

PART XIII

MARKET MISCONDUCT TRIBUNAL

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243. Market Misconduct Tribunal

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(6) Schedule 8 shall have effect in relation to the appointment of members ~~and replacement members~~¹ of the Tribunal, the appointment and the role of Presenting Officers and of persons appointed to assist Presenting Officers, and to the proceedings and sittings of, and procedural and other matters concerning, the Tribunal.

¹ Amendment consequential to the proposed amendments to delete the definition of “replacement member” in Schedule 8 in the light of the comment made by a Member at the Bills Committee meeting on 14 December 2001.

(7) ~~The Tribunal may, w~~Where the Chief Executive considers appropriate, ~~be divided into 2 or more divisions~~additional Tribunals may be established for the purposes of any proceedings instituted under section 244², whereupon the provisions of this or any other Ordinance shall apply, subject to necessary modifications, to each ~~division of the~~ of such additional² Tribunals (including appointment of the chairman and other members of, ~~such division~~ and all matters concerning, each of such division additional Tribunals²) as they apply to the Tribunal.

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² At the Bills Committee meeting on 14 December 2001, some Members commented that the concept of "division" might cause confusion when in effect each "division" of the Tribunal operates independently as a Tribunal with the same powers and functions. We accordingly propose further amendment to Paper No. CSA12/01 to remove the reference to "division" and provide instead for the establishment of more than one Tribunal.

244. Market misconduct proceedings

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(4) Subject to subsections (5) and (6), the Tribunal may identify a person as having engaged in market misconduct pursuant to subsection (3)(b) if -

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(b) notwithstanding that he has not perpetrated any conduct which constitutes the market misconduct

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(i) the Tribunal identifies another person which is a corporation as having engaged in market misconduct pursuant to subsection (3)(b); and

(ii) the market misconduct occurred with ~~the~~ ^{his} consent or connivance ~~of,~~ ^{him} ~~him~~ as an officer of the corporation;

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³ Technical drafting amendment in response to the comment made by a Member at the Bills Committee meeting on 14 December 2001.

(7) Subject to section 253(3), the standard of proof required to determine any question or issue before the Tribunal shall be ~~that~~ the standard of proof⁴ applicable to civil proceedings in a court of law.

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⁴ Technical drafting amendment in response to the comment made by a Member at the Bills Committee meeting on 14 December 2001.

245. Powers of Tribunal

(1) Subject to the provisions of Schedule 8 and any rules made by the Chief Justice under section 260, the Tribunal, for the purposes of any proceedings instituted under section 244, may, on its own motion or on the application of any party before it -

- (a) receive and consider any material by way of oral evidence, written statements ~~or~~ documents ~~or otherwise~~⁵, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;
- (b) by notice in writing signed by the chairman of the Tribunal require a person to attend before it at any sitting ~~relating to the proceedings~~⁶ and to give evidence and produce any article, record or document in his possession relating to the subject matter of the proceedings;

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⁵ Members questioned at the Bills Committee meeting on 14 December 2001 whether the words “or otherwise” were necessary. Given the wide definition of “document” in Schedule 1, we agree that “or otherwise” can be deleted.

⁶ Technical drafting amendment in response to the comment made by a Member at the Bills Committee meeting on 14 December 2001.

(j) determine the procedure to be followed in
~~connection with~~⁷the proceedings;

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⁷ Technical drafting amendment in response to the comment made by a Member at the Bills Committee meeting on 14 December 2001.

249. Orders, etc. of Tribunal

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(5A) Where the Tribunal makes an order under subsection (1)(e) or (f) requiring the payment of costs as costs reasonably incurred in relation or incidental to any proceedings instituted under section 244——

~~(a)~~ subject to any rules made by the Chief Justice under section 260, Order 62 of the Rules of High Court (Cap. 4 sub. leg.) applies to the taxation of the costs; ~~and~~—

~~(b) the Tribunal may order that the costs shall be taxed on the basis of one of the scales of costs in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.).~~⁸—

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⁸ At the Bills Committee meeting on 14 December 2001, a Member queried if clause 249(5A)(b) in Paper No. CSA12/01 dated 3 December 2001 was necessary. Having reviewed the matter with our legal adviser, we believe that clause 249(5A)(b) should be covered by clause 249(5A)(a) and hence can be deleted. We also propose to delete clauses 250(5A)(b) and 252(4), which are the same as clause 249(5A)(b).

