Research Working Paper Series

Sanctions imposed for insider trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom and the United States: An empirical study

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JUNE 2016

WORKING PAPER NO.117/2016 / Project T021

This research was supported by the Centre for International Finance and Regulation, which is a Centre of Excellence for research and education in the financial sector, funded by the Commonwealth and NSW Governments www.cifr.edu.au.

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**SANCTIONS IMPOSED FOR INSIDER TRADING IN AUSTRALIA, CANADA
(ONTARIO), HONG KONG, SINGAPORE, NEW ZEALAND, THE UNITED KINGDOM
AND THE UNITED STATES: AN EMPIRICAL STUDY***

WORKING PAPER NO. 5

June 2016

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EXECUTIVE SUMMARY

This working paper presents the results of a detailed comparative empirical study of sanctions imposed for insider trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom (UK), and the United States (US). Insider trading is considered to be a serious form of misconduct and has in some cases resulted in defendants receiving lengthy custodial sentences and significant monetary sanctions.

The comparative study is based on a dataset of a significant size, scope and comprehensiveness, encompassing nearly 700 individuals and companies found or alleged to have contravened insider trading provisions ('defendants') and approximately 1400 sanctions across the jurisdictions. The study compares the type, magnitude and frequency of sanctions imposed by statutory bodies and the courts for insider trading in the selected jurisdictions in the seven year period from 1 January 2009 to 31 December 2015 ('the study period'). The study provides a detailed analysis of the insider trading enforcement landscape across a range of common law jurisdictions over an extended period by examining custodial sentences, banning orders and various pecuniary sanctions imposed for insider trading.

The focus of this study reflects not only the importance of enforcement of insider trading provisions, but the importance of enforcement more generally. It is widely believed that insider trading, prohibited in most countries, is a widespread form of misconduct, which allows for meaningful comparisons of enforcement methods between jurisdictions.

Key findings: enforcement approach in each of the jurisdictions

Australia

During the study period, the proportion of insider trading defendants receiving sanctions in the criminal courts was substantially higher in Australia than in the other jurisdictions. All but three sanctions were imposed by the criminal courts, whereas in the other jurisdictions (excepting the UK), criminal prosecution was undertaken in a minority of cases. A typical defendant in Australia received a custodial sentence and paid a small pecuniary sanction. However, a high proportion of the custodial sentences were fully suspended. Based on cases where the size of illegal profits is available, the size of the average punitive pecuniary sanction was equal to the profit, but most defendants did not pay a punitive pecuniary sanction at all. The low level of pecuniary sanctions may reflect a perception by the courts that the main sanction is the custodial sentence and that criminal

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finances play a supplementary role. The low level of bans may reflect the fact that defendants would be subject to automatic disqualification from managing corporations as a result of their insider trading conviction.

Enforcement of insider trading offences resulted in 28 successful criminal proceedings, where each of the defendants pleaded guilty. The two other defendants were subject to administrative proceedings, and these were both contested (both of these defendants also faced unsuccessful criminal actions). Insider trading actions usually resulted in custodial sentences or pecuniary sanctions. Nearly two thirds of defendants received custodial sentences, which were more common than punitive pecuniary sanctions (47% of defendants). This was not the case in the other jurisdictions, in which custodial sentences were never the most commonly imposed sanction.

Hong Kong

In Hong Kong, the proportion of defendants receiving a ban was 55%, which was higher than the number of defendants receiving a custodial sentence (45%). The duration of custodial sentences imposed in Hong Kong was the shortest of all the jurisdictions. Similarly to Australia, the size of pecuniary sanctions also tended to be low both in absolute terms and as a proportion of profits. A typical defendant in Hong Kong received a ban *or* a short custodial sentence, and a small fine.

New Zealand

There were no sanctions imposed in New Zealand for insider trading during the study period.

Ontario

Ontario was characterised by high (and frequent) pecuniary sanctions and bans, but there was just one custodial sentence imposed for insider trading during the study period, so a typical defendant received a ban *and* a pecuniary sanction.

Singapore

In Singapore, custodial sentences and bans were both imposed infrequently (the low frequency of bans may be because in Singapore an insider trading conviction or a civil penalty also results in automatic management disqualification). Pecuniary sanctions were imposed on all defendants, and these sanctions were significantly higher than the illegal profits.

United Kingdom (UK)

In the UK, a typical defendant received a shorter custodial sentence than Australia, but the size of pecuniary sanctions was substantially higher so a typical defendant received a custodial sentence and paid a significant pecuniary sanction. However, there also appears to have been an increase in the proportion of insider trading matters that are prosecuted criminally since 2009. Bans were imposed on only 15% of defendants, but they were all of indefinite duration.

United States (US)

The US, which had the highest number of defendants, also had the widest range of sanctions imposed for insider trading. Custodial sentences for defendants ranged between 21 days and 17 years. Pecuniary sanctions imposed on defendants ranged between \$US500 and \$US1.8 billion. Most

of the defendants in civil matters settled with the SEC, while the vast majority of criminal convictions obtained by the SEC during the period resulted from guilty pleas.

Another area where the US appears to be unique is the number and complexity of the insider trading proceedings. A number of defendants faced both criminal actions brought by the Department of Justice (DOJ) and civil actions brought by the Securities and Exchange Commission (SEC) in relation to the same conduct, and in some cases administrative follow-on proceedings were also brought (for example, to impose a ban).

What characterises most insider trading cases in the US is the high proportion of pecuniary sanctions. In the US, some form of corrective/restorative pecuniary sanction (such as forfeiture, disgorgement or restitution) was imposed on nearly 87% of defendants, which was higher than in each of the other jurisdictions. Punitive pecuniary sanctions were imposed on around 70% of defendants. In most cases the sanctions were determined with reference to the size of the profit (for example, the civil penalty was equal to the size of the profit for at least 150 defendants, all of whom settled with the SEC).

Key findings: custodial sentences

- During the study period, the overall number of custodial sentences imposed on defendants in Australia (19) was the third highest of the jurisdictions, less than the US (85) and the UK (27).
- Australia had the highest proportion of defendants that received a custodial sentence (63%). However, of the countries that imposed custodial sentences for insider trading, Australia also had the highest proportion of sentences that were fully suspended (58% of sentences were fully suspended).

Key findings: banning orders

- During the study period, the proportion of defendants that received banning orders was lower in Australia than in the other jurisdictions (except Singapore, which had the same proportion of banning orders as Australia). Only three defendants (10%) received a banning order in Australia.
- The proportion of defendants that received banning orders was highest in Ontario, where all but one defendant received a ban.

Key findings: pecuniary sanctions

- During the study period, the total quantum in pecuniary sanctions (including corrective/restorative sanctions) imposed for insider trading in Australia (around US\$7.4 million) was lower than in each of the other jurisdictions, but comparable to Hong Kong, Singapore and Ontario. The highest total amount in pecuniary sanctions was imposed in the US.
- Average pecuniary sanctions in Australia were lower than in each of the other jurisdictions. The average pecuniary sanction in Australia (including corrective/restorative sanctions such as orders under *Proceeds of Crime* legislation) was around US\$386,930. Australia also had a relatively high proportion of cases (37%) where no pecuniary sanction was imposed at all.

- In Australia, punitive pecuniary sanctions (i.e. fines, civil and administrative penalties) comprised a smaller proportion of total pecuniary sanctions imposed for insider trading compared to most of the other jurisdictions. There were only 14 fines with an average of around US\$34,000 (median of around US\$21,290) imposed in Australia, and no civil penalties. The most comparable jurisdiction to Australia in this respect was Hong Kong, where there were 12 fines imposed, with an average of around US\$53,700 and a median of around US\$21,930.
- When the amount in pecuniary sanctions imposed is adjusted by the size of the sharemarket in each jurisdiction, the total amount in pecuniary sanctions in Australia is higher than in Ontario and Hong Kong, but substantially lower than in the US, Singapore and the UK. However, the size of the punitive component of pecuniary sanctions imposed in Australia is substantially lower: it is lower than the amount imposed in all of the jurisdictions other than Hong Kong.
- Pecuniary sanctions imposed in Australia and Hong Kong comprised a smaller percentage of illegal profits than in the other jurisdictions. On average, pecuniary sanctions in Australia and Hong Kong were either equal to, or lower than, the profits made from the misconduct, while in other jurisdictions pecuniary sanctions imposed comprised a substantially larger proportion of the illegal profits. Pecuniary sanctions imposed in Ontario and Singapore were the highest relative to illegal profits.

These findings provide important insights into the more commonly used enforcement tools (and those tools not commonly used) by securities regulators to enforce insider trading laws, which will be of interest to policy-makers, international regulators and participants in securities markets. The research findings also provide empirical evidence of the actual sanctions imposed for insider trading across a wide range of jurisdictions resulting in a more accurate picture of the enforcement landscape.

OTHER PROJECT PUBLICATIONS

Working papers

- George Gilligan, Paul Ali, Andrew Godwin, Jasper Hedges and Ian Ramsay, 'An Analysis of Penalties under ASIC Administered Legislation: Scoping the Issues' (Working Paper No. 1, Centre for International Finance and Regulation and Melbourne Law School, 31 May 2015)
- Helen Bird and George Gilligan, 'Financial Services Misconduct and the Corporations Act 2001' (Working Paper No. 2, Centre for International Finance and Regulation and Melbourne Law School, 31 July 2015)
- Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay, 'An Empirical Analysis of Public Enforcement of Directors' Duties in Australia: Preliminary Findings' (Working Paper No. 3, Centre for International Finance and Regulation and Melbourne Law School, 31 December 2015)
- Helen Bird, George Gilligan, Andrew Godwin, Jasper Hedges and Ian Ramsay, 'An Empirical Analysis of the Use of Enforceable Undertakings by the Australian Securities and Investments Commission Between 1 July 1998 and 31 December 2015' (Working Paper No. 4, Centre for International Finance and Regulation and Melbourne Law School, 4 March 2016)

Journal articles

- George Gilligan, Jasper Hedges, Paul Ali, Helen Bird, Andrew Godwin and Ian Ramsay, 'Regulating by Numbers: the Trend Towards Increasing Empiricism in Enforcement Reporting by Financial Regulators' (2015) 9 *Law and Financial Markets Review* 260-282
- Helen Bird and George Gilligan, 'Deterring Corporate Wrongdoing: Penalties, Financial Services Misconduct and the Corporations Act 2001 (Cth)' to be published in (2016) 34 *Company and Securities Law Journal*
- Helen Bird, George Gilligan and Ian Ramsay, 'The Who, Why and What of Enforceable Undertakings Accepted by the Australian Securities and Investments Commission' to be published in (2016) 34 *Company and Securities Law Journal*

I. INTRODUCTION

This working paper presents the results of a comparative empirical study of sanctions imposed for insider trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom (UK), and the United States (US). This empirical study compares the type, magnitude and frequency of sanctions imposed by statutory bodies and the courts for insider trading and tipping ('insider trading')¹ in the selected jurisdictions during the seven year period from 1 January 2009 to 31 December 2015 ('the study period'). Public enforcement actions operate in parallel with private actions relating to insider trading and the prevalence of these types of actions also varies between the different jurisdictions, but private actions are not included in this study.²

Insider trading involves the trading of securities by a party with access to non-public ('inside') information. Usually it involves (1) an 'insider' (such as a director, employee, or professional adviser) trading on the basis of information that is not available to the broader market and which they obtained in the course of employment or in the course of their professional relationship with the company, or (2) conduct involving more than one party, one of whom provides the inside information (commonly referred to as 'tipping') to another party (or parties) that trade on the basis of the inside information.

The severity of the insider trading conduct varies significantly from case to case. At the more severe end of the spectrum are criminal cases involving multiple counts of insider trading, which commonly involve other offences, such as fraud or money laundering. For example, in one Australian insider trading matter, Lukas Kamay, who also pleaded guilty to money laundering and identity theft charges, operated a scheme with Christopher Hill whereby Hill provided Kamay employment, trade and retail figures obtained through his employment with the Australian Bureau of Statistics moments before the figures were released to the market. This allowed Kamay, based at the National Australia Bank, to make trades on currency markets and make a profit of over A\$7.2 million. Kamay received a custodial sentence of seven years and three months including a non-parole period of four and a half years, while Christopher Hill was jailed for three years and three months with a non-parole period of two years.³ An example of conduct at the less severe end of the spectrum is the Canadian case of Michael Newbury, a registered professional engineer, who was acting as a geological consultant for OntZinc Corporation, a mining company. Newbury made a trade on the basis of inside information that he had obtained in the course of his work, which was the fact that OntZinc was involved in exclusive negotiations for the acquisition of Hudson Bay Mining and Smelting Co. Ltd, from Anglo American plc. Newbury believed that the inside information had

¹ The study covers defendants that received sanctions for both insider trading and tipping conduct. For ease of presentation, references to insider trading should be read to include either tipping or trading. References to 'defendants' should be read to include individuals and companies found to (or alleged to) have engaged in insider trading.

² For example, it has been observed that private actions are commonly used in the US, and the number of these sanctions has been increasing. Refer JC Coffee, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review (2) 229, 268.

³ See <<https://www.cdpp.gov.au/case-reports/lukas-kamay-and-christopher-hill>>. Other examples of significant sanctions imposed for insider trading were the sanctions imposed on Hui Xiao in Australia, Du Jun in Hong Kong, SAC Capital Advisors LP (and related actions) in the US, Anthony Soh Guan Cheow in Singapore, and Stanko Joseph Grmovsek in Ontario.

already been generally disclosed, but failed to ensure that this was the case.⁴ Newbury received a fine of CA\$7,850, which was double the profit made on his trade.

A key reason for the focus on enforcement of insider trading laws by securities regulators is a belief among regulators and others that insider trading corrodes confidence in sharemarkets and removes capital from the marketplace.⁵ For example, the negative effect of insider trading has been characterised by former Australian Securities and Investments Commission (ASIC) chairman Tony D'Aloisio as a form of 'public cost' in the sense that:

'The offenders are unfairly exploiting for their financial benefit, the inherent information asymmetries between well-informed insiders and less-well-informed market participants, including retail investors. Both destroy trust in market fairness and efficiency, and represent a market failure if they are prevalent.'⁶

With this view of the 'public cost' in mind, the most relevant rationales to the Australian context are market fairness and the maintenance of confidence in the financial system.⁷ The authors of *Ford, Austin and Ramsay's Principles of Corporations Law* have suggested that the rationale of maintaining confidence in the financial system has 'an economic rather than ethical foundation; the Australian economy will suffer if securities markets are not seen to be fair'.⁸ The need for a prohibition against insider trading has also been emphasised by the courts. For example, as expressed by the court in *Hartman v R (Cth)*, insider trading 'not only has the capacity to undermine the integrity of the market, it also has the potential to undermine aspects of confidence in the commercial world generally.'⁹

However, as observed by Lei and Ramsay, the 'mere existence of strong insider trading laws is not enough': for the laws to be effective they need to be enforced by regulators and the courts.¹⁰ The connection between enforcement and the rationale for the prohibition was explored by the court in *Joffe v R* and *Stromer v R*, which noted the severity of the potential criminal penalty as important in the context of the conduct undermining confidence in the financial system.¹¹

⁴ Ontario Securities Commission, 'In the matter of Michael Newbury, Settlement agreement between the staff of the Ontario Securities Commission and Michael Newbury' 20 February 2006, <http://www.osc.gov.on.ca/en/Proceedings_set_20060220_newburym.htm>

⁵ C Montagano, 'The global crackdown on insider trading: a silver lining to the "Great Recession"' (2012) 19 (2) (Summer) *Indiana Journal of Global Legal Studies* 575, 577. See also for example ASIC's Report 387, below n 57 [21].

⁶ T D'Aloisio, 'Insider trading and market manipulation' (speech delivered at the Supreme Court of Victoria Law Conference, Melbourne, 13 August 2010) <<http://download.asic.gov.au/media/1347296/speech-insider-trading-market-manipulation-August-2010.pdf>>.

⁷ RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online, LexisNexis Australia, 2016), [9.830.12].

⁸ Ibid.

⁹ *Hartman v R (Cth)* (2011) 87 ACSR 52; [2011] NSWCCA 261, [94]; also see *Mansfield v R* (2012) 91 ACSR 1; 30 ACLC 12-057; [2012] HCA 49, [45].

