that that the Enforcement Division and other Divisions of the FSA have competent and skilled persons. See generally Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 190-195 & Blair & Walker Financial Services Law 34-35.

\textsuperscript{122} See paragraph 7 4 above.

\textsuperscript{123} Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 203 & 225-229.

\textsuperscript{124} Barnes Stock Market Efficiency, Insider Dealing 19.
signed various Memoranda of Understanding with other regulatory bodies like the United States Securities and Exchange Commission, the Commodity Futures Trading Commission and the International Organisation of Securities Commissions.125

As indicated above, it is evident that the Financial Services Authority plays a key role in the enforcement of the securities and market abuse provisions in the United Kingdom. For instance, notwithstanding the fact that the Financial Services Authority is primarily responsible for the enforcement of the civil remedy for market abuse, it further oversees the enforcement of other securities laws in the United Kingdom.

Moreover, although a few criminal cases of market manipulation and insider trading have been successfully prosecuted since the inception of the United Kingdom’s market abuse regime in 1986, relatively more prosecutions of such cases have been obtained, especially after 2001 when the Financial Services Authority took over from the Department of Trade and Industry.126 For instance, about five criminal cases of market abuse have so far been successfully prosecuted by the Financial Services Authority.127 Additionally, in the Rigby and Bailey scandal, Carl Rigby and Gareth Bailey were convicted for making a reckless statement, promise or forecast which was deceptive and misleading and sentenced to eighteen

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126 The Department of Trade and Industry (DTI) was previously responsible for enforcing the insider trading prohibition in the United Kingdom. It was generally believed that the DTI failed to obtain more convictions in criminal cases involving insider trading in the United Kingdom. Precisely, about 15 cases involving 19 individuals were prosecuted for insider trading during the period between 1984 & 1996 in the United Kingdom. However, no convictions were obtained in all these 15 cases. Barnes Stock Market Efficiency, Insider Dealing 161.

127 See generally Barnes Stock Market Efficiency, Insider Dealing 161.
months imprisonment each. They were further convicted of contravening the disclosure provisions of the Financial Services and Markets Act and sentenced to a two year jail term each. In the Hipwel and Bhoyrul scandal, Hipwell was jailed for six months; Shepherd was also jailed for three months while Bhoyrul was sentenced to 180 hours of community service for market abuse and conspiracy to commit market abuse on 17 December 2005.

In contrast to the few successful prosecutions achieved in the criminal cases of market abuse, the Financial Services Authority has to date obtained relatively more settlements in civil cases involving market abuse, especially after enactment of the enactment of the Financial Services and Markets Act. About twelve cases of market abuse offences which were committed during the period between April 2004 and March 2007 have so far been settled with the Financial Services Authority. Moreover, about five cases which constituted a breach of the Financial Services Authority’s Listing Rules were settled with the Financial Services Authority during the same period.

The Financial Services Authority has, in the wake of the early 1980s market abuse scandals such as the Guinness-Distillers and the Blue Arrow cases, subsequently introduced stricter measures to curb and prevent the recurrence of similar scandals in all the prescribed markets in the United Kingdom. For example, after a bogus take-over scheme for the shares of Distillers company, the chairman and chief executive officer of Guinness company, Ernest Saunders, financiers and the share support group members namely, Gerald Ronson, Sir

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129 S 397(1); also see Barnes Stock Market Efficiency, Insider Dealing 161.
130 Hipwell, Bhoyrul & Shepherd allegedly conspired between August 1999 & February 2000 to buy shares in 44 companies that they later tipped in their column over the Internet. As a result, Hipwell made £41 000, Anil Bhoyrul £15 000 & Terry Shepherd gained about £17 000. Barnes Stock Market Efficiency, Insider Dealing 162-164.
131 Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 94.
132 See related remarks in paragraphs 7 4 & 7 7 of this Chapter; also see Barnes Stock Market Efficiency, Insider Dealing 174 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 95.
133 Eight of these cases involved insider trading; one case constituted improper disclosure of non-public material information; two involved the unlawful dissemination and one constituted distortion and misleading behaviour. Barnes Stock Market Efficiency, Insider Dealing 174.
135 See the related discussions in paragraphs 7 5 2 & 7 7 of this Chapter; also see Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 93-94.
136 Directors and some members of the County NatWest and National Westminster Bank’s merchant banking subsidiary were convicted of misleading the market by disguising the failure of their Blue Arrow rights issue in February 1992. However, their convictions were set aside on appeal in August in 1992.
137 Generally see Barnes Stock Market Efficiency, Insider Dealing 148-152.
Jack Lyons and stock broker Antony Parnes were all convicted of conspiracy, theft and issuing false, misleading or deceptive accounting statements. Sir Jack Lyons was stripped of his knighthood, Saunders was sentenced to ten years in jail (he, however, served five months of this sentence but it was later halved on appeal due to his pre-senile dementia medical condition) and Gerald Ronson was fined for five million pounds plus a one year jail term. Antony Parnes was sentenced to two and half years imprisonment, but this sentence, however, was later reduced to 21 months on appeal in 1991. Consequently, the Financial Services Authority has so far imposed penalties and other appropriate administrative actions against any individuals or companies involved in market abuse activity. For example, in *ABN Amro Equities UK* case, on 23 April 2003 this company was fined £900 000 for market manipulation. In the same case, Michael Ackers was also fined £70 000 for violation of Principle 3 of the Financial Services Authority’s Listing Requirements which requires companies and the individuals concerned to maintain good corporate standards so as to combat market abuse conduct. In *Shell Transport and Trading and Royal Dutch/Shell Group of companies*, a £17 000 000 fine was imposed on the directors as well as other persons who issued false or misleading information to the financial markets contrary to the Listing Rules and the relevant provisions of the Financial Services and Markets Act.

Disciplinary action for a public censure was invoked by the Financial Services Authority in *Marconi plc* case. In this case, the Financial Services Authority issued a public statement to the effect that *Marconi plc* had failed to speedily release price-sensitive information regarding a change in its performance expectation to the relevant financial market. In another case, the Financial Services Authority found Roberto Casoni (a former equities

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138 Barnes *Stock Market Efficiency, Insider Dealing* 148-152.
139 Barnes *Stock Market Efficiency, Insider Dealing* 148-152.
140 Barnes *Stock Market Efficiency, Insider Dealing* 164-166.
141 See the FSA *Final Notice* 2004-08-24; also see Rider, Alexander, Linklater & Bazley *Market Abuse and Insider Dealing* 215.
142 Generally see Barnes *Stock Market Efficiency, Insider Dealing* 164-165; also see other similar cases such as the Financial Services Authority v (1) Sean Fradley (t/a Top Bet Placement Services) (2) Gary Woodward [2004] EWHC 3008 (Ch), where the FSA successfully obtained injunctions against the market abuse offenders & Philip Jabre v Financial Services Authority (2006) 36 fin 06/2006, where the FSA successfully charged the accused persons for engaging in conduct that give rise to market abuse. Also see Rider, Alexander, Linklater & Bazley *Market Abuse and Insider Dealing* 76-77; 206.
143 In so doing it was stated that *Marconi plc* company had contravened Rule 9.2(c) of the FSA’s Listing Rules.
analyst) guilty for failing to observe the required proper standards of market conduct contrary to its general principles for approved persons.  

7 5 2  The Role of the Courts

The relevant courts and the Department of Trade and Industry have played an important role in the enforcement of securities and market abuse laws in the United Kingdom. Put differently, the Department of Trade and Industry and the courts initially had the main prerogative to prosecute all criminal cases involving market abuse in the United Kingdom. Thus, in spite of the fact that the Financial Services Authority may now itself prosecute market abuse cases, it used to refer such criminal cases to the Department of Trade and Industry and the courts for further investigations and/or prosecution. In most instances the Department of Trade and Industry could prosecute and enforce securities violations that relate to general corporate matters, for example, the disqualification of directors. On the other hand, the courts may hear and prosecute any market abuse cases referred to them by the Financial Services Authority.

In addition, it should be noted that the Crown Prosecution Services is the public prosecuting body in England and Wales. The Director of Public Prosecutions and the Crown Office are the bodies responsible for prosecuting market abuse cases in Northern Ireland and Scotland respectively. The courts have the power to investigate, prosecute and impose appropriate penalties on market abuse offenders. For example, the courts may impose civil, criminal and administrative sanctions on any person who indulges in market abuse activities. The courts may, on application of the Financial Services Authority or any prejudiced person, further grant orders for judicial and quasi-judicial remedies such as injunction for restitution, freezing

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144 Additionally see the General Principle 3 of the FSA’s Listing Requirements. Also see other civil cases that were successfully settled with the FSA’s in table seven of Barnes Stock Market Efficiency, Insider Dealing 164-165 & Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 206-209.

145 Blair & Walker Financial Services Law 299-300.

146 It is reported that the Department of Trade and Industry’s market abuse prosecutorial powers are now vested in the Department for Business Enterprise and Regulatory Reform. Herbert Smith “UK Market Abuse Update” 2009 Financial Regulation Briefing 1 2-3; see the Department of Business Enterprise and Regulatory Reform’s market abuse prosecutions on <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/002.shtml> (accessed 28-01-2012).

147 S 402(1)(a) of the Financial Services and Markets Act.

148 S 381 of the Financial Services and Markets Act; also see s 148 of the Powers of Criminal Courts (Sentencing) Act 2000 (c 6), which empowers courts to impose restitution orders against all the convicted persons.
assets, declaratory relief, prohibitory and mandatory injunction relief as well as desist or seize orders against market abuse offenders.\textsuperscript{149} Undoubtedly, this has, in a way, further enhanced the Financial Services Authority’s imposition of administrative sanctions against the market abuse offenders in the United Kingdom.\textsuperscript{150} Additionally, the courts (including the Equity and Chancery Courts) may further award financial orders and damages to compensate all the persons affected by market abuse.\textsuperscript{151}

Despite the fact that some weaknesses and irregularities still exist in the criminal enforcement of the market abuse prohibition, the courts have to date successfully prosecuted a considerable number of cases involving market abuse in the United Kingdom. For example, cases like the \textit{Chase Manhattan Equities v Goodman}\textsuperscript{152} have been adequately prosecuted. In this case Knox J held that any transaction or dealing based on the misuse of inside information was against public policy, unenforceable and consequently resulted in criminal liability on the part of the offenders.\textsuperscript{153} Moreover, in the \textit{Scott v Brown}\textsuperscript{154} case, the Court of Appeal held that an agreement to stabilise the price of shares while a number of certain shares were brought into the financial market was illegal and unenforceable. This decision was \textit{inter alia} probably intended at preventing market abuse practices like insider trading and market manipulation. In the \textit{Financial Services Authority v Fitt}\textsuperscript{155} the High Court used its discretion to impose a freezing order against the persons accused of market abuse.\textsuperscript{156}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{149} For further clarity check s 129; s 380; s 381; s 382 & s 383 read with s 348 of the Financial Services and Markets Act. Also see Russen \textit{Financial Services Authorisation, Supervision} 146-166.
\item\textsuperscript{150} Significantly high penalties have further been, in many cases, successfully levied against individuals or companies that commit market abuse offences. See Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 226-230.
\item\textsuperscript{151} This clearly suggest that the courts have a discretion to award equitable remedies like specific performance or rescission of Part IV permission against any person who violates market abuse provisions. S 50 of the Supreme Court Act 1981 (c 54). Also see \textit{Seager v Copydex (No 2)} [1969] 1 WLR 809, where damages for misuse of price-sensitive (confidential) information were granted against the perpetrators of securities and market abuse violations; see further Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 38-39.
\item\textsuperscript{152} [1991] BCLC 897.
\item\textsuperscript{154} [1892] QB 724.
\item\textsuperscript{155} [2004] EWHC 1669 ch.
\item\textsuperscript{156} This injunction or freezing order was generally awarded in accordance with s 381(3) & (4) of the Financial Services and Markets Act.
\end{itemize}
\end{footnotesize}
In a nutshell, the successful prosecution of the Guinness-Distillers, Blue Arrow, Geoffrey Collier and the Smith, Spearman and Payne scandals is clear evidence of the competence of the relevant courts to enforce the market abuse prohibition in the United Kingdom. For instance, in the Smith, Spearman and Payne case the defendants were found guilty of conspiracy to commit insider trading in January 2004 after Payne, who was a proof reader at a company of commercial printers, passed non-public information that he had seen at that company to the other defendants, involving drafts of the prospectus and offer documents prior to the announcement on the London Stock Exchange. Eventually, about 27 takeover and merger transactions were made and all the defendants made almost £336 000 profit. The Court of Appeal sentenced Smith and Catherine Spearman to 18 months imprisonment terms each. Payne was sentenced to 21 months in jail while Richard Spearman was imprisoned for 30 months.

Likewise, in the Financial Services Authority v Martin and Anor, Alton J gave an injunctive relief against the defendants to cancel all the transactions that contravened some market abuse provisions. In some instances, the defendants were also ordered to compensate the affected investors directly for their incurred losses.

As indicated above, one can conclude that the effectiveness of the United Kingdom’s market abuse regime is attributed to the competence of the relevant courts in enforcing and prosecuting market abuse cases. Accordingly, in spite of the inconsistent and relatively few successful criminal prosecutions recorded in market abuse cases by the courts during the Department of Trade and Industry era, a notable increase in the number of successful prosecutions of such cases has been achieved since the Financial Services Authority succeeded the Department of Trade and Industry in 2001. In other words, although the Department for Business Enterprise and Regulatory Reform and the Financial Services Authority are empowered to prosecute market abuse cases, the relevant courts have to date

157 [2005] 1 BCLC 495; also see R v Caldwell [1982] AC 341, where the court charged the accused for disseminating false and misleading information & Bell v Lever Brothers Ltd [1932] AC 161 where the defendant was sued for engaging in market manipulation practices that influenced the price of the affected securities.

consistently utilised their main prerogative to hear and prosecute all criminal cases involving market abuse violations in the United Kingdom.

7 5 3 The Role of Other Self-Regulatory Organisations

In spite of the fact that the Financial Services Authority was established as the main agency solely responsible for the enforcement of market abuse in the United Kingdom, several self-regulatory organisations have also made a significant contribution to the supervision and regulation of the securities and financial services industry in the United Kingdom to date.

During the 1970s and the early 1980s, self-regulatory organisations such as the Bank of England, the Personal Investment Authority, the Investment Management Regulatory Organisation, the Securities and Investments Board and the Securities and Futures Authority played a leading role in the prevention, investigation and prosecution of securities and market abuse cases in the United Kingdom. Nevertheless, serious systemic flaws were still evident in the regulation of the financial services industry in the United Kingdom. Therefore, in an attempt to rectify these flaws and to make the enforcement of the securities and market abuse laws more effective, most of the responsibilities of the Bank of England, the Securities and Investments Board and the Securities and Futures Authority were transferred to the Financial Services Authority in 1997.

A number of regulatory organisations like the London Stock Exchange, the London International Financial Futures and Options Exchange Administration and Management, the Serious Fraud Office, the Financial Services and Markets Tribunal, the Financial Ombudsman Service, the Financial Services Compensation Scheme, the Department for Business Enterprise and Regulatory Reform, the Regulatory Decisions Committee, and the Treasury are currently involved in the regulation and enforcement of market abuse in the United Kingdom.

The London Stock Exchange is the main securities exchange in the United Kingdom which oversees the public trading of listed qualifying investments in the relevant financial markets to minimise and curb market abuse activities. This is done by adopting relevant rules and

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159 See paragraph 7 5 1 above.
160 Avgouleas *The Mechanics and Regulation of Market Abuse* 308-310.
161 Avgouleas *The Mechanics and Regulation of Market Abuse* 309.
guidelines that restrict and discourage market abuse practices. The London Stock Exchange further employs sophisticated and computerised surveillance systems to detect all possible market abuse activity. Where such activity is detected, a publication is made to the relevant financial markets and the Financial Services Authority through the so-called Suspicious Transaction Reports to inform all the investors and possible investors.162

One of the Recognised Investment Exchange which plays a pivotal role in the regulation of market abuse is the London International Financial Futures and Options Exchange Administration and Management. The London International Financial Futures and Options Exchange Administration and Management has a mandate to investigate, operate and employ necessary measures that detect and discourage market abuse activities. For instance, it has powers to take disciplinary action like issuing private warnings to any person accused of serious misconduct or contravening market abuse provisions.163

The Serious Fraud Office was established under the Criminal Justice Act 1987164 and was granted wide investigatory and prosecutorial powers in respect of serious and complex corporate frauds. Consequently, since its introduction the Serious Fraud Office has investigated and prosecuted several cases involving insider trading and market manipulation.165 The Serious Fraud Office is further allowed to extract any information or documents necessary for an ongoing investigation from any accused persons. In addition, the Serious Fraud Office has the power to indict persons accused of fraud and/or market abuse offences and refer such matters to the Crown Prosecution Services or the Director of Public Prosecutions for prosecution.166

For the purposes of obtaining more settlements in cases involving securities violations, the Financial Ombudsman Service was introduced under the auspices of the Financial Services and Markets Act.167 The Financial Ombudsman Service was formally launched in December 2001 with the main aim of providing an independent alternative method of redress to all the

162 Barnes Stock Market Efficiency, Insider Dealing 199.
163 Swan Market Abuse Regulation 89.
164 (c 38); see s 1 of the Criminal Justice Act 1987.
166 S 401(2) of the Financial Services and Markets Act; also see Avgouleas The Mechanics and Regulation of Market Abuse 384; Kiernan “The Regulatory Bodies Fraud: Its Enforcement in the Twenty-First Century” 2003 The Company Lawyer 293 293.
167 S 225; also see Blair & Walker Financial Services Law 166-183.
affected persons or investors. In other words, the Financial Ombudsman Service is not a regulatory body *per se*; its main role is to resolve individual disputes between consumers (investors) and other market participants like financial services organisations.\(^{168}\) The Financial Ombudsman Service deals with all kinds of financial disputes involving securities violations. This could imply that the Financial Ombudsman Service may also deal with disputes involving market abuse violations. Moreover, the Financial Ombudsman Service administers the Financial Services Compensation Scheme in instances where it has either compulsory or voluntary jurisdiction.\(^{169}\) The Financial Services Compensation Scheme provides compensation to all eligible and successful complainants who were prejudiced by any securities violations.\(^{170}\)

The Financial Services and Markets Tribunal is an independent regulatory body established to provide a platform for any person aggrieved by the decisions of the Financial Services Authority to appeal.\(^{171}\) Consequently, the Financial Services and Markets Tribunal may hear any references or appeal against the Financial Services Authority regarding its disciplinary decisions, cancellation of Part IV permission, imposed penalties, prohibition orders and its verdicts or final decisions on matters relating to market abuse.\(^{172}\) This is probably targeted at maintaining the stability and integrity in the United Kingdom’s financial markets. However, it should be noted that the appeal against any Financial Services Authority’s decision must be made within 28 days of the date on which the decision notice or supervisory notice was issued.\(^{173}\) The Financial Services and Markets Tribunal may, if satisfied, conduct a *de novo* review of matters referred to it by authorised persons or by any other aggrieved persons. For purposes of providing appropriate redress to the affected persons, the Financial Services and Markets Tribunal is obliged to derive its rules or course of action in accordance with the provisions of the Financial Services and Markets Act.\(^{174}\) The Financial Services and Markets

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\(^{168}\) In contrast to the regulatory powers of the FSA which are usually invoked to seek redress on a more broad scale, the Financial Ombudsman Service (FOS) is responsible for resolving disputes on an individual basis.

\(^{169}\) S 226 & s 227 of the Financial Services and Markets Act; also see Blair & Walker *Financial Services Law* 169-170.

\(^{170}\) Russen *Financial Services Authorisation, Supervision* 340-346.

\(^{171}\) See s 132 read with s 133 of the Financial Services and Markets Act. The Financial Services and Markets Tribunal (FSMT) is administered by the Tribunal Service, an executive organ of the Ministry of Justice in the United Kingdom. Avgouleas *The Mechanics and Regulation of Market Abuse* 382-383.

\(^{172}\) S 127(4) read with s 133 of the Financial Services and Markets Act.

\(^{173}\) S 133(4) read with s 133 of the Financial Services and Markets Act.

\(^{174}\) S 133; s 127 & s 388 of the Financial Services and Markets Act.
Tribunal may, for example, take decisions like re-hearing a matter, reviewing, dismissing an appeal or setting aside its own decision. Additionally, the Financial Services and Markets Tribunal may determine and give directions regarding the appropriate action to be followed by the Financial Services Authority. The Financial Services and Markets Tribunal may further give recommendations to the Financial Services Authority regarding its rules and regulating procedures.

The Treasury has also played a crucial role in the general regulation of the securities and financial services industry in the United Kingdom. It is responsible for the overall institutional structure of the securities and financial services regulation and/or relevant legislation. As a result, the Treasury may take action in instances where serious securities law violations are reported to it. The Treasury can further appoint or remove members of the executive governing body and the non-executive committee of the Financial Services Authority. Moreover, the Treasury can appoint an independent person to conduct a review and/or a separate independent inquiry into the efficiency or effectiveness of certain functions of the Financial Services Authority and the specific circumstances regarding securities, market abuse or any other violations where such action is considered to be in the public interest.

Another regulatory body which deserves some consideration is the Regulatory Decisions Committee. The Regulatory Decisions Committee was established as a committee of the Financial Services Authority which exercises certain regulatory powers on behalf of the Financial Services Authority. In spite of the fact that the chairman of the Regulatory Decisions Committee is appointed by the Financial Services Authority and that it is accountable for its decisions to the Financial Services Authority, the Regulatory Decisions Committee may conduct its own independent investigations and make its own decisions.

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175 A person aggrieved by a decision of the FSMT is free to apply to a Court of Appeal for permission to appeal within fourteen days. See Rules 23 & 24(5) of the FSMT.
176 S 133(4); (5) & (7) of the Financial Services and Markets Act.
177 See s 133(8) of the Financial Services and Markets Act; see further Rules 20 & 21 of the FSMT. Also see generally Russen Financial Services Authorisation, Supervision 312-315.
178 S 12 & s 13 of the Financial Services and Markets Act.
regarding market abuse violations.\footnote{Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 210.} According to the Decision Making Manual of the Financial Services Authority, the Regulatory Decisions Committee is a separate regulatory body outside the Financial Services Authority’s management structure.\footnote{See Chapter 4.2 of the Decision Making Manual which was inserted by the Enforcement (Settlement and Other Procedures) Instrument in October 2005.} In short, the Regulatory Decisions Committee is also responsible for the enforcement, authorisation and supervision of the securities and market abuse laws in the United Kingdom.\footnote{See further Blair & Walker Financial Services Law 146-148; Swan Market Abuse Regulation 106-107.}

As indicated above, it is quite clear that self-regulatory organisations like the London Stock Exchange, the London International Financial Futures and Options Exchange Administration and Management, the Serious Fraud Office, the Financial Services and Markets Tribunal, the Financial Ombudsman Service and the Regulatory Decisions Committee currently play an equally important role in preventing and curbing market abuse practices in the United Kingdom.\footnote{See further paragraph 7 6 2 of this Chapter.} These self-regulatory organisations may also take their own appropriate action regarding any market abuse violations. For example, the London Stock Exchange has in most instances offered some relevant information to the Financial Services Authority regarding its market abuse prosecutions.\footnote{See paragraph 7 6 2 of this Chapter.} This culminated in the speedy settlement and prosecution of market abuse cases by the Financial Services Authority.\footnote{See further paragraph 7 6 2 of this Chapter.} In addition, the Financial Services Authority co-operates quite well with other international regulatory bodies like the International Organisation of Securities Commissions in order to combat cross-border market abuse practices in the prescribed financial markets in the United Kingdom.\footnote{See paragraph 7 5 3 above.}

\section*{7 6 Co-operation between Enforcement Authorities}

\subsection*{7 6 1 Co-operation between the Financial Services Authority, Treasury, Department of Trade and Industry and the Courts}

A number of notable achievements obtained by the market abuse regime in the United Kingdom have been largely influenced by a good co-operative relationship that existed between the Financial Services Authority and other enforcement authorities like the Treasury, courts and the Department of Trade and Industry. Accordingly, this sub-heading will
investigate whether such co-operative effort is still being employed by the Financial Services Authority to curb market abuse activities in the United Kingdom.

Firstly, the Treasury entered into an agreement with the Financial Services Authority in October 1997 which outlines, among other aspects, the terms of their relationship and guiding principles on accountability, transparency and regular information exchange.\textsuperscript{188} This agreement was introduced to enhance the efficiency and effectiveness of the securities and financial services industry regulation in the United Kingdom. In addition, the same agreement improved the Financial Services Authority’s monitoring and supervision of the clearing and settlements systems, relevant financial markets, and companies in order to detect and discourage market abuse violations. The aforementioned agreement has further enabled the Financial Services Authority to formulate adequate policy and principles regarding its general regulatory functions.

Secondly, the Financial Services Authority and the Department of Trade and Industry had concurrent jurisdiction to investigate and prosecute certain matters involving serious corporate frauds and market abuse offences.\textsuperscript{189} For example, it is reported that the Department of Trade and Industry could appoint its own investigators and inspectors to deal with any specific or suspected securities violations.\textsuperscript{190} The Department of Trade and Industry could further disclose certain information to the Financial Services Authority and other relevant enforcement authorities for them to take any appropriate action.\textsuperscript{191} This could imply, notwithstanding the fact that some of the Department of Trade and Industry’s market abuse prosecutorial powers are now vested in the Department for Business Enterprise and Regulatory Reform,\textsuperscript{192} that there was a better co-operation relationship between the Department of Trade and Industry and the Financial Services Authority in relation to the enforcement of securities and market abuse laws in the United Kingdom. It is hoped that such co-operation relationship will also be carried out between the Department for Business Enterprise and Regulatory Reform and the Financial Services Authority.

\textsuperscript{188} Blair & Walker \textit{Financial Services Law} 35.
\textsuperscript{189} Blair & Walker \textit{Financial Services Law} 299-300.
\textsuperscript{190} Blair & Walker \textit{Financial Services Law} 299-300.
\textsuperscript{191} Blair & Walker \textit{Financial Services Law} 299.
\textsuperscript{192} See earlier similar remarks in paragraph 752 above.
Lastly, the relevant courts\textsuperscript{193} are mostly responsible for the criminal enforcement of the market abuse prohibition in the United Kingdom. In practice, the courts may, nevertheless, prosecute any market abuse cases referred to them by the Financial Services Authority. As a result, the courts and the Financial Services Authority have to date achieved some substantial progress in their quest to eradicate market abuse practices in the relevant financial markets in the United Kingdom. Furthermore, the courts have on many occasions relied on the help of the Crown Prosecution Services and the Financial Services Authority to obtain a number of settlements and convictions in market abuse cases.\textsuperscript{194} For example, as discussed earlier,\textsuperscript{195} in \textit{Chase Manhattan Equities v Goodman}\textsuperscript{196} Knox J held that the accused persons were guilty of misusing material non-public inside information. The court further held that the illicit trading of these accused persons was tantamount to an offence against public policy. Moreover, in \textit{Seager v Copydex (No 2)},\textsuperscript{197} damages were awarded against the person who misused confidential non-public inside information (insider trading) for personal gain.

The effectiveness of the co-operation between the Financial Services Authority and the courts was further revealed in \textit{Financial Services Authority v Rourke},\textsuperscript{198} where Neuberger J imposed a declaratory injunctive relief against the accused persons who violated the Financial Services and Markets Act’s provisions on the disclosure of confidential information.\textsuperscript{199} The Courts of Appeal have to date been able to assist the Financial Services Authority to make appropriate decisions in relation to any appeal raised by the aggrieved persons. Significant efforts have also been successfully made by both the courts and the Financial Services Authority to curb cross-border market abuse activities. For example, the Financial Services Authority may appoint specific competent persons and assign them to assist the courts to investigate and/or prosecute market abuse violations perpetrated in the United Kingdom by persons domiciled elsewhere.\textsuperscript{200}

\textsuperscript{193} These include the High Courts, Supreme Courts and the Courts of Appeal.
\textsuperscript{194} Blair & Walker \textit{Financial Services Law} 300.
\textsuperscript{195} See paragraph 7.52 above.
\textsuperscript{196} 897.
\textsuperscript{197} 809.
\textsuperscript{198} (HC, 2001-10-19).
\textsuperscript{199} S 348. Also see Russen \textit{Financial Services Authorisation, Supervision} 148-149.
\textsuperscript{200} Also see further Blair & Walker \textit{Financial Services Law} 34-38 & 302-303 & Rider, Alexander, Linklater & Bazley \textit{Market Abuse and Insider Dealing} 190-195.
762 Co-operation between the Financial Services Authority and the Local Self-Regulatory Organisations

As indicated earlier, the Financial Services Authority does not work in isolation. It involves self-regulatory organisations such as the London Stock Exchange, the London International Financial Futures and Options Exchange Administration and Management, the Serious Fraud Office, the Financial Services and Markets Tribunal, the Financial Ombudsman Service and the Regulatory Decisions Committee in order to enhance its anti-market abuse enforcement efforts. Consequently, this sub-heading will scrutinise whether this co-operative enforcement approach has managed to reduce market abuse practices in the United Kingdom. A brief analysis of the functions of the Financial Services Authority and selected self-regulatory organisations in relation to this co-operative approach will be therefore carried out under this sub-heading.

The Financial Services Authority has entered into several operating arrangements (co-operation agreements) with certain self-regulatory organisations which are directly or indirectly involved in the enforcement of market abuse laws in the United Kingdom. As pointed out before, the Financial Services Authority and the London Stock Exchange have stipulated relevant guidelines which help them to determine the appropriate action that will be taken by either the London Stock Exchange or the Financial Services Authority with regard to suspected market abuse cases in order to avoid unnecessary duplication of their functions. Moreover, both the Financial Services Authority and the London Stock Exchange employ the same computerised surveillance systems to detect and prevent market abuse practices in the United Kingdom’s financial markets. This has enabled the Financial Services Authority to investigate and prosecute market abuse violations that are committed over the Internet in respect of any prescribed financial markets in many instances. Similarly, the Financial Services Authority has forged some good co-operation agreements with the London International Financial Futures and Options Exchange Administration and Management to detect, investigate and prosecute all market abuse cases relating to any qualifying investments that are dealt with on the London International Financial Futures and Options Exchange

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201 See paragraph 753 above.
202 See paragraph 753 above.
203 See paragraph 753 above.
204 See Blair & Walker Financial Services Law 301-303, for generally related remarks; also see paragraphs 751 & 753 above.
Administration and Management or other prescribed financial markets. Thus, the Financial Services Authority, with the help of the London International Financial Futures and Options Exchange Administration and Management, may detect and track any suspected market abuse activity in the prescribed financial markets situated in the United Kingdom or which are accessible electronically in the United Kingdom or in any member state of the European Union.

Furthermore, the Serious Fraud Office and the Financial Services Authority are both responsible for investigating and curbing serious fraud and other illicit trading practices that amount to market abuse in the United Kingdom. This has nonetheless resulted in the duplication of some of the regulatory functions by either the Financial Services Authority or the Serious Fraud Office, especially with regard to market abuse violations. One can therefore assume that this overlap of functions that usually occurs between the Serious Fraud Office and the Financial Services Authority could be indication of an inconsistent cooperative enforcement relationship between these two regulatory bodies. Be that as it may, as highlighted earlier, the Financial Services Authority is mainly responsible for policing the market abuse prohibition in the United Kingdom. In view of this, the Serious Fraud Office may only prosecute certain market abuse cases if it reasonably believes that such cases also constitute serious fraud. Where such market abuse violations are detected and investigated by the Serious Fraud Office, they may be referred to the Crown Prosecution Services or the Financial Services Authority for further prosecution.

The Financial Ombudsman Service and the Financial Services Authority have been cooperatively involved to curb market abuse activities in the United Kingdom. For instance, the Financial Ombudsman Service hears individual disputes involving cases of market abuse.

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206 This has enabled the FSA to discourage and combat cross-border market abuse practices. Also see Rider, Alexander, Linklater & Bazley Market Abuse and Insider Dealing 74.
207 See further analysis in paragraph 753 above.
208 Blair & Walker Financial Services Law 300.
209 See paragraph 751 above.
210 Blair & Walker Financial Services Law 300.
211 The FSA signed co-operation agreements with the Association of Chief Police Officers of England and Wales to enhance its investigation and prosecution of market abuse practices in the United Kingdom. See further Russen Financial Services Authorisation, Supervision 96; also see paragraph 753 above.
that do not necessarily fall under the ambit of the Financial Services Authority. In so doing, the Financial Ombudsman Service enables the Financial Services Authority to resolve any outstanding matters involving market abuse cases in order to promote the efficiency and integrity of the United Kingdom’s financial markets. Put differently, the Financial Services Authority has put in place some guidelines that govern and allow the Financial Ombudsman Service to take independent and appropriate action regarding complaints against any decision of the Financial Services Authority or other relevant enforcement authorities. The Financial Services Authority has permitted the Financial Ombudsman Service to administer independent claims under the Financial Services Compensation Scheme in order to afford all the aggrieved persons an opportunity to obtain adequate redress.

As discussed before, the Financial Services and Markets Tribunal offers a platform for prejudiced persons to appeal against the decisions of the Financial Services Authority. In other words, the Financial Services and Markets Tribunal and the Financial Services Authority have some co-operation guidelines in place to enable them to perform their functions more effectively. These guidelines further allow the Financial Services and Markets Tribunal to advise the Financial Services Authority regarding its disputed decisions or any other relevant matter. The Financial Services Authority has further exploited its mutual co-operation with the Regulatory Decisions Committee to investigate and prosecute market abuse violations in the United Kingdom. The Regulatory Decisions Committee is responsible and accountable to the Financial Services Authority for its decisions in relation to market abuse

212 See further analysis in paragraph 7.5.3 above.
213 See generally s 226 & s 227 read with s 155 & s 225 of the Financial Services and Markets Act; also see Avgouleas The Mechanics and Regulation of Market Abuse 409-411.
214 See R (on the application of Davies and others) v Financial Services Authority [2003] 4 All ER 1196 where the applicants sought a judicial review to challenge the decision of the FSA to issue a warning notice pursuant to s 56 of the Financial Services and Markets Act without initially referring the matter to the FSMT.
215 See paragraph 7.5.3 above.
216 For example, in Legal and General Assurance Society Limited v Financial Services Authority (2005) FSMT 016 the FSMT upheld a decision made by the FSA to award a public censure and a financial penalty against the applicants and warned the FSA to be flexible in order to give appropriate penalties in such matters in the future; also see Piggott v FSA (2003) FSMT 004 the FSMT reduced the financial penalty imposed by the FSA from £40 000 to £10 000 citing that the applicants were having some difficulties in paying the initial penalty and see further Mohammed v FSA (2005) 013 the FSMT held that the applicant’s other share dealings were not in themselves unlawful and were therefore not in contravention of s 118 of the Financial Services and Markets Act. Also see generally Russen Financial Services Authorisation, Supervision 194-195; Avgouleas The Mechanics and Regulation of Market Abuse 382-383 & the discussion in paragraph 7.5.3 above.
217 See the related remarks in paragraph 7.5.3 above.
cases. This could *prima facie* imply that there is a good co-operation relationship between the Financial Services Authority and the Regulatory Decisions Committee, especially with regard to the enforcement of market abuse laws in the United Kingdom.

763 Co-operation between the Financial Services Authority and Similar International Regulatory Bodies

The Financial Services Authority entered into some co-operation agreements (Memoranda of Understanding) with several regulatory bodies in other jurisdictions. For example, the Financial Services Authority signed a separate Memorandum of Understanding with the United States Securities and Exchange Commission and the Commodity Futures Trading Commission in October 1997. The main objective of this Memorandum of Understanding is *inter alia* to improve the ability of the bodies concerned to exchange relevant information in respect of the activities, internal controls and management systems of the United Kingdom and the United States of America’s companies that operate internationally. In addition, this Memorandum of Understanding developed procedures to increase co-operation, especially in connection with important market events occurring in the United Kingdom and the United States of America’s banking companies, securities and financial markets.

Furthermore, the Financial Services Authority forged bilateral and multilateral Memoranda of Understanding with leading international regulatory bodies such as the Basel Committee on Banking Supervision, the Financial Action Task Force, the Joint Forum on Financial Conglomerates, the International Organisation of Securities Commissions, the Financial Stability Forum, and the Committee on the Global Financial System. The Financial Services Authority also entered into other short term co-operation arrangements known as the Financial Information Sharing Agreements with self-regulatory organisations and regulators.

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218 See the related remarks in paragraph 753 above.
219 See *Market Abuse Regulation* 106-107.
220 See paragraph 751 above; also see Blair & Walker *Financial Services Law* 37.
221 Generally see Blair & Walker *Financial Services Law* 37.
222 Additionally, this Memorandum of Understanding (MOU) has generally improved the relations between the FSA, the Commodity Futures Trading Commission (CFTC) & the United States Securities and Exchange Commission (SEC) as well as the effectiveness of the financial supervision in discouraging cross-border market abuse activities in both the United Kingdom and the United States of America’s financial markets.
223 This body is now known as the Joint Forum.
224 See related analysis in paragraph 751 above.
225 Blair & Walker *Financial Services Law* 34-38.
in other jurisdictions in order to share information that will be relevant to any ongoing investigations of securities and/or market abuse violations. The Financial Services Authority is a member of the International Organisation of Securities Commissions. This membership enables the Financial Services Authority to exchange relevant information with other regulatory bodies that are also members of the International Organisation of Securities Commissions. It further empowers the Financial Services Authority to co-operate with similar regulatory bodies elsewhere in order to establish good corporate standards and better surveillance systems to combat cross-border market abuse practices. In addition, the Financial Services Authority specifically signed the International Organisation of Securities Commissions Multilateral Memorandum Concerning Consultation, Cooperation and the Exchange of Information. This Memorandum of Understanding allows the Financial Services Authority to obtain mutual assistance from other international regulatory bodies and to adopt better corporate standards that will enhance the enforcement and prosecution of cross-border market abuse offences. The United Kingdom co-chaired the International Organisation of Securities Commissions taskforce on unregulated financial entities with Italy. This enabled the Financial Services Authority to focus closely on unregulated entities and hedge funds in order to devise alternative regulatory approaches that curb the negative effects associated with their trading and global opacity.

The Financial Services Authority co-operates with similar regulatory bodies in the European Union member countries. As envisaged in the European Union Market Abuse Directive, the Financial Services Authority may track and prosecute market abuse activities conducted in the United Kingdom in relation to qualifying investments listed on a regulated financial market in any other European Union member state.

226 See generally Blair & Walker Financial Services Law 37.
227 See similar analysis in paragraph 7 5 1 above.
228 See generally Blair & Walker Financial Services Law 37-38.
229 See generally Blair & Walker Financial Services Law 37-38.
230 Blair & Walker Financial Services Law 37-38 & 826-830; also see similar analysis in paragraph 7 5 1 above.
232 See similar discussion in paragraph 7 5 1 above.
233 Also see Article 16(1) of the EU Market Abuse Directive which provides some guiding principles which allow regulatory bodies in the EU member countries to co-operate whenever necessary for the purpose of effectively executing their duties, especially with regard to market abuse enforcement. Also see Blair & Walker Financial Services Law 302-303 & related remarks in paragraphs 7 3 & 7 5 1 above.
Likewise, the Financial Services Authority has reportedly received assistance from other affiliate bodies such as the Basel Committee on Banking Supervision, the Joint Forum, the Financial Action Task Force and the Organisation for Economic Co-operation and Development to develop principles and/or identify practices that will reduce illicit trading activities like market abuse as much as possible.\footnote{See generally Blair & Walker \textit{Financial Services Law} 34-35 & 830-836.} This has also enabled the Financial Services Authority to improve its supervisory methods and market abuse enforcement approaches.\footnote{See generally Blair & Walker \textit{Financial Services Law} 34-35 & 830-836.}

7.7 The Adoption of Adequate Preventative Measures

The United Kingdom, like many other countries, has developed and adopted several methods to prevent market abuse practices in all its prescribed financial markets. These methods include providing a definition of, and enumerating the conduct that amounts to market abuse, reliance on criminal, civil and administrative penalties, public censure and the use of surveillance systems.

As has already been pointed out,\footnote{See paragraph 7.3 above.} a wide but comprehensive definition of practices that constitute market manipulation and other related market abuse offences is statutorily provided for in the United Kingdom. Specifically, about seven types of conduct that amount to or that could give rise to market abuse are clearly stipulated in the Financial Services and Markets Act.\footnote{See s 118(1) to (8).} The United Kingdom’s market abuse regime further discourages and prohibits Internet-based market manipulation practices.\footnote{The making or publishing of false, deceptive or misleading statements to manipulate the financial markets over the Internet is prohibited in the United Kingdom. See generally Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (part 2)” 2008 \textit{SA Merc LJ} 177 182-183.} This has led to a substantial increase in compliance and enforcement of the market abuse laws in the United Kingdom to date.

The United Kingdom’s market abuse regime also employs appropriate penalties to discourage all persons from committing market abuse offences. For example, criminal penalties may be levied against the offenders under both the Financial Services and Markets Act and the
Criminal Justice Act. As indicated before, criminal penalties under the Criminal Justice Act are only limited to individuals who commit insider trading and very few convictions have been obtained in such cases so far. The Financial Services and Markets Act has, however, now extended this criminal liability to both individuals and companies. Moreover, offenders may incur civil and administrative penalties for market abuse under the Financial Services and Markets Act. Therefore, the Financial Services Authority may impose unlimited financial penalties on companies or individuals who indulge in market abuse practices. The United Kingdom’s market abuse regime also provides separate and different penalties for individuals and companies. This has arguably increased deterrence on the part of the offenders and improved the overall enforcement of the market abuse prohibition in the United Kingdom.

Apart from relying on penalties, the Financial Services Authority may further issue public statements to the effect that the accused person was involved in market abuse in some instances where it reasonably believes that issuing such statements is the more appropriate sanction. These public statements are also employed in instances where the accused persons have taken responsibility of their market abuse conduct as well as reasonable steps to co-operate with the Financial Services Authority and where such persons are unable to pay the imposed financial penalty. This name and shame approach is usually employed to deter and prevent unscrupulous persons from wilfully indulging in market abuse activities in the United Kingdom’s prescribed financial markets.

The Financial Services Authority also relies on the London Stock Exchange’s surveillance systems to detect possible market abuse activities in the United Kingdom’s prescribed financial markets. Specifically, the London Stock Exchange reports any cases of suspected market abuse through the Suspicious Transaction Reports to the Financial Services Authority

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239 See paragraph 7 4 above.
240 See paragraph 7 4 above.
241 See paragraph 7 4 above.
242 S 123(1) of the Financial Services and Markets Act.
243 See generally Cassim 2008 SA Merc LJ 191-195; also see paragraph 7 4 above.
244 S 123(3) of the Financial Services and Markets Act; also see generally ENF 14.4.1G.
245 See ENF 14.6.2G(6).
246 Generally see Cassim 2008 SA Merc LJ 195-196.
247 See related comments in paragraph 7 6 2 above.
for further adjudication. Thus the Financial Services Authority is responsible for the investigation and prosecution of market abuse practices which occur on the London Stock Exchange and any other prescribed financial markets in the United Kingdom.

Investigation and information gathering is another tool used by the Financial Services Authority’s Enforcement Division to combat market activities in the United Kingdom’s prescribed financial markets. The Financial Services Authority has powers to appoint specific skilled persons to investigate and submit reports pertaining to ongoing market abuse cases. In addition, the Financial Services Authority may summon and interrogate any persons suspected to have contravened the relevant market abuse provisions in the United Kingdom. The Financial Services Authority also has the power to impose Anton pillar orders and to search and seize any documents or material from any person or premises if it reasonably believes that such material or documents will be essential to its market abuse investigations. In most instances, the Financial Services Authority searches any person or premises after having obtained permission from the competent courts in the United Kingdom. Consequently, a number of market abuse cases have so far been successfully investigated by both the Regulatory Decisions Committee and the Financial Services Authority.

The Financial Services Authority further employs whistle-blowing immunity provisions to promote prompt disclosure (tip-offs) by all persons who are aware of any market abuse activities without fear of reprisals. Whistle-blowers in the United Kingdom are therefore protected against the risk of being victimised, losing their jobs or sidelined in their careers. This has since improved the timeous disclosure of relevant information to the prescribed financial markets through the Internet or the Suspicious Transaction Reports by all the market participants in the United Kingdom. The Financial Services Authority also imposes a duty on directors, employees and other relevant persons to report or speedily publish non-public

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248 See earlier discussion in paragraph 7.5.3 above.
249 This could further imply that the FSA is empowered to combat market abuse practices in relation to both listed and unlisted qualifying investments. A central computerised system known as the Stock Exchange Electronic Trading Service (SEETS) is usually used to detect the occurrence of such practices in the relevant financial markets in the United Kingdom.
250 See related comments in paragraph 7.5.1 above.
251 See related analysis in paragraph 7.5.1 above.
252 See related analysis in paragraph 7.5.1 above.
253 See related comments in paragraphs 7.5.3 & 7.6.2 above.
254 Wood Regulation of International Finance (The Law and Practice of International Finance Series Volume 7) (2007) 591; also see paragraph 7.5.1 above.
price-sensitive information relating to qualifying investments or their dealing in any qualifying investments in order to discourage illicit trading practices like insider trading.255

Additionally, the Financial Services Authority uses awareness programmes to combat and discourage market abuse practices in the prescribed United Kingdom’s financial markets. As pointed out earlier,256 the Financial Services Authority has provided the Code of Market Conduct to guide and educate all relevant persons regarding market abuse. The Financial Services Authority has, in some instances, relied on public lectures and publishing important information through the Internet to inform all the relevant stakeholders regarding any illicit trading activities. This has assisted the Financial Services Authority to develop and establish a good anti-market abuse corporate ethics culture among all the market participants and issuers of qualifying investments. The Financial Services Authority has formulated extensive Listing Principles which must be followed by all issuers of qualifying investments.257 These Listing Principles allow all the listed companies to take reasonable steps to train their directors about their duties, maintain adequate procedures, systems and controls which enable them to execute their functions well, and to promote market integrity.258

The United Kingdom’s market abuse regime has established the Financial Services Authority as the main competent regulatory body to police the enforcement of the market abuse prohibition.259 This is the so-called single regulator model and it is used in the United Kingdom as a measure to discourage and combat market abuse practices in its financial markets. Thus, although the Financial Services Authority co-operates with and delegates some of its functions to other local self-regulatory organisations like the Regulatory Decisions Committee;260 it remains mainly responsible for the enforcement of the market abuse prohibition in the United Kingdom.

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255 See the FSA’s Disclosure and Transparency Rules 2.6.1; 2.6.2; 2.2.8; 2.2.9; 2.8.1; 2.8.1; 2.8.3 to 2.8.10. Also see Wood Regulation of International Finance 591; Barnes Stock Market Efficiency, Insider Dealing 119-121.

256 See paragraph 751 & related analysis in Chapter Nine of this thesis.

257 Also see further the FSA’s Disclosure and Transparency Rules 2.6.1; 2.6.2; 2.2.8; 2.2.9; 2.8.1; 2.8.1; 2.8.3 to 2.8.10. Also see Wood Regulation of International Finance 591; Barnes Stock Market Efficiency, Insider Dealing 119-121.

258 Generally see further the FSA’s Disclosure and Transparency Rules 2.6.1; 2.6.2; 2.2.8; 2.2.9; 2.8.1; 2.8.1; 2.8.3 to 2.8.10. Also see Wood Regulation of International Finance 591; Barnes Stock Market Efficiency, Insider Dealing 119-121.

259 See the discussion in paragraph 751 above.

260 See the discussions in paragraphs 753 & 762 above.
Moreover, the Financial Services Authority uses transaction recording, telephonic tapping, exit interviews, staff vetting checks, review of unusual trades and regular internal audit review of polices, systems and controls of issuers to prevent market abuse activities. For purposes of preventing cross-border market abuse activity, the Financial Services Authority usually invokes its fellow regulators in other jurisdictions to prosecute market abuse offences committed in the United Kingdom by persons in other countries.

A private right of action in relation to certain market abuse offences is further used to discourage market abuse activities in the United Kingdom. Therefore, all the prejudiced persons are given an opportunity to claim their damages or compensation directly from the market abuse offenders. This has, in a way, afforded the affected persons an alternative arbitration method to obtain their damages speedily from the market abuse offenders. On the other hand, this private right of action method has increased deterrence on the part of the market abuse offenders to disengage from their illegal trading activities. Over and above, it is generally accepted that some of the persons have so far successfully relied on this private right of action to claim their damages from either the companies or the individuals who involved themselves in market abuse practices.

7.8 Concluding Remarks

As already pointed out, the United Kingdom employs an extensive regulatory approach which statutorily authorises only one regulator (the Financial Services Authority) to oversee the enforcement of its securities and market abuse laws. Therefore, other self-regulatory organisations may only exercise certain functions on behalf of the Financial Services Authority.

261 Barnes *Stock Market Efficiency, Insider Dealing* 122-123.
262 See the discussion in paragraph 7.6.3 above.
263 See similar remarks in paragraph 7.4 above.
264 See similar remarks in paragraph 7.4 above.
265 Rider, Alexander, Linklater & Bazley *Market Abuse and Insider Dealing* 94. Also see paragraphs 7.4 & 7.7 above.
266 See Barnes *Stock Market Efficiency, Insider Dealing* 164-175; also see *In Re A-G’s Reference (No 1 of 1998)* [1998] BCLC 193, where Lord Lane CJ ruled in favour of a plaintiff who was prejudiced by any insider (offender) who had dealt dishonestly in respect of the affected securities concerned & *In Re A-G’s Reference (No 1 of 1988)* [1989] AC 971 973-977 & 986, the court held that the defendant was guilty for misusing non-public price-sensitive information. See further Rider, Alexander, Linklater & Bazley *Market Abuse and Insider Dealing* 60.
267 See paragraph 7.5.1 above; also see related remarks in Chapter Nine of this thesis.
Authority in order to complement its enforcement efforts. Nonetheless, it was acknowledged, in contrast to the position in South Africa, that there is a separate and specific statute, namely the Criminal Justice Act, that deals with insider trading and another one, namely the Financial Services and Markets Act, that widely deals with the prohibition of insider trading, market manipulation and other types of market abuse in the United Kingdom. Consequently, the Financial Services Authority is empowered as a single main regulatory body that exercises its regulatory functions under each of these statutes. The rationale for this single regulator model was *inter alia* to establish a more coherent and proportionate approach in relation to the regulation and enforcement of financial services, securities and market abuse laws as well as a level playing field for all investors and other relevant market participants in the United Kingdom. Thus, as pointed out earlier, the Financial Services Authority has fairly managed to formulate high level objectives and measures, especially in relation to the enforcement of market abuse laws in order to obtain more settlements and prosecutions in market abuse cases.

It was also noted that South Africa has so far not been able to enforce its market abuse prohibition successfully and consistently in order to increase the combating of market abuse practices in South Africa. The reason for this disparity could be that, unlike South Africa, the United Kingdom has devoted significantly more resources towards the enforcement of its securities and market abuse laws. It was further submitted that the reason for the aforesaid disparity might also have been influenced by the fact that the United Kingdom’s market abuse regime has a number of measures in place such as market abuse awareness programmes; appointing additional skilled investigators; technological surveillance mechanisms and about 2500 to 3000 competent persons who work for the Financial Services Authority in order to enhance the enforcement of the market abuse provisions in the United Kingdom.

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268 See paragraphs 7.5.3 & 7.6.2 above.
269 See paragraphs 7.2 & 7.3 above; also see related remarks in Chapter Nine of this thesis.
270 See paragraphs 7.2 & 7.1 above.
271 See paragraphs 7.3 & 7.1 above.
272 See paragraph 7.5.1 & generally see Blair & Walker *Financial Services Law* 53-55.
274 See paragraphs 7.5.1; 7.6.2 & 7.6.3 above.
275 See paragraph 7.5.1 above.
276 See related analysis in Chapter Nine of this thesis; also see further related discussions in paragraphs 3.2.1 & 4.2 in Chapters Three & Four of this thesis.
277 See paragraph 7.5.1 above.
278 See paragraphs 7.5.1 & 7.7 above.
relation to this, it is suggested that the Securities Services Act,\(^{279}\) the Financial Markets Bill\(^{280}\) and/or the Financial Markets Bill 2012\(^{281}\) should be reviewed to enact provisions that specifically empower the Financial Services Board to appoint other additional skilled persons, apart from its own employees, to provide it with reports or relevant information relating to any suspected market abuse violations in South Africa. It was also suggested that South Africa should not have blindly adopted some of the enforcement methods that are employed in the United Kingdom without proper measures in place to ensure that such methods will be practically compatible and consistently enforced to combat market abuse activities in South Africa.\(^{282}\) Moreover, it was suggested that South Africa should consider practically implementing only the relevant principles of the United Kingdom’s single regulator model because it is economical and less complex.\(^{283}\)

The researcher also acknowledged that, in contrast to the position in the United Kingdom,\(^{284}\) not many self-regulatory organisations have been actively involved in the enforcement of the market abuse prohibition to supplement the efforts of the Financial Services Board in South Africa to date.\(^{285}\) In relation to this, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly empower other self-regulatory organisations in South Africa, apart from the Financial Services Board, to impose their own penalties or take any other appropriate action against any persons who indulge in market abuse activities in South Africa.

It is submitted that a significant number of flaws and challenges such as the adoption of few market abuse preventative measures and the failure to provide separate and distinct penalties for companies and individuals could also have marred the successful enforcement of the market abuse ban in South Africa to date.\(^{286}\) It is further submitted that the Financial Services Board should be expressly and statutorily authorised to impose separate and different penalties on individuals and juristic persons or companies that engage in market abuse

\(^{279}\) 36 of 2004, hereinafter referred to as the Securities Services Act.

\(^{280}\) [B-2011], hereinafter referred to as the Financial Markets Bill.

\(^{281}\) [B12-2012], hereinafter referred to as the Financial Markets Bill 2012.

\(^{282}\) See related analysis in Chapter Nine of this thesis

\(^{283}\) See related analysis in Chapter Nine of this thesis

\(^{284}\) See related analysis in paragraphs 753 & 762 above.

\(^{285}\) See related analysis in Chapter Nine of this thesis.

\(^{286}\) See related remarks in Chapter Nine of this thesis.
activities in South Africa. Over and above, it is suggested that the Financial Services Board, like the Financial Services Authority,\(^{287}\) should be statutorily empowered to publicise the names of the culprits who commit market abuse offences (public censure or name and shame approach) in South Africa. In line with this, as previously stated,\(^{288}\) it is was submitted that the provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which seek to empower the Financial Services Board to publish by notice on its official website or by means of other appropriate public media, any outcome, status or details of market abuse investigations (public censure or name and shame approach) if such publication is in the public interest, should speedily come into force. In addition, it was noted that, unlike the position in the United Kingdom,\(^{289}\) there is no provision for a private right of action that is afforded to market abuse victims to enable them to recover their damages directly from the offenders in South Africa.\(^{290}\) It is accordingly submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that give private rights of action to the affected persons for them to claim their damages directly from the market abuse offenders. Furthermore, it was stated that, unlike the position in the United Kingdom,\(^{291}\) the market abuse whistle-blowing immunity method is not statutorily employed in South Africa.\(^{292}\) Therefore, it is recommended that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to introduce whistle-blower immunity provisions for the purposes of encouraging all the persons to voluntarily disclose any information regarding market abuse activities to the Financial Services Board or other enforcement authorities in South Africa. It was also acknowledged that in most instances the Financial Services Board depend on the JSE’s surveillance systems to detect any purported market abuse activity in the regulated financial markets in South Africa.\(^{293}\) In view of this, it is suggested that the Financial Services Board should seriously consider establishing its own surveillance systems to improve and increase the timeous detection of market abuse activity in both the regulated and unregulated financial markets in South Africa.

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\(^{287}\) Generally see paragraphs 7 5 1 & 7 7 above.

\(^{288}\) See related remarks in Chapter Nine of this thesis.

\(^{289}\) See related remarks in paragraphs 7 4 & 7 7 above.

\(^{290}\) See related remarks in Chapter Nine of this thesis.

\(^{291}\) See related remarks in Chapter Nine of this thesis.

\(^{292}\) See related remarks in paragraph 7 7 above.

\(^{293}\) See related remarks in Chapter Nine of this thesis.

See similar comments in Chapter Nine of this thesis.
It has been noted that the United Kingdom’s market abuse regime has empowered the Financial Services Authority to enter into some co-operation agreements with local self-regulatory organisations as well as other international regulatory bodies like the United States Securities and Exchange Commission and the International Organisation of Securities Commissions to combat market abuse practices in the United Kingdom and elsewhere.\(^\text{294}\) It was argued that this has enabled the Financial Services Authority and the relevant courts to speedily detect, investigate and prosecute any persons who commit market abuse offences in the United Kingdom, even when such persons are domiciled in other countries.\(^\text{295}\) On the other hand, it was noted that neither the Financial Services Board nor the courts have achieved any momentous progress in relation to the prosecution and settlement of cross-border market abuse cases in South Africa.\(^\text{296}\) As a result, it is suggested that more specialised market abuse courts manned by sufficient persons with the relevant expertise to adjudicate in matters involving market abuse should be established in all the provinces of South Africa to increase awareness and/or the combating of market abuse practices in the South African financial markets. It is further submitted that the Financial Services Board should be statutorily required to support the Director of Public Prosecutions and the relevant courts with the necessary information regarding ongoing market abuse cases in South Africa by assigning certain persons with the relevant expertise to assist the Director of Public Prosecutions and/or relevant courts in their prosecution of such cases in South Africa.

It was further noted and discussed that although the Financial Services Board has reportedly forged co-operation agreements with some international self-regulatory organisations like the International Organisation of Securities Commissions, there is very little or no effort that has been specifically made to enforce and exploit such co-operation agreements to combat cross-border market abuse practices in South Africa.\(^\text{297}\) Accordingly, it was submitted that the relevant provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which now empower the Financial Services Board to assist foreign regulators with investigations pertaining to any cross-border market abuse cases should speedily come into force to enhance the combating of such cases in South Africa and elsewhere. It was further submitted that the Financial Services Board should also enter into more co-operation

\(^{294}\) See paragraphs 7.51; 7.62 & 7.63 above.

\(^{295}\) See paragraphs 7.52; 7.61 & 7.63 above.

\(^{296}\) See related comments in Chapter Nine of this thesis; also see further related discussions in paragraphs 3.2.1 & 3.2.6 in Chapter Three of this thesis & paragraphs 4.2 & 4.4.3 in Chapter Four of this thesis.

\(^{297}\) See similar comments in Chapter Nine of this thesis.
arrangements with international regulatory bodies that enforce commodities-based market abuse laws such as the Commodity Futures Trading Commission, the London International Financial Futures and Options Exchange Administration and Management and the Trade Point Stock Exchange in order to increase the combating of commodities-based market abuse practices in South Africa. Moreover, the fact that a relatively few market abuse cases reported to the Financial Services Board by either the JSE or other enforcement authorities have been successfully settled and prosecuted in South Africa under the Securities Services Act was acknowledged. In this regard, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly impose a mandatory co-operation obligation on both the Financial Services Board and the JSE to improve the enforcement of the market abuse prohibition in South Africa.

The fact that the Criminal Justice Act only extends the insider trading liability to individuals who deal in affected securities on a regulated market or where such dealing is conducted on the over the counter markets through a professional intermediary, while there is no similar provision in the corresponding legislation in South Africa, was noted and discussed. Accordingly, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly discourage any market abuse activity or illicit dealing in securities on unregulated over the counter markets through agents or professional intermediaries and face-to-face transactions between non-professional intermediaries in South Africa.

The absence of adequate definition for insider trading in the United Kingdom and South Africa was discussed. In this regard, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly and adequately define the concept of insider trading in South Africa. Moreover, it was noted that the concept of, and conduct amounting to market manipulation or other market abuse practices is statutorily defined in the United Kingdom, while such

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298 See similar remarks in Chapter Nine of this thesis.
299 See paragraph 72 above.
300 See related remarks in Chapter Nine of this thesis; also see paragraph 72 above.
301 See related remarks in Chapter Nine of this thesis; also see paragraph 72 above.
302 See related remarks in paragraph 73 above.
concept and/or conduct is not statutorily defined in South Africa.\textsuperscript{303} In view of this, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly and adequately define the concept of market manipulation in South Africa.

Moreover, it has been noted that, unlike the Securities Services Act,\textsuperscript{304} the Financial Services and Markets Act treats insider trading, market manipulation and other forms of market abuse practices on a more equal footing in United Kingdom.\textsuperscript{305} It was argued that this approach is desirable\textsuperscript{306} and consequently, it was suggested that the Securities Services Act should be amended in line with the Financial Services and Markets Act to enable the Financial Services Board and/or other enforcement authorities to enforce the market abuse prohibition consistently in South Africa. While giving due regard to this view,\textsuperscript{307} it was also submitted that another option will be to ensure that the provisions of the Financial Markets Bill which now extends the civil liability compensation orders to cases involving both insider trading and market manipulation will speedily come into effect to enhance the enforcement of the market abuse ban in South Africa.

It was noted that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly provide how the extra-territorial application of their market abuse ban will be utilised to protect the South African financial markets from non-resident persons who manipulate securities listed on a foreign market where such conduct has no effect on the related securities listed on the regulated financial markets in South Africa.\textsuperscript{308} In this regard, it is suggested that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that clearly enumerate sufficient guidelines or conditions under which such extra-territorial application will be employed to prevent cross-border market abuse activities consistently in South Africa and elsewhere.

\textsuperscript{303} See related remarks in Chapter Nine of this thesis; also see paragraph 7 3 above.
\textsuperscript{304} See s 75 & s 76 read with s 73 & s 77 of the Securities Services Act; also see related remarks in Chapter Nine of this thesis.
\textsuperscript{305} See further related remarks in paragraph 7 3 above.
\textsuperscript{306} See further related remarks in Chapter Nine of this thesis; also see paragraph 7 3 above.
\textsuperscript{307} See further related remarks in Chapter Nine of this thesis.
\textsuperscript{308} See further related remarks in Chapter Nine of this thesis.
It was acknowledged that the Financial Services Authority has issued the Code of Market Conduct to guide all the relevant persons on conduct that amounts to market manipulation and related practices (including factors to be considered when determining whether such conduct amounts to market abuse) in the United Kingdom. Consequently, it is submitted that the Financial Services Board should be statutorily obligated to provide its own Code of Market Abuse Conduct containing sufficient and adequate guidelines on factors that should be considered from time to time, in determining whether a trading practice and/or behaviour will give rise to or amounts to market abuse practices in order to improve the combating of such practices in South Africa. It is further submitted that both the Financial Services Board and the JSE should consider embarking more on awareness and educative programmes such as developing an adequate anti-market abuse curriculum to be taught to students from high school level up to tertiary level; publishing adequate quarterly informative market abuse booklets on their respective websites; and conducting anti-market abuse workshops and public lectures in order to prevent market abuse practices and increase the general awareness among the market participants and/or other relevant stakeholders in the South African financial markets.

In conclusion, notwithstanding the fact that a detailed analysis of the recommendations is reserved for the last chapter, it is submitted that the suggestions and/or proposed provisions summarised below could play a key role in the enforcement of the market abuse ban in South Africa:

Firstly, it is submitted that the Financial Services Board should be statutorily required to provide its own Code of Market Abuse Conduct containing sufficient and adequate guidelines on factors that should be considered from time to time, in determining whether a trading practice and/or behaviour will give rise to or amounts to market abuse practices in order to increase the combating of such practices in South Africa;

Secondly, it is submitted that the Financial Services Board and the JSE should consider embarking more on awareness and educative programmes such as developing an adequate anti-market abuse curriculum to be taught to students from high school level up to tertiary level; publishing some quarterly informative market abuse booklets on their respective websites; and conducting anti-market abuse workshops and public lectures in order to prevent market abuse practices and increase the general awareness among the market participants and/or other relevant stakeholders in the South African financial markets.

309 See paragraph 7 5 1 above; also see further related remarks in Chapter Nine of this thesis.
websites; conducting market abuse workshops and public lectures to prevent market abuse practices and increase the general awareness among the market participants and/or other relevant stakeholders in the South African financial markets;

Thirdly, the Financial Services Board should be expressly and statutorily authorised to impose separate, different and unlimited monetary and other appropriate penalties on individuals and juristic persons or companies that engage in market abuse activities in South Africa;

Fourthly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly and adequately define the concepts of “insider trading” and “market manipulation” in South Africa;

Fifthly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly discourage any market abuse activity or illicit dealing in securities on unregulated over the counter markets through agents or professional intermediaries and face-to-face transactions between non-professional intermediaries in South Africa;

Sixthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly impose a mandatory cooperation obligation on both the Financial Services Board and the JSE to improve the enforcement of the market abuse prohibition in South Africa;

Seventhly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that clearly enumerate sufficient guidelines or conditions under which the extra-territorial application of the market abuse ban will be employed to prevent cross-border market abuse activities consistently in South Africa and elsewhere;

Eighthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that specifically empower the Financial Services Board to appoint or assign other additional skilled persons, apart from its own
employees, to provide it with reports or relevant information relating to any suspected market abuse violations in South Africa; and

Lastly, the Financial Services Board should enter into more co-operation arrangements with international regulatory bodies that enforce commodities-based market abuse laws such as the Commodity Futures Trading Commission, the London International Financial Futures and Options Exchange Administration and Management and the Trade Point Stock Exchange to increase the combating of commodities-based market abuse practices in South Africa.

Given the analysis employed in this chapter, the next chapter will comparatively focus on the enforcement of the market abuse ban in South Africa and Australia in order to isolate, where possible, appropriate enforcement measures that can be incorporated into the South African anti-market abuse enforcement framework.
CHAPTER EIGHT

THE ENFORCEMENT OF MARKET ABUSE PROVISIONS IN AUSTRALIA: A COMPARATIVE PERSPECTIVE

8 1  Introduction

Although Australia has been criticised by some commentators as having arguably one of the broadest market abuse prohibitions,\(^1\) it is widely acknowledged that Australia currently has the most progressive and developed market abuse legislation in the world.\(^2\) Its regulatory framework prohibits insider trading activity indirectly through common law and directly through statutory insider trading provisions.\(^3\) In addition, illicit trading practices like market manipulation and/or other market misconduct practices are expressly prohibited under the Corporations Act\(^4\) as amended by the Financial Services Reform Act.\(^5\) Furthermore, in

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\(^4\) 50 of 2001(Cth) as amended, hereinafter referred to as the Corporations Act. Generally see the Corporations Act, s 1041A for market manipulation; s 1041B for false trading and market rigging including the creation of false or misleading appearance of active trading; s 1041C for false trading and market rigging including artificially maintaining a trading price; s 1041D for dissemination of information about illegal transactions; s 1041E for false or misleading statements; s 1041F for inducing other persons to deal; s 1041G for dishonest conduct & s 1041H for misleading or deceptive conduct (civil liability only). For a detailed analysis of these provisions, see the discussion that will ensue later in paragraph 8 2 8 3 of this Chapter & also see Part 7.10 of the Corporations Act. See further Huang “Redefining Market Manipulation in Australia: The Role of An Implied Intent Element” 2009 *Company and Securities Law Journal* 8 9-22 (this article is also available at <http://www.clta.edu.au/professional/papers/conferences2009/HuangCLTA09.pdf> (accessed 13-04-2010)).
Australia, the market abuse prohibition is generally well accepted by the investing and non-investing public as well as by the government. This co-operative and co-ordinated approach on the part of all the relevant stakeholders has to date given rise to an increased awareness and commendable combating of market abuse activities in the Australian corporations, companies and securities markets.6

It is against this background that the Australian market abuse regime accordingly demands a special and more careful comparative analysis. For the purposes of this chapter, the significant enforcement methods which may be learnt from the Australian experience will be isolated where necessary for consideration in the South African market abuse regulatory framework. Nonetheless, this chapter will mainly concentrate on the relevant provisions of the Corporations Act and other selected international market abuse cases.

8 2 Historical Overview of Market Abuse Prohibition
8 2 1 Prohibition on “Insider Trading” Prior to 1970

The securities laws which were enacted to regulate the Australian financial markets in the early 1960s were very different to the current insider trading framework.7 For example, each state operated its own stock exchange and enacted its own securities laws with varying enforcement approaches.8 Thus, despite the fact that the federal government enacted a Uniform Companies Act9 which was adopted by each state, very little was achieved regarding the uniformity of the Australian securities laws for the purposes of combating insider trading in Australia.

