Enforcement of Insider Trading Regulations: Comparative Analysis of Nigeria and Australia

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Abstract
Insider trading remained a problem in the Nigerian Stock markets. The recent probe of the collapse of the Nigerian capital market by the National Assembly of Nigeria has helped to identify Insider trading as being amongst the major causes of the near collapse of Nigeria's equity capital market. Despite the efforts being made by Nigeria's Authority to combat the menace through regulations, enforcement has been identified as one of the major impediments to effective enforcement of insider trading regulations in Nigeria. This paper will primarily address the issue of enforcement of insider trading regulation in Nigeria. By way of comparison the paper will frequently refer to the Australian experience because Australiais one of the few countries in the world that has stringent insider trading law and stronger enforcement. The successful track record of the Australian regulatory framework therefore demands a comparative analysis. This is done with a view to investigating lessons that might be learnt or adopted from Australia. The research is anchored on primary and secondary source materials. The study contends that having the best insider trading laws on paper alone will not cure the insider trading problem. What is required is the effective enforcement of the laws in Nigeria.

1.1 Introduction

Insider dealing on the basis of inside information has been identified as an action against the principle of equal access to information for all those who need such information to make investment decisions.

Insider dealing or trading is one of the corporate ills that have existed since the emergence of the abstract entity known as company. Incidentally, this corporate evil has existed unchecked for over a century of the development of company law. As noted by Orojo,[1] at common law no clear prohibition was imposed on the use of insider information except only in the case of industrial and trade secrets.[2] In other respects, the directors or other officers were free to hold and deal in the shares of the companies.[3] The absence of

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[1]Orojo J.O. Company Law and Practice in Nigeria, 3rd ed. (Mbeyi and Assoc. Lagos1992) p. 447
[2] See *British Industrial Phastic V. Ferguson* 9(1938) 4 All E.R. 504
[3]*Percival V. Wright (1902) 2 Ch. 421*

legislative check on the ills of insider dealing was a feature of company law in most jurisdictions including Nigeria until recently.[4]

In Australia prior to 1970 there was no law generally prohibiting insider trading. During the unprecedented investment boom of the late 1960s worry about the conduct of certain mining companies led to the establishment of the Senate Select Committee on Securities and Exchange (known as the Rae Committee). The Committee found that insider trading involving directors, investors and brokers was a feature of the Australian stock market and that it was taking place without any legal restraint. It was then that issues of insider dealing came to the front burner of company legislation in Australia, ultimately resulting in the passing of the Securities Industry Act 1970 in New South Wale. This Act, amended in 1971, included section 75A which prohibited direct or indirect insider trading by any person who obtained information "through his association with a corporation"[5]

In Nigeria only a passing reference was made to insider dealing in the Securities and Exchange Commission Decree No 71 of 1979 and its amended version of 1983. A more comprehensive provision on the ills of insider dealing was contained in the repealed part 17 of the Companies and Allied Matters Act (CAMA) 1990.[6] The Investments and Securities Act 1999 repealed the CAMA provisions regulating insider dealing thereby giving the Securities and Exchange Commission (SEC) the undisputable responsibilities and powers to administer this area of the capital market. The 1999 ISA has now been repealed and replaced by the Investments and Securities Act (2007), hereinafter referred to as the ISA 2007.

This paper examines the issue of enforcement of insider trading regulation in Nigeria. By way of comparison the paper will frequently refer to the Australian experience because Australia is one of the few countries in the world that has stringent insider trading law and effective enforcement. The successful track record of the Australian regulatory framework therefore demands a comparative analysis. This is done with a view to investigating lessons that might be learnt or adopted from Australia.

1.2 An Overview of Nigeria's Stock Markets and the Extent of Insider Trading

The Nigerian Stock Exchange (NSE), the counterpart of the Australian Securities Exchange (ASX)was established in 1960 and today, it services the second largest financial centre in sub-Saharan Africa. The NSE is licensed under the Investments and Securities Act (ISA) and is regulated by the Nigerian Securities and Exchange Commission (SEC). The

[4]Essien I.T. "A Critical Examination of the Statutory Bottleneck Against Insider Dealing" (2007) 2 *Nasarawa State Law Journal* 145
[5]Tomasic R &Pentony B, Insider Trading in Australia: Part 4Summary And Recommendations 1989http://www.criminologyresearchcouncil.gov.au/reports/7-87-4.pdf visited 22 March 2013
[6] See *Companies and Allied Matter Act Cap 20 Laws of the Federation 2004*. S. 615 to 617

Exchange is a full member and executive committee member of the African Securities Exchanges Association (ASEA) and an affiliate member of the World Federation of Exchanges (WFE).[7] The Exchange is an automated exchange and provides listing and trading services, as well as electronic Clearing, Settlement and Delivery (CSD) services through Central Securities Clearing System (CSCS) Ltd., an associate company to the NSE, which also offers custodian services. Along with securities listing and trading services, the Exchange offers market data dissemination services, market indices and much more.