¹⁰ V Lei and I Ramsay, 'Insider trading enforcement in Australia' (2014) 8 *Law and Financial Markets Review* 214, 214; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520334; U Bhattacharya and H Daouk, 'The World Price of Insider Trading' (2002) 57 *Journal of Finance* 75, 78.

¹¹ *Joffe v R*; *Stromer v R* (2012) 82 NSWLR 510; 273 FLR 267; 30 ACLC 12-066; [2012] NSWCCA 277 at [34]. Also see *R v Fysh* (No 4) (2012) 92 ACSR 116; [2012] NSWSC 1587 at [47].

The focus of this paper reflects not only the importance of enforcement of insider trading provisions, but the importance of enforcement more generally. While there are some differences between jurisdictions in the operation of the insider trading laws, most jurisdictions have criminalised insider trading.¹² However it is widely believed that insider trading is a widespread form of misconduct.¹³ This allows for meaningful comparisons of enforcement methods between jurisdictions.

This comparative study provides an extensive empirical analysis of the insider trading enforcement landscape across a range of common law jurisdictions over an extended period by examining custodial sentences, banning orders and various pecuniary sanctions imposed for insider trading. Even in jurisdictions with very similar legislation on insider trading, such as Australia and Singapore, regulators, prosecutors and decision-making bodies may have very different enforcement budgets, priorities and strategies. These findings provide important insights into the more commonly used enforcement tools (and those tools not commonly used) by securities regulators to enforce insider trading laws, which will be of interest to policy-makers, international regulators and participants in securities markets. The research findings also provide empirical evidence of the actual sanctions imposed for insider trading resulting in a more accurate picture of enforcement practices across a wide range of jurisdictions. This study also demonstrates that certain jurisdictions had a relatively small number of sanctions imposed for insider trading in recent years. While this makes it difficult to form concrete findings based on the data in these jurisdictions, it is a significant finding in itself, possibly indicating the relative difficulty regulators face in detecting and obtaining sanctions for insider trading or a preference to take enforcement action against only the most severe cases of insider trading.¹⁴

II. INSIDER TRADING LAWS AND SANCTIONS IN AUSTRALIA, ONTARIO, HONG KONG, NEW ZEALAND, SINGAPORE, THE UNITED KINGDOM AND THE UNITED STATES

This section provides an overview of the regulatory bodies, relevant legislative provisions and key sanctions that apply to insider trading in each of the jurisdictions included in the empirical study.

¹² Refer Coffee, above n 2, 264 and Bhattacharya, above n 10, 77.

¹³ Refer for example Augustin P et al, 'Informed Options Trading Prior to M&A Announcements: Insider Trading?' (2015) Available at SSRN: <<http://ssrn.com/abstract=2441606>> or <<http://dx.doi.org/10.2139/ssrn.2441606>>. Also refer Coffee above n 2, 264. Coffee notes that: '[...]it is useful to focus on a specific form of illegal behavior that is contrary to law in virtually all countries, and yet appears to occur systematically. Insider trading satisfies both of these conditions. It has been criminalized by virtually all jurisdictions with securities markets. Yet, it persists. Thus, it supplies an ideal context in which to examine relative enforcement intensity.'

¹⁴ The difficulty of detecting and proving insider trading has been expressed by both the courts and regulators. For example, refer to *R v Rivkin* [2004] NSWCCA 7 at [412],[423]; D'Aloisio, above n 6, 12. Also refer to Financial Markets Authority 'Investigation and Enforcement Report' (FMA, Report, 2014), 20 <<https://fma.govt.nz/assets/Annual-reports/2014-Investigations-and-Enforcement-Report.pdf>>; Thomsen L, US Securities and Exchange Commission, 'Testimony Concerning Insider Trading, Before the US Senate Committee on the Judiciary' (September 2006) <<https://www.sec.gov/news/testimony/2006/ts092606lct.htm>>; Cole M, Former Financial Services Authority Director of Enforcement 'Insider Dealing in the City' (speech delivered at the London School of Economics, London, 17 March 2007) <http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0317_mc.shtml>.

Each of the jurisdictions considered as part of this study has criminal sanctions that could be imposed for insider trading. In addition to criminal sanctions, civil and/or administrative sanctions are also available to address insider trading conduct in each of the jurisdictions.

- In Australia, New Zealand and Singapore there are criminal offences and civil penalty provisions that can be applied to insider trading and tipping.
- In the UK there is the criminal offence of insider trading and the civil market abuse provisions, which include a number of forms of misconduct including insider trading, tipping and market manipulation.
- Hong Kong has two sets of provisions (criminal and civil) prohibiting insider trading and tipping which are substantially the same.
- In Ontario, quasi-criminal proceedings can be initiated for insider trading and tipping (insider trading and tipping are also indictable offences under the Criminal Code of Canada), or there can be administrative proceedings conducted by the Ontario Securities Commission (OSC).
- The rules prohibiting insider trading and tipping in the US can result in court actions (criminal proceedings prosecuted by the DOJ, civil proceedings brought by the U.S. Securities and Exchange Commission (SEC), or administrative proceedings heard by an administrative law judge.

Table 1 summarises the laws applying to insider trading in each jurisdiction, and the bodies responsible for regulating or enforcing these laws.

Table 1 Statutory bodies and provisions regulating insider trading in each jurisdiction

Jurisdiction	Provision prohibiting insider trading	Regulatory body (responsible for civil/administrative actions)	Body responsible for bringing criminal prosecution
Australia	<i>Corporations Act 2001</i> (Cth) s 1043A: Prohibited conduct by person in possession of insider information	Australian Securities and Investments Commission (ASIC)	Commonwealth Director of Public Prosecutions (CDPP)
Canada (Ontario)	<i>Criminal Code of Canada</i> s 382.1(1): Prohibited insider trading	Ontario Securities Commission (OSC)	
	<i>Criminal Code of Canada</i> s 382.1(2): tipping		
	<i>Securities Act 1990</i> (Ontario) s 76(1), (2): Trading where undisclosed change, Tipping		
Hong Kong	<i>Securities and Futures Ordinance</i> (Cap. 571) (Hong Kong) s 270: insider dealing	Securities and Futures Commission (SFC)	SFC together with the Prosecutions Division of the Department of Justice ¹⁵
	<i>Securities and Futures Ordinance</i> (Cap. 571) (Hong Kong) s 291: offences of insider dealing (criminal)		
New Zealand	<i>Financial Markets Conduct Act 2013</i> (NZ) s 241: information insider must not trade	Financial Markets Authority (FMA)	
	<i>Financial Markets Conduct Act 2013</i> (NZ) s 242: information insider must not disclose inside information		

¹⁵ The SFC is responsible for summary prosecution before a magistrate, while prosecutions by indictment are handled by the Department of Justice.

	<i>Financial Markets Conduct Act 2013</i> (NZ) s 243: information insider must not advise or encourage trading		
Singapore	<i>Securities and Futures Act</i> (Cap. 289) (Singapore) s 218: prohibited conduct by connected person in possession of inside information	Monetary Authority of Singapore (MAS) (since March 2015 investigations are undertaken by MAS jointly with the Commercial Affairs Department of the Singapore Police Force)	Public prosecutor
	<i>Securities and Futures Act</i> (Cap. 289) (Singapore) s 219: prohibited conduct by other persons in possession of inside information		
United Kingdom	<i>Financial Services and Markets Act 2000</i> (UK) s 118: (market abuse) (sub-ss 2-4)	Financial Conduct Authority (FCA) (previously the Financial Services Authority (FSA))	
	<i>Criminal Justice Act 1993</i> (UK) s 52: the offence of insider dealing		
United States	<i>Securities Exchange Act 1934</i> (US) s 10: manipulative and deceptive devices and SEC rule 10b-5	U.S. Securities and Exchange Commission (SEC)	Department of Justice (DOJ)
	<i>Securities Exchange Act 1934</i> (US) s 14(e) and SEC rule 14e-3 ¹⁶		

Table 2 presents the maximum fines, civil penalties, administrative penalties and custodial sentences that can be used to address insider trading and tipping. Other sanctions are also available, such as bans and good behaviour bonds, and cease and desist orders. Although custodial sentences, bans/prohibitions and pecuniary sanctions are available in each of the jurisdictions, not all are actively used in each.

Table 2 Legislated maximum custodial sentences and pecuniary sanctions relating to insider trading

Jurisdiction	Act, relevant section/(s)	Custodial sentence	Criminal fine applicable to an individual (company in parentheses if applicable)	Civil/administrative penalty applicable to an individual (company in parentheses if applicable)
Australia ¹⁷	<i>Corporations Act 2001</i> (Cth) s 1043A	10	A\$810,000 (4,500 penalty units), or 3 times the benefit gained [A\$8.1 million, (45,000 penalty units) or 3 times benefits gained, or 10% of annual turnover]	A\$200,000 [A\$1 million] (per contravention)
Canada (Ontario) ¹⁸	<i>Criminal Code of Canada</i> s 382.1(1): Prohibited insider trading	10	Unlimited	
	<i>Criminal Code of Canada</i> s 382.1(2): tipping	5		
	<i>Securities Act 1990</i> (Ontario) ss 76(1),(2), 122	5 ¹⁹	greater of CA\$5 million and 3 times the amount of profit gained [same]	CA\$1 million for each contravention [same]

¹⁶ This section of the *Securities and Exchange Act 1934* (US) and SEC rule 14e-3 prohibits insider trading in the limited context of tender offers.

¹⁷ *Corporations Act 2001* (Cth) Schedule 3, ss 1317E, 1317G. The criminal fines above are calculated using the current \$180 penalty units set out in *Crimes Act 1914* (Cth), s 4AA.

¹⁸ *Securities Act 1990* (Ontario), ss 122(1), 122(4), 126(1)(9), *Criminal Code of Canada*, s 734(1)

¹⁹ Five years less one day

Hong Kong ²⁰	<i>Securities and Futures Ordinance</i> (Cap. 571) (Hong Kong) ss 270, 291	10 ²¹	HK\$10 million [same]	Unlimited [same]
New Zealand ²²	<i>Financial Markets Conduct Act 2013</i> (NZ) ss 241-243	5	NZ\$500,000 [NZ\$2.5 million]	greater of the consideration for the transaction, or 3 times the gain made/loss avoided, or NZ\$1 million [greater of the consideration for the transaction or 3 times the gain made/loss avoided, or NZ\$5 million]
Singapore ²³	<i>Securities and Futures Act</i> (Cap. 289) (Singapore) ss 218-219	7	SD\$250,000 [same]	greater of 3 times profit/loss as a result of contravention or SD\$50,000 (if no profit/loss, maximum civil penalty of SD\$2 million) [greater of 3 times profit/loss as a result of contravention or SD\$100,000 (if no profit/loss, maximum civil penalty of SD\$2 million)]
UK ²⁴	<i>Financial Services and Markets Act 2000</i> (UK) s 118	N/A	Unlimited	
	<i>Criminal Justice Act 1993</i> (UK) s 52	7		
US ²⁵	<i>Securities Exchange Act 1934</i> (US) s 10 and SEC rule 10b-5	20	US\$5 million [US\$25 million]	3 times benefit gained (for controlling person, US\$1 million or 3 times the amount of profit gained)
	<i>Securities Exchange Act 1934</i> (US) s 14(e) and SEC rule 14e-3 ²⁶			[same]

Australia

The Australian Securities Exchange (ASX), the 16th-largest securities market in the world by market capitalisation (US\$1,187 billion),²⁷ is regulated by ASIC. ASIC is the responsible securities regulator, but it is also responsible for licensing and monitoring financial services businesses and individuals and businesses engaging in consumer credit activities.²⁸

In Australia, insider trading conduct can result in either criminal proceedings (conducted by the Commonwealth Director of Public Prosecutions - CDPP)²⁹ or civil penalty proceedings (conducted by

²⁰ *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) ss 194, 303, 281, 305. The SFC may also take disciplinary action in respect of regulated persons, where it may order the regulated person to pay a pecuniary sanction not exceeding the amount which is the greater of HK\$10 million or three times the amount of the profit gained or loss avoided (*Securities and Futures Ordinance* (Cap. 571) (Hong Kong) ss 194 and 196).

²¹ Applies to s 291, which contains the criminal offence.

²² *Financial Markets Conduct Act 2013* (NZ), s 244, s 385(2).

²³ *Securities and Futures Act* (Cap. 289) (Singapore), ss 221(1), 232(2)-(3).

²⁴ *Criminal Justice Act 1993* (UK), s 61.

²⁵ *Securities Exchange Act 1934* (US), s 32(a), s 21A.

²⁶ Above n 16.

²⁷ Based on market capitalisation in December 2015, source: <<http://www.world-exchanges.org>> data tables.

²⁸ <<http://asic.gov.au/about-asic/what-we-do/our-role/>>

²⁹ ASIC is able to prosecute summary regulatory offences 'as are agreed from time to time between ASIC and CDPP at the national level': refer Memorandum of Understanding entered into by ASIC and the CDPP (2006). However, ASIC states that it is authorised to prosecute some 'minor regulatory offences' on its own behalf (refer ASIC Information Sheet 151 *ASIC approach to enforcement (INFO 151)*, <<http://asic.gov.au/about->

ASIC), as well as disciplinary sanctions imposed by ASIC. Prior to 2001, insider trading was exclusively a criminal offence; however since 2001 the insider trading prohibitions form part of the civil penalty provisions of the *Corporations Act 2001* (Cth). However, as observed by Lei and Ramsay, who undertook an analysis of all insider trading cases in Australia since the first enforcement case in 1973, in most cases of insider trading in Australia, criminal enforcement is still the predominant form of enforcement.³⁰ Generally, ASIC has publicly stated that it 'will use civil penalty proceedings where [it considers] the conduct engaged in is contrary to the law and there is either insufficient evidence to criminally prosecute, the conduct falls short of criminality or criminal proceedings are otherwise not available'.³¹

The sanctions that are available differ depending on whether the enforcement action being taken is in the criminal courts or under the civil penalty provisions. In civil penalty enforcement cases, the court can make pecuniary³² and compensation³³ orders, whereas in criminal cases, a number of sanctions are available, including custodial sentences, criminal fines, and community service orders as well as other sanctions under the *Crimes Act 1914* (Cth) for federal offences. In respect of criminal insider trading conduct, orders can also be made by the court under the *Proceeds of Crime Act 2002* (Cth) to disgorge the benefit obtained as a result of the crime.³⁴ Usually this would require a successful conviction.³⁵ In addition to punitive sanctions (such as criminal sanctions - resulting in imprisonment, fines and/or community service orders - and civil monetary penalties), ASIC has a number of other tools that it can use to address insider trading, such as administrative actions, seeking injunctive relief or freezing orders from the courts, commencing representative actions, and achieving negotiated or agreed outcomes.³⁶

[asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/](http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/)), so it is clear that this would not apply to serious market offences such as insider trading.

³⁰ Lei and Ramsay above n 10, 218. The study found that 'an overwhelming majority of 73 cases (92%) were criminal proceedings, with just six cases (8%) relying on the civil penalty provisions'.

³¹ Refer, for example, to ASIC 'Report 421: ASIC enforcement outcomes: July to December 2014' (ASIC, Report, 2014), [16] <<http://download.asic.gov.au/media/3315419/rep421-published-30-january-2015-updated-august-2015.pdf>>. Also refer M Welsh, 'Civil penalties and responsive regulation: The Gap between Theory and practice', (2009) 33 Melbourne University Law Review, <http://law.unimelb.edu.au/data/assets/pdf_file/0006/1705245/33_3_9.pdf>, which provides examples of public statements by both ASIC and the CDPP that express the policy of commencing criminal prosecutions in preference to civil penalty applications in all cases where there is sufficient evidence to sustain the criminal prosecution.

³² *Corporations Act 2001* (Cth) s 1317G(1B).

³³ *Corporations Act 2001* (Cth) s 1317HA.

³⁴ *Proceeds of Crime Act 2002* (Cth) s 116. Refer, for example, to <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-387mr-former-gunns-ltd-chairman-ordered-to-pay-500-000-pecuniary-penalty-for-insider-trading/>>.

³⁵ Lei and Ramsay, above n 10, 216.

³⁶ ASIC categorises these other actions as: protective, preservative, corrective, compensatory, and negotiated or agreed outcomes. See ASIC 'ASIC's approach to enforcement (INFO 151)' (ASIC, Information sheet, 2013) <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>>.

