



# **Securities and Futures Ordinance**

**HKSI 4 August 2002**



# **Market misconduct tribunal and dual system**



# Introduction

## ◆ Parts XIII & XIV cover:

- identical civil and criminal governing “market misconduct” ie:
  - + insider dealing
  - + forms of market manipulation
  - + disclosing info about prohibited transactions
  - + disclosing false or misleading info



# Introduction

- ◆ Part XIII and XIV cover:
  - Market Misconduct Tribunal (MMT) modelled on Insider Dealing Tribunal (IDT)
  - revised civil sanctions
  - increased criminal penalties
  - third party actions
  
- ◆ Part XIV also has some fraud, deception or misrepresentations offences not mirrored in Part XIII



# Purpose

- ◆ To better deter and punish market misconduct to better protect investors and keep market confidence
  
- ◆ Through:
  - better balance between civil and criminal sanctions
  - improved market manipulation and false/misleading info provisions
  - third party actions
  - procedural reforms for civil tribunal



## Existing system

- ◆ Insider dealing subject to civil regime under SIDO:
  - IDT inquires into and punishes insider dealing (s 16)
  - no rules of evidence, civil standard of proof (but high) (s 17(a), Success Holdings inquiry, *Briginshaw v Briginshaw*)
  - inquisitorial procedure (ss 16(3), 17, 18, 21, 24 & Sch)
  - sanctions of disgorgement, treble damages, disqualification and costs orders (ss 23-25 & 27)



## Existing system

- ◆ Limited market manipulation and related abuse offences (ss 135-139 SO/ss 63- 65 CTO)
- ◆ Fraud, deception and misrepresentation offences in relation to non-market traded LFE contracts (s 40 LFETO)
- ◆ Criminal penalties inconsistent - on indictment - SO - 2 years' gaol and/or \$50k fine - CTO/LFETO - 7 years' gaol and/or \$1m fine



## Initial proposal

- ◆ (July 1999) Decriminalise all market misconduct and subject to 3 times profit/loss or \$10m fine and other sanctions as under SIDO
- ◆ Rationale was limited success with criminal offences owing to criminal evidence laws and standard of proof when evidence often circumstantial and documentary
- ◆ Contrasted with success of IDT with insider dealing
- ◆ Solution: establish MMT modelled on IDT with expanded jurisdiction



## Developments

- ◆ European human rights convention case law: high fines may be “criminal” and requires extra procedural protections contrary to aims of decriminalisation (privilege against self-incrimination/criminal standard of proof)
- ◆ UK FSA encountered problems, now other EU regulators
- ◆ Basic Law and Bill of Rights
- ◆ High fines good deterrent but success of IDT owing to use of compelled self-incriminating evidence, no rules of evidence and civil standard of proof
- ◆ Decision to adopt cautious approach



## Bill proposals

- ◆ Broadened civil regime with MMT retained to satisfy original objectives
- ◆ Fine of up to 3 times profit/loss or \$10m dropped
- ◆ Expanded civil sanctions (cold shoulder and cease and desist orders) (ss 257 & 258)
- ◆ Parallel criminal regime if sufficient evidence and public interest warrants (Part XIV)



## Dual regime

- ◆ US, UK and Australia all have dual civil/criminal regimes
- ◆ Initial referral for civil or criminal prosecution will be SFC's subject to review and final decision by Secretary for Justice (criminal) or Financial Secretary (civil) (s 252)
- ◆ SFC will have power to prosecute minor cases summarily (s 388)
- ◆ Referral process to be negotiated with FSTB and DoJ



## Dual regime and safeguards

- ◆ Will use DoJ Prosecution Guidelines:
  - sufficient evidence
  - public interest
- ◆ US, UK and Australia use similar approach
- ◆ No “double jeopardy” under civil and criminal regimes (ss 283 & 307)

## MMT procedures

- ◆ MMT to be modelled on IDT ie:
  - 1 judge and 2 lay members independent of SFC & Govt (s 251)
  - no rules of evidence and civil standard of proof (but high) (ss 253(1)(a) & 252(7), *Briginshaw*)
  - able to use self-incriminating testimony (s 255)
  - may make further inquiries (s 254)
  
- ◆ Counsel assisting to be made presenting officer and MMT to be more adversarial (ss 252(4)-(6) and Sch 9 ss 13-21)
  
- ◆ MMT may stay on penalty and cost decisions on appeal to Court of Appeal (s 265)



## Sanctions

- ◆ MMT sanctions chosen for compliance with human rights protections:
  - disgorgement of profit or loss (s 257(1)(d))
  - up to 5 years disqualification as director etc (s 257(1)(a))
  - up to 5 years withholding of market facilities - can't invest or trade in Hong Kong markets (cold shoulder) (s 257(1)(b))



## Sanctions

- ◆ MMT sanctions:
  - cease and desist order breach by repeat offender punishable as if contempt (s 257(1)(c))
  - reasonable SFC/Govt costs orders (s 257(1)(e) & (f))
  - disciplinary referrals (s 257(1)(g))
  - compound interest for disgorgement orders (s 259)
- ◆ Criminal sanctions increased to 10 years' gaol and/or \$10m fine on indictment and 3 yrs' gaol &/or \$1m fine on summary conviction, MMT sanctions also available on conviction (s 303)



## Private civil actions

- ◆ Affected person may sue for financial loss from breach (ss 281(1) & 305(1))
- ◆ Need not be MMT finding, criminal charge or conviction (ss 281(5) & 305(4))
- ◆ MMT findings given evidentiary status as for criminal conviction under s 62 Evidence Ordinance (ss 281(7)-(9) & 305(6)-(8))
- ◆ Common law limiting principles will be read in by judiciary
- ◆ Injunctions available (ss 281(6) & 305(5))



# Summary

- ◆ Added flexibility with civil and criminal regimes
- ◆ Comprehensive civil sanctions that comply with human rights protections
- ◆ Increased criminal penalties
- ◆ Third party actions for better investor protection



## Transition

- ◆ Crimes before the Bill commences will be prosecuted under the old law (s 23 Cap. 1)
- ◆ Insider dealing inquiries already started but not over before the Bill will continue under the SIDO (Sch 10 s 77)
- ◆ Insider dealing before Bill for which no IDT inquiry yet will be dealt with under the SIDO (Sch 10 s 78)
- ◆ Insider dealing in relation to substantially the same inside information which straddles the commencement of the Bill will be deal with under the SIDO (Sch 10 s 79)
- ◆ IDT will be preserved for such inquiries (Sch 10 s 81)