



The Monetary Authority of Singapore

INSIDER TRADING

CONSULTATION DOCUMENT

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CLOSING DATE
FOR COMMENTS: 26 FEBRUARY 2001

Please forward your comments to :

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Consultation Document on Insider Trading 27 Jan 2001

Insider trading erodes the confidence of investors and is antithetical to market fairness and efficiency. The Monetary Authority of Authority (MAS) is reviewing the scope of our present insider trading laws for the Securities and Futures Act 2001.

MAS introduced the concept of a civil fine and a statutory civil remedy for insider trading in March last year to introduce greater market discipline. The present review relates to the adequacy of the provisions which define criminal and civil liability for insider trading.

The proposed changes to Singapore's insider trading laws are set out in the attached consultation paper. MAS invites the public to give their views and comments on the proposed changes. Submissions should reach MAS by 26 February 2001, and may be sent via email or hardcopy to:

insider@mas.gov.sg

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Disclaimer: The views contained therein relate to a preliminary study by the Monetary Authority of Singapore and do not necessarily reflect the views of the Authority when the eventual provisions are legislated. The provisions in **Annexure 2** are in draft form and are subject to change.

The Present Approach

1. Our present insider trading provisions are found in Section 103 of the Securities Industry Act (SIA) ¹. Enacted in 1986, Section 103 SIA was modelled after Section 128 of the Australian Securities Industry Code, and was based on proof of the Accused's connection or relation with the company concerned either as an insider ² (a director, officer, substantial shareholder or a person having a business relationship with the company) or a tippee ³ (a person receiving price-sensitive information from the insider, and who had an arrangement or association with the insider). This has been termed the "person-connected approach". The present provisions are found in **Annexure 1**.
2. The tippee provision makes it harder for tippees to be convicted, as the balance may be tilted too much in favour of tippees, to the detriment of other market participants. Firstly, the Prosecution has to show that the tippee has received information, directly or indirectly from an insider. Secondly, it has to show that the tippee had an arrangement or association with the insider ⁴. Thirdly, the tippee must be aware or ought to be aware that the insider himself is precluded from dealing ⁵.
3. These tippee requirements pose a legal difficulty in extending liability to others who are further down the information chain (secondary tippees and beyond). Where the tippee himself does not trade but communicates price-sensitive information to another

¹ Chapter 289, 1985 Revised Edition.

² Sections 103(1) and 103(2)

³ See Section 103(3).

⁴ A person is said to be "associated" with another if he falls under one of the categories of persons defined in Section 3 SIA (including a "person in concert with whom the other person is acting or proposes to act). The "arrangement" requirement relates to an arrangement for the communication of undisclosed price-sensitive information with a view to dealing in securities.

⁵ *ie* by virtue of Sections 103(1) and 103(2).

person (the secondary tippee), who then trades in securities, it may be difficult to prove any "arrangement" or "association" with the insider. The secondary tippee may escape from being caught by the existing insider trading prohibition. This is unsatisfactory, as the secondary tippee (or other persons down the information chain who eventually receive information from the secondary tippee) would have traded with an unfair information advantage.

4. A person who receives inside information from sources *other* than a connected person is also not caught under the present person-connected approach (which requires the tracing of information back to the connected person). This needs to be remedied.
5. At the core, the mischief of insider trading lies in tilting the playing field unfairly against other market participants. Those who knowingly have inside information (subject to certain defences) should be prohibited from trading, whether or not they are connected with the company. The present exercise re-looks at our jurisprudential approach to our insider trading laws. The intent is to address the core evil of trading while in possession of undisclosed market sensitive information, instead of having liability depend on the person's connection with the company.

MENS REA FOR INSIDER TRADING

6. Section 103 SIA is silent on any mental intent or *mens rea* requirement. The High Court in ***PP v. Ng Chee Kheong & Tang Siu Shing*** (June 1999) imposed a 3-tier *mens rea* test for insider trading. The Prosecution would have to show that the Accused:
 - ⊙ knew that the information was price-sensitive;
 - ⊙ knew that the information was undisclosed; and
 - ⊙ intended to use the information.
7. When Section 103 SIA was introduced in 1986, it was meant to remedy the shortcomings of Section 158 of the Companies Act ⁶.