Hong Kong

The Hong Kong Stock Exchange, the eighth-largest market in the world by market capitalisation (US\$3,185 billion),³⁷ is regulated by the Securities and Futures Commission (SFC), Hong Kong's securities regulator. In addition to setting and enforcing market regulations, including investigating breaches of rules and market misconduct, the SFC has the role of licensing and supervising intermediaries (such as brokers, investment advisers and fund managers) that conduct activities under the SFC's regulatory responsibility.³⁸

There is a dual civil and criminal insider trading regime that applies in Hong Kong, which has been operating since 2003; however the substantive provisions of what constitutes insider trading under both regimes are substantially the same.³⁹ All civil insider trading cases are heard by the Market Misconduct Tribunal (MMT),⁴⁰ while criminal insider dealing cases are prosecuted in the courts.⁴¹ The SFC is able to bring criminal actions in its own name but only for offences that can be tried summarily before a magistrate; indictable matters must be brought by the Department of Justice.⁴²

A variety of orders are available for addressing misconduct, which can be issued by the courts, and the MMT. For example, the SFC can apply to a court to make interim injunctions, injunctions for prospective financial penalties and disgorgement of profits, and to appoint administrators.⁴³ Additionally, the courts have the power to make final orders without a prior finding of insider trading or other market misconduct by either the MMT or a criminal court.⁴⁴

Sanctions including banning orders and fines can be issued by the MMT.⁴⁵ In particular, the MMT can impose the following orders:

³⁷ Based on market capitalisation in December 2015, source: <<http://www.world-exchanges.org>> data tables.

³⁸ <<http://www.sfc.hk/web/EN/about-the-sfc/our-role/>>

³⁹ *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) ss 270 and 291.

⁴⁰ The MMT, which replaced the Insider Dealing Tribunal in 2003, is an independent body which is established under the *Securities and Futures Ordinance* (Cap. 571) (Hong Kong), and is chaired by a judge or former judge of the High Court who sits with two members. See the homepage of the tribunal, at <<http://www.mmt.gov.hk/eng/home/home.htm>>.

⁴¹ Hon Kiu Chan, Raymond Siu Yeung Chan and Kong Shan John Ho, 'Enforcement of Insider Trading Law in Hong Kong: What Insights Can We Learn from Recent Convictions?' (2013) *Australian Journal of Corporate Law* 271 <<http://ssrn.com/abstract=2400214>>

⁴² *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) s 388.

⁴³ *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) s 213: injunctions and other orders. This section allows the Court of First Instance, on the application of the SFC, to make final orders including an order restraining or prohibiting the occurrence or continued occurrence of the contravention of a provision, or the attempted contravention of a provision. Where a person has been, or it appears that a person has been, is or may become, involved in any of the matters referred to in a contravention, the court may also make an order requiring the person to take certain steps, which may include steps to restore the parties to any transaction to the position in which they were before the transaction was entered into.

⁴⁴ Final orders can be made under *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) s 213. This was confirmed in the decision of the Court of Final Appeal in *Securities and Futures Commission v Tiger Asia Management LLC* (FACV 10-13 of 2012). The Court ordered Tiger Asia to pay HK\$45 million to investors affected by its insider trading, without the need to first prove that the fund house was guilty of insider trading. Tiger Asia had no office in Hong Kong which made it difficult for the SFC to carry out a criminal prosecution or refer it to the MMT. See Chan et al, above n 41, 281-2.

⁴⁵ *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) s 257(1).

- disqualification order of up to five years
- ‘cold shoulder’ order (an order that prohibits a person from dealing in any securities, futures contracts or leveraged foreign exchange contracts, for up to five years)
- cease and desist order
- disgorgement order
- costs order (to the Government and to the SFC)
- a referral order to a body (for example, an industry or professional association) which may take disciplinary action against the person.

The SFC may also take disciplinary action against any regulated person that is guilty of misconduct.⁴⁶

New Zealand

The New Zealand Exchange, operated by NZX Limited (NZX), is the main national securities exchange in New Zealand. NZX also operates a derivatives market in New Zealand,⁴⁷ and NXT, a market for small and medium-sized businesses.⁴⁸ The Financial Markets Authority (FMA) is the consolidated market conduct regulator, responsible for securities regulation in New Zealand, having replaced the New Zealand Securities Commission in 2011.⁴⁹ It is responsible for licensing, compliance, supervision and systems oversight.⁵⁰ The FMA has the responsibility for enforcing financial markets legislation through criminal prosecutions, civil penalty proceedings, other civil proceedings, and through the use of administrative actions (including enforceable undertakings and warnings).⁵¹ It is also able to exercise an injured party’s civil right of action in certain circumstances.⁵² The regulator can also grant exemptions in certain circumstances.⁵³ In some cases, a New Zealand court may make a banning order prohibiting a person from acting as a director.⁵⁴

However, while large a number of these tools are available to the regulator, as observed by Walker and Simpson, New Zealand’s insider trading regime ‘has never been characterized by active and rigorous enforcement’.⁵⁵ Indeed, Walker and Simpson note that the former Securities Commission did not originally have an enforcement function at all.⁵⁶ The inclusion of New Zealand in the study

⁴⁶ *Securities and Futures Ordinance* (Cap. 571) (Hong Kong) ss 194 and 196. A wide range of sanctions is available, including licence revocations and fines of up to HK\$10 million or three times the amount of the profit gained or loss avoided.

⁴⁷ <<https://www.nzx.com/derivatives>>.

⁴⁸ <<https://www.nxt.co.nz/pages/about>>.

⁴⁹ <<http://www.mbie.govt.nz/info-services/business/business-law/agencies-we-monitor/financial-markets-authority>>.

⁵⁰ <<https://fma.govt.nz/fmas-role/what-we-do/our-role/>>.

⁵¹ The FMA has the power to accept enforceable undertakings and issue public warnings under ss 46 and 49 of the *Financial Markets Authority Act 2011* (NZ). Refer FMA Prosecution policy <<https://fma.govt.nz/assets/Policies/prosecution-policy.pdf>>.

⁵² *Financial Markets Authority Act 2011* (NZ) s 34.

⁵³ *Financial Markets Conduct Act 2013* (NZ) s 556.

⁵⁴ *Financial Markets Conduct Act 2013* (NZ) subpart 6, and *Companies Act 1993* (NZ) s 383.

⁵⁵ Walker & Simpson, ‘Insider Trading Law in New Zealand’, in Stephen M. Bainbridge, *Research Handbook on Insider Trading* (Edward Elgar Publishing, 2013) 402.

⁵⁶ Walker & Simpson, ‘Insider Conduct Regulation in New Zealand: Exploring the Enforcement Deficit’ [2013] NZ Law Rev 521-548. Walker & Simpson also note that ‘[...] New Zealand has experimented with several distinct approaches to controlling insider conduct: purely private enforcement (1988–2002); private

was intended to complement the comparative legal analysis of penalties by ASIC in Report 387 'Penalties for corporate wrongdoing'⁵⁷ and its submission to the Senate inquiry into penalties for white-collar crime by providing empirical evidence of actual sanctions imposed in New Zealand, which was one of the jurisdictions included in that report.⁵⁸ However, there were no sanctions imposed in New Zealand for insider trading during the study period.

Ontario

The major securities exchange in Canada is the Toronto Securities Exchange (TSX), the tenth-largest stock exchange in the world by market capitalisation (US\$1,592 billion).⁵⁹ The provinces and territories in Canada have their own regulators responsible for capital markets.

Of the thirteen provinces and territories, this study has considered Ontario, Canada's largest province by population and the home of the TSX, in which the capital markets are regulated by the Ontario Securities Commission (OSC).⁶⁰ The inclusion of Ontario in the study also complements the comparative legal analysis of penalties by ASIC in Report 387⁶¹ and its submission to the Senate inquiry into penalties for white-collar crime, which focussed on the legislative maximum sanctions available in Ontario rather than other provinces or territories in Canada.⁶²

There are administrative and criminal sanctions that apply to insider trading and tipping in Ontario. Both insider trading and tipping are indictable offences under the Criminal Code of Canada, with maximum imprisonment terms of up to ten and five years respectively.⁶³ In addition, administrative proceedings and quasi-criminal proceedings⁶⁴ can be brought by the OSC. The quasi-criminal proceedings generally proceed as ordinary criminal proceedings before a judge in the Ontario Court of Justice. The proceedings are typically prosecuted by the OSC rather than Crown counsel.⁶⁵

OSC Commissioners are responsible for adjudicating the hearings, independently of OSC staff.⁶⁶ The *Securities Act 1990* (Ontario) prescribes the types of orders that the OSC can make in the public interest in an administrative proceeding.⁶⁷ These orders include:

enforcement with an agency right of intervention (2002–2008); and the Australian criminal enforcement model (2008–present)'.

⁵⁷ ASIC, 'Report 387, Penalties for corporate wrongdoing' (Report, ASIC, 2014) <<http://download.asic.gov.au/media/1344548/rep387-published-20-March-2014.pdf>>. Report 387 compares the penalties available for corporate wrongdoing in Australia with those in Ontario, New Zealand, Hong Kong, the United Kingdom and the United States of America.

⁵⁸ ASIC, Submission by the Australian Securities and Investments Commission in response to the Financial System Inquiry interim report (August 2014) <<http://fsi.gov.au/files/2014/08/ASIC.pdf>>. ASIC's submission to the Financial System Inquiry interim report extends the comparison of penalties available for corporate wrongdoing to cover New Zealand and Singapore.

⁵⁹ Based on market capitalisation in December 2015, source: <<http://www.world-exchanges.org>> data tables.

⁶⁰ <http://osc.gov.on.ca/en/About_our_role_index.htm>.

⁶¹ ASIC, Report 387, above n 57.

⁶² ASIC, submission to the Financial System Inquiry interim report, above n 58.

⁶³ *Criminal Code of Canada*, s 382.1(1) and (2).

⁶⁴ *Securities Act 1990* (Ontario) s 122. See William Savitt (ed), *The Securities Litigation Review* (1st edn, Law Business Research Ltd, 2015), 59.

⁶⁵ See William Savitt (ed), *The Securities Litigation Review* (1st edn, Law Business Research Ltd, 2015), 59.

⁶⁶ Ontario Securities Commission, 'Guide to enforcement proceedings', 3 <http://www.osc.gov.on.ca/documents/en/Proceedings/osc_20140107_guide-enf-proceedings.pdf>.

- disgorgement
- requiring a person or company to pay an administrative penalty of not more than CA\$1 million for each contravention
- suspending the registration or recognition of a person or company under Ontario securities law
- orders prohibiting a person from becoming or acting as a director or officer of any issuer, a registrant, or an investment fund manager
- that a person resign one or more positions that the person holds as a director or officer of an issuer, registrant or fund manager
- that a person or company be reprimanded
- 'that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order' and
- that acquiring any securities by a particular person or company is prohibited permanently or for such period as is specified in the order.

Singapore

The Singapore Exchange, the 20th-largest stock exchange in the world by market capitalisation (\$US\$640 billion),⁶⁸ is regulated by the Monetary Authority of Singapore (MAS). MAS, in addition to regulating the securities and futures industries, supervises the banking and insurance sectors. It is also Singapore's central bank.⁶⁹

The Singaporean insider trading laws were largely modelled on the Australian provisions.⁷⁰ Under the *Securities and Futures Act* (Cap. 289) (Singapore), both civil and criminal penalties can apply to insider trading. Civil penalty proceedings are brought by MAS, while criminal proceedings are brought by the Public Prosecutor. The investigations of all market misconduct offences such as insider trading are from March 2015 undertaken jointly by MAS with the Commercial Affairs Department of the Singapore Police.⁷¹

However, during the study period it was the civil penalty regime that was predominantly used by MAS as the enforcement mechanism for insider trading. While other sanctions are also available (for example, insider trading can result in a custodial sentence of up to seven years), these appear to be rarely used, as MAS opts to seek civil pecuniary sanctions in relation to insider trading. As demonstrated by the empirical findings in section III and by the empirical study undertaken by Lei and Ramsay,⁷² this is in stark contrast with the insider trading regime in Australia, where sanctions for insider trading have predominantly been criminal rather than civil or administrative.

⁶⁷ *Securities Act 1990* (Ontario) s 127(1), (2), (2.1), (6), (8), (8.1), (8.2), (8.3), (8.4), (8.5), (9) and (10). See William Savitt (ed), *The Securities Litigation Review* (1st edn, Law Business Research Ltd, 2015), 52.

⁶⁸ Based on market capitalisation in December 2015, source: <<http://www.world-exchanges.org>> data tables.

⁶⁹ <<http://www.mas.gov.sg/About-MAS.aspx>>.

⁷⁰ Chiu, H, 'Australian Influences on the Insider Trading Laws in Singapore' (2002) *Singapore Journal of Legal Studies*, 574-603. Available at SSRN: <<http://ssrn.com/abstract=956047>>.

⁷¹ Joint media release by MAS with the Commercial Affairs Department of the Singapore Police Force, 'MAS and CAD to Jointly Investigate Market Misconduct Offences' (March 2015) <<http://www.mas.gov.sg/news-and-publications/media-releases/2015/mas-and-cad-to-jointly-investigate-market-misconduct-offences.aspx>>.

⁷² Lei and Ramsay, above n 10, 218.

United Kingdom

The United Kingdom is home to the fifth-largest stock exchange in the world by market capitalisation, the London Stock Exchange (US\$3,879 billion).⁷³ The regulator responsible for securities trading in the UK is the Financial Conduct Authority (FCA) - previously the Financial Services Authority (FSA).

Although insider trading has been unlawful in the UK since 1980,⁷⁴ the first criminal prosecution was not undertaken until 2009 (initiated by an investigation by the FSA).⁷⁵ Insider trading actions can take the form of criminal court actions prosecuted by the FCA,⁷⁶ and can also result in regulatory proceedings undertaken by the FCA under the market abuse provisions in the *Financial Services and Markets Act 2000* (UK), which have a lower evidentiary standard than the criminal offence.⁷⁷ The FCA also has powers to impose a broad range of disciplinary penalties in relation to market abuse. The sanctions most commonly imposed by the FCA are: fines (with no upper limit on the amount); a public censure; imposing suspensions and restrictions on firms and approved persons; and a private warning. In determining the appropriate pecuniary sanction for market abuse, the FCA has published a five-step penalty setting process which includes disgorgement of any benefit received as a result of the conduct and an additional financial penalty which reflects the seriousness of the conduct. It is adjusted to take into account any aggravating and mitigating circumstances, as well as deterrence effect, and any settlement discount.⁷⁸ The Tax and Chancery Chamber of the Upper Tribunal, an independent judicial body, is responsible for hearing appeals from the FCA's decisions in market abuse cases.⁷⁹

The majority of the provisions in the European Union's Market Abuse Regulation (MAR) will enter into application on 3 July 2016.⁸⁰ Amongst other things, the MAR provides for a number of

⁷³ Based on market capitalisation in December 2015, source: <<http://www.world-exchanges.org>> data tables.

⁷⁴ *Part V of the Companies Act 1980* (UK).

⁷⁵ Refer below n 115.

⁷⁶ *Criminal Justice Act 1993* (UK) s 52 contains the prohibition on insider trading. The *Financial Services and Markets Act 2000*, c. 8 (Eng.), s 402(1)(a) authorises the FCA to bring insider dealing prosecutions. There are procedural differences between the application of the law between England and Wales, and Scotland and Northern Ireland. For example, the Lord Advocate is responsible for the prosecution of criminal offences in Scotland. See William Savitt (ed), *The Securities Litigation Review* (1st edn, Law Business Research Ltd, 2015), 64.

⁷⁷ There are seven categories of market abuse set out in *Financial Services and Markets Act 2000* (UK) s 118, the first of which is insider trading. The market abuse prohibition evolved from the European Union Directive on Insider Dealing and Market Manipulation (*Directive 2003/6/EC of the European Parliament and Council of 28 January 2003* [2003] OJ L96/16).

⁷⁸ FCA, *DEPP 6.5.3*. More detail on the application of these five steps on individuals in market abuse cases is in *DEPP 6.5C*.

⁷⁹ The Upper Tribunal will hear the matter afresh, and determine the appropriate action to be taken by the decision-maker. The matter is then remitted back to the FCA. See William Savitt (ed), *The Securities Litigation Review* (1st edn, Law Business Research Ltd, 2015), 71.