While the ASX is Australia's primary securities exchange. It was created by the merger of the Australian Stock Exchange and the Sydney Futures Exchange in July 2006 and is today one of the world's top-10 listed exchange groups measured by market capitalisation.[8]

As at January 31, 2013, the Nigerian Stock Exchange (NSE) has about 198 listed companies with a total market capitalization of about N10 trillion ($63 billion). At the same time, the Australian Securities Exchange (ASX) had combined market capitalization of approximately $1.4 trillion and has over 2000 companies listed.[9] In terms of market capitalization and listed companies Nigeria's stock market is small, however, insider trading is widespread.[10]

1.3 The Securities and Exchange Commission

The Nigerian Securities and Exchange Commission (SEC), the counterpart of the Australian Securities and Investment Commission (ASIC) is the main regulatory institution of the Nigerian capital market. It is supervised by the Federal Ministry of Finance. The Nigerian Stock Exchange (NSE) is privately-owned and self-regulating, but the SEC maintains surveillance over it with the mandate of ensuring orderly and equitable dealings in securities, and protecting the market against insider trading, market manipulation and other fraudulent acts.

ASIC is Australia's corporate, markets and financial services regulator. It is an independent Commonwealth Government body. It is set up under and administer the Australian Securities and Investments Commission Act (ASIC Act), and carries out most of its work under the Corporations Act.[11]

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[7] See The Nigerian Stock Exchange available at http//www.nigerianstockexchange.com/aboutus visited 2 February 2021
[8] See the ASX Group http://www.asxgroup.com.au/index.htm visited 2 February 2021
[9] ASX, The Australian Market http://www.asxgroup.com.au/the-australian-market.htm visited 1 February 2013
[10] Olusola-Obasa, B. "Act Now Operators Urged SEC" Reported in the Punch newspaper of 19 March 2011 http://www.punchng.com/
[11] About ASIC-An Overview, http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/About%20ASIC%20overview visited 19 January 2021

1.4 The Insider Trading Regulatory Framework

In Nigeria, the Investment and Securities Act (ISA) 2007 is the primary regulator with respect to supervising stock markets. Section 111 of the Act precludes an insider of a company from buying or selling or otherwise dealing in the securities of the company which are offered to the public for sale or subscription if he has information which he knows is unpublished price sensitive information in relation to those securities. Rule 110 (e) of the SEC Rules[12] also contains a similar restriction.

The following persons are insiders of a company under Nigeria's Act if they are or have at any time in the preceding six months been knowingly connected with a company in one or more of the following capacities;[13]

i. A Director of the company or a related company[14].
ii. An officer of the company[15] or a related company;
iii. An employer of the company or a related company;
iv. An employee of the company, involved in a professional or business relationship to the company.
v. Any shareholder of the company who owns 5 per cent or more of any class of securities or any person who is or can be deemed to have any relationship with the company or member and
vi. Members of audit committee of a company; and other persons who, by virtue of being so connected have obtained unpublished price sensitive information in relation to the securities of the company.

So also Rule 17 of the SEC. Code of Corporate Governance extends the restrictions to cover a director's immediate family (spouse, son, daughter, mother or father).[16] and Section 112 of the ISA 2007 also extends "insiders" to include public officers, who, by virtue of their position have access to information in the course of their duty and also person contemplating takeovers of companies.

The prohibition on the insider lasts for as long as he occupies the office and up to six months after relinquishing the office. A director who resigns his office can deal in the prohibited securities six months after the resignation notwithstanding that the information is still unpublished price sensitive information. However, imposing a rule of thumb limitation of six months for all cases does not tally with the objective of insider trading regulations. This objective would be better promoted if the prohibition were made to last for as long as the information remains non-public. The director's example is only used to

[12] *Securities and Exchange Commission Rules 2012*
[13] *The Investment and Securities Act (ISA) 2007* s 315
[14] Related company is a body corporate which is that company's subsidiary or holding company or a subsidiary of that holding company. See *Investment and Securities Act (ISA) 2007* s.315
[15] The Act did not define officer but it may include directors, manager or secretary of a company.
[16] *SEC Code of Corporate Governance 2011*

show the defect of the six months limitations. The person perpetrating the abuse may be one who does not owe the company any fiduciary obligation, for example a person in a professional or business relationship with the company.

Unlike the legislation in Nigeria, which classified specific groups of people as insiders, Australian jurisdiction defined "insiders" in a wider context. Under s1002G (1),Corporation Act 2001 a person is an insider if they possess information that is reasonably expected or is known to have a material effect on the price of securities. A trading or communication of such price-sensitive information would therefore deem to be contravening the provision of the Corporation Act.

1.5 Prohibition of Insider Trading Transactions

In Australia the concept of insider trading is not statutorily defined. There appears to be less than full agreement with regard to the literal, purposive and legislative interpretation of this concept in Australia.[17] Consequently, the term "insider trading" is not noticeably used in the Australian insider trading legislation.[18] The Australian legislature however defined a few terms which constitute or involve insider trading. For example, it defined terms such as *insider*,[19] *inside information*,[20] *material effect*,[21] *person*[22] and *procuring*.[23] So also, other terms such as *tipping*, *tippee*, *tipper* and *generally available* are not statutorily defined in the current insider trading provisions. However, it is generally accepted that insider trading involves the abuse of or exploitation of non-public price-sensitive inside information that relates to a body corporate or its securities for personal gain by any person.[24]