250. Further orders in respect of
officers of corporation

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(5A) Where the Tribunal makes under subsection (1) an order referred to in section 249(1)(e) or (f) requiring the payment of costs as costs reasonably incurred in relation or incidental to any proceedings instituted under section 244——
~~(a)~~ subject to any rules made by the Chief Justice under section 260, Order 62 of the Rules of High Court (Cap. 4 sub. leg.) applies to the taxation of the costs; ~~and~~
~~(b)~~ ~~the Tribunal may order that the costs shall be taxed on the basis of one of the scales of costs in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.).⁸~~—

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252. Costs

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~~(4) The Tribunal may order that any costs awarded under this section shall be taxed on the basis of one of the scales of costs in the Schedules to Order 62 of the Rules of the High Court (Cap. 4 sub. leg.).⁸~~

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253. Contempt dealt with by Tribunal

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(4) Notwithstanding anything in this section and any other provisions of this Ordinance -

(a) no power ~~to punish for contempt~~ may be exercised ~~against any person~~ under or pursuant to this section to determine whether to punish any person for contempt⁹ in respect of any conduct if -

(i) criminal proceedings have previously been instituted against the person under section 245(2), 246(6), 249(9) or 250(9) in respect of the same conduct; and

(ii) (A) those criminal proceedings remain pending; or

⁹ At the Bills Committee meeting on 14 December 2001, a Member questioned whether the word "exercised" would cover the case where the person had been tried but subsequently acquitted. The amendment seeks to clarify the operation of the "no double jeopardy" rule that the provision should apply whether the person concerned has been convicted or acquitted. The original reference to the Court's power to punish for contempt should accordingly be to the Court's power to initiate action to determine whether to punish for contempt.

(B) by reason of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against that person under such section in respect of the same conduct;

(b) no criminal proceedings may be instituted against any person under section 245(2), 246(6), 249(9) or 250(9) in respect of any conduct if -

(i) any power ~~to punish for contempt~~ has previously been exercised against the person under or pursuant to this section to determine whether to punish the person for contempt⁹ in respect of the same conduct; and

(ii) (A) proceedings arising from the exercise of such power remain pending; or

(B) by reason of the previous exercise of such power, no power ~~to punish for contempt~~ may again be lawfully exercised ~~against that person~~ under or pursuant to this section to determine whether to punish the person for contempt⁹ in respect of the same conduct.

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¹⁰256A. Applications for stay of orders of Tribunal under section 249, 250, 251 or 252

Any person in respect of whom an order has been made under section 249, 250, 251 or 252 may apply to the Tribunal for a stay of the order, whereupon the Tribunal may, where it considers appropriate, by order grant the stay, subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Tribunal considers appropriate.

¹⁰ In response to the comment made by a Member at the Bills Committee meeting on 14 December 2001, we propose new clause 256A to provide the MMT with the flexibility to stay its own orders where it considers appropriate.

257. Appeal to Court of Appeal

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(2) A person in respect of whom an order has been made under section 249, 250, 251 ~~or~~, 252 or 256A¹¹ may appeal to the Court of Appeal against the order.

¹¹ Technical drafting amendment to allow for appeal to the Court of Appeal against a decision of the MMT to grant or refuse to grant a stay of execution of its orders. This amendment is consequential to the insertion of new clause 256A.

258. Powers of Court of Appeal on appeal

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(2) In an appeal under section 257(2), the Court of Appeal may -

- (a) confirm, vary or set aside the order appealed against; and
- (b) where the order is set aside, substitute ~~another for the order any other order~~ it considers appropriate ~~(whether more or less onerous), being any order that the Tribunal had power to make in respect of the appellant, whether or not under the same provision as that under which the order has been made~~¹².