⁸⁰ *Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR)* [88] <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>>.

administrative sanctions and other measures that can be applied to insider trading.⁸¹ The EU has also published a Directive relating to market abuse, the *Directive on criminal sanctions for market abuse* (CSMAD). EU member states were required to transpose this Directive into national law by 3 July 2016.⁸² The UK has decided to opt out of the CSMAD, but the Government has announced that the UK criminal sanctions regime for market abuse would be updated, and would be at least as strong as the CSMAD.⁸³

United States

The US, which is the home of the two largest stock exchanges in the world by market capitalisation (New York Stock Exchange and NASDAQ, with market capitalisation of US\$17,787 billion and US\$7,281 billion respectively),⁸⁴ has had statutory insider trading laws in place since the 1930s.⁸⁵ The Securities and Exchange Commission (SEC) is the regulator of the securities industry in the US.

⁸¹ Administrative sanctions and maximum administrative fines are outlined in Chapter 5 Article 30 of the MAR. Insider trading is prohibited by Article 14 of the MAR. The administrative sanctions in the MAR that apply to insider trading include:

- an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;
- the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;
- a public warning which indicates the person responsible for the infringement and the nature of the infringement;
- withdrawal or suspension of the authorisation of an investment firm;
- a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;
- in the event of repeated infringements of insider dealing or market manipulation (Articles 14 and 15), a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement, from exercising management functions in investment firms;
- a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;
- maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined;
- in respect of a natural person, maximum administrative pecuniary sanctions of at least: EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014,
- in respect of legal persons, maximum administrative pecuniary sanctions of at least EUR 15 000 000 or 15% of the total annual turnover of the legal person according to the last available accounts approved by the management body, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014.

⁸² *Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse* (market abuse directive), <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0057>>. Article 7 of the Directive requires states to ensure that their maximum criminal sanction for insider dealing is at least four years imprisonment.

⁸³ Joint News Release with HM Treasury and the Financial Conduct Authority, 'Chancellor of the Exchequer announces Fair and Effective Markets Review', (Media Release, 12 June 2014) <<http://www.bankofengland.co.uk/publications/Pages/news/2014/089.aspx>>.

⁸⁴ Based on market capitalisation in December 2015, source: <<http://www.world-exchanges.org>> data tables.

⁸⁵ *Securities Act 1933* (US) and *Securities Exchange Act 1934* (US).

The rule that prohibits insider trading in the US is SEC Rule 10b-5,⁸⁶ promulgated by the SEC pursuant to its authority granted under § 10(b) of the Securities Exchange Act of 1934.⁸⁷ The rule prohibits any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security, including insider trading.⁸⁸ Additionally, rule 14e-3, promulgated by the SEC pursuant to section 14(e) of the *Securities Exchange Act 1934* (US) prohibits insider trading in the limited context of tender offers.

Insider trading can result in civil, administrative and criminal actions in the US. Criminal actions are brought by the US Department of Justice (DOJ), sometimes in parallel with civil proceedings. The maximum criminal sanctions for insider trading include 20 years imprisonment and US\$5 million in fines for an individual or US\$25 million for a corporation.⁸⁹ The SEC can bring a civil action by filing a complaint with a US District Court seeking various sanctions or remedies, including injunctions, disgorgement of profits, civil monetary penalties (of up to three times the profits gained or losses avoided, or US\$1 million), and bans or suspensions of individuals from serving as corporate officers or directors.⁹⁰ As observed by Crimmins, the SEC has an established approach to prosecuting insider trading cases whereby it will file civil insider trading proceedings and, at the outset, seek to impose pecuniary sanctions in all cases (in addition to other sanctions).⁹¹ The SEC can also seek a variety of sanctions through administrative proceedings, which are heard by an administrative law judge. Administrative sanctions available include cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement.⁹² However, while administrative sanctions are being used increasingly often by the SEC in relation to other contraventions,⁹³ 'stand-alone' administrative sanctions for insider trading remain rare compared to civil sanctions. However,

⁸⁶ Codified at 17 C.F.R. 240.10b-5.

⁸⁷ 15 USC § 78a (1934), s 10(b).

⁸⁸ The application of the rule to insider trading is further defined in SEC Rule 10b5-1, codified at 17 C.F.R. 240.10b5-1.

⁸⁹ *Securities Exchange Act 1934* (US), s 32(a)

⁹⁰ US Securities and Exchange Commission, *How investigations work* <<https://www.sec.gov/News/Article/Detail/Article/1356125787012>>.

⁹¹ Crimmins notes that '[f]ollowing the Cady, Roberts administrative decision in 1961, the SEC has opted to file virtually all of its insider trading cases in federal district court, and not as administrative proceedings. In so doing, the SEC has structured the disposition of its insider trading cases with a rigidity not found in its other enforcement program areas. All insider trading cases are pled as intentional or reckless fraud cases. All seek full repayment of trading profits plus market-rate interest. All seek an additional payment as a civil monetary penalty. Where downstream tippees are involved, the case will seek to impose joint and several liability for those profits as well. When a case proceeds to trial, the SEC will seek a penalty equal to three times the trading profits, the maximum allowed under the applicable penalty provision. In settlement, the SEC will often insist on all of the relief sought in the complaint, but with a one-time penalty.' Refer Crimmins S J, 'Insider trading: Where is the Line' (2013) *Columbia Business Law Review* (2) 330, 366.

<<http://www.mmlawus.com/data/files/Articles/Crimmins,%202013%20Columbia%20Business%20Law%20Review%20330.pdf>>.

⁹² US Securities and Exchange Commission, *How investigations work* <<https://www.sec.gov/News/Article/Detail/Article/1356125787012>>.

⁹³ Refer, for example, to Jones, R, 'The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings' (2015) *SMU Law Review*, (68) 507. Available at SSRN:

<<http://ssrn.com/abstract=2589703>>, and SEC Enforcement Activity against Public Companies and Their Subsidiaries: Midyear FY 2016 Update, <<http://www.law.nyu.edu/sites/default/files/SEC-Enforcement-Activity-Midyear-FY2016.pdf>>.

administrative proceedings are often implemented by the SEC to impose ‘follow-on’ banning orders on defendants after criminal or civil judgement.

III. RESEARCH FINDINGS ON SANCTIONS IMPOSED IN EACH JURISDICTION

A. Research method

This empirical study involved the construction of a dataset containing information on sanctions imposed on individuals and companies for insider trading and tipping (‘insider trading’)⁹⁴ in each of the jurisdictions other than New Zealand during the period from 1 January 2009 to 31 December 2015 (‘the study period’). New Zealand is not included in the empirical part of the study because there appear to have been no sanctions imposed for insider trading in New Zealand during the study period. This study covers public enforcement of insider trading - public enforcement actions operate in parallel with private actions relating to insider trading and the prevalence of these types of actions also varies between the different jurisdictions, but private actions are not included in this study.⁹⁵ Broadly, the dataset includes all matters where a contravention of an insider trading provision was found to have occurred by the regulator, other administrative body, or court, as well as publicly available insider trading matters that were not contested (i.e. settled matters, including matters resolved by consent orders), and the penalty has not been overturned on appeal.

Each defendant that received a sanction was included separately but all of the sanctions imposed on the defendant in relation to the conduct were grouped together even if the sanctions were imposed in different proceedings. In other words, where separate criminal, civil and administrative proceedings were undertaken against the same defendant in relation to the same conduct, or when these proceedings were subject to appeals, all the final sanctions were grouped together with the one defendant. In some cases there may have been a number of legal proceedings for a single defendant, in others there may have been a number of defendants in the same legal proceeding: however, the analysis in this paper focusses on the defendants that received sanctions for insider trading, rather than the legal proceedings in which such sanctions were imposed.

While there are significant commonalities between the sanctions that apply to insider trading in the selected jurisdictions, there are also some obvious differences. For example, in the UK disgorgement is the first ‘step’ in the calculation of the pecuniary sanction under the civil market abuse regime, which includes insider trading conduct, while in some other jurisdictions disgorgement is a separate order that is distinct from the punitive pecuniary sanction. This should be borne in mind where this study distinguishes between punitive pecuniary sanctions (criminal fines, administrative penalties, civil penalties and other fines have been categorised as punitive), and corrective/restorative pecuniary sanctions (disgorgement, forfeiture, restitution, and other court orders that are not punitive pecuniary sanctions) in the various jurisdictions.

Another area where a number of different sanctions have been grouped together is bans. The most common bans were directorship/managerial bans and bans on participation in the securities

⁹⁴ The study covers both insider trading and tipping conduct. Refer above n 1.

⁹⁵ For example, private actions are commonly used in the US, and sanctions from these kinds of actions have been increasing. Refer Coffee above n 2, 268.

industry (against acquiring and trading securities). In cases where multiple types of bans were imposed on a single defendant in relation to the same conduct, this study did not aggregate the bans but treated them as one single ban.⁹⁶

The dataset was generated from a number of publicly available sources, such as media releases issued by the respective regulators, as well as final orders and court judgments referred to in media releases.⁹⁷ Some additional information was obtained from other sources, such as online newspaper reports and reports and notes prepared by consultants and law firms. One limitation of undertaking this study is that it relies on public enforcement data published on regulators' and prosecutors' websites, and court case databases providing an accurate picture of the enforcement landscape in each of the jurisdictions. It is also possible that some of the decisions will be reversed on appeal.⁹⁸ The availability of information on the regulators' websites varied considerably: for example, it was possible to obtain all necessary data on sanctions and court outcomes from ASIC's media releases, which included both maximum and minimum custodial sentences imposed on each defendant, the size of the pecuniary fine, and any orders imposed by the court. The amount of information on sanctions available in SEC media releases was also significant.

Given the relatively small number of actions taken in some of the jurisdictions, this study focused on the most commonly imposed forms of sanctions, which were custodial sentences, pecuniary sanctions (both punitive and corrective/restorative) and banning orders. Other sanctions imposed in the jurisdictions included community service orders, good behaviour bonds and orders for disciplinary action by other bodies: these sanctions are not included in the study because they were relatively infrequent and were in most cases imposed in conjunction with other sanctions such as fines and custodial sentences. In interpreting the research findings, it is important to keep in mind that some of the defendants included in the study may have engaged in multiple acts of insider trading and/or engaged in other unlawful behaviour in addition to insider trading, such as fraud, money laundering or market manipulation, which may in some cases contribute to a higher overall sanction. On the other hand, the sanctions included in the dataset in some cases incorporated a reduction due to hardship of the defendant, or to provide a discount for early settlement, which resulted in a lower sanction than what would have been issued otherwise. In some cases a pecuniary sanction was waived in its entirety by the regulator due to financial hardship of the defendant. The sanctions included in this study are the final sanctions, taking into account any reductions or waivers.

⁹⁶ In most cases where a defendant received multiple different types of ban, all the bans were of the same duration. In these cases the duration of these bans was not aggregated. For example, if a defendant received a 10-year ban on acquiring and trading securities and a 10-year ban on acting as a director and officer, this was treated as a single 10-year ban. Refer to below n 145.

⁹⁷ To ensure that the list of defendants was comprehensive and incorporated any successful appeals, searches on case law databases were undertaken for all the jurisdictions. For reasons explained later in this section, this was not done for the US.

⁹⁸ The likelihood of this is perhaps most significant in the US, where a number of insider trading appeals may be forthcoming in light of the decision of the United States Court of Appeal for the Second Circuit overturning the insider trading convictions of Todd Newman and Anthony Chiasson (*United States v Newman*, Nos. 13-1837-cr(L), 13-1917-cr(con) (2d Cir. Dec. 10, 2014), ECF No. 262). For example, a number of guilty pleas were vacated after the decision.

Given the large number of complex and inter-related matters in the US, the study does not attempt to undertake a comprehensive search of legal databases to verify the completeness of the data that is publicly available on regulators' websites. The only sanctions for insider trading included in this study were those imposed by the courts and the SEC (a large number of brokers were also banned for insider trading by the Financial Industry Regulatory Authority – FINRA – during the study period). The authors relied principally on reports prepared by Morrison & Foerster⁹⁹ on insider trading and SEC media releases.¹⁰⁰ The Morrison & Foerster reports (available for the 2009-2014 years at the time of writing) included tables listing finalised criminal and civil matters and sanctions imposed in each year (the 2013 and 2014 reports also included administrative matters, which appear to be increasingly relied on by the SEC). In the case of pecuniary sanctions in the US, pre-judgement interest was not included as part of this study (however, it was not always possible to determine from the source data whether the amounts included pre-judgement interest).

The primary source of data in the UK was the FCA webpage listing market abuse outcomes, which includes final notices and press releases issued by the FCA (and previously the FSA) from 2003.¹⁰¹ The primary source of data for administrative actions in Ontario was the disciplined persons register maintained by the Canadian Securities Administrators, the umbrella body covering the securities administrators in each of the provinces, which includes a list of decisions and sanctions involving individuals and companies (going back to 1997 for individuals, and 2008 for companies, in Ontario).¹⁰² For Hong Kong, the key sources of data were media releases in the 'enforcement news' category of the SFC website and the website of the Market Misconduct Tribunal (MMT).¹⁰³ For Singapore, the key source of data was the 'enforcement actions' section of its news releases on the MAS website, and the Singapore National Archives website.¹⁰⁴ The case database LawNet was used to search for criminal cases brought by the Public Prosecutor in Singapore, as these were not listed on the MAS website.¹⁰⁵ For Australia, the key source of data was ASIC media releases in the Financial Markets category.¹⁰⁶

B. Research Findings

⁹⁹ Morrison & Foerster is a San Francisco-based law firm.

¹⁰⁰ The latest of these reports was the Morrison Foerster Insider trading annual review 2014, available at <<http://www.mofo.com/~media/Files/ClientAlert/2015/02/150211InsiderTradingAnnualReview.pdf>>.

¹⁰¹ FCA Market Abuse Outcomes <<http://www.fca.org.uk/firms/markets/market-abuse/outcomes>>.

¹⁰² Canadian Securities Administrators Disciplined List <<https://www.securities-administrators.ca/disciplinedpersons.aspx>>.

¹⁰³ SFC Enforcement News <<http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/>>; MMT Reports and Rulings/Notices <<http://www.mmt.gov.hk/eng/reports/reports.htm>> and <http://www.mmt.gov.hk/eng/rulings/rulings.htm>.

¹⁰⁴ A limitation of this source is that it is stated that 'the information will remain on this page for a period of five years from the date of publication except for prohibition orders which are still in force after the expiry of the five year period. Information on such prohibition orders will remain on this page until they cease to be in force'. For that reason, a search of the Singapore national archives was conducted to obtain the press releases which were no longer listed on the MAS page.

¹⁰⁵ Additional searches on case law databases were undertaken to confirm that UK, Hong Kong, New Zealand and Ontario regulators' website listings of insider trading cases were comprehensive.

¹⁰⁶ ASIC Media Releases <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/?filter=2015&financialmarkets=on>>.

1. Number of defendants receiving insider trading sanctions

During the study period, the number of defendants that received a sanction for insider trading in Australia (30) was third highest after the US (535) and the UK (53). The number of factual ‘insider trading events’ in Australia was 21, only four less than the UK.

To obtain a measure of the relative enforcement intensity in each of the jurisdictions, the number of defendants was adjusted by the size of the sharemarket in each jurisdiction. On this basis, Singapore had the highest level of sanctions imposed (over 60% more than the US), while Australia had the second-highest level of sanctions imposed (around 15% more than the US and around twice the level of sanctions in the UK).

The number of defendants receiving a sanction for insider trading and the number of insider trading events are illustrated in Table 3.¹⁰⁷ In order to obtain an indication of the number of separate investigations that lead to final convictions or other sanctions, the data for each of the jurisdictions (other than the US) has been grouped by reference to the number of separate ‘insider trading events’. Where a number of defendants were implicated in the same scheme together (for example, where one defendant was providing insider information to others that traded based on the inside information), these defendants have been grouped together in one ‘insider trading event’.