For a person to be considered an insider under the Australian Act there is no requirement for a nexus (or connection) between the insider and the company whose securities are traded.[25] This was highlighted in *R v Evans*[26]Mr. Doyle was charged as an insider for his possession of inside information although he was a broker, and he was purchasing shares as an agent and not for personal benefit. Accordingly Lyon and Plessis stated thus:

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[17]Chitimira, H, The Regulation of insider Trading in South Africa: A Roadmap for Effective Competitive and Adequate Regulatory Framework (LLM thesis University of Fort Hare 200*8)* p.140 htpp//www.hdl.handle.net/10353/230

[18]Chitimira, H, n 17 p.140

[19]*Corporations Act 2001* (Cth), s1043A (1)

[20]*Ibid*(Cth), s1042A

[21]*Ibid* (Cth), s 1042D

[22]*Ibid* (Cth), s 1042G and 1042H

[23]*Ibid* (Cth), s1042F

[24] See Ziegelaar M "Insider Trading Law in Australia" in Walker G, Ramsay I and Fisse B (eds) *Securities Regulation in Australia and New Zealand* LBC Information Services 1998 556-560; Bostock "Australia's New Insider Trading Laws" (1992) 10 *Company and Securities Law Journal* 165-181

[25] Lyon G and Plesiss J, the Law of Insider Trading in Australia (Federation Press, Sydney Australia 2005) p.15

[26]*(1999) USC 488*

> *An insider is defined by a bare requirement of trading whilst in the possession of inside information. This has been described as the "information connection definition" A person who overhears inside information in passing, and then trade on that information may be just as liable to Prosecution under the legislation as the company director who learns of insider information by virtue of their office.*[27]

Taken as a whole, the Australian approach to the definition of insider appears more appropriate for Nigeria and it will track down any person for insider trading. As Huang[28] reasons, "the Australian 'information connection only approach' to the definition of insiders is both theoretically justifiable and practically manageable".

The insider trading prohibition in Australia is currently contained in Division 3 of Part 7.10 of the Corporations Act 2001, and applies to Division 3 financial products. Division 3 financial products include securities, derivatives, or managed investment products, or superannuation products other than those proscribed by the regulations made for the purposes of section 1042, or other financial products that are capable of being traded on a financial market.[29] Consequently, insiders or any other persons who possess price sensitive inside information that relates to the securities of a body corporate and who know or ought reasonably to have known that such information was not generally available to the public are prohibited from subscribing for or procuring or purchasing or selling such securities.[30]
It is clear that the insider trading prohibition in Australia has a much wider application than the prohibition in Nigeria. It covers explicitly, a wide range of financial products. An insider or any other person is specifically prohibited from deliberate, intentional and unlawful communicating (disclosure) of price-sensitive inside information to another person before it becomes generally available to the public (published).[31]

1.6 What is Inside Information?

Inside information is defined as information that is not generally available and, if the information were generally available, a reasonable person would expect it to have a

[27] Lyon G and Du Plessis J, n 25 p.15
[28] See Huang H "The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform" (2005) 17 *Australian Journal of Corporate Law* 281-322
[29] See generally section 1042A of the 2001 Act; Lyon G and Plessis J, n 28 54-56.
[30] See section 1043A of the 2001 Act; Lyon G and Du PlessisJ,n 25 pp.22-23
[31] Latimer P "Whistleblowing in the Financial Services Sector" (2002) 21 *University of Tasmania Law Review* 3946; Zipparo L "Encouraging Public Employees to Report Workplace Corruption" (1999) 58*Australian Journal of Public Administration* 83 88; Liverani M "Cool Reception for Whistleblowingin the Professions" (December 2002) *Law Society Journal* 26; Gobert J and Punch M "Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998" (2000) 63 *Modern Law Review* 25 46.

material effect on the price or value of particular Division 3 financial products.[32] For example, it can include merger and acquisition plans/contracts, advance earnings results and confidential reports detailing significant proposed financial/structural change to a business. Section 1042D of the Australian Corporation Act provides that a reasonable person would be taken to expect information to have a material effect on the price or value of Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the financial products.

The key inference to be drawn from the foregoing definitions is that the insider unfairly benefits from an unlawful use of information not otherwise available to other market players by making a profit or avoiding a loss, which would have otherwise not been possible had he not been in possession of such privileged information.

In Nigeria save for the reference to the equivalent concept of "unpublished price sensitive information", there is no statutory definition of the term "inside information" under Nigerian law. In order to trigger the restriction under section 111 of the ISA 2007, the information in question must be "unpublished" and "price sensitive". There is neither a statutory definition of these terms nor is this author aware of any reported judicial interpretation of same. However, section 315 of the ISA describes any reference to "unpublished price sensitive information" as a reference to information which:

(i) relates to specific matters relating or of concern (directly or indirectly) to that company, that is, is not of a general nature relating or of concern to that company; and
(ii) is not generally known to those persons who are accustomed to or would be likely to deal in those securities but which would, if it were generally known to them be likely materially to affect the price of those securities.

The key drawback(s) with the above mentioned description is that the same is circular, ambiguous, and does not prescribe any objective criteria for reasonably determining what constitutes unpublished price sensitive information.