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7 Also see generally Chapter Three in Lyon An Examination of Australia’s Insider Trading Laws SJD Thesis, Deakin University (2003) 57.
8 This disparate was evidenced in part, by a number of notable corporate scandals and securities abuses which were reported particularly after the mining boom of the late 1960s in Australia. See further Chapter Three in Lyon An Examination of Australia’s Insider Trading Laws 56-57.
9 1961, hereinafter referred to as the Uniform Companies Act. Put differently, from 1961 to 1962 all the states enacted similar Companies Acts in order to comply with the Uniform Companies Act; see further s 124 & s 124A of the Uniform Companies Act.
822 Prohibition on “Insider Trading” Prior to 1980

Various recommendations were made in the Company Law Advisory Committee Report of 1970. Consequently, a prohibition was introduced in the Uniform Companies Act to specifically deal with insider trading in Australia. However, this prohibition was restricted only to directors, officers or other employees of a company who dealt in securities of that company while in possession of certain information relating to the affected securities and which was not generally available. This restriction was accordingly criticised by other commentators. As a result, the New South Wales state parliament recommended the adoption of a new provision to deal with insider trading under the Securities Industry Act. This Act imposed criminal and civil liability on any person who traded with another person associated to or in association with a corporation or company for purposes of obtaining a financial advantage, gain or profit, if that person possessed specific price-sensitive inside information relating to the corporation or company which was not generally available (known) to the public. This provision was further amended in 1971. Nonetheless, the Senate Select Committee on Securities and Exchange exposed rampant insider trading activity which was committed by certain classes of brokers, directors and investors by trading in the securities of a mining company called Poseidon NL. Eventually, the Securities Industry Act was introduced in an attempt to strengthen the insider trading prohibition.

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10 The Company Law Advisory Committee is hereinafter referred to as the Eggleston Committee and its Report as the Eggleston Report.
12 See Chapter Three in Lyon An Examination of Australia’s Insider Trading Laws 58.
14 See s 75A of the Securities Industry Act 1970.
15 This amendment was introduced by the Securities Industry (Amendment) Act 11 of 1971(NSW), hereinafter referred to as the Securities Industry Amendment Act.
16 See the Senate Select Committee on Securities and Exchange, Parliament of Australia, Australian Securities Markets and their Regulation (1974) 2.110. This Committee is hereinafter referred to as the Rae Committee and its report as the Rae Report.
17 See the Rae Report 129.
18 See Rae Committee 16.2.
19 3 of 1975 (NSW), hereinafter referred to as the Securities Industry Act 1975.
Subsequent review of the insider trading legislation led to the enactment of the Securities Industry Act. Its provisions included more elaborate civil remedies for all persons who were prejudiced by insider trading and related activities, such as tipping. However, the Securities Industry Act 1980 restricted the insider trading prohibition only to natural persons connected to the company or body corporate involved, by virtue of being an officer of that body corporate or by having a substantial holding in the relevant body corporate or of a related body corporate or by virtue of their professional relationship with the body corporate or company concerned. Moreover, the insider trading prohibition was mainly based on the fiduciary relationship between the offenders and the body corporate or company concerned. Nonetheless, no successful prosecutions of insider trading cases were achieved under the Securities Industry Act 1980. This, inter alia, prompted other states to introduce further amendments to their insider trading prohibition in a bid to improve the enforcement of such prohibition. The National Companies and Securities Commission appointed Professor Anisman to investigate and report on the effectiveness of the Securities Industry Act 1980’s insider trading provisions. The Anisman Report revealed that the adoption of the requirement of the proof of connection to the company, on the part of the offenders, was impeding the enforcement of the insider trading prohibition in Australia. It also exposed the problem of non-disclosure and proposed the adoption of a mandatory disclosure requirement on the part of all the listed companies in Australia. Nevertheless, the Anisman Report was criticised by the government, academics and other relevant stakeholders for, among other things, its failure to provide empirical evidence for its proposals and to critically review the policy issues regarding former insider trading legislation in Australia. Furthermore, the
Tomasic and Pentony Report\textsuperscript{30} indicated that insider trading was still rife in Australia according to the anecdotal evidence which was obtained and that insider trading activity was generally tolerated in the Australian securities markets and very difficult to prove owing to investigatory and evidentiary problems.\textsuperscript{31} In 1989, the Griffiths Report further proposed the adoption of an administrative framework which supervises the financial markets and the enforcement of insider trading provisions in Australia.\textsuperscript{32} Consequently, the Corporations Law\textsuperscript{33} was enacted at a federal level and it prohibited insider trading indirectly through common law by punishing officers, advisers or employees of any corporation or company who negligently or fraudulently breached their fiduciary duties by practising insider trading.\textsuperscript{34} Moreover, its statutory (direct) prohibition on insider trading was contained in Division 2A of Part 7.11.\textsuperscript{35}

\textbf{8 2 4 Prohibition on “Insider Trading” Prior to 2001}

In 1990 yet another legislative review was undertaken and the Corporations Legislation Amendment Act\textsuperscript{36} came into force. However, its provisions were amended and repealed by the Corporations Legislation Amendment Act.\textsuperscript{37} This followed the adoption of several recommendations made in the Griffiths Report in October 1989.\textsuperscript{38} A further amendment was
introduced by the Corporations Legislation Amendment (No 2) Act. Moreover, the Corporate Law Reform Act was passed and it introduced new policy objectives regarding the regulation of insider trading in Australia, namely market fairness, equal access and market efficiency. Other key changes to the enforcement of the insider trading ban were introduced by the Corporate Law Economic Reform Program Act.

8 2 5 Prohibition on “Insider Trading” under the Corporations Act 2001

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

Notably, the concept of insider trading is not statutorily defined in the Australian statutes, including the Corporations Act. There seems to be less than full agreement with regard to the literal, purposive and legislative interpretation of this concept in Australia. Therefore, the term “insider trading” is not prominently used in the Australian insider trading legislation. The Corporations Act has, however, defined a few terms which constitute or involve insider trading. For example, it defines terms such as “generally available”, “inside information”,

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39 201 of 1991 (Cth), hereinafter referred to as the Corporations Legislation Amendment (No 2) Act.
41 See the Corporations Legislation Bill Explanatory Memorandum 326-327; also see the Attorney-General’s Department, Commonwealth Government’s draft legislation and explanatory paper entitled Insider Trading—Proposed Amendments to the Corporations Law (1990) 6.
42 103 of 2004 (Cth), hereinafter referred to as the CLERP Act. This Act upheld the civil penalty rules reforms that were introduced by a similar Act in 1999, in a bid to inter alia enhance the enforcement of the insider trading ban.
44 This is the so-called fuzzy law technique, which characterises most of the Australian insider trading criminal sanctions. See Lyon & Du Plessis The Law of Insider Trading in Australia 66.
45 S 1042C read with 1042A of the Corporations Act.
“material effect”, and “procuring”. Nonetheless, other terms such as “insider”, “tipping”, “tippee” and “tipper” are not expressly defined in the current insider trading provisions. Be that as it may, it is generally accepted that insider trading involves the abuse of or exploitation of non-public price-sensitive inside information that relates to a body corporate or its securities for personal gain by any person. Therefore, the current insider trading prohibition applies to all Division 3 financial products. Division 3 financial products include: (a) securities, or (b) derivatives, or (c) interests in a managed investment scheme, or (d) debentures, stocks or bonds issued or proposed to be issued by a government, or (e) superannuation products other than those prescribed by the regulations made for the purposes of the insider trading prohibition, or (f) any other financial products that are able to be traded on a financial market.

As a result, insiders or any other persons who possess price-sensitive inside information that relates to the securities or financial products of a body corporate and who know or ought reasonably to have known that such information was not generally available to the public are prohibited from subscribing for, applying for or disposing of, purchasing, procuring or selling such securities or financial products. Notably, the current Australian insider trading prohibition applies to any person as defined under the Corporations Act or who qualifies to be an insider as stipulated under the same Act. The term “person” is defined to include a body corporate or partnership (juristic persons) as well as a natural person (an individual). This clearly shows that the Australian insider trading prohibition now has a much broader

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46 S 1042A of the Corporations Act.
47 S 1042D read with s 1042A of the Corporations Act.
48 S 1042F read with s 1042A of the Corporations Act.
50 See further s 1042A compare it with s 764A of the Corporations Act. Also see further Lyon & Du Plessis The Law of Insider Trading in Australia 54-57.
51 S 1043A read with s 1042A & s 1042C of the Corporations Act. Also see further Lyon & Du Plessis The Law of Insider Trading in Australia 14-65; O’Brien “Insider Trading Case to Test Chinese Walls” Irish Times (2006-05-01), on the prospect of the Citigroup Global Capital Market company facing heavy penalties for allegedly practising insider trading amounting to a profit of about Aus $4, 6 billion of (its client) Toll Holdings shares.
52 S 1043A of the Corporations Act.
53 Generally see s 1042G; s 1042H & s 1043A read with s 761F & s 761FA of the Corporations Act, which describes the term “person” to include both individuals and body corporate or juristic persons who possess inside information.
application than the similar prohibition found in other jurisdictions. It explicitly covers both juristic and natural persons as well as a wide range of financial products. Moreover, it discourages a number of related insider trading activities, like tipping. Accordingly, an insider or any other person is specifically prohibited from deliberate, intentional and unlawful communicating (disclosure) of price-sensitive inside information to another person before it becomes generally available to the public (published).\footnote{S 1043A(2)(c) read with (a); (b); (d) & (e) of the Corporations Act; also see Chapter Four in Lyon An Examination of Australia’s Insider Trading Laws 104; see further Latimer “Whistleblowing in the Financial Services Sector” 2002 University of Tasmania Law Review 39 46; Zipparo “Encouraging Public Employees to Report Workplace Corruption” 1999 Australian Journal of Public Administration 83 88; Liverani “Cool Reception for Whistleblowing in the Professions” 2002 Law Society Journal 26; Gobert & Punch “Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998” 2000 Modern Law Review 25 46 & generally see comparatively Brand “Sanctioned ‘Dobbing’: Whistle Blowing under the Corporations Act, 2001 (C’th)” <http://www.parsons.law.usyd.edu.au/CLTA/BrandPaper.pdf> (accessed 28-02-2007).

In addition, the Corporations Act’s insider trading provisions apply to acts or omissions (unlawful trading) within Australia relating to securities or financial products of any person or foreign body corporate as well as extra-territorially to acts or omissions outside Australia in relation to the securities or financial products of a person or body corporate that is established or carrying on business in Australia.\footnote{S 1042B(a) & (b) of the Corporations Act. Also see generally Ford, Austin & Ramsay Ford’s Principles of Corporations Law Looseleaf service update number 43, 9/2004 9338 [9.605] & Looseleaf service update number 42, 6/2004 9357 [9.650].}

Therefore, all territorial limitations and problems which previously impeded the enforcement of insider trading provisions outside Australia appear now to be solved.\footnote{See generally Berkahn & Su “The Definition of ‘Insider’ in Section 3 of the Securities Markets Act 1998: A Review and Comparison with Other Jurisdictions” 2003 Discussion Paper Series 218 9-10 <http://www.accountancy.massey.ac.nz/Publications.htm> (accessed 02-02-2010). Also see Danae Investment Trust plc v Macintosh Nominees Pty Ltd (1993) 11 ACLC 273 1242, where the Supreme Court of South Australia previously held that s 128 of the Securities Industry Act 1980 did not apply to the purchase or sale of shares in a company incorporated in Australia if such transactions took place elsewhere. In this case it was further held that s 128 did not apply to transactions which took place in the United Kingdom.}

8 2 6 Available Penalties and Remedies

For the purposes of achieving the best results in Australia, the remedies and penalties for violating insider trading provisions fall in three categories, namely criminal penalties, civil remedies and civil penalties.\footnote{Lyon & Du Plessis The Law of Insider Trading in Australia 107.}
Civil Penalties

Although the civil penalty actions were only introduced in respect of insider trading on 11 March 2002, when the amendments which were brought by the Financial Services Reform Act were formally adopted, they have to date considerably enabled the Australian Securities and Investments Commission to seek and recover some penalties from several insider trading offenders in Australia. Therefore, the introduction of the civil penalty actions was positively welcomed in Australia as a potentially effective way of overcoming the high and difficult evidentiary challenge associated with the criminal standard of proof required for insider trading purposes. Accordingly, the Corporations Act imposes civil penalties on those who engage in insider trading activity by aiding, abetting, inciting, conspiring in or who knowingly contravene its insider trading provisions. Put simply, the civil penalty actions for insider trading are generally two-fold in nature. Firstly, any person who violates the insider trading provisions will be primarily liable to compensate any other person who fall victim to insider trading or tipping for his losses. Secondly, a civil penalty action for compensation is further provided against a principal, person procured and/or any other person who contravenes the insider trading civil compensation provisions. Moreover, the actions for compensation and imposing a penalty must be instituted within six years of the arising of the cause of action.

Even though it seems that procuring or tipping another person as contemplated in the Corporations Act does not lead to an action for compensation, various circumstances are specifically provided for in the said Act under which such an action may be brought against

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60 S 79 of the Corporations Act.
61 S 1043L read with s 1317HA of the Corporations Act.
62 The term “procure” is defined as including inciting, inducing or encouraging an act or omission by another person. S 1042F read with s 1043L of the Corporations Act.
63 S 1043L read with s 1043A(1) & s 1317HA of the Corporations Act.
64 S 1317K of the Corporations Act.
65 S 1043A(2)(c) read with (a); (b); (d) & (e) of the Corporations Act.
an insider or any other person whose conduct amounts to tipping.\textsuperscript{67} Additionally, this enables any uninformed purchaser, the issuer of securities and the Australian Securities and Investments Commission to invoke the civil proceedings in a number of ways. Firstly, the issuer of the securities or financial products is entitled to recover any damages suffered by him from the insider or from any person who applies or procures another to apply for financial products as contemplated in the Corporations Act.\textsuperscript{68} The civil penalties or damages will then comprise the difference between the application price and the price that could have been asked if the information had been available to the public at the time of application. In addition, the issuer of financial productions has additional rights as enshrined in the Corporations Act.\textsuperscript{69} For example, if such products were the subject matter of an affected transaction, the issuer or any affected person in question may also recover the loss incurred.\textsuperscript{70} This may indicate that an insider or any person who contravenes the insider trading provisions may incur civil liability where the securities in question have been purchased or sold.\textsuperscript{71} Secondly, an uninformed purchaser or any person who disposes of a financial product may recover his damages suffered from the insider trading offenders.\textsuperscript{72} Lastly, the Australian Securities and Investments Commission may, where it considers it being in the public interest, bring an action in the name of and for the benefit of any affected issuer or body corporate to recover civil damages.\textsuperscript{73}

\textbf{8 2 6 2 Criminal Penalties}

Any person who contravenes the insider trading provisions will further be liable for criminal penalties.\textsuperscript{74} Nonetheless, the Corporations Act does not expressly provide for ancillary

\textsuperscript{67} S 1043L(2) to (5) of the Corporations Act.
\textsuperscript{68} S 1043L(2) of the Corporations Act.
\textsuperscript{69} S 1043L(5) of the Corporations Act.
\textsuperscript{70} See further s 1043L(5) read with subsections (3) & (4) of the Corporations Act.
\textsuperscript{71} See further Ford, Austin & Ramsay Looseleaf service update number 43, 9/2004 9406 [9.690]. Also see Keygrowth Ltd v Mitchell (1990) 3 ACSR 476 487.
\textsuperscript{72} See for details s 1043L(3) & (4) read with s 1317HA of the Corporations Act.
\textsuperscript{74} S 1311(1) of the Corporations Act; also see Lyon & Du Plessis \textit{The Law of Insider Trading in Australia} 111-112.
criminal liability for accessories (aiders and abettors).\textsuperscript{75} Despite this, such accessories (aiders and abettors) who deliberately engage themselves in insider trading may still incur accessorial criminal liability in terms of the Criminal Code Act\textsuperscript{76} which applies to all contraventions of Commonwealth Acts.\textsuperscript{77} The Criminal Code Act stipulates that a person who aids, abets, counsels or procures the commission of an offence is regarded to have actually committed that offence and is sentenced accordingly even where the principal offender has not been prosecuted or convicted.\textsuperscript{78} In relation to this, the discretion to institute criminal proceedings on indictment for insider trading is vested in the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions.\textsuperscript{79} The prosecution of an offence against the Corporations Act may be instituted within five years after the commission of the offence in question or at any time agreed by the Minister of Justice.\textsuperscript{80} It is submitted that this five year time frame should be flexible in its application and must not be treated as a time restriction with regard to the institution of criminal actions for insider trading. This will enable the prosecution for summary offences\textsuperscript{81} to be executed outside the period contemplated under other relevant statutes in Australia.\textsuperscript{82} It is also hoped that the insider trading offence will be successfully prosecuted anytime even after five years of its commission because it is treated as an indictable offence in Australia.\textsuperscript{83}

\textsuperscript{75} However, s 1043A(1) & 1043L(1)(c) of the Corporations Act provides that an insider, whether as a principal or an agent, may not deal or procure another person to deal in any financial products. Be that as it may, the term “agency” does not always give rise to accessorial liability because it sometimes requires the element of \textit{mens rea} or fault to be fulfilled before such liability can be imputed against the offenders.

\textsuperscript{76} 12 of 1995 (Cth) as amended, hereinafter referred to as the Criminal Code Act.

\textsuperscript{77} See Part 2.4 Division 11; s 11.22 & s 11.2(5) of the Criminal Code Act.

\textsuperscript{78} This is the so-called ancillary or accessorial liability. See Part 2.4 Division 11; s 11.22 & s 11.2(5) of the Criminal Code Act; also see s 1370 & s 1384 of the Corporations Act & see further Lyon & Du Plessis \textit{The Law of Insider Trading in Australia} 108-109.

\textsuperscript{79} This is done in accordance with a memorandum of understanding between the Commonwealth Director of Public Prosecutions (Commonwealth DPP) and the Australian Securities and Investments Commission (ASIC) which was signed on 22 September 1992. See generally s 1316 of the Corporations Act; also see related articles like ASIC Digest Vol 4 [3603] 3330; ASIC Digest Vol 1 [1047] 58.48 & the Commonwealth DPP \textit{The Decision to Prosecute: The Policy of the Commonwealth} (2003) 2.28 <http://www.cdpp.gov.au/Prosecutions/Policy> (accessed 31-05-2010). Also see related cases like \textit{Kovess v Director of Public Prosecutions} (1998) 74 FCR 297 & \textit{Attorney-General (C’th) v Qates} (1999) 198 CLR 162.

\textsuperscript{80} See generally s 1316 of the Corporations Act; see further \textit{Attorney-General (C’th) v Qates} 162.

\textsuperscript{81} S 4H of the Crimes Act 12 of 1914 (Cth) as amended, hereinafter referred to as the Crimes Act.

\textsuperscript{82} For example, summary prosecutions for offences in the Victoria state are required to be instituted within one year of the commission of the offence in question. See s 26(4) of the Magistrate Court Act 51 of 1989 (Vic) as amended.

The penalties for contravening the insider trading provisions are stipulated in Schedule 3 of the Corporations Act. Such penalties range from Aus $200,000 and Aus $220,000. For example, where an individual (natural person) is convicted of insider trading, he would be liable for a fine up to 2000 penalty units (Aus $220,000), or a maximum sentence of five years imprisonment, or both. A body corporate may, if it is convicted, be fined up to 10,000 penalty units (Aus $1 million) and in addition, to a maximum fine of up to five times the pecuniary penalty. These penalties were recently increased by the Corporations Amendment (No 1) Act, to a maximum pecuniary fine of Aus $495,000, or three times the profit gained or loss avoided, whichever is the greater, or ten years imprisonment or both, for individuals. Likewise, the maximum criminal penalties for bodies corporate were increased to a fine of Aus $4,950,000 or three times the profit made or loss avoided, or 10% of the bodies corporate’s annual turnover during the relevant period in which the offence was committed, whichever is greater. In addition, where the convicted person is a manager of a company or corporation, that person is automatically disqualified from performing his duties for a period of five years from the date of conviction or release from prison, whichever is later. Furthermore, the Australian Securities and Investments Commission may increase this period by applying to a court for a longer disqualification order where it is justified by exceptional circumstances. Where a person has been convicted of insider trading, the prosecutor on behalf of the Commonwealth Director of Public Prosecutions may apply for the forfeiture of any benefit derived from the criminal activity. The proceeds will be the amount of the illicit profit made and such profit may be forfeited through the intervention of the

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84 See Schedule 3 items 311B & 311C of the Corporations Act.
85 R v Hannes 529.
87 131 of 2010 (Cth), hereinafter referred to as the Corporations Amendment (No 1) Act.
88 See the Explanatory Memorandum of the Corporations Amendment (No 1) Bill 2010 (Cth), hereinafter referred to as the Corporations Amendment (No 1) Bill Explanatory Memorandum; see generally the Corporations Amendment (No 1) Bill Explanatory Memorandum 3.11.
90 Bowen “Greater Powers to the Corporate Regulator to Pursue Market Misconduct” Press Release 28 January 2010; also see further the Corporations Amendment (No 1) Bill Explanatory Memorandum 3.11.
91 S 206B of the Corporations Act.
92 ASIC v Rich [2003] NSWSC 186, where a longer banning period was imposed upon the offenders.
Commonwealth Director of Public Prosecutions and the courts. The proceeds of an indictable offence also include property that is derived or realised, directly or indirectly, by the offenders from the commission of the offence in question. The courts may grant *ex parte* orders preventing access to, or the sale or disposal of the assets by the alleged offenders until after a judicial outcome is obtained. Practically, the Commonwealth Director of Public Prosecutions and the courts have to date successfully managed to impose orders to freeze real property, bank accounts, share trading accounts, cars and other relevant personal property from some insider trading offenders in Australia. Moreover, the use of the seizure and forfeiture method to confiscate the assets or proceeds of criminal activities and any ill-gotten gains has to date served both as a vital deterrent and a key way of curbing insider trading activity in Australia.

### 8263 Civil Remedies

A wide range of civil remedies for insider trading are provided for under the Corporations Act and are mainly administered by the Australian Securities and Investments Commission. In relation to this, actions for civil remedies like compensation orders against the offenders stem from both the insider trading civil compensation provisions and the civil penalty compensation provisions. Furthermore, as earlier adverted to, the civil compensation provisions enumerate some specific circumstances under which an order for civil compensatory remedies may be made. Therefore, any competent court may issue

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93 See s 4; 19(1); s 26 & s 43 of the Proceeds of Crime Act 87 of 1987 (C’th) as amended, hereinafter referred to as the Proceeds of Crime Act. Also see *R v Hannes* 519.
94 See s 4 of the Proceeds of Crime Act.
95 See s 43 of the Proceeds of Crime Act.
96 *R v Hannes* 519; *R v Rivkin* [2003] NSWC 447.
97 For example, in the *Hannes* case, it is stated that the ASIC seized and recovered about Aus $2 million profit made by the offenders as a result of insider trading within two days of the commission of the offence. See *R v Hannes* 519; 529. Also see generally Tomasic “The Prosecution of Insider Trading: Obstacles to Enforcement” 1991 *Australian Studies in Law, Crime and Justice Series* 115 116-126; Tomasic “Insider Trading in the USA and the United Kingdom” 1991 *Australian Studies in Law, Crime and Justice Series* 31 33-39.
98 S 1043L & s 1317HA of the Corporations Act.
99 S 1043L of the Corporations Act.
100 S 1317HA of the Corporations Act.
101 See paragraph 8261 above.
102 See further s 1043L(2) to (6) read with s 1043A & s 1317HA of the Corporations Act. See further related analysis in paragraph 8261 above. Notably, the said order for compensation is usually made in terms of s 1317HA which consists of and is part of the civil penalty compensation provisions. As earlier highlighted, such compensatory orders should be instituted within six years of the cause of action. Also
compensation orders against the insider trading offenders, where the damage results directly from the contravention of a financial services penalty provision which prohibits trading, procuring and tipping.\textsuperscript{103} Notably, the civil compensatory remedies for insider trading are usually utilised in recovering damages from trading and procuring related violations.\textsuperscript{104} As result, other commentators like Gregory Lyon\textsuperscript{105} have lamented that this may lead to an irregular scenario where a person who contravenes the insider trading provisions through actual trading\textsuperscript{106} may be sued for civil compensatory damages while the person who communicates (tipping) that information to others will be exempted.\textsuperscript{107}

Although the circumstances under which the compensatory remedies may be obtained are somehow limited, such remedies are extended against a broad class of persons which extends beyond the stipulated circumstances.\textsuperscript{108} In addition, an action for compensation is available to the prejudiced persons regardless of whether the principal or accessory has been convicted of insider trading.\textsuperscript{109}

The Corporations Act further provides the so-called issuer’s remedy by granting the first right of action to the issuer of the security or other financial products.\textsuperscript{110} Accordingly, issuers may recover the loss suffered (the difference between the application price and the higher price had the information been generally available at the time of the application) from any person who applies for or procures another to apply for the financial products\textsuperscript{111} relating to the issuer

\textsuperscript{103} See s 1317K of the Corporations Act; also see Lyon & Du Plessis The Law of Insider Trading in Australia 117-135.

\textsuperscript{104} S 1317E(1) read with s 1317HA of the Corporations Act. Insider trading civil penalty provisions for procuring and tipping includes s 1317E(jf) & (jg) respectively.

\textsuperscript{105} S 1043L(1) read with s 1043A(1) of the Corporations Act; see further Chapter Six in Lyon An Examination of Australia’s Insider Trading Laws 232.

\textsuperscript{106} See further Chapter Six in Lyon An Examination of Australia’s Insider Trading Laws 232.

\textsuperscript{107} S 1043A(1) of the Corporations Act.

\textsuperscript{108} S 1043A(2) of the Corporations Act.

\textsuperscript{109} S 79 & s 1043L of the Corporations Act.

\textsuperscript{110} S 1043L of the Corporations Act; also see s 1005 & s 1013 of the Corporations Act, which were earlier insider trading civil compensation provisions respectively. S 1043A(1) requires proof of mens rea, so that the person concerned knows or ought reasonably to know that he is in possession of non-public price-sensitive information. On the one hand s 1043L(1) requires proof that the insider knew or was reckless of such information. This implies that the test required for civil compensatory action for remedies is subjective and hence very difficult for the ASIC to recover more civil compensatory remedies against the alleged offenders. See further Qu “The Efficacy of Insider Trading Civil Liability Regime in the Corporations Act” 2002 Australian Journal of Corporate Law 161 178.

\textsuperscript{111} As defined in s 1042A of the Corporations Act.
or the insider concerned. The issuer of the affected financial products may, in addition to actions which may be brought by other prejudiced persons against the insider trading offenders, further recover compensation from the offenders concerned. Therefore, to avoid being liable twice where securities were purchased or sold, the insider should not have benefited from an on-market transaction even if privity is not proved by another opposite trader. Additionally, civil compensatory remedies are also available to other parties affected by the insider or any other offender’s illicit transactions. This means that any person who disposes of a financial product can recover the losses suffered (the difference between the lower price for which the financial product was disposed of and the higher price likely to have been gained had the information been generally available) from an insider who dealt in such financial product. Furthermore, a person who acquires a financial product can recover the loss suffered (the difference between the higher price for which the financial product was acquired and the lower price for which they were most likely to have been obtained if the information was general available) from an insider who disposed of the financial product in question.

Moreover, as earlier stated, the Australian Securities and Investments Commission may, where it considers being in the public interest, institutes an action in the name of and for the benefit of the issuer or body corporate to recover its civil damages. This is usually employed in situations where the issuer’s board of directors was unable or unwilling to act, especially when the insider involved holds some influence over the board.

112 See similar remarks in paragraph 8 2 6 1 above.
113 S 1043L(5) read with subsections (3) & (4) of the Corporations Act; also see related remarks in paragraph 8 2 6 1 above.
114 S 1043L(5) of the Corporations Act; also see Lyon & Du Plessis The Law of Insider Trading in Australia 122.
115 S 1043L(3) read with subsection (4) of the Corporations Act; see similar remarks in paragraph 8 2 6 1 above.
116 S 1043L(3) of the Corporations Act; also see similar remarks in paragraph 8 2 6 1 above.
117 S 1043L(4) of the Corporations Act; also see related remarks in paragraph 8 2 6 1 above. See further Chapter Six in Lyon An Examination of Australia’s Insider Trading Laws 237; also see generally Huang 2005 Australian Journal of Corporate Law 281-322, this article is also available at <http://www.clta.edu.au/professional/papers/conference2005/HuangCLTA05.pdf> (accessed 23-04-2010).
118 See further related analysis in paragraph 8 2 6 1 above.
119 S 1043L(6) of the Corporations Act.
120 The ASIC may therefore institute the action for civil remedies without the affected issuer’s consent. See s 1325 of the Corporations Act; also see also see Lyon & Du Plessis The Law of Insider Trading in Australia 125-130; ASC v Sackley (1991) 9 ACLC 874 & Permanent Trustee Australia Limited v Perpetual Trustee Company Limited (1994) 15 ACSR 722.
A private right of action is another remedy available to the issuers or affected persons to claim their civil damages directly from the insider trading offenders. Such damages include a determination of the profits made by any person resulting from the contravention or the value of the diminution in value of the property of a registered scheme. Accordingly, the extent of damages resulting from these determinations could conceivably go beyond the interpretation of loss as provided in the Corporations Act.

8.2.7 Prohibition on “Market Manipulation”

8.2.7.1 Prohibition on “Market Manipulation” under the Common Law

Australia, like many other jurisdictions, does not statutorily define the concept of “market abuse” and/or other related practices like market manipulation. However, it is generally accepted that market manipulation activities were outlawed under common law as early as 1899 in Australia. Therefore, like the United Kingdom, Australia primarily prohibited market manipulation through the common law principles. Moreover, market manipulation is usually treated and interpreted to include activities that interfere with the natural forces of supply and demand of a particular security or financial product in Australia.

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121 S 1317J read with s 1043L(2) to (5); s 1043L(9) & (10) & s 1317HA of the Corporations Act.
122 S 1317HA(2) of the Corporations Act.
123 S 1317HA(3) of the Corporations Act.
124 S 1043L of the Corporations Act; also see Ampolex v Perpetual Trustee Company [No 2] (1996) 14 ACLC 1514 1524, where it was considered whether the civil compensation provisions could be invoked independently from each other by the affected persons to claim their additional and/or various insider trading damages.
125 See similar discussions in Chapters Two & Five of this thesis.
126 See the codification of common law as undertaken in the Australian states of Queensland in 1899, Western Australia in 1902 and Tasmania in 1924. Accordingly, in Victoria and South Australia states, the common law crime principles discouraging market abuse practices are expressly retained under s 321F(2) of the Crimes Act 6231 of 1958 (Vic) & s 133(2) of the Criminal Law Consolidation Act 2252 of 1935 (SA). See Loke “Common Origins, Different Destinies: Investors’ Rights against Market Manipulation in the United Kingdom, Australia and Singapore” (2007) 4-7 <http://www.nus.edu.sg/lawlex市场化/paper.htm> (accessed 24-02-2009).
127 See R v De Berenger (1814) 3 M&S 67, 105 ER 536.
Market manipulation was initially prohibited by the Securities Industry Act 1970. This Act *inter alia* outlawed the creation of false or misleading appearance of active trading with respect to the listed securities or the market for and/or the price of any securities. A similar prohibition was also retained by the legislations which were later enacted. Moreover, the Corporations Law 1990 further prohibited market manipulation practices such as the making or publication of false or misleading statements, futures contracts market manipulation and the artificial maintaining of securities trading prices in the relevant markets in Australia. The Corporations Law 1990 also prohibited any misleading or deceptive conduct on the part of all the relevant persons, especially the officers or employees of companies. It is stated that the Corporations Law 1990 mainly prohibited stock (including securities) market manipulation and market rigging and its prohibition required proof of *mens rea* on the part of the persons.
of the prosecution. Consequently, the enforcement authorities struggled to obtain settlements and convictions in market manipulation cases.138

8 2 7 3 Prohibition on “Market Manipulation” under the Corporations Act 2001

Market manipulation and other related market misconduct activities are currently prohibited in the Corporations Act.139 This essentially implies that the scope of application of the market manipulation prohibition is now broadly extended not only to market manipulation but also to other related activities.140 More importantly, among the major amendments brought by the Financial Services Reform Act is the removal, on the part of the prosecution, of the explicit requirement of proving the existence of intent from the wording of the market manipulation and other related provisions before imputing any liability on the accused offenders.141 Consequently, market manipulation is prohibited by discouraging all persons from carrying out transactions which have, or are likely to have the effect of creating an artificial price for trading in the financial products or maintaining at an artificial level, a price for trading in the financial products on a financial market in Australia.142 As stated above, the current market manipulation provisions dispense with the requirement of proving the intention to induce

138 See s 5.6(1) read with subsection (2) of the Criminal Code Act; also see further Huang 2009 Company and Securities Law Journal 9-10.

139 See Part 7.10.


141 See s 1041A read with s 1041B(1); s 1041C; s 1041D; s 1041E; s 1041F; s 1041G & s 1041H. Notably, the required faults element for violating s 1041B(1) has now been established, intention is the fault element for the physical element for doing or omitting to do an act as stated in that subsection and recklessness is the fault element for having or likely to have the effect of creating or causing the creation of a false or misleading appearance as stated in that subsection. See s 1041B(1)(1A) of the Corporations Act; also see generally the Corporations Amendment (No 1) Bill Explanatory Memorandum 3.7 & 3.14. It is hoped that this will, in the long run, improve the enforcement of the market abuse prohibition in Australia. See Constable 2011 MqJBL 107; also see generally Huang 2009 Company and Securities Law Journal 8-10 &16-17; Goldwasser “CLERP6-Implications and Ramifications for the Regulation of Australian Financial Markets” 1999 C&SLJ 210 & also see further Armonson (2009) Corporate Law Teachers Association Conference Paper (2009-02-01 to 03) 2-4; 7-12 & 16-17 <http://www.clta.edu.au/professional_papers/conference2009/ArmonsonCLTA09.pdf> (accessed 06-05-2012).

142 S 1041A of the Corporations Act.
others to sell, buy or subscribe for the affected securities or financial products, on the part of
the prosecuting authorities. Put simply, the key requirement now is whether the price of
certain financial products is artificial or misleading. Thus, the focus is now on the effect of the
market manipulative conduct in relation to the affected financial product rather than on the
intention of the trader or the person involved.

Additionally, false trading and market rigging and/or the creation of a false or misleading
appearance of active trading in a financial product or with respect to the market for, or the
price for trading in a financial product is expressly prohibited under the Corporations Act. In
addition, what may constitute a false or misleading appearance of active trading is outlined
in the so-called deeming provisions concerning wash sales and matched orders. Likewise,
the carrying out of fictitious transactions which have the effect of maintaining, fluctuating,
inflating or depressing the price for trading in the financial products on the relevant financial markets in Australia is prohibited.

The dissemination of information about illegal transactions is also prohibited in the
Corporations Act. Put differently, all persons are prohibited from disseminating any
statement or information to the effect that the price for trading in financial products on the
relevant markets will, or is likely to rise, fall or be maintained. Similarly, the reckless or

143 S 1041A of the Corporations Act; compare with s 997 & s 1259 of the Corporations Law 1990.
144 S 5.4(4); s 5.2 & s 5.6(2) read with s 5.6(1) of the Criminal Code Act.
145 S 1041B(1) of the Corporations Act; also see s 1041B(1)(1A) of the same Act which outlines the fault
146 A wash sale occurs where a person or an associate is both the buyer and seller in the same transaction
(selling and repurchasing of the same or substantially the same financial product for the purpose of
generating activity and increasing its price). S 1041B(2)(a) read with s 1041B(1) of the Corporations Act; s 1041B(3) of the Corporations Act sets out circumstances in which an acquisition or disposal of financial
products does not involve a change in beneficial ownership & s 1041B(4) of the Corporations Act enumerates what a transaction of acquisition or disposal of financial products includes.
147 A matched order occurs where a person and his associate places an order to buy or sell at the same time,
for substantially the same number of securities or financial products at substantially the same price. S 1041B(2)(b) read with s 1041B(1) of the Corporations Act; also see s 5.2(2) & 5.6(2) of the Criminal
Code Act, where other physical elements which are taken into account by the courts or the prosecuting
authorities in determining whether the market manipulation offences were committed by the accused
persons in question are outlined. See paragraphs 3.115 & 15.15 of the Supplementary Explanatory
Memorandum to the Financial Services Reform Bill 2001 (hereinafter referred to as the Supplementary
Explanatory Memorandum) & the Revised Explanatory Memorandum respectively. See further Huang
149 S 1041D of the Corporations Act.
150 See s 1041D of the Corporations Act; also see generally Hieronymus “Manipulation in Commodity
Futures Trading: Towards a Definition” 1977 Hofstra Law Review 41 45; Loke “The Investors’ Protected
intentional making or dissemination of a statement or information that is false or misleading materially, and which is likely to induce other persons to deal in financial products or to affect the price of such financial products is outlawed in Australia.152

The Corporations Act further prohibits any person from inducing others to deal in financial products.153 Notably, this prohibition contains a definition of the term “dishonest”.154 This prohibition on ‘inducing others’ is now extended to conduct such as applying to become a standard employer sponsor of a superannuation entity and permitting a person to become a standard employer sponsor of a superannuation entity.155 The Corporations Act prohibits any person, in the course of carrying on a financial services business in Australia, from engaging in dishonest conduct in relation to a financial product or financial service.156 Dishonest conduct was defined to mean dishonest according to the standards of ordinary people, including conduct known by any person to be dishonest according to the standards of ordinary people.157 This definition seem to contain both subjective and objective elements which must be proved by the prosecution in determining whether the conduct in question will be dishonest as contemplated above.158

Moreover, conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive other persons with respect to certain financial

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151 S 1041E(1)(c) of the Corporations Act.
153 S 1041F of the Corporations Act.
154 S 1041F(2) of the Corporations Act.
155 S 1041F(3) of the Corporations Act. Accordingly, the contravention s 1041F will lead to civil liability despite the fact that it is not necessarily a ‘civil penalty provision’; see further the Supplementary Explanatory Memorandum paragraph 3.116.
156 S 1041G(1) of the Corporations Act, which is treated as a ‘civil penalty provision’ but nonetheless its contravention may further results in criminal liability on the part of the offenders. Also see the Revised Explanatory Memorandum paragraph 15.19.
157 S 1041G(2) of the Corporations Act.
158 This criterion was employed in Ghosh [1982] Q.B 341; also see S 1041G(2) of the Corporations Act.
products is broadly prohibited. However, this prohibition does not apply to misleading or deceptive takeover, compulsory acquisition and fund raising documents or disclosure documents or statements as defined in the Financial Services Reform Act. However, the prohibition on misleading or deceptive conduct may apply to: (a) applying to become a standard employer sponsor of a superannuation entity, (b) permitting a person to become a standard employer sponsor of a superannuation entity, (c) a trustee of a superannuation entity dealing with the beneficiary of that entity as such beneficiary, and (d) a trustee of a superannuation entity dealing with a standard employer sponsor.

Other activities that are related to market manipulation such as short selling and market stabilisation are also outlawed in the Corporations Act. Notwithstanding this general prohibition, short selling and market stabilisation may only be permitted under certain requirements as stipulated in the Corporations Act.

### 8.2.7.4 Available Penalties and Remedies

As is the case with the insider trading prohibition, the Corporations Act extends civil penalties, civil remedies and criminal penalties to any person who violates its provisions on market manipulation.

#### 8.2.7.4.1 Criminal Penalties

Any person who engages in market manipulation activities will be liable for a criminal offence and penalty. The discretion to institute criminal proceedings rests primarily with

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159 S 1041H(1) & (2) of the Corporations Act; also see the Revised Explanatory Memorandum paragraphs 15.8 to 15.10, which stipulates that s 1041H repealed and replaced the former provisions of s 995 of the Corporations Law.

160 See Parts 7.7 & 7.9 of the Financial Services Reform Act; also s 1041H(3) of the Corporations Act; the Revised Explanatory Memorandum paragraph 15.10.

161 See further the Supplementary Explanatory Memorandum paragraphs 3.117 & 3.118.

162 S 1020B of the Corporations Act.

163 For example, short selling and market-stabilisation may be allowed where it is the subject of a declaration by a market operator (for example a stock exchange) as approved for such short selling or market stabilisation purposes.

164 See paragraphs 8.2.6 & 8.2.6.4 above.

165 S 1041I provides civil liability against any person who violates s 1041E to s1041H of the Corporations Act.

the Commonwealth Director of Public Prosecutions. Nonetheless, the Australian Securities and Investments Commission may, after consultation with the Commonwealth Director of Public Prosecutions, further bring criminal proceedings against any person accused of contravening the relevant market abuse provisions in Australia.\footnote{168} Accordingly, the prosecution of market manipulation and other market misconduct offences may be instituted within five years after the commission of the offence in question or at any time as stipulated by the Minister of Justice.\footnote{169} Any person who engages in manipulation and/or other market misconduct offences\footnote{170} will be liable for a maximum criminal penalty fine of Aus $22,000 for individuals or (Aus $110,000 for a body corporate), or imprisonment for a period not exceeding five years, or both such fine and imprisonment.\footnote{171} These penalties were recently increased by the Corporations Amendment (No 1) Act, to a maximum pecuniary fine of Aus $495,000 or three times the profit gained or loss avoided, whichever is the greater\footnote{172} or ten years imprisonment\footnote{173} or both, for individuals. The maximum criminal penalties for a body corporate were increased to a fine of Aus $4,950,000, or three times the profit made or loss avoided, or 10\% of the body corporate’s annual turnover during the relevant period in which the offence was committed, whichever is greater.\footnote{174} This clearly suggests that market manipulation and other related market misconduct offences are all treated as criminal offences which carry the same penalty.\footnote{175} In relation to this, the Australian Securities and Investments Commission may further bring such criminal proceedings even after the civil penalty

\footnote{167} S 1308A of the Corporations Act; also see Comino 2006 \textit{Australian Business Law Review} 430-446.
\footnote{168} Comino 2006 \textit{Australian Business Law Review} 429-446.
\footnote{169} S 1316 of the Corporations Act.
\footnote{170} S 1041A to s 1041G read with s 1311of the Corporations Act.
\footnote{171} S 1311; s 1312 & Schedule 3 item 309C of the Corporations Act; also see 4AA of the Crimes Act.
\footnote{172} See the Corporations Amendment (No 1) Bill \textit{Explanatory Memorandum} 3.11.
proceedings for the same conduct have been instituted. However, where a person has been convicted of a criminal offence of the same conduct, no civil penalty action will be additionally instituted against such person.

8 2 7 4 2 Civil Penalties

Civil penalties may also be instituted against any person who violates market manipulation and/or other market misconduct provisions. Currently, such penalties may only be instituted under the civil penalty provisions. Put differently, the civil penalty provisions are now similarly applicable to both the market misconduct and continuous disclosure provisions. Consequently, civil penalties may be brought against the offenders, either as financial services civil penalties or as corporation or scheme civil penalties.

The Australian Securities and Investments Commission is statutorily empowered to take a relevant civil action against the offenders. For example, the Australian Securities and Investments Commission may impose civil pecuniary penalties of up to Aus $200, 000 fine for individuals and Aus $1 million fine for a body corporate against the offenders and the recovered money will be utilised to compensate all the prejudiced persons. It is stated that these pecuniary penalties were recently increased to enhance the combating of market manipulation and similar practices in Australia. In addition, the Australian Securities and Investments Commission may impose civil pecuniary penalties of up to Aus $200, 000 fine for individuals and Aus $1 million fine for a body corporate against the offenders and the recovered money will be utilised to compensate all the prejudiced persons. It is stated that these pecuniary penalties were recently increased to enhance the combating of market manipulation and similar practices in Australia.

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177 S 1317N to s 1317P read with s 1041I; s 1317E to s 1317HA & s 206C of the Corporations Act.
178 S 1041A to s 1041E of the Corporations Act.
179 S 1041F to s 1041H of the Corporations Act. The civil penalty provisions were first introduced in 1993 and are now contained in Part 9.4B of the Corporations Act.
180 S 1317E to s 1317HA read with s 206C of the Corporations Act.
182 The financial services civil penalties applies to any person who violate the market misconduct provisions while the corporation or scheme civil penalties applies to any contravention in relation to the continuous disclosure provisions. S 1317E(1)(ja); s 1317J(3A) & s 1041I of the Corporations Act.
183 S 1317E to s 1317HA read with s 206C; s 1317J(1) & (2) of the Corporations Act.
185 Constable 2011 MqJBL 107 & generally see paragraphs 8 2 6 2 & 8 2 7 4 1 above.
Investments Commission may order the disqualification of the perpetrators of market manipulation and other market misconduct offences from being involved in the management of any company or corporation for a certain period. The Australian Securities and Investments Commission and/or the courts may declare (publicise) the existence of a violation, when satisfied that a particular person was involved in market manipulation and/or other related market misconduct offences. This is *inter alia* employed to discourage unscrupulous persons from engaging in market manipulation. The Australian Securities and Investments Commission may further impose orders for civil penalties for punitive purposes against the market manipulation offenders. Notably, the Australian Securities and Investments Commission has a discretion regarding the actual amount to be imposed as civil punitive or pecuniary penalties against such offenders. In addition, further civil action against the offenders can be brought by the actual prejudiced person (a private right of action) and the relevant courts. For example, a court may, after it is satisfied that the contravention in question will materially prejudice the issuers of the financial products to which it relates, bring a civil compensatory action against the offenders to recover any damages incurred by the affected persons.

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187 S 1317E(1) of the Corporations Act; also see further Cassim 2008 *SA Merc LJ* 192.


190 However, where any financial services civil provision was violated, the courts or the ASIC may impose pecuniary penalties up to Aus $200 000 on the perpetrators of such offences. S 1317EA of the Corporations Act read with s 1317FA of the same Act.

191 S 1317J(3A) of the Corporations Act.

192 S 1317E(1) of the Corporations Act.

193 S 1041I of the Corporations Act read with s 1317S of the same Act. The Commonwealth DPP usually consults with the ASIC to determine whether to bring civil penalty actions or criminal proceedings in relation to any market abuse violations.
The financial services civil penalties have to date significantly improved the enforcement of the market manipulation and other market misconduct provisions in Australia.\textsuperscript{194} In other words, the lower standard of proof required in civil cases has not been quite exploited by both the Australian Securities and Investments Commission and the courts to obtain more successful settlements in market manipulation cases in Australia.\textsuperscript{195}

8 2 7 4 3 Civil Remedies

Civil remedies are also available to all the persons prejudiced by market manipulation\textsuperscript{196} and/or other related market misconduct offences.\textsuperscript{197} Accordingly, the Australian Securities and Investments Commission may institute civil penalty compensation orders against any person who contravenes the market manipulation and/or other market misconduct provisions.\textsuperscript{198} The Australian Securities and Investments Commission has further discretion and authority to determine the actual appropriate civil compensatory remedies that will be given to any persons affected by the market manipulation and/or other related offences.\textsuperscript{199}

In addition, a private right of action is expressly provided for any persons who incurred some losses as a result of market manipulation and/or other market misconduct violations to apply for a compensation order.\textsuperscript{200} This enables the affected persons to claim their civil compensatory damages timely and directly from the perpetrators of market manipulation.

\textsuperscript{194} Middleton “The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC’s Civil Penalty Proceedings under the Corporations Act” 2003 C\&SLJ 507.
\textsuperscript{195} Constable 2011 MqJBL 92-96; Longo “Civil Penalty Regime to Extend to Market Misconduct” 2001 Keeping Good Companies 635 635; Andrews “If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Commission Act” 2003 AJCL 137 146; Huang 2009 Company and Securities Law Journal 12-15; Gilligan, Bird & Ramsay “Civil Penalties and the Enforcement of Directors’ Duties” 1999 UNSWLJ 417 424; Goldwasser 1998 Australian Journal of Corporate Law 111. See further Donald v ASIC (2001) 38 ACSR 10; Donald v ASIC [2001] AATA 366, the accused was found guilty of market manipulating the price relating to the affected shares (financial products); for further discussion on the theory, history and application of civil penalties in Australia, see Gething “Do We Really Need Criminal and Civil Penalties for Contraventions of Directors’ Duties?” 1996 ABLR 375; Bird “The Problematic Nature of Civil Penalties in Corporations Law” 1996 C\&SLJ 405.
\textsuperscript{196} S 1041A to s 1041E of the Corporations Act.
\textsuperscript{197} S 1041F to s 1041H of the Corporations Act.
\textsuperscript{198} S 1317E to s 1317HA & s 206C read with s 1325 of the Corporations Act.
\textsuperscript{200} S 1317J(3A) of the Corporations Act read with s 1324A; s 1324B & s 1325(2) of the same Act, which deals with injunctive relief during prosecutions, orders for the disclosure of relevant information and compensatory orders.
and/or other related offences. As stated earlier, the relevant courts and/or the Australian Securities and Investments Commission may make a declaration that certain conduct had constituted a market manipulation violation. Importantly, the Australian Securities and Investments Commission or any other applicant in a civil action for remedies may rely on such declaration without being required to further prove the actual occurrence of market manipulation or other related contravention in question. A declaration of contravention of market manipulation and/or other market misconduct provisions is therefore a useful tool to expedite the actions for civil remedies by both the courts and the Australian Securities and Investments Commission.

Furthermore, the Australian Securities and Investments Commission may seek civil or administrative freezing orders or injunctions from the courts against the perpetrators of market manipulation and other market misconduct offences. This remedy is, among other things, aimed at directly preventing or stopping the offenders from continuing with a particular illicit conduct or their market manipulation and/or market misconduct violations. Additionally, the Australian Securities and Investments Commission or the Australian Stock Exchange may take disciplinary action against a market participant or any person who committed market manipulation and/or other related offences. In essence, this directly implies that such matters will be brought to the Australian Stock Exchange Disciplinary Tribunal which will then decide on the appropriate civil remedy to be imposed against such offenders.

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201 S 1041I & s 1317HA of the Corporations Act. This is usually referred to as a private right of action of piggy-back civil rights against the offenders who are then required to compensate the claimants or the affected investors.

202 See paragraph 8 2 8 4 2 above.

203 S 1317E(1) read with s 1041I of the Corporations Act; also Cassim 2008 SA Merc LJ 192.


206 S 1323 & s 1324 of the Corporations Act.


Any prejudiced person or the Australian Securities and Investments Commission may seek banning orders and/or disqualification orders from the courts against those who violate market manipulation or other market misconduct provisions. Notably, the banning or disqualification orders may be implemented against the offenders permanently or for a specified period. Therefore, the courts and the Australian Securities and Investments Commission have discretionary powers to determine the exact period under which the accused persons will be banned or disqualified from executing their managerial duties in the affected corporations. Moreover, any person who can show or prove that he suffered a loss as a result of the contravention of continuous disclosure provisions will recover his damages from the offenders concerned.

Although it may be argued that the civil remedies are at the bottom of the Australian securities law enforcement pyramid, which has civil penalties in the middle and criminal penalties on the top, such remedies have to date significantly contributed to the general combating of market manipulation and other related offences in Australia.

**8 3 Detection, Prosecution and the Enforcement of the Market Abuse Prohibition**

**8 3 1 The Role of the Australian Securities and Investments Commission**

The regulation of securities markets in Australia has come a long way. It was introduced at a federal level on 1 January 1991 and was administered by a single federal regulatory body, the

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209 S 920B of the Corporations Act.

210 S 1041A to s 1041H of the Corporations Act; Constable 2011 MqJBL 96-99.

211 S 920B(2) of the Corporations Act.

212 S 920A(1) of the Corporations Act; ASIC v Adler [2003] NSWCA 131; ASIC v Adler (2003) 46 ACSR 504; ASIC v Adler (2003)21ACLC 1810, where Adler was disqualified for 20 years and ordered to pay approximately Aus $7 million compensation jointly with Adler Corporation Pty Limited and Williams. In addition, Adler was further ordered to pay Aus $450 000 pecuniary penalties. See further related articles by Main “One.Tel: From Rich Dream to Costly Nightmare” AFR (2006-05-29) 6; Johnston “Disgraced Director Vizard ‘Motivated by Greed’” AFR (2005-07-22) 1, where the ASIC successfully requested and imposed on Vizard, a five year ban on managing companies and about Aus $390 000 compensatory and pecuniary penalties.


This followed the failure of its predecessor, the National Companies and Securities Commission in the early 1980s to enforce the securities and market abuse laws consistently in Australia. The Australian Securities Commission was renamed the Australian Securities and Investments Commission on 1 July 1998. As a result, apart from its main responsibility to oversee the regulation of companies and the futures markets, the Australian Securities and Investments Commission assumed further responsibilities. For instance, the Australian Securities and Investments Commission may investigate any criminal matters involving insider trading and market manipulation and prosecute such matters in terms of the Australian Securities and Investments Commission Act and the Corporations Act. The Australian Securities and Investments Commission may further refer any serious criminal matters to the Commonwealth Director of Public Prosecutions for prosecution in accordance with a Memorandum of Understanding between itself and the Commonwealth Director of Public Prosecutions. Therefore, the Australian Securities and Investments Commission may, after investigations and liaising with the Commonwealth Director of Public Prosecutions, institute criminal proceedings against any person accused of violating any market misconduct provisions, especially where it reasonably suspects that such violation actually occurred. Eventually, if such person is convicted, the Australian Securities and Investments Commission and/or the courts may impose a maximum criminal fine of Aus $495, 000, or three times the profit gained or loss avoided, whichever is the greater, or ten years imprisonment or both, for individuals. The maximum criminal

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216 Adams & Freeman Securities Regulation in Australia and New Zealand 141-145; Comino “National Regulation of Corporate Crime” 1997 Current Commercial Law 84 & also see generally Tomasic “Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures” 1993 Australian Journal of Corp Law 192 197.


218 S 49 of the Australian Securities and Investments Commission Act 51 of 2001(Cth) as amended, hereinafter referred to as the Australian Securities and Investments Commission Act.

219 S 49 of the Australian Securities and Investments Commission Act.

220 S 1314 of the Corporations Act.

221 See further related comments and analysis by Tomasic “Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalisation Solutions” 1992 Australian Journal of Corp Law 82 102-105; It is noteworthy that the ASIC signed a new Memorandum of Understanding (MOU) with the Commonwealth DPP on 01 March 2006 which replaced the former MOU of the ASIC and the Commonwealth DPP that was dated 22 April 1996, see the ASIC & Commonwealth DPP’s 2006 MOU (01-03-2006) <http://www.asic.gov.au> (accessed 30-04- 2010); also see Constable 2011 MqJBL 93.

222 S 13 Australian Securities and Investments Commission Act. Also see Boys v ASIC (1998) 26 ACSR 464, where it was stated that the ASIC’s investigative powers are applicable if it has a ‘reason to suspect’ or reason to believe that the alleged contravention actually occurred.
penalties for a body corporate were increased to a fine of Aus $4,950,000, or three times the profit made or loss avoided, or ten per cent of the body corporate’s annual turnover during the relevant period in which the offence was committed, whichever is greater. However, relatively few successful prosecutions were obtained in criminal cases for market manipulation in Australia during the period from 1990 to 2011.224

Furthermore, the Australian Securities and Investments Commission may commence civil proceedings against any person who engages in market abuse activities. Accordingly, the Australian Securities and Investments Commission may in the public interest bring an action in the name of and for the benefit of the body corporate to recover its losses, pecuniary damages, property or other entitlements as contemplated in the Corporations Act. Therefore, the Australian Securities and Investments Commission may institute a civil action for insider trading and/or other related offences without the consent of the affected persons or the issuer of the affected securities or financial products. Moreover, the Australian Securities and Investments Commission may bring civil penalty proceedings and impose civil penalties of up to Aus $200,000 for individuals and Aus $1 million for corporations that contravene its Rules and/or indulge in illicit market abuse practices. The Australian Securities and Investments Commission is further empowered to apply for a compensation order on behalf of any person who was affected by market abuse practices. Additionally, the Australian Securities and Investments Commission may seek court orders such as restraint, investment, mandatory direction and cancellation orders to ensure timely compensation for the victims of insider trading and/or other related market abuse activities

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224 For instance, it is stated that only about five successful criminal prosecutions for market manipulation were obtained during the period from 1990 to 2000, while ten successful criminal prosecutions for market manipulation were obtained during the period from 2001 to 2011 by the ASIC. See Constable 2011 MqJBL 88-89 & Goldwasser 1999 Australian B.L.R 484-485; 505-511.

225 S 50 Australian Securities and Investments Commission Act.

226 S 1043L(6) read with s 1043L(2) or (5) of the Corporations Act; s 50 Australian Securities and Investments Commission Act; also see related remarks in paragraphs 8.26.1 & 8.26.3 above.


228 See similar remarks in paragraph 8.27.4.2 above; also see further analysis by Austin (2009) 3 <http://www.clta.edu.au/professional/papers/conference2009/AustinCLTA09.pdf> (accessed 28-04-2010).

229 S 1317J & s 1325 read with s 1043L(6); s 1043L(3) & (4) of the Corporations Act.

230 S 1043O of the Corporations Act; also see ASIC v Petsas [2005] FCA 88.
and is further empowered to apply for a civil penalty by way of a pecuniary penalty. A pecuniary penalty is a penalty imposed only after a declaration of contravention of a financial services penalty provision has been proved in a court of law. In relation to this, the Australian Securities and Investments Commission may seek a court order for a declaration of contravention of market abuse provisions in Australia. It is nonetheless submitted that the Australian Securities and Investments Commission has grappled to obtain more successful settlements in civil proceedings involving market manipulation.

Moreover, the Australian Securities and Investments Commission has powers to disqualify any person convicted of committing market abuse offences from his managerial position in any corporation. Regarding this, the Australian Securities and Investments Commission may impose an order against the offenders restricting, stopping or banning them from providing any financial services or exercising any voting or other rights attached to financial products, or issuing, acquiring or disposing of such financial products. In relation this, the Australian Securities and Investments Commission has so far managed to impose relatively more banning orders against the market abuse offenders. The Australian Securities and Investments Commission may also suspend or cancel the offenders’ Australian Financial Service Licences and/or impose varying conditions on such Licences. As earlier stated, the Australian Securities and Investments Commission may further seek court

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232 S 1317E(1) read with s 1317HA; s 1317J(1) & (2) & s 1317J(3A) of the Corporations Act; also see related remarks in paragraphs 8 2 7 4 2 & 8 2 7 4 3 above.

233 Also see the ASIC “ASIC Obtains Pecuniary Penalty and Disqualification Order against former Select Vaccines Director” ASIC Media Release 10-88 27 April 2010; also see ASIC v Soust [2010] FCA 68; ASIC v Nomura International plc (1998) 89 FCR 301; 29 ACSR 473, where the ASIC successfully imposed a civil penalty against Nomura International plc for manipulating share price index through its illicit Aus $600 million securities scheme & Constable 2011 MqJBL 92-96.

234 R v Rivkin (2003) 198 ALR 400 406 where one Rivkin was disqualified from managing any corporation or company for five years and fined Aus $30 000. Also see further s 1317E to s 1317HA & s 206C of the Corporations Act & see further related remarks in paragraphs 8 2 6 2; 8 2 7 4 2 & 8 2 7 4 3 above.

235 S 1043O(a) of the Corporations Act.

236 S 1043O(b) of the Corporations Act.

237 S 1043O(c) of the Corporations Act. It is stated that the length of the banning orders ranges from one year to ten years and any person aggrieved with such orders may lodge their complaints with the Administrative Appeals Tribunal. See Constable 2011 MqJBL 98.

238 ASIC v Kippe (1996) 137 ALR 423 431; also see Constable 2011 MqJBL 97-99, where it is stated that the ASIC successfully obtained banned orders against several persons, including Clive Henry, Rocco Musumeci, Richard Wade and Newton Chan.

239 See paragraph 8 2 7 4 3 above; also see Constable 2011 MqJBL 96-99.
orders for the freezing of assets or injunctions against the offenders.\(^{240}\) The Australian Securities and Investments Commission may also take disciplinary action which \textit{inter alia} includes the cancellation of an agreement for the acquisition or disposal of financial products or imposing an order directing a person to do or refrain from doing a specified conduct.\(^{241}\)

The Australian Securities and Investments Commission has additional powers to search and seize any proceeds in relation to any benefits that may result from market abuse activities in Australia.\(^{242}\) Therefore, the Australian Securities and Investments Commission may issue notices to the accused persons in order to inspect their premises and, after obtaining a search warrant, to compel such persons to appear before it for the purposes of answering questions and/or providing it with any other relevant information.\(^{243}\) Additionally, the Australian Securities and Investments Commission has powers to investigate any market abuse violations. Like other enforcement agencies such as the Federal Police, the State and territory, the Australian Securities and Investments Commission may collect statements and evidence from the available witnesses. The Australian Securities and Investments Commission can further request any relevant person to give it reasonable assistance in relation to an ongoing investigation and/or any subsequent prosecution.\(^{244}\) Most recently, the Australian Securities and Investments Commission’s investigatory powers were significantly increased.\(^{245}\) Accordingly, the Australian Securities and Investments Commission will no longer be required to issue a notice before applying to a magistrate for a search warrant.\(^{246}\) This will reduce the risk of the accused persons destroying market abuse evidential material before the search warrant is obtained.\(^{247}\) Furthermore, market manipulation and insider trading offences

\(^{240}\) S 1323; s 1324 read with s 1325 of the Corporations Act.

\(^{241}\) S 1043O(f); (g) & (h); s 1323; s 1324 & s 920B(3) of the Corporations Act; also see Constable 2011 \textit{MqJBL} 96.

\(^{242}\) \textit{R v Hannes} 519 & 529.

\(^{243}\) S 19 & s 29 to s 34 read with s 49 of the Australian Securities and Investments Commission Act.


\(^{245}\) These new powers were introduced by the Corporations Amendment (No 1) Act which amended Australian Securities and Investments Commission Act and the Telecommunications (Interception and Access) Act 114 of 1979 (Cth) as amended, hereinafter referred to as the Telecommunications Act.

\(^{246}\) Constable 2011 \textit{MqJBL} 106.

\(^{247}\) Constable 2011 \textit{MqJBL} 106; also see s 19 & s 30 to s 33 the Australian Securities and Investments Commission Act.
are now listed as serious offences under the Telecommunications Act, thereby empowering the Australian Federal Police and/or other interception agencies to apply for a telephone interception warrant in matters involving market abuse investigations. This is aimed at granting the Australian Securities and Investments Commission an opportunity to work with the Australian Federal Police to obtain intercepted telephone material which could be used in the prosecution of market abuse offences.

The Australian Securities and Investments Commission is now responsible for the real-time surveillance of the Australian securities and futures markets to detect and prevent market abuse activities. This suggests that the Australian Securities and Investments Commission’s Market Surveillance Team now uses the same surveillance system which was initially used by the Australian Stock Exchange’s Surveillance Department. Moreover, the Australian Securities and Investments Commission’s Market Surveillance Team is also made up of a number of former employees of the Australian Stock Exchange’s Surveillance Department with extensive market experience. Consequently, the Australian Securities and Investments Commission may further detect market abuse activities from the surveillance it undertakes, complaints from the public, media and the assistance it receives from other enforcement agencies like the Australian Stock Exchange. It is hoped that the delays which used to inhibit the Australian Securities and Investments Commission’s investigations


249 S 5(1) of the Telecommunications Act, which defines the term “interception agency”.

250 The telecommunications intercepted must, however, be obtained under a court issued warrant or court order.

251 The ASIC took over the supervision and surveillance of securities markets and market participants responsibility from the Australian Stock Exchange (the ASX) on 01 August 2010. This change was introduced by the amendments which were brought to the Corporations Act by the Corporations Amendment (Financial Market Supervision) Act 26 of 2010 (Cth), hereinafter referred to as the Corporations Amendment Act, in order to enable new market operators to come to Australia and compete with the Australian Stock Exchange. See Austin 2010 C&SLJ 444-446 & 451-459 & Constable 2011 MqJBL 101; 107-110.

252 Constable 2011 MqJBL 108.

253 Constable 2011 MqJBL 108.

and preliminary enquiries into the Australian Stock Exchange’s market abuse referrals will now be removed.\textsuperscript{255}

In addition, the Australian Securities and Investments Commission is also responsible for maintaining confidence of investors in securities markets and futures markets by obtaining orders that direct the disposal of financial products or vests such products under its control to ensure adequate protection of such investors,\textsuperscript{256} for the purpose of enhancing commercial stability, efficiency, the development of the economy and generally reducing business costs. The Australian Securities and Investments Commission may further employ enforceable undertakings against the market abuse offenders.\textsuperscript{257} These undertakings have enabled the Australian Securities and Investments Commission to obtain timely and cost-effective administrative settlements flexibly in market abuse cases.\textsuperscript{258} The Australian Securities and Investments Commission may also administer and ensure compliance with its new Market Integrity Rules.\textsuperscript{259} Put differently, the market participants in licensed markets are obliged to comply with the Market Integrity Rules.\textsuperscript{260} Market participants are therefore prohibited from engaging in insider trading, market manipulation\textsuperscript{261} and/or any unprofessional conduct.\textsuperscript{262} The Australian Securities and Investments Commission may impose a civil penalty of up to

\textsuperscript{255} Constable 2011 \textit{MqJBL} 107-108; also see \textit{R v Chan} [2010] VSC 312.


\textsuperscript{257} These enforceable undertakings were introduced by the Financial Sector Reform (Amendments and Transitional Provisions) Act 54 of 1998 (Cth), hereinafter referred to as the Financial Sector Reform Act, which amended the Australian Securities and Investments Commission Act 90 of 1989 (Cth) as amended, hereinafter referred to as the Australian Securities and Investments Commission Act 1989; see Schedule 1, paragraph 11 of the Financial Sector Reform Act.


\textsuperscript{259} See the ASIC \textit{Market Integrity Rules (ASX Market)} 2010, hereinafter referred to as the Market Integrity Rules which were introduced by the Corporations Amendment Act. These Rules are modeled after the former ASX Market Rules which were administered by the Australian Stock Exchange (the ASX). See Constable 2011 \textit{MqJBL} 101-104.

\textsuperscript{260} \S\ 798H of the Corporations Act; also see Constable 2011 \textit{MqJBL} 101.

\textsuperscript{261} Rules 2.1.5 & 5.7.1 of the Market Integrity Rules.

\textsuperscript{262} Rule 1.4.3 of the Market Integrity Rules; also see Constable 2011 \textit{MqJBL} 101.
Aus $1 million on any person who violates its Market Integrity Rules. Moreover, where a person failed to comply with the Market Integrity Rules, the court may order such person to compensate the affected persons (including corporations) for any damages they incurred. The Australian Securities and Investments Commission may also issue an infringement notice which mandates any offender to pay a penalty of not more than Aus $600,000 or undertake remedial measures such as education programmes. Notably, the Australian Securities and Investments Commission delegates the power to issue infringement notices and/or accept enforceable undertakings to an independent peer review tribunal called the Markets Disciplinary Panel. It is anticipated that many market abuse offenders will elect to comply with the Australian Securities and Investments Commission’s infringement notices and/or enforceable undertakings rather than the costly civil penalty proceedings. It is also expected that the Australian Securities and Investments Commission will develop adequate technological mechanisms for cross-market surveillance to detect and combat market abuse practices across different markets in Australia.

Although the role of the Australian Securities and Investments Commission as a corporate watchdog against market abuse practices has been criticised by some commentators for being ineffective, the market abuse cases which have been successfully settled and prosecuted to date could serve as proof of the Australian Securities and Investments Commission’s efficiency. For example, at least a considerable number of persons have to date been investigated and prosecuted for various market abuse offences as a result of the functioning of the Australian Securities and Investments Commission and the relevant courts in Australia.

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263 S 798G(2) of the Corporations Act; also see Constable 2011 MqJBL 102 & Austin 2010 C&SLJ 452.
264 S 1317HB of the Corporations Act; Constable 2011 MqJBL 102.
265 S 798K of the Corporations Act; also see Constable 2011 MqJBL 102.
267 Constable 2011 MqJBL 102 & Austin 2010 C&SLJ 453.
268 Austin 2010 C&SLJ 454-455.
269 Comino 1997 Current Commercial Law 84; Ferguson “The Watchdog No one Fears” 2000 BRW 58.
In other words, the Australian Securities and Investments Commission has played and continues to play a significant role in the entire enforcement of securities laws and the market abuse prohibition in Australia.\textsuperscript{271} It is evident that, in spite of the relatively few market abuse settlements and convictions obtained by the Australian Securities and Investments Commission in the late 1990s,\textsuperscript{272} the Australian Securities and Investments Commission has in recent years successfully increased its settlements and prosecutions of market abuse cases in Australia. This has been attributed to several factors which include, \textit{inter alia}, the Australian Securities and Investments Commission’s ability to devote more resources specifically to deal with the enforcement of the market abuse prohibition in Australia.\textsuperscript{273} This may further indicate that the Australian Securities and Investments Commission takes the enforcement of market abuse as one of its top priorities.\textsuperscript{274} For example, the Australian Securities and Investments Commission operates a system for the Electronic Document Lodgment. This system enables lodgment agents such as accountants, lawyers and brokers to transfer relevant documents promptly to the Australian Securities and Investments Commission electronically and free of charge in order to effect disclosure of inside information. Therefore, although anecdotal evidence could suggest that the Australian Securities and Investments Commission is still facing some challenges in relation to the enforcement of the market abuse prohibition in the bull markets and hedge funds,\textsuperscript{275} one can

\begin{itemize}
\item \textsuperscript{271} Austin (2009) 1-3 & 6-18 <http://www.clta.edu.au/professional/papers/conference2009/AustinCLTA09.pdf> (accessed 28-04-2010); also see ASIC v Vizard 1037, where about Aus $390 000 and a five year banning order was obtained by the ASIC against the offenders; ASIC v Vines 1222; ASIC v Loiterton 897; ASIC v Adler (2002) 20 ACLC 576, where about Aus $7 million was recovered by the ASIC from the offenders and ASIC v Plymin & others 123, where the ASIC obtained banning orders, pecuniary and civil compensation orders against all the market abuse offenders (defendants).
\item \textsuperscript{275} Generally see Comino 1997 \textit{Current Commercial Law} 84; Ferguson 2000 \textit{BRW} 58 & Constable 2011 MqJBL 81-110.
\end{itemize}
conclude that the Australian Securities and Investments Commission enforcement has to date significantly reduced market abuse activity in the Australian financial markets.