Table 3 Number of defendants receiving a sanction and interrelated insider trading events

Jurisdiction	Total number of defendants	Total number of insider trading events
Australia	30	21
Hong Kong	20 ¹⁰⁸	15
Ontario	24	11
Singapore	20	16
United Kingdom	53	25
United States	535 ¹⁰⁹	Data not available
Total	682	N/A

¹⁰⁷ Given the large number and complexity of the cases in the US, and the significant proportion of related and parallel proceedings, it was not possible to group defendants in the US for this study. However, it is likely that the number of defendants in related matters is significantly higher than the number of factual matters, as in some cases there was a large number of related defendants. For example, the Galleon insider trading cases involved 35 defendants charged in 2009. Refer to SEC, ‘SEC Enforcement Actions – Insider Trading Cases’, <<https://www.sec.gov/spotlight/insidertrading/cases.shtml>>. Also refer to Morrison & Foerster ‘Insider Trading 2010 Review’ (Morrison & Foerster, Report, 2011) Appendix 2 <<http://media.mofo.com/files/Uploads/Images/110223-Insider-Trading-2010-Review.pdf>>.

¹⁰⁸ This study excludes the decision of the Insider Dealing Tribunal (the predecessor of the MMT) in relation to the insider dealing inquiry in relation to Harbour Ring International Holdings Limited. The final reports by the Insider Dealing Tribunal were made in December 2009; however the conduct took place in 2001. Refer <<http://archive.news.gov.hk/isd/ebulletin/en/category/lawandorder/091216/html/091216en08004.htm>>.

¹⁰⁹ There was also a large number (at least 24) of relief defendants in the US. They are not included in Table 3. Relief defendants include any persons or entities to whom unlawful proceeds were transferred and that have no legitimate claim to the funds or other assets (Baker, N. A. *The Securities Enforcement Manual: Tactics and Strategies* (American Bar Association, 2007)). Where relief defendants were identified, they were often liable to disgorge profits jointly and severally with the other defendants. As noted by the SEC in its guidance, ‘Division Enforcement Approach to Forum Selection in Contested Actions’, in federal court actions (but not in administrative proceedings), the SEC can join parties as ‘relief defendants’. Refer <<https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf>>.

While insider trading may be very common (for example, a study found that about 25% of takeovers in the US have positive abnormal volumes which may be an indication of insider trading),¹¹⁰ our study found that the number of insider trading defendants and matters was not particularly high in each of the selected jurisdictions other than the US. One possible reason for the small number of sanctions may be the difficulty regulators face in detecting and obtaining sanctions for insider trading. The number of defendants that received a sanction for insider trading was third highest in Australia after the US and the UK. While the number of defendants in the UK exceeded Australia 53 to 30, the number of insider trading events in the two jurisdictions is much more comparable (25 to 21), reflecting the fact that in the UK most insider trading events involved a sanction for two or more defendants (for example, the tipper and the tippee), while in Australia most insider trading events involved a sanction for only one defendant. The vast majority of all defendants were natural persons, however in the US a large proportion of relief defendants¹¹¹ were companies.

To obtain a measure of the relative enforcement intensity ('enforcement intensity') in each of the jurisdictions, the number of defendants was adjusted by the size of the sharemarket in each jurisdiction. The results are illustrated in Figure 1 (the enforcement intensity in each jurisdiction is presented relative to the level of enforcement in the US).¹¹²

Figure 1 Frequency of sanctions imposed (adjusted by size of market capitalisation, presented relative to the US)

Adjusting by the size of the sharemarket paints a very different picture of the enforcement intensity in each jurisdiction. While the US had the highest 'raw' number of insider trading defendants (535), the US is also the home to the two largest securities exchanges in the world, NYSE and NASDAQ.¹¹³ On this adjusted basis, Singapore had the highest level of enforcement intensity (over 60% more

¹¹⁰ Augustin, above n 13.

¹¹¹ Refer to above n 109.

¹¹² The number of defendants in each jurisdiction was divided by the size of the respective sharemarket/(s), based on data tables obtained from <<http://www.world-exchanges.org>> (to calculate the size of the sharemarkets, an average was calculated based on the sizes of the respective sharemarkets in 2006 and 2015). Figure 1 presents this adjusted data in each of the jurisdictions relative to the number of defendants and the sharemarket in the US (i.e. the number of defendants in the US divided by the size of the US sharemarket is equated to 1.00).

¹¹³ Refer above n 84.

sanctions than the US) while Australia had the second-highest level of enforcement intensity (around 15% more sanctions than the US and around twice the level of sanctions imposed in the UK).

The size of the sharemarket is only one criterion by which the enforcement intensity can be evaluated. Other possible approaches involve adjusting the number of actions by the number of market participants or the number of trades (or a combination of all of these criteria). In addition to the size of the sharemarket, the number of insider trading actions may be influenced by factors such as regulatory priorities, the relative size of the regulator and its enforcement budget, and the level of insider trading conduct occurring in each market. Furthermore, the frequency of sanctions imposed does not provide an indication of the type and magnitude (i.e. the severity) of those sanctions. The following section provides insights into the predominant enforcement method in each jurisdiction based on the dataset of insider trading matters while the magnitude of sanctions is discussed in sections 3-5.

2. Predominant enforcement method and sanctions imposed in each jurisdiction

During the study period, the proportion of insider trading defendants receiving sanctions in the criminal courts was substantially higher in Australia than in the other jurisdictions. All but three sanctions were imposed by the criminal courts, whereas in the other jurisdictions (other than the UK), criminal prosecution was undertaken in the minority of cases. During the study period, in Australia, enforcement of insider trading offences resulted in 28 successful criminal proceedings, where each of the defendants pleaded guilty. The only defendants in Australia subject to administrative proceedings for insider trading had also faced unsuccessful criminal actions.

Australia's insider trading actions usually resulted in custodial sentences or pecuniary sanctions. The data shows that nearly two thirds of defendants received custodial sentences, which were more common than punitive pecuniary sanctions (46.7% of defendants received pecuniary sanctions).

This section compares Australia's overall 'enforcement methods' relating to insider trading conduct with the other jurisdictions. It does this first by examining the forums where the sanctions were imposed. This section then examines the proportion of contested and non-contested matters, and the types of sanctions most frequently imposed (custodial sentences, corrective/restorative pecuniary sanctions, punitive pecuniary sanctions, banning orders) in each jurisdiction.

a. Forum

This section compares the number of defendants that received sanctions as a result of proceedings in the criminal courts, courts and tribunals exercising civil and administrative jurisdiction, and regulatory bodies imposing administrative orders for insider trading conduct.

A significant finding of this study was that during the study period, the proportion of insider trading defendants receiving sanctions in the criminal courts was substantially higher in Australia than in the other jurisdictions. All but three sanctions¹¹⁴ in Australia were imposed by the criminal courts, whereas in the other jurisdictions (other than the UK), criminal prosecution was undertaken in the

¹¹⁴ Two of the ASIC banning orders (against Catena and McKenzie) were unsuccessfully appealed.

minority of cases. The reliance on criminal prosecution in Australia is in clear contrast with Singapore (which also has a dual criminal and civil penalty system for insider trading), where the civil penalty regime was used in the vast majority of cases (17 of 20). This is all the more striking given that Singapore's insider trading laws were largely modelled on the laws in Australia.

In Ontario sanctions were imposed by the OSC on all insider trading defendants, and there was only one defendant who was also convicted criminally (Grmovsek). The sanctions imposed by the OSC involved pecuniary sanctions, bans, or commonly both. It is interesting to note that the data appears to indicate that the UK, where around half of the insider trading defendants were prosecuted criminally, is increasingly pursuing insider trading cases in the criminal courts. While the first criminal insider trading conviction in the UK occurred in 2009, the number of defendants sentenced in criminal courts has recently exceeded the number of defendants receiving administrative bans and fines.¹¹⁵ This may reflect an increased focus by the FCA (and its predecessor, the FSA) on taking stronger enforcement action in relation to market abuse after the global financial crisis.¹¹⁶

In Hong Kong, criminal proceedings were brought against less than half of the defendants. Civil insider trading proceedings were conducted at the MMT; however in a number of the cases the ban was issued by the SFC after the decision of the MMT. A number of these decisions of the MMT were unsuccessfully appealed.

An area where the US appears to be unique is the number and complexity of the insider trading proceedings. A number of defendants faced both criminal actions brought by the DoJ and civil actions brought by the SEC in relation to the same conduct, and in some cases administrative follow-on proceedings were also brought (for example, to impose a ban). However, overall, the proportion of defendants prosecuted criminally in the US was relatively low (around 23% of all defendants), with the majority of defendants receiving civil penalties. As discussed further in the next section, most of these civil penalties were not contested.

¹¹⁵ The first convictions were of Christopher McQuoid and James William Melbourne, who received an eight month custodial sentence and a fully suspended sentence respectively. Since the sentencing of Melbourne and McQuoid, 27 other defendants received criminal sanctions for insider trading, while 21 defendants received sanctions under the civil market abuse provisions relating to insider trading conduct. Refer FSA, 'Solicitor and his father-in-law found guilty in FSA insider dealing case' (Media Release, March 2009) <<http://www.fsa.gov.uk/library/communication/pr/2009/042.shtml>>. See also David Enrich and Harriet Agnew 'U.K. agency struggles in fight against insider trading', *Wall Street Journal* (online), 4 January 2014 <<http://www.wsj.com/articles/SB10001424052702303640604579296520563211360>>.

¹¹⁶ FSA former head of enforcement Margaret Cole has referred to a strategy of creating a 'credible deterrent' against market abuse in the City by taking more criminal cases. She notes that it was previously 'widely held that [insider trading] cases were too complex to go before a jury and therefore only civil cases before a tribunal should be contemplated, on the grounds that there was then a lower burden of proof'. Refer Tracy Corrigan, 'FSA's Margaret Cole wages war against criminals in the City' *The Telegraph* (online), 8 May 2010 <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7696855/FSAs-Margaret-Cole-wages-war-against-criminals-in-the-City.html>>.

b. Comparison between contested and non-contested matters (civil and administrative) and guilty and non-guilty pleas (criminal)

As shown in Table 4 and Figure 2, Australia and Hong Kong are characterised by a significantly lower number of non-contested civil matters than the other jurisdictions (there were no publicly available settlements identified in either jurisdiction). The number of defendants in this section is higher than in section 1 because some defendants received sanctions in more than one forum (for example, both civil and criminal sanctions, or civil and administrative sanctions).

Table 4 Number of defendants receiving sanctions in contested and non-contested matters (civil, administrative matters; guilty and non-guilty pleas)

Jurisdiction	Non-contested administrative and civil matters	Contested civil and administrative actions	Defendant pleaded guilty	Defendant pleaded not guilty	Total
Australia	0	3	28	0	31
Hong Kong	0	12	3	8	23
Ontario	12	12	1	0	25
Singapore	15	2	0	3	20
United Kingdom	12	16	13	14	55
United States	445 ¹¹⁷	23	121	15	604
Total	484	68	166	40	758

Figure 2 Proportion of defendants receiving sanctions in contested/non-contested matters; and after pleading guilty/not guilty

In Australia enforcement of insider trading laws resulted in 28 successful criminal proceedings during the period, where each of the defendants pleaded guilty. The two other defendants in Australia

¹¹⁷ The US figure comprises orders from standalone administrative proceedings, non-contested civil proceedings, and 'follow-on' administrative proceedings (administrative orders which related to completed civil and criminal matters). In the US there were a large number of civil settlements between the SEC and insider trading defendants which require court approval.

were subject to successful administrative proceedings, and these were both contested (both of these defendants also faced unsuccessful criminal actions).¹¹⁸ The data indicates that Australia also had the highest proportion of successful criminal cases where the defendant pleaded guilty (100%), while Hong Kong had the highest proportion of criminal cases where defendants pleaded not guilty (73%) (which is in stark contrast to Australia and the US).¹¹⁹ Lei and Ramsay's study of insider trading cases, which looked at all insider trading cases in Australia since the first enforcement case in 1973 until 25 August 2013, found that regulators had become more successful at enforcing insider trading laws as time progressed: from 1973 until 2000, 83% of enforcement proceedings were unsuccessful, while between 2001 and 25 August 2013 only 35% of 32 cases were unsuccessful.¹²⁰ The improvement may reflect increasing levels of electronic trading in the market (resulting in a more viable evidence trail), and the availability of improved algorithmic detection methods.¹²¹ However, when these findings are viewed in conjunction with the findings of our study, it becomes clear that at least the most recent successful cases have all involved guilty pleas. There were also at least five unsuccessful insider trading criminal cases in Australia identified during the study period.¹²²

The regimes that had the highest proportion of administrative and civil settlements reported in publicly available sources were Singapore, the US and Ontario. The policy in these three jurisdictions allows settlements without an admission of wrongdoing; however in the case of settlements made in Ontario during the study period respondents and the regulator have agreed to a set of 'agreed facts', and to certain orders being made against the respondents (such as pecuniary sanctions, reprimands, and banning orders). In each of the non-contested matters in Singapore during the study period, civil penalty contraventions were admitted by the respondents. The high percentage of settlements¹²³ and guilty pleas in the US is also interesting. A high success rate has been observed in the DOJ's insider trading prosecutions during most of the study period, while the SEC's civil insider trading trials have had only a mixed record of success.¹²⁴

¹¹⁸ The two contested administrative actions in Australia were against McKenzie and Catena: ASIC, 'Federal Court Dismisses Appeal by Perth Broker' (ASIC, Media Release, 2010) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2010-releases/10-174ad-federal-court-dismisses-appeal-by-perth-broker/>>. For the unsuccessful criminal actions against McKenzie and Catena, refer to the following media releases: <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2010-releases/10-191ad-melbourne-broker-charged-with-insider-trading/>> and <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-058mr-wa-men-acquitted-on-insider-trading-charges/>>.

¹¹⁹ There were too few criminal cases in Ontario and Singapore during the study period to draw reliable comparisons.

¹²⁰ Lei and Ramsay, above n 10.

¹²¹ For example ASIC claims that its new market surveillance system, 'Market Analysis Intelligence', is designed to identify suspicious trading in real time and provide greater levels of detection of insider trading. <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-316mr-asics-next-generation-market-surveillance-system-commences/>>.

¹²² The unsuccessful cases included Fysh (which was overturned on appeal), Elberg (which was discontinued), McKenzie (in which charges were thrown out), and Catena and Nielsen (who were both acquitted).

¹²³ Most of the settlements involved the respondent not admitting or denying the allegations.

¹²⁴ Crimmins above n 91, 363-4. Crimmins suggests that the reason for the different success rates can be explained with reference to the DOJ's direct evidence approach (including wiretap evidence and plea-bargained confessions) compared to the often highly circumstantial character of the SEC's evidence. Also refer to Julie La Roche, 'Here's Preet Bharara's Amazing 79-0 Insider Trading Conviction Score Card', *Business Insider*

The UK was the only jurisdiction which had roughly the same number of successful criminal and civil cases, and where the number of settlements and guilty pleas was roughly the same as contested matters and non-guilty pleas. In a number of civil cases respondents agreed to settle early in return for a 30 per cent discount in the size of the financial penalty. However, in others, defendants did not settle early, and some applicants referred their cases to the Upper Tribunal (a specialist court).¹²⁵

c. Sanctions most frequently imposed

Table 5 illustrates the number of different types of sanctions imposed for insider trading in each of the jurisdictions. It categorises the sanctions into broad categories, which can be described as:

- Custodial sentences (which include fully suspended custodial sentences)
- Banning orders (i.e. directorship and management bans, bans on trading of securities, prohibition orders, licence revocations)
- Pecuniary sanctions, categorised as:
 - punitive pecuniary sanctions (criminal fines, civil penalties, administrative pecuniary penalties and other fines imposed by a regulator or tribunal),¹²⁶ and
 - corrective/restorative pecuniary sanctions (disgorgement orders, restitution, forfeiture orders, and confiscation orders made under *Proceeds of Crime* legislation).¹²⁷

Data on each of these categories of sanctions is discussed in more detail in sections 3 to 5.

Table 5 Number of sanctions imposed for insider trading across jurisdictions

Jurisdiction	Custodial sentences	Punitive pecuniary sanctions	Corrective and restorative pecuniary sanctions	Bans	Total
Australia	19	14	11	3	47
Hong Kong	9	12	3	11	35
Ontario	1	21	16	23	61
Singapore	1	20	1	2	24
United Kingdom	27	24	36	8	95
United States	85	395	524	108	1,112
Total	142	486	591	155	1,374

Australia (Online) 7 February 2014 <<http://www.businessinsider.com.au/bharara-insider-trading-convictions-2014-2>>.