1.7 Detection of Insider Trading Transactions

In Australia, the Australian Securities and Investments Commission detect market abuse from the surveillance it undertakes, complaints from the public, referrals from other agencies (such as the ASX) and the media.[33]

[32] *Corporations Act 2001* (Cth), s 1042A
[33] ASIC, *A Guide to How We Work*, p 10, http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/asic_guide_how_we_work.pdf/$file/asic_guide_how_we_work.pdf. Accesed19 January 2021.

1.7.1 ASIC's surveillance

ASIC's surveillance team examines potential matters which are detected by SMARTS through price and volume anomalies ahead of material transactions or events, and also reviews trading ahead of significant transactions or events where there is no unusual trading. ASIC's surveillance is not limited to SMARTS, however, with the regulator also using a variety of other databases, in-house developed tools and a range of online resources to identify potential connections or associations which may uncover inside trading.[34] ASIC's surveillance capabilities, combined with its information gathering powers under the ASIC law, co-operation with other enforcement agencies and its own internal fraud investigation expertise mean that the investigation of insider trading is becoming swifter.[35]

1.7.2 Australian Stock Exchange (ASX) referral of matters to Australian Securities and Investment Commission (ASIC)

When suspicious trading has been detected, the ASX is obliged to refer this to AS**I**C under the Corporations Act 2001 and its memorandum of understanding with ASIC.[36]Both The ASX and ASIC use the SMARTS surveillance system supplied by NASDAQ OMX. Prior to sending the referral, the ASX conducts its own investigation described as follows:

> *'Prior to any referral to ASIC we undertake considerable analysis of trading data, broker records and other available information to determine whether or not there is prima facie evidence of insider trading. A referral to ASIC will include a detailed report comprising chronology, analysis, all relevant data and identification of those people who may be of most interest should ASIC pursue further investigations.'*[37]

ASIC has stated that the procedure from this point on is that the ASX referrals go to a "market watch" team in ASIC for a preliminary assessment. If the market watch team decides there is substance to the referral, then it is passed on to the "enforcement" team. It

[34] Deloitte, "Insider Trading Investing in Prevention" https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Forensic/Deloitte_Insider_Trading_June_2012.pdf visited 12 January 2021

[35] Deloitte, n 33

[36]*Memorandum of Understanding between Australian Securities and Investments Commission and Australian Stock Exchange Limited* (28 October 2011), http://www.asx.com.au/asc/pdfflif.nsf/ Lookup By File Name/ASIC-ASX-MOU.pdf visited 19 January 2021

[37]Lawrence D, *ASX Markets Supervision*, 11th Annual SDIA Conference, 22 May 2008, http://www.asx.com.au/supervision/pdf/sdia_speech_melb_may08_mayne_lawrence.pdf visited 19 December 2021.

is the job of the enforcement team to gather admissible evidence so that ASIC is in a position to commence legal proceedings.[38]

According to the ASIC's Deputy Chairman Belinda Gibson, ASIC has also significantly reduced the time taken to commence investigations into suspicious market conduct. She said:

> *...of the 138 market matters referred to ASIC's enforcement team for investigations since ASIC assumed responsibility for market supervision in August 2010, 42 were made within 30 days of identifying the possible misconduct, and 93 were made in less than 60 days.*[39]

It is clear that increased focus and use of technology has greatly helped in the detection of insider trading in Australia.

Regrettably, in Nigeria detection of insider trading is one of the major impediments to the enforcement of insider trading regulation. Nigeria lacks advanced market surveillance software systems that could track illegal transactions. Just recently Frontline operators in the Nigerian Stock Exchange have urged the Securities and Exchange Commission to wake up to its surveillance role and rescue the capital market from insider trading, among other negative practices. They regretted that these practices had caused untold losses for unsuspecting investors.[40] A member of the NSE council had lamented that no one has ever been convicted for insider trading in Nigeria. He said that it is unfortunate that SEC lacks the machineries to detect insider trading,"[41]

Nigeria should import advanced technology close to that of Australia to help it in detecting insider trading and other market abuses.

Added to the problem of absence of hi-tech is lack of awareness of the public on insider trading offences. Many Nigerian investors are still not aware that insider trading is a

[38]Gibson B, "Improving Confidence and Integrity in Australia's Capital Markets", presentation to the Committee for Economic Development of Australia, Sydney, 8 July 2008, http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Gibson_26-3-08_asx_seminar.pdf/$file/Gibson_26-3-08_asx_seminar.pdf visited 19 December 2012

[39]Newswala, "ASIC publishes fifth market supervision report"http://www.newswala.com/International-News/13-036MR-ASIC-publishes-fifth-market-supervision-report-31006.html visited 2 February 2021

[40]Olusola-Obasa, B, "Act Now Operators Urged SEC" Reported in the Punch newspaper of 19 March 2011 http://www.punchng.com

[41]Olusola-Obasa, B, n 39

serious offence that attracts severe penalties. Several investors lack the business sophistication that would make them concerned with, or even understand, the concept of insider trading. Despite this lack of sophistication, underneath, the society is capitalist to the core and people are generally concerned with how to maximised profits by taking advantage of any available opportunity. People are not concerned with the loss their conduct will cause their victims. This has made the detection and enforcement of laws on insider trading ineffective in Nigeria.