⁶ Reprint of the Companies Act (Cap 50, 1985 Revised Edition). The provision read:

“An officer, agent, employee or substantial shareholder of a corporation who is or in relation to a dealing in securities of the corporation by himself or any other person **makes use to gain, directly or indirectly, an advantage for himself or any other**

Dr Richard Hu, in the 2nd reading of the Securities Industry Bill, 1986, stated that this was the mischief that Section 103 SIA was meant to address:

“Part IX of the Bill contains revised provisions dealing with trading in securities. The significant feature of this Part is the new provision for dealing in securities by insiders, *ie* persons with access to price-sensitive information. A notable **difference under the new provision is that an offence is committed whether or not the dealing is undertaken with the intention of using information to gain an advantage; the purpose of dealing is irrelevant.**”

8. The decision in *PP v Ng Chee Kheong*, by introducing the "intent to use" test, effectively brings our insider trading laws to the position in the repealed Section 158 of the Companies Act. This interpretation of Section 103 SIA effectively negates the very intent it was meant to remedy. The requirement of proof of "intent to use" information by the Prosecution makes it too

person of specific confidential information acquired by virtue of his position as such officer, agent, employee or substantial shareholder, which if generally known, might reasonably be expected to affect materially the price of the subject-matter of the dealing shall, in addition to any penalty imposed under subsection (9), be liable to a person for loss suffered by that person by reason of the payment by him or to him of a consideration in respect of the securities greater or lesser, as the case may be, than the consideration would have been reasonable if the information had been generally known at the time of the dealing.”

onerous and reduces the effectiveness of our insider trading laws.
This needs to be rectified.

The Proposed Approach

SCOPE OF INSIDER TRADING PROHIBITION

9. MAS intends to redefine our present approach towards insider trading, by removing the need to prove the Accused's connection with the corporation, and shifting the focus to the possession of inside information by the Accused. In other words, liability will now directly depend on whether the Accused traded whilst in knowing possession of inside information, and is not dependent on how he was connected with the company concerned. The present *mens rea* test also needs to be rectified at an appropriate level which balances the dual concerns of effectiveness of enforcement and fairness to securities market participants, *ie* to ensure that the net is not cast unduly wide.
10. MAS' proposed provision under the Securities and Futures Act 2001 is found in **Annexure 2**.
11. This "information-connected" approach has been adopted in Australia, and there is a discernible trend in some jurisdictions towards it. Australia introduced an information-connected approach in 1991, after experiencing no successful criminal prosecutions with their earlier provision [upon which our Section 103 is based)⁷]. The UK, in introducing the civil remedy for market abuse⁸, has also chosen an information-connected approach⁹, although their criminal provisions retain the person-connected approach. The US Courts have moved towards this approach. Whilst the US' insider trading laws have remain

⁷ There are 5 successful criminal prosecutions in Singapore under Section 103 SIA.

⁸ Section 118 of the Financial Services and Markets Act.

⁹ "Behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected."

unchanged over some time¹⁰, some judges have interpreted the insider trading provisions to cover **structural insiders**, ie insiders who are, strictly speaking not connected with the company, but are deemed to be so because of their access to price-sensitive information¹¹. Malaysia has adopted an information-connected approach.

12. Australia has experienced greater success in criminal prosecutions using the information-connected approach. Out of 7 prosecutions, 3 were successful¹².

MENS REA

13. The proposed provision will make it clear that "intent to use" inside information is not an ingredient in an offence of insider trading. This is to address the concerns over ***PP v Ng Chee Kheong***.
14. We also propose to distinguish connected persons from unconnected persons. Whilst we shift the focus of liability to possession of inside information, we also need to tighten up the prohibition on directors, officers and persons-connected with the company, from trading whilst in possession of inside information. This is consistent with the fundamental principles of strict fiduciary duties owed by directors towards the company.
15. In relation to **connected persons**, the present laws laid out in ***PP v Ng Chee Kheong*** require that the prosecution show that connected

¹⁰ Rule 10b-5 was promulgated in 1934.