However, as noted above at n 98, a number of guilty pleas have been vacated following the case of Newman, and some civil cases have also been successfully reversed on appeal (e.g. Diamondback Capital Management and Level Global Investors).

¹²⁵ In a number of these cases the appeals were withdrawn by the applicants prior to a hearing.

¹²⁶ There is some overlap between the corrective/restorative and punitive pecuniary sanctions due to the different ways of classifying disgorgement. This is discussed in section IIIA.

¹²⁷ For example, in Australia and in the UK respectively, in the case of criminal convictions for insider trading, orders were commonly made under *Proceeds of Crime Act 2002* (Cth) and *Proceeds of Crime Act 2002* (UK), respectively.

The number of sanctions is significantly higher than the number of defendants in the previous section, as many defendants received more than one type of sanction (for example, a custodial sentence and a fine, or a civil penalty and a disgorgement order). Unsurprisingly given the size of the US sharemarket, the US had the largest number of sanctions of each kind imposed. As a proportion of the overall number of each type of sanction imposed, the number of pecuniary sanctions was particularly high in the US (around 85% of all pecuniary sanctions were imposed in the US, compared to around 70% of all bans and 60% of all custodial sentences). While this provides a useful comparison of the relative intensity of enforcement levels in each of the jurisdictions, given the different sizes of the securities markets in each jurisdiction, it is difficult to make further comparisons based on the 'raw' number of sanctions imposed. However, when expressed as a percentage of the total number of sanctions imposed in each jurisdiction, it becomes possible to analyse the most prevalent enforcement methods in each jurisdiction. This is presented in Figure 3 and Table 6, which provide a breakdown of the percentage of defendants within each jurisdiction that received each type of sanction.¹²⁸ The combined figures often exceed 100% as in many cases defendants received more than one type of sanction. For example, in Ontario 96% of defendants received bans, 88% of defendants received a punitive pecuniary sanction, 67% of defendants received a corrective/restorative pecuniary sanction, and only 4.2% of defendants received a custodial sentence (so in most cases a defendant received a ban, a punitive pecuniary sanction and a corrective/restorative pecuniary sanction).

Figure 3 Breakdown of sanctions imposed for insider trading across jurisdictions

¹²⁸ Where a defendant received more than one sanction from each category (for example, more than one type of ban, or more than one type of corrective/restorative pecuniary sanction e.g. disgorgement and restitution), this has been treated as a single sanction in Figure 3 and Table 6.

Table 6 Breakdown of sanctions imposed for insider trading across jurisdictions

Jurisdiction	Most common sanction	Second most common sanction	Third most common sanction	Least common sanction
Australia	Custodial (63.3%)	Punitive pecuniary (46.7%)	Corrective or restorative pecuniary (36.7%)	Ban (10.0%)
Hong Kong	Punitive pecuniary (60.0%)	Ban (55.0%)	Custodial (45.0%)	Corrective or restorative pecuniary (15.0%)
Ontario	Ban (95.8%)	Punitive pecuniary (87.5%)	Corrective or restorative pecuniary (66.7%)	Custodial (4.2%)
Singapore	Punitive pecuniary (100%)	Ban (10.0%)	Custodial (5.0%); Corrective or restorative pecuniary (5.0%)	N/A
United Kingdom	Corrective or restorative pecuniary (66.0%)	Custodial (50.9%)	Punitive pecuniary (45.3%)	Bans (15.1%)
United States	Corrective or restorative pecuniary (86.7%) ¹²⁹	Punitive pecuniary (70.5%)	Bans (20.2%)	Custodial (15.9%)
Average (simple)	Punitive pecuniary (68.3%)	Corrective or restorative pecuniary (46.0%)	Bans (34.4%)	Custodial (30.7%)

As demonstrated in Figure 3, insider trading actions in Australia usually resulted in custodial sentences or pecuniary sanctions. It shows that nearly two thirds of defendants received custodial sentences, which were more common than punitive pecuniary sanctions (46.7% of defendants). In this respect, the enforcement methods in the UK appear to be closest to those in Australia. In the UK, around half of the defendants received custodial sentences, and around the same proportion of defendants received punitive pecuniary sanctions (45.3%). The proportion of defendants that received bans was very low in both jurisdictions (10% in Australia and 15.1% in the UK). It is perhaps not surprising that the percentage of bans imposed in Australia is low compared to some other jurisdictions because criminal convictions of insider trading result in automatic disqualification from managing companies for five years,¹³⁰ and all of the defendants (that were not specifically banned) were convicted of insider trading. The main difference between the two jurisdictions appears to be corrective/restorative pecuniary sanctions: the proportion of defendants receiving corrective/restorative pecuniary sanctions in the UK was substantially higher than in Australia (66.0%, compared with 10%).

¹²⁹ In the case of the US, some defendants (around 55) received more than one type of corrective/restorative pecuniary sanction (for example a defendant subject to criminal and civil proceedings receiving both forfeiture and disgorgement orders), and some defendants (around 18) received more than one type of punitive pecuniary sanction (for example a criminal fine and a civil penalty).

¹³⁰ *Corporations Act 2001* (Cth), s 206B. A similar automatic disqualification provision exists in Singapore (*Companies Act* (Chapter 50) (Singapore), s 154A). Refer below n 147-8.

The enforcement methods in each of the other jurisdictions appear very different from Australia and the UK. Under Singapore's civil penalty regime, every defendant received a punitive pecuniary sanction. One of those defendants, Koh Huat Heng, also received a ban.¹³¹ There appears to have been only one custodial sentence during the period (however, it was a substantial sentence with a duration of over eight years – for both insider trading and false trading).¹³² There were no specific disgorgement orders made; however the civil penalties were in many cases calculated by reference to a multiple of the profits made, so it could be said that these civil penalties in a sense included a corrective/restorative component.

Similarly to Singapore, the US also had a very high reliance on pecuniary sanctions. Corrective/restorative pecuniary sanctions were imposed on nearly all defendants (86.7%), while civil penalties and fines (punitive pecuniary sanctions) were imposed on around 70.5% of defendants. Custodial sentences and banning orders were imposed on a minority of defendants (banning orders were imposed on around 20% of defendants, and custodial sentences only on around 16%).

The prevalence of bans imposed in Ontario was substantially higher than in the other jurisdictions, with 95.8% of defendants receiving various banning orders. The only exception was IBK Capital Corp, which was one of only two corporate insider trading defendants in Ontario during the study period, the other being Pollen Services Limited, which was permanently banned from acquiring or trading in securities.¹³³ These bans were in most cases accompanied by pecuniary sanctions (87.5% of defendants received punitive pecuniary sanctions, and two thirds of defendants received corrective/restorative pecuniary sanctions). However, there was only one custodial sentence for insider trading in Ontario during the study period, which was the landmark case of Grmovsek, in which Grmovsek received a 39 month custodial sentence. In addition to the custodial sentence, Grmovsek was permanently banned by the OSC and was required to disgorge over CA\$1 million.¹³⁴

¹³¹ The ban prohibited Mr Koh from (i) providing any financial advisory service, and (ii) taking part, directly or indirectly, in the management of, acting as a director of, or becoming a substantial shareholder of a licensed financial adviser or exempt financial adviser, for a period of three years. Refer <<http://www.mas.gov.sg/News-and-Publications/Enforcement-Actions/2014/Koh-Huat-Heng.aspx>>.

¹³² *Public Prosecutor v Soh Guan Cheow Anthony* [2015] SGDC 190, 335.

¹³³ Refer OSC, 'In the matter of the Securities Act R.S.O. 1990, c. S.5 as amended and in the matter of IBK Capital Corp and William F. White, Order (Sections 127 and 127.1)' <http://www.osc.gov.on.ca/en/Proceedings_rad_20101007_ibk.htm>; OSC, 'In the matter of the Securities Act, R.S.O. 1990, c. S.5 as amended and in the matter of Eda Marie Agueci and others, Reasons and decision on sanctions and costs (Subsection 127(1) and Section 127.1 of the Act)', <http://www.osc.gov.on.ca/en/Proceedings_rad_20150624_agueci-2.htm>.

¹³⁴ Stan Grmovsek, a self-employed consultant, pleaded guilty to charges of insider trading in relation to a prolonged insider trading scheme also involving Gil Cornblum, a lawyer who tragically committed suicide a day before he was scheduled to plead guilty. Grmovsek and Cornblum also faced a civil action brought by the SEC. In the regulatory action by the OSC, Grmovsek was permanently banned from trading or acquiring securities, from becoming an officer or director of an issuer, registrant or investment fund manager, and from becoming a registrant, investment fund manager or promoter. He was also required to disgorge CA\$750,000 for allocation to or for the benefit of third parties, and CA\$283,000 for the benefit of the Attorney General for Ontario (in addition to paying the costs of the investigation of CA\$250,000). Refer <http://www.osc.gov.on.ca/en/Proceedings_rad_20091026_grmovseks.htm>.

Bans were also commonly imposed in Hong Kong, where they were imposed on around 55% of defendants. A slightly larger proportion of defendants in Hong Kong received punitive pecuniary sanctions (60%). However, corrective/restorative pecuniary sanctions were imposed on only three defendants.¹³⁵ Custodial sentences were imposed on a smaller proportion of defendants in Hong Kong compared to Australia and the UK, and, as discussed further in the next section, the maximum sentences imposed were also lower.¹³⁶

This section of the working paper has illustrated the varied ‘enforcement methods’ of prosecutors and regulators in relation to insider trading by focusing on the frequency of the various types of sanctions. Sections 3 to 5 provide another dimension to the analysis by further examining the data on custodial sentences, banning orders and the various types of pecuniary sanctions. The main focus of the next sections is examining the duration of the custodial sentences and banning orders, and the relative sizes of the pecuniary sanctions, imposed for insider trading.

3. Custodial sentences

The overall number of custodial sentences imposed on defendants in Australia (19) was the third highest of the jurisdictions, less than the US (85) and the UK (27). Australia also had the highest proportion of defendants that received a custodial sentence (over 63%). However, of the countries that imposed custodial sentences for insider trading, Australia also had the highest proportion of sentences that were fully suspended.

a. Proportion of defendants receiving custodial sentences

As noted in the previous section, the total number of custodial sentences issued across the jurisdictions for insider trading was 142, which was smaller than the number of other sanctions examined in this paper (there were 591 defendants receiving corrective/restorative pecuniary sanctions, 486 defendants receiving punitive pecuniary sanctions, and 155 defendants receiving bans in the jurisdictions). In respect of the total number of custodial sentences for insider trading, the US had the largest number of custodial sentences imposed (85), followed by the UK (27) and Australia (19). There were nine custodial sentences imposed in Hong Kong, and only one in each of Ontario and Singapore during the study period. It appears that across the jurisdictions, custodial sentences tended to be imposed for the most serious offences, whereas pecuniary sanctions were generally imposed for conduct that was judged to be less serious.¹³⁷ This observation is based on the number of instances of insider trading, whether the conduct was systemic, and the size of the profits made (determined from descriptions of the conduct in the regulators’ media releases and other sources).

¹³⁵ Du Jun, an ex-Morgan Stanley managing director, was required to disgorge around HK\$24 million in addition to his custodial sentence, HK\$1.7 million fine and permanent ban, in Hong Kong’s biggest insider trading case. The other disgorgement order was made against Salina Yu Lai Si, the former Chief Executive Officer of Water Oasis Group Limited (Water Oasis). The third order included here was the order against Tiger Asia Management (refer above n 44).

¹³⁶ The maximum sentences imposed in Hong Kong did not exceed a year for all but two defendants, Du Jun and Ma Hon Yeung, who received sentences of six years and 26 months respectively.

¹³⁷ Examples of some of the more serious cases are at above n 3.

As noted above, in some of these instances the custodial sentences were accompanied by banning orders and/or pecuniary sanctions.

Figure 4 illustrates the proportion of defendants that received custodial sentences in each jurisdiction. As noted in section IIIA, this study has focused on the most common and comparable types of sanctions. For the purposes of comparison of custodial sentences between jurisdictions, custodial sentences are defined to include sentences with a defined maximum duration of imprisonment, including fully and partially suspended sentences. Other criminal sanctions such as good behaviour bonds, periods of community service, supervised release and home confinement have not been included in the study because they were infrequently imposed (these other sanctions were sometimes imposed on insider trading defendants in addition to, or instead of, imprisonment in Australia, UK and the US).

Figure 4 Proportion of defendants receiving a custodial sentence (including suspended sentences) for insider trading across jurisdictions

In Australia, the proportion of defendants that received a custodial sentence was 63.3%, which was higher than in all of the other jurisdictions. As discussed further in the next section, a large proportion of custodial sentences in Australia were fully suspended or ordered to be served by way of an Intensive Correction Order.¹³⁸ The UK had the second highest proportion of custodial sentences (50.9%), followed by Hong Kong (45.0%), the US (15.9%), Singapore and Ontario (5.0% and 4.2% respectively). As noted above in section 2, the data indicates that the UK is also increasingly pursuing insider trading cases in the criminal courts, which has resulted in an increase in the number of defendants that have received custodial sentences.¹³⁹ If an unweighted average is calculated based on the proportion of custodial sentences issued in each jurisdiction, custodial sentences were imposed on around 31% of defendants, which is less frequent than the other categories of sanctions (bans: 34%; corrective/restorative pecuniary sanctions: 46%; and punitive pecuniary sanctions: 68%). However, as discussed in the following section, the duration of custodial sentences imposed for insider trading varied significantly, both between jurisdictions, and within those jurisdictions where multiple sentences were imposed.

¹³⁸ For details on Intensive Correction Orders in NSW and Victoria refer to http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/intensive_correction_orders.html and https://www.cdpp.gov.au/sites/g/files/net391/f/Federal-Sentencing-in-Victoria_1Aug2015.pdf.

¹³⁹ Refer above n 115.

b. Duration of custodial sentences imposed

This section examines the duration of custodial sentences imposed for insider trading in each jurisdiction. Figure 5 provides a summary of the highest, lowest, average, and median custodial sentences imposed in the four jurisdictions where multiple custodial sentences were imposed during the study period (Singapore and Ontario are excluded as there was only one custodial sentence imposed in each of these jurisdictions during the study period). This section is focused on the *maximum* custodial sentence imposed by the court, as opposed to the time actually served or the minimum period required to be served (for example, if the entire sentence, or a portion, was suspended).

Figure 5 Custodial sentences imposed for insider trading in each jurisdiction (years)

As shown in Figure 5, across these four jurisdictions the duration of custodial sentences tended to be around two years. The average and median durations of custodial sentences in Australia, US and the UK were relatively similar, while the duration of custodial sentences imposed in Hong Kong tended to be lower (average 1.4 years, median 0.8 years).

However, as demonstrated most starkly in the case of the US - where the longest period of imprisonment imposed was 17 years and the shortest period of imprisonment was 21 days - the duration of custodial sentences imposed for insider trading also varied significantly within each jurisdiction. There was at least one very high profile case where a long custodial sentence was imposed in each jurisdiction during the study period.¹⁴⁰ The highest and lowest maximum custodial sentences imposed during the study period are outlined below (lowest penalty in parentheses):

- US: 17.0 years (0.1 years)
- Australia: 7.3 years (0.8 years)

¹⁴⁰ Refer Lukas Kamay in Australia (seven years and three months), Du Jun in Hong Kong (six years), Matthew Martoma in the US (nine years), Anthony Soh Guan Cheow in Singapore (eight years and nine months), and Stanko Joseph Grmovsek in Ontario (three years and three months). In the UK, seven individuals received a total of 20 years in jail in relation to a sophisticated and complex scheme which resulted in profits of over GB£ 700,000.

- Hong Kong: 6.0 years (0.3 years)
- UK: 4.0 years (0.7 years)

In each of the jurisdictions other than Australia it was not possible to determine the minimum period required to be served by defendants (or the time actually served) from the source data. The lack of data on partially suspended sentences may indicate that some jurisdictions do not impose partially suspended sentences, or that the minimum components of partially suspended sentences are not publicly reported. In the case of the UK, where a determinate custodial sentence is imposed, half of the sentence is served in custody and the other half of the sentence is served in the community.¹⁴¹

However, it was possible to determine where custodial sentences were fully suspended in all jurisdictions other than the US. In the US a number of defendants (at least 57) did not receive a custodial sentence but received other non-monetary criminal sanctions such as standalone¹⁴² good behaviour bonds, periods of community service, supervised release or periods of home confinement. Some of these sanctions were also imposed on defendants in addition to, or instead of, imprisonment in Australia and the UK. These sanctions have not been included in the 'custodial sentences' totals in Table 7.

