

## Speech at Law Council of Australia Hong Kong Chapter

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### Opening

Thank you for inviting me to speak to you today.

They say 'fair dinkum' is hardly heard outside Australia. I am not sure this is right or was ever right. It is certainly heard in the streets of Hong Kong and, perhaps apocryphally, may well have Chinese, or more accurately, Cantonese origins, deriving from '*djin gum*' [真金], the Chinese for 'real gold', a word supposedly exclaimed by Chinese miners on the gold fields of Ballarat and Bendigo in Australia more than 150 years ago.

The ability to be fair dinkum – genuine, real and not false or misleading – is a hallmark of strong and reliable markets. The very first corporate vision statement of the Australian Securities Commission was "honesty and fairness in business". It was emblazoned on everyone's coffee mug. There was something daring about using this phrase as a 'mission statement' as it implies the market may not be all that it appears to be. But this too is an aspect of being fair dinkum because who would pretend things are otherwise. And aiming to be fair dinkum expresses the simplest and most important purposes of financial services law and regulation.

I want to speak about the cross-pollination of influences on the law and regulation of Hong Kong's capital markets and financial services industry, using the Australian or perhaps the Cantonese notion of fair dinkum as a touchstone. I say Australian or perhaps Cantonese because I will track some very clear Australian references in Hong Kong's regulatory landscape. At the same time, there is a distinctly protean Hong Kong approach that is different to any other jurisdiction and I will touch on this as well.

And I want to follow this protean theme into where we are today, especially this week, with some comments relevant to the Shanghai-Hong Kong Stock Connect.

### Section 295

For Australian lawyers so much of the Securities and Futures Ordinance (SFO) sounds familiar. As we know, a statute is always speaking and in this case, one can almost hear the Australian accent.

For example, one of the key provisions dealing with market misconduct is section 295 of the SFO which prohibits what is called 'false trading'. Section 295(1) says:

A person shall not, in Hong Kong or elsewhere, do anything or cause anything to be done, with the intention that, or being reckless as to whether, it has, or is likely to have,



the effect of creating a false or misleading appearance- (a) of active trading in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services; or (b) with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

Like the gold miners 150 years ago, tracing the thin seam of 'real gold' in the hard Bendigo quartz, these words can be traced to section 70 of the Victorian Securities Industry Act 1970. The same language reappeared in 1989's Australian Corporations Act and is now contained in section 1041B of the Australian Corporations Act (the numbers keep changing and getting higher).

It is said that the original source of the Australian language is section 9 of the US Securities Exchange Act of 1934. The US provision is no doubt the origin of the prohibition, although the language of section 9 is quite different.

An important aspect of the Australian provision that is carried through into the Hong Kong provision (but is not in the US source) is that it prohibits unspecified conduct. What is the *actus reus* of an offence that prohibits the doing of anything that has the prescribed consequence of creating a false or misleading appearance in our market? What elements make up such an offence?

Like Hong Kong, it is a protean provision for this reason, flexible and capable of dealing with any kind of misconduct that is committed with the intention or reckless as to the actual or likely adverse consequences on the market.

The High Court considered the ambit of the Australian provision in *North v Marra Development*<sup>1</sup>. The Court stated:

"The section seeks to ensure that the market reflects the forces of genuine supply and demand. By 'genuine supply and demand' I exclude buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting or maintaining the market price."<sup>2</sup>

In short, genuine supply and demand means fair dinkum trading.

### **Section 213**

Another example of a provision with an Australian accent and an example of Hong Kong's protean development of it, is section 213 of the SFO. Section 213 permits the SFC to apply to the High Court for injunctive relief based on contraventions.

The most immediate origin of this provision is section 1324 of the 1989 Australian Corporations Act which permitted the Australian Securities Commission, as Australian Securities and Investments Commission (ASIC) then was, to seek injunctive relief restraining contraventions, attempted contraventions and other ancillary misconduct. Its ambit was very wide.

By comparison (rather by contrast), section 213 also permits the SFC to apply to the Court for specified injunctive relief in the same equally wide circumstances. I know of no parallel

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<sup>1</sup> (1981) 148 CLR 42

<sup>2</sup> (1981) 148 CLR 42 at 59



source for section 213 in any other common law jurisdiction other than section 1324 of the Australian provision.

I should add that the Hong Kong version is arguably wider than the Australian provision in two important respects and this is its protean dimension.

First, section 213 can be used in relation to contraventions of any notice or requirement made by the SFC under the SFO or in response to a breach of any license condition or other condition imposed by the SFC under the SFO. Secondly, section 213 can be used to obtain statutory rescission of offending transactions, returning innocent counterparties as closely as possible to their pre-transaction financial position. The use of statutory rescission as an antidote to financial misconduct is a remarkable Hong Kong innovation nonpareil and has led to outstanding outcomes for investors whose misfortune to be caught up in misconduct has been reversed.