8.3.2 The Role of the Australian Stock Exchange

The establishment and statutory recognition of the Australian Stock Exchange commenced in the early 1970s. This follows the adoption of the recommendations that were enshrined in the report of the Senate Select Committee on Securities and Exchange which was chaired by Senator Rae in 1974. In April 1987, the Australian Stock Exchange was created to replace the Australian Associated Stock Exchange to consolidate six former state Exchanges and to formulate a national exchange which has since been the only operating stock exchange in Australia. In 1998 the Australian Stock Exchange was demutualised and became a public company incorporated under the Corporations Act. Its shares were eventually listed on the exchange that it operates. In other words, the Australian Stock Exchange is fully licensed to operate the Australian Stock Exchange. This license stipulates, among other things, that the Australian Stock Exchange must ensure that the market is fair, orderly and transparent. Moreover, the Australian Stock Exchange is further required to have adequate arrangements for supervising the market, including the necessary arrangements to oversee and monitor the conduct of all the market participants and to enforce compliance with the market’s operating rules. In terms of this licence, the Australian Stock Exchange is additionally obliged to give any appropriate and reasonable assistance to the Australian Securities and Investments Commission, like furnishing it with a written notice as soon as possible, if it has an objective reason to suspect that a person has committed, is committing or is about to commit a material contravention of the market misconduct provisions, stipulating the accused person’s name, the

277 See the Rae Report 129.
281 S 792A of the Corporations Act.
type of contravention and its reasons for suspecting that there has or will be a market abuse
violation.  

Furthermore, under its market licence, the Australian Stock Exchange is mandated to develop
and maintain operating rules dealing with any matter as prescribed in its regulations. Such
rules have a contractual effect upon the Australian Stock Exchange and market participants
and between a market participant and another market participant. For example, one of the
obligations for market participants enshrined in the former Australian Stock Exchange Market
Rules is that they must not engage in market manipulation or any “unprofessional
conduct”. Where a market participant or an executive of a market participant violates any
of the Australian Stock Exchange’s Market Rules or engages in unprofessional conduct, the
Australian Stock Exchange has the authority to take appropriate disciplinary action and/or
refer that matter to the Australian Stock Exchange Disciplinary Tribunal. Consequently, the
Australian Stock Exchange Disciplinary Tribunal has wider discretionary powers to make a
public censure, impose a disciplinary fine of up to Aus $1 million and suspend the market
participant in question and/or to terminate such participant’s admission to the Australian
Stock Exchange. The Australian Stock Exchange has further powers to require the
production of documents and to inspect the premises of any market participant who is
suspected to have violated its Market Rules and/or the market misconduct provisions.

282 S 792B read with s 792C & s 792D of the Corporations Act; also see Austin (2009) 4
2010).

283 S 793A of the Corporations Act. For example, in one of its operating rules, the ASX has prescribed
Market Rules which contain rules relating to how a participant can gain access to trade or execute orders
on the Australian Stock Exchange and other relevant information regarding the obligations of such
participants. For more information see the ASX’s Market Rules “A Guide to Becoming an ASX Market
Participant” <http://www.asxonline.com/intradoccorp/groups/participant_services/documents/information/asx.pdf>
(accessed 04-05-2010).

284 S 793C of the Corporations Act.

285 See the ASX Market Rule 2.10; see further ASX Market Rules 13.4; 13.5 & 28.3.1 which are also
2010).


Additionally, the Australian Stock Exchange has the authority to summon market participants and their employees to attend its interviews and to furnish it with any other relevant information pertaining to an ongoing investigation.\footnote{ASX Market Rule 28.1.3, available at <http://www.asx.com.au/supervision/rules_guidance/market_rules.htm> (accessed 26-04-2010).} However, it is stated that some of these functions are now vested in the Australian Securities and Investments Commission.\footnote{Constable 2011 MQJBL 101-102 & Austin 2010 C&SLJ 452-453; also see paragraph 831 above.}

Moreover, the Australian Stock Exchange offers a number of services to the markets such as fair trading systems, control of market integrity, guarantees of trade completion and supplying relevant information pertaining to securities trading, settlement and transfer systems.\footnote{See the ASX Annual Report 1996 2-3; 8-9; 15-16; 20 & 31.} More specifically, such services include the Company Announcements Platform. The Company Announcements Platform was introduced by the Australian Stock Exchange in August 1995 to assist companies to lodge announcements by facsimile to the Australian Stock Exchange from any place in Australia at a reasonably cheap cost. This service was introduced to encourage companies to comply with prompt disclosure requirements of any inside information that relates to securities or financial products in Australia. Another service offered by the Australian Stock Exchange is the Stock Exchange Automated Training System which was established in 1987 and became fully operative in 1990.\footnote{See the ASX Annual Report 1996 8.} Its main role is to enable the Australian Stock Exchange member organisations with recognised orders to buy and sell securities or financial products that are traded on a market conducted by the Australian Stock Exchange. It also provides its member organisations with adequate information pertaining to securities or financial markets trading such as any changes in the market. This avoids the abuse of non-public price-sensitive information relating to the financial products by any person who might have access to such information.\footnote{See generally Simpson “Securities Regulation for the Information Age” in Walker, Ramsay & Fisse (eds) Securities Regulation in Australia and New Zealand (1998) 37.}

Furthermore, in order to complement and supplement the Stock Exchange Automated Training System, the Clearing House Electronic Sub-register System was put in place in September 1994 by the Australian Stock Exchange Settlement and Transfer Corporation, a wholly owned subsidiary of the Australian Stock Exchange, for expedient electronic settlement in Australia of share transfers of both domestic and foreign issuers.\footnote{Simpson Securities Regulation in Australia and New Zealand 39-40.}
Probably, one of the major services offered by the Australian Stock Exchange is its assistance in electronic market surveillance, which is *inter alia* employed to investigate and detect market abuse practices. This electronic surveillance has been utilised by the Australian Stock Exchange as early as the 1990s to detect any incidences of market abuse practices in the Australian financial markets. Notably, the Australian Stock Exchange’s detection and investigation functions were vested in the Australian Stock Exchange Market Supervision Private Limited. The surveillance is usually done by way of monitoring market activity and trading patterns through a computerised and sophisticated system called the Surveillance of Market Activity. Moreover, the Surveillance of Market Activity system is programmed to detect abnormal trading sequences by looking at the electronic signal of the Stock Exchange Automated Training System which contains the details of trading and some programmed parameters in order to alert persons such as financial analysts for consideration. For example, specific transactions conducted in relation to a nominated security can be isolated and analysed by the Stock Exchange Automated Training System as regards to the time, offer, bids, sales and purchases. The Surveillance of Market Activity system will then compare the electronic signal containing all the details of trading against a series of parameters. These parameters are programmed to ignore normal trading activity but to record and report any abnormal or irregular trading activity immediately when such parameters are violated. Thereafter, such transactions will be discussed with the broker or representative concerned and coded for historical sequencing. This enables the Australian Stock Exchange to assess and monitor price movements and share trading volumes, through matching the representative’s coded transaction number with the transaction contracts held by brokers, to

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295 See further *Ali v Hartley Poynton* [2002] VSC 113, where the expert evidence was given in relation to the ASX’s surveillance techniques, namely the Surveillance of Market Activity (SOMA) and the Stock Exchange Automated Trading System (SEATS).

296 The ASX’s Market Supervision Private Limited (ASXMS) is a separate company to the ASX in spite of the fact it is a wholly owned subsidiary of the ASX, which is also funded by the ASX. Also see the article “*Australian Stock Exchange*” (2008) 109 [http://www.asx.com.au/about/pdf/annual_report_2008.pdf] (accessed 16-04-2010); the ASXMS is also manned by a board comprising five directors, three of whom are also ASX directors and two of whom are independent directors, see Mayne “ASX Markets Supervision—Looking Forward” (2007) 2 *SDIA Conference*, Sydney [http://www.asx.com.au/supervision/pdf/sdia_conference_speech_mayne-June01.pdf] (accessed 16-04-2010).

297 See Australian Stock Exchange *ASX Surveillance: Helping to Protect the Australian Share Market for all Participants* (undated pamphlet) & see further Simpson *Securities Regulation in Australia and New Zealand* 41-42 & Hannigan *Insider Dealing* (1994) 20-46, for a comparative analysis on the detection and surveillance of market abuse activities.

298 Consequently, such information will be continuously viewed or frozen, by a single screen or split screen which isolates certain facets of the transactions and their sequence for further analysis. See *Ali v Hartley Poynton* (2001) VSC 7439-7441.
identify the affected clients. In some instances, these trading alerts were admissible as evidence against the perpetrators of market abuse offences. In the recent years, the Securities Market Automated Research Trading and Surveillance system has been successfully employed to monitor all real-time trading information and highlights unusual trading patterns and volume movements in order to detect market abuse activity in Australia.

Moreover, the Australian Stock Exchange has the power, especially where a suspected trading has been detected, to refer such matters to the Australian Securities and Investments Commission in accordance with their Memorandum of Understanding. Specifically, any such referrals are directly transferred to the Market Watch Division of the Australian Securities and Investments Commission for more investigation and preliminary analysis. If the Market Watch Division is satisfied that some market abuse offences were committed, then the matter will be passed on to the Enforcement Division of the Australian Securities and Investments Commission, which will eventually commence with the legal proceedings against the offenders concerned. Notably, these surveillance systems are now operated by the Australian Securities and Investments Commission to execute its duties in relation to the real-time surveillance of the Australian securities and financial markets. Put differently, Australia used to impose the responsibility to enforce the market abuse ban squarely on the Australian Securities and Investments Commission as a government national regulator and the Australian Stock Exchange as an independent self-regulatory organisation. Consequently, the Australian Stock Exchange played a key role in the real-time monitoring of market participants and the surveillance of market abuse activities in the Australian securities and financial markets.

299 This detection method is commonly employed by a number of broking firms that tape and digitally record all the telephonic orders from the client to the representatives.

300 As was held in R v Evans [1998] VSC 488.


304 Constable 2011 MqJBL 101-102; 108 & Austin 2010 C&SLJ 444-446 & 452-453; also see paragraph 83.1 above.

305 The similar enforcement approach is also employed in countries such as the United States of America, France, Canada, New Zealand, Hong Kong, Japan, Germany and the United Kingdom (UK). See Gadinis & Jackson “Markets as Regulators: A Survey” (2007) http://www.ssrn.com/abstract=960168 (accessed 29-04-2010).
financial markets. Nonetheless, these powers have now been transferred to the Australian Securities and Investments Commission. 

8 3 3  The Role of Other Self-Regulatory Organisations

For the purposes of this sub-heading, the self-regulatory organisations include the Australian Competition and Consumer Commission, the Corporations and Market Advisory Committee, the International Banks and Securities Association of Australia, the Securities and Derivatives Industry Association, the Australian Financial Markets Association and the Australian Institute of Company Directors. Each of these self-regulatory organisations will therefore be briefly discussed below.

8 3 3 1  The Role of the Corporations and Markets Advisory Committee

The Corporations and Market Advisory Committee has also contributed significantly to the general regulation and enforcement of the securities laws in Australia. Specifically, the Corporations and Market Advisory Committee was established in terms of Part 9 of the Australian Securities and Investments Commission Act 1989 as an advisory body to the government, which is responsible for monitoring the occurrence of illicit trading activities and the enforcement of market abuse provisions in Australia. Some commentators agree that the Corporations and Market Advisory Committee has to date made a number of useful proposals for the reform of the Australian market abuse regulatory framework. This could be the reason why a considerable number of successful prosecutions of matters involving market abuse have been achieved in Australia to date. Moreover, the Corporations and Market

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307 See paragraph 8 3 1 above.
308 Lyon & Du Plessis Law of Insider Trading in Australia 10. Prior to 11 March 2002 the CAMAC was known as the Companies and Securities Advisory Committee (CASAC), for more information see http://www.camac.gov.au (accessed 08-03-2007).
Advisory Committee has to date managed to participate in the reviewing of market abuse laws, especially with regard to insider trading, and has on a number of occasions formulated proposals for reforms aimed at promoting investor confidence and the integrity of the Australian securities and futures markets.³¹¹

In addition, the Corporations and Market Advisory Committee has, to a fair extent, managed to isolate potentially serious flaws that are sometimes embedded in the securities legislation and recommended possible solutions to combat market abuse practices in Australia to date.³¹² Put differently, the Corporations and Market Advisory Committee may make recommendations on any matter relating to the operation or administration of the corporations or securities legislation, or companies or a segment of the financial products and financial services industry, or law reform with regard to the corporations or securities legislation and/or proposals for improving the efficiency of the financial markets in Australia.³¹³

8332 The Role of the Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission is equally involved in the regulation of the securities legislation and the enforcement of the anti-market abuse prohibition in Australia.³¹⁴ For example, the Australian Competition and Consumer Commission is empowered under the Trade Practices Act to intercept all electronic communications based on a suspicious trading which could be as a result of market manipulation or insider trading. Additionally, the Australian Competition and Consumer Commission prohibits the formulation of cartels by discouraging contracts, arrangements or understandings which have the effect or are likely to have the effect of substantially lessening competition or containing an exclusionary provision.³¹⁵ As a result, the Australian Competition and Consumer Commission may impose civil pecuniary penalties of up to Aus $10 million per contravention on corporations and Aus $500 000 per contravention on individuals (or company executives).

³¹² See generally Baxt, Black & Hanrahan Securities and Financial Services Law 546-547.
³¹⁵ S 45(2) of the Trade Practices Act.
who indulge in cartels. In 2006, a new regime of criminal sanctions was introduced to enable the Australian Competition and Consumer Commission to curb serious cartel conduct and market abuse activities. In addition, the Australian Competition and Consumer Commission has further concluded a Memorandum of Understanding with the Commonwealth Director of Public Prosecutions to seek criminal prosecutions and jail terms for individuals who systematically engage in the violation of market misconduct provisions or who misled it in relation to its market abuse investigations.

8 3 3 3 The Role of the International Banks and Securities Association of Australia

Additionally, the International Banks and Securities Association of Australia has to date formulated some business rules and guidelines that do not only represent the interests of merchant and investment banks in Australia, but that have also played a crucial role in dispute resolution. The International Banks and Securities Association of Australia has further managed to promote and protect the interest of its members in Australia and other foreign-owned institutions. Moreover, the International Banks and Securities Association of Australia’s rules and guidelines require all its member organisations to ensure that their employees acknowledge in writing that they are aware of such rules or guidelines and that they are not going to violate the market misconduct provisions and/or engage in transactions involving conflicts of interests. The International Banks and Securities Association of Australia’s guidelines also require the member organisations to summarise the relevant

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316 S 76(1A) & (1B) of the Trade Practices Act.
317 Under the new regime, a fine for corporations that is the greater of Aus $10 million or three times the gain from the contravention or 10% of the annual turnover of the body corporate and all its subsidiary bodies, will now be levied against those individuals or corporations that engage in cartel conduct or other market misconduct offences. In relation to this, see generally related remarks and analysis by Austin (2009) 11-13 <http://www.clta.edu.au/professional/papers/conference2009/AustinCLTA09.pdf> (accessed 28-04-2010).
statutory provisions and examples of situations which highlight an alert of any contravention of the market misconduct provisions (especially insider trading).\textsuperscript{320}

The International Banks and Securities Association of Australia’s guidelines stipulate that price-sensitive information which is in the possession of an employee should only be given to the other employees in the normal course of executing their professional duties. In addition, the International Banks and Securities Association of Australia’s guidelines recommend the physical separation of the underwriting and corporate advisory developments as well as the employees from other member organisations.\textsuperscript{321} This could have aimed at discouraging insider trading and market manipulation. Moreover, the International Banks and Securities Association of Australia’s guidelines require its member companies to develop and maintain lists of embargoed or restricted securities in which employees or any persons related to them cannot deal in or encourage other clients to deal in, until the stipulated embargo is lifted.\textsuperscript{322}

8 3 3 4 The Role of the Securities and Derivatives Industry Association

The Securities and Derivatives Industry Association has further contributed significantly to the securities regulation in Australia, especially with regard to conflict resolution.\textsuperscript{323} For example, the Securities and Derivatives Industry Association has developed its best practice guidelines regarding research integrity, which among other things, encourage both the securities industry and the financial services industry to promote a culture of self-compliance in order to reduce as much as possible the occurrence of conflicts of interests. Although the Securities and Derivatives Industry Association guidelines are neither a comprehensive prescription nor a mandatory method for combating conflicts of interests, they provide useful ways of enforcing Chinese walls and the general combating of market abuse activities in Australia. For instance, the Securities and Derivatives Industry Association guidelines

\textsuperscript{320} The IBSA mandate its member organisation to list or summarise the examples of price-sensitive information such as profit forecasts, mergers or reconstructions, impending takeovers, financial liquidity problems, proposed share issues and significant changes in operations. See the IBSA article (1989) 2 \textsuperscript{321} See the IBSA Rule 3.5.
\textsuperscript{322} See general R v Hannes (2000) 36 ACSR 72 115, where similar embargo lists were employed by the financial institutions, for example Macquarie Corporate Financial advised TNT Limited regarding a proposed takeover. However, Macquarie Corporate Finance placed TNT Limited on its embargo list to prevent the employees of Macquarie Corporate Finance from dealing in TNT Limited shares.
\textsuperscript{323} For a more detailed analysis, see Securities and Derivatives Industry Association (SIASDIA) “Best Practice Guidelines for Research Integrity” (2001) \textsuperscript{324} (accessed 22-02-2009).
include measures for encouraging its member organisations to put the interests of the
investors first by engaging in independent and objective research and/or financial advice and
establishing specific and separate reporting structures to ensure that analysts report only to the
head of research and not to the corporate or trading units for approval. Such guidelines also
encourage member organisations to have Chinese walls to prevent the improper dissemination
of price-sensitive information. Additionally, the Securities and Derivatives Industry
Association guidelines encourage member organisations to discourage market abuse by
implementing a written statement of a corporation’s policies and procedures for managing
conflicts of interests, restricting trading by analysts in the subject of research during the
research or for a reasonable period after its completion or from trading in a manner
inconsistent with the research in question and/or by monitoring the public’s compliance with
a corporation’s policies and procedures.

8 3 3 5 The Role of the Australian Financial Markets Association and the Australian
Institute of Company Directors

The Australian Financial Markets Association and the Australian Institute of Company
Directors have additionally played a key role in the regulation and enforcement of securities
legislation in Australia. They have specifically formulated various guidelines for the persons
involved in the securities business such as brokers and other market participants like financial
analysts. Particularly, the Australian Institute of Company Directors has devised certain rules
and guidelines to promote market integrity and investor confidence by discouraging
corporation directors from abusing their office or price-sensitive information to engage inter
alia in market abuse activities. Likewise, the Australian Financial Markets Association
has some rules and regulations that prohibit any person from engaging in market manipulation,
especially with regard to the transactions that are conducted privately or bilaterally on the
over the counter financial markets and on the Australian offshore licenced markets. In other
words, the Australian Financial Markets Association regulates the over the counter financial
markets and ensures that the parties to the over the counter transactions include terms in their
contracts which prohibit the misuse of material non-public price-sensitive information. In

324 See further Chapter Five in Lyon An Examination of Australia’s Insider Trading Laws 195.
325 See further Chapter Five in Lyon An Examination of Australia’s Insider Trading Laws 195.
326 See the Australian Financial Markets Association (the AFMA) article “AFMA Response to the CAMAC Insider Trading Proposal Paper” 01 November 2002 2-10.
addition, the Australian Financial Markets Association has further positively contributed to the review and reform of various securities and financial laws in Australia.\textsuperscript{327}

\textbf{8.3.4 The Role of the Courts}

The Commonwealth Director of Public Prosecutions and the courts have a crucial role in the enforcement of the securities and market abuse legislation in Australia.\textsuperscript{328} Therefore, all the competent courts\textsuperscript{329} have inherent powers to impose sanctions on any person who contravenes insider trading and/or other market misconduct provisions in Australia.\textsuperscript{330} These powers include the making of: (a) orders restraining any accused persons from exercising rights attached to Division 3 financial products, (b) orders to restrain the acquisition, issue or disposal of such products, (c) orders for the vesting of such products in the Australian Securities and Investments Commission and/or to direct the disposal of such products, or (d) orders for the cancellation of the Australian financial services licences.\textsuperscript{331} The competent courts in Australia further have powers to make orders that direct any person to do or refrain from doing specified acts, for the purposes of ensuring compliance with any other order they may make in this regard.\textsuperscript{332} Additionally, the competent courts in Australia have the discretion to make a declaration of contravention of the market manipulation and/or other market misconduct provisions, particularly when they are certain that such contravention actually occurred.\textsuperscript{333} In relation to this, the Australian courts advocates that market abuse practices should be regulated and outlawed at all costs in order to maintain open and transparent financial markets which promote investor confidence and market integrity.\textsuperscript{334}

\textsuperscript{327} See the AFMA article 01 November 2002 2-10.
\textsuperscript{329} Such competent courts include district courts, courts of appeal, federal courts, High Courts and Supreme Courts of Australia.
\textsuperscript{330} S 1043O of the Corporations Act.
\textsuperscript{331} S 1043O of the Corporations Act; also see generally related comments by Baxt, Black & Hanrahan \textit{Securities and Financial Services Law} 546; Mann 1992 \textit{The Yale Law Journal} 1845. Also see “ASIC Obtains Court Undertakings Freezing Assets of Former One. Tel Managers” \textit{ASIC Media Release 01/343} 24 September 2001.
\textsuperscript{332} S 1043O(h) of the Corporations Act; also see further the CAMAC Report 27-48.
\textsuperscript{333} S 1317E(1) of the Corporations Act; also see further Cassim 2008 \textit{SA Merc LJ} 192.
\textsuperscript{334} See \textit{North v Marra Developments Limited} (1981) 148 CLR 42; 59 (High Court Australia), where the High Court held that the securities markets must be free from market manipulation or other market abuse activities in order to promote the interests of both the investors and the community at large by ensuring that such markets allows the true forces of genuine supply and demand to be operative in them. Also see Cassim 2008 \textit{SA Merc LJ} 37-39; Toross “Double–Click on this: Keeping Pace with Online Market
Moreover, the success achieved by the Australian courts in relation to the effective enforcement of the market abuse provisions is clearly reflected in the number of reported settlements and prosecutions achieved in both civil and criminal cases to date. The Australian courts have in fact been commended for radically achieving more settlements and prosecutions in relation to market abuse cases, particularly with regard to insider trading. They do not rely on circumstantial evidence to impute liability on the accused persons, but they nonetheless take cognisance of other relevant factors, such as the actual abuse of material non-public price-sensitive inside information by an insider or any other person for personal benefit or for the benefit of another. The Australian courts have further provided useful interpretation and guidelines regarding the enforcement of some key market abuse provisions. For example, in the *Firns* case, the Court of Appeal held that information was readily observable if it was disseminated to a financial market in Australia as stipulated in the

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337 Glandon Pty Ltd v *Strata Consolidated Pty Ltd* (1998) 11 ACLC 895, where Mahoney JA submitted that a fiduciary duty may exist when a director purchases a shareholder’s shares as a result of an informational advantage which he usually has at the expense of the shareholder(s) concerned and consequently, such director would have committed insider trading if he dealt in the shares in question on the basis of the price-sensitive information which he had; also see *Brunnerhausen* case (1999) 46 NSWLR 538 549; *Glavanics v Brunningenhausen* (1996) 14 ACLC 345 549, where the plaintiff’s reliance on the breach of a fiduciary duty was overturned by the Court of Appeal and in essence acquitting the defendant of all the charges that were brought against him, namely fraud, engaging in misleading and deceptive conduct, negligence and breach of a fiduciary duty.

338 *R v Firns* (2001) 51 NSWLR 548 & *R v Firns* [2001] NSWCCA 191, where Mr Firns was consequently convicted to an imprisonment term of which he appealed but was unsuccessful. Also see *R v Kruse* [2001] NSWCA 59 & *Kruse v DPP (Cth)* [2001] NSWCA 59, where in the same vein of interpreting the readily observable principle, the District Court held that the decision of the Supreme Court of PNG was delivered while Mr Kruse and others were present and hence it was accordingly readily observable and generally available and Mr Kruse was therefore acquitted; However, in *R v Hannes* (2000) 36 ACSR 72 115-116, the Court of Appeal held that the term “readily observable” meant that the matter had to be able to be easily perceived by the senses in some way and/or was available in the relevant markets and that such words were plain English which required no further explanation.
Corporations Act.\textsuperscript{339} Additionally, the Australian courts have also managed, in some instances, to provide meaningful recommendations regarding the enforcement of penalties, remedies and other related actions against the market abuse offenders.\textsuperscript{340} Precisely, the Australian courts advise the Australian Securities and Investments Commission and other relevant authorities regarding whether a criminal as opposed to civil action should be instituted against any market abuse offenders in question.\textsuperscript{341}

As highlighted above, the Commonwealth Director of Public Prosecutions and the relevant courts have also contributed immensely to the market abuse enforcement in Australia. For example, the courts may, upon the request from the Australian Securities and Investments Commission, the Commonwealth Director of Public Prosecutions or the affected persons, grant orders for compensation, injunctive relief, restitution orders, seize and desist orders, banning orders, freezing orders and other appropriate sanctions against the offenders in Australia.\textsuperscript{342} Moreover, the courts have helped the Australian Securities and Investments Commission to interpret certain key principles regarding market abuse prohibition in Australia. This has in a way helped to increase the number of market abuse prosecutions which are executed by both the courts and the Australian Securities and Investments Commission in Australia. Additionally, the Supreme Courts and the Courts of Appeal have quite usefully provided their support to the Australian Stock Exchange, the Australian Stock Exchange Disciplinary Tribunal and the Administrative Appeals Tribunal to resolve market abuse related appeals from the aggrieved persons.

\textsuperscript{339} S 1042C(1)(a) of the Corporations Act.
\textsuperscript{340} See generally \textit{National Exchange Pty Ltd v ASIC} [2004] FCAFC 90(25) were a reasonable investor test was employed by the court against the offenders concerned.
\textsuperscript{341} \textit{R v Hannes} 508, were Mr Hannes was convicted for insider trading and sentenced to two years and two months imprisonment plus a fine of Aus $100 000; also see \textit{ASIC v Petsas \& Miot} (2005) 23 ACLC 269, where the first civil penalty proceedings for insider trading were instituted in the courts and all the defendants pleaded guilty; \textit{ASIC v Citigroup Global Markets Australia Pty Ltd} [2007] FCA 963, where the a civil penalty action against Citigroup Global Markets Australia Pty Ltd was, however, unsuccessful; \textit{Donald v ASIC} 10; \textit{Donald v ASIC} [2001] AATA 366 where the accused was convicted of market manipulation. Also see generally Coffey 2008 \textit{Journal of the Australasian Law Teachers Association} 45-48; 52-53.
\textsuperscript{342} For example, see \textit{Donald v ASIC} 366; \textit{North v Marra Developments Limited} 42; \textit{ASIC v Petsas \& Miot} 269 \& \textit{Glandon Pty Ltd v Strata Consolidated Pty Ltd} 895.
8 4 Co-operation between Enforcement Authorities

8 4 1 Co-operation between the Australian Securities and Investments Commission, the Commonwealth Director of Public Prosecutions and the Courts

Although the Australian Securities and Investments Commission is mainly responsible for policing the regulation and enforcement of the securities and market misconduct provisions in Australia, it does not perform its functions alone. For example, it works closely with other enforcement agencies like the Commonwealth Director of Public Prosecutions, the federal police and the competent courts to combat market abuse activities in Australia.

As stated earlier, the Australian Securities and Investments Commission has the authority to hear, investigate and prosecute all matters relating to market abuse violations in Australia. Be that as it may, the Australian Securities and Investments Commission is required in terms of its Memorandum of Understanding with the Commonwealth Director of Public Prosecutions to refer all serious market abuse cases to the Commonwealth Director of Public Prosecutions for further investigations and/or prosecution. While the existence of this Memorandum of Understanding could be a prima facie indication of some good co-operation between the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions, it has been criticised by some commentators for restricting the Australian Securities and Investments Commission from fully utilising its powers to promptly settle or prosecute market abuse cases in Australia. In other words, the aforementioned Memorandum of Understanding has sometimes inadvertently resulted in unnecessary complexities and inexplicable delays, especially in the criminal prosecution of market abuse cases by both the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions in Australia.

343 See paragraph 8 3 1 above.
344 S 13 of the Australian Securities and Investments Commission Act.
346 For example, see Duplessis “Reverberations after the HIH and Other Recent Australian Corporate Collapses” 2003 Australian Journal of Corporate Law 225 245 & also see Chapter Seven in Lyon An Examination of Australia’s Insider Trading Laws 283.
347 R v Brown, MacDougall and Weston [2002] VSCA 99, where it took about twelve months after the ASIC’s referral, for the Commonwealth DPP to institute criminal proceedings against the accused persons; R v Evans 488, where it took four years after the ASIC’s referral, for the Commonwealth DPP to institute legal proceedings against the alleged offenders; also see generally Leaf “Enough is Enough” 2002 Fortune 30 36-37.
On the other hand, the Australian Securities and Investments Commission has to date managed to utilise the advice and help from the competent courts to obtain a considerable number of settlements and convictions in market abuse cases in Australia.\textsuperscript{348} Therefore, notwithstanding some existing challenges like the lack of sufficient experienced staff, especially in the courts, the Australian Securities and Investments Commission and the competent courts have achieved commendable success in relation to the enforcement of the market abuse prohibition in Australia to date.\textsuperscript{349} It has further been stated that the Australian Securities and Investments Commission have in place some arrangements which allow it to have the relevant assistance from the federal police, especially with regard to the execution of a telephone interception warrant and search warrant and the conducting of market abuse investigations in Australia.\textsuperscript{350} Accordingly, this enables the Australian Securities and Investments Commission to investigate and speedily summon any suspected market abuse offenders for interrogation and/or production of any other relevant documents.

\section*{8.4.2 Co-operation between the Australian Securities and Investments Commission and the Local Self-Regulatory Organisations}

The Australian Securities and Investments Commission has a number of Memorandum of Understanding and/or co-operation arrangements in place with several self-regulatory organisations for the purposes of ensuring that there are efficient channels for communication, increased mutual understanding, exchange of relevant information and other appropriate measures for the provision of assistance, particularly in relation to the detection and investigation of market abuse activities in Australia.\textsuperscript{351} In this regard, it must be noted that for the purposes of this sub-heading, more attention will be paid to the co-operation between the Australian Securities and Investments Commission and the self-regulatory organisations like the Australian Stock Exchange, the Corporations and Market Advisory Committee, the Australian Competition and Consumer Commission, the Australian Financial Markets Association, the Australian Institute of Company Directors, the International Banks and Securities Association of Australia and the Securities and Derivatives Industry Association.

\textsuperscript{348} See paragraphs 8.3.1 & 8.3.4 above.
\textsuperscript{349} Austin (2009) 1-3 & 7-10 <http://www.cltla.edu.au/professional/papers/conference2009/AustinCLTA09.pdf> (accessed 28-04-2010) & also see paragraphs 8.3.1 & 8.3.4 above.
\textsuperscript{351} See generally paragraph 8.3.1 above.
As earlier stated, the Australian Stock Exchange has concluded a Memorandum of Understanding with the Australian Securities and Investments Commission which allows the Australian Stock Exchange to assist the Australian Securities and Investments Commission with regard to market abuse investigations and/or prosecution. Additionally, such assistance and/or referrals of the Australian Stock Exchange to the Australian Securities and Investments Commission’s Market Watch Department will provide details of the trading data, broker records, a report with the analysis, chronology, other relevant data and identification of the persons accused of committing the market abuse offences in question. Although more may still need to be done to increase the number of successful market abuse enforcement actions in Australia, the co-operative enforcement effort of the Australian Stock Exchange and the Australian Securities and Investments Commission has to date managed to achieve a commendable number of successful disciplinary actions and other appropriate sanctions, particularly in insider trading and market manipulation cases.

Similarly, the Australian Securities and Investments Commission have some co-operation arrangements in place with the Corporations and Market Advisory Committee regarding the general regulation and enforcement of the market misconduct provisions in Australia. In relation to this, the Corporations and Market Advisory Committee may, in terms of such co-operative arrangements, advise the Australian Securities and Investments Commission on any matter relating to law reform or the operation of the market misconduct provisions and the trend patterns.

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See paragraph 8.3.2 above.


For a further analysis, see the Australian Stock Exchange Annual Report 2008 29-30, also available at <http://www.asx.com.au/about/pdf/annual_report_2008.pdf> (accessed 09-05-2010), which outlined that in 2008 alone the number of cases which were settled by the ASX Disciplinary Tribunal increased to 28 in contrast to only 24 which were obtained in 2007 and accordingly the fines were increased by 137% to about Aus $1.1 million, more than Aus $175 000 fines which were obtained in 2007 for market manipulation. In addition, the number of enforcement actions in relation to the ASX’s market abuse cases which were referred to the ASIC further increased in 2008 compared to those in 2007.

See the ASIC article “ASIC’s Submission on CAMAC’s Issues Paper: Aspects of Market Integrity” (2009) 3-24 <http://www.asic.gov.au/asic/pdf/camac_paper_March09.pdf> (accessed 09-05-2010); also see generally paragraph 8.3.3.1 above.
administration or regulation of the securities and futures markets in Australia.\textsuperscript{357} Accordingly, this has helped both the Corporations and Market Advisory Committee and the Australian Securities and Investments Commission to come up with useful submissions and recommendations that discourage market abuse activities and promote market integrity in Australia.\textsuperscript{358}

In addition, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission have mutual measures which enable the Australian Competition and Consumer Commission, after referring a matter involving serious cartels or market abuse offences to the Australian Competition Tribunal, to further refer such matters to the Commonwealth Director of Public Prosecutions or the Australian Securities and Investments Commission. This has been useful in providing some strategic ways of enforcing the market abuse prohibition in Australia, in that where a matter is not satisfactorily dealt with by the Australian Competition Tribunal, it will eventually be settled or prosecuted by either the Australian Securities and Investments Commission or the Commonwealth Director of Public Prosecutions.\textsuperscript{359}

The Australian Financial Markets Association and the Australian Institute of Company Directors may also advise the Australian Securities and Investments Commission on any matter relating to the regulation of the securities laws in Australia.\textsuperscript{360} Specifically, as earlier pointed out,\textsuperscript{361} the Australian Institute of Company Directors may assist the Australian Securities and Investments Commission with any information relating to the directors who commit market abuse offences, while the Australian Financial Markets Association may provide the Australian Securities and Investments Commission with the relevant information regarding the market abuse violations in the Australian over the counter markets.\textsuperscript{362} Additionally, both the Australian Financial Markets Association and the Australian Institute of Company Directors participate actively in the public consultation and law reform forums.

\textsuperscript{357} See the ASIC article (2009) 5-24 \texttt{<http://www.asic.gov.au/asic/pdf.camac_paper_March09.pdf>} (accessed 09-05-2010); also see further paragraph 8 3 3 1 above.


\textsuperscript{360} See further analysis in paragraph 8 3 3 5 above.

\textsuperscript{361} See further analysis in paragraph 8 3 3 5 above.

\textsuperscript{362} See further analysis in paragraph 8 3 3 5 above.
that sometimes recommend and advise the Australian Securities and Investments Commission on matters relating to the enforcement of the market misconduct provisions in Australia. 363

Lastly, the International Banks and Securities Association of Australia and the Securities and Derivatives Industry Association have in recent years successfully managed to draw some useful guidelines that complement the Australian Securities and Investments Commission’s anti-market abuse enforcement efforts. 364 For example, in terms of such guidelines, the International Banks and Securities Association of Australia may assist the Australian Securities and Investments Commission by stipulating, among other things, that its member organisations must not abuse price-sensitive information and must have Chinese walls to prevent insider trading and other related market abuse practices. 365 Similarly, the Securities and Derivatives Industry Association mandates its members to promote useful objective research and to have special and separate reporting requirements for the employees to combat the misuse of price-sensitive information by such employees through insider trading or market manipulation. 366

8 4 3 Co-operation between the Australian Securities and Investments Commission and Similar International Regulatory Bodies

The Australian Securities and Investments Commission has entered into some co-operation agreements with other like-minded regulatory bodies in other jurisdictions. These co-operation agreements are mainly aimed at addressing the various challenges facing such regulatory bodies, particularly in relation to the effective enforcement of the market abuse prohibition in their respective jurisdictions. 367 For example, in 2008 the Australian Securities and Investments Commission and the United States Securities and Exchange Commission concluded an Enforcement Memorandum of Understanding which, among other things, seeks to provide greater and enhanced co-operation between the Australian Securities and Investments Commission and the United States Securities and Exchange Commission. 368

363 See further analysis in paragraph 8 3 3 5 above.
364 See further analysis in paragraphs 8 3 3 3 & 8 3 3 4 above.
365 See further analysis in paragraph 8 3 3 3 above.
366 See paragraph 8 3 3 4 above.
368 For further discussion and/or analysis on this MOU, see the ASIC Press Release “SEC, Australian Authorities Sign Mutual Recognition Agreement” (26-08-2008).
This Memorandum of Understanding further empowers both the Australian Securities and Investments Commission and the United States Securities and Exchange Commission to share any relevant information, assist each other in relation to their enforcement mandates and to promote the establishment of a more coordinated enforcement approach. Additionally, this Memorandum of Understanding offers both the United States Securities and Exchange Commission and the Australian Securities and Investments Commission a better platform to address and combat cross-border market abuse activities.369

Furthermore, the Australian Securities and Investments Commission concluded a Memorandum of Understanding with the Financial Services Authority on 24 June 2002.370 The main purpose of this Memorandum of Understanding is to ensure that both the Australian Securities and Investments Commission and the Financial Services Authority are fully able to execute their enforcement duties more effectively by providing a proper framework for cooperation, including efficient channels for mutual communication and increased mutual understanding. Moreover, this Memorandum of Understanding upholds certain principles which include the fact that both the Australian Securities and Investments Commission and the Financial Services Authority are obliged to provide the fullest mutual support to each other in any manner consistent with their Memorandum of Understanding. The aforementioned Memorandum of Understanding also maintains the principle that it does not abolish, modify or supersede any laws or regulatory requirements which are applicable to either Australia or the United Kingdom. In other words, the Memorandum of Understanding in question does not cancel or affect any other Memorandum of Understanding which exists between the Australian Securities and Investments Commission and other regulatory bodies, apart from the Financial Services Authority.371 More importantly, the Australian Securities and Investments Commission and the Financial Services Authority’s Memorandum of Understanding sets out the type of assistance which both the Australian Securities and

369 See generally some related remarks by Thomsen (the director of enforcement at the SEC) “US Experience of Insider Trading Enforcement Actions” 2008 ASIC Summer School 89-96.


Investments Commission and the Financial Services Authority are expected to provide to each other. For example, both the Australian Securities and Investments Commission and the Financial Services Authority are required to provide each other with any relevant information in their possession; help each other in conducting inspections or examinations of the financial services providers; exchange or discuss information on matters of mutual interest, such as alternative dispute resolution; help each other to obtain any specific information and/or documents from the accused persons, and to permit, after a formal request, the representatives of the requesting authority to participate in the conduction of enquiries made by or on behalf of the requested authority as contemplated in their Memorandum of Understanding. This Memorandum of Understanding further stipulates that both the Australian Securities and Investments Commission and the Financial Services Authority may provide each other with information, or arrange for information to be provided on a voluntary basis, even in instances where no formal request has been made. Similarly, subject to secrecy and confidentiality issues, a joint investigation may be undertaken by the Australian Securities and Investments Commission and the Financial Services Authority, especially where the suspected violation also breaches the relevant laws of both jurisdictions and where suspected cross-border market abuse practices are detected.

In addition, the Australian Securities and Investments Commission is a member of the International Organisation of Securities Commissions. This suggests that the Australian Securities and Investments Commission, like other member regulators, is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding which deals inter alia with the exchange and sharing of relevant information relating to fraud and market abuse violations. Therefore, the Australian Securities and Investments Commission is able, in terms of this Multilateral Memorandum of Understanding, to rely on the surveillance or investigatory support from other member regulators to detect and combat cross-border market abuse activities.

8.5 The Adoption of Adequate Preventative Measures

Like several other jurisdictions, Australia has to date successfully developed and employed a number of enforcement approaches (including the use of appropriate definitions) to curb market abuse activities in its securities and financial markets. Although no express statutory definition for the concept of market abuse is provided under the Corporations Act, a number of practices which may give rise to market abuse offences are enumerated and outlawed under the said Act.376 As a result, the Corporations Act’s prohibition on market abuse has achieved some considerably more success in relation to the settlements and prosecution of market abuse offences than under its predecessors.377 However, for the purposes of this sub-heading, the enforcement approaches to be discussed include the use of civil penalties, civil remedies, criminal sanctions, private actions, administrative actions, self-regulatory organisations as well as investigation, surveillance and detection techniques.

Appropriate penalties and sanctions are further employed in Australia to prevent and deter all persons from engaging in market abuse activities. As earlier alluded to,378 separate criminal penalties for individuals and corporate bodies may be imposed by the Australian Securities and Investments Commission or the Commonwealth Director of Public Prosecutions on any market abuse offenders in Australia. Apart from criminal penalties, the Australian Securities and Investments Commission and/or the relevant courts may levy separate civil penalties against individuals or corporations that are found guilty of violating insider trading and other market misconduct provisions of the Corporations Act.379 In addition, the Australian market abuse regime further relies on civil remedies to combat market abuse practices. For instance, actions for civil remedies like compensation orders, pecuniary monetary penalties and orders for any damages suffered by the prejudiced persons can be instituted by the Australian Securities and Investments Commission against the individuals or entities that commit market abuse offences.380 The Australian Securities and Investments Commission and the Australian Stock Exchange may also take appropriate administrative action against any person who is

376 See further paragraphs 8.25 & 8.2.7.3 above.
377 See further paragraphs 8.2.4 & 8.2.7.2 above.
378 See further paragraphs 8.2.6.2 & 8.2.7.4.1 above.
379 See paragraphs 8.2.6.1 & 8.2.7.4.2 above, for further details regarding the actual amount of, and/or types of civil penalty actions that can be brought against the market abuse offenders under the Corporations Act.
380 See paragraphs 8.2.6.3 & 8.2.7.4.3 above, for further details and analysis.
reasonably believed to have contravened the market abuse provisions of the Corporations Act. For example, the Australian Securities and Investments Commission may make a declaration of contravention once it is certain that the accused person has committed the market abuse contravention in question. Additionally, the Australian Securities and Investments Commission can seek court orders for injunction relief during prosecutions, disqualification or banning a certain person from performing his managerial duties in the corporations and orders to stop or restrict a person from continuing to indulge in certain market abuse conduct. Similarly, the Australian Stock Exchange has the powers to make a public censure, impose disciplinary fines and suspend the market abuse offenders from admission to trading at the Australian Stock Exchange.

Apart from the appropriate penalties and sanctions, the Australian market abuse regime employs private rights of action for the issuers of securities and any other persons who are prejudiced by market abuse activities to seek compensation orders from the courts against the offenders. These private rights of action have to date usefully enabled the affected issuers and other prejudiced persons to claim their compensatory damages and civil pecuniary penalties promptly and directly from the perpetrators of market abuse practices in Australia.

Moreover, the Australian authorities also rely on the self-regulatory organisations to complement the Australian Securities and Investments Commission’s market abuse enforcement efforts. Thus, in contrast to the so-called single regulator model which is mainly employed in the United Kingdom, Australia seems to be using the multi-functional regulatory approach similar to the one adopted in the United States of America. This approach allows the Australian Securities and Investments Commission as well as other self-regulatory organisations to enforce the market abuse prohibition in Australia. As a result, the relevant Australian enforcement authorities have to date achieved some considerable

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381 See paragraphs 8 3 1 & 8 3 2 read with paragraphs 8 2 6 3; 8 2 7 4 3 above, for further details and analysis.
382 See paragraph 8 3 2 above, for further details regarding the role of the ASX.
383 s 1041I; s 1043L(2) to (5); s 1317HA; s 1317J(3A) read with s 1324A; s 1324B & s 1325(2) & s 1317S of the Corporations Act. Also see paragraphs 8 2 6 3 & 8 2 7 4 3 above for further details regarding the enforcement of the private right of action for market abuse in Australia.
384 See paragraphs 8 2 6 3 & 8 2 7 4 3 above.
385 See Chapter Six of this thesis for more details and analysis of the United Kingdom’s single regulator model.
386 See paragraph 8 4 2 above.
success in the enforcement of the market abuse prohibition in Australia and other relevant jurisdictions (cross-border market abuse practices).  

Investigation and information gathering is another weapon used by the Australian Securities and Investments Commission to prevent market abuse practices in the relevant Australian financial markets. For example, the Australian Securities and Investments Commission may apply to the relevant courts for a search warrant to search any person or premises suspected of having the documents, evidence or other information necessary for a current market abuse case trial. It is further reported that the Australian Securities and Investments Commission can rely on the Administrative Appeals Tribunal members to get the required search warrant and all the intercepted telephonic communications in relation to its market abuse investigations. As stated previously, the Australian Securities and Investments Commission and the Australian Stock Exchange have further powers to summon any person accused of committing market abuse offences for interrogatory interviews in order to obtain the relevant facts and/or information.

Surveillance is another method used by the Australian Securities and Investments Commission to detect and prevent market abuse practices in the Australian financial markets. For example, the Australian Securities and Investments Commission now operates some computer surveillance techniques like the Securities Market Automated Research Trading and Surveillance system to isolate and detect all possible market abuse activities in the Australian financial markets.

Chinese walls are employed in Australia as another method which promotes a culture among all the companies, of developing their own internal principles, polices and structures that reduce the occurrence of market abuse practices like insider trading between the different

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390 See paragraphs 8 3 1 & 8 3 2 above.
departments of such companies. Therefore, although the Chinese walls are often used as
defences, they are also used as preventative measures against market abuse practices in
Australia. Additionally, with regard to insider trading prevention, listed public entities and
directors of such entities are required to disclose their interests in securities of those entities
and/or to comply with both the structured (periodic) and continuous disclosure requirements
of the Australian Stock Exchange. 392 Therefore, listed entities are obliged to complete their
regular periodic financial reports, half-yearly and annual reports and accounts. 393 More
importantly, compliance with the structured (periodic) reporting requirement does not cancel
the listed entities’ duty of continuous disclosure. In other words, listed entities will still be
required, under the continuous disclosure requirements, to notify the Australian Stock
Exchange and other market participants regarding any information which is required by other
disclosing entities for them to further notify the Australian Securities and Investments
Commission. 394 This is primarily aimed at combating insider trading and market
manipulation. The Australian Stock Exchange further recommends the adoption by the listed
entities of some best practices principles that ensure that there is no private briefing which is
done by such entities during blackout periods or which is inconsistent with the continuous
disclosure requirements. Moreover, both the Australian Stock Exchange and the Australian
Securities and Investments Commission may investigate any suspicious trading at, or before
the time of significant announcements to the markets by the issuers, whether or not such
announcements occurred during a blackout period. 395 This is targeted at identifying all
potential illegal trading activity by the employees of the listed entities during blackout
periods.

As indicated before, 396 the Australian authorities, especially the Australian Securities and
Investments Commission, also rely on international co-operation arrangements to tackle and
prevent cross-border market abuse activities. Additionally, whistle-blower immunity is
another preventative measure used in Australia, especially by the Australian Competition and

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392 See generally s 205G of the Corporations Act; also see Lyon & Du Plessis Law of Insider Trading in
Australia 188-189.
393 See generally s 205G of the Corporations Act; also see Lyon & Du Plessis Law of Insider Trading in
Australia 188-189.
394 See generally s 674(1) & (2); s 675; s 1311(1) & s 1317E of the Corporations Act; also see the ASX
Listing Rule 3.1.
395 It is submitted that this provision should also apply to the Australian Clearing House Pty Limited (ACH)
and the ASX Settlement and Transfer Corporation Pty Limited (ASTC). See the ASIC article (2009) 19
396 See paragraph 8 4 3 above, for further details.
Consumer Commission, to encourage all persons to freely report to it any incidences of cartels and/or other serious market abuse offences.397

8 6 Concluding Remarks

As discussed above, the current Australian market abuse prohibition is aimed, among other things, at promoting equal access to the relevant non-public price-sensitive information, market efficiency, market fairness, market integrity and public investor confidence. To attain this goal, the Australian legislature has, from as early as the 1960s, consistently adopted a number of statutes, policies, recommendations and other necessary measures to combat market abuse activities in the Australian financial markets.398

It was noted that the concept of insider trading is not statutorily defined in the Australian statutes, including the Corporations Act.399 In line with this, it was stated that the concept of insider trading generally involves the abuse or exploitation of non-public price-sensitive inside information that relates to a body corporate or its securities for personal gain by any person.400 Moreover, it was also stated that the current Australian insider trading prohibition employs the information connection only approach.401 It was accordingly indicated that this approach defines an insider as any person who has non-public price-sensitive inside information that relates to a company or to any listed securities or financial products.402 It was further stated that such person is prohibited from unlawfully trading in any securities (insider trading and tipping) on the premise of such information to avoid prejudice to other persons who did not have access to the information in question.403 In addition, the Corporations Act’s insider trading provisions apply to acts or omissions (unlawful trading) within Australia relating to securities or financial products of any person or foreign body corporate as well as extra-territorially to acts or omissions outside Australia in relation to the securities or financial products of a person or body corporate that is established or carrying on

397 For more information on the ACCC’s whistle-blower immunity policy, see the ACCC “ACCC Immunity Policy for Cartel Conduct” (26-08-2005) <http://www.accc.gov/content/index.phtml/itemId/708758> (accessed 11-05-2010).
398 See the historical analysis and other relevant discussions under the sub-headings in paragraph 8 2 above.
399 See paragraph 8 2 5 above.
400 See paragraph 8 2 5 above.
401 See paragraph 8 2 5 above.
402 See further analysis in paragraph 8 2 5 above.
403 See further analysis in paragraph 8 2 5 above.
business in Australia.\(^{404}\) Put differently, it was noted that the current Australian insider trading prohibition has a relatively broader application and it explicitly covers both juristic and natural persons as well as a wide range of financial products.\(^{405}\) Furthermore, the Australian insider trading prohibition contains both structured (quarterly and annual) and continuous mandatory disclosure requirements for the issuers of securities and affected persons to ensure that all market participants have equal access to price-sensitive inside information relating to such securities.\(^{406}\) Likewise, the scope of application of the market manipulation prohibition in Australia is now broadly extended, not only to market manipulation, but also to other related activities such as dishonest conduct, shortselling and market rigging.\(^{407}\) It was also noted that the current market manipulation provisions dispense with the requirement of proving the intention to induce others to sell, buy or subscribe for the affected securities or financial products, on the part of the prosecuting authorities.\(^{408}\) In other words, the focus is now on the effect of the market manipulative conducts in relation to the affected financial product rather than on the intention of the trader or the person involved.\(^{409}\)

The Corporations Act imposes civil penalties, civil remedies and criminal penalties on any person (including entities) who violates its provisions on market abuse provisions.\(^{410}\) In line with this, it was noted that the criminal penalties for market abuse were recently increased to a maximum pecuniary fine of Aus $495,000, or three times the profit gained or loss avoided, whichever is the greater, or ten years imprisonment or both, for individuals. The maximum criminal penalties for a body corporate were increased to a fine of Aus $4,950,000, or three times the profit made or loss avoided, or 10% of the body corporate’s annual turnover during the relevant period in which the offence was committed, whichever is greater.\(^{411}\)

It was indicated that the Australian Securities and Investments Commission may institute civil, criminal or administrative proceedings against the market abuse offenders.\(^{412}\)

\(^{404}\) See paragraph 8.2.5 above.
\(^{405}\) See paragraph 8.2.5 above.
\(^{406}\) See paragraph 8.5 above.
\(^{407}\) See Part 7.10 of the Corporations Act; also see paragraph 8.2.7.3 for a further analysis of the prohibition on market manipulation and/or other market misconduct practices under the Corporations Act.
\(^{408}\) See paragraph 8.2.7.3 above.
\(^{409}\) See paragraph 8.2.7.3 above.
\(^{410}\) See paragraphs 8.2.6.1; 8.2.6.2; 8.2.6.3; 8.2.7.4.1; 8.2.7.4.2 & 8.2.7.4.3 above.
\(^{411}\) See paragraphs 8.2.6.2 & 8.2.7.4.1 above.
\(^{412}\) See paragraph 8.3.1 above.
Accordingly, the Australian Securities and Investments Commission may refer any serious criminal matters to the Commonwealth Director of Public Prosecutions. Likewise, the Australian Securities and Investments Commission may institute a civil action for insider trading and/or other market abuse offences in the name of, and for the benefit of the affected persons or the issuer of the affected securities or financial products to recover their losses, pecuniary damages, property or other entitlements as contemplated in the Corporations Act.\footnote{See paragraph 831 above.} The Australian Securities and Investments Commission may also impose a civil penalty of up to A$1 million on any person who violates its Market Integrity Rules. Moreover, where a person failed to comply with the Market Integrity Rules, the court may order such person to compensate the affected persons (including corporations) for any damages they incurred.\footnote{See paragraph 831 above.} The Australian Securities and Investments Commission may further institute infringement notices and/or enforceable undertakings against the market abuse offenders. In the same vein, the Australian Securities and Investments Commission may take administrative action to ban or disqualify any person convicted of committing market abuse offences from his managerial position in any corporation.\footnote{See paragraph 831 above.} Thus, the Australian Securities and Investments Commission may impose an order against the offenders restricting, stopping or banning them from providing any financial services or exercising any voting or other rights attached to financial products; or issuing, acquiring or disposing such financial products.\footnote{See paragraph 831 above.} The Australian Securities and Investments Commission may also suspend or cancel the offenders’ Australian Financial Service Licences and/or impose varying conditions on such Licences.\footnote{See paragraph 831 above.} Additionally, it was acknowledged that the Australian Securities and Investments Commission’s investigatory powers were significantly increased and it will no longer be required to issue a notice before applying to a magistrate for a search warrant.\footnote{See paragraph 831 above.} Furthermore, it was noted that market manipulation and insider trading offences are now listed as serious offences under the Telecommunications Act and this empowers the Australian Federal Police and/or other interception agencies to apply for a telephone interception warrant in matters involving market abuse investigations. As a result, the Australian Securities and Investments Commission may now rely on the Australian Federal Police to obtain intercepted telephone
material which could be used in the prosecution of market abuse offences in Australia. The Australian Securities and Investments Commission has additional powers to search and seize any proceeds in relation to any benefits that may result from market abuse activities in Australia. Moreover, it was noted that the Australian Securities and Investments Commission is now responsible for the real-time surveillance of the Australian securities and futures markets to detect and prevent market abuse activities. Furthermore, the relevant courts and/or the Australian Securities and Investments Commission may also make a declaration that certain conduct had constituted a market manipulation violation. It was also acknowledged that such declaration of contravention of market manipulation and/or other market misconduct provisions is a useful tool to expedite the actions for civil remedies by both the courts and the Australian Securities and Investments Commission.

It was also indicted that the enforcement of the market abuse prohibition in Australia is not necessarily contingent upon the Australian Securities and Investments Commission alone. It involves a co-operative effort of a number of self-regulatory organisations and other regulatory authorities that complement the Australian Securities and Investments Commission in curbing market abuse practices in Australia. Likewise, the Australian Securities and Investments Commission has successfully forged some co-operation agreements with several international self-regulatory organisations like the United States Securities and Exchange Commission, the Financial Services Authority and other members of the International Organisation of Securities Commissions Multilateral Memorandum of Understanding for the purposes of combating cross-border market abuse activities in Australia and elsewhere.

Likewise, it was acknowledged that a number of preventative enforcement methods such as Chinese walls, whistle-blower immunity provisions and private rights of action are employed to discourage market abuse activities in Australia. However, in relation to this, bounty rewards are not yet employed in Australia to allow more persons to provide the Australian Securities and Investments Commission and/or other enforcement authorities with the

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419 See paragraph 8 3 1 above.
420 See paragraph 8 3 1 above.
421 See paragraphs 8 3 1 & 8 2 7 4 3 above.
422 See paragraph 8 3 1 above.
423 See paragraphs 8 3 2; 8 3 3 1 to 8 3 3 5; 8 3 4; 8 4 1 & 8 4 2 above.
424 See paragraph 8 4 3 above.
425 See paragraphs 8 2 6 3; 8 2 7 4 3 & 8 5 above.
relevant information that can lead to the recovery of civil remedies from the market abuse offenders.

In conclusion, it is hoped that this chapter will help the South African legislature and other relevant stakeholders to recognise some of the shortcomings of the current South African market abuse regime and, where necessary, to learn from the Australian experience. For example, as Huang purported, “the Australian ‘information connection only approach’ to the definition of insiders is both theoretically justifiable and practically manageable”. The researcher concurs with Huang and submits that instead of rigidly following some of the United States of America’s market abuse principles, the legislature could consider following the Australian approach in order to make its market abuse prohibition more aligned to the international best practices. Accordingly, notwithstanding the fact that a detailed analysis of the recommendations will be conducted in the last chapter, it is submitted that the following fifteen suggestions and/or proposed provisions could play a key role in the enforcement of the market abuse ban in South Africa:

Firstly, it is suggested that the Financial Services Board should be statutorily empowered (like the Australian Securities and Investments Commission) to enable it to make a declaration of contravention of market abuse provisions and/or to seek a court order for such declaration in South Africa whenever such contravention occurs, for deterrence purposes;

Secondly, it is submitted that the Financial Services Board should be statutorily empowered (like the Australian Securities and Investments Commission) to take over the real-time surveillance of the South African securities and financial markets from the JSE, to enable it to detect, investigate and prevent market abuse practices in South Africa effectively and timeously by eradicating the delays that might be associated with the Financial Services Board’s investigations into the JSE’s market abuse referrals;

Thirdly, it is suggested that South Africa should consider following the developments in Australia and empowering the Financial Services Board to develop its own adequate

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427 See paragraph 8.3.1 above.
428 See paragraph 8.3.1 above.
429 See paragraph 8.3.1 above.
technological mechanisms for market abuse cross-market surveillance, in both the regulated and unregulated financial markets in South Africa;

Fourthly, the South African Police Services and/or the Financial Services Board should be statutorily empowered (as is the position in Australia)\(^{430}\) to co-operatively work together to intercept telephonic data from any suspected offenders in matters involving market abuse investigations in South Africa;\(^ {431}\)

Fifthly, the Financial Services Board and the South African Police Services should also consider concluding a binding Memorandum of Understanding relating to market abuse investigations in order to enhance the prevention of market abuse activities in South Africa and elsewhere (cross-border market abuse activities);

Sixthly, it is suggested that the JSE and the Financial Services Board should follow the Australian position\(^ {432}\) and conclude a binding Memorandum of Understanding to enhance their co-operation in relation to the detection and combating of market abuse practices in South Africa;

Seventhly, the Directorate of Market Abuse and/or a new self-regulatory organisation should be statutorily established and authorised to independently make recommendations to the legislature in relation to any matter dealing with the securities law reform and the general regulation of market abuse in South Africa;

Eighthly, the Securities Services Act,\(^ {433}\) the Financial Markets Bill\(^ {434}\) and/or the Financial Markets Bill 2012\(^ {435}\) should be reviewed to enact a specific provision that obliges the JSE to give reasonable assistance to the Financial Services Board by \textit{inter alia} searching the premises of the accused persons who are suspected of engaging in market abuse practices and

\(^{430}\) See paragraph 8 3 1 above.

\(^{431}\) Nevertheless, such interception should be undertaken in accordance with the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.

\(^{432}\) See paragraph 8 4 2 above.

\(^{433}\) 36 of 2004, hereinafter referred to as the Securities Services Act.

\(^{434}\) [B-2011], hereinafter referred to as the Financial Markets Bill.

\(^{435}\) [B12-2012], hereinafter referred to as the Financial Markets Bill 2012.
by summoning any such persons to furnish it with other relevant information relating to
ongoing market abuse investigations;

In the ninth place, the JSE (like the Australian Stock Exchange)\textsuperscript{436} should consider
establishing its own Markets Disciplinary Tribunal which specifically deals with any illicit
violations of its Listing Requirements and/or market abuse cases in South Africa;

In the tenth place, it is submitted that the Financial Services Board should (as is the position
in Australia)\textsuperscript{437} consider concluding a binding Memorandum of Understanding with the
Director of Public Prosecutions to enhance their co-operation and enforcement of the market
abuse prohibition in South Africa;

In the eleventh place, South Africa should consider adopting the Australian approach\textsuperscript{438} and
introducing a mandatory statutory duty on the part of the insiders or issuers for them to
continuously or periodically disclose their non-public price-sensitive inside information,
coupled with civil penalties for non-compliance to enable the JSE and/or the Financial
Services Board to oblige all the listed public entities and directors of such entities to promptly
and consistently disclose their interests in the securities of those entities to prevent market
abuse practices in South Africa;

In the twelfth place, it is submitted that South Africa should consider adopting the Australian
approach\textsuperscript{439} to use the seizure and forfeiture method to recover or confiscate assets and other
illegal benefits from the market abuse offenders;

In the thirteenth place, the Securities Services Act, the Financial Markets Bill and/or the
Financial Markets Bill 2012 should be amended to expressly provide some rebuttable
presumptions in order to assist the Director of Public Prosecutions in the prosecution of
market abuse cases in South Africa;

\textsuperscript{436} See paragraph 8 3 2 above.
\textsuperscript{437} See paragraph 8 4 1 above.
\textsuperscript{438} See paragraph 8 5 above.
\textsuperscript{439} See paragraph 8 2 6 2 above.
In the fourteenth place, it is submitted that insider trading and market manipulation should be statutorily treated as indictable offences in South Africa;

Lastly, it is submitted that South Africa should consider adopting the Australian approach and enacting adequate statutory provisions to deal with the Chinese walls in order to reduce and/or discourage market abuse practices in South Africa.

Now that the Australian position on the enforcement of the market abuse prohibition has been discussed as indicated above, the next chapter will provide an overall comparative analysis on the enforcement of the market abuse ban in the European Union, the United Kingdom, Australia, the United States of America and South Africa.

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440 See paragraph 8 5 above.
CHAPTER NINE
OVERALL COMPARATIVE ANALYSIS OF THE ENFORCEMENT OF MARKET ABUSE PROVISIONS

9 1  Introduction

As indicated in the previous chapter, this chapter will comparatively explore how market abuse practices are detected, investigated, prosecuted and prevented in the European Union, the United Kingdom, the United States of America, South Africa and Australia. Put differently, this chapter will provide an overall comparative analysis on the enforcement of the market abuse ban in the European Union, the United Kingdom, Australia, the United States of America and South Africa. This will be done to inter alia examine whether the market abuse provisions in these respective jurisdictions are being effectively implemented to prevent insider trading and market manipulation in their relevant financial markets.

9 2  Evaluation and Analysis of the Historical Overview of Insider Trading Prohibition

In contrast to the early developments of the regulation and enforcement of insider trading in the United States of America, the legislature in South Africa only introduced a prohibition on insider trading in 1973. Like the position in the United States of America, the South African regulatory framework also prohibits any person (including juristic persons) from practising insider trading and related activities like tipping. Despite these similarities, the most important characteristics of the regulatory framework in the United States of America,

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1 See paragraph 5 3 1 in Chapter Five of this thesis.
2 S 233 of the Companies Act 61 of 1973, hereinafter referred to as the Companies Act. Also see the historical development of the regulation and enforcement of the insider trading ban in Chapter Two of this thesis.
3 See paragraph 5 3 1 in Chapter Five of this thesis.
4 See s 73 & s 77 of the Securities Services Act 36 of 2004, hereinafter referred to as the Securities Services Act; clauses 82 & 86 read with clause 83 of the Financial Markets Bill [B-2011], hereinafter referred to as the Financial Markets Bill 2011; clauses 80 & 84 read with clause 81 of the Financial Markets Bill [B12-2012], hereinafter referred to as the Financial Markets Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill & the Financial Markets Bill 2012 because at the time of writing this chapter, the aforementioned Bills were not yet effectively passed into law). Also see the historical analysis of the regulation of insider trading in South Africa in Chapter Two of this thesis.
namely the co-ordinated (joint) effort between the courts, self-regulatory organisations and the United States Securities and Exchange Commission and the statutory provision of private rights of action to combat insider trading is relatively minimal in South Africa due to \textit{inter alia} the differences in relation to the financial markets sizes and enforcement approaches. Furthermore, the South African market abuse regulatory framework appears to have blindly borrowed some of the principles regarding the civil enforcement of insider trading from the United States of America as will be highlighted later.

Likewise, both the South African and the United Kingdom’s insider trading regulatory frameworks prohibit individuals from committing insider trading offences, especially in relation to securities listed on regulated financial markets. Moreover, both South Africa and the United Kingdom’s insider trading regulatory frameworks prohibit primary insiders, secondary insiders and their tippees from knowingly dealing directly or indirectly in securities on the basis of non-public price-sensitive (material) inside information for their own benefit or for the benefit of others. Unlike in the United Kingdom, there is no express provision that discourages dealing in securities on unregulated over the counter markets.

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\textsuperscript{6} See the discussions that will be assumed in the later paragraphs of this Chapter highlighting that there is little or no co-operation between the courts and the Financial Services Board (the FSB) and very few successful prosecutions or civil claims that have been obtained especially in the courts.

\textsuperscript{7} For instance, in civil cases it seems as if the provision for a civil penalty of up to three times the profit made or the loss avoided by the offenders was blindly borrowed from the United States of America without statutorily empowering the affected persons to directly claim their damages from the offenders, apart from claiming through the Financial Services Board, see the discussions that will be assumed later in paragraph 9.2.1 of this Chapter; also see s 77 of the Securities Services Act; clause 86 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & the historical development of the regulation and enforcement of insider trading in Chapter Two of this thesis.

\textsuperscript{8} In other words, similar classes of individuals are discouraged from engaging in illicit insider trading activities in both South Africa and the United Kingdom.

\textsuperscript{9} S 72; s 73 & s 77 of the Securities Services Act; also see the definition of insider in clause 81 read with clauses 82 & 86 of the Financial Markets Bill & the definition of insider in clause 79 read with clauses 80 & 84 of the Financial Markets Bill 2012.

\textsuperscript{10} S 52 of the Criminal Justice Act 1993 (c 36), hereinafter referred to as the Criminal Justice Act.

\textsuperscript{11} Individuals (insiders) are therefore prohibited from encouraging or discouraging others to deal in the affected securities while in possession of non-public inside information or to improperly disclose non-public inside information relating to such securities.

\textsuperscript{12} This could further indicate that similar conduct that may give rise to insider trading is prohibited in South Africa as well as in the United Kingdom.

\textsuperscript{13} S 59 & s 52(3) of the Criminal Justice Act.
through agents or professional intermediaries in South Africa. This could be due to the fact that insider trading activities in the over the counter markets are probably very restricted since such transactions are mostly done on a face-to-face basis between persons who know each other quite well. Furthermore, although the words “through an agent” are used in some provisions that discourage insider trading under the Securities Services Act, this Act does not expressly provide a statutory definition for the term “agent”. Similarly, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide a clear definition of the term “agent” to enhance the interpretation and enforcement of the insider trading prohibition in South Africa. On the contrary, the term “professional intermediary” which is similar to the term “agent” is employed and fully defined in the United Kingdom. Notably, the South African insider trading ban has an unlimited extra-territorial application. Thus, in contrast to the United Kingdom’s insider trading regime which only applies to any dealing that takes place on a regulated market which operates in the United Kingdom or if the person dealing in the price-affected securities is a professional intermediary or relies on a professional intermediary to deal in such securities on a regulated financial market in the United Kingdom, an insider who unlawfully deals in the South African securities listed on a foreign market can be prosecuted for insider trading in South Africa even if the territorial (nexus) link to South Africa does not exist. Furthermore, unlike the position in the Criminal Justice Act, insider trading is treated both as a civil and criminal offence in South Africa.