As illustrated in Table 7, more than half of the 19 custodial sentences imposed for insider trading in Australia were fully suspended. This was a substantially higher proportion of suspended sentences than in the other jurisdictions. In the UK, which had more custodial sentences than Australia, only four of 27 custodial sentences were fully suspended, while in Hong Kong only one of nine sentences was fully suspended.

Table 7 Proportion of sentences for insider trading that were fully suspended

	Number of custodial sentences	Number of fully suspended sentences	Proportion of fully suspended sentences
Australia	19	11 ¹⁴³	58%
Hong Kong	9	1	11%
Ontario	1	0	0%
Singapore	1	0	0%
United Kingdom	27	4	15%
United States	85	Not Available	N/A

Although fully suspended sentences were able to be identified for all jurisdictions other than the US, it was not possible to obtain data on partially suspended sentences for this study.

Given the large proportion of suspended sentences for insider trading in Australia, the median *minimum* sentence in Australia was actually '0'.¹⁴⁴ This would likely be lower than in each of the

¹⁴¹ Refer <<http://open.justice.gov.uk/how-it-works/sentencing-and-rehabilitation/>>.

¹⁴² As distinct from good behaviour bonds that form part of fully suspended custodial sentences.

¹⁴³ Fully suspended sentences were imposed on O'Reilly, Rieteborgen, Levi, Lindskog, Jordinson, Stromer, Joffe and Farris. Dalzell, O'Brien and Jeffery Bateson were ordered to serve their sentences in the community under an Intensive Correction Order.

¹⁴⁴ If fully suspended sentences are excluded, the average minimum custodial sentence (i.e. the average minimum non-parole period) imposed in Australia was 1.7 years, while the median minimum custodial sentence was 1.3 years.

other jurisdictions where custodial sentences were imposed, where a lower proportion of defendants received fully suspended sentences. This illustrates the limitations of considering the 'maximum' custodial sentences imposed by the courts in isolation.

4. Bans

The proportion of defendants that received banning orders was lower in Australia than in the other jurisdictions (except Singapore, which had the same proportion of banning orders as Australia). The proportion was highest in Ontario, where all but one defendant received a ban. The low number of bans in Australia may be due to the following two related factors: the existence of an automatic five year disqualification in Australia which prevents individuals convicted of insider trading from managing corporations, and Australia's high reliance on criminal prosecution for insider trading (which would have the effect of imposing the automatic disqualification).

This section compares the number and magnitude of banning orders imposed across the jurisdictions. As noted in section 1 above, different types of banning orders have been grouped together in this study. In cases where multiple different types of bans were imposed on a defendant in relation to the same conduct, this study did not aggregate the multiple bans but treated them as one single ban of that duration.¹⁴⁵ The most common bans were directorship/managerial bans and bans on participation in the securities industry (against acquiring and trading securities). While the various bans are of course different in nature and consequences, the type of ban ordered was generally determined by the nature of the misconduct and the profession of the defendant. For example, directors were given directorship bans, while market participants such as investment bankers or traders were banned from participating in the industry.¹⁴⁶ Not surprisingly, individuals who fell outside of these categories generally did not receive a ban at all.

It is also important to note that convictions for offences under the *Corporations Act 2001* (Cth) punishable by 12 months or more imprisonment result in an automatic five-year ban on managing companies, which includes a ban on being a director, in Australia.¹⁴⁷ A number of defendants

¹⁴⁵ In most cases where a defendant received multiple different types of ban, all the bans were of the same duration. In these cases the duration of these bans was not aggregated. For example, if a defendant received a ten-year ban on trading securities and a ten-year ban on acting as a director and officer, this was treated as a single ten-year ban. In the few cases where a number of different types of bans were imposed, and these bans had a different duration, a different approach was taken to calculate the length of the ban for the study. The most frequent duration was taken to be the duration of the ban. For example:

- Richard Bruce Moore: a ten-year ban on acting as a director or officer of a reporting issuer, a ten-year ban on acquiring and trading securities, and a 15-year ban on acting as a registrant was treated as a ten-year ban (e.g. <http://www.osc.gov.on.ca/en/Proceedings_rad_20130416_moorerb.htm>)
- Mitchell Finkelstein: a ten-year ban on trading and acquiring securities, a ten-year ban on acting as a registrant, investment fund manager or promoter, and a permanent prohibition from acting as a director or officer of a reporting issuer was also treated as a ten-year ban (<http://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20150824_azeffp.pdf>)

¹⁴⁶ In the US, a few attorneys and accountants found to have engaged in insider trading were banned from appearing in front of the SEC. Bans of this nature were not included in the overall number of bans.

¹⁴⁷ *Corporations Act 2001* (Cth), s 206B (Automatic Disqualification) applies to a person:

(a) [...] convicted on indictment of an offence that:

- (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or

convicted of insider trading in Australia had been directors and senior managers of corporations, which means that they would have likely been affected by the automatic disqualification. This means that – for insider trading convictions – ASIC would only seek to impose a management ban if it considered the disqualification for five years was insufficient for a defendant. A similar five year automatic disqualification period applies to directors in Singapore.¹⁴⁸ No equivalent automatic restriction was identified in the other jurisdictions; however, in the US there are a number of examples of automatic disqualification that can apply to a defendant as a result of a violation of securities laws (in some cases it may also affect a firm of which the defendant is an officer or director).¹⁴⁹ In the UK, directors can be disqualified in certain circumstances under the *Company Directors Disqualification Act 1986* (UK): however, this form of disqualification is in most cases not automatic.¹⁵⁰ In practice a criminal conviction of insider trading (or a finding of misconduct) may affect a defendant's employment prospects even if they are not disqualified.

a. Total number of bans/prohibition orders imposed

Across the jurisdictions, the total number of bans for insider trading was 155, which included 97 permanent bans. The number of bans varied significantly between jurisdictions. The largest number of bans was imposed in the US (108), followed by Ontario (23), Hong Kong (11), and the UK (8).

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- (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or
 - (b) [...] convicted of an offence that:
 - (i) is a contravention of [the *Corporations Act* 2001 (Cth)] and is punishable by imprisonment for a period greater than 12 months; or
 - (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
 - (c) [...] convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country.

¹⁴⁸ The five-year automatic disqualification in *Companies Act* (Chapter 50) (Singapore) s 154(1) applies to:

- (a) a person convicted of any of the following offences:
 - i. any offence, whether in Singapore or elsewhere, involving fraud or dishonesty punishable with imprisonment for 3 months or more;
 - ii. any offence under Part XII of the *Securities and Futures Act*; or
- (b) a person subject to the imposition of a civil penalty under s 232 of the *Securities and Futures Act*

Insider trading is prohibited under Part XII of the *Securities and Futures Act* (Cap. 289) (Singapore) which means that this automatic disqualification would potentially apply to defendants subject to either criminal or civil penalty insider trading proceedings in Singapore.

¹⁴⁹ For example, automatic disqualification can affect investment companies and affiliated persons.

15 U.S.C. §§ 80a-9(a) automatically disqualifies a broad range of persons from serving or acting 'in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, registered unit investment trust, or registered face-amount certificate company'. This particular disqualification applies for a period of ten years.

For discussion of other forms of automatic disqualification in the US refer to 'Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws', Speech by SEC Chair Mary Jo White, March 12, 2015, <https://www.sec.gov/news/speech/031215-spch-cmjw.html#_ftn11>.

¹⁵⁰ The three disqualification provisions of the *Company Directors Disqualification Act 1986* (UK) that are automatic are ss 11 (applying to undischarged bankrupts), 12 (applying to a failure to pay under county court administration orders) and 12A (applying to Northern Irish disqualification orders). The court is also required, under s 6, to make a disqualification order against unfit directors of insolvent companies.

There were only three bans imposed in Australia, and two in Singapore. All three of the bans imposed in Australia were imposed on brokers by way of an ASIC administrative banning order.¹⁵¹ The prevalence of bans imposed in Ontario was substantially higher than in the other jurisdictions, with 95.8% of defendants receiving various banning orders. The proportion of defendants banned varied significantly between the other jurisdictions, as follows:

- Hong Kong (55.0%)
- US (20.2%)
- UK (15.1%)
- Australia and Singapore (both 10.0%)

b. Duration of bans imposed

This section compares the duration of bans imposed for insider trading conduct in each of the jurisdictions. The bans imposed can be categorised as having a fixed duration, or being permanent. In the UK, a number of defendants (8) were the subject of orders prohibiting them from performing any regulated activity carried out by an authorised person, exempt person or exempt professional firm on the grounds that the defendant is not a fit and proper person. While all of these orders were of an indefinite duration, which means that they are in a sense similar to a permanent ban, they may be varied or revoked.¹⁵² In addition to these indefinite prohibition orders in the UK, there were 89 permanent bans imposed for insider trading across the other jurisdictions. Seventy six of these were imposed in the US, nine in Ontario, and four in Hong Kong. Of the bans imposed:

- In the US, 70% were permanent
- In Hong Kong, 36% were permanent
- In Ontario, 39% were permanent
- In Australia and Singapore, none of the five bans issued were permanent.

The proportion of all defendants that received permanent bans was highest in Ontario (37.5%), and was much lower in the other jurisdictions (Hong Kong: 20.0%, United Kingdom: 15.1%, United States 14.2%, Singapore: 0%, and Australia: 0%). Overall, bans for a fixed period were imposed less frequently than permanent bans for insider trading. However, as noted above this varied considerably between jurisdictions. Figure 6 compares the average, median, longest and shortest durations of all bans of a fixed duration imposed in each jurisdiction.

¹⁵¹ The banning orders were likely imposed under s 920A of the *Corporations Act 2001* (Cth). The orders related to insider trading conduct by three brokers, all employed by Citigroup Wealth Advisers Pty Ltd. Refer <http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2009-releases/ad09-16-asic-bans-perth-broker-for-five-years/>, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2010-releases/10-08ad-asic-bans-melbourne-broker-for-three-years-for-insider-trading/>, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2010-releases/10-174ad-federal-court-dismisses-appeal-by-perth-broker/>.

¹⁵² These orders were made by the FCA or the FSA under s 56 of the *Financial Services and Markets Act 2000* (UK). These orders may be varied or revoked under subsection 56(7) of the *Financial Services and Markets Act 2000* (UK).

Figure 6 Duration of non-permanent bans imposed in each jurisdiction for insider trading¹⁵³

Of the jurisdictions, Ontario had the longest bans imposed. The longest ban imposed in Ontario was 15 years, and the average length of bans imposed was 9.4 years (median 10.0 years). This was higher than the average across all jurisdictions, which was 5.8 years (median: 5.6 years).

As noted above, there were only three bans issued for insider trading in Australia (three, five and five years), which makes it difficult to compare to the other jurisdictions which had a higher number of bans. The same can be said of Singapore and the UK, where there were two and zero non-permanent bans respectively. The average length of the bans imposed in Australia was 4.3 years (median: 5.0 years).

As noted above, this section has considered specific banning orders imposed on defendants, as opposed to automatic disqualification that applies under other laws. For example, convictions for offences punishable by 12 months or more imprisonment result in an automatic five-year disqualification on managing companies, which includes a ban on being a director, in Australia.¹⁵⁴ Automatic disqualification also applies to defendants that have been convicted of insider trading (or received a civil penalty) in Singapore.¹⁵⁵ Additionally, as noted above, the US has a number of forms of automatic disqualification and certain restrictions that can apply to the defendant (or a firm associated with the defendant).¹⁵⁶ In the case of Australia, the data indicates that at least ten insider trading defendants in Australia¹⁵⁷ (a third of the total number of defendants) had previously been directors or officers of companies, and as such they would have potentially been affected by the automatic disqualification. If one were to treat each of these defendants as receiving a five year ban, Australia would have a much higher proportion of defendants receiving bans (43%, which is lower than Ontario and Hong Kong, but higher than the other jurisdictions). However, it is not possible to

¹⁵³ As noted above, all of the bans imposed in the UK during the study period were of an indefinite duration.

¹⁵⁴ Refer above n 147.

¹⁵⁵ Refer above n 148.

¹⁵⁶ Refer above n 149.

¹⁵⁷ These were John O'Reilly, Noel Stephenson, Jeffrey Bateson, Justin O'Brien, John Gay, Peter Charles Pritchard Farris, Mukesh Panchal, Bo Shi (Calvin) Zhu, Norman John Graham and Jia Yao Matthew Tan. In the case of O'Reilly, Stephenson, Bateson, O'Brien and Gay, ASIC explicitly notes the automatic disqualification in the media release concerning sentencing.

conclusively determine how many defendants are *in fact* impacted by automatic disqualification: it is only possible to say that the automatic disqualification applies to each one of the defendants that received a criminal sanction for insider trading in Australia (the same could be said to apply to each of the defendants that received a criminal conviction or civil penalty for insider trading in Singapore).

5. Pecuniary sanctions¹⁵⁸

The total quantum in pecuniary sanctions imposed for insider trading in Australia was lower than in each of the other jurisdictions, but comparable to Hong Kong, Singapore and Ontario. The highest amount in pecuniary sanctions was imposed in the US. When the amount in pecuniary sanctions imposed is adjusted by the size of the sharemarket in each jurisdiction, the total amount in pecuniary sanctions in Australia is higher than in Ontario and Hong Kong, but substantially lower than in the US, Singapore and the UK. On average, pecuniary sanctions in Australia were lower than in each of the other jurisdictions apart from Hong Kong. Australia also had a relatively high proportion of cases where no pecuniary sanction was imposed at all.

However, the punitive component of the pecuniary sanctions imposed in Australia was substantially lower: when the amounts are adjusted by the size of the sharemarket in each jurisdiction, the amount in punitive pecuniary sanctions imposed in Australia was only marginally higher than in Hong Kong and substantially lower than in all of the other jurisdictions. There were only 14 fines with an average of around US\$34,000 (median of around US\$21,290) imposed in Australia, and no civil penalties. The most comparable jurisdiction to Australia in this respect was Hong Kong, where there were 12 fines imposed, with an average of around US\$53,700 and a median of around US\$21,930.

The pecuniary sanctions imposed in Australia and Hong Kong also comprised a smaller percentage of illegal profits than in the other jurisdictions. The sanctions imposed in Ontario and Singapore were the highest when compared to illegal profits.

This section provides a comparison of the pecuniary sanctions imposed in each of the jurisdictions for insider trading. In particular, this section examines the magnitude of total *combined* pecuniary sanctions (including corrective/restorative sanctions), punitive pecuniary sanctions (including fines, administrative and civil penalties), and the relationships between pecuniary sanctions and the size of the illegal profit.

All of the amounts in this section exclude the three largest pecuniary sanctions ordered in the US, because the size of these three sanctions is substantially larger than all the other pecuniary sanctions imposed in each of the other jurisdictions, which would affect the ability to draw comparisons by skewing the data.¹⁵⁹

¹⁵⁸ All pecuniary sanctions in this paper have been converted to US dollars based on an average exchange rate over the 7-year period between 31/12/2008 and 31/12/2015 (source <<http://www.OANDA.com>>).

¹⁵⁹ These three were the pecuniary sanctions against SAC Capital Advisers, which was fined US\$900 million and had a US\$900 million forfeiture order ordered against it, Barry Minkow, who was the subject of an order for restitution of over US\$580 million, and CR Intrinsic Investors, which was the subject of a civil penalty and disgorgement totalling nearly US\$550 million. These three sanctions combine to nearly US\$3 billion, while all other sanctions imposed for insider trading during the study period combined to around US\$1 billion.

a. Total quantum in pecuniary sanctions imposed

Table 8 presents the total size of pecuniary sanctions imposed on defendants for insider trading (excluding legal/investigation costs), in local currency and in US\$.