1.8 Investigation of Insider Trading

For there to be effective investigation of insider trading infractions, the regulatory body must have wide powers of investigation. Pursuant to section 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), ASIC may investigate where it has reason to suspect that a contravention of the Corporations Act, or the corporate offences under the relevant state or territory legislation, have occurred. During the investigation, ASIC may require a person who can give information about the matters it is investigating to appear before ASIC staff for examination on oath and to answer questions.[42] It can intercept telephone and electronic communications to take depositions and to summon witnesses. It can also search for and seize documents which are relevant to the investigations.

ASIC also has extensive powers to require production of "books" (broadly defined) relating to the affairs of a body corporate. This power extends to books that Australian auditors, operators of financial markets, financial services businesses and any other person that has been a party to dealing in financial products may have in their possession.[43]

After investigation, ASIC may initiate civil penalty proceedings or a criminal prosecution in conjunction with the Commonwealth Director of Public Prosecution (CDPP).[44]

In Nigeria, the SEC is not endowed with such powers of investigation. In fact, one of the glaring defects of the ISA 2007 is the absence of an efficient system of investigation. This might be due to the fact that the same defect existed in the Company Securities (Insider Dealing) Act 1985 after which the ISA was fashioned. The defect in the 1985 UK Act has since been rectified by sections 177 and 178 of the UK Financial Service Act 1986 and part xxv of the Financial Services and Markets Act 2000 (as amended by the Financial Services Act 2010). These UK provisions have now given wider powers of investigation to complement that of the Department of Trade and Industry. The body can summon witnesses and require persons to reveal identities of traders or tippees if the revelation is

[42] *Australian Securities and Investments Commission Act 2001* (Cth), s 19
[43] *Australian Securities and Investments Commission Act 2001* (Cth), ss 29-34.
[44] Their relationship is governed by a Memorandum of understanding with DPP entered on 22 September 1992 http://www.asx.com.au/asc/pdfflif.nsf/LookupByFileName/DPP—MOU-1992.pdf visited 19 January 2013

necessary to prevent the commission of the offence. Refusal to cooperate with the investigators may be regarded as contempt of a court's bench.[45] As the regulation in the ISA reflects the provisions of the earlier British legislation, the defect in the initial Act is still reflected in Nigeria. It is deficient to institute a regime of criminal sanctions without an efficient system of investigating reported or suspected cases of insider dealing violations.

Though the ISA contains in part VII provisions for the appointment of inspectors and investigators, their operations are limited only to market operators.[46] An effective investigation regime must empower the SEC to appoint investigators to inquire into any alleged infringement of the ISA generally and any suspected case of insider dealing in particular. Such investigators should have the powers among other things to require any person whom they consider to be in position to give relevant information on a matter being investigated to attend before the inquiry to give evidence orally or in appropriate cases by affidavit. The enquiry should also be able to compel any person in possession and control of any relevant document to produce the document which the enquiry should be able to copy and ask for explanation and clarification upon of course such investigation should be subject to the regular defence of professional privilege and banking secrecy.[47]

It is submit that the amendment of ISA 2007 is necessary that would empower the SEC to carry out the investigation necessary for an insider trading prosecution. The question of investigation is at the core of effective enforcement of the regulations and until the problems of detection and investigation are properly addressed attempts to prohibit insider trading will remain illusory.

1.9 Civil Enforcement of Insider Trading

The Australian Act also imposed civil sanctions and penalties on those who practice insider trading. The civil remedies are twofold in nature. Any person who violates the insider trading provisions will firstly be liable to compensate any other person who falls victim to insider trading or tipping, for his losses.[48] Secondly, a civil penalty is provided for in section 1317HA. When a court is satisfied that a contravention has occurred, it must first

[45] *Financial Service Act 2010 UK s* 178

[46] Section 45(1) of the *Investment and Securities Act 2007* provides that "the Commission shall conduct routine and special inspection and investigation of capital market operators. To define the parameters of the powers, section 45(9) provides thus: This part of the Act applies to any capital market operator who is involved in the administration management and custody of funds for or on behalf of clients including the management and operation of a collective investment in a collective investment scheme.

[47] Wunmi B, *Insider Trading in Developing Jurisdictions: Achieving an Effective Regulatory Regime (*Abingdon Oxon, London 2012) P.133

[48] See sections 19(1) and 43 of Proceeds of Crime Act of 1987 (Cth); *R v Rivkin*(2003) 198 ALR 400-406 and *R v*
Hannes (2002) 43 ACSR 519

make a declaration of contravention under section 1317E of the Corporations Act. ASIC can then seek certain types of civil penalties, including:

ii) A pecuniary penalty of up to AU$200,000 for an individual and AU$1 million for a corporation.
iii) An order disqualifying the individual from managing corporations for a set period.
iv) Compensation orders on behalf of those who suffered damage as a result of the contravention.