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15 S 73(1) & s 77(1).
16 Although it can be argued that the ordinary meaning of the term “agent” is generally known to all the relevant persons, the Securities Services Act did not provide an adequate and clear definition of this term for the purposes of improving the implementation of the insider trading prohibition in South Africa.
17 Clauses 82 & 86 read with clause 81 of the Financial Markets Bill & clause 80 read with clause 79 of the Financial Markets Bill 2012.
18 S 59 of Criminal Justice Act.
20 Jooste “A Critique of the Insider Trading Provisions of the 2004 Securities Services Act” 2006 SALJ 437 453; also see paragraph 2 4 1 3 in Chapter Two of this thesis; see the definition of regulated market in s 72 & clause 81 of the Securities Services Act & the Financial Markets Bill respectively; also see clause 79 of the Financial Markets Bill 2012.
21 See paragraph 7 2 in Chapter Seven of this thesis.
However, no attempt has been made to statutorily define the concept of insider trading in both South Africa\(^{23}\) and the United Kingdom.\(^{24}\)

In addition, as was the position in Australia,\(^{25}\) prior to 1973 the South African financial markets reportedly had higher levels of insider trading practices and such practices were not statutorily prohibited.\(^{26}\) This prompted the appointment of the Committees such as the Van Wyk de Vries Commission of Inquiry into the Companies Act of 1973 (the Van Wyk de Vries Commission) and the King Task Group into the Insider Trading Legislation (the King Task Group).\(^{27}\) These Committees, like in Australia,\(^{28}\) recommended \textit{inter alia}, several reforms of insider trading and other related legislation in South Africa.\(^{29}\) Notably, like the position under the Corporations Act,\(^{30}\) the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 did not define the concept of insider trading.\(^{31}\) The Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 have nonetheless provided definitions for some terms that relate to insider trading like “insider”, “inside information”, “regulated market”, “person” and “deal”.\(^{32}\) There are notable similarities between the current South African and Australian insider trading provisions that relate to the definitions and other general prohibitions, but it remains to be seen, due to the absence of a comprehensive definition of the concept of insider trading, whether the South African insider trading prohibition\(^{33}\) will also be consistently enforced like the similar prohibition in Australia.\(^{34}\) Moreover, in contrast to the so-called “information connection only approach”

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\(^{23}\) S 72; s 73 & s 77 of the Securities Services Act; clauses 81; 82 & 86 of the Financial Markets Bill & clauses 79; 80 & 84 of the Financial Markets Bill 2012.

\(^{24}\) See Part V of the Criminal Justice Act.

\(^{25}\) See paragraph 8 2 2 in Chapter Eight of this thesis.


\(^{27}\) See further paragraphs 2 1 & 2 3 1 in Chapter Two of this thesis.

\(^{28}\) See paragraphs 8 2 2; 8 2 3 & 8 2 4 in Chapter Eight of this thesis.

\(^{29}\) See further analysis in paragraphs 2 1 & 2 3 1 in Chapter Two of this thesis.

\(^{30}\) 50 of 2001(Cth) as amended, hereinafter referred to as the Corporations Act; also see paragraph 8 2 5 in Chapter Eight of this thesis.

\(^{31}\) S 7 2 of the Securities Services Act; clause 81 of the Financial Markets Bill & also see clause 79 of the Financial Markets Bill 2012.


\(^{33}\) See generally Jooste 2006 \textit{SALJ} 438.

\(^{34}\) See further paragraphs 8 2 5; 8 2 6 1; 8 2 6 2 & 8 2 6 3 in Chapter Eight of this thesis.
which is adopted and employed in Australia, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 seem to be employing the person connection approach by prohibiting insiders (employees, directors or shareholders) of a company and any other persons who possessed unpublished price-sensitive information (or who are connected to a company) by virtue of their relationship with such insiders, from dealing in the affected securities of that company for personal gain or the gain of another person. Moreover, as is the position in Australia, the definition of the term “person” which is provided in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 also include a partnership and a trust. This suggests that a trust or a partnership can be held liable for insider trading in South Africa. However, unlike the position in Australia, it is not expressly and statutorily provided whether the partnership itself or the members of such partnership will incur liability for insider trading in South Africa. In contrast to the situation in Australia, the South African insider trading prohibition’s extra-territorial application is still to be successfully enforced in South Africa or elsewhere. In relation to this, as is the position in Australia and as stated in the previous chapters of this thesis, South Africa should consider adopting a more feasible and practically enforceable extra-territorial approach.

In European Union, the European Union Insider Dealing Directive offered the pioneering insider trading provisions which were applicable in the European Union member states.

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35 See paragraph 8.2.5 in Chapter Eight of this thesis.
36 S 73 & s 77 read with s 72 & s 74 of the Securities Services Act; clauses 82 & 86 read with clauses 81 & 83 of the Financial Markets Bill & clauses 80 & 84 read with clauses 79 & 81 of the Financial Markets Bill 2012.
37 See paragraph 8.2.5 in Chapter Eight of this thesis.
38 S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012.
39 S 1042G; s 1042H read with s 761F & s 761FA of the Corporations Act; also see paragraph 8.2.5 in Chapter Eight of this thesis.
40 S 73 & s 77 read with s 72 of the Securities Services Act; also see clauses 82 & 86 read with clause 81 of the Financial Markets Bill & clauses 80 & 84 read with clause 79 of the Financial Markets Bill 2012.
41 Generally see paragraph 8.2.5 in Chapter Eight of this thesis.
42 Jooste 2006 SALJ 453.
43 Generally see paragraph 8.2.5 in Chapter Eight of this thesis.
44 See further discussions in Chapters Two, Three & Four of this thesis.
46 Articles 1(2) & 2(1) of the IDD. See further paragraphs 6.1 & 6.2 in Chapter Six of this thesis.
Nonetheless, the Insider Dealing Directive was repealed and replaced\textsuperscript{47} by the EU Market Abuse Directive.\textsuperscript{48} The EU Market Abuse Directive introduced several changes such as the three definitions of inside information in a bid to combat insider trading.\textsuperscript{49} Likewise, in South Africa, inside information is defined in the Securities Services Act\textsuperscript{50} as specific or precise information which has not been made public and which is obtained or learned by an insider and which, if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.\textsuperscript{51} A closer look at this definition reveals a number of key elements that are also employed in a similar general definition of inside information contained in the EU Market Abuse Directive.\textsuperscript{52} Such elements include the requirements that:

(a) information must not have been made public;

(b) information must be precise or specific; and

(c) if such information were to be made public, it would be likely to have a material or significant effect on the price or value of the affected securities or financial instruments.

Notably, a similar definition or approach is also employed in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{53} Put differently, the definition of inside information contained in the Securities Services Act,\textsuperscript{54} the Financial Markets Bill and the Financial Markets Bill 2012,\textsuperscript{55} like the position under the EU Market Abuse Directive,\textsuperscript{56} also incorporates an element of specificity. As a result, unconfirmed information or rumours do not qualify or fall under the ambit of the definition of inside information stipulated in the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} Consequently, the implementation of the provisions of the IDD will not be analyzed in detail.
\item \textsuperscript{49} See further paragraphs 631 in Chapter Six of this thesis.
\item \textsuperscript{50} See s 72 of the Securities Services Act.
\item \textsuperscript{51} See further related discussions in paragraphs 2341 \& 2413 in Chapter Two of this thesis.
\item \textsuperscript{52} Article 1(1) of the EU Market Abuse Directive; also see paragraph 631 in Chapter Six of this thesis.
\item \textsuperscript{53} Clause 81 of the Financial Markets Bill \& clause 79 of the Financial Markets Bill 2012.
\item \textsuperscript{54} S 72 of the Securities Services Act.
\item \textsuperscript{55} Clause 81 of the Financial Markets Bill \& clause 79 of the Financial Markets Bill 2012.
\item \textsuperscript{56} Article 1(1) of the EU Market Abuse Directive; also see paragraph 631 in Chapter Six of this thesis.
\end{itemize}
\end{footnotesize}
In addition, like the position under the EU Market Abuse Directive, the definition of inside information contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 also includes an element and/or degree of price-sensitivity, in that the relevant information should be likely to have a significant or material effect on the price of securities if it were made public. Nonetheless, unlike the general definition of inside information contained in the EU Market Abuse Directive, the definition of inside information provided in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 is limited only to securities listed on a regulated market. Furthermore, in contrast to the position under the EU Market Abuse Directive, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide special or complementary definitions of inside information in relation to derivatives on commodities and/or to the persons involved in the execution of orders relating to listed securities or other related derivative financial instruments. It is submitted that this gap, if not expressly addressed, could easily result in the commission of front running or other market abuse activities pertaining to commodities derivatives by some unscrupulous financial brokers and/or other related market participants in South Africa.

Furthermore, in South Africa, an “insider” means a person who has inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or having access to such

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57 S 72 of the Securities Services Act.
59 Article 1(1) of the EU Market Abuse Directive; also see paragraph 6 3 1 in Chapter Six of this thesis & Avgouleas “A Critical Evaluation of the New EC Financial Market Regulation: Peaks, Troughs and the Road Ahead” 2004-2005 The Transnational Lawyer 179 204.
60 S 72 of the Securities Services Act.
62 Article 1(1) of the EU Market Abuse Directive; also see paragraph 6 3 1 in Chapter Six of this thesis.
63 S 72 of the Securities Services Act.
65 Article 1(1) of the EU Market Abuse Directive; also see paragraph 6 3 1 in Chapter Six of this thesis.
66 S 72 of the Securities Services Act.
information by virtue of employment, office or profession; or where such person knows that
the direct or indirect source of the information was an insider as contemplated in the
Thus, like the position under the EU Market Abuse Directive, this definition also provides
the primary insiders category comprising directors, employees or shareholders of the issuer of
securities listed on a regulated market and other persons who accessed inside information by
virtue of their employment, office or profession. Moreover, the secondary insiders category
is also provided under the Securities Services Act, the Financial Markets Bill and the
Financial Markets Bill 2012, consisting of any person who knows that the direct or indirect
source of his inside information was a primary insider. The definition of insider which is
stipulated in the Securities Services Act, the Financial Markets Bill and the Financial
Markets Bill 2012 is further applicable to both natural and juristic persons. However,
unlike the EU Market Abuse Directive, the Securities Services Act, the Financial Markets
Bill and the Financial Markets Bill 2012 do not expressly provide whether their respective
market abuse provisions apply to natural persons (agents or corporate insiders) who
participate in the execution of transactions on behalf of a primary insider who is a legal or
juristic person in order to combat market abuse practices by such agents in the South African
financial markets. In relation to this, a company (legal person) which repurchases its own
shares would be an insider to itself. This should have been acknowledged in the definition of
an insider which is provided in the Securities Services Act, the Financial Markets Bill and

69 S 72(a)(ii) of the Securities Services Act; clause 81(a)(ii) of the Financial Markets Bill & 79(a)(ii) of the
70 S 72(b) of the Securities Services Act.
71 Clause 81(b) of the Financial Markets Bill; clause 79(b) of the Financial Markets Bill 2012 & also see
further related discussions in paragraphs 2 3 4 1 & 2 4 1 3 in Chapter Two of this thesis.
72 Article 2(1) of the EU Market Abuse Directive; also see paragraph 6 3 2 in Chapter Six of this thesis.
73 S 72(a)(i) & (ii) of the Securities Services Act; clause 81(a)(i) & (ii) of the Financial Markets Bill &
74 S 72(b) of the Securities Services Act; clause 81(b) of the Financial Markets Bill & clause 79(b) of the
75 S 72(a)(i); (ii) & (b) of the Securities Services Act.
76 Clause 81(a)(i); (ii) & (b) of the Financial Markets Bill & clause 79(a)(i); (ii) & (b) of the Financial
Markets Bill 2012.
77 Article 2(2) of the EU Market Abuse Directive; see paragraph 6 3 2 in Chapter Six of this thesis.
78 S 72(a)(i); (ii) & (b) of the Securities Services Act.
79 Clause 81(a)(i); (ii) & (b) of the Financial Markets Bill & clause 79(a)(i); (ii) & (b) of the Financial
Markets Bill 2012.
Analysis” 1999 SALJ 760 777.
81 S 72(a)(i); (ii) & (b) of the Securities Services Act.
the Financial Markets Bill 2012,\(^{82}\) to protect shareholders of a company against such company taking advantage of the non-public price-sensitive information to repurchase their shares at a lower price than what the company would have paid if the information had been made public.\(^{83}\) Moreover, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 merely enumerates and prohibits four types of practices, namely, (a) dealing (directly or indirectly) in securities listed on a regulated market by an insider who knows that he has inside information which relates to such securities for his own personal benefit;\(^{84}\) (b) dealing (directly or indirectly) in securities listed on a regulated market by an insider who knows that he has inside information which relates to such securities for the benefit of another person;\(^{85}\) (c) improper disclosure of inside information to another person by an insider who knows that he has such information;\(^{86}\) and (d) the encouraging or discouraging of another person by an insider, to deal in securities listed on a regulated market.\(^{87}\)

Nonetheless, in a striking contrast to the EU Market Abuse Directive’s insider trading prohibition (which applies to financial instruments traded on both the regulated markets and the over the counter markets),\(^{88}\) the insider trading prohibition provided in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 applies mainly to securities transactions executed on the regulated markets.\(^{89}\) Accordingly, in this regard, it is submitted that the EU Market Abuse Directive’s insider trading prohibition is broader than the similar prohibition contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012.

\(^{82}\) Clause 81(a)(i); (ii) & (b) of the Financial Markets Bill & clause 79(a)(i); (ii) & (b) of the Financial Markets Bill 2012.


\(^{84}\) S 73(1)(a) & s 77(1)(a) of the Securities Services Act; clauses 82(1)(a) & 86(1)(a) of the Financial Markets Bill & clause 80(1)(a) read with clause 84 of the Financial Markets Bill 2012.

\(^{85}\) S 73(2)(a) & s 77(2)(a) of the Securities Services Act; clauses 82(2)(a) & 86(2)(a) of the Financial Markets Bill & clause 80(2)(a) read with clause 84 of the Financial Markets Bill 2012.

\(^{86}\) S 73(3)(a) & s 77(3)(a) of the Securities Services Act; clauses 82(4)(a) & 86(4)(a) of the Financial Markets Bill & clause 80(4)(a) read with clause 84 of the Financial Markets Bill 2012.

\(^{87}\) S 73(4) & s 77(4) of the Securities Services Act; clauses 82(5) & 86(5) of the Financial Markets Bill & clause 80(5) read with clause 84 of the Financial Markets Bill 2012.

\(^{88}\) See further paragraph 6 3 3 in Chapter Six of this thesis.

9.2.1 Evaluation and Analysis of the Available Penalties and Remedies for Insider Trading

Like the United States of America, South Africa also provides for civil, criminal and administrative penalties for insider trading in terms of the Securities Services Act. These penalties are set to be retained unchanged in the Financial Markets Bill and/or the Financial Markets Bill 2012. On the other hand, the provision for a civil penalty of up to three times the profit made or the loss avoided was apparently directly borrowed from the United States of America. Moreover, as is the position in the United States of America, the enforcement of the civil penalty in South Africa is a responsibility of an independent board, the Financial Services Board. Nonetheless, it remains questionable whether this approach has offered the ideal solution to the South African situation in relation to civil penalties and remedies, considering the fact that the Securities Service Act, the Financial Markets Bill and the Financial Markets Bill 2012 did not employ enforcement approaches from other jurisdictions like Australia. Like the United States of America, South Africa offers some remedies to the victims of insider trading. For example, the Financial Services Board may, on behalf of the aggrieved persons, effect a civil action for compensatory and punitive damages against the offenders. As is the case with the United States Securities and Exchange Commission, the Financial Services Board may only claim civil damages of up to three times the profit made or loss avoided by the offenders. Moreover, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 stipulate that the civil damages obtained by the Financial Services Board should also be paid into a trust account for distribution to successful

90 See paragraph 5.3.2 in Chapter Five of this thesis.
91 S 115(a) of the Securities Services Act.
92 See further analysis in paragraph 4.4.5 in Chapter Four of this thesis.
93 Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
95 S 82 read with s 77 of the Securities Services Act; clause 91 read with clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
96 S 82 read with s 77 of the Securities Services Act; clause 91 read with clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
97 See paragraph 5.3.3 in Chapter Five of this thesis.
claimants and for the Financial Services Board to recoup its expenses and costs incurred.\textsuperscript{100} Furthermore, like the United States of America,\textsuperscript{101} South Africa employs administrative penalties to prevent and deter all persons from indulging in insider trading and other market abuse practices.\textsuperscript{102} Unlike the United States Securities and Exchange Commission’s Enforcement Division which oversees the enforcement of all market abuse penalties (including administrative penalties) in the United States of America,\textsuperscript{103} the Financial Services Board and/or the Registrar of Securities Services normally refer any administrative cases involving market abuse practices (including insider trading) to the Enforcement Committee in South Africa.\textsuperscript{104} Furthermore, in contrast to the United States of America’s insider trading criminal sanctions,\textsuperscript{105} the South African legislature has rigidly provided for a fixed maximum fine of R50 million, or imprisonment for a period not exceeding ten years, or both.\textsuperscript{106} Although \textit{prima facie} these penalties seem to be quite significant, it is submitted that Cassim\textsuperscript{107} correctly argues that the current available insider trading penalties might not be high enough for deterrence purposes. For instance, in spite of the fact that most companies may take any fine for market abuse offences just like another cost of doing business, no distinction has been made in relation to the penalties imposed on natural and juristic persons to increase deterrence.\textsuperscript{108} Additionally, unlike the position in the United States of America where there are no specific statutory limitations for criminal actions,\textsuperscript{109} the competent courts in South Africa do not seem to have express statutory authority or discretion to impose any other additional penalties (apart from those stipulated in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012) upon the insider trading offenders without violating the \textit{autrefois acquit} or \textit{autrefois convict} doctrine.\textsuperscript{110}

\begin{footnotesize}
\begin{itemize}
\item[100] S 77(7); (8) & (9) of the Securities Services Act; clause 86(9); (10) & (11) of the Financial Markets Bill & clause 84(2); (3) & (4) of the Financial Markets Bill 2012.
\item[101] Paragraph 5 3 2 in Chapter Five of this thesis.
\item[102] S 6A to 6I of the Financial Institutions (Protection of Funds) Act 28 of 2001 as amended, hereinafter referred to as the Protection of Funds Act.
\item[103] Paragraph 5 3 2 read with paragraph 5 4 1 in Chapter Five of this thesis.
\item[104] S 94(e); s 101 & s 104 of the Securities Services Act; clause 105 of the Financial Markets Bill & clause 101 of the Financial Markets Bill 2012. Also see paragraph 3 2 3 in Chapter Three of this thesis.
\item[105] Paragraph 5 3 2 in Chapter Five of this thesis.
\item[106] S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
\item[107] Cassim 2008 SA Merc LJ 191-195.
\item[108] S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
\item[110] S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 79(a)(i); (ii) & (b) of the Financial Markets Bill 2012.
\end{itemize}
\end{footnotesize}
Notwithstanding the differences in the financial markets sizes and enforcement approaches that are used in South Africa and the United States of America, the Financial Services Board has to date obtained very few successful settlements and damages from the insider trading offenders. This is unlikely to change even if the Financial Markets Bill or the Financial Markets Bill 2012 is passed into law because these Bills still do not expressly provide for other enforcement methods like whistle-blower immunity, private rights of action and bounty rewards to increase the settlement or prosecution of cases involving insider trading and other related practices.

Furthermore, like the United Kingdom, South Africa uses civil, criminal and administrative penalties and/or remedies to combat market abuse practices. As is the position in the United Kingdom and as indicated above, criminal and administrative penalties are used to discourage all forms of market abuse in South Africa. On the other hand, civil penalties are employed only to curb insider trading in South Africa. In contrast to this position in South Africa, no civil penalties for insider trading are provided for under the Criminal Justice Act in the United Kingdom. However, a number of civil penalties are now available to discourage and curb insider trading as well as other market abuse practices under the Financial Services and Markets Act.

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111 See paragraphs 532; 533 & 541 in Chapter Five of this thesis.
112 For example, during the period between January 1999 and June 2011 only about 197 insider trading cases were investigated and successfully completed, generally see related analysis on the Directorate of Market Abuse’s past investigations by the Financial Services Board “Past Investigations of the Directorate of Market Abuse” Media Release (28-06-2011) – accessed 22-11-2011); However, during the period between January 2010 and April 2011 only eleven cases involving insider trading were investigated and these investigations were still ongoing, as confirmed by the Financial Services Board “List of Current Investigations of the Directorate of Market Abuse” Media Release (28-06-2011) – accessed 22-11-2011) & also see paragraph 42 of Chapter Four of this thesis for further analysis.
113 Clauses 86; 82 read with clauses 83; 84; 85; 87; 88 & 91 of the Financial Markets Bill & clauses 80; 82; 83 & 86 of the Financial Markets Bill 2012.
114 See paragraph 74 in Chapter Seven of this thesis.
115 S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
116 Also see paragraph 445 in Chapter Four of this thesis.
117 See paragraph 74 in Chapter Seven of this thesis.
118 S 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 86; 84; 85; 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
119 S 77 of the Securities Services Act.
120 See paragraph 74 in Chapter Seven of this thesis.
121 The Financial Services and Markets Act 2000 (c 8), hereinafter referred to as the Financial Services and Markets Act; also see paragraph 74 in Chapter Seven of this thesis.
In addition, like the position in Australia, South Africa extends civil penalties for insider trading activities to both juristic and natural persons who engage in such activities. Moreover, it is hoped, as is the position in Australia, that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 will be amended to provide separate and distinct penalties for individuals and juristic persons in South Africa. However, there is no express mandatory statutory duty on the part of the insiders or issuers provided under the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 to continuously disclose the transactions pertaining to their securities or other instruments, or any express duty on companies or institutions to disclose their unpublished price-sensitive inside information to the public. This could imply that there are no appropriate civil sanctions for such non-disclosure in South Africa. In this regard, South Africa should consider adopting the Australian approach and introduce a mandatory statutory duty coupled with civil penalties for non-compliance on the part of the insiders or issuers for them to continuously disclose their non-public price-sensitive inside information.

In addition, like the position in Australia, South Africa also employs criminal penalties to combat insider trading activities. Notably, the criminal monetary penalties for insider trading were considerably increased from a fine of R2 million to a R50 million fine. Nonetheless, it has already been stated that the potential enormous profits associated with market abuse practices like insider trading could still overshadow the deterring effect of the fine or imprisonment term provided in the Securities Services Act. These concerns are set

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122 See paragraph 8.2.6.1 in Chapter Eight of this thesis.
124 See paragraph 8.2.6.1 in Chapter Eight of this thesis.
125 S 73; s 77 read with s 74.
126 Clauses 82 & 86 read with clause 83 of the Financial Markets Bill & clauses 80 & 84 read with clause 81 of the Financial Markets Bill 2012.
127 Jooste 2006 SALJ 452.
129 Lyon & Du Plessis The Law of Insider Trading in Australia (2005) 170-197; generally see paragraph 8.2.6.1 in Chapter Eight of this thesis.
130 See paragraph 8.2.6.2 in Chapter Eight of this thesis.
131 S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012. Also see further analysis in paragraph 2.5.4 in Chapter Two of this thesis & Cassim 2008 SA Merc LJ 193-195.
133 See s 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012. See further analysis in paragraph 2.5.4 in Chapter Two of this thesis.
134 See Cassim 2008 SA Merc LJ 194; also see Jooste 2006 SALJ 453-454; similar remarks in paragraph 2.5.4 in Chapter Two of this thesis.
to remain unresolved because neither the Financial Markets Bill nor the Financial Markets Bill 2012 increased the criminal penalties for insider trading.\textsuperscript{135} Additionally, as in Australia,\textsuperscript{136} the responsibility for the criminal prosecution of insider trading in South Africa lies mainly with the Director of Public Prosecutions. Nonetheless, in South Africa, the Director of Public Prosecutions may only institute criminal proceedings in relation to insider trading after a referral from the Financial Services Board.\textsuperscript{137} Moreover, in contrast to the Australian Securities and Investments Commission,\textsuperscript{138} the Financial Services Board is not statutorily empowered to institute its own additional criminal penalties and/or to use the seize and forfeiture method to recover or confiscate criminal assets and other illegal benefits from the insider trading offenders. Additionally, it is not quite certain whether insider trading is also treated as an indictable offence\textsuperscript{139} against the financial markets and which can therefore be prosecuted any time in South Africa. This obscurity could have worsened the existing challenges regarding the required evidentiary burden of proof for insider trading criminal sanctions in South Africa. However, like the Corporations Act,\textsuperscript{140} the Securities Services Act does not expressly provide any rebuttable presumptions that could assist the Director of Public Prosecutions in the prosecution of insider trading cases in South Africa.\textsuperscript{141} This flaw remains unresolved in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{142}

Like in Australia,\textsuperscript{143} civil remedies are also available to all the persons who fall victim to insider trading practices in South Africa.\textsuperscript{144} Moreover, like the position in Australia,\textsuperscript{145} the Financial Services Board is mainly empowered to oversee the enforcement of such remedies

\textsuperscript{135} Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
\textsuperscript{136} See paragraph 8 2 6 2 in Chapter Eight of this thesis.
\textsuperscript{138} See paragraph 8 2 6 2 in Chapter Eight of this thesis.
\textsuperscript{139} See paragraph 8 2 6 2 in Chapter Eight of this thesis.
\textsuperscript{141} See similar remarks in paragraph 3 2 6 in Chapter Three of this thesis.
\textsuperscript{142} Clause 82 of the Financial Markets Bill & clause 80 of the Financial Markets Bill 2012.
\textsuperscript{143} See paragraph 8 2 6 3 in Chapter Eight of this thesis.
\textsuperscript{144} S 77 of the Securities Services Act; clause 86 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
\textsuperscript{145} See further analysis in paragraph 8 2 6 3 in Chapter Eight of this thesis.
in South Africa. However, unlike the Australian Securities and Investments Commission, it is not clear whether the Financial Services Board is statutorily limited to institute civil proceedings for insider trading remedies on the behalf of the affected persons only in instances where it considers being in the public interest. In other words, the Financial Services Board appears to be statutorily empowered to institute such proceedings against the offenders regardless of whether a public interest exists. In this regard, the Financial Services Board’s enforcement approach for civil compensatory remedies is more desirable when compared to that of the Australian Securities and Investments Commission. It is hoped that the absence of a restricted time frame under which the civil action for remedies may be instituted and the non-existence of a requirement for such action to be in the public interest will be utilised by the Financial Services Board to obtain more civil remedies from the insider trading offenders in South Africa. Notably, in relation to this and as is the position with the Australian Securities and Investments Commission, the Financial Services Board may bring several actions for remedies on behalf of the affected persons such as the order for a penalty for punitive and compensatory purposes, in a sum or monetary amount determined by the courts but not exceeding three times the loss avoided or the profit gained by the offenders. Such any order may also include the payment by the offender, of any interest, commission and the costs of the suit as determined by the courts in South Africa. Nonetheless, unlike the position in Australia, and as earlier highlighted above, there is no statutory private right of action for the issuers or other affected persons to claim their civil remedies directly from the insider trading offenders in South Africa. This has been criticised as one of the loopholes in the Securities Services Act’s insider trading civil

146 S 82 read with s 77 of the Securities Services Act; clause 91 read with clause 86 of the Financial Markets Bill; clause 86 read with clause 84 of the Financial Markets Bill 2012 & see further paragraph 3.2.1 in Chapter Three of this thesis.
147 See related remarks in paragraphs 8.2.6.1 & 8.2.6.3 in Chapter Eight of this thesis.
148 For more detail regarding these so-called wide powers of the FSB, see a discussion in paragraph 3.2.1 in Chapter Three of this thesis.
149 See further analysis in paragraph 8.2.6.3 in Chapter Eight of this thesis.
150 See further analysis in paragraph 8.2.6.3 in Chapter Eight of this thesis.
151 S 77(1)(c)(ii); (2)(c)(ii); (3)(b)(ii) & (4)(b)(ii) of the Securities Services Act; see clause 86(1)(c)(ii); (2)(c)(ii); (3)(b)(ii); (4)(b)(ii) & (5)(b) of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012.
152 See s 77(1)(c)(iii) & (iv); (2)(c)(iii) to (v); (3)(b)(iii) to (v) & (4)(c) to (e) of the Securities Services Act; clause 86(1)(c)(iii) & (iv); (2)(c)(iii) to (v); (3)(b)(iii) & (iv); (4)(b)(iii) to (v) & (5)(c) to (e) of the Financial Markets Bill & also see clause 84 of the Financial Markets Bill 2012.
153 See related remarks in paragraph 8.2.6.3 in Chapter Eight of this thesis.
remedies provisions. Conspicuously, this flaw remains unresolved in the Financial Markets Bill as well as the Financial Markets Bill 2012 and as result issuers or affected persons are merely left to claim their damages from the insider trading offenders through their own civil litigation. Moreover, although it seems that the Australian civil penalties for insider trading are not very different from the civil remedies and that the criminal penalties are not severe enough for deterrence purposes, the considerable number of successful insider trading settlements and prosecutions obtained in Australia to date could imply that such penalties are relatively better utilised in Australia than in South Africa.

Lastly, in the European Union, unlike the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012, the EU Market Abuse Directive does not specifically provide the amount of remedies or penalties which may be imposed against the insider trading offenders. It is up to the European Union member states to provide the appropriate sanctions for insider trading and/or other related market abuse offences. This failure on the part of the EU Market Abuse Directive to provide common market abuse penalties that are applicable across the European Union member states could have weakened and contributed to the inconsistent implementation of its provisions.

9.3 Evaluation and Analysis of the Historical Overview of Market Manipulation Prohibition


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156 See similar remarks in paragraphs 8.2.6.1; 8.2.6.2 & 8.2.6.3 in Chapter Eight of this thesis.
157 See further related discussions in paragraphs 2.5.4 & 3.2.7 in Chapters Two & Three of this thesis respectively.
158 See Chapter Six of this thesis.
159 S 115(a); also paragraphs 2.5.4 & 4.4.5 in Chapters Two & Four of this thesis.
160 Clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & paragraphs 2.5.4 & 4.4.5 in Chapters Two & Four of this thesis.
161 Article 14 of the EU Market Abuse Directive. Nevertheless, regulatory bodies in the EU member states are allowed to determine and disclose the sanctions imposed on the market abuse offenders, see article 14(4) of the EU Market Abuse Directive.
162 Article 14(1); (3) & (4) of the EU Market Abuse Directive.
163 See paragraph 6.4.5 in Chapter Six of this thesis.
164 See paragraphs 6.1 & 6.3.4 in Chapter Six of this thesis.
under the EU Market Abuse Directive, the concept of market manipulation is not specifically defined in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012. However, like the EU Market Abuse Directive, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 also outlaw several practices that could result in market manipulation, for example, fictitious and artificial transactions-based manipulations. Furthermore, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 prohibit trade-based (including wash sales) manipulations. The Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 further prohibit disclosure-based manipulations that are usually executed through the publishing of false, misleading or deceptive statements, promises and forecasts. In this regard, the prohibition on market manipulation contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 is relatively identical to the similar prohibition that is provided in the EU Market Abuse Directive. In addition, as is the situation under the EU Market Abuse Directive, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 provide several practices that could amount to being, or that are deemed to be manipulative, to include among others:

(a) executing a transaction with no beneficial change of ownership of the securities;

(b) entering an order to buy or sell a security on a regulated market knowing of a similar opposite order that has been entered or that will be entered, with the intention of creating a deceptive appearance of active public trading in connection with or an artificial market price for that security; and

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165 See paragraph 6.3.4 in Chapter Six of this thesis.
166 S 72; s 75 & s 76.
167 Clauses 81; 84; 85 & 87 of the Financial Markets Bill & clauses 79; 82 & 83 of the Financial Markets Bill 2012.
168 See paragraph 6.3.4 in Chapter Six of this thesis.
169 S 75(1)(a)(i) & (ii) of the Securities Services Act; clause 84(1)(a)(i) & (ii) read with clause 87 of the Financial Markets Bill & clause 82(1)(a)(i) & (ii) of the Financial Markets Bill 2012 & also see paragraphs 2.4.1.1 & 2.5.1 in Chapter Two of this thesis.
170 S 75(1)(b) & (2).
171 Clause 84(1)(b) & (2) read with clause 87 of the Financial Markets Bill & clause 82(1)(b) & (2) of the Financial Markets Bill 2012.
172 S 76 of the Securities Services Act; clause 85 read with clause 87 of the Financial Markets Bill & clause 83 of the Financial Markets Bill 2012 & also see paragraphs 2.4.1.1 & 2.5.3 in Chapter Two of this thesis.
173 Article 1(2) of the EU Market Abuse Directive; also see paragraph 6.3.4 in Chapter Six of this thesis.
174 Article 1(2) of the EU Market Abuse Directive; also see paragraph 6.3.4 in Chapter Six of this thesis.
employing any device, scheme or artifice to defraud other persons as a result of a transaction effected through the facilities of a regulated market.175

Nonetheless, unlike the position under the EU Market Abuse Directive,176 the prohibition on market manipulation stipulated in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 does not specifically discourage Internet-based market manipulation practices.177 Moreover, it appears as if the market manipulation prohibition provided in the Securities Services Act,178 the Financial Markets Bill and the Financial Markets Bill 2012179 also employs an objective (effect-based) based approach similar to that of the EU Market Abuse Directive.180 Nonetheless, the South African market abuse prohibition does not specifically distinguish between and/or prohibit both actual and attempted market manipulation practices.

On the other hand, although market manipulation has been discouraged in the United Kingdom from as early as the 1860s,181 it was only statutorily prohibited in South Africa in the late 1980s.182 Prior to this, market manipulation was mainly prohibited by the common law in South Africa.183 In contrast to the position in the United Kingdom where the concept of, and conduct amounting to market manipulation or other market abuse practices is statutorily defined,184 this concept is not statutorily defined in the Securities Services Act.185

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175 See further s 75(3) of the Securities Services Act; clause 84(3) of the Financial Markets Bill & clause 82(3) of the Financial Markets Bill 2012 & also see related analysis in paragraphs 2 4 1 1 & 2 5 1 in Chapter Two of this thesis.

176 Article 1(2) of the EU Market Abuse Directive; also see paragraph 6 3 4 in Chapter Six of this thesis.

177 S 75 & s 76 of the Securities Services Act & clauses 84; 85 & 87 of the Financial Markets Bill & clauses 82 & 83 of the Financial Markets Bill 2012.

178 S 75 & s 76 of the Securities Services Act.


180 Article 1(2) of the EU Market Abuse Directive; also see paragraph 6 3 4 in Chapter Six of this thesis.

181 See paragraph 7 3 in Chapter Seven of this thesis.

182 Also see the relevant provisions of the now repealed statutes, the Stock Exchanges Control Act 1 of 1985, hereinafter referred to as the Stock Exchanges Control Act, see s 40 & the Financial Markets Control Act 55 of 1989, hereinafter referred to as the Financial Markets Control Act, see s 20 to s 23. Notably, s 1 of the Stock Exchanges Control Act prohibited the market manipulation of securities which included stocks, shares and debentures while the relevant provisions of the Financial Markets Control Act prohibited market manipulation of financial instruments, as defined in s 1 including futures contracts, option contracts and loan stock on a financial market. Also see paragraphs 2 2 1; 2 2 2; other relevant sub-paragraphs under paragraph 2 2 in Chapter Two of this thesis & Cassim 2008 *SA Merc LJ* 34.

183 Under common law, market manipulation is usually referred to as a crime of “rigging the market”. Also see Cassim 2008 *SA Merc LJ* 34; 40-42.

184 S 118 of the Financial Services and Markets Act.
The same status quo is also replicated in the Financial Markets Bill and the Financial Markets Bill 2012. Moreover, unlike the position in the United Kingdom where about seven types of market abuse are clearly enumerated and statutorily prohibited, only three forms of market abuse practices, namely insider trading, prohibited trading practices (trade-based market manipulation) and the making or publication of false, misleading or deceptive promises, statements or forecasts (disclosure-based market manipulation) are statutorily discouraged in South Africa. Moreover, unlike the position under the Securities Services Act, the Financial Services and Markets Act treats insider trading, market manipulation and other forms of market abuse practices on a more equal footing in the United Kingdom. For instance, as discussed earlier, market manipulation and other market abuse practices are all treated as civil or criminal offences under the Financial Services and Markets Act in the United Kingdom. This approach is desirable in that it has enabled the Financial Services Authority and other enforcement authorities to enforce the market abuse prohibition consistently in order to combat market manipulation and other related practices in the United Kingdom. In view of this, it is objectively anticipated that the provisions of the Financial Markets Bill which now extends the civil liability compensation orders to cases involving market manipulation will come into effect to improve and increase the enforcement of the market abuse ban in South Africa. Notably, behaviour would constitute market manipulation and/or other market abuse offences in terms of the Financial Services and Markets Act if it occurs in the United Kingdom or in relation to any qualifying investments which are mainly traded on a prescribed market in the United Kingdom or the relevant European Union member states. Thus, in order for the Financial Services Authority to impose liability on the

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185 See s 75 & s 76 & Chapter VIII of the Securities Services Act. Also see further Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (part 1)” 2008 SA Merc LJ 33 34-35.
186 Clauses 84; 85; 87 & related clauses under Chapter X of the Financial Markets Bill & clauses 82; 83 & related clauses under Chapter X of the Financial Markets Bill 2012.
187 S 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 86; 84; 85; 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
188 This Act does not impose civil liability on persons who make or publish false, misleading or deceptive statements, promises and forecasts (disclosure-based market manipulation) or engage in prohibited trading practices (trade-based market manipulation). See s 75 & s 76 read with s 73 & s 77 of the Securities Services Act; also see related analysis in paragraphs 2 5 1; 2 5 3 read with paragraphs 2 5 2 1 & 2 5 2 2 of Chapter Two of this thesis & paragraph 4 4 4 in Chapter Four of this thesis.
189 See further paragraph 7 2 in Chapter Seven of this thesis.
190 S 118.
191 See paragraph 7 3 in Chapter Seven of this thesis.
192 See the discussions in paragraph 7 5 1 in Chapter Seven of this thesis.
193 See clause 87 of the Financial Markets Bill; no similar provision is made in the Financial Markets Bill 2012.
194 S 118A(1)(a).
alleged offenders, there must be a territorial nexus with the relevant financial markets in the United Kingdom or elsewhere. This could imply that the United Kingdom’s provisions on market manipulation and other market abuse practices have a restricted extra-territorial application. However, in South Africa, conduct may amount to market manipulation or insider trading if it was made in relation to securities listed on a regulated market (whether domestic or foreign) which is run in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market. This implies, in contrast to the position in the United Kingdom, that the South African market abuse prohibition is unlimitedly applicable to securities listed on any regulated foreign market and to both natural and juristic persons. However, it remains to be seen whether the South African enforcement authorities will be able to mobilise and have sufficient resources necessary to implement and enforce the prohibition on market manipulation extra-territorially. Moreover, it is not expressly and statutorily provided how this so-called extra-territorial application will be utilised to protect the South African financial markets from non-resident persons who manipulate securities listed on a foreign market where such conduct has no effect on the related securities listed on the regulated financial markets in South Africa. This deficiency is still not addressed in the Financial Markets Bill and the Financial Markets Bill 2012.

The legislature in the United Kingdom amended its market abuse legislation in order to align it with the EU Market Abuse Directive. In light of this, the Financial Services Authority was conferred more powers as a single administrative regulator to ensure that the prohibition on market manipulation and related practices is consistently complied with. The Financial Services Authority has, for instance, issued the Code of Market Conduct to guide all the relevant persons on conduct that amounts to market manipulation and related practices

195 See related remarks in paragraph 7 3 read with paragraph 7 2 in Chapter Seven of this thesis.
196 S 72 of the Securities Services Act; also see clause 81 of the Financial Markets Bill & clause 79 of the Financial Markets Bill 2012, for the definition of regulated market.
197 S 118A(1)(a).
198 S 72; 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 81; 82; 86; 84; 85; 87 of the Financial Markets Bill & clauses 79; 80; 82; 83 & 84 of the Financial Markets Bill 2012. Also see generally Jooste 2006 SALJ 453; Cassim 2007 SA Merc LJ 66-67.
199 S 72 which defines the term “regulated market” read with s 75 & s 76 of the Securities Services Act.
200 Clause 81 which defines the term “regulated market” read with clauses 84; 85 & 87 of the Financial Markets Bill & clause 79 which defines the term “regulated market” read with clauses 82 & 83 of the Financial Markets Bill 2012.
201 See article 11 of the EU Market Abuse Directive. Also see further Cassim 2008 SA Merc LJ 38; paragraph 7 3 in Chapter Seven of this thesis.
(including factors to be considered when determining whether such conduct amounts to market abuse) in the United Kingdom. This Code of Market Conduct has, for instance, stipulated some factors to be considered when determining whether a person dealing in any qualifying investment has created a false or deceptive appearance of a trading activity in relation to a certain security or an artificial price or value of the qualifying investment and the extent to which the price, rate or option volatility movements for the affected investment are outside their normal daily, weekly or monthly range. Although such market conduct is also prohibited by the Securities Services Act, it is not quite clear whether the Financial Services Board has a similar Code or booklet containing the guidelines regarding the behaviour that amounts to market manipulation or related practices in South Africa. In addition, market manipulation practices such as the creation of a false or deceptive appearance of trading activity in connection with a security, dealing that will create an artificial practice and placing orders to buy or sell listed securities in order to create an artificial price for a security or a false or deceptive appearance in trading activity in relation to that security are merely stated and prohibited in the Securities Services Act. Additionally, the same shortcomings are also retained in the Financial Markets Bill and the Financial Markets Bill 2012. Similarly, like the United Kingdom, South Africa prohibits certain conduct that is deemed manipulative, improper, false or deceptive. For example, the Securities Services Act discourages practices such as: (a) wash sales, (b) engaging in conduct that amounts to or creates matched orders, (c) buying orders at successively higher prices and selling such orders at successively lower prices in order to improperly influence the market prices of certain securities, (d) entering orders to buy securities (marking the close) at or near the close of the market to change or maintain the close price of a listed security.

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202 This Code of Market Conduct was revised on 1 July 2005 in accordance with s 119 of the Financial Services and Markets Act. The Code of Market Conduct is usually referred to as the “MAR”.
203 See MAR 1.6.10E.
204 S 75(1)(a) read with s 76 of the Securities Services Act.
205 S 75(1)(a)(i).
206 S 75(1)(a)(ii).
207 S 75(1)(b).
208 See clause 84 read with clauses 85 & 87 of the Financial Markets Bill & clause 82 read with clause 83 of the Financial Markets Bill 2012.
209 See paragraph 7.3 in Chapter Seven of this thesis.
210 S 75(3).
211 S 75(3)(a).
212 S 75(3)(b).
213 S 75(3)(c).
214 S 75(3)(d).
(e) auctioning process,\textsuperscript{215} (f) effecting a market corner,\textsuperscript{216} (g) maintaining an artificial price,\textsuperscript{217} and (h) employing manipulating devices, schemes or artifices or manipulative act, practice or course of business to defraud other investors.\textsuperscript{218} Furthermore, the same practices are also deemed manipulative and are prohibited under the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{219} Nevertheless, in contrast to the position in the United Kingdom, disclosure-based market manipulation and/or other related activities that are perpetrated through the Internet are not statutorily prohibited in South Africa.\textsuperscript{220} Moreover, the Securities Services Act does not expressly provide practical guiding factors on how to determine whether certain practices may be deemed to be amounting to market manipulation.\textsuperscript{221} This flaw is not resolved in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{222}

Furthermore, like the situation in Australia,\textsuperscript{223} market manipulation practices are statutorily prohibited under the Securities Services Act,\textsuperscript{224} the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{225} However, it is hoped that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 will be amended to provide an adequate statutory definition of the concept of market manipulation involving all the elements of this offence (how it is committed) as well as the various types of market manipulation practices to enhance the combating of such practices in South Africa. Like the position under the Corporations Act,\textsuperscript{226} and as already stated above, the Securities Services Act,\textsuperscript{227} the Financial

\textsuperscript{215} S 75(3)(e).
\textsuperscript{216} S 75(3)(f).
\textsuperscript{217} S 75(3)(g).
\textsuperscript{218} S 75(3)(h). The wording of this subsection is almost identical to s 118(6) of the Financial Services and Markets Act.
\textsuperscript{219} Clause 84(3)(a) to (i) of the Financial Markets Bill & clause 82(3)(a) to (i) of the Financial Markets Bill 2012.
\textsuperscript{220} S 76 read with s 75 of the Securities Services Act; also see clause 85 read with clauses 84 & 87 of the Financial Markets Bill & clause 83 read with clause 82 of the Financial Markets Bill 2012.
\textsuperscript{221} S 75(3) read with subsection (4).
\textsuperscript{222} Clause 84(3) read with subsection (4) of the Financial Markets Bill & clauses 82(3) of the Financial Markets Bill 2012.
\textsuperscript{223} See paragraph 8 2 7 1 in Chapter Eight of this thesis.
\textsuperscript{224} S 75 & s 76 of the Securities Services Act.
\textsuperscript{225} Clauses 84; 85 read with clause 87 of the Financial Markets Bill & also see clauses 82 & 83 of the Financial Markets Bill 2012.
\textsuperscript{226} See paragraph 8 2 7 3 in Chapter Eight of this thesis.
\textsuperscript{227} S 75 of the Securities Services Act.
Markets Bill and the Financial Markets Bill 2012\textsuperscript{228} also discourage trade-based market manipulation.\textsuperscript{229} Notably, the prohibition on trade-based market manipulation contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 is relatively similar to that of the Corporations Act.\textsuperscript{230} Moreover, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 prohibit directly or indirectly, the making or publication of false, misleading or deceptive statements, promises or forecasts in respect of the listed securities that relate to the past or future performance of a public company.\textsuperscript{231} However, there is no similar provision in the Corporations Act.\textsuperscript{232} In this respect, the South African market abuse prohibition on disclosure-based market manipulation is commendably broader\textsuperscript{233} than that of the Corporations Act. In addition, unlike the similar prohibition provided in the Corporations Act,\textsuperscript{234} the prohibition on the disclosure-based market manipulation contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 does not require the inducement of other persons to buy or sell any affected listed securities before any liability is imposed on the offenders.\textsuperscript{235} Additionally, the concealment or omission of a material fact which gives rise to or which may give rise to the making or publication of a statement, promise or forecast that is false or deceptive is prohibited under the Securities Services Act,\textsuperscript{236} the Financial Markets Bill and

\begin{itemize}
  \item \textsuperscript{228} Clause 84 of the Financial Markets Bill & clause 82 of the Financial Markets Bill 2012.
  \item \textsuperscript{229} S 75(1)(a) & (b) of the Securities Services Act; clause 84(1)(a) & (b) of the Financial Markets Bill & clause 82(1)(a) & (b) of the Financial Markets Bill 2012; s 75(3)(b) of the Securities Services Act; clause 84(3)(b) of the Financial Markets Bill & clause 82(3)(b) of the Financial Markets Bill 2012; s 75(3)(c) of the Securities Services Act; clause 84(3)(c) of the Financial Markets Bill & clause 82(3)(c) of the Financial Markets Bill 2012; s 75(3)(d) of the Securities Services Act; clause 84(3)(d) of the Financial Markets Bill & clause 82(3)(d) of the Financial Markets Bill 2012; s 75(3)(e) of the Securities Services Act; clause 84(3)(e) of the Financial Markets Bill & clause 82(3)(e) of the Financial Markets Bill 2012; s 75(3)(f) of the Securities Services Act; clause 84(3)(f) of the Financial Markets Bill & clause 82(3)(f) of the Financial Markets Bill 2012; s 75(3)(g) of the Securities Services Act; clause 84(3)(g) of the Financial Markets Bill & clause 82(3)(g) of the Financial Markets Bill 2012; s 75(3)(h) of the Securities Services Act; clause 84(3)(h) of the Financial Markets Bill & clause 82(3)(h) of the Financial Markets Bill 2012; s 75(3)(a) of the Securities Services Act; clause 84(3)(a) of the Financial Markets Bill; clause 82(3)(a) of the Financial Markets Bill 2012 & also see Cassim 2008 \textit{SA Merc LJ} 42-51; 52-60 & paragraph 251 in Chapter Two of this thesis.
  \item \textsuperscript{230} See paragraph 8 2 7 3 in Chapter Eight of this thesis.
  \item \textsuperscript{231} S 76(1) & (2) of the Securities Services Act; clause 85(1) & (2) of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & also see paragraph 2 5 3 in Chapter Two of this thesis.
  \item \textsuperscript{232} S 1041E of the Corporations Act; also see paragraph 8 2 7 3 in Chapter Eight of this thesis.
  \item \textsuperscript{233} See generally s 1041E read with s 1041F of the Corporations Act & also see paragraph 8 2 7 3 in Chapter Eight of this thesis.
  \item \textsuperscript{234} S 76 of the Securities Services Act; clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & see Cassim 2008 \textit{SA Merc LJ} 178.
  \item \textsuperscript{235} S 76 of the Securities Services Act; clause 85 of the Financial Markets Bill; clause 83 of the Financial Markets Bill 2012 & also see Cassim 2008 \textit{SA Merc LJ} 179-180.
  \item \textsuperscript{236} S 76(1)(b).
\end{itemize}
the Financial Markets Bill 2012. The use of the term “material fact” in this prohibition could suggest that an objective test is employed to determine whether the concealed or omitted fact could reasonably give rise to disclosure-based market manipulation in South Africa. On the other hand, the Corporations Act, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s disclosure-based market manipulation ban may only give rise to liability on the part of the accused person, where such person knew or ought reasonably to have known that the statements he made or published were false or misleading. This could further suggest that a purely objective approach is adopted in the enforcement of the disclosure-based market manipulation ban in Australia and South Africa. Moreover, in contrast to the position in Australia, there is no specific provision in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 which expressly prohibits, directly or indirectly, the dissemination of information about illegal transactions and dishonest conduct in relation to listed securities. In addition, market (price) stabilisation mechanisms are allowed in Australia when certain prescribed requirements are met while such mechanisms are generally treated as a defence against some market manipulation offences in South Africa. Nonetheless, in contrast to the situation in Australia, there are relatively few defences apart from the price-stabilisation

238 S 76(1) of the Securities Services Act; clause 85(1) of the Financial Markets Bill & see further clause 83(1) of the Financial Markets Bill 2012.
240 S 76(1)(a) read with (b) of the Securities Services Act; Cassim 2008 SA Merc LJ 181-182.
241 Clause 85(1)(a) read with (b) of the Financial Markets Bill & clauses 83(1) of the Financial Markets Bill 2012.
243 S 1041D & s 1041G of the Corporations Act; also see paragraph 8 2 7 3 in Chapter Eight of this thesis.
244 S 75 & s 76 of the Securities Services Act; clauses 84 & 85 of the Financial Markets Bill & clauses 82 & 83 of the Financial Markets Bill 2012.
245 Cassim 2008 SA Merc LJ 184-185.
246 S 75(3)(i) of the Securities Services Act; clause 84(3)(i) of the Financial Markets Bill; clause 82(3)(i) of the Financial Markets Bill 2012 & also see Cassim 2008 SA Merc LJ 184-185; Chapter Five of the Johannesburg Stock Exchange Limited (the JSE) Listing Requirements which outlines some obligations or requirements that must be complied with by the issuers of securities before engaging in price-stabilisation in South Africa. See further Rule 5.99 of the JSE Listing Requirements which stipulates the various circumstances and conditions under which the price-stabilisation measures will be permitted by the JSE and the Securities Services Act.
247 S 1317S of the Corporations Act; also see Cassim 2008 SA Merc LJ 184-185 & 189.
defence that are available to any person accused of committing market manipulation offences in South Africa.248

Lastly, in the United States of America, the prohibition on market manipulation was introduced by the so-called New Deal legislation that was enacted after a heavy crash occurred in its stock markets in 1929.249 Moreover, the Securities Services Act, like its United States of America counterpart, the Securities Exchange Act,250 prohibits any person from knowingly engaging or participating in trade-based market manipulation practices that interfere with the normal market mechanisms of supply and demand for securities.251 A similar provision is stipulated in the Financial Markets Bill.252 However, unlike the Securities Services Act,253 the Financial Markets Bill does not directly employ the term “knowingly” in its trade-based market manipulation provision and this could imply that no proof of intention is mandatorily required before any liability can be imposed upon the offenders.254 Furthermore, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s disclosure-based market manipulation provisions,255 unlike similar provisions in the United States of America,256 no longer require the motive or intention for making a false or misleading statement in order to impose liability on the offenders.257 Nonetheless, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly prohibit a person who inadvertently aided or abetted another person to make or publish a false, misleading or deceptive statement, promise or forecast that relate to any security.258 For instance, where a printing company inadvertently aided or

249 See paragraph 5 3 4 in Chapter Five of this thesis.
250 1934; Public Law 73-291, 48 Stat 881 15 USC 78a-78ll as amended (hereinafter referred to as the Securities Exchange Act); also see paragraph 5 3 4 in Chapter Five of this thesis.
251 S 75(1). Moreover, the provisions of s 75(3) goes a bit wider than s 10(b) of the Securities Exchange Act by deeming a number of trading practices to be regarded as manipulative in South Africa. Also see Cassim 2008 SA Merc LJ 52-60.
252 Clause 84(1) read with (3), which enumerates other practices that can be deemed as trade-based market manipulation in South Africa & also see clause 82(1) read with (3) of the Financial Markets Bill 2012.
253 S 75(1).
254 Clause 84(1) of the Financial Markets Bill; the term “knowingly” was however, re-introduced in clause 82(1) of the Financial Markets Bill 2012.
abetted a market abuse offender by ignorantly printing and/or publishing his misleading or deceptive materials pertaining to listed securities, to the detriment of other uninformed investors. In other words, it was held in *Central Bank of Denver NA v First Interstate Bank of Denver NA*\(^{259}\) that the words “directly or indirectly” do not apply to secondary actors who are not directly involved in market manipulation practices like aiders and abettors. Therefore, if we are to follow the approach employed in this case, the words “directly or indirectly” as stated in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s disclosure-based market manipulation provisions could be interpreted to exclude aiders and abettors.\(^{260}\) Furthermore, it is uncertain whether the Financial Services Board prohibits Internet-based market manipulation activities. Unlike the United States Securities and Exchange Commission, the Financial Services Board does not have a specific unit that prohibits Internet-based market abuse activities.\(^{261}\) Additionally, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have provisions that specifically prohibit commodity-based market manipulation in South Africa.\(^{262}\) Apparently, commodity-based market manipulation practices are prohibited and enforced by both the JSE and the Financial Services Board. Nonetheless, in contrast with the Commodity Futures Trading Commission,\(^{263}\) it remains to be seen whether the JSE and the Financial Services Board will consistently increase the prohibition and surveillance of commodity-based market manipulation practices in South Africa.\(^ {264}\)

### 9.3.1 Evaluation and Analysis of the Available Penalties and Remedies for Market Manipulation

As is the position in the United States of America,\(^ {265}\) the Securities Services Act also imposes criminal and administrative penalties and remedies against any person who indulges in trade-based market manipulation and disclosure-based market manipulation practices in South

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\(^{261}\) On the other hand, the United States Securities and Exchange Commission (the SEC) introduced the Office of Internet Enforcement to combat Internet-based market abuse practices. See further Cassim 2008 *SA Merc LJ* 182-183.

\(^{262}\) S 75 & s 76 of the Securities Services Act; clauses 84; 85 & 87 of the Financial Markets Bill & clauses 82 & 83 of the Financial Markets Bill 2012.

\(^{263}\) See paragraph 5.3.4.1 in Chapter Five of this thesis.


\(^{265}\) Paragraph 5.3.5 in Chapter of this thesis.
Africa. For instance, persons who engage in such market manipulation practices will be liable for a fine not exceeding R50 million, or imprisonment for a period not more than ten years, or both such fine and imprisonment. The same criminal penalties are also contained in the Financial Markets Bill and the Financial Markets Bill 2012. Unlike the position in the United States of America, relatively few investigations and criminal prosecutions involving market manipulation cases have been obtained in the relevant courts in South Africa to date. As previously indicated, this could be aggravated by the fact that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not impose sufficient, separate and distinct criminal penalties against the natural and juristic persons that commit market manipulation offences to increase deterrence. Moreover, the Securities Services Act does not expressly provide civil penalties and remedies for market manipulation offences. This omission on the part of the legislature could potentially weaken South Africa’s market abuse regime compared to similar foreign legislation in countries like the United States of America. Be that as it may, this flaw could be addressed by the Financial Markets Bill as it now empowers the Financial Services Board to claim from the market manipulation offenders, legal costs and civil compensatory penalties of up to three times the profit gained or loss avoided plus interest. In contrast to the position in the United States

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266 S 75 & s 76. Also see Cassim 2008 SA Merc LJ 193-195; paragraph 9 2 1 above & paragraph 4 4 5 in Chapter Four of this thesis.
267 S 115(a) of the Securities Services Act; also see paragraph 4 4 5 in Chapter Four of this thesis; Cassim 2008 SA Merc LJ 191-195.
268 Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
269 For example, during the period between January 1999 and June 2011 only about 14 market manipulation cases were investigated and successfully completed by the Directorate of Market Abuse, see the Financial Services Board (28-06-2011) <http://www.fsb.co.za/ftp://ftp.fsb.co.za/public/documents/AReport2011.pdf> (accessed 22-11-2011); the Financial Services Board “List of Current Investigations of the Directorate of Market Abuse” Media Release (28-06-2011) <http://www.fsb.co.za/ftp://ftp.fsb.co.za/public/documents/AReport2011.pdf> (accessed 22-11-2011), indicates that during the period between March 2007 and April 2010 only four cases involving disclosure-based market manipulation and twelve cases of trade-based market manipulation were investigated and such investigations were still ongoing.
270 Refer to paragraph 4 4 5 in Chapter Four of this thesis.
271 Also see related remarks in paragraph 9 2 1 above.
272 S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
273 S 75 & 76; also see Cassim 2008 SA Merc LJ 192. This suggests that persons who fall victim to market manipulation practices are left to find their own civil remedies. Also see Cassim 2008 SA Merc LJ 36.
274 Notably, there is no specific statutory civil remedy provision for market manipulation violations as outlawed under s 75 & s 76 of the Securities Services Act.
275 Nonetheless, there is no statutory private right of action for the prejudiced persons to claim their damages straight from offenders on their own, see clause 87 of the Financial Markets Bill & no similar provision is made in the Financial Markets Bill 2012.
of America,\textsuperscript{276} little or no consideration was given to the introduction of specific civil remedies and/or penalties for commodities-based market manipulation practices in South Africa.\textsuperscript{277} Although it appears that the enforcement of commodities-based market manipulation cases vests with both the Financial Services Board and the JSE, not many settlements involving such cases have been obtained in the South African courts to date.\textsuperscript{278} It is not clear whether the Financial Services Board and the JSE have the statutory authority to impose their own civil remedies and/or penalties and appropriate rules to prevent commodity-based market manipulation. In other words, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 fall short when it comes to the statutory provision and policing of commodities-based market manipulation remedies in South Africa.\textsuperscript{279} On the other hand, the Enforcement Committee may impose unlimited administrative penalties on market manipulation offenders in South Africa. However, the Securities Services Act does not empower the Enforcement Committee to provide civil monetary administrative penalties to compensate persons who fall victim to market manipulation.\textsuperscript{280} As stated before,\textsuperscript{281} this problem may be solved by the Financial Markets Bill as it now extends civil penalties to market manipulation offences.\textsuperscript{282} Despite this, the Enforcement Committee does not have more discretionary powers with regard to the enforcement of administrative penalties for market abuse.\textsuperscript{283} Nonetheless, neither the Protection of Funds Act nor the Securities Services Act have a statutory provision that expressly empowers the Enforcement Committee to make or enact its own rules to discourage

\textsuperscript{276} Paragraph 5 3 5 in Chapter Five of this thesis.
\textsuperscript{277} S 75; s 76 & s 115(a) of the Securities Services Act; see further clauses 84; 85; 87 & 115(a) of the Financial Markets Bill & clauses 82; 83 & 111(a) of the Financial Markets Bill 2012.
\textsuperscript{278} See generally the Financial Services Board Annual Report 2011 4 99-102.
\textsuperscript{279} S 75 & s 76 of the Securities Services Act & clauses 84; 85 & 87 of the Financial Markets Bill & clauses 82 & 83 of the Financial Markets Bill 2012. It is submitted that the JSE and the Financial Services Board should be statutorily empowered to have more discretionary powers to combat and discourage commodities-based market manipulation activities in South Africa.
\textsuperscript{280} Such compensatory money is only available in matters involving insider trading, see s 77 read with s 75; s 76; s 101; s 104 & s 105. This may indicate that the Enforcement Committee, unlike the United States Securities and Exchange Commission and the Commodity Futures Trading Commission, does not have express statutory authority to make its own appropriate additional administrative penalties for market manipulation. See paragraph 4 4 5 in Chapter Four of this thesis.
\textsuperscript{281} See paragraph 9 3 read with paragraph 9 2 1above.
\textsuperscript{282} Clause 87 read with clause 105 of the Financial Markets Bill & no similar provision for market manipulation civil penalties is made in the Financial Markets Bill 2012.
\textsuperscript{283} Unlike the position in the United States of America, the Enforcement Committee does not have discretionary powers to impose administrative penalties on the persons who attempt to commit market manipulation offences in South Africa. See paragraph 4 4 5 in Chapter Four of this thesis; Cassim 2008 SA Merc LJ 195.
market manipulation practices.\textsuperscript{284} This problem is still not addressed in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{285} As a result, the Enforcement Committee is currently able to bring only a few administrative actions such as compensatory orders, cost orders, punitive damages orders and disciplinary orders against the market manipulation offenders.\textsuperscript{286} Furthermore, there is no express statutory provision for a private right of action for market manipulation victims in South Africa.\textsuperscript{287}

On the other hand, in the European Union,\textsuperscript{288} unlike the Securities Services Act,\textsuperscript{289} the Financial Markets Bill and the Financial Markets Bill 2012,\textsuperscript{290} and as similarly indicated,\textsuperscript{291} the EU Market Abuse Directive does not specifically provide the amount of remedies or penalties which may be imposed against the market manipulation offenders.\textsuperscript{292} Such penalties and/or remedies are determined by the European Union member states.\textsuperscript{293} This shortcoming is retained in the Criminal Sanctions Market Abuse Directive Proposal\textsuperscript{294} while, on the other

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{284} S 101; s 104; read with s 75; s 76; s 102 & s 105 of the Securities Services Act & s 6A to s 6I of the Protection of Funds Act. Also see paragraph 3 2 3 in Chapter Three of this thesis.
\item \textsuperscript{285} Clause 105 read with clauses 84; 85 & 87 of the Financial Markets Bill & clause 101 read with clauses 82 & 83 of the Financial Markets Bill 2012.
\item \textsuperscript{286} The Financial Services Board “Enforcement Committee Actions” Media Release (28-06-2011) <http://www.fsb.co.za/ftp://ftp.fsb.co.za/public/documents/AReport2011.pdf> (accessed 22-11-2011), which shows that the Enforcement Committee successfully obtained administrative penalties in only about sixteen cases of market manipulation during the period between December 2006 and July 2011; also see the Financial Services Board Annual Report 2011 101-102 & Van Deventer “Harnassing Administrative Law in Encouraging Compliance” 2009 FSB Bulletin 3 4. One can argue that the Enforcement Committee like the United States Securities and Exchange Commission, must have express statutory authority to make additional administrative rules and to take any other action which it reasonably believe will improve the enforcement of the market abuse administrative remedies in South Africa.
\item \textsuperscript{287} S 75 & s 76 of the Securities Services Act; clauses 84; 85 & 87 of the Financial Markets Bill & clauses 82 & 83 of the Financial Markets Bill 2012. Moreover, the Consumer Protection Act also does not expressly provide for any private of action for the persons affected by market manipulation. See generally s 115 & s 116 read with Part C of the Consumer Protection Act. It is accordingly submitted that a private right of action provision should be enacted to give equal opportunity to all the affected persons to claim their own damages straight from the perpetrators of market abuse practices in South Africa, see related remarks in paragraph 9 2 1 above.
\item \textsuperscript{288} See the related discussion in Chapter Six of this thesis.
\item \textsuperscript{289} S 115(a); also paragraphs 2 5 4 & 4 4 5 in Chapters Two & Four of this thesis.
\item \textsuperscript{290} Clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & also see further paragraphs 2 5 4 & 4 4 5 in Chapters Two & Four of this thesis.
\item \textsuperscript{291} See related remarks in paragraph 9 2 1 above.
\item \textsuperscript{292} Article 14 of the EU Market Abuse Directive. Nevertheless, regulatory bodies in the EU member states are allowed to determine and disclose the sanctions imposed on the market abuse offenders, see article 14(4) of the EU Market Abuse Directive.
\item \textsuperscript{293} Article 14(1); (3) & (4) of the EU Market Abuse Directive.
\item \textsuperscript{294} Articles 6 & 8; also see paragraph 6 4 5 in Chapter Six of this thesis.
\end{itemize}
\end{footnotesize}
hand, the Market Abuse Regulation Proposal now provides specific civil or administrative pecuniary sanctions for market abuse.295 

Moreover, like the United Kingdom,296 South Africa uses civil, criminal297 and administrative penalties to combat market manipulation practices.298 With regard to criminal penalties, South Africa rigidly imposes a maximum fine of R50 million, or imprisonment for a period not exceeding ten years, or both such fine and imprisonment against the offenders.299 Moreover, as argued before,300 this flaw and obscurity is still embedded in both the Financial Markets Bill and the Financial Markets Bill 2012.301 In contrast to this, unlimited monetary and other penalties may be imposed on the offenders by the Financial Services Authority in the United Kingdom.302

As earlier discussed,303 several factors are considered in order to determine appropriate civil monetary fines that will be imposed on the market abuse offenders in the United Kingdom. Likewise, almost similar factors are used to determine appropriate civil compensatory or punitive fines and administrative penalties in South Africa.304 Moreover, like the United Kingdom,305 and as already indicated above, South Africa imposes a variety of unlimited administrative penalties on persons who commit market abuse offences.306 Nevertheless, unlike the Financial Services Authority,307 the Financial Services Board is not statutorily empowered to impose certain administrative penalties like public censure or making public (name and shame method) statements against any persons who violated the market abuse

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295   Article 26(1)(k); (l) & (m) of the Market Abuse Regulation Proposal; also see paragraph 6 4 5 in Chapter Six of this thesis.
296    See Chapter Seven of this thesis.
297   S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
298    See paragraph 4 4 5 in Chapter Four of this thesis; also see related remarks in paragraph 9 2 1 above.
299   S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & see further related remarks in paragraph 9 2 1 above.
300    See paragraph 4 4 5 in Chapter Four of this thesis; also see related remarks in paragraph 9 2 1 above.
301   Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
302   S 123(1) of the Financial Services and Markets Act; also see Avgouleas The Mechanics and Regulation of Market Abuse 375.
303    See paragraph 7 4 in Chapter Seven of this thesis.
304   S 77 & s 104(9) of the Securities Services Act; clause 87 read with clauses 86 & 89 of the Financial Markets Bill; clause 84 of the Financial Markets Bill 2012 & see further Cassim 2008 SA Merc LJ 195.
305    See paragraph 7 4 in Chapter Seven of this thesis.
306   S 101 & 102 read with s 104 of the Securities Services Act; clause 105 of the Financial Markets Bill; clause 101 of the Financial Markets Bill 2012; s 6A to s 6l of the Protection of Funds Act & also see Cassim 2008 SA Merc LJ 195.
307   S 123(3) & s 124 of the Financial Services and Markets Act. Also see ENF 14.4.1.G.
This flaw could be corrected by the Financial Markets Bill and/or the Financial Markets Bill 2012 which now allows the Financial Services Board to publish by notice on its official website or by means of other appropriate public media, any outcome, status or details of market abuse investigations (public censure) if such publication is in the public interest.

Furthermore, as is the position under the Corporations Act in Australia, and as stated above, the Securities Services Act also provides criminal sanctions for market manipulation offences. Nonetheless, in contrast to the position in Australia, and as already stated above, the Securities Services Act’s criminal penalties for market manipulation might be less deterrent, particularly with regard to companies which may easily afford to pay the R50 million fine and then continue to commit other market manipulation offences in future. In this regard, it is hoped that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 will be reviewed in line with the Australian position to introduce sufficient and more dissuasive maximum criminal penalties for individuals and juristic persons, with much higher maximum penalties being imposed on such juristic persons. Like its Australian counterpart, the Director of Public Prosecutions in South Africa has the main prerogative to institute criminal proceedings against the perpetrators of market manipulation offences. Furthermore, in South Africa, the Director of Public Prosecutions may institute such proceedings only after referrals from the Financial Services Board. Nevertheless, unlike the situation in Australia, the Securities Services Act, the Financial

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308 S 82 of the Securities Services Act.
309 Clause 91(2)(e) of the Financial Markets Bill; clause 86(2)(e) of the Financial Markets Bill 2012 & also related remarks in paragraph 321 in Chapter Three of this thesis.
310 See paragraph 8274 in Chapter Eight of this thesis.
311 See s 115(a) read with s 75 & s 76 of the Securities Services Act, which directly outlaws any conduct which constitutes market manipulation offences or which may constitute such offences in South Africa. Also see similar comments in paragraphs 921 above; 254 in Chapter Two of this thesis & Cassim 2008 SA Merc LJ 193-195.
312 See paragraph 8274 in Chapter Eight of this thesis.
313 S 115(a) of the Securities Services Act.
314 See paragraph 254 in Chapter Two of this thesis; also see related discussions in paragraphs 445 in Chapter Four of this thesis & also see paragraph 921 above & Cassim 2008 SA Merc LJ 194.
315 See paragraph 8274 in Chapter Eight of this thesis.
316 See related remarks on the powers of the Commonwealth DPP in paragraph 8274 in Chapter Eight of this thesis.
317 See paragraph 326 in Chapter Three of this thesis.
318 Generally see s 82(9) of the Securities Services Act; clause 91(9) of the Financial Markets Bill & clause 86(10) of the Financial Markets Bill 2012.
319 See similar comments in paragraph 8274 in Chapter Eight of this thesis.
Markets Bill and the Financial Markets Bill 2012 do not specifically provide whether the Financial Services Board may, in addition to civil proceedings, bring its own criminal proceedings against the market manipulation offenders without initially referring such proceedings to the relevant courts in South Africa.\(^{320}\) Moreover, the enforcement of the criminal sanctions for market manipulation and/or other related offences has, to some extent, been impeded by the everlasting difficulties relating to the high evidentiary burden of proof required in the prosecution of such offences in both South Africa\(^{321}\) and Australia.\(^{322}\) In addition, the implementation of the criminal sanctions for market manipulation has so far been relatively more successful in Australia\(^{323}\) than in South Africa.\(^{324}\) This could be evidenced, in part, by a considerable number of cases that have so far been obtained by the courts in Australia.\(^{325}\) On the other hand, there are relatively few cases involving market manipulation offences that have been successfully investigated and prosecuted in South Africa to date.\(^{326}\)

As stated above, the Securities Services Act’s market manipulation provisions do not give rise to civil liability on the part of the offenders in spite of the fact that they are fairly comparable and commendable internationally, especially with regard to the nature and scope of their application.\(^{327}\) Consequently, it is hoped that South Africa will follow the example of

\(^{320}\) Apparently, such proceedings may only be instituted by the Financial Services Board if the Director of Public Prosecutions rejects to prosecute the market manipulation cases in question. S 82(9) of the Securities Services Act; clause 91(9) of the Financial Markets Bill & clause 86(10) of the Financial Markets Bill 2012.