Table 8 Insider trading – total pecuniary sanctions imposed in local currency and in US\$

Jurisdiction	Total number of defendants	Total pecuniary sanctions imposed (local currency)	Total pecuniary sanctions imposed (US\$)
Australia	30	A\$10,357,292	US\$7,351,606
Hong Kong	20	HK\$74,508,088	US\$9,611,543
Ontario	24	CA\$11,588,652	US\$8,920,944
Singapore	19	SD\$17,468,993	US\$12,235,282
United Kingdom	53	GB£21,462,002	US\$31,447,198
United States¹⁶⁰	533	US\$925,166,767	US\$925,166,767

The data shows that the total amount in pecuniary sanctions imposed for insider trading in Australia was lower than in each of the other jurisdictions, but were comparable to Hong Kong, Singapore and Ontario. The total amounts in this section are significantly higher than their punitive component (fines, administrative penalties, and civil penalties), which are analysed below at section 5b. It should be noted that, of the A\$10.4 million in pecuniary sanctions imposed in Australia during the study period, A\$7 million related to forfeiture imposed in one matter: the case of Kamay and Hill. The highest amount in pecuniary sanctions was imposed in the US. It should be noted that these are *combined* penalties, which include disgorgement of profits, forfeiture, restitution, and orders made under *Proceeds of Crime* legislation. For some defendants an order for disgorgement, restitution or forfeiture was made but no punitive pecuniary sanction was made and for many defendants both punitive and corrective/restorative sanctions were made.

Table 9 compares average and median combined punitive and corrective/restorative pecuniary sanctions in each jurisdiction.

Table 9 Insider trading – average and median pecuniary sanctions imposed in US\$¹⁶¹

Jurisdiction	Average combined pecuniary sanction (US\$)	Median combined pecuniary sanction (US\$)
Australia	\$386,927	\$38,861
Hong Kong	\$686,539	\$28,380
Ontario	\$405,497	\$338,431
Singapore	\$611,764	\$61,985
United Kingdom	\$669,089	\$258,256
United States	\$1,869,024	\$176,926

¹⁶⁰ Excluding SAC Capital Advisers, Barry Minkow and CR Intrinsic Investors.

¹⁶¹ Excluding SAC Capital Advisers, Barry Minkow and CR Intrinsic Investors.

Average pecuniary sanctions in Australia were the lowest of each of the jurisdictions, while median pecuniary sanctions in Australia were lower than in each of the other jurisdictions apart from Hong Kong. In addition to the low pecuniary sanctions, it should be noted that Australia had a higher proportion of cases where no pecuniary sanction was imposed at all compared to the other jurisdictions.¹⁶² As shown in Table 9, the average pecuniary sanctions were highest in the US. However, it is clear that in the case of the US that the average sanction figure is skewed significantly by a small number of very large pecuniary sanctions imposed in that jurisdiction. Given the impact on averages of a small number of large pecuniary sanctions, the median pecuniary sanction is a superior measure for comparison of typical pecuniary sanctions. The highest median pecuniary sanctions were in Ontario (US\$338,431), followed by the UK (US\$258,256), while the lowest median pecuniary sanctions were in Australia and Hong Kong (US\$38,861 and US\$28,380 respectively).

b. Punitive pecuniary sanctions

The types of punitive pecuniary sanctions available and imposed for insider trading vary between jurisdictions. Specifically, there are civil penalties, administrative penalties, and fines. For ease of presentation, in this section criminal fines imposed by the court and monetary fines imposed by the regulator have been grouped together.¹⁶³ The number of punitive pecuniary sanctions imposed is outlined in Table 10 (categorised by the type of sanction).

Table 10 Number of punitive pecuniary sanctions imposed

Type of punitive pecuniary sanction	Australia	Hong Kong	Ontario	Singapore	United Kingdom	United States	Total
Administrative penalties	0	0	21	0	22	7 ¹⁶⁴	50
Civil penalties	0	0	0	17	0	330	347
Fines	14	12	0	3	2	58	89
Total	14	12	21	20	24	395	486

During the study period, fines were imposed in Australia, Hong Kong, Singapore, the UK and the US; civil penalties were imposed in Singapore and the US, and administrative penalties were imposed in the UK, US and Ontario. By far the highest number of punitive pecuniary sanctions was imposed in the US (395), followed by the UK (24), Ontario (21) and Singapore (20). As demonstrated in Table 10, there were 14 criminal fines but no civil pecuniary sanctions imposed for insider trading during the study period in Australia. The total number of punitive pecuniary sanctions imposed in Australia was similar to Hong Kong (12).

The magnitude of individual pecuniary sanctions varied significantly between jurisdictions. Figure 7 compares the total amounts in pecuniary sanctions and the punitive aspects of sanctions imposed in each jurisdiction, relative to its sharemarket capitalisation (presented on an annual basis).

¹⁶² The proportion of defendants that received some form of pecuniary sanction was 63.3% in Australia, which was lower than each of the other jurisdictions.

¹⁶³ Criminal fines were imposed in each of the jurisdictions other than Ontario, while Hong Kong was the only jurisdiction where fines were also imposed by the regulator, the SFC, for insider trading conduct.

¹⁶⁴ This refers to civil monetary penalties imposed in administrative cease-and-desist proceedings.

Figure 7 Annual combined and punitive pecuniary sanctions for insider trading adjusted for sharemarket capitalisation (\$US per \$ bn of market capitalisation per year)¹⁶⁵

When the amount in pecuniary sanctions imposed is adjusted by the size of the sharemarket¹⁶⁶ in each jurisdiction, the total amount in pecuniary sanctions in Australia is higher than in Ontario and Hong Kong, but still substantially lower than in the US and Singapore. However, it is also clear that the punitive component of the pecuniary sanction imposed in Australia is substantially lower: it is only marginally higher than Hong Kong and substantially lower than all of the other jurisdictions. This finding is significant in terms of the deterrence effect of pecuniary sanctions in Australia and Hong Kong. However, it may reflect a perception by the courts in Australia and Hong Kong that the main sanction is the custodial sentence and that criminal fines only play a supplementary role. The average and median fines, administrative penalties and civil penalties are illustrated in Figure 8.

¹⁶⁵ Excluding SAC Capital Advisers, Barry Minkow and CR Intrinsic Investors.

¹⁶⁶ The total amounts imposed in pecuniary sanctions and in punitive pecuniary sanctions in each jurisdiction was divided by the size of the respective sharemarket/(s), based on data tables obtained from <http://www.world-exchanges.org>. To calculate the size of the sharemarkets, an average was calculated based on the sizes of the respective sharemarkets in 2006 and 2015. The total amounts were divided by seven to obtain the annual penalties, and presented in US\$ per billion of market capitalisation.

Figure 8 Average and median fines, civil penalties and administrative penalties¹⁶⁷

As demonstrated in Table 10 and Figure 8, there were only 14 fines with an average of around US\$34,000 (median of around US\$21,290) imposed in Australia. The most comparable jurisdiction to Australia in this respect was Hong Kong, with average fines of around US\$53,700 and median fines of around US\$21,930. Punitive pecuniary sanctions tended to be considerably higher in other jurisdictions, with the highest median civil/administrative penalties in Ontario and the UK, and the highest median fines imposed in the UK and Singapore.

The data shows a very substantial difference between average and median punitive pecuniary sanctions in each of the US, UK and Singapore. In the case of the US, while the average civil penalty was nearly US\$1 million and the average criminal fine was nearly US\$500,000, the median civil penalty was only around US\$75,000, and median criminal fine was only US\$22,500. This demonstrates that in most insider trading matters in the US civil penalties and fines tended to be reasonably low (the median criminal fine was only marginally higher than in Australia and Hong Kong). However, the US was also characterised by a number of much larger pecuniary sanctions. This may in turn be a reflection of sanctions being able to be determined with reference to the size of the illegal profit (which means that there is no defined upper limit for the size of a pecuniary sanction). For example, it has been observed that the SEC seeks a civil penalty equal to three times the illegal profits in all insider trading trials, and a civil penalty equal to the illegal profits in settlement.¹⁶⁸ The relationship between profits and pecuniary sanctions is discussed further in the next section.

c. Pecuniary sanctions as a proportion of illegal profits

A comparison was undertaken based on those defendants where it was possible to identify the size of the illegal profits made from the order or media release. This was able to be determined for 502

¹⁶⁷ Excluding SAC Capital Advisers, Barry Minkow and CR Intrinsic Investors.

¹⁶⁸ Crimmins, above n 91, 366

of the total number of 682 defendants, and of those 502 defendants 376 received a punitive pecuniary sanction.¹⁶⁹ For those cases it was possible to analyse the relationship between the size of the pecuniary sanction imposed and the size of the profits made by defendants as a result of their wrongdoing (however calculated). The results of this calculation are outlined in Table 11, which clearly shows that, at least in those cases where data on illegal profits was available, in Australia and Hong Kong the total pecuniary sanction was either equal to, or lower than, the profits made from the misconduct, while in other jurisdictions pecuniary sanctions imposed comprised a larger proportion of the illegal profits.

Table 11 Analysis of relationship between illegal profits and size of pecuniary sanctions (number of cases in parentheses)¹⁷⁰

Jurisdiction	Average total pecuniary sanction v profit relationship	Median total pecuniary sanction v profit relationship	Average punitive pecuniary sanction v profit relationship	Median punitive pecuniary sanction v profit relationship
Australia	102.24% (n=16)	100.00%	90.84% (n=7)	100.00%
Hong Kong	85.04% (n=8)	100.00%	78.41% (n=6)	81.25%
Ontario	590.18% (n=18)	289.84%	547.13% (n=17)	199.84%
Singapore	913.13% (n=12)	252.92%	913.13% (n=12)	252.92%
United Kingdom	299.36% (n=22)	238.28%	296.79% (n=11)	198.64%
United States	280.90% (n=426)	200.00%	185.63% (n=323)	100.00%
Average (simple)	378.48%	196.84%	351.99%	155.44%

At an aggregate level, the jurisdictions that imposed the highest pecuniary sanctions relative to the illegal profits were Singapore (average 913.13% and median 252.92%), Ontario (average 590.18% and median 289.84%) and the UK (average: 299.36% and median 238.28%). Australia had the second lowest level (average: 102.24% and median 100.00%), above Hong Kong (85.04% and 100%). What this essentially demonstrates is that in Australia and Hong Kong, based on the cases where profits were identifiable, the total pecuniary sanction was either equal to, or lower than, the profits made from the misconduct. This can be contrasted with all of the other jurisdictions where total pecuniary sanctions were at least twice the size of the illegal profits made.

The difficulty in comparing the measures only arises when comparing the size of the *punitive pecuniary sanction* with profits made across jurisdictions. While it is clear from Table 11 that the punitive component of total pecuniary sanctions is often substantially less than the overall pecuniary sanction, as noted in section III.A, it is difficult to make comparisons because disgorgement is not treated equally in all jurisdictions (in some jurisdictions such as the US a separate disgorgement

¹⁶⁹ The other 126 defendants either did not receive a punitive pecuniary sanction, or it was waived. Of course, if one is to include these defendants in the analysis (as having an effective punitive pecuniary sanction of '0'), the punitive pecuniary sanction in each jurisdiction would be a smaller proportion of the profit.

¹⁷⁰ Excluding SAC Capital Advisers, Barry Minkow and CR Intrinsic Investors.

order was made in nearly all cases while in Singapore and in the UK often no disgorgement orders were made but the punitive pecuniary sanctions were in some cases calculated with reference to the size of the illegal profit). In any case, what the data demonstrates is that in cases where profits were identified, punitive pecuniary sanctions in Australia and Hong Kong were lower or equal to the illegal profit, and in the case of Australia a large proportion of defendants (nine of the 16 defendants where profits were identified) did not receive a punitive pecuniary sanction at all. In contrast, punitive pecuniary sanctions tended to be higher than illegal profits in the other jurisdictions. While the regulators in Singapore and the UK did not always separate disgorgement from the punitive pecuniary sanction, overall pecuniary sanctions in those jurisdictions were at the higher end of the spectrum.

In each of the jurisdictions considered (apart from Hong Kong)¹⁷¹ the types of pecuniary sanctions imposed most commonly for insider trading are able to be determined with reference to the size of the illegal profit under the legislation, and/or disgorgement is available. This means that there is no defined upper limit for the size of the total pecuniary sanction in each jurisdiction other than Hong Kong. For example, maximum criminal fines in Australia, civil penalties imposed in the US and Singapore, and penalties imposed for market abuse in the UK are able to be determined with reference to the size of the profit, or unlimited. However, based on the analysis in this section, it appears that the pecuniary sanctions imposed in Australia and Hong Kong are lower than the pecuniary sanctions imposed in each of the other jurisdictions (whether considered on their own or with reference to illegal profits).

IV. CONCLUSION

This study has presented a detailed analysis of the insider trading enforcement landscape across a range of common law jurisdictions over an extended period by examining custodial sentences, banning orders and pecuniary sanctions imposed for insider trading. The following summary of the typical sanctions imposed on defendants highlights the different approaches taken in the various jurisdictions to enforcing insider trading provisions.

Australia

A typical defendant in Australia received a custodial sentence and paid a small pecuniary sanction. However, a high proportion of the custodial sentences were fully suspended. Based on cases where the size of illegal profits is available, the size of the average punitive pecuniary sanction was equal to the profit, but most defendants did not pay a punitive pecuniary sanction at all. The low level of pecuniary sanctions may reflect a perception by the courts that the main sanction is the custodial sentence and that criminal fines play a supplementary role. The low level of bans may reflect the fact that defendants were subject to automatic disqualification from managing corporations as a result of their insider trading conviction.

¹⁷¹ The maximum criminal fine for insider trading in Hong Kong is HK\$10 million (approximately US\$1.8 million).

Hong Kong

In Hong Kong, the proportion of defendants receiving a ban was 55%, which was higher than the number of defendants receiving a custodial sentence (45%). The duration of custodial sentences imposed in Hong Kong was the shortest of all the jurisdictions. Similarly to Australia, the size of pecuniary sanctions also tended to be low both in absolute terms and as a proportion of profits. A typical defendant in Hong Kong received a ban *or* a short custodial sentence, and a small fine.

New Zealand

There were no sanctions imposed in New Zealand for insider trading during the study period.

Ontario

Ontario was characterised by high (and frequent) pecuniary sanctions and bans, but there was only one custodial sentence imposed for insider trading during the study period, so a typical defendant received a ban *and* a pecuniary sanction.

Singapore

In Singapore, custodial sentences and bans were both imposed infrequently (the low frequency of bans may be because in Singapore an insider trading conviction or a civil penalty also results in automatic management disqualification). Pecuniary sanctions were imposed on all defendants, and these sanctions were significantly higher than the illegal profits.

UK

In the UK, a typical defendant received a shorter custodial sentence than Australia, but the sizes of pecuniary sanctions tended to be substantially higher so a typical defendant received a custodial sentence and paid a significant pecuniary sanction. However, there also appears to have been an increase in the proportion of insider trading matters that are prosecuted criminally since 2009. Bans were imposed on only 15% of defendants, but they were all of indefinite duration.

US

The US, which had the highest number of defendants, also had the largest range of penalties. The duration of custodial sentences for defendants ranged between 21 days and 17 years. The size of pecuniary sanctions imposed on defendants ranged between \$US500 and \$US1.8 billion. Most of the defendants in civil matters settled with the SEC, while the vast majority of criminal convictions obtained by the DoJ during the period resulted from guilty pleas.

Another area where the US appears to be unique is the number and complexity of the insider trading proceedings. A number of defendants faced both criminal actions brought by the DoJ and civil actions brought by the SEC in relation to the same conduct, and in some cases administrative follow-on proceedings were also brought (for example, to impose a ban).

What characterises most insider trading cases in the US is the high proportion of pecuniary sanctions. In the US, some form of corrective/restorative pecuniary sanction (such as forfeiture, disgorgement or restitution) was imposed on nearly 87% of defendants, which was higher than in

each of the other jurisdictions. Punitive pecuniary sanctions were imposed on around 70% of defendants. In most cases the sanctions were determined with reference to the size of the profit (for example, the civil penalty was equal to the size of the profit for at least 150 defendants, all of whom settled with the SEC).

The results of this study have illustrated the different approaches taken in the various jurisdictions to enforcing insider trading provisions. Even in jurisdictions with very similar legislation on insider trading, such as Australia and Singapore, regulators, prosecutors and decision-making bodies may have very different enforcement budgets, priorities and strategies. This shows the importance of conducting empirical research on the actual application of sanctions in parallel with legal analysis of the enforcement methods and sanctions that are available under the legislation.