¹¹ In the ***Chiarella*** case, Blackmun J was of the view that persons "having access to confidential market information **that is not legally available to others** are prohibited by Rule 10b-5 from engaging in schemes to exploit their **structural information advantage through trading** in affected securities ". Even their fiduciary duty approach is wider than that which underpinned our repealed Section 158 Companies Act, as the test is whether there is a duty owed to the counter-party investor, and not the company.

¹² 1 of these acquittals related to a technical defect in the charge. The decision is being appealed against by the Prosecution. In another case, an Appellate Court reversed the conviction on appeal, based on the finding that the Judge had wrongly directed the Jury.

persons had actual knowledge of the inside information, its undisclosed and price sensitive nature, and had the intention to use the information. We propose under the new laws that the prosecution will have to show that they have either **actual**¹³ or **constructive** knowledge¹⁴ of inside information. Thereafter they would be deemed to know that the information in their possession is undisclosed and price-sensitive, without the prosecution having to prove such knowledge. This presumption may be rebutted by the defendants, who have to prove that they did not know that the information was undisclosed and price-sensitive. The proposed approach will therefore introduce greater discipline for those in fiduciary positions.

16. For unconnected persons, we are taking care not to cast the net so wide as to catch innocent market participants, who unwittingly trade on inside information without knowing that it is undisclosed and price-sensitive. The intent for unconnected persons is to make liable those who can be proven to have **actual** knowledge:

- (i) of inside information;
- (ii) that the information is undisclosed and;
- (iii) that the information is price-sensitive.

¹³ Actual knowledge means a direct and clear awareness or understanding of an act, a fact or the truth.

¹⁴ Constructive knowledge is deemed knowledge – that one using ordinary care and diligence would possess.

Insider Trading and the Derivatives Market

17. MAS also proposes to extend the offence of insider trading to cover futures and options contracts on stocks and stock indices which are extensions of the underlying product.
18. As stock index trading becomes more popular, it is important to include these under our insider trading laws for completeness. While the definition of securities in the SIA was amended in Aug 1999 to cover stock index futures, the latter falls within the exclusion for "futures contracts that are governed by any written law regulating trading in futures contracts" *ie*, the Futures Trading Act. As insider trading is not proscribed under the Futures Trading Act, the use of inside information in relation to trading in stock indices contracts is therefore presently not an offence. This lacuna has to be addressed.
19. Our proposal to extend insider trading to stock futures/options and stock index futures/options is consistent with international practices ¹⁵.

¹⁵ In **Australia**, insider trading in connection with securities-based futures contracts is an offence under Part 8 of the Corporations Law. In the **US**, insider trading in futures and options is an offence under the Commodity Exchanges Act. **UK's** Criminal Justice Act 1993 makes insider trading an offence in respect of instruments based on underlying securities, whilst **Hong Kong's** Securities (Insider Dealing) Ordinance covers insider trading in relation to listed companies and their derivatives, although this does not cover trading in futures contracts in the Hang Seng index.

20. MAS therefore recommends that we extend the concept of insider trading to securities-related futures/options contracts, *ie* both individual stock futures/options as well as stock index futures/options.

Conclusion

21. MAS' view is that the proposed approach would make our insider trading laws more effective, without casting the net too wide. These provisions would also apply to define liability for civil fines and civil remedies for insider trading. The juxtaposition of the new definition of insider trading and the civil fine/civil remedy framework will further enhance the effectiveness of our insider trading laws. These proposed changes are part of MAS' continuing efforts to ensure that our markets operate fairly and efficiently.

Annexure 1 – Section 103 Securities Industry Act

Prohibition of dealings in securities by insiders.