\(^{321}\) See paragraph 2 5 4 in Chapter Two of this thesis; also see related discussions in paragraphs 4 4 5; 5 3 5 1 & 6 4 1 in Chapters Four; Five & Six of this thesis respectively.


\(^{323}\) See generally paragraph 8 2 7 4 1 in Chapter Eight of this thesis.

\(^{324}\) See related analysis in paragraph 9 2 1 above & paragraphs 2 5 4 & 4 4 5 in Chapters Two & Four of this thesis respectively.


\(^{326}\) See related analysis in paragraph 9 2 1 above & paragraphs 2 5 4 & 4 4 5 in Chapters Two & Four of this thesis respectively.

\(^{327}\) S 75 & s 76 read with s 115(a) of the Securities Services Act; also see generally Cassim 2008 SA Merc LJ 33-36; paragraphs 2 5 1 & 2 5 3 in Chapter Two of this thesis. Also see further comparative discussions in Chapters Five; Six & Seven of this thesis which deals with the enforcement of market abuse provisions in the United States of America (US), United Kingdom (UK) and European Union (EU) respectively.
Australia\footnote{See paragraph 8.2.7.4.2 in Chapter Eight of this thesis.} and/or other jurisdictions on derivative civil penalties for market manipulation, in order to promptly enact the relevant provisions of the Financial Markets Bill which provides for such civil penalties.\footnote{Clause 87 of the Financial Markets Bill; no similar provision is made in the Financial Markets Bill 2012; also see related remarks in paragraph 9.2.1above & in Chapters Five & Six of this thesis.} As already stated above, it appears that the affected persons are denied the prospect of recovering their losses through their own private civil litigation proceedings for market manipulation, under the Securities Services Act,\footnote{S 75 & s 76 of the Securities Services Act; also see generally paragraphs 2.5.1 & 2.5.3 in Chapter Two of this thesis; Cassim 2008 \textit{SA Merc LJ} 191-193. The researcher submits that the Securities Services Act should have considered the Australian’s Corporations Act approach, of not only relying on criminal penalties for market manipulation. See further Cassim 2008 \textit{SA Merc LJ} 191-195; 198-199.} the Financial Markets Bill and the Financial Markets Bill 2012.\footnote{Clause 87 of the Financial Markets Bill & no similar provision is made in the Financial Markets Bill 2012.} Therefore, it is hoped that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 will be reviewed in line with the position in Australia\footnote{See paragraph 8.2.7.4.3 in Chapter Eight of this thesis.} to provide a private right of action for the persons affected to claim their own civil remedies directly from the offenders. Moreover, in contrast to the Australian position,\footnote{S 1041I of the Corporations Act; also see paragraph 8.2.7.4.3 in Chapter Eight of this thesis.} the civil remedies and civil penalties for market manipulation are not expressly and statutorily treated differently in South Africa. Additionally, as stated above, the Securities Services Act also does not have specific civil remedies for market manipulation.\footnote{S 75 & s 77read with s 115(a) of the Securities Services Act.} This implies that the Securities Services Act treats and interprets market manipulation simply as a wrong against the financial markets rather than a direct wrong against all the affected persons.\footnote{Henning & Du Toit 2000 \textit{The Company Lawyer} 29-36.} This may further suggest that its market manipulation prohibition is directed only at the public good and not necessarily at the individual or affected person’s protection.\footnote{Luiz “Market Abuse II–Prohibited Trading Practices and Enforcement” 2002 \textit{Juta’s Business Law} 180-183; Henning & Du Toit “High–Pressure Selling of Securities: From Rigging the Market to False Trading, Market Manipulation and Insider Dealing” 2000 \textit{The Company Lawyer} 29 29-36; Cassim 2008 \textit{SA Merc LJ} 192.} It is, however, argued that such affected persons are not statutorily precluded from seeking their own additional civil remedies, apart from private rights of action, directly from the market manipulation offenders.\footnote{Cassim 2008 \textit{SA Merc LJ} 192 & 195; also see paragraph 2.5.4 in Chapter Two of this thesis.} Additionally, unlike the Australian experience,\footnote{See paragraph 8.2.7.4.3 in Chapter Eight of this thesis.} no provision was made in the Securities Services Act for the competent courts and/or the Financial Services Board to make a declaration of contravention...
of the market manipulation provisions. As result, the preventive and deterrent effect attached to such a declaration of contravention by the courts in Australia is obviously absent in respect of the relevant courts in South Africa. Moreover, in contrast to the position in Australia, and as already stated above, the Enforcement Committee may only seek an administrative compensatory monetary remedy payable to the Financial Services Board for later reimbursement to the affected persons, only with regard to insider trading violations. No similar provision is made in the Financial Markets Bill, but it is rather indicated that the Financial Services Board can now recover civil damages in market manipulation cases on behalf of the affected persons.

9.4 Evaluation and Analysis of the Role of Regulators and Other Role Players

The Financial Services Board has almost similar functions as those of the United States Securities and Exchange Commission. In other words, the Financial Services Board, like the United States Securities and Exchange Commission, bears the main responsibility to oversee and enforce the securities and market abuse laws in South Africa. It is not very clear whether the Financial Services Board is also statutorily responsible for enforcing the prohibition on commodities-based market manipulation in South Africa. Moreover, there is no specific regulatory body like the Commodity Futures Trading Commission which is statutorily authorised to deal effectively and exclusively with the commodities-based market manipulation violations in South Africa. Strikingly, this flaw has still not been corrected by the Financial Markets Bill and the Financial Markets Bill 2012. Like the United States Securities and Exchange Commission, the Financial Services Board also has quasi-

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339 S 75 & s 76 of the Securities Services Act.
340 See paragraph 8.2.7.4.3 in Chapter Eight of this thesis.
341 S 105 read with s 101(2) of the Securities Services Act; also see similar remarks in paragraph 2.5.4 in Chapter Two of this thesis; also see Cassim 2008 SA Merc LJ 195.
342 See clause 87 read with clause 105 of the Financial Markets Bill; no provision for civil penalties is made under the Financial Markets Bill 2012.
343 See paragraph 3.2.1 in Chapter Three of this thesis.
344 See paragraph 5.4.1 in Chapter Five of this thesis.
345 See paragraphs 5.3.4.1 & 5.4.1 in Chapter Five of this thesis.
346 See s 73; s 75; s 76 & s 77 of the Securities Services Act. In relation to this, it is submitted that either the FSB or the JSE should be statutorily empowered to exclusively deal with the enforcement and prohibition of commodities-based market abuse practices in the relevant South African financial markets.
347 Clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
348 See paragraph 5.4.1 in Chapter Five of this thesis.
legislative (rulemaking) authority. The Financial Services Board may, for instance, make market abuse rules after consulting with the Directorate of Market Abuse. In addition, the Financial Services Board exercises administrative and supervisory authority over the Directorate of Market Abuse, the Enforcement Committee and other relevant securities market participants. In spite of these positive developments, most of the market abuse rules that could be made by the Financial Services Board are only limited to the general manner in which its administrative powers and roles should be conducted. To ensure more compliance and to enhance the enforcement of the market abuse ban, the Financial Services Board delegates some of its roles to the Directorate of Market Abuse, the JSE and the Enforcement Committee. The Directorate of Market Abuse deals primarily with the market abuse investigations, the JSE offers surveillance support for the detection of market abuse activity and the Enforcement Committee oversees the enforcement of the administrative sanctions. Nevertheless, the Financial Services Board does not have its own surveillance systems or other mechanisms like the United States Securities and Exchange Commission’s Electronic Data Gathering Analysis and Retrieval system to detect and prevent market abuse activity in the South African financial markets. In contrast with the United States Securities and Exchange Commission, the Financial Services Board is still to employ other additional relevant measures to discourage and curb cross-border market abuse activities. Additionally, unlike the United States Securities and Exchange Commission, the Financial Services Board has not been able to investigate and/or successfully obtain timeous enforcement settlements consistently in market abuse cases as evidenced in figure 1 and table 1 below.

351 Unlike the SEC, the FSB does not have express or actual authority to make (quasi-judicial powers) additional binding rules that it reasonably believe are necessary for the effective enforcement of the market abuse prohibition in South Africa. S 82(2)(g) of the Securities Services Act; clause 91(2)(f) of the Financial Markets Bill; clause 86(2)(f) of the Financial Markets Bill 2012 & see further paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
352 See paragraphs 3 2 2; 3 2 3 & 3 2 5 in Chapter Three of this thesis.
353 See paragraph 5 4 1 in Chapter Five of this thesis.
354 In relation to this, the FSB should consider following the SEC approach of devoting more competent persons to deal specifically with the enforcement of the market abuse prohibition in South Africa.
355 See paragraph 5 4 1 in Chapter Five of this thesis.
356 See paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
357 See paragraph 5 4 1 in Chapter Five of this thesis.
Figure 1: The Financial Services Board’s anti-market abuse enforcement statistics from 1999 to 2010.

Adapted from the Financial Services Board’s 2011 Annual Report.\textsuperscript{358}

Table 1: The Financial Services Board’s annual anti-market abuse enforcement statistics of new cases from 1999 to 2010.

<table>
<thead>
<tr>
<th></th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brought forward</td>
<td>-</td>
<td>37</td>
<td>26</td>
<td>32</td>
<td>17</td>
<td>12</td>
<td>12</td>
<td>22</td>
<td>14</td>
<td>15</td>
<td>13</td>
<td>22</td>
<td>222</td>
</tr>
<tr>
<td>New cases</td>
<td>66</td>
<td>35</td>
<td>25</td>
<td>21</td>
<td>19</td>
<td>8</td>
<td>11</td>
<td>20</td>
<td>16</td>
<td>19</td>
<td>21</td>
<td>23</td>
<td>284</td>
</tr>
<tr>
<td>Carried forward</td>
<td>37</td>
<td>26</td>
<td>32</td>
<td>17</td>
<td>12</td>
<td>12</td>
<td>22</td>
<td>14</td>
<td>15</td>
<td>13</td>
<td>22</td>
<td>25</td>
<td>247</td>
</tr>
</tbody>
</table>

Adapted from the Financial Services Board’s 2011 Annual Report.\textsuperscript{359}

Furthermore, as is the situation in the European Union where the initial market abuse regulatory authority was vested in the Forum of European Securities Commissions,\textsuperscript{360} such

\textsuperscript{358} See the Financial Services Board Annual Report 2011 4 99-101. Notably, figure 1 indicates a sharp and inconsistent decline in new cases of market abuse that were successfully investigated each year, from 1999 to 2010.

\textsuperscript{359} See the Financial Services Board Annual Report 2011 99-101. Table 1 indicates that very few cases were successfully investigated while many cases were either brought forward or carried forward each year, from 1999 to 2010.

\textsuperscript{360} See paragraph 6 4 1 in Chapter Six of this thesis.
regulatory functions were a joint responsibility of the Registrar of Companies, the Department of Justice and the Securities Regulation Panel prior to 1998 in South Africa. Moreover, like the Committee of European Securities Commissions Regulators, the Financial Services Board replaced all the previous regulatory authorities and it bears the main responsibility to oversee the enforcement of the market abuse provisions in South Africa. Additionally, as is the position under the European Union, the Financial Services Board has its own established committees, namely the Directorate of Market Abuse which is an investigatory arm of the Financial Services Board and the Enforcement Committee which polices the enforcement of the market abuse administrative sanctions on a referral basis. The Financial Services Board has to date fairly managed to perform its duties in relation to the enforcement of the market abuse provisions, which include, \textit{inter alia}, investigating market abuse violations; making market abuse rules; interrogating any persons accused of violating the market abuse provisions; and instituting civil and other appropriate proceedings against any persons who commit market abuse offences. However, unlike the Committee of the Wise Men’s committees, namely the Committee of European Securities Commissions Regulators and the European Securities and Markets Authority (including the repealed European Securities Committee), the Financial Services Board (including its committees, the Directorate of Market Abuse and the Enforcement Committee) has no authority to oversee the enforcement of securities and market abuse laws by similar regulatory bodies across the African Union member states. This is influenced, in part, by the fact that there is no

\begin{itemize}
\item \text{361} See paragraph 2 3 3 1 in Chapter Two of this thesis.
\item \text{362} See paragraph 6 4 2 in Chapter Six of this thesis.
\item \text{363} See similar remarks in paragraph 3 2 1 in Chapter Three of this thesis.
\item \text{364} See paragraphs 6 4 1; 6 4 2; 6 4 3 & 6 4 4 in Chapter Six of this thesis.
\item \text{365} S 83; s 97 to s 104 of the Securities Services Act; clauses 92 & 105 of the Financial Markets Bill; clauses 87 & 101 of the Financial Markets Bill 2012 & also see paragraphs 3 2 2 & 3 2 3 in Chapter Three of this thesis.
\item \text{366} See further related analysis in paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
\item \text{367} S 82(2)(a) of the Securities Services Act; clause 91(2)(a) & (b) of the Financial Markets Bill & clause 86(2)(a) & (b) of the Financial Markets Bill 2012.
\item \text{368} S 82(2)(g) of the Securities Services Act; clause 91(2)(f) of the Financial Markets Bill & clause 86(2)(f) of the Financial Markets Bill 2012.
\item \text{369} S 82(2)(e) of the Securities Services Act; clause 91(3)(b) of the Financial Markets Bill & clause 86(3)(b) of the Financial Markets Bill 2012.
\item \text{370} S 82(2)(b) & (c) of the Securities Services Act; clause 91(2)(c) & (d) of the Financial Markets Bill & clause 86(2)(c) & (d) of the Financial Markets Bill 2012.
\item \text{371} See paragraphs 6 4 2; 6 4 4 read with 6 4 3 in Chapter Six of this thesis.
\item \text{372} S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012 & also see further related analysis in paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
\end{itemize}
legislation like the EU Market Abuse Directive\textsuperscript{373} which has been specifically enacted to harmonise the enforcement of the securities and market abuse laws in Africa.\textsuperscript{374} Accordingly, the Financial Services Board’s powers are primarily limited to the implementation and enforcement of the market abuse provisions in South Africa.\textsuperscript{375}

Moreover, like the Financial Services Authority in the United Kingdom,\textsuperscript{376} and as already stated above, the Financial Services Board bears the sole responsibility and function to oversee the enforcement of the securities and market abuse provisions in South Africa.\textsuperscript{377} Nonetheless, unlike the position in the United Kingdom, where the Bank of England’s regulatory mandate does not include banks because they are regulated by the Financial Services Authority,\textsuperscript{378} the South African Reserve Bank (not the Financial Services Board) oversees the regulation of banks in South Africa. In this regard, the Financial Services Authority’s regulatory powers are broader than those of the Financial Services Board.\textsuperscript{379} On the other hand, like the Financial Services Authority,\textsuperscript{380} the Financial Services Board administers and enforces the civil market abuse provisions in South Africa.\textsuperscript{381} However, it is not very clear whether the Financial Services Board is also adjudicated by sufficient and competent persons to enhance its cross-border market abuse enforcement efforts in South Africa and elsewhere.\textsuperscript{382} Nonetheless, like the Financial Services Authority,\textsuperscript{383} and as already indicated above, the Financial Services Board has quasi-legislative (rule-making) powers.\textsuperscript{384} While this is a commendable achievement and must as such be welcomed, it is not quite certain whether the Financial Services Board has to date been able to make any such rules or

\begin{itemize}
\item \textsuperscript{373} Generally see paragraphs 6 4 1; 6 4 2; 6 4 3 & 6 4 4 in Chapter Six of this thesis.
\item \textsuperscript{374} It is submitted that this might have generally contributed to the inconsistent enforcement and combating of cross-border market abuse practices especially in the African securities and financial markets.
\item \textsuperscript{375} S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012 & also see further related analysis in paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
\item \textsuperscript{376} See paragraph 7 5 1 in Chapter Seven of this thesis.
\item \textsuperscript{377} See paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis.
\item \textsuperscript{378} See paragraph 7 5 1 in Chapter Seven of this thesis.
\item \textsuperscript{379} See paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis.
\item \textsuperscript{380} See paragraph 7 5 1 in Chapter Seven of this thesis.
\item \textsuperscript{381} S 77 of the Securities Services Act; clauses 86 & 87 of the Financial Markets Bill & clause 84 of the Financial Markets Bill 2012. Also see the discussions in paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis.
\item \textsuperscript{382} See paragraph 4 2 read with paragraph 3 2 1 in Chapters Four & Three of this thesis respectively.
\item \textsuperscript{383} See paragraph 7 5 1 in Chapter Seven of this thesis.
\item \textsuperscript{384} S 82(2)(g) of the Securities Services Act & clause 91(2)(f) of the Financial Markets Bill & clause 86(2)(f) of the Financial Markets Bill 2012.
\end{itemize}
to issue its own adequate Code of Market Abuse Conduct to guide all the relevant market participants on conduct that amounts to market abuse in South Africa. Unlike the Financial Services Authority’s Code of Market Conduct which supplemented and defined market abuse conduct in the United Kingdom,385 such conduct is merely outlined, mainly in Chapter VIII of the Securities Services Act, Chapter X of the Financial Markets Bill and Chapter X of the Financial Markets Bill 2012 in South Africa.386 In addition, the Financial Services Board may only commence its investigations when it has received some tip-offs regarding any suspected market abuse activity from the JSE.387 As indicated earlier,388 this is not the position in the United Kingdom where the Financial Services Authority is authorised to appoint other additional skilled persons to provide it with reports or relevant information relating to any suspected market abuse violations. Nevertheless, like the Financial Services Authority,389 the Financial Services Board may impose disciplinary, administrative and civil sanctions like orders for compensatory and punitive damages as well as desist or cease orders on market abuse offenders.390

As briefly highlighted above, in order to enhance compliance and the general enforcement of market abuse prohibition in South Africa, the Financial Services Board has also purportedly entered into co-operation agreements with other international regulatory bodies like the Financial Services Authority, the United States Securities and Exchange Commission and the International Organisation of Securities Commissions.391 However, it remains to be seen whether these co-operation agreements will be fully exploited by the Financial Services Board to combat cross-border market abuse activities in South Africa.

In addition, like the Australian Securities and Investments Commission,392 the Financial Services Board has ostensibly broad powers in order to ensure the proper supervision, regulation and enforcement of the financial markets and the market abuse prohibition in South

385 See paragraph 7 5 1 in Chapter Seven of this thesis.
386 Nonetheless, the FSB has to date issued several booklets and bulletins with general information regarding the regulation of market abuse practices in South Africa.
387 See related remarks in paragraphs 9 3 & 9 3 1 above.
388 See paragraph 7 5 1 in Chapter Seven of this thesis.
389 See paragraph 7 5 1 in Chapter Seven of this thesis.
390 Generally see s 77 read with s 82 of the Securities Services Act; clauses 86 & 87 read with clause 91 of the Financial Markets Bill & clause 84 read with clause 86 of the Financial Markets Bill 2012.
391 See paragraph 4 3 3 in Chapter Four of this thesis.
392 See paragraph 8 3 1 in Chapter Eight of this thesis.
Africa.\footnote{See s 82 of the Securities Services Act; clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012 & also see similar remarks in paragraph 3 2 1 in Chapter Three of this thesis.} For instance, the Financial Services Board may institute criminal proceedings to prosecute any alleged market abuse offences especially where the Director of Public Prosecutions\footnote{See related remarks in paragraphs 9 2 1 & 9 3 1 above.} in South Africa declines to do so as contemplated in the Securities Services Act,\footnote{S 82(9) of the Securities Services Act.} the Financial Markets Bill and/or the Financial Markets Bill 2012.\footnote{Clause 91(9) of the Financial Markets Bill & clause 86(10) of the Financial Markets Bill 2012.} However, this could imply, in contrast to the Australian Securities and Investments Commission,\footnote{See paragraph 8 3 1 in Chapter Eight of this thesis.} that the Financial Services Board does not have authority to institute such criminal proceedings at any time, regardless of whether the Director of Public Prosecutions in South Africa has declined to prosecute them. In relation to this, unlike the Australian Securities and Investments Commission,\footnote{S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill & clause 86 of the Financial Markets Bill 2012.} the Financial Services Board is not statutorily empowered to impose its own criminal penalties on the market abuse offenders in South Africa.\footnote{S 82(9) of the Securities Services Act.} With regard to civil proceedings, like the Australian Securities and Investments Commission,\footnote{See paragraph 8 3 1 in Chapter Eight of this thesis.} the Financial Services Board is empowered to administer proof of claims on behalf of the affected persons and to distribute any payments or the recovered damages to such persons.\footnote{See s 82(2)(c) read with s 77 of the Securities Services Act; clause 91(2)(d) read with clauses 86 & 87 of the Financial Markets Bill; clause 86(2)(d) read with clause 84 of the Financial Markets Bill 2012 & also see similar remarks in paragraph 3 2 1 in Chapter Three of this thesis & paragraphs 9 2 1 & 9 3 1 above.} Nonetheless, in contrast to the Australian Securities and Investments Commission,\footnote{See paragraph 8 3 1 in Chapter Eight of this thesis.} the Financial Services Board is not statutorily empowered to impose any fixed amount of civil penalties in relation to market abuse offences.\footnote{S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill & clause 86 of the Financial Markets Bill 2012.} Specifically, the Financial Services Board may impose a penalty for compensatory or punitive purpose upon the market abuse offenders, as regards any amount as determined by the relevant courts but not exceeding three times the amount of profit gained or loss avoided by the offenders concerned.\footnote{See paragraph 8 3 1 in Chapter Eight of this thesis.} Furthermore, in contrast to the position with the Australian Securities and Investments Commission,\footnote{S 77 of the Securities Services Act.} the Financial Services Board does not seem to be statutorily authorised to make a declaration or to seek a court order.
for a declaration of contravention of market abuse provisions in South Africa. Additionally, notwithstanding its enforcement authority, the Financial Services Board does not appear to have statutory powers to disqualify and/or impose banning orders on the market abuse offenders to restrict or stop them from assuming any managerial position in the affected companies for a certain period. Unlike the Australian Securities and Investments Commission, the Financial Services Board is not statutorily and expressly empowered to institute administrative actions such as freezing orders, injunctions, restraint orders and other appropriate sanctions against the market abuse offenders in South Africa. Additionally, unlike the Australian Securities and Investments Commission, it appears that the Financial Services Board does not employ infringement notices and enforceable undertakings to discourage market abuse activities in South Africa. However, like the Australian Securities and Investments Commission, and as previously stated above, the Financial Services Board has the power to investigate, summon and interrogate any person in respect of any market abuse violations. Furthermore, the Financial Services Board also has the discretion, subject to the conditions that it may determine, to delegate its power to any fit person to investigate, summon, interrogate or search the premises and/or persons accused of contravening the market abuse provisions. Nevertheless, such fit persons may search the accused person’s premises only in matters regarding market abuse after obtaining a search

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406 S 73; s 75; s 76 & s 77 read with s 82 of the Securities Services Act & clauses 82; 84; 85; 86 & 87 read with clause 91 of the Financial Markets Bill; clauses 80; 82; 83 & 84 read with clause 86 of the Financial Markets Bill 2012. Also see similar remarks in paragraph 3 2 1 in Chapter Three of this thesis & paragraph 9 3 1 above.


408 See paragraph 8 3 1 in Chapter Eight of this thesis.


410 See paragraph 8 3 1 in Chapter Eight of this thesis.

411 S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill & clause 86 of the Financial Markets Bill 2012. It is hoped that the FSB will also introduce infringement notices and enforceable undertakings to discourage market abuse activities in South Africa.

412 See paragraph 8 3 1 in Chapter Eight of this thesis.

413 See further analysis in paragraph 3 2 1 in Chapter Three of this thesis.

414 S 82(10) read with s 82(2)(a); (d) & (e) of the Securities Services Act; clause 91(10); (2)(a) & (b); (3)(a) to (d) of the Financial Markets Bill & clause 86(2)(a) & (b); (3)(a) to (c); (4) & (11) of the Financial Markets Bill 2012.

415 S 82(4) of the Securities Services Act; clause 91(4) of the Financial Markets Bill; clause 86(5) of the Financial Markets Bill 2012 & see further analysis in paragraph 3 2 1 in Chapter Three of this thesis.
warrant from a judge or magistrate who has jurisdiction in the area where such premises are located.\(^{416}\)

Additionally, in contrast to the Australian Securities and Investments Commission\(^ {417}\), the Financial Services Board is not responsible for the real-time surveillance of the South African securities and financial markets to detect and prevent market abuse practices. Moreover, unlike the Australian Securities and Investments Commission\(^ {418}\), it is uncertain whether the South African Police Services and/or the Financial Services Board is empowered to intercept telephonic data\(^ {419}\) from any suspected offenders in matters involving market abuse investigations in South Africa. This could have contributed, in part, to the current paucity of, and/or delays associated with the market abuse cases that have been prosecuted or settled with the Financial Services Board in South Africa to date.\(^ {420}\) With regard to this, apart from solely imposing the main responsibility of enforcing the market abuse prohibition on the Financial Services Board, enacting a statutory private right of action for the issuers of securities or the affected persons should be seriously considered to improve the curbing of market abuse activities in South Africa.\(^ {421}\) Moreover, it is hoped that South Africa will follow the Australian approach\(^ {422}\) and empower the Financial Services Board to take over the real-time surveillance of the South African securities and financial markets, to intercept telephonic data from the suspected market abuse offenders and to develop its own technological mechanisms for market abuse cross-market surveillance. In relation to this, it is important to note that the JSE bears the responsibility to operate the Stock Exchange in South Africa.\(^ {423}\) Additionally, like the Australian Stock Exchange\(^ {424}\), the JSE is involved in the general regulation and enforcement of securities laws in South Africa in order to prevent, among other things, the occurrence of market abuse and/or other illicit trading activities in the relevant regulated


\(^{417}\) See paragraph 8 3 1 in Chapter Eight of this thesis.

\(^{418}\) See paragraph 8 3 1 in Chapter Eight of this thesis.

\(^{419}\) S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill & clause 86 of the Financial Markets Bill 2012. However, it is submitted that such interception should be undertaken in accordance with the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 although this Act does not expressly provide for market abuse-related interceptions in South Africa. See related comments in paragraph 8 6 in Chapter Eight of this thesis.

\(^{420}\) See further paragraphs 3 2 1; 3 2 7 & 4 2 in Chapters Three & Four of this thesis

\(^{421}\) Jooste 2006 SALJ 458-459.

\(^{422}\) See paragraph 8 3 1 in Chapter Eight of this thesis.

\(^{423}\) See paragraph 3 2 5 in Chapter Three of this thesis.

\(^{424}\) See paragraph 8 3 2 in Chapter Eight of this thesis.
financial markets.\textsuperscript{425} Moreover, although the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly provide whether the JSE is statutorily obliged to give reasonable assistance to the Financial Services Board, the JSE has, however, played a very significant role in the detection, investigation and prevention of market abuse practices in South Africa to date.\textsuperscript{426} Therefore, like the Australian Stock Exchange,\textsuperscript{427} the JSE is primarily responsible for the promotion of market integrity and market fairness in the South African financial markets and companies. Nevertheless, unlike the position in Australia,\textsuperscript{428} the JSE (not the Financial Services Board) is responsible for the real-time monitoring of market participants and the surveillance of market abuse activities in the South Africa financial Markets.\textsuperscript{429} In relation to this, the JSE’s Surveillance Division is reportedly equipped with sophisticated proprietary surveillance systems that are designed to detect abnormal movements and trading volumes which usually point to market abuse activity.\textsuperscript{430} These surveillance systems are controlled by the Market Practices Department of the JSE’s Surveillance Division and are reportedly capable of isolating the names, addresses, telephone numbers and other details of the parties involved in the affected transactions.\textsuperscript{431} Consequently, unlike the current position in Australia,\textsuperscript{432} where suspicious or irregular trading activity is detected in South Africa, the JSE’s Surveillance Division may contact the affected persons or refer such matters to the Directorate of Market Abuse for further investigation.\textsuperscript{433} Nonetheless, in contrast to the position in Australia,\textsuperscript{434} there seems to be no statutory or formal binding Memorandum of Understanding that has been brokered between the Financial Services Board and the JSE regarding the detection and referral of suspected market abuse

\textsuperscript{425} See similar remarks in paragraphs 3.2.1 & 3.2.5 in Chapter Three of this thesis.

\textsuperscript{426} Loubser (02-10-2006) 25 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 10-10-2008); also see related remarks in paragraph 3.2.5 in Chapter Three of this thesis.

\textsuperscript{427} See paragraph 8.3.2 in Chapter Eight of this thesis.

\textsuperscript{428} See paragraphs 8.3.2 & 8.3.1 in Chapter Eight of this thesis.

\textsuperscript{429} See similar remarks in paragraphs 3.2.1 & 3.2.5 in Chapter Three of this thesis.

\textsuperscript{430} Also see further Loubser (02-10-2006) 25 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 10-10-2008); Cassim 2008 \textit{SA Merc LJ} 196–198. Also see related remarks in paragraph 3.2.5 in Chapter Three of this thesis.

\textsuperscript{431} See generally Loubser (02-10-2006) 25 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 10-10-2008); also see related remarks in paragraph 3.2.5 in Chapter Three of this thesis.

\textsuperscript{432} The Australian Securities and Investments Commission no longer rely on the Australian Stock Exchange’s referrals to detect market abuse activities in the Australian securities markets. See paragraph 8.3.2 in Chapter Eight of this thesis.

\textsuperscript{433} Loubser (02-10-2006) 25 <http://www.jse.co.za/public/insider/JSEbooklet.pdf> (accessed 10-10-2008); also paragraph 3.2.5 in Chapter Three of this thesis.

\textsuperscript{434} See paragraph 8.3.2 in Chapter Eight of this thesis.
practices in South Africa. It is hoped that South Africa will adopt the Australian approach and introduce a statutory or formal binding Memorandum of Understanding between the JSE and the Financial Services Board in order to enhance the detection and combating of market abuse practices in South Africa. As stated earlier, it is also hoped that the responsibility for the real-time monitoring of market participants and the surveillance of the South African financial markets will be moved from the JSE to the Financial Services Board to eradicate the delays which usually hamper the Financial Services Board’s investigations into the JSE’s market abuse referrals. Like the Australian Stock Exchange, the JSE has also developed its own Listing Requirements aimed at preventing market abuse activities. For example, the JSE requires all the listed companies to disclose promptly any price-sensitive information relating to the listed securities. This general obligation of disclosure on the part of the issuers of securities is commonly utilised through the JSE’s Securities Exchange News Service to curb and prevent insider trading in South Africa. Nevertheless, in contrast to the Australian Stock Exchange, the JSE does not seem to have its own Disciplinary Tribunal which specifically deals with any violations of its Listing Requirements and/or market abuse cases in South Africa. As a result, apart from some disciplinary action such as suspension, termination of operating licences and stopping or delaying the trading of the offender’s securities on the JSE, the JSE does not seem to have the statutory authority to impose fixed or specified disciplinary monetary fines on such offenders. In this regard, the JSE’s enforcement powers appear to be more restricted than those of the Australian Stock Exchange. Moreover, unlike the position in Australia, the JSE is not statutorily empowered to search the premises of the accused persons who are suspected of engaging in market abuse practices and/or to summon any such persons to furnish it with other relevant information relating to ongoing market abuse cases.

435 See paragraph 8.3.2 in Chapter Eight of this thesis.
436 See paragraph 8.3.2 in Chapter Eight of this thesis.
437 S 3 of the JSE Listing Requirements that relate to the disclosure of price-sensitive information.
438 S 3.4 of the JSE Listing Requirements; also see paragraph 3.2.5 in Chapter Three of this thesis.
439 See paragraph 8.3.2 in Chapter Eight of this thesis.
440 See paragraph 8.3.2 in Chapter Eight of this thesis.
441 See paragraph 8.3.2 in Chapter Eight of this thesis.
9.5 Evaluation and Analysis of the Role of the Courts and Other Role Players

In contrast with the position in the United States of America,\textsuperscript{442} it has already been pointed out that very few cases of market abuse have, to date, been successfully prosecuted and settled in South Africa.\textsuperscript{443} Unlike the United States of America’s Department of Justice and courts,\textsuperscript{444} the Director of Public Prosecutions and the competent courts in South Africa have, to some extent, struggled to obtain more convictions in market abuse cases to date.\textsuperscript{445} Notwithstanding the efforts being made by the Financial Services Board to refer the criminal cases of market abuse to the Director of Public Prosecutions for prosecution, only a few competent courts\textsuperscript{446} have jurisdiction to hear such cases.\textsuperscript{447} This has, to some extent, restricted or resulted in delays in the prosecution of some market abuse cases in South Africa.\textsuperscript{448} Moreover, as discussed earlier,\textsuperscript{449} some of the market abuse cases that were referred to the Director of Public Prosecutions by the Financial Services Board are still pending while others have either been withdrawn or abandoned, possibly because of insufficient evidence and the backlog of other cases in the relevant courts.\textsuperscript{450}

\textsuperscript{442} See paragraph 5.4.2 in Chapter Five of this thesis.

\textsuperscript{443} Cassim 2008 SA Merc LJ 33-37.

\textsuperscript{444} See paragraph 5.4.2 in Chapter Five of this thesis.

\textsuperscript{445} Notwithstanding the fact that Bloomberg News published a story on 11 April 2007, stating that the Financial Services Board was investigating and/or has reported to the Director of Public Prosecutions the alleged market manipulation caused by an unknown American business consortium after making a substantial offer of $12.5 billion for Gold Fields Limited resulting in 11% increase in its shares and adding about R10 billion to the market value of Gold Fields Limited shares. See Brown “Gold Fields Zooms 11% on Bid Talk” Business Report (2007-04-12) 1. This story was unfortunately somewhat false and misleading, for example, as at 13 April 2007, the JSE had since the enactment of the Securities Services Act only referred about seven cases of market manipulation to the Financial Services Board and/or the Director of Public Prosecutions for further investigation and possible prosecution by the courts. No convictions were obtained by the South African competent courts in all these cases. This may further indicate that market abuse practices are still difficult to investigate and prosecute in South Africa. See report by Brown “FSB may Probe Bloomberg Story on Gold Fields” Business Report (2007-04-13) 1; also see Cassim 2008 SA Merc LJ 34.

\textsuperscript{446} S 79(1) of the Securities Services Act; this provision is likely to be repealed by clause 81 of the Financial Markets Bill and/or clause 86(10) & other relevant provisions of the Financial Markets Bill 2012.

\textsuperscript{447} See paragraph 3.2.6 in Chapter Three of this thesis.

\textsuperscript{448} This could be worsened by the fact that the Securities Services Act, the Financial Markets Bill & the Financial Markets Bill 2012 do not have provisions that empower or establish more courts to specifically adjudicate or deal with market abuse cases in South Africa. See s 79(1) of the Securities Services Act; also see clause 81 read with clause 89 & other relevant provisions under Chapter X of the Financial Markets Bill & other relevant provisions under Chapter X of the Financial Markets Bill 2012.

\textsuperscript{449} See further related analysis in Chapters Two; Three & Four of this thesis; also see paragraphs 9.2.1 & 9.3.1 above.

\textsuperscript{450} The Director of Public Prosecutions is still to ensure that the competent courts are manned by sufficient people with the relevant expertise in order to obtain more prosecutions and settlements in market abuse cases referred to them by the FSB.

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Moreover, unlike the position under the EU Market Abuse Directive, relatively few courts have the jurisdiction to hear market abuse cases in South Africa. In other words, the EU Market Abuse Directive does not expressly provide for a specific court to hear market abuse cases in the European Union. This role was apparently left to the relevant courts in the European Union member states.

In contrast to the position in the United Kingdom, as has already been highlighted above and in previous chapters, only the High Courts or Regional Courts have the jurisdiction to hear market abuse cases under the Securities Services Act. This flaw could be corrected if the Financial Markets Bill comes into force since it now provides that any court within whose jurisdiction the regulated market has its principal place of business or head office or in which any element of the dealing or offence occurred can hear market abuse cases, without any need to make an attachment to found or confirm its jurisdiction. Nevertheless, the high evidentiary burden employed in criminal cases of market abuse remains probably the main contributory factor of the paucity of convictions obtained in such cases in both the United Kingdom and South Africa. In line with this, it remains to be seen whether the Financial Markets Bill and/or the Financial Markets Bill 2012’s market abuse provisions will enhance the combating and prosecution of market abuse cases in South Africa. Additionally, unlike the position in the United Kingdom, it is not quite certain whether the relevant courts in South Africa may also rely on any skilled persons from the Financial Services Board itself or on persons who are assigned to them by the Financial Services Board to adjudicate in market abuse cases. Furthermore, the absence of sufficient persons with the relevant expertise to adjudicate in matters involving market abuse remains a significant challenge for the competent courts in South Africa.

451 See Chapter Six of this thesis.
452 See related analysis above & paragraphs 326 in Chapter Three of this thesis.
453 See Chapter Six of this thesis.
454 See Chapter Six of this thesis.
455 See paragraph 752 in Chapter Seven of this thesis.
456 See similar analysis in Chapter Two to Chapter Four of this thesis.
457 S 79(1) of the Securities Services Act.
458 Clause 81 of the Financial Markets Bill; no similar provision is expressly made in clause 79 of the Financial Markets Bill 2012 & also see related comments in paragraph 326 in Chapter Three of this thesis.
459 See paragraph 752 in Chapter Seven of this thesis.
460 See related analysis in paragraph 326 in Chapters Three of this thesis.
Moreover, like the position in Australia, as stated above, the competent courts in South Africa also have the discretion to impose appropriate sanctions and penalties against the market abuse offenders. In the same vein, the competent courts in South Africa further have powers to hear and give advice on any market abuse matter referred to them by the Financial Services Board. In particular, such advice usually relates to the actual amount of the fines to be imposed on the market abuse offenders and the nature of proceedings (that is civil, criminal or administrative proceedings) to be instituted against such offenders. However, other commentators have alluded to the fact that the paucity of settlements and prosecutions of market abuse cases in South Africa could have been ameliorated if the legislature had not rigidly adopted some of the American contemporaneous principles, especially with regard to the insider trading prohibition. In addition, it is submitted that the legislature should consider statutorily engaging additional regulatory agencies and empowering more specialised courts that deal with market abuse offences in South Africa. In line with this, it is hoped that the Australian approach will be adopted in South Africa to empower the competent courts to have the discretion to make a declaration of contravention of the market abuse provisions whenever they are certain that such contravention actually occurred in order to increase deterrence on the part of the offenders.

9.6 Evaluation and Analysis of the Role of Other Self-Regulatory Organisations

Apart from the Financial Services Board and its committees, other regulatory bodies like the JSE are also statutorily allowed to deal with the enforcement of market abuse in South Africa. Accordingly, like the United States Securities and Exchange Commission, the Financial Services Board may exercise supervisory authority over all the regulatory bodies that deal with market abuse in South Africa. In the same vein, as stated before, the Financial Services Board has a prerogative to make market abuse rules that govern the enforcement of

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461 See paragraph 8.3.4 in Chapter Eight of this thesis.
462 S 79 of the Securities Services Act; clause 81 of the Financial Markets Bill & no similar provision is expressly made in clause 79 of the Financial Markets Bill 2012.
463 See related remarks in paragraphs 3.2.1 & 3.2.6 in Chapter Three of this thesis.
464 For example see Jooste’s summary and concluding remarks in Jooste 2006 SALJ 460.
465 The so-called United States of America (US) approach.
466 See paragraph 8.3.4 in Chapter Eight of this thesis.
467 See paragraph 5.4.3 in Chapter Five of this thesis.
468 See related remarks in paragraphs 3.2.1 in Chapter Three of this thesis.
469 See related remarks in paragraphs 9.4 & 9.5 above.
Apart from the Financial Services Board and the JSE, there are no self-regulatory organisations that are specifically responsible for enforcing market abuse laws in South Africa. In relation to this, there is no specific provision in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 which empowers other self-regulatory organisations to enforce the market abuse ban in South Africa. While this approach is good in that it minimises bureaucracy, balkanisation, conflict of interests and confusion that may be associated with many regulatory bodies and self-regulatory organisations, it has not been fully utilised to obtain more settlements and prosecutions of market abuse cases in South Africa to date.

Furthermore, unlike the situation in the European Union, where the EU Market Abuse Directive has advocated for the adequate co-operation between the relevant stakeholders, no such provision is made in South Africa. In other words, although there are no specific self-regulatory bodies, apart from the European Securities and Markets Authority, that are mandated to exclusively deal with market abuse under the EU Market Abuse Directive, the duty to involve such bodies was apparently ceded to the relevant European Union member states.

Additionally, in contrast with the position in the United Kingdom regarding the role of self-regulatory organisations, it appears as if the importance of the role of such organisations has to some extent been overlooked in South Africa. This may be reflected, in part, by the

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470 S 82(2)(g) of the Securities Services Act; clause 91(2)(f) of the Financial Markets Bill & see further clause 86(2)(f) of the Financial Markets Bill 2012. This implies that other regulatory bodies like the Directorate of Market Abuse do not have express statutory authority to make their own independent market abuse rules regarding the enforcement of market abuse laws in South Africa.


473 See paragraphs 3.2.1 & 4.2 in Chapters Three & Four of this thesis respectively.

474 See related remarks in Chapter Six of this thesis.

475 Also see relevant sections under Chapter VIII entitled Market Abuse in the Securities Services Act; relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill & relevant clauses under Chapter X entitled Market Abuse of the Financial Markets Bill 2012.

476 See Chapter Six of this thesis.

477 See paragraph 7.5.3 in Chapter Seven of this thesis.

478 See similar analysis in paragraphs 4.3.1 in Chapters Four of this thesis.
fact that only a few self-regulatory organisations, namely the JSE, the Enforcement Committee, the Directorate of Market Abuse and the Securities Regulation Panel, are either directly or indirectly involved in the enforcement of the securities and market abuse laws in South Africa. Nevertheless, apart from the Financial Services Board, there are no other self-regulatory organisations that are statutorily, specifically and mainly responsible for enforcing market abuse laws in South Africa. As a result, not many self-regulatory organisations have been actively involved in the enforcement of the market abuse prohibition to supplement the efforts of the Financial Services Board in South Africa to date. South Africa seems to have blindly adopted some of the enforcement methods that are employed in the United Kingdom by empowering the Financial Services Board as the only main regulatory board that oversees the enforcement of its market abuse ban. In relation to this, it is suggested that South Africa should consider practically implementing only the relevant principles of the United Kingdom’s single regulator model because it is economical and less complex. This could increase the number of settlements and convictions in market abuse cases in South Africa. Additionally, it is not certain whether other self-regulatory organisations in South Africa have the same or similar statutory leverage available to the Financial Services Board to make their own decisions, rules and appropriate regulations in relation to market abuse offences. However, it is important to note that the Directorate of Market Abuse and the Enforcement Committee have functions almost similar to those of their United Kingdom counterparts, the Regulatory Decisions Committee and the Financial Services and Markets Tribunal respectively.

Moreover, the role of the self-regulatory organisations in South Africa is not as widely recognised as it is in Australia. For instance, in contrast to the Australian Stock Exchange, the JSE does not seem to have the powers to impose monetary pecuniary penalties against the market abuse offenders in South Africa. It is therefore hoped, as is the

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479 See related remarks on the role of each of these self-regulatory organisations (SROs) in Chapter Three of this thesis; see further paragraphs 4.2 & 4.3 in Chapter Four of this thesis.


481 See similar analysis in paragraphs 4.3 of Chapters Four & Five of this thesis.


483 See paragraphs 3.2 & 3.2 in Chapter Three of this thesis.

484 See paragraph 7.5 in Chapter Seven of this thesis.

485 See paragraphs 8.3.2; 8.3.3; 8.3.3.1; 8.3.3.2; 8.3.3.3; 8.3.3.4 & 8.3.3.5 in Chapter Eight of this thesis.

486 See paragraph 8.3.2 in Chapter Three of this thesis.
position in Australia, that the Securities Regulation Panel and the JSE will continue to participate more in matters regarding the enforcement of the market abuse prohibition in South Africa. However, like the Corporations and Market Advisory Committee, the Directorate of Market Abuse has the powers to advise and perform some investigatory functions on the behalf of the Financial Services Board. Nevertheless, unlike the Corporations and Market Advisory Committee, the Directorate of Market Abuse is not statutorily authorised to make recommendations to the South African legislature on matters regarding the securities law reform, operation of securities and financial markets and the general regulation of such markets. Moreover, in contrast to the Corporations and Market Advisory Committee, the Directorate of Market Abuse is yet to engage more in the public consultation and making of proposals to the legislature and/or other relevant authorities regarding the general regulation and enforcement of the market abuse prohibition in South Africa. Moreover, unlike the Australian Stock Exchange, it is uncertain whether the Enforcement Committee has the powers to take an administrative action like suspending or banning the market abuse offenders from managing any company for a stipulated period in South Africa. In addition, in contrast to the Australian Stock Exchange, the Enforcement Committee does not seem to have additional powers to summon any suspected offenders to produce evidence or documents necessary for any particular ongoing market abuse case trial or to search any premises or persons who are suspected to have such documents. Furthermore, unlike the self-regulatory organisations in Australia, as already stated above, the self-regulatory organisations in South Africa seem to have restricted authority, especially with regard to the making of their own market abuse rules, decisions,

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487 See paragraphs 8.3.3.3; 8.3.3.4 & 8.3.3.5 in Chapter Eight of this thesis.
488 See related analysis in paragraph 3.2.7 in Chapters Three of this thesis.
489 See paragraph 8.3.3.1 in Chapter Eight of this thesis.
490 S 83(1)(c); (d) & (e) of the Securities Services Act; clause 92(1)(c); (d) & (e) of the Financial Markets Bill; clause 87(1)(c) & (d) of the Financial Markets Bill 2012 & also see paragraph 3.2.2 in Chapter Three of this thesis.
491 See paragraph 8.3.3.1 in Chapter Eight of this thesis.
492 See paragraph 3.2.7 in Chapter Eight of this thesis.
493 See paragraph 8.3.3.1 in Chapter Eight of this thesis.
494 See paragraph 8.3.2 in Chapter Eight of this thesis.
495 See further analysis in paragraph 3.2.3 in Chapter Three of this thesis.
496 See paragraph 8.3.2 in Chapter Eight of this thesis.
497 See further analysis in paragraph 3.2.3 in Chapter Three of this thesis.
498 See paragraphs 8.3.2; 8.3.3.1; 8.3.3.2; 8.3.3.3; 8.3.3.4 & 8.3.3.5 in Chapter Eight of this thesis.
499 Also see paragraph 9.4 above.
regulations and other appropriate disciplinary or administrative actions on matters involving market abuse offences.\textsuperscript{500} In relation to this, it is hoped, as is the position in Australia,\textsuperscript{501} that more self-regulatory organisations will be statutorily empowered and introduced in South Africa in the near future to complement the Financial Services Board’s efforts to combat market abuse activities.

9.7 Evaluation and Analysis of the Co-operation between the Regulators, Courts and Other Role Players

In South Africa, the Financial Services Board and the Director of Public Prosecutions are also responsible for the civil and criminal enforcement of the market abuse prohibition respectively.\textsuperscript{502} As is the position in the United States of America,\textsuperscript{503} the Director of Public Prosecutions may only prosecute criminal cases of market abuse that are referred to it by the Financial Services Board in South Africa. However, in contrast to the position in the United States of America,\textsuperscript{504} there is apparently little or minimal co-operation between the Financial Services Board and the Director of Public Prosecutions in South Africa. Put differently, the co-operative enforcement relationship between the Financial Services Board and the Director of Public Prosecutions has not been fully developed and utilised to increase and improve the criminal prosecution of market abuse cases in South Africa.\textsuperscript{505}

Moreover, as highlighted earlier,\textsuperscript{506} the EU Market Abuse Directive did not expressly provide for a specific court to hear market abuse cases in the European Union.\textsuperscript{507} This role was apparently left to the relevant courts in the European Union member states.\textsuperscript{508} Accordingly, like the position in South Africa,\textsuperscript{509} the EU Market Abuse Directive\textsuperscript{510} does not expressly

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{500} Also see related comments in paragraph 431 in Chapter Four of this thesis.
\item \textsuperscript{501} See paragraphs 832; 8331; 8332; 8333; 8334 & 8335 in Chapter Eight of this thesis.
\item \textsuperscript{502} Paragraph 9.5 above; paragraphs 321 & 326 in Chapter Three of this thesis & paragraph 42 in Chapter Four of this thesis.
\item \textsuperscript{503} Paragraphs 542 & 551 in Chapter Five of this thesis.
\item \textsuperscript{504} Paragraph 551 in Chapter Five of this thesis.
\item \textsuperscript{505} Paragraph 326 in Chapter Three of this thesis.
\item \textsuperscript{506} See paragraph 9.5 above.
\item \textsuperscript{507} See Chapter Six of this thesis.
\item \textsuperscript{508} See Chapter Six of this thesis.
\item \textsuperscript{509} See related analysis in paragraphs 94 & 95 above; also see paragraph 326 in Chapter Three of this thesis.
\item \textsuperscript{510} See Chapter Six of this thesis.
\end{enumerate}
\end{footnotesize}
provide for the co-operation of the relevant courts and other enforcement authorities in the European Union.\footnote{511}

Furthermore, as is the position with the Financial Services Authority,\footnote{512} the Financial Services Board has to date received considerable help, especially in respect of the criminal prosecution of market abuse cases, from the courts and the Director of Public Prosecutions in South Africa.\footnote{513} As has already been discussed above,\footnote{514} the Director of Public Prosecutions in South Africa, like the Crown Prosecution Services of the United Kingdom,\footnote{515} usually prosecutes matters relating to market abuse after a referral from the Financial Services Board or other relevant authorities. This could, in a way, suggest that the Director of Public Prosecutions in South Africa may only commence its own investigations or prosecution of market abuse offences after consultation with the Financial Services Board.\footnote{516} This position remains unchanged in the Financial Markets Bill and the Financial Markets Bill 2012.\footnote{517} As indicated above,\footnote{518} although it may be \textit{prima facie} presumed that the Financial Services Board supports the Director of Public Prosecutions and the relevant courts with the necessary information regarding ongoing market abuse cases in South Africa, it is not clear whether the Financial Services Board is statutorily mandated to assign certain persons with the relevant expertise to assist the courts in their prosecution of such cases.\footnote{519} Moreover, notwithstanding the outstanding effort that is being made by the courts and the Financial Services Board to prosecute market abuse cases timeously and effectively, the paucity of successful settlements or prosecutions that have been obtained in such cases remains a major challenge in South Africa to date.\footnote{520} Relatively few settlements have been obtained in cases involving market abuse activities like market manipulation in South Africa.\footnote{521} In line with this, it remains to be seen whether the co-operation relationship between the Financial Services Board, the courts

\footnote{511} See related analysis 9 5 above.
\footnote{512} See paragraph 7 6 1 in Chapter Seven of this thesis.
\footnote{513} See related analysis in paragraph 3 2 6 in Chapter Three of this thesis.
\footnote{514} See paragraph 3 2 6 in Chapter Three of this thesis.
\footnote{515} See related remarks in paragraph 7 5 3 in Chapter Seven of this thesis.
\footnote{516} S 82(9) of the Securities Services Act.
\footnote{517} Clause 91(9) of the Financial Markets Bill & clause 86(10) of the Financial Markets Bill 2012.
\footnote{518} See related remarks in paragraph 9 5 above.
\footnote{519} Generally see paragraph 3 2 6 in Chapter Three of this thesis.
\footnote{520} See similar analysis in paragraphs 3 2 1 & 3 2 6 in Chapter Three of this thesis & paragraph 4 2 in Chapter Four of this thesis.
\footnote{521} See \textit{Pretorius v Natal South Sea Investment Trust Limited} 1965 3 SA 410 (W), where the court held that the accused persons were guilty for prejudicing other investors by selling overpriced securities (market manipulation).
and the Director of Public Prosecutions will give rise to more convictions and settlements in matters involving market abuse in South Africa. Additionally, as similarly stated above, it is uncertain whether the courts and the Financial Services Board have been successful with regard to the combating of cross-border market abuse practices. For example, no single case involving cross-border market abuse activities has been reported or successfully prosecuted in South Africa to date. Accordingly, this raises some doubt as to whether the co-operative efforts of the courts and the Financial Services Board have to date sufficiently and effectively dealt with the market abuse violations in South Africa and elsewhere.

Lastly, like the position in Australia, the requirement that the Financial Services Board must refer all market abuse criminal cases to the Director of Public Prosecutions could have somewhat limited the Financial Services Board’s prospects of speedily instituting its own criminal proceedings against the perpetrators of market abuse in South Africa. In addition, in contrast to the position in Australia, the Financial Services Board and the Director of Public Prosecutions appear not to have concluded any binding Memorandum of Understanding regarding the enforcement of the market abuse prohibition in South Africa. This could imply that both the Financial Services Board and the Director of Public Prosecutions are not statutorily and expressly obliged to co-operate with each other to enforce the market abuse prohibition in South Africa. It is therefore hoped that the Financial Services Board and the Director of Public Prosecutions will conclude a binding co-operation and relevant information-sharing Memorandum of Understanding to enhance their co-operation and enforcement of the market abuse prohibition in South Africa. Moreover, unlike the position in Australia, it is uncertain whether there are some binding and/or formal co-operation arrangements that were concluded by the Financial Services Board and the South African Police Services, particularly in relation to the criminal investigation of market abuse activities in South Africa. In other words, although it is generally expected that the South African Police Services would arrest any persons indicted by the either the Financial Services Board

522 Unlike in the United Kingdom, there is no person who has been convicted for insider trading in South Africa. See related analysis in paragraph 326 in Chapter Three of this thesis & paragraphs 42 in Chapter Four of this thesis.
523 See related analysis in paragraph 326 in Chapter Three of this thesis & paragraphs 42 in Chapter Four of this thesis.
524 See related analysis in paragraph 326 in Chapter Three of this thesis & paragraphs 42 in Chapters Four of this thesis.
525 See further paragraph 841 in Chapter Eight of this thesis.
526 See further paragraph 841 in Chapter Eight of this thesis.
527 See further paragraph 841 in Chapter Eight of this thesis.
or the courts, there appears to be no formal Memorandum of Understanding that was concluded between the Financial Services Board and the South African Police Services in relation to the investigation and prevention of market abuse activities in South Africa and elsewhere (cross-border market abuse activities).

9.8 Evaluation and Analysis of the Co-operation between the Regulators and Other Local Self-Regulatory Organisations

In South Africa, as earlier stated,\(^{528}\) the Financial Services Board also polices the general enforcement of securities laws by other regulatory bodies such as the JSE and the Securities Regulation Panel. This \textit{prima facie} suggests that the Financial Services Board has some co-operation relationship with other local regulatory bodies regarding the enforcement of such laws in South Africa. Although the degree or extent of the effectiveness of such co-operation relationship is unclear, the Financial Services Board has to date managed to obtain some settlements and to investigate market abuse cases referred to it by other self-regulatory organisations like the JSE.\(^{529}\) However, unlike the position in the United States of America,\(^{530}\) it is uncertain whether the Financial Services Board has entered into any binding co-operation agreements with specific local self-regulatory organisations like the Securities Regulation Panel to combat market abuse practices in the South African financial markets.\(^{531}\)

Furthermore, as stated before,\(^{532}\) the EU Market Abuse Directive\(^{533}\) has advocated for the adequate co-operation between the relevant stakeholders in the European Union member states.\(^{534}\) On the contrary, no similar provision has been made in South Africa.\(^{535}\)

In addition, as is the position in the United Kingdom,\(^{536}\) and as indicated above,\(^{537}\) the Financial Services Board works hand in hand with other local self-regulatory organisations to

\(^{528}\) See paragraph 9.6 above.
\(^{529}\) Paragraphs 3.2.5 & 4.3.1 in Chapters Three & Four of this thesis.
\(^{530}\) Paragraph 5.5.2 in Chapter Five of this thesis.
\(^{531}\) There are no self-regulatory organisations such as those in the United States of America that are specifically and statutorily empowered to supplement the Financial Services Board’s efforts to enforce and combat commodities-based market abuse activities in South Africa and elsewhere.
\(^{532}\) See paragraph 9.6 above.
\(^{533}\) See Chapter Six of this thesis.
\(^{534}\) See related remarks in Chapter Six of this thesis.
\(^{535}\) See relevant sections under Chapter VIII entitled Market Abuse in the Securities Services Act; relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill & relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill 2012.
complement its market abuse enforcement efforts. Like the London Stock Exchange, the JSE has to date been assisting the Financial Services Board with the surveillance, detection and investigation of suspicious illicit activities which in most instances would be indicative of market abuse violations. As highlighted in previous chapters, there is some co-operation and relevant information sharing between the Financial Services Board and the JSE. Moreover, as stated before, the JSE has now consolidated the functions of the Bond Exchange of South Africa in order to investigate and curb commodities-based market abuse practices in South Africa. This suggests that the Financial Services Board now relies on the JSE to combat commodities-based market abuse practices in the South African financial markets. Nevertheless, the fact still remains that a relatively few market abuse cases reported to the Financial Services Board by either the JSE or other enforcement authorities have to date been successfully settled and prosecuted in South Africa under the Securities Services Act. This status quo is likely to continue because the Financial Markets Bill and the Financial Markets Bill 2012 still do not expressly and statutorily impose a mandatory co-operation obligation on both the Financial Services Board and the JSE to improve the enforcement of the market abuse prohibition in South Africa.

As stated earlier, the Directorate of Market Abuse has similar roles as those of the Regulatory Decisions Committee and it investigates and exercises some functions on behalf of the Financial Services Board. Currently, the Financial Services Board and the Directorate of Market Abuse work closely and consult each other in relation to the making of

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536 See paragraph 7 6 2 in Chapter Seven of this thesis.
537 Also see paragraph 9 6 above.
538 See the related remarks in paragraph 9 6 above.
539 See paragraph 7 6 2 in Chapter Seven of this thesis.
540 See the analysis in paragraphs 3 2 5 & 4 3 1 in Chapters Three & Four of this thesis respectively; also see paragraph 9 6 above.
541 See specifically Chapters Two; Three & Four of this thesis.
542 See further analysis in paragraph 4 3 1 in Chapter Four of this thesis.
543 See further analysis in paragraph 4 3 1 in Chapter Four of this thesis.
544 See further analysis in paragraph 4 3 1 in Chapter Four of this thesis.
545 See relevant provisions under Chapter VIII of the Securities Services Act; also see related analysis in paragraph 9 6 above & paragraphs 3 2 5 & 4 3 1 in Chapters Three & Four of this thesis respectively.
547 See paragraph 9 6 above.
548 S 83 of the Securities Services Act & clause 92 of the Financial Markets Bill & clause 87 of the Financial Markets Bill 2012. Also see similar discussions in paragraphs 3 2 2 & 4 3 1 in Chapters Three & Four of this thesis respectively.
market abuse rules, penalties and any other decisions.\textsuperscript{549} It is hoped that this co-operation between the Financial Services Board and the Directorate of Market Abuse will in future produce more settlements and convictions, especially in criminal cases of market abuse.\textsuperscript{550} Notwithstanding the fact that the Financial Services Board and the Directorate of Market Abuse convene regular meetings to discuss and share any relevant confidential information, especially in respect of ongoing market abuse investigations, more may still need to be done to increase the number of market abuse cases that will be prosecuted in South Africa.

Likewise, the Securities Regulation Panel offers additional support to the Financial Services Board in relation to the regulation and enforcement of securities laws in South Africa.\textsuperscript{551} For example, the Securities Regulation Panel has some requirements in place pertaining to the disclosure of price-sensitive information.\textsuperscript{552} This is aimed at preventing insider trading and market manipulation by insiders in relation to the offeror or offeree company by dealing unlawfully in securities of the affected companies at an early stage of the negotiations. All parties to an offer relating to an affected transaction are required to take reasonable steps to prevent the making or publication of misleading statements, creation of false markets and other market abuse activities.\textsuperscript{553} However, the extent of co-operation between the Financial Services Board and the Securities Regulation Panel remains unclear. It appears as if the Securities Regulation Panel does not involve itself much in the day-to-day enforcement of matters relating to market abuse as such matters usually concern the Financial Services Board. Consequently, the actual degree of co-operation between the Financial Services Board and the Securities Regulation Panel is very difficult to ascertain since the Securities Regulation Panel does not primarily deal with the enforcement of the market abuse prohibition in South Africa on a more regular basis.

Furthermore, like the Financial Services and Markets Tribunal of the United Kingdom,\textsuperscript{554} the Enforcement Committee\textsuperscript{555} provides all aggrieved persons with an opportunity to appeal against any decisions of the Financial Services Board, especially with regard to the penalties

\textsuperscript{549} See similar analysis in paragraph 4 3 1 in Chapter Four of this thesis.
\textsuperscript{550} See similar analysis in paragraphs 3 2 2 & 4 3 1 in Chapters Three & Four of this thesis respectively.
\textsuperscript{551} See generally paragraph 9 6 above & paragraph 4 3 1 in Chapter Four of this thesis.
\textsuperscript{552} See generally paragraph 4 3 1 in Chapter Four of this thesis.
\textsuperscript{553} See the Securities Regulation Panel (SRP) General Principles 6 & 9.
\textsuperscript{554} See paragraphs 7 5 3 & 7 6 2 in Chapter Seven of this thesis.
for market abuse.\(^{556}\) While this is important in that it helps the Financial Services Board to review its own decisions and to make appropriate decisions in relation to its market abuse enforcement and regulatory functions, only a minimum number of market abuse cases have been settled with the Enforcement Committee to date.\(^{557}\) Accordingly, this could be an indication that there is inconsistent, little or no co-operation between the Financial Services Board and the Enforcement Committee.

Lastly, like the Australian Stock Exchange, and as earlier indicated\(^{558}\) the JSE requires all the issuers of listed securities to disclose any trading activity which might result in market abuse promptly through the Securities Exchange News Service.\(^{559}\) Notably, there is some co-operative enforcement effort between the JSE and the Financial Services Board which has to date relatively given rise to the increased investigation and detection of market abuse practices in South Africa.\(^{560}\) On the other hand, like the Australian Financial Markets Association,\(^{561}\) the JSE (not the Bond Exchange of South Africa) now deals with the regulation of commodities and futures markets in South Africa. Nonetheless, it remains to be seen whether the JSE will be actively and consistently involved in the enforcement of the commodities-based market abuse prohibition in South Africa.\(^{562}\) Furthermore, unlike the Australian Competition and Consumer Commission,\(^{563}\) the Securities Services Act,\(^{564}\) the Financial Markets Bill and the Financial Markets Bill 2012\(^{565}\) do not expressly provide whether the Enforcement Committee has the powers to refer market abuse cases to the

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\(^{556}\) See similar analysis in paragraphs 3 2 3 & 4 3 1 in Chapters Three & Four of this thesis respectively.

\(^{557}\) Generally see similar remarks in paragraph 7 5 3 1 above; also see paragraph 9 6 above & paragraphs 3 2 3 & 4 3 1 in Chapters Three & Four of this thesis respectively.

\(^{558}\) See related comments in paragraphs 9 4 & 9 6 above; also see paragraph 8 4 2 in Chapter Eight of this thesis.

\(^{559}\) S 3.4 of the JSE Listing Requirements; also see generally paragraph 4 3 1 in Chapter Four of this thesis.

\(^{560}\) It is reported that during the period from 2005 to 2008 alone, the JSE substantially increased the number of market abuse cases which were later referred to the FSB. However, only about seven of such cases relating to market manipulation were later investigated and prosecuted by the FSB during the same period. See generally Cassim 2008 *SA Merc LJ* 34.

\(^{561}\) Generally similar remarks in paragraphs 8 3 3 5 & 8 4 2 in Chapter Eight of this thesis.

\(^{562}\) See related analysis in paragraph 4 3 1 in Chapters Four of this thesis & paragraph 9 6 above.

\(^{563}\) See related remarks in paragraph 4 3 1 in Chapters Four of this thesis & paragraph 9 6 above.

\(^{564}\) S 94(e); s 97 to s 105.

\(^{565}\) See clause 105 & the relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill & clause 101 & the relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill 2012.

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Director of Public Prosecutions for prosecution. Nevertheless, as is the position with the Australian Institute of Company Directors, the International Banks and Securities Association of Australia and the Securities and Derivatives Industry Association, and as earlier stated, the Securities Regulation Panel provides the Financial Services Board with the necessary support pertaining to the general regulation and enforcement of the relevant securities law prohibitions in South Africa.

9.9 Evaluation and Analysis of the Co-operation between the Regulators and Similar International Regulatory Bodies

The Financial Services Board has reportedly entered into co-operation agreements with the United States Securities and Exchange Commission and the Financial Services Authority of the United States of America and the United Kingdom respectively for the purposes of curbing cross-border market abuse activities. While this is a positive attempt to combat and reduce all potential cross-border market abuse practices as much as possible, relatively minimal success has been achieved in relation to the utilisation of such co-operation agreements in South Africa to date. In other words, it remains uncertain whether such co-operation agreements have been fully implemented to improve the detection, investigation and prosecution of all possible unscrupulous trading practices in the relevant financial markets in South Africa and elsewhere. One can therefore ascribe this inconsistent enforcement of cross-border market abuse laws to the low level of co-operation between the Financial Services Board and similar bodies in other jurisdictions. Nonetheless, this flaw could be corrected by the Financial Markets Bill and/or the Financial Markets Bill 2012 which now empowers the Financial Services Board to assist foreign regulators with investigations pertaining to any cross-border market abuse cases.

566 On the contrary, the ACCC has signed a Memorandum of Understanding (MOU) with the Commonwealth DPP in Australia which allows it to refer serious cartels and market abuse cases to the Commonwealth DPP for prosecution.
567 See paragraph 8.4.2 in Chapter Eight of this thesis.
568 See the Securities Regulation Panel (SRP) General Principles 6 & 9; also see related remarks in paragraph 9.6 above.
569 Paragraph 4.3.3 in Chapter Four of this thesis; also see related remarks in paragraph 9.4 above.
570 Paragraph 4.3.3 in Chapter Four of this thesis.
571 See similar comments in paragraph 9.4 above; also see discussions in paragraph 4.3.3 of Chapter Four of this thesis.
572 See related comments in paragraph 9.4 above; also see discussions in paragraphs 4.3.3 of Chapter Four of this thesis.
573 Clause 91(2)(b) of the Financial Markets Bill; clauses 86(2)(b) of the Financial Markets Bill 2012 & also see similar remarks in paragraph 3.2.1 of Chapter Three of this thesis.
Additionally, unlike the situation in the European Union\(^{574}\) where the EU Market Abuse Directive encourages mutual co-operation between the regulatory authorities and other relevant stakeholders in all the different European Union member states,\(^{575}\) the Securities Services Act, the Financial Markets Bill and the Financial Markets 2012 do not expressly provide for such international co-operation in South Africa.\(^{576}\)

In contrast to the Financial Services Authority,\(^{577}\) it is not certain whether the Financial Services Board has also entered into some co-operation arrangements with international regulatory bodies that deal with commodities-based market abuse practices such as the Commodity Futures Trading Commission, the London International Financial Futures and Options Exchange Administration and Management and the Trade Point Stock Exchange.\(^{578}\) Likewise, it is not clear whether South Africa has also ratified any agreement with the Organisation for Economic Co-operation and Development\(^{579}\) in order to enable the Financial Services Board to improve its policies regarding the monitoring, investigation, information gathering and the adoption of other appropriate market abuse enforcement approaches. Nevertheless, the Financial Services Board should be commended for its great efforts to respond to the mounting global concern over the negative effects of market abuse activities.\(^{580}\) It has, for instance, joined the International Organisation of Securities Commissions in order to learn from the experiences of similar regulatory bodies that are members of the International Organisation of Securities Commissions.\(^{581}\) For example, in light of this, the Financial Services Board can rely on its International Organisation of Securities Commissions membership to co-operate with other regulators such as the Securities and Exchange Board of India to track and investigate market abuse activities that relate to the affected securities in South Africa by the perpetrators who anonymously dealt in such securities while in India.\(^{582}\)

\(^{574}\) See related remarks in Chapter Six of this thesis.