The actions for compensation and to impose a penalty must be instituted within 6 years of the arising of the cause of action.[49]

Although it seems that tipping another person as contemplated in section 1043A(2) does not lead to an action for compensation under section 1043L, various circumstances are specifically provided for in section 1043L(2)-(5) under which such an action may be brought against an insider or any other person whose conduct amounts to tipping.[50]

These provisions enable an uninformed purchaser, the issuer of securities and ASIC to invoke the civil proceedings in a number of ways. Firstly, the *issuer* of the securities or financial products is entitled to recover any damages suffered by him from the insider or from any person who applies or procures another to apply for financial products as contemplated in section 1043L (2). The damages will then comprise the difference between the application price and the price that could have been asked if the information had been available to the public at the time of application.
The issuer of financial products has additional rights provided for in section 1043L (5). For example, if such products were the subject matter of an affected transaction, the issuer in question may also recover the loss incurred.[51] This implies that an insider or any person who contravenes the provisions may incur civil liability where the securities in question have been purchased or sold.[52]

Secondly, the uninformed purchaser or any person who disposes of a financial product may recover his loss suffered, from an insider or any other person who purchases the disposer's financial products.[53] Lastly, ASIC may, where it considers to be in the public interest, bring

[49] See section 1043L of the 2001 Act.
[50] Chitimira H, n 17 p.150
[51] See further section 1043L (3) and (4) of 2001 Act
[52] See *Keygrowth Ltd v Mitchell* (1990) 3 ACSR 476 487
[53] See for detail section 1043L (3) of the 2001 Act.

an action in the name of and for the benefit of any affected body corporate to recover civil damages.[54]

In Nigeria civil penalty is provided in Section 116 of the ISA 2007.The Section provides that:

> *(1) A person who is liable under this part of this Act shall pay compensation at the order of the Commission or the Tribunal, as the case may be, to any aggrieved person, in a transaction for the purchase or sale of securities entered into with the first mentioned person or with a person acting for or on his behalf, suffers a loss by reason of the difference between the price at which the securities would have likely been dealt in such transaction at the time the first mentioned transaction took place if the transaction had not occurred.*
> *(2) The amount of compensation for which a person is liable under subsection (1) of this section is the amount of the loss sustained by the person claiming the compensation or any other amount as may be determined by the Commission or the Tribunal.*

However, compared to Australian provision, the Nigerian Act is still inadequate, section 116 of the ISA 2007 enabling a person to claim compensation on the order of the SEC or the Investment and Securities Tribunal establish under section 274 of ISA is grossly deficient since it is too limited in scope as it only provides for compensation. The scope of the jurisdiction of the SEC over insiders who are not market operators is also yet to be tested, but it is doubtful if the SEC is able to assume unlimited jurisdiction over all persons.[55] So also, the powers of the Tribunal under section 290 ISA to summon and examine witnesses or perform incidental or ancillary functions is restricted by section 284 of ISA which defines the inter-party jurisdiction of the Tribunal. An investor bringing an action against a corporate insider will obviously not be covered. Again the exclusive jurisdiction conferred upon the Tribunal runs contrary to the express provision of the 1999 Constitution which confers unlimited jurisdiction in corporate matters in the Federal High Court.[56]

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[54] See section 1043L (2) and (5) of the 2001 Act; *ASC v Forem Free-way Enterprises Pty Ltd* (1999) 30 ACSR 339 351; Welsh "The Corporations Law Civil Penalty Provisions and the Lessons Learned from the Trade Practices Act 1974" (2000) 11 *Australian Journal of Corporate Law* 299.
[55]Wunmi B, n 46 p.133
[56] See section 6 particularly (4)(a) and (5), 251 particularly (1)(e) of the Constitution of the Federal Republic of Nigeria 1999. See also Attorney General of the Federation v Sode & Ors (1990) 1 NWLR (Pt 128) 500; University of Abuja v Ologe (1996) 4 NWLR (P.445) 706

It is submitted that the amendment of section 116 of ISA 2007 is very necessary if the compensation provision is to have any reasonable meaning under the Act. Deployment of comprehensive civil remedies is necessary to complement present criminal sanctions. Public investors, corporations and traders who are victims of insider dealing must be able to seek appropriate redress in court of competent jurisdiction. Provision for civil remedies will also address the problem associated with the proof beyond reasonable doubt standard of criminal prosecution since a proof on the balance of probabilities is all that is required in a civil suit.

1.10 Criminal Enforcement

Criminal enforcement has been enhanced in Australia. The Corporation Act was amended in 2010 which increased the penalties, a corporation that breaches the insider trading provisions may be subject to a maximum penalty equal to the greater of a fine of $4,950,000 or three times the benefit obtained, or 10% of the annual turnover of the corporation if the benefit obtained cannot be determined.[57] The maximum penalty for individuals for an insider trading offence is a prison term of 10 years and / or a fine of up to $495,000 or three times the value of the profits obtained (prior to the amendment to the Corporations Act in 2010 the penalty was 5 years imprisonment and / or a maximum fine of $220,000). Recent penalties actually applied by the Courts have varied: in the six criminal convictions for 2010 – 2011 reported in the ASIC annual report, there have been prison terms ranging from 20 months to 4.5 years.[58]

In addition, where the convicted person has managed a company or corporation, that person is automatically disqualified from performing his or her duties for a period of five years from the date of conviction or release from prison. Again, ASIC may increase this period by applying to a court for a longer disqualification or banning order where it is justified by exceptional circumstances.[59]

Where a person has been convicted of insider trading, the prosecutor on behalf of the DPP may make an application for forfeiture of any benefit derived from the trading. The proceeds being the amount of illicit profit made may be forfeited through the intervention of the DPP and the courts.[60]

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[57] These penalties were increased in 2010 as a result of the governments firm stance on ensuring fair and efficient financial markets, which is also one of three of ASIC's key priorities .