103. –(1) A person who is, or at any time in the preceding 6 months has been, connected with a body corporate shall not deal in any securities of that body corporate if by reason of his so being, or having been, connected with that body corporate he is in possession of information that is not generally available but, if it were, would be likely materially to affect the price of those securities.

(2) A person who is, or at any time in the preceding 6 months has been, connected with a body corporate shall not deal in any securities of any body corporate if by reason of his so being, or having been, connected with the first-mentioned body corporate he is in possession of information that —

(a) is not generally available but, if it were, would be likely materially to affect the price of those securities; and

(b) relates to any transaction (actual or expected) involving both those bodies corporate or involving one of them and securities of the other.

(3) Where a person is in possession of any such information as is mentioned in subsection (1) or (2) that if generally available would be likely materially to affect the price of securities but is not precluded by either of those subsections from dealing in those securities, he shall not deal in those securities if —

(a) he has obtained the information, directly or indirectly, from another person and is aware, or ought reasonably to be aware, of facts or circumstances by virtue of which that other person is then himself precluded by subsection (1) or (2) from dealing in those securities; and

(b) when the information was so obtained, he was associated with that other person or had with him an arrangement for the communication of information of a kind to which those subsections apply with a view to dealing in securities by himself and that other person or either of them.

(4) A person shall not, at any time when he is precluded by subsection (1), (2) or (3) from dealing in any securities, cause or procure any other person to deal in those securities.

(5) A person shall not, at any time when he is precluded by subsection (1), (2) or (3) from dealing in any securities by reason of his being in possession of any information, communicate that information to any other person if —

(a) trading in those securities is permitted on a securities exchange whether within or outside Singapore; and

(b) he knows, or ought reasonably to know, that the other person will make use of the information for the purpose of dealing or causing or procuring another person to deal in those securities.

(6) Without prejudice to subsection (3) but subject to subsections (7) and (8), a body corporate shall not deal in any securities at a time when any officer of that body corporate is precluded by subsection (1), (2) or (3) from dealing in those securities.

(7) A body corporate is not precluded by subsection (6) from entering into a transaction at any time by reason only of information in the possession of an officer of that body corporate if —

(a) the decision to enter into the transaction was taken on its behalf by a person other than the officer;

(b) it had in operation at that time arrangements to ensure that the information was not communicated to that person and that no advice with respect to the

transaction was given to him by a person in possession of the information; and

(c) the information was not so communicated and such advice was not so given.

(8) A body corporate is not precluded by subsection (6) from dealing in securities of another body corporate at any time by reason only of information in the possession of an officer of that first-mentioned body corporate, being information that was obtained by the officer in the course of the performance of his duties as an officer of that first-mentioned body corporate and that relates to proposed dealings by that first-mentioned body corporate in securities of that other body corporate.

(9) For the purposes of this section, a person is connected with a body corporate if, being a natural person —

(a) he is an officer of that body corporate or of a related body corporate;

(b) he is a substantial shareholder within the meaning of Division 4 of Part IV of the Companies Act in that body corporate or in a related body corporate; or

(c) he occupies a position that may reasonably be expected to give him access to information of a kind to which subsections (1) and (2) apply by virtue of —

(i) any professional or business relationship existing between himself (or his employer or a body corporate of which he is an officer) and that body corporate or a related body corporate; or

(ii) his being an officer of a substantial shareholder within the meaning of Division 4 of Part IV of the Companies Act in that body corporate or in a related body corporate.

(10) This section does not preclude the holder of a

dealer's licence from dealing in securities, or rights or interests in securities, of a body corporate, being securities or rights or interests that are permitted by a securities exchange to be traded on the stock market of that securities exchange, if —

- (a) the holder of the licence enters into the transaction concerned as agent for another person pursuant to a specific instruction by that other person to effect that transaction;
- (b) the holder of the licence has not given any advice to the other person in relation to dealing in securities, or rights or interests in securities, of that body corporate that are included in the same class as the first-mentioned securities; and
- (c) the other person is not associated with the holder of the licence.