\(^{575}\) See Chapter Six of this thesis; also see related remarks in paragraph 9.6 above.

\(^{576}\) See the relevant sections under Chapter VIII entitled Market Abuse in the Securities Services Act; also see the relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill as well as in the Financial Markets Bill 2012.

\(^{577}\) See paragraphs 7.5.1 & 7.6.3 read with paragraph 7.6.2 in Chapter Seven of this thesis.

\(^{578}\) This might further suggest that commodities-based cross-border market abuse practices are not being sufficiently detected and prosecuted in South Africa.


\(^{580}\) See paragraph 4.3.3 in Chapter Four of this thesis

\(^{581}\) Generally see related comments in paragraph 9.4 above; also see similar discussions in paragraphs 3.2.1 & 4.3.3 of Chapters Three & Four of this thesis respectively.

\(^{582}\) Also see similar comments in paragraphs 3.2.1 & 4.3.3 of Chapters Three & Four of this thesis respectively.
However, it is unclear whether the Financial Services Board has concluded any binding co-operation Memorandum of Understanding with the Securities and Exchange Board of India in relation to the enforcement of the cross-border market abuse prohibitions.

As is the position in Australia, as stated above, the Financial Services Board is reported to have concluded some separate mutual co-operation agreements with the United States Securities and Exchange Commission and the Financial Securities Authority. Moreover, although more may still need to be done by the Financial Services Board to increase the consistent enforcement of these co-operation agreements to improve its own detection, investigation and prosecution of cross-border market abuse cases in South Africa, it is encouraging that the Financial Services Board has at least taken the initiative to co-operate and/or seek the relevant enforcement support from other regulators at an international level. In addition, like the Australian Securities and Investments Commission, the Financial Services Board is a signatory of the International Organisation of Securities Commissions Multilateral Memorandum of Understanding. Thus, like the Australian Securities and Investments Commission, and as stated above, the Financial Services Board may also utilise surveillance, investigation and detection support from other International Organisation of Securities Commissions Multilateral Memorandum of Understanding member regulators to combat cross-border market abuse practices in South Africa. Nevertheless, in contrast to the Australian Securities and Investments Commission, the Financial Services Board has, in relatively few instances, reportedly managed to rely on other International Organisation of Securities Commissions’ Multilateral Memorandum of Understanding member regulators for some market abuse prohibition enforcement support. It is hoped that the Financial Services Board will consider entering into more co-operation agreements with other renowned international regulators like the Ontario Securities Commission and the Australian Securities and Investments Commission to strengthen and improve its enforcement of the market abuse

583 See paragraph 8 4 3 in Chapter Eight of this thesis.  
584 Notably, the Memorandum of Understanding (MOU) between the Financial Services Board and the United States Securities and Exchange Commission was signed in Pretoria on 01 April 1996.  
585 See similar remarks in paragraph 4 3 3 in Chapters Four of this thesis.  
586 See paragraph 8 4 3 in Chapter Eight of this thesis.  
587 See paragraph 8 4 3 in Chapter Eight of this thesis.  
588 Generally see related comments in paragraph 9 4 above.  
589 See paragraph 8 4 3 in Chapter Eight of this thesis.  
590 See generally similar remarks above & paragraph 9 4 above.
prohibition. This could potentially improve the Financial Services Board’s investigation and detection of cross-border market abuse activities in South Africa and elsewhere.591

9 10 Evaluation and Analysis of the Adoption of Adequate Preventative Measures

A considerable number of methods are also used to prevent market abuse practices in South Africa. In other words, South Africa has made some significant efforts to promote and build a good anti-market abuse culture among all the relevant persons in both regulated and unregulated financial markets. As in the United States of America, South Africa relies on civil, criminal, and administrative sanctions to deter and discourage unscrupulous persons from engaging in market abuse activities. Nevertheless, unlike the position in the United States of America, and as already pointed out, the Securities Services Act’s market abuse civil sanctions are only limited to cases involving insider trading. As stated earlier, this flaw could be addressed by the Financial Markets Bill as it now extends civil sanctions to market manipulation offences. Furthermore, apart from the workshops, seminars, presentations and the JSE’s Insider Trading Booklet, no other measures were employed by the Financial Services Board or other enforcement agencies to increase awareness and prevent market abuse activity in the South African financial markets. Moreover, the South African legislature did not employ other methods like incentives, bounty rewards and whistle-blower immunity to encourage informants to voluntarily report all suspected market abuse activities to the Financial Services Board or other relevant enforcement authorities. It is submitted in line with the position in the United States of America and the United Kingdom, that the

591 Nevertheless, it is encouraging that the FSB has reportedly entered into a co-operation MOU with the Emirates Securities and Commodities Authority (ESCA) of the United Arab Emirates in April 2007.
592 Paragraphs 5 3 2; 5 3 3; 5 3 5 & 5 3 6 in Chapter Five of this thesis.
593 Paragraphs 9 2 1 & 9 3 1 above & see further paragraph 4 4 7 in Chapter Four of this thesis.
594 Paragraphs 5 3 2; 5 3 3; 5 3 5 & 5 3 6 in Chapter Five of this thesis.
595 See related remarks in paragraph 9 3 1 read with paragraph 9 2 1 above.
596 This implies that other market abuse practices like trade-based market manipulation and disclosure-based market manipulation do not lead to civil liability on the part of the offenders in South Africa. See s 77 of the Securities Services Act.
597 See related remarks in paragraph 9 3 1 read with paragraph 9 2 1 above.
598 See clause 87 read with clauses 84 & 85 of the Financial Markets Bill; no similar provision is made in the Financial Markets Bill 2012.
599 Paragraph 4 4 6 in Chapter Four of this thesis.
600 Paragraph 4 4 7 in Chapter Four of this thesis; also see paragraph 9 2 1 above.
601 See paragraph 5 5 3 in Chapter Five of this thesis.
602 See paragraph 7 7 in Chapter Seven of this thesis.
Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to provide specific market abuse whistle-blower immunity provisions for the purposes of encouraging all persons to report market abuse activities to the Financial Services Board and/or other relevant enforcement authorities in South Africa. On the other hand, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have provisions that authorise a specific regulatory body to enforce and prohibit Internet-based market abuse practices. Moreover, in contrast to the United States of America’s multi-functional regulatory model, South Africa gives the Financial Services Board the main responsibility of enforcing the market abuse provisions. In addition, unlike the Australian Competition and Consumer Commission, other self-regulatory bodies like the JSE may only refer any suspected market abuse activities to the Financial Services Board for further investigations. Furthermore, there is no express statutory private right of action for the affected persons to claim their damages directly from the offenders in South Africa.

In addition, as stated earlier, in spite of some inconsistencies that sometimes occur regarding the interpretation of the provisions of the EU Market Abuse Directive, a number of the European Union member states have successfully adopted some relevant rules, regulations, legislation and/or other relevant measures to implement the provisions of the EU Market Abuse Directive in order to inter alia combat cross-border market abuse practices.

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603 Notably, although s 159 of the Companies Act 71 of 2008; the Protected Disclosures Act 26 of 2000; s 9 of the South African constitution & the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 can be employed to protect shareholders, directors and other employees from occupational reprisals, there are no specific provisions in the Securities Services Act, the Financial Markets Bill & the Financial Markets Bill 2012 that can be used to encourage and/or protect market abuse whistle-blowers from such reprisals.

604 See s 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012. Also see related comments in paragraph 9 3 above.

605 See Chapter Five of this thesis.

606 Although other regulatory bodies like the JSE, the Directorate of Market Abuse, the Director of Public Prosecutions, the Board of Appeal, the Enforcement Committee and the Securities Regulation Panel are also involved in the enforcement of the securities and market abuse laws, there are no regulatory bodies or self-regulatory organisations other than the FSB that are expressly and statutorily empowered to make their own rules for the purposes of enforcing or combating market abuse practices in South Africa. See generally related analysis under paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis.

607 See paragraph 8 5 in Chapter Eight of this thesis.

608 Accordingly, the FSB may investigate such matters and/or refer criminal matters to the Director of Public Prosecutions for prosecution or to the Enforcement Committee for further administrative action.

609 See further related remarks in paragraphs 9 2 1 & 9 3 1 read with paragraphs 9 2 & 9 3 above.

610 See the discussion in paragraph 6 4 5 in Chapter Six of this thesis.
However, unlike the position of the regulatory bodies in the European Union, the Financial Services Board may extra-territorially enforce the Securities Services Act’s market abuse provisions only where some co-operation arrangements with similar bodies elsewhere exist. The same status quo is set to be retained under the Financial Markets Bill and/or the Financial Markets Bill 2012. Moreover, unlike the position under the EU Market Abuse Directive, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have specific definitions of inside information as regards to commodity derivatives and professional intermediaries so as to curb market abuse activities, particularly front running, by brokers and/or other market participants in the South African financial markets. In this regard, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 employ a slightly distinct and different approach from that which is followed under the EU Market Abuse Directive. Accordingly, it remains to be seen whether the approach employed in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012, especially in relation to the interpretation and application of the market abuse prohibition, will enable the Financial Services Board and other relevant authorities to prevent market abuse activities in South Africa robustly and consistently.

Unlike the position in the United Kingdom, there was no attempt on the part of the South African legislature to define the concept of market abuse comprehensively. In addition,
unlike the position in the United Kingdom, the Financial Services Board is not statutorily authorised to impose unlimited financial penalties on the market abuse offenders. As indicated before, no separate and distinct penalties for violating market abuse provisions are given to individuals and companies in South Africa. Furthermore, in contrast to the situation in the United Kingdom, the Financial Services Board is not statutorily empowered to issue public statements to expose the perpetrators of market abuse under the Securities Services Act. Therefore, it is not very clear whether this name and shame approach may be used by the Financial Services Board in conjunction with another penalty for market abuse deterrence purposes under the Securities Services Act.

Detection and surveillance is another method employed by the enforcement authorities in South Africa to prevent market abuse practices. Thus, like the position in the United Kingdom where market abuse surveillance is extended to all the prescribed financial markets, such surveillance is also usually restricted to the regulated financial markets in South Africa. Moreover, as is the position with the Financial Services Authority, the Financial Services Board uses the investigation and information gathering method to identify and prevent all possible contravention of market abuse provisions by both individuals and companies in South Africa. In line with this, as has already been said, in most instances the Directorate of Market Abuse may, on behalf of the Financial Services Board, summon, interrogate or search and seize documents or material from any person or premises when it

626 See Chapter VIII of the Securities Services Act; Chapter X of the Financial Markets Bill; Chapter X of the Financial Markets Bill 2012 & also see paragraphs 9 2 & 9 3 above.
627 See analysis in paragraphs 7 4 & 7 5 1 in Chapter Seven of this thesis.
628 See s 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012 & also see analysis in paragraph 4 4 5 in Chapter Four of this thesis.
629 See paragraph 9 2 1 & 9 3 1 above.
630 This could probably fail to deter and prevent all persons especially companies or other entities from wilfully indulging in market abuse activities. S 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012 & also see analysis in paragraph 4 4 5 in Chapter Four of this thesis.
631 See related remarks in paragraph 7 4; 7 5 1 & 7 7 in Chapter Seven of this thesis.
632 S 82. It is generally believed that potential offenders might desist from committing market abuse offences if they are aware that their identity and illicit trading practices, if caught, will be made public.
633 See generally paragraphs 7 5 3 & 7 6 2 in Chapter Seven of this thesis.
634 See paragraphs 7 5 1 & 7 7 in Chapter Seven of this thesis.
635 S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012. Also see paragraph 4 2 read with paragraph 3 2 1 in Chapters Four & Three of this thesis respectively.
636 See further paragraphs 9 4 above; also see paragraphs 4 3 1 & 3 2 1 in Chapters Three & Four of this thesis.
objectively believes that such material or documents are relevant to the market abuse matter under investigation. However, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly empower the Financial Services Board to appoint other additional competent persons apart from the members of the Directorate of Market Abuse to investigate the occurrence of market abuse activities in the South African financial markets.

Awareness and educational programmes have further been employed by the Financial Services Board in an attempt to prevent market abuse practices in the South African financial markets. The Financial Services Board, for example, issues some quarterly informative market abuse booklets on its website to increase the general awareness among the market participants and all the relevant stakeholders. However, unlike the Financial Services Authority which was statutorily obliged to publish a detailed Code of Market Conduct, the Financial Services Board is not expressly and statutorily empowered to provide a similar code of market conduct to increase market abuse awareness and promote a good anti-market abuse corporate ethics culture in South Africa.

Lastly, like the Australian Securities and Investments Commission, and as earlier stated, the Financial Services Board employs the investigation and information gathering method to prevent market abuse activity in South Africa. However, it is not clear whether the Financial Services Board has measures in place to enable it to work closely with the South African Police Services when conducting its market abuse investigations. Additionally, in contrast to the Australian Stock Exchange and the Australian Securities and Investments Commission’s position, the Financial Services Board does not have statutory authority to

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638 S 83 read with s 84 of the Securities Services Act.
639 S 82 & s 83 read with s 84 of the Securities Services Act.
641 See related analysis in paragraph 9.4 above.
642 See similar discussions above & in paragraph 4.4.6 in Chapters Four of this thesis.
643 See paragraphs 7.5.1 & 7.7 in Chapter Seven of this thesis.
644 See Chapter VIII of the Securities Services Act; Chapter X of the Financial Markets Bill & Chapter X of the Financial Markets Bill 2012, which outlines market abuse offences in South Africa. Also see the analysis in paragraph 9.4 above & paragraphs 4.4.6 & 4.4.7 in Chapter Four of this thesis.
645 See paragraph 8.5 in Chapter Eight of this thesis.
646 S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012 & also see paragraph 3.2.1 in Chapter Three of this thesis.
647 See paragraphs 8.5 & 8.3.1 in Chapter Eight of this thesis.
declare any contravention of market abuse provisions in South Africa whenever such contravention occurs. In this regard, it is hoped that South Africa will follow the position in Australia and empower the Financial Services Board to declare any contravention of market abuse provisions in South Africa for deterrence purposes whenever such contravention occurs.

Market surveillance is also used to detect and prevent market abuse activity in South Africa. Nonetheless, unlike the position in Australia, the JSE (not the Financial Services Board) operates some computerised surveillance systems which detect suspected market abuse activities in relation to listed securities in South Africa. Additionally, the JSE Equities Rules do not impose a mandatory duty on the issuers of listed securities to notify either the Financial Services Board or the JSE of any detected or suspected market abuse violations. Moreover, in contrast to the situation in Australia, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly provide for a continuous disclosure requirement on the part of the issuers of listed securities. In relation to this, it is hoped that South Africa will consider adopting the Australian approach and introduce both the structured (periodic) and continuous disclosure requirements to enable the JSE and/or the Financial Services Board to oblige all the listed public entities and directors of such entities to disclose their interests in securities of those entities promptly and consistently to prevent market abuse practices in South Africa. Moreover, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically provide for the Chinese walls and their use in preventing market abuse activities between the different departments of the companies. In relation to this, it is hoped that South Africa will consider adopting the

649 See paragraphs 8.5 & 8.31 in Chapter Eight of this thesis.
650 In relation to this, if the Financial Markets Bill and/or the Financial Markets Bill 2012 comes into force, the Financial Services Board could be merely allowed to publish the status and outcome of the market abuse investigations when the publication is in the public interest. See clause 91(2)(e) of the Financial Markets Bill & clause 86(2)(e) of the Financial Markets Bill 2012.
651 See paragraphs 8.32; 8.31 & 8.5 in Chapter Eight of this thesis.
652 See paragraph 8.3.5 in Chapter Three of this thesis; paragraph 9.4 above.
653 See the JSE Equities Rule 8.10.7; also see Cassim 2008 S Afr Merc LJ 196-198.
654 See paragraph 8.5 in Chapter Eight of this thesis.
655 See paragraph 8.5 in Chapter Eight of this thesis.
656 S 73; s 75; s 76 & s 77 of the Securities Services Act; clauses 82; 84; 85; 86 & 87 of the Financial Markets Bill & clauses 80; 82; 83 & 84 of the Financial Markets Bill 2012.
Australian approach and enact adequate statutory provisions to deal with Chinese walls and private right of actions for the affected persons in order to reduce and/or discourage market abuse practices in South Africa. Like the current position in Australia and as highlighted earlier, some self-regulatory organisations are also involved in the enforcement of the market abuse prohibition in South Africa.

However, both the South African and Australian market abuse regimes do not use bounty rewards to encourage more persons to provide both the Financial Services Board and the Australian Securities and Investments Commission with the relevant information that can lead to the recovery of civil remedies from the market abuse offenders. It is hoped that specific provisions for bounty rewards will be introduced in South Africa to prevent market abuse activities.

9 11 Concluding Remarks

It was noted that, unlike the multi-functional regulatory approach of the United States of America, South Africa mainly empowers the Financial Services Board to supervise and oversee the enforcement of its market abuse prohibition. Moreover, despite the fact that the Financial Services Board has to date managed to obtain some settlements in civil cases of market abuse, it falls short when comparing its anti-market abuse enforcement record with that of similar foreign regulatory bodies like the United States Securities and Exchange Commission, the Financial Securities Authority and the Australian Securities and Investments Commission. For example, unlike the Financial Services Board, the United States Securities and Exchange Commission has in a number of instances not rigidly imposed

657 See paragraph 8 5 in Chapter Eight of this thesis.
658 See paragraph 8 5 in Chapter Eight of this thesis.
659 See further related remarks in paragraph 9 6 above.
660 See paragraphs 3 2 2; 3 2 3; & 3 2 5 in Chapter Three of this thesis.
662 See paragraphs 9 4; 9 6 & 9 10 above; also see paragraphs 5 4 3 & 5 5 2 in Chapter Five of this thesis.
663 Also see paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
664 Paragraph 9 4 above.
665 See paragraph 9 4 above; see further paragraph 5 4 1 in Chapter Five of this thesis & paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
666 See paragraph 7 5 1 in Chapter Seven of this thesis.
667 See paragraph 8 3 1 in Chapter Eight of this thesis.
668 See paragraph 3 2 1 in Chapter Three of this thesis & paragraphs 4 2 & 4 3 1 in Chapter Four of this thesis.
its own civil monetary fines; other self-regulatory organisations under its supervision have
further awarded their own penalties to discourage market abuse practices in the United States
of America. On the contrary, in South Africa, it is not certain whether other self-regulatory
organisations like the JSE may impose their own civil or administrative market abuse
penalties, apart from those of the Financial Services Board. Put differently, it was noted
that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill
2012 do not expressly provide whether other self-regulatory organisations in South Africa are
empowered like the Financial Services Board to impose their own penalties or to take any
other appropriate action against the market abuse offenders in South Africa. Given this
current status quo, as indicated above, it remains to be seen whether the Financial Services
Board will be equally comparable to the Financial Services Authority, the United States
Securities and Exchange Commission and the Australian Securities and Investments
Commission in relation to the investigation, detection, settlement and prosecution of market
abuse offences in South Africa. Moreover, it was also acknowledged that the Securities
Services Act does not expressly provide civil penalties and remedies for market manipulation
offences. It was accordingly submitted that this omission on the part of the legislature
could potentially weaken South Africa’s market abuse regime, compared to similar foreign
legislation in countries like the United States of America. It was also stated that this flaw
could be addressed by the Financial Markets Bill as it now empowers the Financial Services
Board to claim legal costs and civil compensatory penalties of up to three times the profit
gained or loss avoided plus interest from the market manipulation offenders. In addition, it
was noted that the Securities Services Act, the Financial Markets Bill and the Financial
Markets Bill 2012 fall short when it comes to the statutory provision and policing of
commodities-based market manipulation remedies in South Africa.

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669 See paragraph 5 4 3 read with paragraph 5 5 2 in Chapter Five of this thesis; also see paragraph 9 4 above.
670 Apparently, other regulatory bodies like the JSE and the Securities Regulation Panel are not statutorily
and expressly empowered to impose their own penalties upon the market abuse offenders in South Africa.
671 See Chapter VIII of the Securities Services Act, Chapter X of the Financial Markets Bill & Chapter X of
the Financial Markets Bill 2012. Also see paragraphs 9 4; 9 6 & 9 8 above.
672 Generally see paragraphs 9 4; 9 6 & 9 8 above; also see related discussions in paragraphs 4 2 in Chapters
Four of this thesis.
673 S 75 & s 76; also see Cassim 2008 SA Merc LJ 192 & related remarks in paragraphs 9 3; 9 2 1 & 9 3 1
above. This suggests that persons who fall victim to market manipulation practices are left to find their
own civil remedies. Also see Cassim 2008 SA Merc LJ 36.
674 See paragraph 9 3 1 above.
675 See clause 87 of the Financial Markets Bill; no similar provision is made in the Financial Markets Bill
2012 & related remarks in paragraphs 9 3; 9 2 1 & 9 3 1 above.
676 See paragraph 9 3 1 above.
It was further noted that, in spite of the fact that the Financial Services Board like the United States Securities and Exchange Commission is a member of the International Organisation of Securities Commissions and has signed co-operative agreements with other regulators like the United States Securities and Exchange Commission to discourage cross-border market abuse practices, not even a single case involving such practices has been reported and/or settled with the Financial Services Board to date. Nevertheless, the Financial Services Board is still to fully utilise the support from other International Organisation of Securities Commissions Multilateral Memorandum of Understanding member regulators to combat cross-border market abuse activities. Put differently, unlike the position in the European Union, minimal attention has been given to combat cross-border market abuse practices in South Africa. It was additionally noted that notwithstanding the fact that the Financial Services Board, like the Financial Securities Authority and the Australian Securities and Investments Commission, has also concluded some Memoranda of Understanding with the United States Securities and Exchange Commission and the Financial Securities Authority, relatively little progress has been made by the Financial Services Board to fully utilise such Memoranda of Understanding to combat cross-border market abuse activities in South Africa. Moreover, it remains to be seen whether the South African self-regulatory organisations’ enforcement efforts will be fairly comparable to those of Australia, the United Kingdom and the United States of America, particularly in relation to the detection and prosecution of cross-border market abuse practices. It was also submitted that

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677 For example, during the period between March 2008 and June 2011 the Financial Services Board managed to give some undisclosed assistance to other foreign regulators only in four cases involving the Australian Securities and Investments Commission; the Belgium Banking, Finance and Insurance Commission; the Jersey Financial Services Commission and the Commodity Futures Trading Commission, generally see related comments and analysis on the Directorate of Market Abuse’s past investigations by the Financial Services Board (28-06-2011) <http://www.fsb.co.za/ftp://ftp.fsb.co.za/public/documents/AReport2011.pdf> (accessed 22-11-2011); also see paragraphs 9 4; 9 6 & 9 9 above.

678 See paragraphs 9 4; 9 6 & 9 9 above; also see related comments in paragraphs 4 2 & 4 3 3 Chapters Four of this thesis.

679 Generally see paragraph 6 4 5 in Chapter Six of this thesis.

680 See further related discussions in paragraphs also see paragraphs 9 4; 9 6 & 9 9 above; also see paragraphs 3 2 7 & 4 3 3 in Chapters Three & Four of this thesis respectively.

681 See paragraphs 7 5 1 & 7 6 3 in Chapter Seven of this thesis.

682 See paragraphs 8 3 1 & 8 4 3 in Chapter Eight of this thesis.

683 See related remarks in paragraphs 9 4 to 9 10 above; also see related comments in paragraphs 4 2 & 4 3 3 Chapters Four of this thesis.

684 See paragraph 8 4 2 in Chapter Eight of this thesis.

685 See paragraph 7 6 2 in Chapter Seven of this thesis.

686 See paragraph 5 5 2 in Chapter Five of this thesis.

687 See paragraphs 9 6 & 9 8 above.
while the reasons for the lack of reported successful cases of cross-border market abuse prosecutions and settlements remain unclear, one can conclude that this might have been caused by the unavailability of sufficient resources and the adoption of inadequate preventative measures on the part of the Financial Services Board, as a national regulator, to monitor and enforce the market abuse prohibition, both at a local and international level.\textsuperscript{688} It was further submitted that the absence of the Financial Services Board’s own market abuse surveillance systems could have aggravated the paucity of successful cases of cross-border market abuse prosecutions and settlements in South Africa.\textsuperscript{689} Moreover, it was acknowledged that, like the Department of Justice in the United States of America,\textsuperscript{690} the Director of Public Prosecutions is responsible for the criminal prosecution of market abuse cases in South Africa.\textsuperscript{691} It was further noted that, unlike the Department of Justice in the United States of America,\textsuperscript{692} the Director of Public Prosecutions has not been able to obtain more convictions in matters involving market abuse in South Africa to date.\textsuperscript{693} In relation to this, it was stated that some market abuse cases have either been abandoned or withdrawn.\textsuperscript{694} Moreover, it was also indicated that although it may be \textit{prima facie} presumed that the Financial Services Board supports the Director of Public Prosecutions and the relevant courts with the necessary information regarding ongoing market abuse cases in South Africa, it is not clear whether the Financial Services Board is statutorily mandated to assign certain persons with the relevant expertise to assist the courts in their prosecution of such cases.\textsuperscript{695} Additionally, it was highlighted that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have specific provisions which give private rights of action (class actions) to all the prejudiced persons to increase deterrence and to afford such persons the opportunity to claim their own compensatory damages straight from the market.

\textsuperscript{688} Paragraphs 4 2; 4 3 1; 4 3 3; 4 3 4; & 4 5 in Chapter Four of this thesis; also see further discussions in paragraph 3 2 7 in Chapter Three of this thesis.

\textsuperscript{689} See paragraphs 9 4; 9 6; 9 8 & 9 10 above; see further discussions in paragraphs 3 2 1; 3 2 5 & 3 2 7 in Chapter Three of this thesis & also see related remarks in paragraph 4 2 in Chapter Four of this thesis.

\textsuperscript{690} Paragraphs 5 4 2 & 5 5 1 in Chapter Five of this thesis.

\textsuperscript{691} Paragraphs 9 5 & 9 7 above; paragraph 3 2 6 in Chapter Three of this thesis.

\textsuperscript{692} Paragraphs 5 4 2 & 5 5 1 in Chapter Five of this thesis.

\textsuperscript{693} See paragraphs 9 5 & 9 7 above; also see 3 2 6 & 4 2 in Chapters Three & Four of this thesis.

\textsuperscript{694} See paragraphs 9 5 & 9 7 above; also see 3 2 6 & 4 2 in Chapters Three & Four of this thesis.

\textsuperscript{695} See related remarks in paragraphs 9 5 & 9 7 above& also generally see paragraph 3 2 6 in Chapter Three of this thesis.
abuse offenders. This could also suggest that, unlike the position in the United Kingdom, all the persons who are prejudiced by market abuse activities are not statutorily given the opportunity to independently claim their compensatory damages directly from the perpetrators of such activities in South Africa. Put differently, it was noted that only the Financial Services Board is statutorily empowered to bring a civil action on behalf of all the persons affected by market abuse practices in terms of the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012. It was further stated that this approach has, in a way, contributed to the scanty and inconsistent enforcement of the market abuse prohibition in South Africa. Moreover, unlike the position in Australia, this approach could have been worsened by the absence of a mandatory duty of continuous disclosure on the part of the issuers of listed securities to prevent the market abuse offences in South Africa.

It was noted that, as is the case with the current European Union market abuse regime, a number of regulatory and enforcement measures have also been employed to curb market abuse in South Africa. For example, the Securities Services Act was introduced in 2005 to improve, among other things, the regulation of market abuse in South Africa. Furthermore, the Financial Markets Bill and the Financial Markets Bill 2012 were recently introduced in a bid to improve and remedy some of the flaws that are contained in the Securities Services Act, especially with regard to the enforcement of the market abuse prohibition in South Africa. In addition, it was noted that a number of regulatory authorities such as the

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696 Paragraphs 9 2 1; 9 3 1 & 9 10 above; see further s 73; s 75; s 76; s 77 read with s 78 & s 82 of the Securities Services Act; also see clauses 82; 84; 85; 86; 87 read with clauses 88 & 91 of the Financial Markets Bill & clauses 80; 82; 83 & 84 read with clause 86 of the Financial Markets Bill 2012.
697 See paragraphs 7 4 & 7 7 in Chapter Seven of this thesis.
698 See related comments in paragraphs 9 2 1; 9 3 1 & 9 10 above.
699 S 82 of the Securities Services Act.
700 See clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012 & also see related comments in paragraphs 9 2 1; 9 3 1 & 9 10 above.
701 See related comments in paragraphs 9 2 1; 9 3 1 & 9 10 above.
702 See paragraphs 8 3 1; 8 2 7 4 2 & 8 5 in Chapter Eight of this thesis.
703 See paragraph 9 10 above.
704 See paragraphs 6 4 1 to 6 4 5 in Chapter Six of this thesis.
705 See related remarks in paragraphs 9 4 to 9 10 above.
706 The Securities Services Act was assented to on 18 January 2005 and it introduced Chapter VIII which deals specifically with the regulation of market abuse in South Africa. See further details in s 72 to s 87 of the Securities Services Act.
707 See the relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill & relevant clauses under Chapter X entitled Market Abuse in the Financial Markets Bill 2012.
Financial Services Board, the Directorate of Market Abuse, the Enforcement Committee, the Board of Appeal, the JSE, and the competent courts have to date been fairly involved in the enforcement of the market abuse provisions in South Africa. Furthermore, it was noted that, unlike the position in the European Union, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly provide any provisions that require issuers or their agents to draw up and update their employee or insider’s lists and/or such issuers, managers or directors of juristic persons to immediately report (mandatory duty of disclosure) any suspicious transactions to the relevant authorities in South Africa. It was additionally noted that, in contrast to the EU Market Abuse Directive and the subsequent Market Abuse Regulation Proposal, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not seem to expressly provide whether the Financial Services Board or other relevant regulatory authorities have the authority to access telephone and existing data traffic records from companies, issuers of securities and other suspected market abuse offenders in order to track down and meritoriously discourage the commission of market abuse offences in South Africa. In this regard, it is acknowledged that adopting the approach employed in the EU Market Abuse Directive or the subsequent Market Abuse Regulation Proposal could assist the regulatory authorities in South Africa to curb the occurrence of market abuse activities in both the regulated and unregulated financial markets as much as possible. Unlike the position in the European Union, it was noted that in South Africa it is not provided whether the issuers of securities are statutorily allowed to delay or defer the publication of inside information, especially where such delay could be reasonable and justifiable. In relation to this, it is acknowledged that the provisions of the Market Abuse Regulation Proposal that deal with the definition of inside information, market manipulation and the dissemination of inside information could become so handy in the

708 See related remarks in paragraphs 9.4 to 9.10 above.
709 See paragraph 6.4.5 in Chapter Six of this thesis.
710 See the relevant provisions under Chapter VIII of the Securities Services Act, relevant provisions under Chapter X of the Financial Markets Bill & relevant provisions under Chapter X of the Financial Markets Bill 2012 & also see paragraphs 9.2; 9.3 & 9.10 above.
711 See paragraph 6.4.5 in Chapter Six of this thesis.
712 See relevant provisions under Chapter VIII of the Securities Services Act; relevant provisions under Chapter X of the Financial Markets Bill; relevant provisions under Chapter X of the Financial Markets Bill 2012 & also see paragraphs 9.2; 9.3 & 9.10 above.
713 See paragraph 6.4.5 in Chapter Six of this thesis.
714 See paragraphs 6.4.5 & 6.5 in Chapter Six of this thesis.
715 S 72 to s 87 of the Securities Services Act; clauses 81 to 95 of the Financial Markets Bill & clauses 79 to 90 of the Financial Markets Bill 2012.
716 See paragraph 6.4.5 in Chapter Six of this thesis.
enforcement of the market abuse ban in South Africa. Moreover, it was indicated that in contrast to the situation in the European Union,\(^\text{717}\) no provision is expressly made under the Securities Services Act for the Financial Services Board to co-operate with similar bodies in South Africa and/or other jurisdictions.\(^\text{718}\) It was additionally noted that although the Financial Markets Bill and the Financial Markets 2012 now stipulates that the Financial Services Board may assist foreign regulators with investigations pertaining to any cross-border market abuse cases,\(^\text{719}\) it remains unclear whether the Financial Services Board is statutorily obligated to co-operate with other local enforcement bodies,\(^\text{720}\) for the purposes of enhancing and/or increasing the curbing of market abuse activities in South Africa.\(^\text{721}\) It was also indicated that, unlike the Securities Services Act\(^\text{722}\) the Financial Markets Bill and the Financial Markets Bill 2012,\(^\text{723}\) the EU Market Abuse Directive does not specifically provide the amount of remedies or penalties which may be imposed against the market abuse offenders.\(^\text{724}\) It was also acknowledged that this failure on the part of the EU Market Abuse Directive\(^\text{725}\) to provide common market abuse penalties that are applicable across the European Union member states has weakened and contributed to the inconsistent implementation of its provisions.\(^\text{726}\) It was further noted that this flaw is repeated in the Criminal Sanctions Market Abuse Directive Proposal\(^\text{727}\) while, on the other hand, the Market Abuse Regulation Proposal now provides specific civil or administrative pecuniary sanctions for market abuse.\(^\text{728}\)

\(^{717}\) Article 16 of the EU Market Abuse Directive; see further article 19 read with articles 16 to 18 & 20 of the Market Abuse Regulation Proposal & also see paragraph 6 4 5 in Chapter Six of this thesis.

\(^{718}\) See the relevant provisions under Chapter VIII of the Securities Services Act; also see paragraphs 9 2; 9 3 & 9 10 above.

\(^{719}\) Clause 91(2)(b) of the Financial Markets Bill; clause 86(2)(b) of the Financial Markets Bill 2012 & also see related remarks in paragraph 3 2 1 in Chapter Three of this thesis.

\(^{720}\) See the relevant provisions in Chapter X of the Financial Markets Bill & the relevant provisions in Chapter X of the Financial Markets Bill 2012.

\(^{721}\) Also see paragraphs 9 2; 9 3; 9 6; 9 7 & 9 8 & 9 10 above.

\(^{722}\) S 115(a).

\(^{723}\) Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.

\(^{724}\) Article 14 of the EU Market Abuse Directive. Nevertheless, regulatory bodies in the EU member states are allowed to determine and disclose the sanctions imposed on the market abuse offenders, see article 14(4) of the EU Market Abuse Directive. See paragraphs 9 2 1 & 9 3 1 above; also paragraphs 2 5 4 & 4 4 5 in Chapters Two & Four of this thesis respectively.

\(^{725}\) See paragraph 6 4 5 in Chapter Six of this thesis.

\(^{726}\) See paragraphs 9 2 1 & 9 3 1 above; also paragraphs 2 5 4 & 4 4 5 in Chapters Two & Four of this thesis respectively.

\(^{727}\) Articles 6 & 8; also see paragraph 6 4 5 in Chapter Six of this thesis.

\(^{728}\) Article 26(1)(k); (l) & (m) of the Market Abuse Regulation Proposal; also see paragraph 6 4 5 in Chapter Six of this thesis & paragraph 9 3 1 above.
Moreover, it was stated that the United Kingdom’s market abuse single regulator model is not employed in South Africa.\textsuperscript{729} In relation to this, it was accordingly noted that although other self-regulatory organisations like the JSE, the Directorate of Market Abuse, the Securities Regulation Panel and the Enforcement Committee are also involved in the enforcement of securities and market abuse laws as indicated earlier,\textsuperscript{730} only the Financial Services Board may make market abuse rules as well as other appropriate guidelines that govern the investigation of market abuse activities by such self-regulatory organisations and/or other relevant enforcement authorities in South Africa.\textsuperscript{731} It was also indicated that, unlike the Financial Services Authority,\textsuperscript{732} the Financial Services Board cannot impose unlimited financial penalties in matters involving criminal cases relating to market abuse in South Africa.\textsuperscript{733} Such unlimited penalties may only be imposed by the Enforcement Committee in respect of administrative cases for market abuse.\textsuperscript{734} Moreover, it was noted that the Financial Services Board is not expressly and statutorily authorised to impose separate and/or different penalties on individuals and companies that engage in market abuse activities.\textsuperscript{735} It was additionally noted that, unlike the position in Australia,\textsuperscript{736} the United Kingdom\textsuperscript{737} and the United States of America,\textsuperscript{738} the Financial Services Board does not publicise the names of the culprits who commit market abuse offences (name and shame approach) in South Africa. In line with this, it is hoped that these flaws will be corrected by the Financial Markets Bill and/or the Financial Markets Bill 2012 in order to improve the enforcement of the market abuse prohibition in South Africa.\textsuperscript{739} Furthermore, in contrast to the courts in the United Kingdom,\textsuperscript{740} Australia\textsuperscript{741} and the United States of America,\textsuperscript{742} the South African courts are

\begin{footnotes}
\footnotetext[729]{See paragraphs 9.4 & 9.6 above.}
\footnotetext[730]{See paragraphs 9.4 to 9.10 above.}
\footnotetext[731]{Generally see paragraphs 9.4 to 9.10 above; also see paragraphs 3.2.1 & 4.2 in Chapters Three & Four of this thesis respectively.}
\footnotetext[732]{Generally see paragraphs 7.5.1; 7.4 & 7.7 in Chapter Seven of this thesis.}
\footnotetext[733]{Generally see paragraphs 9.2.1; 9.3.1; 9.4 & 9.10 above.}
\footnotetext[734]{Generally see paragraphs 9.2.1; 9.3.1; 9.4 & 9.10 above.}
\footnotetext[735]{Generally see related comments in paragraphs 9.2.1; 9.3.1 & 9.10 above.}
\footnotetext[736]{See paragraphs 8.3.1 & 8.5 in Chapter Eight of this thesis.}
\footnotetext[737]{Generally see paragraphs 7.5.1; 7.5.3; 7.6.2 & 7.8 in Chapter Seven of this thesis.}
\footnotetext[738]{See related comments in Chapter Five of this thesis.}
\footnotetext[739]{Generally see related comments in paragraphs 9.2.1; 9.3.1 & 9.10 above.}
\footnotetext[740]{See paragraphs 7.5.2 & 7.6.1 in Chapter Seven of this thesis.}
\footnotetext[741]{See paragraphs 8.3.4 & 8.4.1 in Chapter Eight of this thesis.}
\footnotetext[742]{See paragraphs 5.4.2 & 5.5.1 in Chapter Five of this thesis.}
\end{footnotes}
still to obtain more settlements and convictions in market abuse cases.\textsuperscript{743} For example, there is no single insider trading case that has been successfully prosecuted in the South African courts to date.\textsuperscript{744} Moreover, relatively few cases of market manipulation have either been settled or prosecuted by our courts to date.\textsuperscript{745} Moreover, it was noted that in contrast to the Australian Securities and Investments Commission,\textsuperscript{746} the Financial Services Board has no statutory authority to make a declaration of a market abuse contravention whenever such contravention occurs in South Africa or elsewhere.\textsuperscript{747}

In view of the analysis above and notwithstanding the fact that a detailed analysis of the recommendations will be conducted in the last chapter, it is submitted that the following six recommendations could play a key role in the enforcement of the market abuse ban in South Africa:

Firstly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to provide adequate special or complementary definitions of inside information in relation to derivatives on commodities and/or to the persons (professional intermediaries) involved in the execution of orders relating to listed securities or other related derivative financial instruments. It is submitted that this could prevent the commission of front running or other market abuse activities pertaining to commodities derivatives by some unscrupulous financial brokers and/or other related market participants in South Africa;

Secondly, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly prohibit natural persons (agents or corporate insiders) who participate in the execution of transactions on behalf of a primary insider who is a legal or juristic person, from committing market abuse practices and other related organised crime activities in the South African financial markets;

\textsuperscript{743} See related remarks in paragraphs 9 5 & 9 7 above & also generally see paragraph 3 2 6 in Chapter Three of this thesis.
\textsuperscript{744} See related remarks in paragraphs 9 5 & 9 7 above & also generally see paragraph 3 2 6 in Chapter Three of this thesis.
\textsuperscript{745} See related remarks in paragraphs 9 5 & 9 7 above & also generally see paragraph 3 2 6 in Chapter Three of this thesis.
\textsuperscript{746} See paragraph 8 3 1 in Chapter Eight of this thesis.
\textsuperscript{747} S 82 of the Securities Services Act; clause 91 of the Financial Markets Bill; clause 86 of the Financial Markets Bill 2012 & also see generally paragraphs 9 2 1; 9 3 1; 9 4; 9 6; 9 8 & 9 10 above.
Thirdly, the definition of an insider which is provided in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to expressly acknowledge that a company (legal person) which repurchases its own shares would be an insider to itself. It is submitted that this will protect shareholders of a company against such company taking advantage of the non-public price-sensitive information to repurchase their shares at a lower price than what the company would have paid if the information had been made public;

Fourthly, the relevant courts in South Africa should be expressly and statutorily empowered to impose other additional penalties (apart from those stipulated in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012) upon the market offenders without the fear of violating the *autrefois acquit or autrefois convict* doctrine;

Fifthly, the Financial Services Board should consider employing infringement notices and enforceable undertakings to discourage market abuse activities in South Africa; and

Lastly, South Africa should consider adopting and implementing the relevant principles of the United Kingdom’s single regulator model because it is economical and less complex. This could increase the number of settlements and convictions in market abuse cases in South Africa.

Now that the overall comparative analysis of the enforcement of the market abuse ban in the European Union, the United Kingdom, Australia, South Africa and the United States of America has been undertaken, the next chapter will focus on the overall conclusions and recommendations.
CHAPTER TEN
CONCLUSIONS AND RECOMMENDATIONS

10 1  Introduction

As indicated in the previous chapter, this chapter focuses on the overall conclusions and recommendations. Put differently, this chapter will provide conclusions and recommendations on the enforcement of the market abuse ban in the European Union, the United Kingdom, Australia, the United States of America and South Africa. This will be done by firstly, providing the general observations regarding the enforcement of the market abuse ban in the European Union, the United Kingdom, Australia, the United States of America and South Africa. Secondly, the overall conclusions on the enforcement of the market abuse prohibition in each of these jurisdictions will be discussed. Lastly, overall recommendations from the European Union, the United Kingdom, Australia and the United States of America will be discussed in a bid to inter alia provide a new policy framework and/or propose provisions that will enhance the enforcement of the market abuse prohibition in South Africa. It is hoped that the recommendations in this chapter will help the legislature and other relevant stakeholders to revamp the current market abuse laws in order to develop an adequate and robust enforcement framework that consistently and effectively combats market abuse activities in the South African financial markets.

10 2  General Observations

The prohibition on market abuse in South Africa was introduced in the early 1970s in a bid to restore public investor confidence in the financial markets. This prohibition was later consolidated in the Securities Services Act. While this attempt on the part of the legislature to improve the regulation and enforcement of the market abuse prohibition by repealing and replacing all the previous statutes which dealt with such prohibition by the Securities Services Act was commendable, it was observed that previous flaws were repeated and new ones were

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1 See Chapters Two & Three of this thesis.
2 36 of 2004, hereinafter referred to as the Securities Services Act.
additionally introduced, particularly in relation to the enforcement of the insider trading ban. In relation to this, it was further observed that the same status quo is retained in the Financial Markets Bill and the Financial Markets Bill 2012. It was observed, as evidenced in the previous chapters, that the legislature’s good intentions with the adoption of the Securities Services Act and the drafting of the Financial Markets Bill and/or the subsequent provisions of the Financial Markets Bill 2012 are still to be reflected in an increase of market abuse prosecutions and settlements in South Africa. Notably, unlike the equivalent provisions in the United States of America, the United Kingdom, the European Union and Australia, the Securities Services Act has very few defences that relate to market manipulation. It was further noted that the Securities Services Act omitted to provide a statutory derivative civil remedy for market manipulation in South Africa. It was also observed that although the Securities Services Act brought fairly higher penalties for market abuse, it failed to provide separate and distinct penalties for companies (entities) and individuals in order to deter all the relevant persons from committing market abuse offences. It was further observed that this flaw was repeated in the Financial Markets Bill and the Financial Markets Bill 2012. Additionally, it was observed that, unlike the position in other jurisdictions like the United States of America, the United Kingdom, the European Union and Australia, South

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5 [B-2011], hereinafter referred to as the Financial Markets Bill.
6 [B12-2012], hereinafter referred to as the Financial Markets Bill 2012, (I have employed the term “clause” to refer to the provisions of both the Financial Markets Bill and the Financial Markets Bill 2012 because at the time of writing this Chapter & thesis, the aforementioned Bills were not yet effectively passed into law). Also see related discussion in Chapters Two; Three & Four of this thesis.
7 See related analysis in Chapters One, Two, Three & Four of this thesis.
8 See related analysis in Chapter Five of this thesis.
9 See related analysis in Chapter Seven of this thesis.
10 See related analysis in Chapter Six of this thesis.
11 See related analysis in Chapter Eight of this thesis.
12 Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (part 2)” 2008 SA Merc LJ 177 191; 198-199; also see discussions in Chapters Two; Three & Four of this thesis.
13 See discussions in Chapters Two; Three; Four & Nine of this thesis.
14 See discussions in Chapters Two; Three & Four of this thesis.
15 See discussions in Chapters Two; Three & Four of this thesis.
16 See related analysis in Chapter Five of this thesis.
17 See related analysis in Chapter Seven of this thesis.
18 See related analysis in Chapter Six of this thesis.
19 See related analysis in Chapter Eight of this thesis.
Africa does not seem to have an express statutory prohibition on Internet-based market abuse practices.\textsuperscript{20}

It was acknowledged that both the United States of America\textsuperscript{21} and the South African\textsuperscript{22} market abuse regimes have similar regulatory and enforcement goals and missions. In spite of this, they adopt and implement very different approaches to achieve their enforcement goals or targets.\textsuperscript{23} For instance, it was observed that the United States of America, unlike South Africa, employs a multi-functional regulatory approach which allows more positive competition among the regulatory bodies in order to give rise to a much better and consistent enforcement of the market abuse prohibition in its financial markets. It was also noted that although the South African market abuse legislation\textsuperscript{24} was relatively influenced by the corresponding legislation in the United States of America,\textsuperscript{25} it appears to lack a more practical enforcement approach to combat market manipulation activities in South Africa.\textsuperscript{26}

Moreover, it was observed that, unlike South Africa, the United Kingdom employs the so-called single regulator model to combat market abuse activities in all its relevant financial markets.\textsuperscript{27} It was additionally noted that although South Africa has adopted some of the enforcement methods that are employed in the United Kingdom,\textsuperscript{28} more may still need to be done to prevent and curb market abuse practices in the South African financial markets.\textsuperscript{29}

It was observed that, unlike the position in South Africa,\textsuperscript{30} the European Union Directive on Insider Dealing and Market Manipulation\textsuperscript{31} has devised useful definitions of some key

\textsuperscript{20} See discussions in Chapters Two; Three; Four & Nine of this thesis.
\textsuperscript{21} See Chapter Five of this thesis.
\textsuperscript{22} See discussions in Chapters Two; Three; Four & Nine of this thesis.
\textsuperscript{23} See discussions in Chapters Two; Three; Four & Nine read with Chapter Five of this thesis.
\textsuperscript{24} This is mainly true especially in relation to the insider trading prohibition.
\textsuperscript{25} See related analysis in Chapter Five of this thesis.
\textsuperscript{26} See the relevant discussions in Chapters Two; Three; Four & Nine of this thesis.
\textsuperscript{27} See related remarks in Chapter Seven of this thesis.
\textsuperscript{29} See discussions in Chapters Two; Three; Four & Nine of this thesis.
\textsuperscript{30} See discussions in Chapters Two; Three; Four & Nine of this thesis.
market abuse terms like “accepted market practices”, “regulated market”, “financial instruments”, “inside information” and “market manipulation” in order to enable all the European Union member states to implement its market abuse prohibition. In spite of this, it was noted that the EU Market Abuse Directive had some flaws especially with regard to, inter alia, (a) the mandatory duty for issuers and/or their agents to promptly disclose inside information, (b) issuers’ insider lists, (c) reporting of suspicious transactions and (d) the absence of specific common market abuse penalties applicable across all the European Union member states.

Furthermore, it was noted that the current Australian market abuse prohibition is broadly aimed at promoting, (a) equal access to the relevant non-public price-sensitive information, (b) market efficiency, (c) market fairness, (d) market integrity and (e) public investor confidence. It was also noted that, unlike in South Africa, the Australian market abuse regime contains both the structured and continuous mandatory disclosure requirements for the affected persons and/or issuers of securities to ensure that all the market participants have equal access to price-sensitive inside information relating to such securities. Furthermore, it was acknowledged that the Australian market abuse regime has devised several preventative polices, measures and procedures to identify and combat market abuse practices in its relevant financial markets.

10.3 Conclusions

In this thesis, it was concluded that the flaws, disparities and inconsistencies in the enforcement of the market abuse provisions is the core reason for this research, the rationale being to enhance co-operation between the enforcement authorities, promote market efficiency, market integrity and/or public investor confidence and to increase education and awareness thereof by adopting a robust anti-market abuse enforcement ethics culture in the South African financial markets.

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32 See Chapter Six of this thesis.
33 See Chapter Six of this thesis.
34 See paragraph 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
35 See discussions in Chapters Two; Three; Four & Nine of this thesis.
36 See related analysis in Chapter Eight of this thesis.
37 See similar remarks in Chapter One of this thesis.
This thesis also dealt with the historical regulation of market abuse in South Africa. In this regard, as discussed in Chapter Two, it was concluded that the various market abuse laws enacted in South Africa were mainly aimed at improving the regulation of market manipulation and insider trading to *inter alia* restore public investor confidence in our financial markets. It was further concluded that numerous amendments and changes to the market abuse legislation were introduced from time to time in a bid to improve the regulation of market abuse practices in South Africa. Nevertheless, in relation to this, it was concluded that both the Stock Exchanges Control Act and the Financial Markets Control Act had little success in combating market manipulation in South Africa. It was also concluded that the pioneering provisions in the Companies Act (including all its amendments) were not only inconsistent for the purposes of combating insider trading, but were also not properly enforced. It was additionally concluded that the enforcement (approaches) methods adopted under the Companies Act as amended were few and only restricted to criminal sanctions, and other methods such as whistle-blowing, bounty rewards and administrative sanctions were not considered. The Insider Trading Act was eventually enacted and welcomed as another attempt to enhance the enforcement of insider trading in South Africa. Not giving less regard to some key factors like the challenges involving the availability of adequate financial resources, it was concluded that the Insider Trading Act, like its predecessors, also failed to expressly provide for other alternative practical enforcement methods like administrative sanctions, whistle-blowing, private rights of action, the establishment of additional self-regulatory organs and specific insider trading courts or tribunals to complement the enforcement efforts of the Financial Services Board. As a result, the Securities Services Act was later introduced and it brought more elaborate civil remedies, new criminal penalties, administrative sanctions and additional regulatory bodies such as the Enforcement Committee, the Board of Appeal and the Directorate of Market

38 See the discussions under paragraphs 2; 2 3; 2 4; 2 5 & 2 6 in Chapter Two of this thesis.
39 See the discussions under paragraph 2 6 in Chapter Two of this thesis.
40 1 of 1985, hereinafter referred to as the Stock Exchanges Control Act.
42 See paragraph 2 2 3 in Chapter Two of this thesis.
43 61 of 1973, hereinafter referred to as the Companies Act.
44 See the discussions in paragraphs 2 3 1; 2 3 2 1 & 2 3 3 1 in Chapter Two of this thesis.
45 See paragraph 2 3 5 in Chapter Two of this thesis.
46 135 of 1998; hereinafter referred to as the Insider Trading Act.
47 See paragraph 2 3 5 in Chapter Two of this thesis.
48 See paragraph 2 3 5 in Chapter Two of this thesis.
Abuse in a bid to enhance regulation and enforcement of the market abuse ban in South Africa.\textsuperscript{49} It was nonetheless concluded that the concept of market abuse is not statutorily and expressly defined in the Securities Services Act.\textsuperscript{50} In light of this, it was suggested and concluded that enacting a statutory provision for a definition of the concept of market abuse involving all the types and/or elements of this offence (how it is committed), as well as adequate presumptions could improve the enforcement of the market abuse prohibition in South Africa.\textsuperscript{51} It was also concluded that instances where a “market corner” could have been formed in respect of, and/or influenced by the securities traded in the over the counter markets were not expressly outlawed under the Securities Services Act.\textsuperscript{52} The same flaw is retained in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{53} It was further concluded that the application of the market abuse prohibition under the Securities Services Act is not limited to situations where there is a territorial link between the actual commission of market abuse offences and South Africa.\textsuperscript{54} The same status quo is retained under the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{55} In light of this, it was suggested and concluded that the prohibition on market abuse should apply to transactions on foreign markets where a territorial link is present by virtue, either of the fact that the offender is at the time physically present in South Africa, or was acting through an intermediary who is in South Africa, or by virtue of the prohibited conduct occurring in South Africa.\textsuperscript{56} In addition, it was also indicated and concluded that the Securities Services Act has inconsistently prohibited three major forms of market abuse, namely insider trading, trade-based market manipulation and the disclosure-based market manipulation relating to listed securities in South Africa.\textsuperscript{57} Moreover, it was submitted and concluded that the fact that prejudiced persons who prove their claims as provided for in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 will only get their compensation after the Financial Services Board has recouped its costs and expenses in relation to a successful

\textsuperscript{49} See the discussions under paragraphs 2.4 & 2.5 in Chapter Two of this thesis.
\textsuperscript{50} See paragraph 2.4.1.1 in Chapter Two of this thesis.
\textsuperscript{51} See paragraph 2.4.1.1 in Chapter Two of this thesis.
\textsuperscript{52} See paragraph 2.4.1.2 in Chapter Two of this thesis.
\textsuperscript{53} See paragraph 2.4.1.2 in Chapter Two of this thesis.
\textsuperscript{54} See paragraph 2.4.1.3 in Chapter Two of this thesis.
\textsuperscript{55} See paragraph 2.4.1.3 in Chapter Two of this thesis.
\textsuperscript{56} See paragraph 2.4.1.3 in Chapter Two of this thesis.
\textsuperscript{57} See paragraphs 2.5.1; 2.5.2; 2.5.2.1; 2.5.2.2 & 2.5.3 in Chapter Two of this thesis.
litigation may, if not properly executed, give rise to bureaucracy and unnecessary delays before the affected persons receive their compensation.\textsuperscript{58}

Furthermore, an overview of the role-players in the enforcement of market abuse provisions in South Africa was provided in Chapter Three. In relation to this, it was inter alia concluded that the enforcement framework established under the Securities Services Act can be welcomed as a better move towards improving the enforcement of the market abuse provisions in South Africa and the eradication of a general belief that market abuse practices might be still rife in our financial markets.\textsuperscript{59} For example, it was concluded that in an attempt to establish a good enforcement framework, more elaborate definitions, civil remedies and new criminal penalties were introduced under the Securities Services Act.\textsuperscript{60} Likewise, it was concluded that the Directorate of Market Abuse was established as an investigatory arm of the Financial Services Board, while the Enforcement Committee was empowered to hear cases of market abuse and to impose unlimited administrative sanctions against anyone who violates the market abuse provisions in South Africa.\textsuperscript{61} It was further concluded that the Board of Appeal was also given the mandate to hear appeal matters by persons aggrieved by any decision of the Enforcement Committee, claims officer of the Financial Services Board or the Registrar of Securities Services.\textsuperscript{62} With regard to the detection, prevention and investigation of market abuse activities, it was concluded that the Financial Services Board depends mainly on the JSE’s Surveillance Division.\textsuperscript{63} Irrespective of this, it was noted and concluded that various shortcomings are still found in the enforcement of the market abuse provisions in South Africa.\textsuperscript{64} Notably, the criminal penalties imposed against market abuse offenders are still very little for deterrence purposes.\textsuperscript{65} The same deficiency is still contained in the Financial Markets Bill and the Financial Markets Bill 2012.\textsuperscript{66} Furthermore, it was concluded that the establishment of additional structures such as the Enforcement Committee to hear market abuse cases on a referral basis and the introduction of administrative sanctions have

\textsuperscript{58} See paragraph 2.5.4 in Chapter Two of this thesis.
\textsuperscript{59} Generally see the analysis in sub-paragraphs under paragraph 2.2 in Chapter Two of this thesis & paragraph 3.3 in Chapter Three of this thesis.
\textsuperscript{60} See the analysis in paragraphs 2.4.1.1; 2.4.1.2; 2.4.1.3 & 2.5.4 in Chapter Two of this thesis.
\textsuperscript{61} See paragraph 3.3 in Chapter Three of this thesis.
\textsuperscript{62} See paragraph 3.3 in Chapter Three of this thesis.
\textsuperscript{63} See paragraph 3.3 in Chapter Three of this thesis.
\textsuperscript{64} See the analysis in paragraphs 3.2.7 & 3.3 in Chapter Three of this thesis.
\textsuperscript{65} S 115(a) of the Securities Services Act.
\textsuperscript{66} Clause 115(a) of the Financial Markets Bill & clause 111(a) of the Financial Markets Bill 2012.
not been able to encourage all persons to comply with the market abuse prohibition in South Africa.\textsuperscript{67} In relation to this, it was stated and concluded that the aforesaid referral procedure might have weakened the enforcement functions of the Enforcement Committee and could, if not properly managed, continue to have the effect of restricting or impeding the implementation of the administrative sanctions for market abuse in South Africa.\textsuperscript{68} It was also indicated and concluded that the Directorate of Market Abuse does not have the power of its own to make market abuse rules and this could be negatively affecting the execution of its duties.\textsuperscript{69} In relation to this, it was suggested and concluded that the Directorate of Market Abuse (which is a committee of the Financial Services Board) should be allowed to execute its duties without prior confirmation from the Financial Services Board in order to curb potential bureaucracy.\textsuperscript{70} It was also suggested and concluded that both the Directorate of Market Abuse and the Financial Services Board should have their own surveillance systems in place to detect, investigate and prevent the occurrence of market abuse practices in the South African financial markets.\textsuperscript{71} In relation to this, it was additionally noted and concluded that the failure of the Financial Services Board to have its own surveillance equipment that timeously detects any suspected market abuse practices and/or provides the details of the beneficial owners of securities held in nominee accounts in South Africa or elsewhere could be negatively affecting its efforts to combat cross-border market abuse practices.\textsuperscript{72} Moreover, it was noted and concluded that, in civil proceedings, the right to claim compensation is exclusively given to the Financial Services Board and no provision is made for the prejudiced persons to claim such compensation directly (a private right of action) from the perpetrators of market abuse.\textsuperscript{73} It was further concluded that this could be too rigid and bureaucratic and may, if not carefully enforced, lead to the failure, on the part of the Financial Services Board, to compensate all the affected persons speedily.\textsuperscript{74} It was also noted and concluded that the same weakness is replicated in the Financial Markets Bill and the Financial Markets Bill

\textsuperscript{67} See the analysis in paragraphs 3 2 3; 3 2 7 & 3 3 in Chapter Three of this thesis.
\textsuperscript{68} See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
\textsuperscript{69} See the analysis in paragraphs 3 2 2; 3 2 7 & 3 3 in Chapter Three of this thesis.
\textsuperscript{70} See the analysis in paragraph 3 2 7 read with paragraphs 3 2 2 & 3 3 in Chapter Three of this thesis.
\textsuperscript{71} See the analysis in paragraph 3 2 7 above read with paragraph 3 3 in Chapter Three of this thesis.
\textsuperscript{72} See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
\textsuperscript{73} S 82(2)(c) of the Securities Services Act; also see paragraph 3 3 in Chapter Three of this thesis.
\textsuperscript{74} See paragraphs 3 2 1; 3 2 7 read with paragraph 3 3 in Chapter Three of this thesis.
2012. It was further suggested and concluded that the Financial Services Board should consider having more offices and other divisions of its departments in different regions of South Africa to increase awareness and to enhance the implementation of its functions. It was also concluded that the JSE’s enforcement efforts could still be interrupted and hampered by its inconsistent co-operation with other regulatory bodies. In light of this, it was submitted and concluded that the JSE should continue co-operating with the Financial Services Board, the Securities Regulation Panel and other relevant enforcement authorities in order to curb market abuse practices, especially in relation to over the counter transactions as well as cross-border market abuse activity. Not giving less regard to some practical considerations such as the current backlog in the courts, severe stress on the judicial resources and the availability of sufficient resources on the part of the Financial Services Board, it was concluded that there is still a need to introduce other alternative enforcement measures to enhance and improve the enforcement of the market abuse provisions in South Africa. In relation to this, it was suggested and concluded that even though the availability of adequate resources could be problematic, more courts and/or additional special commercial courts and tribunals should be established to adjudicate on market abuse cases in South Africa.

The thesis further provided an overview of problems associated with the ineffective enforcement of the market abuse ban in South Africa. Accordingly, it was concluded that significant progress has been made with regard to the co-operation between the Financial Services Board and other local enforcement bodies like the JSE. Nevertheless, it was concluded that there was inconsistent or minimal co-operation between the Financial Services Board and the listed companies as well as other similar international regulatory bodies. It was also concluded that the Financial Services Board does not provide or employ private rights of action for the prejudiced persons and other enforcement measures like bounty rewards and whistle-blowing immunity to encourage all the relevant stakeholders to bona fide

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75 See clause 91(2)(d) read with clauses 86 & 87 of the Financial Markets Bill; clause 86(2)(d) read with clause 84 of the Financial Markets Bill 2012 & also see paragraphs 3 2 1; 3 2 7 read with paragraph 3 3 in Chapter Three of this thesis.
76 See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
77 See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
78 See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
79 See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
80 See the analysis in paragraphs 3 2 7 & 3 3 in Chapter Three of this thesis.
81 See paragraphs 4 3 1 & 4 8 in Chapter Four of this thesis.
82 See paragraphs 4 3 2; 4 3 3 & 4 8 in Chapter Four of this thesis.
report any suspected market abuse activities to itself or to other relevant enforcement authorities so as to combat cross-border market abuse activities. Moreover, it was noted and concluded that the Financial Services Board does not seem to be using other detection strategies such as engaging more brokerages and companies that tape or digitally record telephonic orders and other transactions from clients to their agencies in order to isolate all possible market abuse activities timeously. It was further acknowledged and concluded that another challenge and/or problem associated with the enforcement of the market abuse prohibition in South Africa is the fact that insider trading and market manipulation offences are inconsistently defined and treated separately and differently. It was noted and concluded that market manipulation and insider trading cases are inherently difficult to prosecute. It was also acknowledged and concluded that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide specific provisions for a separate maximum criminal penalty for individuals and juristic persons, with a much higher maximum penalty to be imposed on such juristic persons.

With regard to market abuse awareness, it was noted and concluded that the enforcement of the market abuse prohibition has not been very successful in South Africa, partly because some small companies and other relevant persons are still unaware of the nature and effects of market abuse. It was further noted and concluded that there is no specific provision in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 which expressly provides for awareness or extensive education on market abuse from the grassroots level in order to change the illicit norms and attitudes among the market participants and to help all the relevant persons to comply with the market abuse prohibition in South Africa. Moreover, it was concluded that the Financial Services Board did not embark sufficiently on awareness programmes to ensure that all the relevant persons are fully acquainted with the market abuse prohibition. It was also noted and concluded that the legislature, the Financial Services Board, the JSE and other relevant stakeholders did not adopt a holistic approach with

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83 See paragraphs 4.2; 4.4.7; 4.5 & 4.8 read with paragraph 4.3.3 in Chapter Four of this thesis.
84 See paragraphs 4.4.2 & 4.8 in Chapter Four of this thesis.
85 See paragraphs 4.4.4 & 4.8 in Chapter Four of this thesis.
86 See paragraphs 4.4.3 & 4.8 in Chapter Four of this thesis.
87 See paragraphs 4.4.5 & 4.8 in Chapter Four of this thesis.
88 See paragraphs 4.4.6 & 4.8 in Chapter Four of this thesis.
89 See paragraph 4.4.6 & 4.8 in Chapter Four of this thesis.
90 See paragraphs 4.4.6 & 4.8 in Chapter Four of this thesis.
regard to the development of a strong anti-market abuse culture in South Africa.\textsuperscript{91} For instance, as indicated above, it was concluded that other enforcement approaches such as incentives and allowing the Financial Services Board to impose unlimited criminal penalties on the market abuse offenders are not used in South Africa.\textsuperscript{92} It also noted and concluded that the preventative measures adopted by some companies seem not to be targeted at preventing other market abuse practices such as market manipulation.\textsuperscript{93} Moreover, it was acknowledged and concluded that the Financial Services Board falls short with regard to market abuse preventative measures.\textsuperscript{94} For example, apart from relying on its powers to make market abuse rules and the JSE’s Surveillance Division to detect and prevent market abuse, it was concluded that the Financial Services Board does not seem to employ other preventative methods like public censure to discourage market abuse practices in South Africa.\textsuperscript{95} Moreover, it was submitted and concluded that the Financial Services Board should consider establishing its own mandatory legally binding guidelines on market transparency to prevent relevant trading information asymmetry problems associated with issuers and market abuse activity.\textsuperscript{96} It was further noted and concluded that the JSE Listing Requirements have addressed some aspects of market transparency to a fair extent but nonetheless it was suggested that the determination of a reasonable degree of certainty in terms of these Listing Requirements should not be only contingent upon the issuers of listed securities and their directors to avoid possible subjectivity and/or bias which could hamper the market transparency enforcement efforts of the JSE.\textsuperscript{97} In addition, it was noted and concluded that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not have provisions that specifically enforce market transparency best practices in relation to over the counter commodities and derivatives markets.\textsuperscript{98} It was noted and concluded that the market abuse provisions contained in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly regulate matters involving investor due diligence.\textsuperscript{99} In relation to this, it was stated and concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to

\textsuperscript{91} See paragraphs 4.47 & 4.8 in Chapter Four of this thesis.

\textsuperscript{92} See paragraphs 4.47 & 4.8 in Chapter Four of this thesis.

\textsuperscript{93} See paragraphs 4.5 & 4.8 in Chapter Four of this thesis.

\textsuperscript{94} See paragraphs 4.5 & 4.8 in Chapter Four of this thesis.

\textsuperscript{95} See paragraphs 4.5 & 4.8 in Chapter Four of this thesis.

\textsuperscript{96} See paragraphs 4.7.12 & 4.8 in Chapter Four of this thesis.

\textsuperscript{97} See paragraphs 4.7.12 & 4.8 in Chapter Four of this thesis.

\textsuperscript{98} See paragraphs 4.7.12 & 4.8 in Chapter Four of this thesis.