¹²(2A) Where the Court of Appeal varies, or substitutes any other finding or, determination or order for, ~~the a finding or, determination or order in question~~ under subsection (1)(ba) or (2)(a) or (b), the finding or, determination or order ~~in question~~ as varied or the other finding or, determination or order substituting for the finding or, determination or order ~~in question~~ (as the case may be) may be =

¹² **Technical amendment to Paper No. CSA12/01 dated 3 December 2001 for greater clarity. The relocation of "whether more or less onerous" from clause 258(2)(b) to new clause 258(2A)(b) is consistent with the drafting of clause 258(1)(ba). The Law Draftsman has also further refined the drafting of clause 258(2A) in the light of the comments made by a Member at the Bills Committee meeting on 14 December 2001.**

(a) in the case of subsection (1)(ba), any finding or determination (whether more or less onerous) that the Tribunal had power to make for the purposes of the proceedings in question; ~~or~~

(b) in the case of subsection (2)(a) or (b), any order (whether more or less onerous) that the Tribunal had power to make in respect of the appellant,

whether or not under the same provision as that under which the finding ~~or~~, determination or order ~~in question~~ has been made.

¹³(2B) Where on appeal the Court of Appeal remits any matter to the Tribunal under section 258(1)(c), ~~without limiting the generality of that section, unless~~ the Court of Appeal otherwise directs, ~~may direct that the matter in question, upon being remitted to the Tribunal, shall be disposed of by~~

~~(a) the same members of the Tribunal disposing of the matter may be the same as, or different from, those of the Tribunal from which the appeal in question lies;~~ ~~or.~~

¹³ In response to the comments made by a Member at the Bills Committee meeting on 14 December 2001, we have further refined the drafting to provide for the possibility that the “same Tribunal” may not be reconstituted as certain members are no longer available.

~~(b) the Tribunal constituted in such manner as the
Court of Appeal considers appropriate.~~

~~¹⁴(2C) Where, upon a matter being remitted to it under
section 258(1)(c), the Tribunal is constituted in accordance
with the terms of any direction given by the Court of Appeal
under subsection (2B), the validity of the proceedings before
the Tribunal shall not be called into question by reason only
that members of the Tribunal are not the same as those of the
Tribunal from which the appeal in question lies.~~

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¹⁴ We proposed to add new clause 258(2C) in Paper No. CSA12/01 dated 3 December 2001, to complement new clause 258 (2B) and to remove any doubt as to the validity of the proceedings of the “different” MMT constituted in accordance with the direction of the Court of Appeal. Members commented at the Bills Committee meeting on 14 December 2001 that clause 258(2C) might not be necessary. Given the latest amendments to clause 258(2B), we agree that clause 258(2C) may be deleted.

259. No stay of execution on appeal

¹⁵Without prejudice to section 256A, neither the lodging of an appeal nor the filing of an application for leave to appeal under section 257 by itself operates as a stay of execution of a finding or determination or an order (as the case may be) of the Tribunal unless the Court of Appeal otherwise orders, and any stay of execution may be subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Court of Appeal considers appropriate.

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¹⁵ Technical amendment consequential to the insertion of new clause 256A.

272. Civil liability for market misconduct

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(3) For the purposes of this section, a person shall, subject to subsection (4), be regarded as having committed a relevant act in relation to market misconduct if -

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- (b) (i) another person which is a corporation has committed a relevant act in relation to market misconduct under paragraph (a); and
- (ii) the market misconduct occurred with ~~the~~ his¹⁶ consent or connivance ~~of,~~ ~~him~~¹⁶ as an officer of the corporation; or

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Financial Services Bureau
Securities and Futures Commission
7 January 2002

¹⁶ Technical drafting amendment in line with that made to clause 244(4)(b)(ii). See Note 3 above.