(11) Where a prosecution is instituted against a person for an offence by reason that the person was in possession of certain information and entered into a transaction in contravention of this section, it is a defence if the person satisfies the court that the other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction.

(12) For the purposes of subsection (8), “officer”, in relation to a body corporate, includes —

- (a) a director, secretary, executive officer or employee of the body corporate;
- (b) a receiver, or receiver and manager, of property of the body corporate;
- (c) a judicial manager of the body corporate;
- (d) a liquidator of the body corporate; and
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons.

Annexure 2 – Proposed Insider Trading Provision

Interpretation

12.3.2 For the purposes of this Division:

“information” includes:

- (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public;
- (b) matters relating to the intentions, or the likely intentions, of a person;
- (c) matters relating to negotiations or proposals with respect to –
 - (i) commercial dealings; or
 - (ii) dealing in securities;
- (d) information relating to the financial performance of a body corporate or otherwise;
- (e) information that a person proposes to enter into, or had previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
- (f) matters relating to the future.

“securities” means —

- (a) debentures, stocks, bonds or notes issued or proposed to be issued by a government;
- (b) debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate or unincorporate;
- (c) any right, option or derivative in respect of any such debentures, stocks, shares, bonds or notes;
- (d) any right under a contract for differences or under any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in –
 - (i) the value or price of any such debentures, stocks, shares, bonds or notes;
 - (ii) the value or price of any group of any such debenture, stocks, shares, bonds or notes;

(iii) an index of any such debenture, stocks, shares bonds or notes; or

(e) any collective investment scheme as defined in Section * of the Act

but does not include —

(f) bills of exchange;

(g) promissory notes; or

(h) certificates of deposit issued by a bank or finance company;

“sell”, in relation to securities, includes, in the case of an option contract under which a party acquires an option or right from another party:

(a) grant or assign the option or right; or

(b) take, or cause to be taken, such action as releases the option or right;

whether or not on another's behalf.

Information generally available.

12.3.3 –(1) This section has effect for the purposes of this Division.

(2) Information is generally available if:

(a) it consists of readily observable matter; or

(b) without limiting the generality of paragraph (a), both the following subparagraphs apply:

(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information; and

(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph (2)(a);

(b) information made known as mentioned in subparagraph (2)(b)(i).

Material effect on price or value of securities

12.3.4 For the purposes of this Division, a reasonable person would be taken to expect information to have a material effect on the price or value of securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the first-mentioned securities.

Trading, and procuring trading, in securities

12.3.5 --(1) Trading in securities that is ordinarily permitted on the stock market or futures market is taken for the purposes of this Division to be permitted on that stock market or futures market even though trading in any such securities on that stock market or futures market is suspended.

- (2) For the purposes of this Division but without limiting the meaning that the expression *procure* has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to procure the act or omission by the other person.

Prohibited conduct by person in possession of inside information

12.3.6 --(1) Subject to this Division, where:

- (a) a person (in this section, section 13.3.7 and section 13.3.8 called the *insider*) knows that he possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities; and
- (b) the person knows that:
 - (i) the information is not generally available; and
 - (ii) if it were generally available, it might have a material effect on the price or value of those securities;

the following subsections apply.

- (2) The insider must not (whether as principal or agent):
- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
 - (b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

- (3) Where trading in the securities referred to in subsection (1) is permitted on a stock market or futures market, the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:
- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
 - (b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

Prohibited conduct by connected person in possession of inside information

12.3.7 –(1) Subject to this Division, and without prejudice to section 12.3.6, where:

- (a) an insider who is connected to a body corporate knows or ought reasonably to know that he possesses information concerning that body corporate that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of that body corporate; and
- (b) the insider knows or ought reasonably to know that:
 - (i) the information is not generally available; and
 - (ii) if it were generally available, it might have a material effect on the price or value of those securities;

the following subsections apply.