[58] ASIC Annual Report 2010-2011 www.asic.gov.au/asic/pdfflip.nsf/annual-report-2010-11pdf visited on 17 January 2021

[59] See *ASIC v Rivkin* (2003) 198 ALR 400-406 where one *Rivkin* was disqualified from managing any corporation or company for 5 years and fined Aus. $30, 000

[60] See sections 19(1) and 43 of Proceeds of Crime Act of 1987 (Cth); *R v Rivkin*(2003) 198 ALR 400-406 and *R v Hannes (2002) 43 ACSR* 519 where ASIC seized Aus. $2 million's worth of unlawful insider trading profits from the accused, Mr. Hannes.

The prosecution for insider trading is done by the Commonwealth Director of Public Prosecutions (DPP) on the referral of ASIC in accordance with a Memorandum of Understanding(MOU) between itself and the DPP.[61]

The Nigerian Act has also made provision for criminal penalty in section 115 of ISA 2007 under the section a person convicted of the offence could be sentenced to fine of not less than N500, 000 or an amount equivalent to double the amount of profit derived by him or loss averted by the use of the information or imprisonment for a term not exceeding 10 years. In case of a body corporate to a fine of not less than N1,000,000 or an amount equivalent to twice the amount of profit derived by it or loss averted by the use of the information.[62]

Nigeria like Australia made provisions for criminal sanctions to curb insider trading. But regrettably since the first insider trading legislation made its debut in Nigeria up till now not a single person has been convicted for insider trading in Nigeria.[63] But with the current efforts of government and the regulators toward combating insider trading, it is hoped that in the near future successful prosecution for insider trading would be secured.

It is however, submitted that if the Australian approach is followed it could lead to more effective curbing of insider trading in Nigeria.

1.11 Problems of Proof

Insider trading is not easy to establish even in the more advanced stock markets. This can be evidenced by the limited number of actions taken by regulators around the world. It is interesting to note that until 1990 only nine countries had brought any charges on breaches of insider trading laws.[64]

In Nigeria also, one of the major obstacles to successful prosecution is the requirement of proof which lies squarely upon the prosecution and may not be easily discharged, for a person accused of insider trading in Nigeria to be convicted the criminal element of mensrea must be proved.[65] For instance in cases of "connected person" prove must be

[61] See generally Tomasic R "Sanctioning Corporate Crime and Misconduct: Beyond Draconian and Decriminalization Solutions" (1992) 2 *Australian Journal of Corp Law* 82 102-105. See also the Memorandum of Understanding between ASC and DPP entered September 1992, n 35

[62] Section 115 of ISA 2007 improve section 94 of the repealed 1999 ISA which provided for 2 years imprisonment or a fine of N1, 000,000 or both fine and imprisonment.

[63] See the House of Reps Report of the Ad-Hoc Committee on the Investigation into the Near Collapse of the Nigerian Capital Market, National Assembly, Abuja; Resolution No (Hr70/2012) www.proshareng.com. See also Wunmi B, n 41 p.133

[64] Bhattacharya, U and Daouk, H 'The World Price of Insider Trading', (2002) 57 *Journal of Finance*, pp. 75–107.

[65]Okonkwo, C.O. Okonkwo and Naish *Criminal Law in Nigeria,* 2nd ed.(Sweet and Maxwell,London1980) 97

given of his being knowingly connected with the company and his knowledge of the price sensitive information. Because of the emphasis on knowledge in our statutory provisions, we are confronted with the difficulty of establishing knowledge. Gower recognises this difficulty and observes inter-alia: "To prove that someone knows, unless he is willing to admit, is not easy though sometimes the fact will raise an almost irresistible inference that he did not know."[66]

Perhaps this problem may be solved by shifting the burden of prove on the person accused of insider trading to prove that he did not know of the existence of any price sensitive information. In the alternative an objective test achievable by substituting the requirement of knowledge for the requirement of showing that there was reasonable cause to believe that a person was in possession of price sensitive information may well ameliorate this stringent condition and help in achieving the objective of insider provisions in the Investment and Securities Act.

Added to the problem of prove is the standard of proof which is beyond reasonable doubt unlike in civil cases where liability is founded upon the preponderance of evidence.[67] The difficulty here is enormous when it is realized how difficult it is to secure direct evidence in order to secure conviction. Most of the time what is available is circumstantial evidence which may prove insufficient to ground criminal liability in most cases.