\textsuperscript{99} See paragraphs 4.7.2.2 & 4.8 in Chapter Four of this thesis.
accommodate new adequate provisions specifically dealing with investor due diligence to prevent insider trading, market manipulation and other possible financial risks in the South African financial markets.\textsuperscript{100} It was also submitted and concluded that another option could be enacting a specific statute that solely deals with market transparency, issuer transparency and investor due diligence to enable the Financial Services Board and the JSE to enforce investor due diligence best practices and to curb systemic risks and possible cross-border market abuse activity in the South African financial markets.\textsuperscript{101} Moreover, it was noted and concluded that there is no legislation that solely regulates issuer transparency standards in South Africa.\textsuperscript{102} It was also suggested and concluded that a specific legislation should be enacted in line with the International Organisation of Securities Commissions and the Group of Twenty proposals\textsuperscript{103} to deal solely with issuer transparency, investor due diligence and market transparency in both the regulated and unregulated financial markets in South Africa.\textsuperscript{104} It was further submitted and concluded that this legislation should provide a mandatory continuous disclosure requirement on the part of the issuers for them to disclose initial and ongoing information pertaining to their securities to enable the Financial Services Board, the JSE and other relevant enforcement bodies to combat insider trading, market manipulation and other related cross-border market abuse practices.\textsuperscript{105}

It was acknowledged and concluded that there are no specific market abuse provisions in the Securities Services Act, the Companies Act,\textsuperscript{106} the Financial Markets Bill and the Financial Markets Bill 2012 that regulate and enforce credit rating agencies standards and requirements.\textsuperscript{107} Moreover, it was concluded that there is no specific regulatory body in the Securities Services Act, the Companies Act 2008, the Financial Markets Bill and the Financial Markets Bill 2012 that oversees the regulation of credit rating agencies in South Africa.\textsuperscript{108} It was accordingly submitted and concluded that the Credit Rating Services Bill\textsuperscript{109}

\textsuperscript{100} See paragraphs 4 7 2 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{101} See paragraphs 4 7 2 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{102} See paragraphs 4 7 3 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{103} See paragraph 4 7 3 1 in Chapter Four of this thesis.
\textsuperscript{104} See paragraphs 4 7 3 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{105} See paragraphs 4 7 3 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{106} 71 of 2008, hereinafter referred to as the Companies Act 2008.
\textsuperscript{107} See paragraphs 4 7 4 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{108} See paragraphs 4 7 4 2 & 4 8 in Chapter Four of this thesis.
\textsuperscript{109} [B-2011], hereinafter referred to as the Credit Rating Services Bill.
and/or the Credit Rating Services Bill 2012\textsuperscript{110} should be applicable to credit ratings of securities and/or financial instruments in both the regulated and unregulated financial markets to discourage the misuse of price-sensitive information through market abuse activities in these markets.\textsuperscript{111} Furthermore, it was noted and concluded that the responsibility of crisis management in South Africa is vested in the South African Reserve Bank as opposed to the Financial Services Board.\textsuperscript{112} However, it was submitted and concluded that the crisis management responsibility should be removed from the South African Reserve Bank and placed in an independent self-regulatory body like the Financial Services Board to promote transparency, less bureaucracy and less governmentally induced bias.\textsuperscript{113} In relation to this, it was concluded that an adequate and comprehensive national statute should be enacted to provide an effective enforcement framework for crisis management and compensation measures across the financial services industry and all the financial markets in South Africa in order to curb market abuse activities.\textsuperscript{114} It was also noted and concluded that there is no specific provision in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012, which deals with the enforcement of risk management measures to expressly combat market abuse related systemic risks in all the South African financial markets.\textsuperscript{115} It was accordingly submitted and concluded that the policy makers should, in line with the European Commission proposals,\textsuperscript{116} statutorily empower an independent regulatory agency to enforce the risk management measures across all the South African financial sectors and financial markets.\textsuperscript{117} Moreover, it was noted and concluded that there is no legislation that solely and expressly provides an enforcement framework for market abuse related accounting standards violations in South Africa.\textsuperscript{118} However, it was stated and concluded that accounting standards violations are generally outlawed under different legislations, for example, the Companies Act 2008, the Financial Advisory and Intermediary

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{110} [B8-2012], hereinafter referred to as the Credit Rating Services Bill 2012 (I have employed the term “clause” to refer to the provisions of both the Credit Rating Services Bill & the Credit Rating Services Bill 2012 because at the time of writing this Chapter, the aforementioned Bills were not yet effectively passed into law).
\item \textsuperscript{111} See paragraphs 4742 & 48 in Chapter Four of this thesis.
\item \textsuperscript{112} See paragraphs 4752 & 48 in Chapter Four of this thesis.
\item \textsuperscript{113} See paragraphs 4752 & 48 in Chapter Four of this thesis.
\item \textsuperscript{114} See paragraphs 4752 & 48 in Chapter Four of this thesis.
\item \textsuperscript{115} See paragraphs 4752 & 48 in Chapter Four of this thesis.
\item \textsuperscript{116} See paragraphs 4762 & 48 in Chapter Four of this thesis.
\item \textsuperscript{117} See paragraph 4761 in Chapter Four of this thesis.
\item \textsuperscript{118} See paragraphs 4772 & 48 in Chapter Four of this thesis.
\end{enumerate}
\end{footnotesize}
Services Act\textsuperscript{119} and the Financial Services Board Act.\textsuperscript{120} It was also concluded that these Acts do not have designated regulatory agencies to enforce their accounting standards to combat fraud, insider trading and market manipulation as well as penalties that could be imposed on the offenders in such instances.\textsuperscript{121} It was further acknowledged and concluded that there is no uniformity as regards the adopted accounting and/or auditing standards and accordingly it is hoped that a specific legislation will be enacted in future to enforce auditing, accounting and financial reporting standards uniformly across the financial services industry in order to combat fraud and market abuse-related accounting violations and to enhance comparability with the international accounting best practice.\textsuperscript{122}

It was suggested and concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to enact provisions that directly and expressly apply to possible quote stuffing and front running that might occur in the over the counter commodity and commodity derivatives transactions.\textsuperscript{123} It was further submitted and concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to provide a mandatory requirement on the part of the financial analysts or advisors, brokers and other market participants to openly hold-on to their orders for specific minimum periods in order not to prejudice investors through quote stuffing or front running.\textsuperscript{124} Moreover, it was noted and concluded that the Companies Act 2008, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically prohibit dark pools and flash orders.\textsuperscript{125} It was accordingly concluded that the South African policy makers should consider enacting additional provisions to expressly prohibit flash orders and dark pools in all the relevant financial markets.\textsuperscript{126} In addition, it was submitted and concluded that the Financial Services Board and the JSE should strictly impose a mandatory requirement on the issuers of securities, brokers and other relevant market participants to disclose their trading interests in certain securities promptly and cautiously in order to detect and curb manipulative dark pools

\textsuperscript{119} 37 of 2002; hereinafter referred to as the Financial Advisory and Intermediary Services Act.
\textsuperscript{120} 97 of 1990, hereinafter referred to as the Financial Services Board Act; also see paragraphs 4\textsuperscript{77} 2 & 4\textsuperscript{8} in Chapter Four of this thesis.
\textsuperscript{121} See paragraphs 4\textsuperscript{77} 2 & 4\textsuperscript{8} in Chapter Four of this thesis.
\textsuperscript{122} See paragraphs 4\textsuperscript{77} 2 & 4\textsuperscript{8} in Chapter Four of this thesis.
\textsuperscript{123} See paragraphs 4\textsuperscript{78} 1 1 & 4\textsuperscript{8} in Chapter Four of this thesis.
\textsuperscript{124} See paragraphs 4\textsuperscript{78} 1 1 & 4\textsuperscript{8} in Chapter Four of this thesis.
\textsuperscript{125} See paragraphs 4\textsuperscript{78} 2 1 & 4\textsuperscript{8} in Chapter Four of this thesis.
\textsuperscript{126} See paragraphs 4\textsuperscript{78} 2 1 & 4\textsuperscript{8} in Chapter Four of this thesis.
and flash orders. Furthermore, it was noted and concluded that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions do not expressly prohibit hedge funds insider trading and high yield investment fraud. It was also noted and concluded that the Companies Act 2008, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly empower the Financial Services Board to combat hedge funds insider trading and commodities derivatives insider trading. It was also submitted and concluded that additional provisions should be enacted in accordance with other applicable reforms and proposals that were introduced elsewhere to expressly prohibit hedge funds market abuse activities and other securities violations, especially in the South African over the counter markets. Moreover, it was stated and concluded that the Companies Act 2008, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not specifically discourage high frequency trading, Internet-based market manipulation, programme trading and other related technologically perpetrated market abuse activities. It was further suggested and concluded that the JSE and the Financial Services Board should consider employing practically applicable proposals from other jurisdictions such as the back testing process, real-time risk monitoring and market surveillance measures to detect and curb illicit high frequency trading related market abuse activities. It was also noted and concluded that the Companies Act 2008, the Financial Markets Bill, the Financial Markets Bill 2012 and the Securities Services Act’s provisions apply only to trades conducted on a regulated market and they do not directly or indirectly prohibit illicit or naked credit default swaps derivatives transactions in the over the counter markets. In line with this, it was submitted and concluded that the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to provide a specific prohibition on naked credit default swaps and appropriate penalties against the offenders. It was also noted and concluded that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012’s market abuse provisions do not explicitly prohibit short selling. Consequently, it was suggested and concluded that the Securities

127 See paragraphs 47821 & 48 in Chapter Four of this thesis.
128 See paragraphs 47831 & 48 in Chapter Four of this thesis.
129 See paragraphs 47831 & 48 in Chapter Four of this thesis.
130 See paragraphs 47831 & 48 in Chapter Four of this thesis.
131 See paragraphs 47841 & 48 in Chapter Four of this thesis.
132 See paragraphs 47841 & 48 in Chapter Four of this thesis.
133 See paragraphs 47851 & 48 in Chapter Four of this thesis.
134 See paragraphs 47851 & 48 in Chapter Four of this thesis.
135 See paragraphs 47861 & 48 in Chapter Four of this thesis.
Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be fastidiously amended, giving regard to relevant applicable developments in other jurisdictions\textsuperscript{136} to expressly prohibit naked short selling.\textsuperscript{137}

In addition, it is submitted and concluded that although the JSE was rated as the number one stock exchange by the World Federation of Exchanges with regard to regulation in 2010,\textsuperscript{138} the various gaps in the enforcement of the market abuse prohibition in relation to some specific aspects of the South African financial markets and in relation to some selected market abuse practices that occurred during the global financial crisis as earlier discussed\textsuperscript{139} could weaken the stability and integrity of the South African financial markets in the future. In line with this, it was submitted and concluded that some flaws in the detection, prosecution and the general enforcement of the market abuse prohibition could have, to some extent, contributed to the poor reputation and low investor confidence associated with some of the South African companies and financial markets.\textsuperscript{140} In a nutshell, it was concluded that the market abuse problems as highlighted above as well as in Chapter Four should be appropriately resolved for the purposes of combating market abuse activities in South Africa.\textsuperscript{141} In other words, it was revealed and concluded that although South Africa, like several other countries, has made numerous efforts to combat market abuse practices, the current gaps and problems associated with the enforcement of the South African market abuse laws could have hampered such efforts.\textsuperscript{142}

The thesis also provided a comparative analysis of the enforcement of the market abuse ban in the United States of America. In line with this, as discussed in Chapter Five, it was concluded that the impropriety of market abuse in the United States of America is generally accepted by the public, judiciary, market participants and all the relevant stakeholders in that

\begin{itemize}
  \item \textsuperscript{136} See paragraph 4 7 8 6 in Chapter Four of this thesis.
  \item \textsuperscript{137} See paragraphs 4 7 8 6 1 & 4 8 in Chapter Four of this thesis.
  \item \textsuperscript{139} See the discussion in sub-paragraphs under paragraph 4 7 in Chapter Four of this thesis.
  \item \textsuperscript{140} See sub-paragraphs under paragraph 4 4 in Chapter Four of this thesis & also see paragraph 4 6 in Chapter Four of this thesis.
  \item \textsuperscript{141} See paragraph 4 8 in Chapter Four of this thesis.
  \item \textsuperscript{142} Cassim “An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (part 1)” 2008 SA Merc LJ 33 33-36; also see paragraph 4 8 in Chapter Four of this thesis.
\end{itemize}
country, both at a state and federal level.\textsuperscript{143} It was noted and concluded that this could be supported, in part, by the fact that the enforcement of the market abuse ban is a co-operative effort involving the United States Securities and Exchange Commission, private litigants, self-regulatory organisations, the Commodity Futures Trading Commission and the Department of Justice at a federal level\textsuperscript{144} as well as the relevant financial or corporation departments at the states level.\textsuperscript{145} Moreover, as earlier discussed,\textsuperscript{146} it is clear that both the United States of America and the South African market abuse regimes maintain similar enforcement goals and missions.\textsuperscript{147} In spite of this, it was concluded that they adopt and implement very different approaches to achieve their enforcement goals or targets.\textsuperscript{148} It was also concluded that the most important characteristic of the regulatory framework in the United States of America,\textsuperscript{149} namely a co-ordinated (joint) effort between the courts, self-regulatory organisations and the United States Securities and Exchange Commission to combat illicit practices like insider trading is relatively minimal or absent in South Africa due to the differences in relation to the financial markets sizes and enforcement approaches.\textsuperscript{150} Put differently, it was noted and concluded that the United States of America’s market abuse enforcement framework employs the multi-functional regulatory approach which offers competition among the regulatory authorities at a federal level\textsuperscript{151} as well as the relevant financial or corporation departments at a State level,\textsuperscript{152} but nevertheless, resulting in far much greater and effective enforcement. Moreover, it was noted and concluded that the United States of America’s market abuse enforcement framework provides the much needed resources, competent personnel in the courts and the United States Securities and Exchange Commission as well as better technological surveillance mechanisms to detect illicit trading

\textsuperscript{143} See the discussion under paragraphs (including sub-paragraphs) 5 2, 5 3, 5 4 & 5 5 & 5 6 in Chapter Five of this thesis; also see Steinberg 2003 \textit{The International Lawyer} 169-171.

\textsuperscript{144} In other words, the prevalent attitudes in the United States of America favour a rigorous enforcement of the market abuse prohibition. Paragraphs (including sub-paragraphs) 5 4 1, 5 4 2, 5 4 3, 5 5 & 5 6 in Chapter Five of this thesis.

\textsuperscript{145} See the discussion under paragraphs (including sub-paragraphs) 5 2 in Chapter Five of this thesis.

\textsuperscript{146} See paragraph 10 2 above.

\textsuperscript{147} Generally see paragraphs 5 3 1, 5 3 4, & 5 3 4 1 in Chapter Five of this thesis; also see paragraph 5 6 & paragraphs under 5 2 in Chapter Five of this thesis & relevant comparative analysis in Chapter Nine of this thesis.

\textsuperscript{148} See paragraph 10 2 above; also see paragraph 5 6 in Chapter Five of this thesis & relevant comparative analysis in Chapter Nine of this thesis.

\textsuperscript{149} See paragraphs 5 4 1, 5 5 1, 5 5 2 & 5 6 in Chapter Five of this thesis; also see paragraphs 5 3 1, 5 3 4 & 5 3 4 1 in Chapter Five of this thesis.

\textsuperscript{150} See the related analysis in Chapter Nine of this thesis.

\textsuperscript{151} See sub-paragraphs under paragraph 5 3 & also see paragraph 5 6 in Chapter Five of this thesis.

\textsuperscript{152} See sub-paragraphs under paragraph 5 2 & also see paragraph 5 6 in Chapter Five of this thesis.
On the other hand, it was noted and concluded that the South African market abuse regime relies mainly on the Financial Services Board to police and enforce the market abuse ban. It was also concluded that this approach has so far not been able to achieve more settlements and prosecutions in cases involving market abuse in South Africa.154

Moreover, it was concluded that although the South African market abuse legislation was relatively influenced by the corresponding legislation in the United States of America, it sometimes lacks a rigorous practical enforcement approach and infrastructure to combat insider trading and other related activities.155 It was concluded that this could be evidenced, in part, by many delays in investigations, settlements and the inherent paucity of successful criminal prosecutions obtained in market abuse cases in South Africa to date.156 It was further concluded that although the adoption of some principles from the United States of America’s market abuse enforcement framework shows a significant effort by the legislature to provide an adequate market abuse proscription in South Africa, deficiencies such as the inconsistent application of the market abuse provisions and the use of few enforcement measures have directly impeded these efforts.157 It was additionally submitted and concluded that the South African legislature should not have blindly adopted some of the United States of America’s market abuse regulatory principles without proper measures in place to enforce them.158 In Chapter Five, it was also noted and concluded that the current South African market abuse legislation does not explicitly empower the Financial Services Board to operate its own separate and specific technological surveillance machinery in order to supplement the significant surveillance efforts of the JSE. Moreover, the Financial Services Board is still to employ sufficient measures for the training of competent personnel and educational awareness programmes in order to prevent market abuse practices in the South African financial markets.159 Additionally, it was noted and concluded that, unlike the position in the United

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153 See paragraph 5 6 in Chapter Five of this thesis.
154 Paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively & relevant comparative analysis in Chapter Nine of this thesis. Also see paragraph 5 6 in Chapter Five of this thesis.
155 See paragraph 5 6 in Chapter Five of this thesis.
156 See paragraphs 4 2; 4 4 3; 4 4 4 & other related remarks in Chapter Four of this thesis; also see relevant comparative analysis in Chapter Nine of this thesis & paragraph 5 6 in Chapter Five of this thesis.
157 See paragraphs 4 2; 4 4 3; 4 4 4 & other related remarks in Chapter Four of this thesis; also see relevant comparative analysis in Chapter Nine of this thesis & paragraph 5 6 in Chapter Five of this thesis.
158 See relevant comparative analysis in Chapter Nine of this thesis & also see paragraph 5 6 in Chapter Five of this thesis.
159 See paragraphs 4 2 & 4 5 in Chapter Four of this thesis; also see relevant comparative analysis in Chapter Nine of this thesis & paragraph 5 6 in Chapter Five of this thesis.
States of America, most of the market abuse rules that could be made by the Financial Services Board are only limited to the general manner in which its administrative powers and roles should be conducted. On the other hand, in California, it was noted and concluded that when the Commissioner of Corporations receives some leads from the Internet Compliance and Enforcement Team’s surveillance, junk mail and public complaints and referrals from other enforcement bodies, he may impose damages or other applicable remedies against the offenders. It was further acknowledged and concluded that California has managed to develop a relatively consistent market abuse enforcement framework that effectively discourages a number of market abuse practices (including franchise-related, capital markets related as well as Internet-based market abuse violations). Likewise, it was noted and concluded that although Delaware does not have a statutory provision that expressly prohibits insider trading, it has to date successfully relied on common law principles on fiduciary duties to combat insider trading. It was accordingly noted and concluded that this success has prompted other commentators to submit that Delaware was effectively combating insider trading and market manipulation because it cedes other areas of its laws that involve insider trading enforcement to the federal government. Furthermore, in Washington, it was noted and concluded that the Director of Financial Institutions may impose administrative penalties such as public censure, suspension, or revocation of the license of any broker-dealer, salesperson, investment advisor’s representative, investment advisor or any other person who commits market abuse and other related securities violations. It was further noted and concluded that the advantage of Washington is inter alia the statutory availability of non-exclusive common law penalties and private rights of action for the prejudiced persons to claim their damages directly from the market abuse offenders.

160 See paragraph 5 4 1 read with paragraph 5 6 in Chapter Five of this thesis.
161 S 82(2)(g) of the Securities Services Act; clause 91(2)(f) of the Financial Markets Bill & clause 86(2)(f) of the Financial Markets Bill 2012. See further paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively & also see paragraph 5 6 in Chapter Five of this thesis.
162 See paragraphs 5 2 3 & 5 2 4 read with paragraph 5 6 in Chapter Five of this thesis.
163 See paragraph 5 2 4 read with paragraph 5 6 in Chapter Five of this thesis.
164 See paragraph 5 2 8 read with paragraph 5 6 in Chapter Five of this thesis.
165 See paragraph 5 2 8 read with paragraph 5 6 in Chapter Five of this thesis.
166 See paragraph 5 2 12 read with paragraph 5 6 in Chapter Five of this thesis.
167 See paragraph 5 2 12 read with paragraph 5 6 in Chapter Five of this thesis.
Overall, it was acknowledged and concluded that, like the United States of America, South Africa also prohibits three main forms of market abuse, namely insider trading, trade-based market manipulation and disclosure-based market manipulation. It was also concluded that, like the United States of America, South Africa relies on civil, criminal and administrative sanctions to deter and discourage unscrupulous persons from engaging in market abuse activities. Nevertheless, it was concluded that, unlike the position in the United States of America, the Securities Services Act’s market abuse civil sanctions are only limited to cases involving insider trading. It was concluded that this flaw could be addressed by the Financial Markets Bill as it now extends civil sanctions to market manipulation offences. It was further concluded that, unlike the position in the United States of America where there are no specific statutory limitations for criminal actions, the competent courts in South Africa do not seem to have express statutory authority or discretion to impose any other additional penalties (apart from those stipulated in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012) upon the market abuse offenders without violating the *autrefois acquit or autrefois convict* doctrine. It was also concluded that, in contrast to the position in the United States of America, little or no consideration was given to the introduction of specific civil penalties for commodities-based market manipulation practices in South Africa. It was further concluded that, unlike the

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168 See paragraphs 5.3.1; 5.3.4; 5.3.4.1 & 5.6 in Chapter Five of this thesis.
169 Cassim 2008 *SA Merc LJ* 34-35; also see paragraph 5.6 in Chapter Five of this thesis & related analysis in Chapter Nine of this thesis.
170 Paragraphs 5.3.2; 5.3.5; 5.3.6 & 5.5.3 read with paragraph 5.6 in Chapter Five of this thesis.
171 See the relevant comparative analysis in Chapter Nine of this thesis & see further paragraph 4.4.7 in Chapter Four of this thesis; also see paragraph 5.6 in Chapter Five of this thesis.
172 Paragraphs 5.3.2; 5.3.5; 5.3.6 & 5.5.3 read with paragraph 5.6 in Chapter Five of this thesis.
173 S 77 of the Securities Services Act; also see relevant comparative analysis in Chapter Nine of this thesis & paragraph 5.6 in Chapter Five of this thesis.
174 Clause 87 read with clauses 84 & 85 of the Financial Markets Bill; no similar provision is made in the Financial Markets Bill 2012 & also see related remarks and comparative analysis in Chapter Nine of this thesis & paragraph 5.6 in Chapter Five of this thesis.
175 See paragraphs 5.3.2 & 5.3.5 above & relevant comparative analysis in Chapter Nine of this thesis. Also see paragraph 5.6 in Chapter Five of this thesis.
176 See s 115(a) of the Securities Services Act; clause 115(a) of the Financial Markets Bill; clause 111(a) of the Financial Markets Bill 2012; also see paragraphs 5.3.2 & 5.3.5 read with paragraph 5.6 in Chapter Five of this thesis & relevant comparative analysis in Chapter Nine of this thesis.
177 Paragraph 5.3.5 read with paragraph 5.6 in Chapter Five of this thesis.
178 S 75; s 76 & s 115(a) of the Securities Services Act; see further clauses 84; 85; 87 & 115(a) of the Financial Markets Bill & clauses 82; 83 & 111(a) of the Financial Markets Bill 2012. Also see relevant comparative analysis in Chapter Nine of this thesis & paragraph 5.6 in Chapter Five of this thesis.
The thesis further provided a comparative analysis of the enforcement of the market abuse ban in the European Union. Accordingly, it was noted and concluded that broader definitions of “accepted market practices”, “regulated market”, “financial instruments”, “inside information” and “market manipulation” were introduced by the EU Market Abuse Directive. Furthermore, it was noted and concluded that the EU Market Abuse Directive brought stringent measures, for example:

(a) a mandatory duty is imposed upon the issuers to promptly disclose inside information to the public;\(^{182}\)

(b) issuers or their agents are required to compile lists of their insiders (employees);\(^{183}\)

(c) persons in managerial positions are further required to report suspicious transactions which relate to their shares, derivatives or other financial instruments linked to them;\(^{184}\) and

(d) any professional person who objectively suspects that certain transactions might give rise to insider trading or market manipulation is required to immediately report (whistle-blowing) them to the competent regulatory authorities in the European Union member states.\(^{185}\)

It was further concluded that these measures are clearly targeted at improving the detection and prevention of market abuse activities in the European Union financial markets.\(^{186}\)

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\(^{179}\) See relevant analysis in paragraph 5 6 in Chapter Five of this thesis.

\(^{180}\) See relevant analysis in paragraph 5 6 in Chapter Five of this thesis.

\(^{181}\) Articles 1(1) to (5); article 2 read with articles 3; 4 & 5 of the EU Market Abuse Directive; also see related discussions in paragraphs 6 3 1; 6 3 2; 6 3 3 & 6 3 4 read with paragraph 6 5 in Chapter Six of this thesis.

\(^{182}\) See paragraph 6 5 in Chapter Six of this thesis.

\(^{183}\) See paragraph 6 5 in Chapter Six of this thesis.

\(^{184}\) See paragraph 6 5 in Chapter Six of this thesis.

\(^{185}\) See paragraph 6 5 in Chapter Six of this thesis.

\(^{186}\) See paragraph 6 5 in Chapter Six of this thesis.
However, it was concluded that the EU Market Abuse Directive’s regulatory framework has a considerable number of flaws and such flaws include, *inter alia*, the failure on the part of the EU Market Abuse Directive to provide the specific types (whether civil, criminal or administrative sanctions) of market abuse penalties that are commonly applicable across the European Union member states and/or the various disparities that are found in relation to the interpretation and implementation of some of the provisions of the EU Market Abuse Directive in such member states. In relation to this, it was concluded that the implementation of the EU Market Abuse Directive in the United Kingdom was considered because it is generally regarded as one of the major economies in the European Union. Accordingly, it was demonstrated and concluded that although the United Kingdom has implemented most of the provisions of the EU Market Abuse Directive, it has sometimes inconsistently applied heterogeneous enforcement approaches to combat market abuse in its financial markets. It was concluded that the key proposals brought by both the Criminal Sanctions Market Abuse Directive Proposal and the Market Abuse Regulation Proposal were aimed at addressing the flaws contained in the EU Market Abuse Directive. In relation to this, it was indicated and concluded that the Market Abuse Regulation Proposal seeks to extend the scope of the EU Market Abuse Directive to cover a wide range of financial instruments traded on regulated markets, multilateral trading facilities and/or organised trading facilities to curb the gaps in the regulation of new markets, trading venues or platforms and over the counter instruments. Despite this, it was concluded that the Market Abuse Regulation Proposal should be further reviewed so that it provides adequate practical measures or guidelines regarding the uniform application of its extended scope in the European Union member states to avoid balkanisation and other potential overregulation problems. It was further concluded that the aforementioned extended scope should be carefully revised to reduce, as much as possible, the risk of creating new transaction reporting administrative burdens and/or cross-border enforcement-related problems for regulators and other relevant stakeholders in the European Union member states. It was also concluded that the Market Abuse Regulation Proposal’s new definition for commodity derivatives

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187 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis; also see related remarks in paragraph 10.2 above.
188 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
189 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
190 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
191 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
192 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
193 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
should be reviewed to ensure that it provides specific guidelines on how regulators in the European Union member states can oversee the regulation of spot commodity markets and derivative markets without discouraging legitimate derivative and spot commodity contracts transactions and/or imposing undue pressure on the issuers or other relevant market participants.\textsuperscript{194} It was further concluded that the Wholesale Energy Market Integrity and Transparency Regulation should be amended so that it may provide a clear roadmap on its application in the European Union member states and how it will dovetail with the Market Abuse Regulation Proposal and the Markets in Financial Instruments Directive Proposal to prevent potential negative effects of overregulation and/or violating the \textit{autrefois} acquit or \textit{autrefois} convict doctrine on the part of the market abuse offenders.\textsuperscript{195}

It was concluded that the Market Abuse Regulation Proposal’s new definition of inside information for emission allowances provides that emissions allowance markets participants, except small participants (emitters) whose transactions may not significantly affect the market price of emission allowances in question, will be mandated to create insider lists, report managers’ transactions and publicly disclose inside information.\textsuperscript{196} It was submitted and concluded that the Market Abuse Regulation Proposal should be reviewed to provide an optimal threshold for emissions or thermal input or a combination thereof to curb market abuse in spot carbon markets and to prevent the potential risk of smaller emission allowances participants circumventing their market abuse liability unduly.\textsuperscript{197} Moreover, it was concluded that the Market Abuse Regulation Proposal’s new definition of market manipulation was \textit{inter alia} targeted at encouraging regulators to adopt a common approach when enforcing the market manipulation ban across the European Union member states and/or addressing concerns that the EU Market Abuse Directive lacked clarity on certain key elements pertaining to the attempted insider trading and attempted market manipulation offences, giving rise to legal uncertainty.\textsuperscript{198} It was further concluded that the Market Abuse Regulation Proposal gives regulatory bodies in the European Union member states the power to request existing telephone and data traffic records held by telecommunication operators if a reasonable suspicion exists that such records are required in an ongoing market abuse

\textsuperscript{194} See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
\textsuperscript{195} See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
\textsuperscript{196} See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
\textsuperscript{197} See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
\textsuperscript{198} See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
investigation. It was concluded that such regulatory bodies’ supervisory and sanctioning powers were revamped, for example, such bodies are now able to impose upon the market abuse offenders, civil or administrative pecuniary sanctions of not less than the profit made or loss avoided from the market abuse transactions in question and/or a maximum fine of not less than twice the value of any such profit gained or loss avoided. Moreover, it was concluded that the aforesaid regulatory bodies may impose a maximum fine of not less than five million euros on natural persons and civil or administrative pecuniary sanctions of up to 10% of the total annual turnover in the preceding business year on legal persons. It was also submitted and concluded that the new regulators’ investigatory powers and whistle-blower immunity provisions should be carefully and uniformly utilised in the European Union member states to minimise the risk of discouraging potential investors which is generally associated with overregulation. It was noted and concluded that the European Union member states are obliged to impose “effective, proportionate and dissuasive” criminal sanctions upon any person who intentionally engages or attempts to engage in insider trading or market manipulation activities or who incites, aids and abets or attempts to incite, aid and/or abet another to engage in such activities. Nevertheless, it was concluded that the Criminal Sanctions Market Abuse Directive Proposal should be reviewed to ensure that it clearly provides separate and different criminal sanctions for natural and juristic persons that will be homogeneously enforced across the European Union member states.

It was noted and concluded that the Market Abuse Regulation Proposal provides that the precise data to be included in insider lists should be defined in delegated acts and implementing technical standards adopted by the European Commission. In relation to this, it was concluded that the Market Abuse Regulation Proposal should be reviewed to provide adequate measures or provisions on the content of insider lists and/or conditions under which issuers shall have an obligation to draw up such lists to reduce administrative burdens, particularly on multinational companies. It was also concluded that in the case of

199 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
200 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
201 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
202 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
203 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
204 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
205 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
206 See paragraphs 6.45 & 6.5 in Chapter Six of this thesis.
inside information relating to issuers of a financial instrument, whose financial instruments are admitted to trading on a small and medium-sized growth market, such issuers, like any other issuers, will be required to seek permission from the competent authorities if they want to delay the disclosure of the inside information.\footnote{207} It was submitted and concluded that the aforementioned delayed disclosure of inside information might be very difficult to implement homogeneously in the European Union member states to prevent market abuse without being exploited by other unscrupulous issuers.\footnote{208}

A comparative analysis of the enforcement of the market abuse ban in the United Kingdom was undertaken in Chapter Seven. In relation to this, it was concluded, as already pointed out,\footnote{209} that the United Kingdom employs an extensive regulatory approach which statutorily authorises only one regulator (the Financial Services Authority) to oversee the enforcement of its securities and market abuse laws. It was concluded that the rationale for this single regulator model was \textit{inter alia} to establish a more coherent and proportionate approach in relation to the regulation and enforcement of financial services, securities and market abuse laws as well as a level playing field for all investors and other relevant market participants in the United Kingdom.\footnote{210} It was further concluded, in contrast to the position in South Africa,\footnote{211} that there is a separate and specific statute, namely the Criminal Justice Act,\footnote{212} that deals with insider trading\footnote{213} and another one, namely the Financial Services and Markets Act,\footnote{214} that widely deals with the prohibition of insider trading, market manipulation and other types of market abuse in the United Kingdom.\footnote{215} It was noted and concluded that, unlike South Africa, the United Kingdom has devoted significantly more resources towards the enforcement of its securities and market abuse laws.\footnote{216} It was further submitted and concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that specifically empower the
Financial Services Board to appoint other additional skilled persons, apart from its own employees, to provide it with reports or relevant information relating to any suspected market abuse violations in South Africa.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} It was further concluded that South Africa should consider practically implementing only the relevant principles of the United Kingdom’s single regulator model because it is economical and less complex.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} It was concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that expressly empower other self-regulatory organisations in South Africa, apart from the Financial Services Board, to impose their own penalties and/or take any other appropriate action against any persons who indulge in market abuse activities in South Africa.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} It was further concluded that the Financial Services Board should be expressly and statutorily authorised to impose separate and different penalties on individuals and juristic persons or companies that engage in market abuse activities in South Africa.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} Furthermore, it was concluded that the Financial Services Board, like the Financial Services Authority,\footnote{Generally see paragraphs 7.5.1 & 7.7 in Chapter Seven of this thesis.} should be statutorily empowered to publicise the names of the culprits who commit market abuse offences (public censure or name and shame approach) in South Africa.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} In line with this, it was submitted and concluded that the provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which seek to empower the Financial Services Board to publish by notice on its official website or by means of other appropriate public media any outcome, status or details of market abuse investigations (public censure or name and shame approach) if such publication is in the public interest should speedily come into force.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} Accordingly, it was concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that give private rights of action to the affected persons for them to claim their damages directly from the market abuse offenders.\footnote{See paragraph 7.8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.} It was also concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to introduce whistle-blower immunity provisions for the purposes of encouraging all persons to disclose any information regarding market abuse violations
voluntarily to the Financial Services Board or other enforcement authorities in South Africa. Moreover, it was concluded that the Financial Services Board should seriously consider establishing its own surveillance systems to improve and increase the timeous detection of market abuse activity in both the regulated and unregulated financial markets in South Africa.226

In addition, it was concluded that more specialised market abuse courts manned by sufficient persons with the relevant expertise to adjudicate in matters involving market abuse should be established in all the provinces of South Africa to increase awareness and/or the combating of market abuse practices in the South African financial markets.227 It was also concluded that the Financial Services Board should be statutorily required to support the Director of Public Prosecutions and the relevant courts with the necessary information regarding ongoing market abuse cases in South Africa, by assigning certain persons with the relevant expertise to assist the Director of Public Prosecutions and/or relevant courts in their prosecution of such cases in South Africa.228 It was further concluded that although the Financial Services Board has reportedly forged co-operation agreements with some international self-regulatory organisations like the International Organisation of Securities Commissions, very little or no effort has been specifically made to enforce and exploit such co-operation agreements to combat cross-border market abuse practices in South Africa.229 It was accordingly concluded that the relevant provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which now empower the Financial Services Board to assist foreign regulators with investigations pertaining to any cross-border market abuse cases should speedily come into force to enhance the combating of such cases in South Africa and elsewhere.230 Furthermore, it was concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly impose a mandatory co-operation obligation on both the Financial Services Board and the JSE to improve the enforcement of the market abuse prohibition in South Africa.231 It was noted and concluded that the Criminal Justice Act only extends the insider trading liability to individuals

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225 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
226 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
227 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
228 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
229 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
230 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
231 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
who deal in affected securities on a regulated market or where such dealing is conducted on
the over the counter markets through a professional intermediary, while there is no similar
provision in the corresponding legislation in South Africa. In line with this, it was
concluded that the Securities Services Act, the Financial Markets Bill and/or the Financial
Markets Bill 2012 should be amended to enact provisions that expressly discourage any
market abuse activity or illicit dealing in securities on unregulated over the counter markets
through agents or professional intermediaries and face-to-face transactions between non-
professional intermediaries in South Africa.

It was further concluded that the Securities Services Act, the Financial Markets Bill and/or the
Financial Markets Bill 2012 should be amended to enact provisions that expressly and
adequately define the concept of insider trading in South Africa. Moreover, it was noted
and concluded that the concept of, and conduct amounting to market manipulation or other
market abuse practices is statutorily defined in the United Kingdom, while such concept
and/or conduct is not statutorily defined in South Africa. In view of this, it was concluded
that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill
2012 should be amended to enact provisions that expressly and adequately define the concept
of market manipulation in South Africa. Moreover, it was noted and concluded that, unlike
the Securities Services Act, the Financial Services and Markets Act treats insider trading,
market manipulation and other forms of market abuse practices on a more equal footing in the
United Kingdom. It was concluded that this approach is desirable and consequently, it
was suggested that the Securities Services Act should be amended in line with the Financial
Services and Markets Act to enable the Financial Services Board and/or other enforcement
authorities to enforce the market abuse prohibition consistently in South Africa.

232 See paragraph 7 2 in Chapter Seven of this thesis.
233 See further related remarks in Chapter Nine of this thesis; also see paragraphs 7 2 & 7 8 in Chapter Seven
of this thesis.
234 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
235 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
236 See related remarks in paragraph 7 3 in Chapter Seven of this thesis.
237 See related remarks in Chapter Nine of this thesis; also see paragraph 7 8 in Chapter Seven of this thesis.
238 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
239 See s 75 & s 76 read with s 73 & s 77 of the Securities Services Act; also see related remarks in Chapter
Nine of this thesis.
240 See further related remarks in paragraph 7 3 in Chapter Seven of this thesis.
241 See paragraphs 7 3 & 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
242 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
to this, it was concluded that another option will be to ensure that the provisions of the Financial Markets Bill which now extends the civil liability compensation orders to cases involving both insider trading and market manipulation will speedily come into effect to enhance the enforcement of the market abuse ban in South Africa. 243 It was further concluded that the Financial Services Board should be statutorily obligated to provide its own Code of Market Abuse Conduct containing sufficient and adequate guidelines on factors that should be considered from time to time in determining whether a trading practice and/or behaviour will give rise to or amounts to market abuse practices in order to enhance the combating of such practices in South Africa. 244 Moreover, it was concluded that both the Financial Services Board and the JSE should consider embarking on more awareness and educative programmes such as developing an adequate anti-market abuse curriculum to be taught to students from high school level up to tertiary level; publishing adequate quarterly informative market abuse booklets on their respective websites; and conducting market abuse workshops and public lectures to prevent market abuse practices and increase the general awareness among the market participants and/or other relevant stakeholders in the South African financial markets. 245

The thesis also gave a comparative analysis of the enforcement of the market abuse ban in Australia. In this regard, it was concluded that the Australian legislature has, as early as the 1960s, consistently adopted a number of statutes, policies, recommendations and other necessary measures to combat market abuse activities in the Australian financial markets. 246 It was also noted and concluded that the concept of insider trading is not statutorily defined in the Australian statutes, including the Corporations Act. 247 In line with this, it was concluded that the current Australian insider trading prohibition employs the “information connection only approach”. 248 It was further concluded that this approach defines an insider as any person who has non-public price-sensitive inside information that relates to a company or to

243 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
244 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
245 See paragraph 7 8 in Chapter Seven of this thesis & related remarks in Chapter Nine of this thesis.
246 See the historical analysis and other relevant discussions under the sub-headings in paragraph 8 2 & also see paragraph 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
247 50 of 2001(Cth) as amended, hereinafter referred to as the Corporations Act; also see paragraphs 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
248 See paragraphs 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
any listed securities or financial products.  

249 It was further concluded that such a person is prohibited from unlawfully trading in any securities (insider trading and tipping) on the premise of such information in order to avoid prejudice to other persons who did not have access to the information in question.  

250 In addition, it was concluded that the Corporations Act’s insider trading provisions apply to acts or omissions (unlawful trading) within Australia relating to securities or financial products of any person or foreign body corporate as well as extra-territorially to acts or omissions outside Australia in relation to the securities or financial products of a person or body corporate that is established or carrying on business in Australia.  

251 Likewise, it was concluded that the scope of application of the market manipulation prohibition in Australia is now broadly extended, not only to market manipulation, but also to other related activities such as dishonest conduct and market rigging.  

252 It was also concluded that the current market manipulation provisions dispense with the requirement of proving the intention to induce others to sell, buy or subscribe for the affected securities or financial products, on the part of the prosecuting authorities.  

253 It was noted and concluded that the criminal penalties for market abuse were recently increased to a maximum pecuniary fine of Aus $495, 000 or three times the profit gained or loss avoided, whichever is the greater, or ten years imprisonment or both, for individuals. The maximum criminal penalties for a body corporate were increased to a fine of Aus $4, 950, 000 or three times the profit made or loss avoided, or 10% of the body corporate’s annual turnover during the relevant period in which the offence was committed, whichever is greater.  

254 It was further concluded that the Australian Securities and Investments Commission may refer any serious criminal matters to the Commonwealth Director of Public Prosecutions and/or institute a civil action for insider trading and/or other market abuse offences in the name of, and for the benefit of the affected persons or the issuer of the affected securities or financial products in order to recover their losses, pecuniary damages, property or other entitlements as

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249 See further analysis in paragraphs 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.  

250 See further analysis in paragraphs 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.  

251 See paragraphs 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.  

252 See Part 7.10 of the Corporations Act; also see paragraphs 8 2 7 3; 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.  

253 See paragraphs 8 2 7 3; 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.  

254 See paragraphs 8 2 6 2; 8 2 7 4 1; 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
contemplated in the Corporations Act.\textsuperscript{255} It was also noted and concluded that the Australian Securities and Investments Commission may also impose a civil penalty of up to Aus $1 million on any person who violates its Market Integrity Rules.\textsuperscript{256} Moreover, it was concluded that the Australian Securities and Investments Commission may further institute infringement notices and/or enforceable undertakings against the market abuse offenders.\textsuperscript{257} It was noted and concluded that market manipulation and insider trading offences are now listed as serious offences under the Telecommunications (Interception and Access) Act\textsuperscript{258} and this empowers the Australian Federal Police and/or other interception agencies to apply for a telephone interception warrant in matters involving market abuse investigations.\textsuperscript{259} In line with this, it was concluded that the Australian Securities and Investments Commission may now rely on the Australian Federal Police to obtain intercepted telephone material which could be used in the prosecution of market abuse offences in Australia.\textsuperscript{260} Moreover, it was noted and concluded that the Australian Securities and Investments Commission is now responsible for the real-time surveillance of the Australian securities and futures markets in order to detect and prevent market abuse activities.\textsuperscript{261} It was also concluded that the declaration of contravention of market manipulation and/or other market misconduct provisions is a useful tool to expedite the actions for civil remedies by both the courts and the Australian Securities and Investments Commission in Australia.\textsuperscript{262} It was concluded that a number of self-regulatory organisations and other regulatory authorities are employed to complement the Australian Securities and Investments Commission in curbing market abuse practices in Australia.\textsuperscript{263} It was noted and concluded that the Australian Securities and Investments Commission has successfully forged some co-operation agreements with several international

\textsuperscript{255} See further paragraphs 8 3 1; 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{256} See further paragraphs 8 3 1; 8 2 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{257} See further paragraphs 8 3 1; & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{258} 114 of 1979 (Cth) as amended, hereinafter referred to as the Telecommunications Act.

\textsuperscript{259} See further paragraphs 8 3 1; & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{260} See further paragraphs 8 3 1 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{261} See further paragraphs 8 3 1 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{262} See paragraphs 8 3 1; 8 2 7 4 3 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.

\textsuperscript{263} See paragraphs 8 3 2; 8 3 1 to 8 3 3 5; 8 3 4; 8 4 1; 8 4 2; 8 3 1 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
self-regulatory organisations for the purposes of combating cross-border market abuse activities in Australia and elsewhere. Moreover, it was concluded that a number of preventative enforcement methods such as Chinese walls, whistle-blower immunity provisions and private rights of action are employed to discourage market abuse activities in Australia. However, it was noted and concluded that bounty rewards are not yet employed in Australia to encourage more persons to provide the Australian Securities and Investments Commission and/or other enforcement authorities with the relevant information that can lead to the recovery of civil remedies from the market abuse offenders.

It was further noted and concluded that an overall comparative analysis on how market abuse practices are detected, investigated, prosecuted and prevented in the European Union, the United Kingdom, South Africa, Australia and the United States of America was undertaken in Chapter Nine. In relation to this, as indicated in Chapter Five, it was concluded that, unlike the multi-functional regulatory approach of the United States of America, South Africa mainly empowers only the Financial Services Board to supervise and oversee the enforcement of its market abuse prohibition. It was concluded that although the Financial Services Board has to date managed to obtain some settlements in civil cases of market abuse, it falls short when comparing its market abuse enforcement record with that of similar foreign regulatory bodies like the United States Securities and Exchange Commission, the Financial Securities Authority and the Australian Securities and Investments Commission. It was also concluded that the Securities Services Act, the

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264 See further paragraphs 8 4 3 & 8 6 read with paragraph 8 3 1 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
265 See paragraphs 8 2 6 3; 8 2 7 4 3; 8 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
266 See paragraphs 8 2 6 3; 8 2 7 4 3; 8 5 & 8 6 in Chapter Eight of this thesis & related remarks in Chapter Nine of this thesis.
267 Generally see paragraph 9 11 in Chapter Nine of this thesis.
268 Generally see related analysis in Chapter Five of this thesis.
269 See paragraphs 9 4; 9 6 & 9 11 in Chapter Nine of this thesis; also see paragraphs 5 4 3 & 5 5 2 in Chapter Five of this thesis & paragraph 10 2 above.
270 Also see paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
271 See paragraphs 9 4 & 9 11 in Chapter Nine of this thesis.
272 See paragraphs 9 4 & 9 11 in Chapter Nine of this thesis; see further paragraph 5 4 1 in Chapter Five of this thesis & paragraphs 3 2 1 & 4 2 in Chapters Three & Four of this thesis respectively.
273 See further paragraph 7 5 1 in Chapter Seven of this thesis; also see paragraphs 9 4 & 9 11 in Chapter Nine of this thesis.
274 See further paragraph 8 3 1 in Chapter Eight of this thesis; also see paragraphs 9 4 & 9 11 in Chapter Nine of this thesis.
Financial Markets Bill and the Financial Markets Bill 2012 do not expressly provide whether the self-regulatory organisations in South Africa are empowered like the Financial Services Board to impose their own penalties or to take any other appropriate action against the market abuse offenders in South Africa.\textsuperscript{275} Moreover, it was concluded that the Securities Services Act does not expressly provide civil penalties and remedies for market manipulation offences.\textsuperscript{276} It was further concluded that this omission on the part of the legislature could potentially weaken South Africa’s market abuse regime,\textsuperscript{277} compared to similar foreign legislation in countries like the United States of America. In addition, it was concluded that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 fall short when it comes to the statutory provision and policing of commodities-based market manipulation remedies in South Africa.\textsuperscript{278} It was also concluded that the Financial Services Board has not fully utilised the support from other International Organisation of Securities Commissions Multilateral Memorandum of Understanding member regulators to combat cross-border market abuse activities.\textsuperscript{279} It was also noted and concluded that, unlike the position in the European Union,\textsuperscript{280} very minimal attention has been given to the combating of cross-border market abuse practices in South Africa.\textsuperscript{281} It was further concluded that, although the Financial Services Board, like the Financial Securities Authority\textsuperscript{282} and the Australian Securities and Investments Commission\textsuperscript{283} has also concluded some Memoranda of Understanding with the United States Securities and Exchange Commission and the Financial Securities Authority, relatively little progress has been made by the Financial Services Board to fully utilise such Memoranda of Understanding to combat cross-border market abuse activities in South Africa.\textsuperscript{284} It was also concluded the lack of reported successful cases of cross-border market abuse prosecutions and settlements might have been

\textsuperscript{275} See Chapter VIII of the Securities Services Act; Chapter X of the Financial Markets Bill; Chapter X of the Financial Markets Bill 2012 & also see paragraphs 9 4; 9 6; 9 8 & 9 11 in Chapter Nine of this thesis.

\textsuperscript{276} S 75 & s 76; also see Cassim 2008 \textit{SA Merc LJ} 192 & related remarks in paragraphs 9 3; 9 2 1; 9 3 1 & 9 11 in Chapter Nine of this thesis. Also see Cassim 2008 \textit{SA Merc LJ} 36.

\textsuperscript{277} See paragraphs 9 3 1 & 9 11 in Chapter Nine of this thesis.

\textsuperscript{278} See paragraphs 9 3 1 & 9 11 in Chapter Nine of this thesis.

\textsuperscript{279} See paragraphs 9 4; 9 6; 9 9 & 9 11 in Chapter Nine of this thesis & see related comments in paragraphs 4 2 & 4 3 3 Chapters Four of this thesis.

\textsuperscript{280} Generally see paragraph 6 4 5 in Chapter Six of this thesis.

\textsuperscript{281} See further related discussions in paragraphs also see paragraphs 9 4; 9 6; 9 9 & 9 11 in Chapter Nine of this thesis; also see paragraphs 3 2 7 & 4 3 3 in Chapters Three & Four of this thesis respectively.

\textsuperscript{282} See paragraphs 7 5 1 & 7 6 3 in Chapter Seven of this thesis.

\textsuperscript{283} See paragraphs 8 3 1 & 8 4 3 in Chapter Eight of this thesis.

\textsuperscript{284} See related remarks in paragraphs 9 4 to 9 11 in Chapter Nine of this thesis; also see related comments in paragraphs 4 2 & 4 3 3 Chapters Four & Six of this thesis.
caused by the unavailability of sufficient resources and the adoption of inadequate preventative measures on the part of the Financial Services Board to monitor and enforce the market abuse prohibition, both at a local and international level.\textsuperscript{285} It was also indicated and concluded that, although it may be \textit{prima facie} presumed that the Financial Services Board supports the Director of Public Prosecutions and the relevant courts with the necessary information regarding ongoing market abuse cases in South Africa, it is not clear whether the Financial Services Board is statutorily mandated to assign certain persons with the relevant expertise to assist the courts in their prosecution of such cases.\textsuperscript{286} As indicated in Chapter Seven,\textsuperscript{287} it was concluded that, unlike the position in the United Kingdom,\textsuperscript{288} all the persons who are prejudiced by market abuse activities are not statutorily given the opportunity to independently claim their compensatory damages directly from the perpetrators of such activities in South Africa.\textsuperscript{289} It was concluded that this approach has, in a way, contributed to the scanty and inconsistent enforcement of the market abuse prohibition in South Africa.\textsuperscript{290} Moreover, it was concluded that, unlike the position in Australia,\textsuperscript{291} this approach could have been worsened by the absence of a mandatory duty of continuous disclosure on the part of the issuers of listed securities to prevent the market abuse offences in South Africa.\textsuperscript{292} It was also concluded that, unlike the Financial Services Authority,\textsuperscript{293} the Financial Services Board cannot impose unlimited financial penalties in matters involving criminal cases relating to market abuse in South Africa.\textsuperscript{294} Such unlimited penalties may only be imposed by the Enforcement Committee in respect of administrative cases for market abuse.\textsuperscript{295}

It was also concluded, as earlier stated in Chapter Six,\textsuperscript{296} that as is the case with the current European Union market abuse regime,\textsuperscript{297} a number of regulatory and enforcement measures

\textsuperscript{285} Paragraphs 4.2; 4.3.1; 4.3.3; 4.3.4; & 4.5 in Chapter Four of this thesis; also see further discussions in paragraph 3.2.7 in Chapter Three of this thesis. Also see paragraphs 9.4 & 9.11 in Chapter Nine of this thesis.

\textsuperscript{286} See further related remarks in paragraphs 9.5; 9.7 & 9.11 in Chapter Nine of this thesis & also generally see paragraph 3.2.6 in Chapter Three of this thesis.

\textsuperscript{287} See related analysis in Chapter Seven thesis.

\textsuperscript{288} See paragraphs 7.4 & 7.7 in Chapter Seven of this thesis.

\textsuperscript{289} See related comments in paragraphs 9.2.1; 9.3.1; 9.10 & 9.11 in Chapter Nine of this thesis.

\textsuperscript{290} See related comments in paragraphs 9.2.1; 9.3.1; 9.10 & 9.11 in Chapter Nine of this thesis.

\textsuperscript{291} Generally see paragraphs 8.3.1; 8.2.7.4.2 & 8.5 in Chapter Eight of this thesis.

\textsuperscript{292} See paragraphs 9.10 & 9.11 in Chapter Nine of this thesis.

\textsuperscript{293} Generally see paragraphs 7.5.1; 7.4 & 7.7 in Chapter Seven of this thesis.

\textsuperscript{294} Generally see paragraphs 9.2.1; 9.3.1; 9.4; 9.10 & 9.11 in Chapter Nine of this thesis.

\textsuperscript{295} Generally see paragraph 9.2.1; 9.3.1; 9.4; 9.10 & 9.11 in Chapter Nine of this thesis.

\textsuperscript{296} Generally see related analysis in Chapter Six.
have also been employed to curb market abuse in South Africa.\textsuperscript{298} Furthermore, it was concluded that unlike the position in the European Union,\textsuperscript{299} the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 do not expressly provide or give any provisions that require issuers or their agents to draw up and update their employee or insiders’ lists and/or such issuers, managers or directors of juristic persons to immediately report (mandatory duty of disclosure) any suspicious transactions to the relevant authorities in South Africa.\textsuperscript{300} It was also noted and concluded that, in contrast to the EU Market Abuse Directive and the subsequent Market Abuse Regulation Proposal,\textsuperscript{301} the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly provide whether the Financial Services Board or other relevant regulatory authorities have the authority to access telephone and existing data traffic records from companies, issuers of securities and other suspected market abuse offenders in order to track down and meritoriously discourage the commission of market abuse offences in South Africa.\textsuperscript{302} In this regard, it was concluded that adopting the approach employed in the EU Market Abuse Directive or the subsequent Market Abuse Regulation Proposal\textsuperscript{303} could assist the regulatory authorities in South Africa to curb, as much as possible, the occurrence of market abuse activities in both the regulated and unregulated financial markets.\textsuperscript{304} Yet again, it was concluded that, unlike the position in the European Union,\textsuperscript{305} the South African market abuse laws do not expressly provide whether the issuers of securities are statutorily allowed to delay or defer the publication of inside information, especially where such delay could be reasonable and justifiable.\textsuperscript{306} It was additionally concluded that although the Financial Markets Bill and/or the Financial Markets Bill 2012 now stipulates that the Financial Services Board may assist foreign regulators with investigations pertaining to any cross-border market

\textsuperscript{297} See paragraphs 6 4 1 to 6 4 5 in Chapter Six of this thesis.
\textsuperscript{298} See related remarks in paragraphs 9 4 to 9 11 in Chapter Six of this thesis.
\textsuperscript{299} See paragraph 6 4 5 in Chapter Six of this thesis.
\textsuperscript{300} Also see the relevant provisions under Chapter VIII of the Securities Services Act; Chapter X of the Financial Markets Bill; Chapter X of the Financial Markets Bill 2012 & also see paragraphs 9 2; 9 3; 9 10 & 9 11 in Chapter Nine of this thesis.
\textsuperscript{301} See paragraph 6 4 5 in Chapter Six of this thesis.
\textsuperscript{302} Also see the relevant provisions under Chapter VIII of the Securities Services Act; Chapter X of the Financial Markets Bill; Chapter X of the Financial Markets Bill 2012 & also see paragraphs 9 2; 9 3 & 9 10 above.
\textsuperscript{303} See paragraph 6 4 5 in Chapter Six of this thesis.
\textsuperscript{304} See paragraph 9 11 in Chapter Nine of this thesis.
\textsuperscript{305} See paragraphs 6 4 5 & 6 5 in Chapter Six of this thesis.
\textsuperscript{306} S 72 to s 87 of the Securities Services Act; clauses 81 to 95 of the Financial Markets Bill; clauses 79 to 90 the Financial Markets Bill 2012 & also see paragraph 9 11 in Chapter Nine of this thesis.
abuse cases, it remains unclear whether the Financial Services Board is statutorily obligated to co-operate with other local enforcement bodies for the purposes of enhancing and/or increasing the curbing of market abuse activities in South Africa. It was also concluded that the failure on the part of the EU Market Abuse Directive to provide common market abuse penalties that are applicable across the European Union member states has contributed to the inconsistent implementation of its provisions. It was further concluded that this flaw is repeated in the Criminal Sanctions Market Abuse Directive Proposal while, on the other hand, the Market Abuse Regulation Proposal now provides specific civil or administrative pecuniary sanctions for market abuse. Moreover, it was concluded that, in contrast to the position in Australia, the United Kingdom and the United States of America, the Financial Services Board does not publicise the names of the culprits who commit market abuse offences (name and shame approach) in South Africa. It was further concluded that, in contrast to the courts in the United Kingdom, Australia and the United States of America, the South African courts are still to obtain more settlements and convictions in market abuse cases.

10.4 Recommendations

It is submitted that a comprehensive, holistic and pragmatic approach to the enforcement of the market abuse prohibition should be adopted in South Africa. In order to achieve this,

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307 Clause 91(2)(b) of the Financial Markets Bill; clauses 86(2)(b) of the Financial Markets Bill 2012 & also see related remarks in paragraph 3.2.1 in Chapter Three of this thesis.
308 See the relevant provisions in Chapter X of the Financial Markets Bill & the relevant provisions in Chapter X of the Financial Markets Bill 2012.
309 Also see paragraphs 9.2; 9.3; 9.6; 9.7 & 9.8; 9.10 & 9.11 in Chapter Nine of this thesis.
310 See paragraph 6.4.5 in Chapter Six of this thesis.
311 See paragraphs 9.2.1; 9.3.1 & 9.11 in Chapter Nine of this thesis; also paragraphs 2.5.4 & 4.4.5 in Chapters Two & Four of this thesis respectively.
312 Articles 6 & 8; also see paragraph 6.4.5 in Chapter Six of this thesis.
313 Article 26(1)(k); (l) & (m) of the Market Abuse Regulation Proposal; also see paragraph 6.4.5 in Chapter Six of this thesis & paragraphs 9.3.1 & 9.11 in Chapter Nine of this thesis.
314 See paragraphs 8.3.1 & 8.5 in Chapter Eight of this thesis.
315 Generally see paragraphs 7.5.1; 7.5.3; 7.6.2 & 7.8 in Chapter Seven of this thesis.
316 See related comments in Chapter Five of this thesis.
317 Also see paragraph 9.11 in Chapter Nine of this thesis.
318 See paragraphs 7.5.2 & 7.6.1 in Chapter Seven of this thesis.
319 See paragraphs 8.3.4 & 8.4.1 in Chapter Eight of this thesis.
320 See paragraph 5.4.2 & 5.5.1 in Chapter Five of this thesis.
321 See further related remarks in paragraphs 9.5; 9.7 & 9.11 in Chapter Nine of this thesis & also generally see paragraph 3.2.6 in Chapter Three of this thesis.
firstly, a number of recommendations aimed at resolving the problems associated with the enforcement of the market abuse prohibition in South Africa will be enumerated below. Secondly, key recommendations and/or proposed provisions to combat market abuse in South Africa will be discussed as indicated in figure 1 below, in four categories, namely, the adoption of adequate and/or appropriate penalties for market abuse, the adoption of adequate market abuse preventative measures, mutual co-operation between the relevant stakeholders and the adoption of adequate market abuse awareness measures. Notably, the aforementioned key recommendations and/or proposed provisions will be briefly preceded by some relevant explanations where necessary.

10.4.1 Overall Synopsis of the Recommendations

The overall recommendations aimed at inter alia improving the enforcement of the market abuse prohibition in South Africa are broadly divided into four categories, namely, those that deal with (a) the adoption of adequate and/or appropriate penalties for market abuse, (b) the adoption of adequate market abuse preventative measures, (c) mutual co-operation between the relevant stakeholders and, (d) the adoption of adequate market abuse awareness measures as enumerated below.322

10.4.1.1 Adoption of Adequate and/or Appropriate Penalties for Market Abuse

It is recommended that:

Firstly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact specific provisions for separate and distinct maximum penalties (civil, criminal or administrative) that can be imposed upon any individual or juristic person that commits or attempts to commit or that incites, aids and abets or attempts to incite, aid and/or abet another person to commit insider trading or market manipulation offences in South Africa, with much higher maximum criminal penalties being imposed on such juristic person;

322 It is submitted, depending on the merits of each case, that the regulatory authorities should co-operatively select or flexibility consider employing the most suitable enforcement measures that are listed in any of the aforesaid categories, to effectively combat market abuse in South Africa.
Secondly, the Financial Services Board should be expressly and statutorily authorised to impose its own additional separate and distinct unlimited monetary and other appropriate (civil, criminal or administrative) penalties on individuals and juristic persons that engage in market abuse activities in South Africa; and/or to use the seizure and forfeiture method to recover or confiscate assets and other illegal benefits from the market abuse offenders;

Thirdly, the Securities Services Act should be reviewed to expressly provide civil penalties for market manipulation offences and desist from rigidly relying on the policy goal of deterrence alone; and/or the provisions of the Financial Markets Bill which now empowers the Financial Services Board to claim from the market manipulation offenders, legal costs and civil compensatory penalties of up to three times the profit gained or loss avoided plus interest should speedily come into force to promote the consistent enforcement of the market abuse prohibition in South Africa;

Fourthly, the relevant courts in South Africa should be expressly and statutorily empowered to impose other additional penalties (apart from those stipulated in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012) upon the market offenders without the fear of violating the *autrefois acquit* or *autrefois convict* doctrine;

Lastly, the Securities Services Act should be reviewed to statutorily and expressly empower the Financial Services Board to employ administrative sanctions or penalties such as public censure against the market abuse offenders in South Africa; or the relevant provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which seek to empower the Financial Services Board to publish by notice on its official website or by means of other appropriate public media, any outcome, status or details of market abuse investigations (public censure or name and shame approach) if such publication is in the public interest should speedily come into force.

10 4 1 2 Adoption of Adequate Market Abuse Preventative Measures

It is recommended that:

Firstly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to provide for specific market abuse whistle-blower immunity
provisions and bounty rewards for the purposes of encouraging all the persons to report market abuse activities to the Financial Services Board or other relevant enforcement authorities in South Africa;

Secondly, the relevant courts and/or the Financial Services Board should be statutorily empowered to make a declaration of contravention of the market abuse provisions in South Africa and/or to seek a court order for such declaration in South Africa whenever a contravention occurs, for deterrence purposes;

Thirdly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to establish a specific regulatory body that prohibits and investigates Internet-based market abuse practices in South Africa, and to specifically discourage the dissemination or publication of rumours, false, deceptive or misleading information through the Internet and/or through the electronic media (disclosure-based manipulation with regard Internet related to publications) by insiders or any person who knows or ought to have known that such information is false, deceptive or misleading;

Fourthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to explicitly provide a statutory private right of action for the issuers of listed securities and/or other aggrieved or prejudiced persons to claim their market abuse damages directly from the offenders;

Fifthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that statutorily define the concept of market abuse in South Africa;

Sixthly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to provide adequate and comprehensive statutory definitions of the concepts of insider trading and market manipulation, involving all the elements of these offences (how they are committed) as well as the various types of market manipulation practices to enhance the combating of such practices in South Africa;

Seventhly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly prohibit a person
who inadvertently aided or abetted another person to make or publish a false, misleading or deceptive statement, promise or forecast that relates to any security in South Africa;

In the eighth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly prohibit commodity-based market manipulation, and to introduce a specific anti-commodities-based market abuse enforcement commission or a regulatory body like the Commodity Futures Trading Commission, to effectively and exclusively deal with the commodities-based market manipulation violations in South Africa;

In the ninth place, the Financial Institutions (Protection of Funds) Act, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly empower the Enforcement Committee to enact or make its own independent market abuse rules, decisions, regulations and other appropriate disciplinary or administrative actions on matters involving market abuse practices to enhance the combating of such practices in South Africa;

In the tenth place, notwithstanding the potential negative effects of bureaucracy, balkanisation, conflict of interests and confusion that may be associated with many regulatory bodies, it is submitted that more self-regulatory organisations, apart from the Financial Services Board, should be statutorily empowered to enforce the market abuse prohibition and/or to impose their own penalties or take any other appropriate action against any persons who indulge in market abuse activities in South Africa;

In the eleventh place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that specifically prohibit insurance-related insider trading in South Africa;

In the twelfth place, it is submitted, as is the position in Delaware (where there is a system in place for the periodic revision of the Delaware Codes), that the South African policy makers should seriously consider appointing a National Market Abuse Commission to examine and review, from time to time, all the matters and laws pertaining to market abuse in South Africa;

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323 28 of 2001 as amended, hereinafter referred to as the Protection of Funds Act.
or the Directorate of Market Abuse and/or a new self-regulatory organisation should be
statutorily established and authorised to independently engage in public consultation from
time to time, to review or make proposals to the legislature and/or other relevant authorities in
relation to any matter dealing with the securities law reform and the general regulation or
enforcement of the market abuse prohibition in South Africa;

In the thirteenth place, the South African policy makers should consider introducing
provincial market abuse statutes to: (a) create regulatory competition among the provinces to
attract investors by effectively combating market abuse activities, and (b) promote dual or
concurrent regulation and enforcement of the market abuse ban both at a provincial and
national level. However, this should be managed well to avoid creating potential problems
such as balkanisation and/or violating the autrefois acquit or autrefois convict doctrine;

In the fourteenth place, the Securities Services Act, the Financial Markets Bill and/or the
Financial Markets Bill 2012 should be reviewed to enact provisions that mandate companies
and all the relevant persons to have market abuse codes of conduct and to appoint market
abuse compliance officers;

In the fifteenth place, in light of the recent global economic crisis, the Securities Services Act,
the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact
provisions which broadly extend the scope of the market abuse ban to cover securities or
financial instruments traded on regulated markets, over the counter markets, organised trading
facilities or multilateral trading facilities in South Africa or elsewhere, to enable the Financial
Services Board and other relevant regulatory authorities to curb the market abuse challenges
posed by high frequency trading and other related illicit activities associated with the new
trading platforms;

In the sixteenth place, the Securities Services Act, the Financial Markets Bill and/or the
Financial Markets Bill 2012 should be amended in line with the Market Abuse Regulation
Proposal and the Wholesale Energy Market Integrity and Transparency Regulation to enact a
specific definition of inside information for commodity derivatives, spot commodity
derivatives and related spot commodity contracts to curb insider trading and cross-market
manipulation in the South African physical (non-financial markets) commodities markets;
and/or enacting separate, adequate and specific commodity derivatives regulations or
legislation that targets market abuse activities involving commodity derivatives, spot commodity derivatives and related spot commodity contracts in the South African commodities markets;

In the seventeenth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact adequate provisions on emission allowances in order to discourage cross-border market abuse activities in the spot secondary markets or related emission allowances markets in South Africa and elsewhere;

In the eighteenth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact specific, adequate and separate provisions that distinguish and prohibit both actual and attempted insider trading and market manipulation practices to enable the prosecuting authorities and/or the Financial Services Board to increase the number of successful prosecutions and settlements of cases involving such practices in South Africa;

In the nineteenth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that oblige issuers and other relevant persons to draw and update their insiders’ lists to enhance the detection and prevention of market abuse practices in South Africa;

In the twentieth place, the legislature should consider introducing mandatory, structured (periodic) and continuous statutory disclosure requirements coupled with civil penalties for non-compliance to enable the JSE and/or the Financial Services Board to oblige all the issuers or listed entities and directors (insiders) of such entities to promptly, consistently and publicly disclose the relevant non-public price-sensitive inside information (including their lending or pledging of securities or financial instruments), transactions executed on behalf of the issuers and/or their interests in the securities of those entities to prevent market abuse practices in the regulated markets, over the counter markets, small and medium-sized growth markets and/or other related trading platforms in South Africa;

In the twenty-first place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly discourage any market abuse activity or illicit dealing in securities on unregulated over the counter
markets through agents or professional intermediaries and face-to-face transactions between non-professional intermediaries in South Africa; and/or provisions that expressly prohibit natural persons (agents or corporate insiders) who participate in the execution of transactions on behalf of a primary insider who is a legal or juristic person from committing market abuse practices and other related organised crime activities in the South African financial markets;

In the twenty-second place, the Financial Services Board should have its own surveillance systems or other mechanisms in place to detect and prevent market abuse activity in the South African securities and financial markets. Moreover, it is submitted that the Financial Services Board should be statutorily empowered to intercept telephonic data from the suspected market abuse offenders, to take over the real-time surveillance of the South African securities and financial markets from the JSE and to develop its own adequate technological mechanisms for market abuse cross-market surveillance in order to effectively and timeously detect, investigate and prevent market abuse practices in South Africa by eradicating the delays that might be associated with the Financial Services Board’s investigations into the JSE’s market abuse referrals;

In the twenty-third place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact provisions that clearly enumerate sufficient guidelines or conditions under which the extra-territorial application of the market abuse ban will be employed and/or to introduce a more adequate, feasible and practically enforceable extra-territorial approach which enforces the market abuse prohibition only where a violation of the South African securities listed on a foreign market has a territorial (nexus) link to South Africa, in order to prevent cross-border market abuse activities consistently in South Africa and elsewhere;

In the twenty-fourth place, the JSE should consider establishing its own Markets Disciplinary Tribunal which specifically deals with any illicit violations of its Listing Requirements and/or market abuse cases in South Africa;

In the twenty-fifth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to expressly provide some rebuttable presumptions or reduce the evidentiary burden of proof in criminal cases in order to assist the
Director of Public Prosecutions and/or the relevant courts in the prosecution of market abuse cases in South Africa;

In the twenty-sixth place, insider trading and market manipulation should be statutorily treated as indictable offences in South Africa;

In the twenty-seventh place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact specific and adequate statutory provisions that deal with Chinese walls to reduce and discourage market abuse practices in South Africa; and/or other adequate and additional defences for market manipulation so as not to discourage legitimate securities trading by issuers or other potential investors;

In the twenty-eighth place, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to provide adequate special or complementary definitions of inside information in relation to derivatives on commodities and/or to the persons (professional intermediaries) involved in the execution of orders relating to listed securities or other related derivative financial instruments. It is submitted that this could prevent the commission of front running or other market abuse activities pertaining to commodities derivatives by some unscrupulous financial brokers and/or other related market participants in South Africa;

In the twenty-ninth place, the definition of an insider which is provided in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to expressly acknowledge that a company (legal person) which repurchases its own shares would be an insider to itself. It is submitted that this will protect shareholders of a company against such company taking advantage of the non-public price-sensitive information to repurchase their shares at a lower price than what the company would have paid if the information had been made public;

In the thirtieth place, the Financial Services Board should consider employing infringement notices and enforceable undertakings to discourage market abuse activities in South Africa;

Lastly, South Africa should consider adopting and implementing the relevant principles of the United Kingdom’s single regulator model because it is economical and less complex. This
could increase the number of settlements and convictions in market abuse cases in South Africa.