- (2) The insider must not (whether as principal or agent):
- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
 - (b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.
- (3) Where trading in the securities referred to in subsection (1) is permitted on a stock market of a securities exchange or futures market, the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:
- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

- (b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.
- (4) In a prosecution of an offence under subsection (2) or (3), where the prosecution proves that the insider who is connected to a body corporate knows or ought reasonably to know that he possesses information concerning that body corporate that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of that body corporate, it is to be presumed that such a connected person knows, or ought reasonably to know, that the information is not generally available; and if it were generally available, it might have a material effect on the price or value of those securities, unless he can otherwise prove, on a balance of probabilities.
- (5) In this Division, a person is connected with a body corporate if, being a natural person –
 - (a) he is an officer of that body corporate or of a related body corporate;
 - (b) he is a substantial shareholder within the meaning of Division 4 of Part IV of the Companies Act (Cap.50) in that body corporate or in a related body corporate; or
 - (c) he occupies a position that may reasonably be expected to give him access to information of a kind to which this section applies by virtue of —
 - (i) any professional or business relationship existing between himself (or his employer or a body corporate of which he is an officer) and that body corporate or a related body corporate; or
 - (ii) his being an officer of a substantial shareholder within the meaning of Division 4 of Part IV of the Companies Act in that body corporate or in a related body corporate.
- (6) For the purposes of subsection (5), “officer”, in relation to a body corporate, includes –
 - (a) a director, secretary, executive officer or employee of the body corporate;
 - (b) a receiver, or receiver and manager, of property of the body corporate;
 - (c) a judicial manager of the body corporate;
 - (d) a liquidator of the body corporate; and
 - (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons.

Proof of contravention of 12.3.6 or 12.3.7

- 12.3.8 (1) For the avoidance of doubt, in a prosecution of an offence under section 12.3.6 or 12.3.7, it is not necessary to prove that the insider had intended to use inside information in contravention of section 12.3.6 or 12.3.7, as the case may be.
- (2) In a prosecution of an offence under section 12.3.6 or 12.3.7, it is not necessary for the prosecution to prove the non-existence of facts or circumstances which if they existed would, by virtue of section 12.3.10, 12.3.11, 12.3.12, 12.3.13, 12.3.14, 12.3.15, 12.3.16, 12.3.17, 12.3.18 or any regulations made under section 16.15 of this Act, preclude the act from constituting a contravention of section 12.3.6 or 12.3.7, as the case may be.

Penalties

- 12.3.9 –(1) A person who contravenes or fails to comply with section 12.3.6 or 12.3.7, commits an offence and is liable on conviction –
- (a) in the case of a person who is not a body corporate, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding 7 years or to both; or
 - (b) in the case of a body corporate, to a fine not exceeding \$500,000.
- (2) No proceedings shall be instituted against a person for an offence in respect of a contravention of section 12.3.6 or 12.3.7 after a court has made an order against him for the payment of a civil penalty under section 12.4.1 for the contravention.

Exception for withdrawal from registered scheme

12.3.10 Section 12.3.6(2) and 12.3.7(2) shall not apply in respect of the redemption by a trustee under a trust deed relating to a unit trust scheme in accordance with a buy-back covenant contained or deemed to be contained in the trust deed at a price that is required by the trust deed to be calculated, so far as is reasonably practicable, by reference to the underlying value of the assets, less any liabilities of the unit trust scheme to which the units of the unit trust scheme relates, and less any reasonable charge for purchasing the units of the unit trust scheme or interest .

Exception for underwriters

- 12.3.11 –(1) Section 12.3.6(2) and section 12.3.7(2) does not apply in respect of:
- (a) subscribing for securities under an underwriting agreement or a sub-underwriting agreement; or
 - (b) entering into an agreement referred to in paragraph (a); or

(c) selling securities subscribed for under an agreement referred to in paragraph (a).