It is submitted that in Nigeria a lesser requirements of proof should be deployed to lessen the standard of proof to secure liability on the balance of probability rather than proof beyond reasonable doubt.
Equally in Australia proof of insider trading continues to be a challenge for ASIC but one that it is continuing to meet. In a speech by Tony D'Aloisio,[68] former Chairman, Australian Securities and Investments Commission, identified some of the challenges with evidence collection in insider trading cases to include:

i) 'detection of suspect trades can be difficult, particularly during heavy trading (by way of indication, in today's electronic world a significant number of messages, such as offers, can be sent in one second);
ii) distinguishing manipulative from legitimate trading—particularly where there is a high volume of trading and algorithmic trading;

[66] Gower *Principles of Modern Company Law,* 7th ed (Sweet and Maxwell, London 2003) 634
[67] See section 137 and 138 of the *Evidence Act of Nigeria 2011* on burden of prove in civil and criminal matters.
[68] *D'Aloisio T "* Insider Trading and Market Manipulation" A *speech delivered at the Supreme Court of Victoria Law Conference, Melbourne,* 13 August 2010

iii) there is often little in the way of a document trail when the offender engages in insider trading or market misconduct—proving possession of insider information can therefore be very difficult;
iv) obtaining witnesses to prove the communication of price-sensitive information between an insider and a trader in an insider trading case; and
v) in some cases, the difficulty goes beyond possession of the inside information to proving whether the information a person possessed is 'material' as defined by the legislation.'

Furthermore, Duffy also summarised the challenges thus:

1 Regulators will often find themselves in a position where they can identify a person with inside information on a particular security, a person who traded in that security, a relationship between the two persons and even evidence of communications between them (such as telephone records).
2 This may still not be enough unless there is some evidence of the content of the communications.
3 Though a circumstantial case for communication may exist, it is usually necessary to establish what was said to identify it as price sensitive information'. [69]

Despite some of the challenges of proof of insider trading, Australia has recorded remarkable success in prosecution of insider trading for example as at April 2012 ten individual facing charges of insider trading were before the courts, and three of these have pleaded guilty to a range of offences and are awaiting sentence.[70] Eight individuals have been convicted in the past three years.[71]

[69] Duffy, M 'Insider trading: Addressing the continuing problems of proof' (2009) 23 *Australian Journal of Corporate Law*, pp.149–177 at p. 155. Also refer to Rubenstein, S. "The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading", (2002) 20 *Company and Securities Law Journal*, pp. 89–113 at p. 107.
[70] Deloitte, n 33
[71] Some of the cases include R v Dalzell (2011) NSWSC 454 (20 May 2011), ASIC v Oswyn Indra de Silva (2010) NSWSC 200 (18 March 2010) and R v Hartman (2010) NSWSC 1422 (2December 2010)

1.12 Conclusion/ Recommendations

The regulation of insider trading in Australia is aimed at promoting market integrity and public investor confidence. To achieve this goal, the Australian legislature adopted a number of statutes, policies, recommendations and other necessary measures.

The *"information connection only approach"* is used. It defines an insider as any person who has nonpublic price-sensitive inside information relating to financial products (securities). Such persons are then prohibited from unlawful trading in any securities on the basis of such information to avoid prejudice to other persons who did not have access to it.

Besides, the Australian insider trading prohibition contains mandatory disclosure requirements for all issuers of securities and affected persons to ensure that all market participants have *equal access* to price-sensitive inside information relating to such securities.

As an important part of securities regulation and supervision, Nigeria's regulators need to make more efforts on the enforcement of insider trading regulation. The paper therefore recommends the following:

1. Nigeria regulators should make efforts to detect insider trading. With greater likelihood of detection there comes greater deterrence of insider trading. Nigerian regulators should import some advanced market surveillance software systems with the purpose to effectively tracking illegal transactions. The monitoring units of both the Securities and Exchange Commission (SEC) and Nigerian Stock Exchange (NSE) must be strengthened and well equipped to perform their functions. Furthermore, the enforcement budget and resources of the SEC and in particular, a substantial portion should be allocated for insider trading enforcement. Currently, it is necessary to maximize the effectiveness of available resources and ensure focusing on the combined efforts of key enforcement agencies, such as the cooperation between the SEC and stock exchanges and the SEC and the prosecutors.
2. The enactment and adoption of less stringent methods of proving insider trading cases. The unsatisfactory state of affairs in relation to prosecutions can largely be addressed by adoption of streamlined procedures for prosecution of the insider trading cases such as reducing the evidentiary burden of proof on the prosecution. With respect to both criminal and civil cases, it is inherently difficult for the plaintiff or prosecutor to establish that the defendant knew that he was connected with the company, that he got the information by virtue of his being so connected and that he knew that the information was one which he was not reasonably expected to disclose except for the proper performance of the duties attaching to his office. The plaintiff or prosecutor also have to prove the materiality of the information and the fact that it had not been published and was not generally known to persons who are accustomed to deal in those securities. The researcher recommends that the courts should be

empowered to adopt a flexible approach that incorporates other less stringent methods such as exceptions or rebuttable presumptions.

3. Comprehensive civil remedies should be deployed to complement present criminal sanctions. Public investors, corporations and traders who are victims of insider dealing must be able to seek appropriate redress in courts of competent jurisdiction.
4. An effective investigation regime that would empower the SEC to appoint investigators to inquire into any alleged infringement of the ISA generally and any suspected case of insider dealing in particular should be made.
5. Adequate awareness and education of insider trading offences to all relevant persons is necessary. Many are not even aware that insider trading is a serious offence that attracts severe penalties. This has made the enforcement of laws on insider trading ineffective in Nigeria. Awareness and educational strategies are important to ensure that the public is aware of their rights and potential perpetrators of the effects of insider trading activity. Insider trading manual (booklet) should be published by the Securities and Exchange Commission and be distributed to the relevant members of the public.