10 4 1 3 Mutual Co-operation between the Relevant Stakeholders

It is recommended that:

Firstly, the Financial Services Board should consider concluding a binding co-operation and information-sharing Memorandum of Understanding or other specific binding co-operation agreements with more local self-regulatory organisations such as the JSE and the Securities Regulation Panel to increase co-operation in relation to the detection and combating of market abuse practices in the South African financial markets; or the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact provisions that expressly impose a mandatory co-operation obligation on both the Financial Services Board and the JSE to improve the enforcement of the market abuse prohibition in South Africa;

Secondly, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be reviewed to enact a specific provision that obliges the JSE to give reasonable assistance to the Financial Services Board regarding the combating of market abuse whenever it is necessary, by inter alia, searching the premises of the accused persons who are suspected of engaging in market abuse practices and by summoning any such persons to furnish it with other relevant information relating to ongoing market abuse investigations;

Thirdly, the Securities Services Act should be amended to enact a provision that expressly empowers the Financial Services Board to co-operate with other local and international regulatory bodies in order to enhance the enforcement of the market abuse prohibition in South Africa; or the provisions of the Financial Markets Bill and/or the Financial Markets Bill 2012 which seeks to empower the Financial Services Board to assist foreign regulators with investigations pertaining to any cross-border market abuse cases should speedily come into force to enhance the combating of such cases in South Africa and elsewhere;

Fourthly, the Financial Services Board should be statutorily mandated to support the Director of Public Prosecutions and/or the relevant courts with the necessary information regarding
ongoing market abuse cases in South Africa by assigning from time to time certain persons with the relevant expertise to assist the Director of Public Prosecutions and relevant courts in their prosecution of such cases in South Africa; and/or the Financial Services Board and the Director of Public Prosecutions should consider concluding a binding co-operation and information-sharing Memorandum of Understanding to enhance their co-operation and enforcement of the market abuse prohibition in South Africa;

Fifthly, the Financial Services Board should be statutorily authorised to appoint other relevant stakeholders and/or additional skilled persons, apart from its own employees, to provide it with reports or relevant information relating to any suspected market abuse violations;

Sixthly, the legislature should consider enacting specific provisions which empower the Financial Services Board and the JSE to jointly form, fund, and operate a Joint Market Abuse Advisory Committee that would be tasked with considering and developing solutions to emerging and ongoing market abuse issues of common interest involving commodity and commodity derivatives as well as futures and/or securities traded in both the regulated and over the counter markets in South Africa. In other words, the aforesaid Joint Market Abuse Advisory Committee should identify emerging regulatory risks, assess and quantify their implications for investors and other market participants, and recommend possible solutions to the Financial Services Board and the JSE;

Seventhly, the legislature should consider enacting specific provisions which empower the Financial Services Board, the Securities Regulation Panel, the JSE and other relevant stakeholders to create a Joint Anti-Market Abuse Enforcement Task Force to harness synergies from shared market surveillance data; improve market oversight; enhance enforcement; and to reduce duplicative regulatory burdens and/or balkanisation. The Joint Anti-Market Abuse Enforcement Task Force should prepare and offer market abuse training programmes for the employees of all the relevant enforcement authorities, develop practical market abuse investigation and enforcement measures and timeously coordinate the sharing of relevant market abuse information. Moreover, the Joint Anti-Market Abuse Enforcement Task Force should oversee the general execution of the day-to-day duties by the employees of all the relevant enforcement agencies to enhance the enforcement of the market abuse ban in South Africa;
In the eighth place, regulatory agencies such as the Financial Services Board and the JSE should establish a Joint Market Abuse Cross-Agency Training Programme for their employees to increase the enforcement of the market abuse provisions in South Africa. This could be achieved by developing a training programme to increase the consistent and/or regular sharing of relevant information and rotating of employees between the Financial Services Board and the JSE. This programme could, each year, give the employees of both the Financial Services Board and the JSE the opportunity to work at the other agency for a temporary specified period of time to enhance greater collaboration and coordination between these two agencies;

In the ninth place, the Financial Services Board and the JSE should consider developing a Joint Market Abuse Information Technology Task Force to link their relevant information pertaining to on-going market abuse investigations if they consider such information to be jointly useful and/or in the public interest. This could promote transparency and facilitate the use and understanding of such information by providing a comprehensive, consolidated database on persons and entities investigated by both the Financial Services Board and the JSE to combat market abuse activities in the South African regulated financial markets;

In the tenth place, the South African Police Services and/or the Financial Services Board should be statutorily empowered to co-operatively work together and jointly have measures in place to intercept or access telephone and existing data traffic records from companies, issuers of securities and any other suspected offenders in matters involving market abuse investigations in South Africa; and/or the Financial Services Board and the South African Police Services should also consider concluding a binding Memorandum of Understanding relating to market abuse investigations in order to track down and meritoriously discourage the commission of market abuse offences in South Africa and elsewhere (cross-border market abuse activities);

Lastly, the Financial Services Board should enter into more co-operation arrangements with other renowned international regulators such as the Ontario Securities Commission and the Australian Securities and Investments Commission and similar bodies that enforce commodities-based market abuse laws such as the Commodity Futures Trading Commission, the London International Financial Futures and Options Exchange Administration and Management and the Trade Point Stock Exchange to increase the combating of commodities-
based market abuse practices and cross-border market abuse activities in South Africa and elsewhere.

10 4 1 4 Adoption of Adequate Market Abuse Awareness Measures

It is recommended that:

Firstly, the legislature should consider statutorily establishing more specialised courts and mediation, arbitration and settlement tribunals that are manned with judges and other persons with the relevant expertise in all the provinces of South Africa to increase awareness, improve the negotiation, settlement and prosecution of market abuse cases and/or the general combating of market abuse practices in the South African financial markets;

Secondly, the Financial Services Board should be statutorily required to provide its own adequate market abuse policy guidelines or Code of Market Abuse Conduct containing sufficient and adequate guidelines on factors that should be considered from time to time in determining whether a trading practice and/or behaviour will give rise to or amount to market abuse practices to increase awareness and the combating of such practices in South Africa;

Lastly, the legislature, the JSE, the Financial Services Board and/or other enforcement agencies should co-operatively engage more on preventative, educative and awareness programmes such as developing an adequate anti-market abuse curriculum to be taught to students from high school level up to tertiary level; publishing some quarterly informative market abuse booklets on their respective websites; and conducting anti-market abuse workshops and public lectures to increase the general awareness among the market participants and/or other relevant stakeholders in the South African financial markets.

10 4 2 Key Recommendations

The key recommendations and/or proposed provisions will be briefly stated and, where necessary, some explanations for these proposed provisions will be provided as indicated earlier and as stated in figure 1 below. Notably, the key recommendations and/or proposed

324 See paragraph 10 4 above.
provisions are broadly divided into four categories, namely those that deal with (a) the adoption of adequate and/or appropriate penalties for market abuse, (b) the adoption of adequate market abuse preventative measures, (c) mutual co-operation between the relevant stakeholders, and (d) the adoption of adequate market abuse awareness measures. Moreover, these key recommendations and/or proposed provisions and policy objectives are not numbered and enumerated in any specific order of preference; as a result there will not be any cross-referencing among these provisions. In addition, notwithstanding the fact that, due to the peculiarities of the circumstances and/or differences in the merits of each case, a particular enforcement measure or a group of enforcement measures enumerated in a particular category as indicated in figure 1 below may be more suitable to remedy or combat certain market abuse cases as compared to other measures, it is submitted that these enforcement measures should be co-operatively and flexibly employed to combat market abuse activities effectively in South Africa.

Figure 1: The (viable) anti-market abuse model and/or policy framework.

As indicated above, figure 1 represents the four main categories of the researcher’s proposed policy framework or model entitled “The (viable) anti-market abuse model and/or policy framework”. The arrows that run back and forth between categories as indicated in figure 1

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325 See generally paragraph 10.4 & paragraph 10.4.1 (including its sub-paragraphs) above.
326 See related remarks in paragraph 10.4.1 above.
denote that there is, and there should always be, an equally important inter-relationship between the proposed enforcement measures that fall into the aforesaid categories. In the same vein, the arrows that run from the center of the model to the different categories as indicated in figure 1 denote that all these categories are part of, and/or comprise the fundamental pillars of the (viable) anti-market abuse model and/or policy framework. In other words, the rationale for this model and/or policy framework is that the enforcement authorities should not rely on the enforcement measures that fall under one pillar or category alone and neglect those in the other categories. Furthermore, it is submitted that the enforcement measures that fall under the different categories should be carefully, cooperatively and flexibly employed, on a case-to-case basis, to improve the enforcement of the market abuse ban in South Africa. In line with this, the proposed key provisions under each category are enumerated below:

10 4 2 1 Adoption of Adequate and/or Appropriate Penalties for Market Abuse

10 4 2 1 1 Criminal Penalties

Currently, there are no separate and distinct criminal penalties that can be levied against individuals and/or entities (juristic persons) that commit market abuse offences in South Africa. Moreover, there are no specific, separate and distinct criminal penalties that can be levied firstly, against insiders (primary, secondary or corporate insiders) who violate the relevant market abuse provisions for their own benefit or for the benefit of others and secondly, against the tippees or other persons who unlawfully discourage or encourage others to deal in securities or who unlawfully disclose price-sensitive inside information to others and/or engage in market manipulation. Consequently, it is submitted that the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended to enact specific provisions for separate and distinct maximum criminal penalties that can be imposed upon any juristic persons or individuals that commit or attempt to commit insider trading or market manipulation offences in South Africa, with much higher maximum criminal penalties being imposed on such juristic persons to increase deterrence and enhance the combating of market abuse practices in the South African financial markets.

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327 See related remarks in Chapters Two; Three; Four & Nine of this thesis.
328 Apparently, the criminal penalties contained in the Securities Services Act, the Financial Markets Bill & the Financial Markets Bill 2012 are rigidly applicable to all the categories of persons and types of market abuse violations in South Africa.
**Proposed Policy Objective**

To increase deterrence by introducing adequate provisions for separate and distinct criminal penalties for juristic persons and individuals that commit or attempt to commit market abuse offences in South Africa.

**Proposed Provisions for Criminal Penalties**

1. An individual who is convicted of an offence relating to insider trading or market manipulation is liable to a fine of, but not limited to R85 million, or to imprisonment for a period of not more than 25 years, or to both such fine and imprisonment.

2. A juristic person or company that is convicted of an offence relating to insider trading or market manipulation is liable to a maximum fine of R750 million, or to six times the profit made or loss avoided, or 20% of the company or juristic person’s annual turnover during the relevant period in which the offence was committed, whichever is greater.

3. The Financial Services Board may, in addition to the penalties stipulated in subsections (1) and (2), impose its own separate and distinct unlimited pecuniary or other appropriate penalties against a company or juristic person and/or an individual that is convicted of an offence relating to insider trading or market manipulation.

4. A juristic person or an individual that incites, aids and abets or attempts to incite, aid or abet another person to commit or attempt to commit an offence relating to insider trading or market manipulation, commits an offence, and is liable on conviction to a penalty as stipulated in subsections (1), (2) or (3).

**Administrative Penalties**

**Proposed Policy Objective**

To enhance the combating of market abuse activities by employing additional administrative penalties and sanctions against any juristic person or individual who commit or attempts to commit insider trading or market manipulation offences in South Africa or elsewhere; or who incites, aids and abets or attempts to incite, aid and/or abet another person to commit insider trading or market manipulation offences in South Africa or elsewhere.
Proposed Provisions for Administrative Penalties

(1) The relevant South African courts may, whenever it is objectively necessary or in the public interest, impose their own additional administrative penalties against a juristic person or an individual that is convicted of an offence relating to insider trading or market manipulation.

(2) Whenever the disclosure is in the public interest, and whenever market abuse violations occur, the Financial Services Board may, subsequent to its investigations –

(a) by notice to the Director of Public Prosecutions; or
(b) in the Government Gazette; or
(c) on its official website; or
(d) by means of other appropriate public media, publicly censure an offender by disclosing the type of market abuse violations and the name of the offender.

(3) Where a juristic person or an individual is convicted of an offence relating to insider trading or market manipulation, including the offence of attempting to commit insider trading or market manipulation or the offence of inciting, aiding or abetting or attempting to incite, aid or abet another person to commit insider trading or market manipulation in South Africa or elsewhere, the Financial Services Board or a relevant enforcement authority may, subject to subsection (1), impose an administrative penalty such as seizure and forfeiture orders, revocation of a license, suspension or disqualification from the profession, seize and desist orders, warnings, and the freezing of assets.

10 4 2 1 3 Civil Penalties

The Securities Services Act does not have a separate and specific statutory derivative civil remedy provision for market manipulation. As a result, it submitted that the Securities Services Act should be reviewed to expressly provide civil penalties for market manipulation offences. Moreover, it is submitted that this may positively deter some unscrupulous persons from indulging in market manipulation activities in South Africa.

Proposed Policy Objective

To desist from mainly or rigidly relying on the policy goal of deterrence alone and to treat market abuse offences on a more equal footing by *inter alia* introducing civil penalties for market manipulation in South Africa.
Proposed Provisions for Civil Penalties

(1) A juristic person or an individual that is convicted of the offence of engaging in or attempting to engage in market manipulation activities, or the offence of inciting, aiding and abetting, or attempting to incite, aid and abet another person to engage in market manipulation activities in South Africa or elsewhere, shall pay to the Financial Services Board as penalty –

(a) an amount of up to six times the profit made or loss avoided, or 20% of the company or juristic person’s annual turnover during the relevant period in which the violation was committed, whichever is greater;
(b) a fine of up to three times the profit gained or loss avoided, for individuals;
(c) a punitive and compensatory fine as determined by the relevant courts;
(d) administrative costs, legal costs and interest as determined by the Financial Services Board or the relevant courts; or
(e) a civil penalty for market manipulation as stipulated in the Financial Markets Bill, when it comes into force.

10 4 2 2 Adoption of Adequate Market Abuse Preventative Measures
10 4 2 2 1 Adoption of Adequate Definitions

The Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 do not have complementary definitions of inside information in relation to derivatives on commodities and/or to the persons (professional intermediaries) involved in the execution of orders relating to listed securities or other related derivative financial instruments. Moreover, the concepts of insider trading, market manipulation and market abuse are not statutorily and expressly defined. In relation to this, it is submitted that these concepts should be expressly defined in the relevant market abuse laws to enhance the enforcement of the market abuse prohibition in South Africa.

Proposed Policy Objective

To improve the combating of market abuse activities by inter alia adopting adequate definitions of the relevant key concepts.

Proposed Provisions for Adequate Definitions

(1) “market abuse” means any act, behaviour, conduct, course of business, transaction or practice by a person, including a juristic person, that takes advantage of the non-public
price-sensitive inside information, or that manipulates the supply of, the demand for, or price of, any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues to the detriment of other unwitting persons, and includes insider trading and market manipulation;

(2) “insider trading” means the unlawful use of non-public price-sensitive inside information by an insider or a person, including a juristic person that has such information, to deal, acquire or dispose of, or attempt to deal, acquire or dispose of, for his own benefit or for the benefit of another, directly or indirectly, any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities and/or other trading venues in South Africa or elsewhere, to which that information relates to the detriment of other unwitting persons, and a juristic person or company which repurchases its own shares would be an insider to itself;

(3) A conduct, practice or transaction by a person, including a juristic person or an insider as contemplated in subsection (2), that has non-public price-sensitive inside information and that incites, aids and abets or attempts to incite, aid or abet another person to deal, acquire or dispose of, or to attempt to deal, acquire or dispose of, for his own benefit or for the benefit of another, directly or indirectly, any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, to which that information relates also amounts to insider trading;

(4) (a) In relation to derivatives on commodities, “inside information” means non-public price-sensitive information which relates to one or more such derivatives or to the relevant spot commodity contracts and which, if it were publicly disclosed, would be likely to have a momentous or material effect on the value or prices of such relevant spot commodity contracts or derivatives traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere;\(^{329}\)

(b) In relation to the persons or professional intermediaries involved in the execution of orders relating to securities or other related derivative financial instruments, “inside information” means non-public price-sensitive information which is disclosed by a client and related to the client’s ongoing or pending transactions in securities, derivative financial instruments or other relevant spot commodity contracts and which directly or indirectly relates to one or more issuers of such securities, derivative financial instruments or related spot commodity contracts or to one or more securities, derivative financial instruments or related spot commodity contracts and which, if it were publicly disclosed, would be likely to have a momentous or material effect on the value or prices of such relevant spot commodity contracts, securities or derivative financial instruments traded on the regulated markets, over the counter markets,

\(^{329}\) This provision was based on a similar definition adopted in the European Union, see related analysis in paragraphs 6 4 5; 6 5 & other relevant paragraphs in Chapter Six of this thesis.
multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere;\textsuperscript{330}

(5) “market manipulation” means any act, behaviour, conduct, course of business, transaction or practice by a person, including a juristic person that manipulates, takes advantage of, distorts or disrupts the supply of, demand for or price of, or that attempts or is likely to attempt to manipulate, take advantage of, distort or disrupt the supply of, demand for or price of any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, to the detriment of other unwitting persons;

(6) A practice, behaviour, act, course of business, transaction or conduct by a person, including a juristic person as contemplated in subsection (5), that incites, aids and abets or attempts to incite, aid or abet another person to manipulate, take advantage of, distort or disrupt the supply of, demand for or price of, or to attempt to manipulate, take advantage of, distort or disrupt the supply of, demand for or price of any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, to the detriment of other unwitting persons also amounts to market manipulation;

(7) Without limiting the generality of subsections (5) and (6), market manipulation practices as contemplated may include various types such as trade-based market manipulation, information or disclosure-based market manipulation, commodities-based market manipulation and Internet-based market manipulation.

10 4 2 2 2 Offences and Prohibited Practices

In South Africa, the prohibition on market abuse is mainly restricted to conduct or violations that occur in regulated markets. In this regard, it is suggested that such prohibition be extended to conduct or violations that occur in regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities and/or other trading venues in South Africa. In line with this, it is further suggested that attempted insider trading and attempted market manipulation should be expressly prohibited in South Africa. On the other hand, it was acknowledged that the JSE houses over 20 brokerages that provides online trading (Internet) facilities for the buying and selling of listed securities (online initial public offerings). Be that as it may, the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 do not expressly prohibit Internet-based market abuse practices in South Africa. Therefore, it is submitted that such prohibition should be enacted. It is further submitted that the Financial Services Board and the JSE must have some enforceable

\textsuperscript{330} This provision was based on a similar definition adopted in the European Union, see related analysis in paragraphs 6 4 5; 6 5 & other relevant paragraphs in Chapter Six of this thesis.
guidelines or regulations in place that protect investors and that give all the issuers of securities sufficient guidance, especially on conducting online initial public offerings in order to curb market abuse practices. Such guidelines could include practical measures which allow electronic prospectuses to be checked for accuracy, updated regularly and to have a restricted shelf life; ban manipulative hyperlinks to other websites, and which impose separate and specific penalties for Internet-based market abuse offences. It has been noted that the current market abuse prohibition is seemingly based mainly on the policy goal of deterrence. In relation to this, it is submitted that both the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be amended in order to extend the civil prohibition on market abuse beyond the insider’s immediate relatives or market counterparties, to enable the aggrieved persons to recover their damages from all the possible market abuse offenders.

Proposed Policy Objective

To increase enforcement by *inter alia* strengthening and/or broadening the scope of the market abuse prohibition.

Proposed Provisions for Offences and Prohibited Practices

(1) In this section, unless the context otherwise indicates –

“attempted insider trading” includes –

(a) disclosing non-public price-sensitive inside information relating to any or certain securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, to another person who fails to or does not trade or deal on the basis of such information;

(b) tipping, inducing or encouraging another person to deal, or to attempt to deal in any or certain securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere;

(c) discouraging or attempting to discourage another person from dealing in any or certain securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere;
“attempted market manipulation” includes –

(a) disclosing false, deceptive or misleading information or non-public price-sensitive inside information relating to certain securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, to another person who fails to or does not trade or deal on the basis of such information;

(b) unsuccessfully entering or attempting to enter an order, practice, artifice, device, scheme, course of business or transaction in respect of any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, to defraud other unwitting persons;

(c) engaging or participating, or attempting to engage or participate in any of the practices that are deemed manipulative practices under the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012.

(2) The Financial Services Board shall establish a specific regulatory committee or unit that prohibits and investigates Internet-based market abuse practices in South Africa.

(3) No agent, professional or non-professional intermediary, insider or other person may, directly or indirectly, engage or participate, or attempt to engage or participate in market manipulation practices in respect of any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, and an agent, professional or non-professional intermediary, insider or other person who does so, commits an offence.

(4) No agent, professional or non-professional intermediary, insider or other person may, directly or indirectly, engage or participate, or attempt to engage or participate in insider trading practices in respect of any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities or other trading venues in South Africa or elsewhere, and an agent, professional or non-professional intermediary, insider or other person who does so commits an offence.

(5) An agent, professional or non-professional intermediary, insider or other person who inadvertently aided or abetted another person to engage or participate or to attempt to engage or participate in market abuse practices commits an offence.

(6) No agent, professional or non-professional intermediary, insider or other person may, in respect of any securities or financial instruments traded on the regulated markets, over the counter markets, multilateral trading facilities, organised trading facilities, emission allowances markets, spot secondary markets or other trading venues in South Africa or elsewhere, directly or indirectly engage or participate, or attempt to engage or participate in -

(a) emission allowances-based market abuse practices;

(b) commodity-based market abuse practices; or
insurance-based market abuse practices, and an agent, professional or non-professional intermediary, insider or other person who does so, commits an offence.

10 4 2 2 3 Enhancing Surveillance, Detection, Investigation and Prosecution

Market surveillance is conducted by the JSE’s Surveillance Division and not the Financial Services Board in South Africa. This has, in some instances, delayed the investigation and prosecution of market abuse cases in South Africa. Consequently, it is suggested that the Financial Services Board should have its own market abuse surveillance systems which complement the enforcement efforts of the JSE’s Surveillance Division and/or take over the surveillance of the South African securities and financial markets from the JSE. It has been noted that apart from the Financial Services Board, there are no other self-regulatory bodies that enforce the market abuse ban in South Africa. In this regard, it is submitted that the legislature should consider introducing other self-regulatory organisations to enhance the curbing of market abuse in South Africa. It was further noted that very minimal progress has been achieved in the prosecution of criminal cases of market abuse in South Africa. In relation to this, it is suggested that the legislature should consider introducing rebuttable presumptions or reducing the evidentiary burden of proof in criminal cases of market abuse. In the same vein, it is submitted that the legislature should also consider adopting measures such as whistle-blowing and bounty rewards\(^\text{331}\) to encourage all persons to freely report all incidences of market abuse violations.

Proposed Policy Objective

To improve the prosecution of market abuse cases by \textit{inter alia} adopting other alternative measures for surveillance, detection and investigation.

Proposed Provisions for Enhancing Surveillance, Detection, Investigation and Prosecution

(1) The Financial Services Board may -

(a) develop or establish its own surveillance systems to detect, curb or prevent market abuse activity in the South African securities and financial markets;

\(^{331}\) These measures are usefully employed in the United States of America. See Chapter Five of this thesis.
(b) develop or establish its own systems for cross-market surveillance to detect, curb or prevent market abuse activity in the South African securities and financial markets;

(c) intercept telephonic data from the suspected market abuse offenders;

(d) employ infringement notices and enforceable undertakings against the market abuse offenders in South Africa;

(f) employ whistle-blower immunity measures and bounty rewards to curb market abuse activities in South Africa.

(2) The Financial Services Board must, under subsection (1)(a) and (b), take over the real-time surveillance of the South African securities and financial markets from the JSE.

(3) Other relevant self-regulatory organisations may, from time to time and after notifying the Financial Services Board, impose their own penalties or take any other appropriate action against the market abuse offenders in South Africa.

(4) A juristic person known as the National Commodity Futures Commission is hereby established to deal with commodity and related derivative market abuse violations in South Africa.

(5) The Enforcement Committee may, subject to subsections (3) and (4) and after notifying the Financial Services Board, make its own market abuse rules, decisions, regulations or administrative actions on matters involving market abuse in South Africa.

(6) It will be presumed, until the contrary is proved, that the accused or defendant is an insider as defined in the Securities Services Act, or the Financial Markets Bill or the Financial Markets Bill 2012, and that such accused or defendant person knew that the information he or she had was inside information, and had in fact, appreciated its price-sensitive nature.

(7) Insider trading and market manipulation may be treated as indictable offences in South Africa.

10 4 2 2 4 Other Preventative Measures

The Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not clearly provide for a private right of action for the issuers of securities. In this regard, it is submitted that all the affected issuers should, after notifying the Financial Services Board, have the option to claim their damages directly from the market abuse offenders if they fail to obtain such damages through the Financial Services Board or if no civil proceedings were instituted by the Financial Services Board. On the other hand, it has been noted that the unlimited extra-territorial application of the market abuse prohibition in the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 is sometimes
inconsistently enforced, probably due to limited financial resources. As a result, it is suggested that a more restricted and practically enforceable approach having a territorial basis should be considered. Moreover, the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not provide for a mandatory duty of disclosure of inside information on the part of companies and the issuers of securities. In relation to this, it is submitted that mandatory disclosure requirements similar to those in the JSE disclosure requirements and the Securities Regulation Panel rules, coupled with appropriate criminal sanctions for companies or issuers who deliberately fail to comply, should be considered to impose a duty on all companies or issuers to disclose without delay, any negotiations towards any transaction that are likely to have a material effect on the demand for, supply of or price of their securities or financial instruments. In addition, a public notice in a newspaper circulating in the Johannesburg area, newspapers circulating in the area where the issuer, company or institution’s registered office or principal place of business is situated, to Reuters, the South African Press Association and through the Stock Exchange News Service should be considered. Although there was no room to discuss the JSE mandatory disclosure rules (which are internal rules of the JSE and not statutory principles) in detail in this thesis, it must be noted that the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 do not expressly impose a duty of disclosure on the JSE to report to the Financial Services Board any suspected market abuse activity or unusual movements in the demand for, supply of or prices of securities or financial instruments, or unusual trade volumes in respect thereof. It is further submitted that companies and other entities should be encouraged to develop their own appropriate internal mechanisms such as Chinese walls and mandatory reporting obligations on the part of their employees to report any abuse of unpublished price-sensitive information relating to securities or other financial instruments to prevent market abuse practices in South Africa. In the same vein, it is submitted that other definitional defences for market manipulation such as share buy-back programmes, a defence that the accused person’s reasons for entering orders to trade were legitimate and a defence that the accused person has acted honestly, having regard to all the relevant circumstances should be provided in order not to discourage or scare away potential investors.

Proposed Policy Objective

To improve the curbing of market abuse practices in South Africa, by inter alia introducing other relevant preventive measures.
Proposed Provisions for Other Preventative Measures

(1) A juristic person to be known as the National Market Abuse Commission is hereby established with the aim of–

(a) examining and reviewing, from time to time, all the matters and laws pertaining to market abuse in South Africa;

(b) independently engaging in public consultation from time to time, to review or make proposals to the legislature and other relevant authorities in relation to any matter pertaining to securities law reform and the general regulation or enforcement of the market abuse prohibition in South Africa.

(2) The JSE shall be required to establish a Markets Disciplinary Tribunal to deal with any violations of its Listing Requirements to prevent or curb market abuse practices in South Africa.

(3) Companies, issuers and other relevant persons shall have internal regulatory measures, market abuse codes of conduct and market abuse compliance officers.

(4) (a) The JSE shall impose a mandatory, structured (periodic) or continuous statutory disclosure duty on issuers or listed entities and insiders of such entities, for them to promptly, consistently and publicly disclose –

(i) the relevant non-public price-sensitive inside information (including their lending or pledging of securities or financial instruments); and

(ii) transactions executed on behalf of the issuers or their interests in the securities or financial instruments of those entities.

(b) An issuer, insider or person who fails to comply with the provisions of subsection (4)(a), shall be liable to civil penalties.

(5) Companies, issuers and other relevant persons shall to draw up and regularly update their insiders’ lists.

(6) Issuers or other aggrieved persons may, through their own private litigation, directly claim their market abuse damages from the offenders.

(7) Companies, issuers and other relevant persons are required to have Chinese walls or other relevant measures to curb market abuse.

(8) Where a person is accused of market manipulation it shall be a defence for that person if he can prove that –

(a) the reasons for entering orders to trade were legitimate;
he has acted honestly, having regard to all the relevant circumstances or share buy-back programmes.

(9) A relevant court or the Financial Services Board may, in respect of any market abuse provision, make a declaration of contravention in South Africa whenever such contravention occurs.

(10) Market abuse provisions have extra-territorial application only where a violation in respect of any South African financial instruments or securities listed on a foreign market has a territorial link to South Africa.

10 4 2 3 Mutual Co-operation between the Relevant Stakeholders

10 4 2 3 1 Co-operation between the Financial Services Board and the JSE

The extent or degree of co-operation between the Financial Services Board and the JSE is very difficult to accurately ascertain. In line with this, it is suggested that the Financial Services Board and the JSE should continue to co-operatively play a leading role in the development of appropriate measures, policies and regulations that promote an anti-market abuse culture among all the relevant persons in South Africa. It is also suggested that such an anti-market abuse culture can be established by employing strong, rigorous and mutual enforcement measures on the part of both the Financial Services Board and the JSE.

Proposed Policy Objective

To improve the detection and curbing of market abuse by inter alia promoting mutual co-operation between the Financial Services Board and the JSE.

Proposed Provisions for Co-operation between the Financial Services Board and the JSE

(1) The Financial Services Board shall from time to time appoint other relevant stakeholders and/or additional skilled persons, apart from its own employees, to provide it with information or reports relating to market abuse violations.

(2) The JSE shall be required to give reasonable assistance to the Financial Services Board whenever it is necessary, and may for this purpose –

(a) search the premises of an accused person; and

(b) summon an accused person to furnish it with relevant information.
(3) The Financial Services Board and the JSE shall establish a Joint Market Abuse Cross-Agency Training Programme to –

(a) deal with, provide for, adopt or propose necessary measures to increase enforcement and market abuse awareness;

(b) deal with, provide for, adopt or propose necessary measures to promote the regular sharing of relevant information; and

(c) encourage greater collaboration and coordination between the Financial Services Board and the JSE.

(4) The Financial Services Board and the JSE shall establish a Joint Market Abuse Information Technology Task Force to –

(a) link relevant information pertaining to market abuse investigations if such information is jointly useful to the Financial Services Board and the JSE;

(b) adopt or propose necessary technology systems and/or other measures to promote regular sharing of relevant information;

(c) provide a comprehensive and consolidated database of the persons investigated by both the Financial Services Board and the JSE; and

(d) promote transparency.

(5) The Financial Services Board and the JSE shall establish a Joint Market Abuse Advisory Committee to -

(a) identify emerging regulatory risks;

(b) assess and quantify the implications of emerging regulatory risks;

(c) develop and propose solutions to emerging or ongoing market abuse risks or issues of common interest.

10 4 2 3 2 Co-operation between the Financial Services Board and Other Local Enforcement Authorities

In South Africa, only the Financial Services Board is directly involved in the enforcement of the market abuse prohibition. Moreover, apart from some involvement from the JSE and a few specialised units that investigate economic offences, there are no other regulatory bodies that complement the Financial Services Board’s efforts to enforce the market abuse ban in South Africa. In this regard, it is submitted that the legislature should empower other
regulatory bodies or additional specialised commercial units to assist and/or co-operate with the Financial Services Board to combat market abuse.

**Proposed Policy Objective**

To promote co-operation between the Financial Services Board and other local enforcement authorities for the purposes of combating market abuse in South Africa.

**Proposed Provisions for Co-operation between the Financial Services Board and Other Local Enforcement Authorities**

(1) The Financial Services Board shall:

   (a) conclude a binding co-operation and information-sharing Memorandum of Understanding with the JSE and the Securities Regulation Panel; and

   (b) conclude a binding co-operation and information-sharing Memorandum of Understanding with any other relevant regulatory body in South Africa.

(2) A regulatory body as contemplated in subsection (1), may, at the request or behest of the Financial Services Board, assist it with investigations or relevant information pertaining to market abuse cases.

(3) The Financial Services Board, the Securities Regulation Panel and the JSE, shall, under subsection (1)(a), co-operate from time to time to detect, investigate or curb market abuse.

(4) The Financial Services Board, the Securities Regulation Panel, the JSE and other relevant stakeholders shall establish a Joint Anti-Market Abuse Enforcement Task Force, with the aim of –

   (a) harnessing synergies from shared market information and surveillance data;

   (b) improving market oversight;

   (c) enhancing enforcement;

   (d) reducing duplicative regulatory burdens and balkanisation;

   (e) preparing and offering anti-market abuse training programmes for the employees of all the relevant enforcement authorities;

   (f) developing practical market abuse investigation and enforcement measures;

   (g) timeously coordinating the sharing of relevant market abuse information; and
(b) overseeing the general performance and duties of the employees of the relevant enforcement agencies.

(5) The Financial Services Board shall conclude a binding co-operation and information-sharing Memorandum of Understanding with the Director of Public Prosecutions.

(6) The Financial Services Board shall, in accordance with subsection (5), provide necessary information or assistance on market abuse cases to the relevant courts.

(7) The Financial Services Board shall conclude a binding co-operation and information-sharing Memorandum of Understanding with the South African Police Services.

(8) The Financial Services Board and the South African Police Services shall:

(a) jointly have measures in place to access telephone and existing data traffic records from companies, issuers or any suspected market abuse offenders;

(b) adopt or employ any other necessary measures to investigate market abuse.

10 4 2 3 3 Co-operation between the Financial Services Board and International Enforcement Authorities

Proposed Policy Objective

To promote co-operation between the Financial Services Board and international enforcement authorities for the purposes of combating cross-border market abuse.

Proposed Provisions for Co-operation between the Financial Services Board and International Enforcement Authorities

(1) The Financial Services Board may co-operate, support or engage with other likeminded international regulatory bodies in relation to -

(a) relevant information sharing;

(b) cross-border market abuse violations and investigations;

(c) mutual co-operation and enforcement agreements;

(d) expertise, resources and/or technological surveillance systems sharing.

(2) The Financial Services Board may, for the purposes contemplated in subsection (1), at the request or behest of other international regulatory bodies, assist such bodies with investigations and/or relevant information pertaining to cross-border market abuse cases.
Not giving less regard to the provisions contemplated in subsections (1) and (2), the Financial Services Board may alternatively co-operate with likeminded international regulatory bodies as stipulated in the Financial Markets Bill or the Financial Markets Bill 2012, when it comes into force.

10 4 2 4 Adoption of Adequate Market Abuse Awareness Measures

10 4 2 4 1 Establishment of Specialised Courts and/or Arbitration and Settlement Tribunals

A relatively minimal number of market abuse cases have been successfully settled or prosecuted in South Africa to date. Many cases have probably been abandoned or delayed due to the everlasting backlog in the current few competent courts. In this regard, notwithstanding the challenges regarding the availability of sufficient resources, it is submitted that specialist courts or mediation, arbitration and settlement tribunals for market abuse cases should be introduced on a regional basis or at least in each centre where there is a division of the High Court of South Africa.

Proposed Policy Objective

To increase market abuse awareness by introducing specialised courts and/or mediation, arbitration and settlement tribunals in all the provinces of South Africa.

Proposed Provisions for the Establishment of Specialised Courts and/or Arbitration and Settlement Tribunals

(1) The Director of Public Prosecutions shall -

(a) establish specific market abuse courts in all the divisions of the High Court of South Africa; and

(b) establish specific market abuse mediation, arbitration and settlement tribunals in all the provinces, regions or divisions of the High Court of South Africa.

(2) A court or tribunal contemplated in subsection (1) shall -

(a) have exclusive jurisdiction in all matters involving market abuse;

(b) be manned by lawyers, judges or other persons with relevant expertise in relation to, *inter alia*, corporate law, market abuse legislation, financial markets and securities regulation;
have the discretion to impose additional penalties against market abuse offenders.

10 4 2 4 2 Adopting a Code of Market Abuse Conduct

In South Africa, there is no specific Code of Market Abuse Conduct with regard to market abuse activities to help or guide market professionals such as brokers, financial analysts, lawyers, accountants and publishing and printing companies who, from time to time, have access to unpublished price-sensitive information in the course of executing their duties. In line with this, it is submitted that the Financial Services Board should be statutorily mandated to provide market abuse policy guidelines or a Code of Market Abuse Conduct. It is further suggested that the company secretary should be statutorily responsible to the company for compliance with the market abuse prohibition and the internal enforcement measures of the company.

Proposed Policy Objective

To increase market abuse awareness in South Africa by *inter alia* adopting an adequate Code of Market Abuse Conduct.

Proposed Provisions for a Code of Market Abuse Conduct

1. The Registrar of Securities Services or the Financial Services Board shall, from time to time, in a proper consultative manner, adopt or prescribe a Code of Market Abuse Conduct for market professionals, market participants or issuers of securities or financial instruments.

2. A Code of Market Abuse Conduct stipulated in subsection (1) shall provide that -
   
   a) market abuse includes insider trading and market manipulation;
   
   b) a market professional, market participant or issuer of securities or financial instruments must not engage or participate or attempt to engage or participate in market abuse practices;
   
   c) a market professional, market participant or issuer of securities or financial instruments must not act unfairly, dishonestly or in a manner that prejudices or that may prejudice other persons;
(d) a market professional, market participant or issuer of securities or financial instruments must not act recklessly or in a manner that affects or that may affect the securities and/or financial markets integrity;

(e) a market professional, market participant or issuer of securities or financial instruments must not act recklessly or in a manner that causes or that may cause systemic risks.

(3) A market professional, market participant or issuer must have -

(a) sufficient and adequate market abuse preventative measures;

(b) market abuse awareness measures;

(c) internal rules or Codes of Market Abuse Conduct;

(d) any other measures or policies necessary and expedient for the compliance with the Code of Market Abuse Conduct and the relevant market abuse laws.

(4) The Code of Market Abuse Conduct is binding upon market professionals, market participants, issuers or other relevant persons, and on their clients, insiders and employees.

(5) A party or person as contemplated in respect of subsection (4), who contravenes the Code of Market Abuse Conduct may -

(a) be disqualified;

(b) have his license revoked;

(c) incur penalties as stipulated in the relevant market abuse laws.

10 4 2 4 3 Education and Other Awareness Measures

Apart from the insider trading manual (booklet) which was published by the JSE at the request of the Minister of Finance, there are very few other measures that were taken to make the public and the relevant stakeholders aware of market abuse practices in South Africa. In this regard, it is suggested that effective publicity campaigns, even at grassroot level, and the development of an academic curriculum comprising securities trading for teaching at both secondary and tertiary levels in South Africa should be considered to increase awareness and for the general prevention of market abuse activities.
Proposed Policy Objective

To increase enforcement by *inter alia* promoting market abuse education and awareness measures.

Proposed Provisions for Education and Other Awareness Measures

(1) The JSE, the Financial Services Board and other enforcement agencies must -

(a) co-operatively conduct market abuse education and awareness campaigns;

(b) develop an adequate anti-market abuse academic curriculum for the South African high schools and tertiary institutions;

(c) quarterly or annually publish adequate and informative booklets or guidelines regarding market abuse practices on their respective websites;

(d) conduct market abuse workshops and public lectures to increase awareness among the relevant stakeholders; and

(e) employ any other measures or policies necessary and expedient for the promotion of market abuse awareness among the relevant stakeholders.

10.5 Concluding Remarks

As discussed in this thesis, there can be no doubt that the enactment of the Securities Services Act and the recent introduction of the Financial Markets Bill and/or the subsequent provisions of the Financial Markets Bill 2012 are positive attempts by the policy makers to improve the enforcement of the market abuse provisions in South Africa. Nonetheless, considering the current shortcomings in the Securities Services Act, the Financial Markets Bill and the Financial Markets Bill 2012 as outlined in this thesis, one can argue that such attempts were to a greater extent unsuccessful.332 It was pointed out in this research that many of the flaws contained in the Insider Trading Act were repeated in the Securities Services Act, sometimes even with the addition of new shortcomings.333 Likewise, it was indicated that most of the shortcomings contained in the Securities Services Act were duplicated in the Financial

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332 See particularly Chapters Two; Three & Four of this thesis for more information.

333 See particularly Chapter Two read with Chapters Three & Four of this thesis for more information.
Markets Bill and the Financial Markets Bill 2012. In light of this, it has been concluded and recommended that the relevant market abuse provisions of the Securities Services Act, the Financial Markets Bill and/or the Financial Markets Bill 2012 should be comprehensively reviewed in regard to the recommendations made in this research. Lastly, it is appropriate to conclude this thesis by highlighting some areas that could be explored further in future research. As discussed in Chapter Four of this thesis, there are several problems associated with the inconsistent enforcement of the market abuse prohibition in South Africa. Some of these problems were simply stated but not extensively dealt with in this thesis due to time and space constraints. In relation to this, one question that could be empirically raised in the future is whether it is advantageous for the regulatory authorities to rely strictly and solely on a certain enforcement approach alone, say for example criminal penalties, to combat market abuse practices in South Africa. Another empirical question that could arise is whether it is actually more effective and viable for the regulatory authorities to flexibly rely on a variety of enforcement measures to combat market abuse on a case-to-case basis in South Africa. Moreover, another debate that could be empirically entertained in future research is whether it is advantageous for the Financial Services Board to have its own market surveillance systems and/or to take over the real-time monitoring and market surveillance of the relevant South African financial markets from the JSE. Moreover, the introduction, use and/or viability of other anti-market abuse enforcement measures such as bounty rewards, whistle-blower immunity provisions and prohibiting short selling and naked credit default swaps could also be theoretically and/or empirically explored further in future research. In a nutshell, this chapter and thesis has advocated and revealed the vital need for vigorous, robust and effective enforcement of the market abuse provisions in South Africa and elsewhere. Notably, similar views were also succinctly echoed by Schapiro:

“Although we continue to learn more about the causes of the financial crisis, one clear lesson is the vital importance that vigorous enforcement of existing laws and regulations plays in the fair and proper functioning of financial markets…vigorous enforcement is essential to restoring and maintaining investor confidence. Through aggressive and even-handed enforcement, we hold accountable those whose violations of the law caused severe loss and hardship and we deter others from engaging in wrongdoing. Such enforcement efforts also help vindicate the principles fundamental to the fair and proper functioning of financial markets…”

334 See relevant analysis in Chapters Two; Three & Four of this thesis for more information.
335 See the sub-paragraphs under paragraph 10 4 above & related analysis in Chapters Two to Nine of this thesis.
336 The merits and/or circumstances in each case involving or relating to market abuse violations.
337 Schapiro Testimony before the Financial Crisis Inquiry Commission Concerning the State of the Financial Crisis 14 January 2010 2.
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ANNEXURE A
ACRONYMS AND GLOSSARY

A

ACCC
Australian Competition and Consumer Commission

ACER
Agency for the Cooperation of Energy Regulators

ACH
Australian Clearing House Pty Limited

AFMA
Australian Financial Markets Association

**Appeal Board**
an independent body established to hear and afford all the aggrieved persons an opportunity to appeal or lodge their complaints against any decisions of the Registrar of Securities Services, the Enforcement Committee or the Financial Services Board regarding market abuse for them to be addressed

ASC
Australian Securities Commission

ASF
American Securitisation Forum

ASIC
Australian Securities and Investments Commission
ASTC
Australian Stock Exchange Settlement and Transfer Corporation Pty Limited

ASXMS
Australian Stock Exchange’s Market Supervision Private Limited

ASX
Australian Stock Exchange

AuSF
Australian Securitisation Forum

Bank for International Settlements
an international organisation which encourages international monetary and financial cooperation and serves a bank for central banks

BCBS
Basel Committee on Banking Supervision

BESA
Bond Exchange of South Africa

Broker
a trading party, who trades in securities or financial instruments on a regulated market either for itself or for its clients

Broker Deal Accounting
a JSE system which keeps the securities records and books of individual broking companies in respect of their clients

Broker–Dealer Accounts System
a method that is employed to extract relevant information from market participants such as brokers, by investigating their trading history for the purposes of detecting market abuse practices
CA
California

Cal Ct App
California Court of Appeal

CAMAC
Corporations and Markets Advisory Committee

CASAC
Companies and Securities Advisory Committee

CEO
Chief Executive Officer

CESR
Committee of European Securities Regulators

CESR-Fin
a permanent group under the Committee of European Securities Regulators which is responsible for financial information disclosures and coordinating the work of member regulators particularly with regard to the endorsement and enforcement of International Accounting Standards

CESR-Pol
an enforcement sub-committee of the Committee of European Securities Regulators which facilitates the sharing of information between member regulators to enhance their cooperation and coordination of surveillance, investigations and enforcement in the securities markets under their jurisdiction

CFO
Chief Finance Officer
CFTC
Commodity Futures Trading Commission

CHESS
Clearing House Electronic Sub-register System

Chicago Mercantile Exchange Group Incorporated
the world’s largest derivatives exchange which was formed after the merger of the Chicago
Mercantile Exchange and the Chicago Board of Trade in 2007

CLERP Act
Corporate Law Economic Reform Program Act 103 of 2004

CME Group Inc
Chicago Mercantile Exchange Group Incorporated

Code of Market Conduct
rules and principles that were adopted in the United Kingdom to *inter alia* guide all the
relevant persons on conduct that amounts to market manipulation and related practices,
including factors to be considered when determining whether or not such conduct amounts to
market abuse

Committee of European Securities Regulators
an independent committee that was established in June 2001 by the European Commission to
*inter alia* assume some advisory functions on the enforcement of the European Union Market
Abuse Directive’s market abuse provisions by the relevant securities regulators in the
European Union member states

Commodities
include non financial instruments such as corn, grain, oils, maize, precious metals like gold
and platinum

Commonwealth DPP
Commonwealth Director of Public Prosecutions
Covered Short Selling
occurs where the value of the asset or security in question depreciates during the period between the time of the sale and its actual delivery giving rise to the seller to illicitly gain profit

CPSS
Committee on Payment and Settlement Systems

CRA
Credit Rating Agencies

Credit Default Swaps
bilateral contracts designed for credit hedging or speculative investment and issues relating counterparty risk, operational risk and market transparency

Credit Swap
relates to credit default swaps and total return swaps

Cth
Commonwealth

D

Dark Pool
a practice that involve more than one person colluding to buy or sell a security in a bid to create an artificial market activity

DEL
Delaware

Del SC
Delaware Supreme Court

Del Supr. Ct
Delaware Supreme Court
**Division 3 Financial Products**
a term employed in Australia to refer to securities or derivatives; or interests in a managed investment scheme; or debentures, stocks or bonds issued or proposed to be issued by a government; or superannuation products other than those prescribed by the regulations made for the purposes of the insider trading prohibition; or any other financial products that are able to be traded on a financial market

**DMA**
Directorate of Market Abuse

**DOJ**
Department of Justice

**DPP**
Director of Public Prosecutions

**DTI**
Department of Trade and Industry

**EC**
European Commission

**EDX London**
an equity derivatives exchange established in 2003 by the London Stock Exchange and the OM London Exchange Limited. It is also a Recognised Investment Exchange and prescribed market for the market abuse regime in the United Kingdom

**EEC**
European Economic Community

**Electronic Data Gathering Analysis and Retrieval system**
a system that is used to assess, review and obtain misleading, manipulative or deceptive information regarding any filings with the United States Securities and Exchange Commission
**Electronic Document Lodgment**
a system that is employed in Australia to enable lodgment agents such as accountants, lawyers and brokers to promptly transfer relevant documents to the Australian Securities and Investments Commission electronically and free of charge to effect disclosure of inside information

**ENF**
Enforcement (Manual) Handbook of the Financial Services Authority

**Enforcement Approaches**
measures and/or methods that are adopted or put in place to combat market abuse practices in various countries

**Enforcement Committee**
a committee of the Financial Services Board that adjudicates on all the forms of market abuse referred to it by the Directorate of Market Abuse or the Registrar of Securities Services

**ESCA**
Emirates Securities and Commodities Authority

**ESF**
European Securitisation Forum

**ESME**
European Securities Markets Expert Group

**EU**
European Union

**Euronext-LIFFE**
an electronic derivatives exchange that was formed in January 2002 after the takeover of the London International Financial Futures and Options Exchange by the Euronext
European Securities and Markets Authority
an independent body that was established to *inter alia* oversee the enforcement of the European Union Market Abuse Directive’s market abuse provisions by the relevant securities regulators in the European Union member states

European Union’s Action Plan for Financial Services
a legislative programme that was introduced to *inter alia* formulate a common securities capital market in Europe

F

FASB
Financial Accounting Standards Board

FESCO
Forum of European Securities Commissions

Financial Markets
infrastructures, institutions and procedures that are employed for the direct and indirect exchange (including the buying and selling) of securities, financial instruments or other financial assets and risk exposures by a variety of market participants and/or economic agents

Financial Stability Board
an international institution that tackles pertinent systemic risks by developing and implementing strong regulatory, supervisory and other relevant policies to enhance financial stability

Flash Order
a manipulative practice that allows a person who has not yet disclosed a stock quote, to quickly view other stock orders before the public and other interested persons are given a chance to trade in those stocks

FOS
Financial Ombudsman Service
Front Running
a technique employed by market participants like brokers to anticipate the effect and/or impact of upcoming trading transactions on the price of certain securities

FSA
Financial Services Authority

FSB
Financial Services Board

FSF
Financial Stability Forum

FSMT
Financial Services and Markets Tribunal

G

Global Joint Initiative
a joint and informal international forum that comprises of the American Securisation Forum, Securities Industry and Financial Markets Association, Australian Securitisation Forum and the European Securitisation Forum

G7
Group of Seven

Group of Seven
an informal and international forum that was established by finance ministers and central bank governors to *inter alia* promote financial stability

G10
Group of Ten

Group of Ten
an international cooperation forum that was established by central bank governors to deal with banking supervision
G30
Group of Thirty

Group of Thirty
an international body composed of leading financiers and academics, which aims to deepen understanding of economic and financial issues and to explore the consequences of decisions made in the public and private sectors related to these issues in order to examine the choices available to policymakers and/or other market practitioners

G20
Group of Twenty

Group of Twenty
an informal forum established to systematically gather or coordinate important industrialised and developing economies to discuss pertinent and crucial matters in the global economy

H
Hedge Funds
privately owned investment funds from different investors (usually wealth individuals or big financial institutions like banks) which are cooperatively managed by an appointed investment manager that may sometimes employ high-risk techniques in the hope of making huge profits

High Frequency Trading
a manipulative practice that involves persons like brokers, issuers and financial analysts who act in a proprietary capacity to employ sophisticated computerised algorithmic decision making systems in order to obtain advantage from some minute discrepancies in the financial markets stock prices and then quickly trade in such stocks in large quantities to gain profit

I
IASB
International Accounting Standards Board

IBSA
International Banks and Securities Association of Australia
IDD
Insider Dealing Directive

IFSG
Intermarket Financial Surveillance Group

IMETS
Integrated Market Enforcement Teams

IMF
International Monetary Fund

IMM
Intelligent Market Monitoring System

Intermarket Financial Surveillance Group
an independent body which was formed in 1987 comprising the self regulatory organisations of the United States of America’s securities and commodities exchanges

IOSCO
International Organisation of Securities Commissions

ITD
Insider Trading Directorate

J

JSE
Johannesburg Stock Exchange Limited

JSE’s Surveillance Division
a division of the Johannesburg Stock Exchange Limited responsible for the preliminary detection, prevention and investigation of market abuse activities in South Africa
Market Abuse
a concept which generally include illicit practices such as insider trading and other various forms of market manipulation

Matched Order
occurs where a person and his associate places an order to buy or sell at the same time, for substantially the same number of securities or financial products at substantially the same price

MiFID
Markets in Financial Instruments Directive

MOU
Memorandum of Understanding

MSRB
Municipal Securities Rule Making Board

N
Naked Short Selling
occurs when a seller agrees to short sell a security within a stipulated period without making prior measures to repurchase it back at a later stage

NASD
National Association of Securities Dealers

NCSC
National Companies and Securities Commission

NSW
New South Wales

NYSE
New York Stock Exchange
Office of Internet Enforcement
a unit or department that was introduced by the United States Securities and Exchange Commission to combat Internet-based market abuse practices

OSC
Ontario Securities Commission

OTC
Over the counter

OTC Market
a market which provides for the trading of securities or financial instruments that are not listed on a regulated market and/or formal exchange

Pecuniary Penalty
a penalty imposed only after a declaration of contravention of a financial services penalty provision has been proved in a court of law in Australia

Ponzi Scheme
a type of high yield investment fraud which attracts persons by low risk investment offers and a guarantee of unusually high and fast profit

Quote stuffing
a manipulative tactic which involves the prompt entering and withdrawing of large stock orders by any person in order to flood the market with quotes that other persons have to process, thereby causing them to lose their fair competitive advantage in such stocks

Regulated Market
means any market, whether domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market
Regulation M
a regulation that was enacted to *inter alia* prohibit market manipulation during a public distribution (public offering of securities) and to allow price-stabilisation activities only in some specific circumstances in the United States of America

Regulation SHO
a regulation that was enacted to combat naked short selling and market manipulation in all the United States of America’s financial markets and in broker-dealer transactions

RICO
Racketeer Influenced and Corrupt Organization Act of 1970

SA
South Australia

SEATS
Stock Exchange Automatic Trading System

SEBI
Securities and Exchange Board of India

SEC
United States Securities and Exchange Commission

SEETS
Stock Exchange Electronic Trading Service

SENS
Securities Exchange News Service

Securities Exchange News Service
a real-time news service that is employed by the Johannesburg Stock Exchange Limited to disseminate company announcements and price-sensitive information to *inter alia* promote market transparency and investor confidence
Securities Market Automated Research Trading and Surveillance System
a computer surveillance technique employed by the Australian Securities and Investments Commission to isolate and detect possible market abuse activities in the Australian financial markets

Short Selling
a practice which involves selling securities or assets such as derivatives by the seller without owning them at the time of the transactions, with the intention of buying them back at a later stage but at a much lower price

SIASDIA
Securities and Derivatives Industry Association

SIFMA
Securities Industry & Financial Markets Association

SOMA
Surveillance of Market Activity

SRO
Self Regulatory Organisations

SRP
Securities Regulation Panel

The (viable) anti-market abuse model and/or policy framework
a proposed policy framework or model comprising four main categories of recommendations that could be employed to enhance the combating of market abuse practices in South Africa

Tipping
a practice where an insider or any other person who has inside information tips off; or encourages or discourages another person to deal or not to deal in certain securities and/or financial instruments to which that information relates
U

UK
United Kingdom

US
United States of America

V

Vic
Victoria

Virt-x
Virtual Exchange

Virt-x Exchange Limited
a Pan-European Blue Chip Stock Exchange that is regulated by the Financial Services Authority in the United Kingdom

W

Wash Sale
occurs where a person or an associate is both the buyer and seller in the same transaction (selling and repurchasing of the same or substantially the same financial product for the purpose of generating activity and increasing its price)

Y

Yield-X
a JSE trading venue or platform for the trading of interest rate products and cash bonds
ANNEXURE B
LIST OF THE DIRECTORATE OF MARKET ABUSE’S CURRENT MARKET ABUSE INVESTIGATIONS

Possible insider trading cases

<table>
<thead>
<tr>
<th>Security</th>
<th>JSE Code</th>
<th>Period</th>
<th>Case status</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Brait S.A.</td>
<td>BAT</td>
<td>2010-11 – 2011-03</td>
<td>Closed</td>
</tr>
<tr>
<td>2. Bell Equipment Limited</td>
<td>BEL</td>
<td>2012-03-08</td>
<td>Ongoing</td>
</tr>
<tr>
<td>4. Dimension Data Holdings Limited</td>
<td>DDT</td>
<td>2010-07</td>
<td>Ongoing</td>
</tr>
<tr>
<td>5. Glenrand MIB Limited</td>
<td>GMB</td>
<td>2010-10-01 - 2010-12-09</td>
<td>Closed</td>
</tr>
<tr>
<td>6. Labat Africa Limited (3)</td>
<td>LAB</td>
<td>2010-01 – 2010-04</td>
<td>Ongoing</td>
</tr>
<tr>
<td>8. Workforce Holdings Limited</td>
<td>WKF</td>
<td>2009-03-27 – 2009-03-31</td>
<td>Closed</td>
</tr>
</tbody>
</table>

Possible prohibited trading practices (market manipulation) cases

<table>
<thead>
<tr>
<th>Security</th>
<th>JSE Code</th>
<th>Period</th>
<th>Case status</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. Afgri Limited</td>
<td>AFR</td>
<td>2009-01 - 2009-03</td>
<td>Ongoing</td>
</tr>
<tr>
<td>11. Cape Empowerment Trust Limited (2)</td>
<td>CAE</td>
<td>2008-10 - 2008-11</td>
<td>Ongoing</td>
</tr>
<tr>
<td>12. Comair Limited</td>
<td>COM</td>
<td>2009-01 - 2009-03</td>
<td>Ongoing</td>
</tr>
<tr>
<td>13. Harmony Gold Mining Company Limited (2)</td>
<td>HAR</td>
<td>2009-10 - 2009-11</td>
<td>Ongoing</td>
</tr>
<tr>
<td>15. Labat Africa Limited (3)</td>
<td>LAB</td>
<td>2010-01 – 2010-04</td>
<td>Ongoing</td>
</tr>
</tbody>
</table>

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1 Adapted from the Financial Services Board Press Release 27 March 2012; the list shows the current market abuse investigations as at 27 March 2012; see further related analysis at <http://www.fsb.co.za/index.htm> (accessed 15-08-2012).
<table>
<thead>
<tr>
<th>Security</th>
<th>JSE Code</th>
<th>Period</th>
<th>Case status</th>
</tr>
</thead>
<tbody>
<tr>
<td>17. Palabora Mining Limited</td>
<td>PAM</td>
<td>2009-01 - 2009-03</td>
<td>Ongoing</td>
</tr>
<tr>
<td>18. Pinnacle Point Group Limited</td>
<td>PNG</td>
<td>2006 - 2008</td>
<td>Ongoing</td>
</tr>
</tbody>
</table>

**Possible false or misleading reporting cases**

Below is a list detailing the current status of possible false or misleading reporting investigations.

<table>
<thead>
<tr>
<th>Security</th>
<th>JSE Code</th>
<th>Publication</th>
<th>Case status</th>
</tr>
</thead>
<tbody>
<tr>
<td>20. Alliance Mining Corporation Limited</td>
<td>ALM</td>
<td>Financial results for the year ended 2009-02-28, published on 2009-06-15</td>
<td>Ongoing</td>
</tr>
</tbody>
</table>
# ANNEXURE C

## LIST OF THE DIRECTORATE OF MARKET ABUSE’S PAST MARKET ABUSE INVESTIGATIONS

<table>
<thead>
<tr>
<th>Type</th>
<th>Security</th>
<th>Period of investigation</th>
<th>Outcome</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insider trading</td>
<td>Felix Limited</td>
<td>1999-03-02</td>
<td>Closed</td>
<td>1999-06-29</td>
</tr>
<tr>
<td>Insider trading</td>
<td>Frelax Limited</td>
<td>1999-03-04 – 1999-03-05</td>
<td>Closed</td>
<td>2000-03-28</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type</th>
<th>Security</th>
<th>Period of investigation</th>
<th>Outcome</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insider trading</td>
<td>Retail Corporation Limited</td>
<td>1999-05-01 – 1999-06-09</td>
<td>Closed</td>
<td>1999-10-26</td>
</tr>
<tr>
<td>Insider trading</td>
<td>MWM Technology Holdings Limited (2)</td>
<td>7/1/1999</td>
<td>Closed</td>
<td>1999-05-22</td>
</tr>
<tr>
<td>Insider trading</td>
<td>Paradigm Capital Holdings Limited (1)</td>
<td>4/14/2000</td>
<td>Closed</td>
<td>2001-04-28</td>
</tr>
<tr>
<td>Insider trading</td>
<td>Computer Configuration Holdings Limited (2)</td>
<td>1999-08-17 – 1999-08-18</td>
<td>Closed</td>
<td>2000-03-28</td>
</tr>
<tr>
<td>Insider trading</td>
<td>Arrangemated Appliance Holdings Limited (1)</td>
<td>8/30/1999</td>
<td>Closed</td>
<td>2000-01-25</td>
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1 The list of past investigations was derived and/or adapted from the Financial Services Board website, <http://www.fsb.co.za/index.htm/public/insider/20110331_Pastinvestigations.doc> (accessed 15-08-2012); the list shows the past market abuse investigations as at 29 March 2011.
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ANNEXURE D
LIST OF THE DIRECTORATE OF MARKET ABUSE’S COMPLETED MARKET ABUSE INVESTIGATIONS¹

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<tr>
<td>Insider trading</td>
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<td>2010-05-12</td>
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<td>2011-03-07</td>
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</table>

¹ Adapted from the Financial Services Board website, <http://www.fsb.co.za/index.htm> (accessed 15-08-2012); the list shows completed market abuse investigations as at 28 June 2011.
<table>
<thead>
<tr>
<th>Category</th>
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<th>Status</th>
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<tr>
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<td>Wesizwe Platinum Limited (2)</td>
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<tr>
<td>Prohibited Trading</td>
<td>Argent Industrial Limited</td>
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<td>Brait S.A.</td>
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<td>Insider trading</td>
<td>Workforce Holdings Limited</td>
<td>2009-03-27 - 2009-03-31</td>
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<td>2012-03-27</td>
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<td>Assistance</td>
<td>Huge Group Limited</td>
<td>2008-08 - 2008-09</td>
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## Enforcement Actions

<table>
<thead>
<tr>
<th>Date</th>
<th>Contravention</th>
<th>Security</th>
<th>Respondents/ defendants</th>
<th>Outcome</th>
<th>Transcript of Determination</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010-06-30</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>MTL</td>
<td>Mr G L van Niekerk</td>
<td>Administrative penalty R16 000</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2010-06-30</td>
<td>Section 75 of the Securities Services Act (Market Manipulation)</td>
<td>CAE BEG</td>
<td>Mr T Pretorius</td>
<td>Administrative penalty R2 000 000</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2010-06-01</td>
<td>Section 73 of the Securities Services Act (Insider Trading)(1) and Section 76 of the Securities Services Act (False Reporting)</td>
<td>SNU</td>
<td>Mr J Pieterse Mr N van der Merwe</td>
<td>Administrative penalty R1 000 000 First respondent</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2010-03-15</td>
<td>Section 73 of the Securities Services Act (Insider trading)</td>
<td>DYM CAE</td>
<td>Mr M J I Brown and Mr R McGregor Mr A D Cheminais</td>
<td>Administrative penalty R75 624 First respondent Acquittal Second respondent Administrative penalty R50 000 Third respondent</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2009-10-21</td>
<td>Section 73 of the Securities Services Act (Insider Trading)</td>
<td>WSL</td>
<td>Mr M Meyer</td>
<td>Administrative penalty R150 000</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2009-09-29</td>
<td>Section 76 of the Securities Services Act (false reporting)</td>
<td>LAB</td>
<td>Labat Africa Limited and Mr B G van Rooyen</td>
<td>Administrative penalties R25 000 per respondent</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2009-09-22</td>
<td>Section 75 of the Securities Services Act (market manipulation) and Section 76 of the Securities Services Act (false reporting)</td>
<td>MTE CRW</td>
<td>Mr N L Hittler</td>
<td>Administrative penalty R1 000 000 (for section 75) R10 000 (for section 76)</td>
<td>Transcript of Determination</td>
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</tbody>
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1 Adapted from the Financial Services Board website, <http://www.fsb.co.za/index.htm> (accessed 15-08-2012); the list shows the Enforcement Committee’s market abuse enforcement actions as at 28 June 2011.
<table>
<thead>
<tr>
<th>Date</th>
<th>Section of the Securities Services Act</th>
<th>Respondent(s)</th>
<th>Penalty Amount</th>
<th>Transcript of Determination</th>
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<tbody>
<tr>
<td>2009-09-22</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>MRB Mr G Pietersen</td>
<td>Administrative penalty R94 500</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2009-09-07</td>
<td>Section 76 of the Securities Services Act (false reporting)</td>
<td>ALJ AH-Vest Limited (formerly known as All Joy Foods Limited) and Mr M Pather</td>
<td>Administrative penalties R1,5 million per respondent</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2009-07-16</td>
<td>Section 76 of the Securities Services Act (false reporting)</td>
<td>STA Stratcorp Limited</td>
<td>Administrative penalty R50 000</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2009-07-16</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>RBW Mr G D de Jager</td>
<td>Administrative penalty R587 511</td>
<td>Transcript of Determination</td>
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<tr>
<td>2008-11-27</td>
<td>Section 76 of the Securities Services Act (false reporting)</td>
<td>WLL Mr D Marais and Mr B Meyer</td>
<td>Administrative penalties R100 000 per respondent</td>
<td>Transcript of Determination</td>
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<tr>
<td>2008-11-27</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>MRB Mr C G Chelin</td>
<td>Administrative penalty R94 500</td>
<td>Transcript of Determination</td>
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<td>Section 75 of the Securities Services Act (market manipulation)</td>
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<td>2008-11-27</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>YRK Dr W J Fouché Mr W J Fouché Dr E Fouché and Mr L van Luik</td>
<td>Administrative penalties: R30 000 for first three respondents and R58 611 for fourth respondent</td>
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</tr>
<tr>
<td>2008-11-27</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>ASR Assore Limited</td>
<td>Administrative penalty R2,5 million</td>
<td>Transcript of Determination</td>
</tr>
<tr>
<td>2008-11-27</td>
<td>Section 75 of the Securities Services Act (market manipulation)</td>
<td>Sunflower Mr A J van Zyl</td>
<td>Administrative penalty R50 000</td>
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<td>Section 75 of the Securities Services Act (market manipulation)</td>
<td>STA Mr H P Olivier</td>
<td>Administrative penalty R10 000</td>
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<td>Section 75 of the Securities Services Act (market manipulation)</td>
<td>KNG Mr A Erasmus</td>
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<td>Penalty</td>
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<td>IFR SAR Mr M Berman and Mr N Stacey</td>
<td>Administrative penalties of R2 million per respondent. Administrative penalty for first respondent reduced to R1 million on appeal</td>
<td>Transcript of Determination</td>
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<td>2007-10-15</td>
<td>Section 73 of the Securities Services Act (insider trading)</td>
<td>ITI Mr D de W Koen and Mr K Gilliland</td>
<td>Civil settlement (High Court case 2003/6460) R275 000 per defendant</td>
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<td>2006-12-20</td>
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<td>Civil settlement (High Court case no 2000/13325) R400 000 per defendant</td>
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<td>PDM Mr M T Forster</td>
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## ANNEXURE F

### LIST OF THE DIRECTORATE OF MARKET ABUSE’S ARCHIVED PAST MARKET ABUSE INVESTIGATIONS

<table>
<thead>
<tr>
<th>Type</th>
<th>Security</th>
<th>Period of investigation</th>
<th>Outcome</th>
<th>Date</th>
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<tbody>
<tr>
<td>Insider trading</td>
<td>• Feltex Limited</td>
<td>1999-03-02</td>
<td>Closed</td>
<td>1999-06-29</td>
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<tr>
<td>Insider trading</td>
<td>• Corpcapital Limited</td>
<td>1999-01-18 – 1999-02-02</td>
<td>Closed</td>
<td>1999-06-29</td>
</tr>
<tr>
<td>Insider trading</td>
<td>• USKO Limited</td>
<td>1999-01-25 – 1999-02-03</td>
<td>Closed</td>
<td>1999-08-24</td>
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<tr>
<td>Insider trading</td>
<td>• Terexco Limited</td>
<td>1999-01-01 – 1999-02-08</td>
<td>Closed</td>
<td>2000-01-25</td>
</tr>
<tr>
<td>Insider trading</td>
<td>• King Consolidated Limited</td>
<td>1999-01-19 – 1999-01-27</td>
<td>Closed</td>
<td>2000-03-28</td>
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<tr>
<td>Insider trading</td>
<td>• Fralex Limited</td>
<td>1999-03-04 – 1999-03-05</td>
<td>Closed</td>
<td>2000-03-28</td>
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<tr>
<td>Insider trading</td>
<td>• Retail Corporation Limited</td>
<td>1999-06-01 – 1999-06-09</td>
<td>Closed</td>
<td>1999-10-26</td>
</tr>
<tr>
<td>Insider trading</td>
<td>• Cullinan Hotel &amp; Leisure Group Limited</td>
<td>1999-03-12 – 1999-03-23</td>
<td>Closed</td>
<td>1999-06-29</td>
</tr>
<tr>
<td>Insider trading</td>
<td>• Truworths International Limited (1)</td>
<td>1999-02-25 – 1999-03-03</td>
<td>Closed</td>
<td>2000-03-28</td>
</tr>
<tr>
<td>Insider trading</td>
<td>• Berzak-Illman Investment</td>
<td>1999-01-14 –</td>
<td>Closed</td>
<td>2000-03-28</td>
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</table>

1 Adapted from the Financial Services Board website, <http://www.fsb.co.za/index.htm> (accessed 15-08-2012); the list shows the archived past market abuse investigations as at 28 June 2011.
<table>
<thead>
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<th>Company Name</th>
<th>Start Date</th>
<th>End Date</th>
<th>Closing Date</th>
</tr>
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<tbody>
<tr>
<td>Barprop Limited Linked Units Limited</td>
<td>1999-02-18 – 1999-03-12</td>
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<td>2000-07-25</td>
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<tr>
<td>Paradigm Interactive Media Limited</td>
<td>1999-02-01 – 1999-02-09</td>
<td>Closed</td>
<td>2001-02-27</td>
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<tr>
<td>MMW Technology Holdings Limited (2)</td>
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