### **Remedies and Sanctions**

The third aspect protean development from Australian sources that I think is worth highlighting is the combination of both criminal and civil remedies in the SFO.

Most other regulators around the world are limited to bringing administrative proceedings or, at the very most, civil proceedings, sometimes with a civil penalty aspect.

The SFC, like its Australian counterpart, is able to bring both criminal and civil proceedings.

The origin of this was a perception that the criminal law was a blunt weapon often unable to deal with the most complex and sophisticated market misconduct cases. Additionally, the criminal justice system is limited in its application to those who are within the jurisdiction or who can be brought within the jurisdiction. And there remains no provision for witnesses to give evidence by video in criminal proceedings which imposes a significant impediment given the predominant order flow into Hong Kong's markets is sourced from outside Hong Kong.

It is self-evident that an enforcement regime that depends on defendants and witnesses all being within the jurisdiction is hardly ideal for an international financial centre with substantial money flows and transactions originating off-shore.

And so civil and civil penalty alternatives were created but, typically, in protean Hong Kong style, with a mature development. Hong Kong has established the Market Misconduct Tribunal (MMT) and its forerunner the Insider Dealing Tribunal as specialized tribunals to impose civil-style sanctions on wrongdoers falling short of criminal or criminal-style penalties. These are unique creations.

The SFC is a heavy user of both deterrent sanctions and civil remedies, bringing cases that focus not only on the conduct of the wrongdoer but also on the consequences of the wrongdoing, seeking wherever possible to remedy those effects for innocent parties. The use of criminal and civil processes in this way is unique and quite unlike anything that occurs in other markets.

### **Shanghai-Hong Kong Stock Connect**

Let me draw these some of these strands together in the context of Shanghai-Hong Kong Stock Connect.



Yesterday saw the first day's trading under the pilot scheme that, for the first time, permits the world to trade shares listed on the Shanghai Stock Exchange through Hong Kong. A substantial volume of the first day's trading emanated from outside Hong Kong and proceeded through Hong Kong to Shanghai - "northbound", as we say.

The legal and regulatory consequences for Hong Kong as a platform for trading of this kind are unique ones but they are also apt for Hong Kong's protean character.

One little appreciated aspect of section 295 of the SFO is that it applies to conduct "in Hong Kong or elsewhere" that creates a false or misleading appearance of trading on markets other than the Stock Exchange of Hong Kong, relevantly, an automated trading service or ATS. Additionally, it applies to conduct that occurs in Hong Kong, where the proscribed effect occurs on an overseas market.

There are a number of foreign exchanges that have established an ATS in Hong Kong and manipulative trading on or through these ATS will be caught regardless of the source of trading or where the relevant conduct occurs. This is consistent with Hong Kong's hub position in the region as an international financial centre.

The best example is an old but important<sup>3</sup> case involving manipulation of the Australian cash and futures market by Nomura back in 1996. At that time, traders employed by Nomura in London initiated a series of orders that were routed through Hong Kong to brokers in Australia that had the effect of illegally manipulating the cash market by forcing prices down at the close just as related futures contracts were due to expire. The events caused:

- the Australian regulator to bring civil proceedings against Nomura International plc, which was not regulated in Australia nor had any presence and so could not be the subject of criminal proceedings;
- the SFC to bring disciplinary proceedings against Nomura International (Hong Kong) Ltd, which did have a presence in Hong Kong and was regulated by the SFC<sup>4</sup>; and
- the London authorities to bring proceedings against the traders in London.

All these actions were successful.

The Australian proceedings alleged a contravention of section 998 of the Corporations law, the equivalent of section 295 of the SFO, despite the fact that none of the defendants were located in Australia or did anything within Australia.

Similarly, section 295 will permit the SFC to take action against any person who does "anything" (the protean *actus reus*) whether in Hong Kong "or elsewhere" with the requisite intention or recklessness as to the effect or likely effect on the Hong Kong market or an ATS.

As we have done in other cases, we will bring action before the High Court and/or the MMT against any person whether the person is in Hong Kong or not who violates any of our market rules, like section 295.

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<sup>3</sup> *Australian Securities Commission v Nomura PLC* (1998) 89 FCR 301; 160 ALR 246

<sup>4</sup> *Nomura International (Hong Kong) Ltd & Ors v SFC* [1998] HKCFA 49; see also SFC Media Release 29 December 1998



And, in closing, I should point out that for the purposes of the Shanghai-Hong Kong Stock Connect, the Shanghai Stock Exchange is an ATS.

Thank you again for inviting me today.