(2) Section 12.3.6(3) and section 12.3.7(3) does not apply in respect of:

- (a) the communication of information in relation to securities to a person solely for the purpose of procuring the person to enter into an underwriting agreement in relation to any such securities; or
- (b) the communication of information in relation to securities by a person who may be required under an underwriting agreement to subscribe for any such securities if the communication is made to another person solely for the purpose of procuring the other person to do either or both of the following:
 - (i) enter into a sub-underwriting agreement in relation to any such securities;
 - (ii) subscribe for any such securities.

Exception for transactions carried out under schemes of arrangement, etc. under any written law.

12.3.12 Section 12.3.6 and section 12.3.7 shall not apply to an acquisition or disposal of securities or the communication of information that is carried out under any written law relating to schemes of arrangement, reconstructions, take-overs and share repurchases relating to corporations.

Attribution of knowledge within bodies corporate

12.3.13 –(1) For the purposes of this Division:

- (a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and
 - (b) if an officer of a body corporate knows or ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows or ought reasonably to know that matter or thing.
- (2) A body corporate does not contravene section 12.3.6(2) or section 12.3.7(2) by entering into a transaction or agreement at any time merely because of information in the possession of an officer of the body corporate if:

- (a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer; and
- (b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was so given.

Attribution of knowledge within partnerships etc.

12.3.14 –(1) For the purposes of this Division:

- (a) a partner of a partnership is taken to possess any information:
 - (i) which another partner of the partnership possesses and which came into the other partner's possession in the other partner's capacity as a partner of the partnership; or
 - (ii) which an employee of the partnership possesses and which came into his or her possession in the course of the performance of duties as such an employee; and
 - (b) if a partner or employee of a partnership knows or ought reasonably to know any matter or thing because the partner or employee is such a partner or employee, it is to be presumed that every partner of the partnership knows or ought reasonably to know that matter or thing.
- (2) The partners of a partnership do not contravene section 12.3.6(2) or section 12.3.7(2) by entering into a transaction or agreement at any time merely because one or more (but not all) of the partners, or an employee or employees of the partnership, are in actual possession of information if:
- (a) the decision to enter into the transaction or agreement was taken on behalf of the partnership by any one or more of the following persons:
 - (i) a partner or partners who are taken to have possessed the information merely because another partner or other partners, or an employee or employees of the partnership, were in possession of the information;
 - (ii) an employee or employees of the partnership who was not or were not in possession of the information; and
 - (b) the partnership had in operation at that time arrangements that could reasonably be expected to ensure that the information was not

communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and

- (c) the information was not so communicated and no such advice was so given.

(3) A partner of a partnership does not contravene section 12.3.6(2) or section 12.3.7(2) by entering into a transaction or agreement otherwise than on behalf of the partnership merely because the partner is taken to possess information that is in the possession of another partner or an employee of the partnership.

Exception for knowledge of person's own intentions or activities

12.3.15 A natural person does not contravene section 12.3.6(2) or 12.3.7(2) by entering into a transaction or agreement in relation to securities merely because the person is aware that he or she proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to those securities.

Exception for bodies corporate and its officers etc

12.3.16 --(1) A body corporate does not contravene section 12.3.6(2) or section 12.3.7(2) by entering into a transaction or agreement in relation to securities merely because the body corporate is aware that it proposes to enter into or has previously entered into, one or more transactions or agreements in relation to those securities.

(2) Subject to subsection (3), a body corporate does not contravene section 12.3.6(2) or section 12.3.7(2) by entering into a transaction or agreement in relation to securities merely because an officer of the body corporate is aware that the body corporate proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to those securities.

(3) Subsection (2) does not apply unless the officer of the body corporate in that subsection became aware of the matters referred to in that subsection in the course of the performance of duties as such an officer.

(4) Subject to subsection (5), a person does not contravene section 12.3.6(2) or section 12.3.7(2) by entering into a transaction or agreement on behalf of a body corporate in relation to securities merely because the person is aware that the body corporate proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to those securities .

- (5) Subsection (4) does not apply unless the person became aware of the matters referred to in that subsection in the course of the performance of duties as an officer of the body corporate or in the course of acting as an agent of the body corporate.

Unsolicited transactions by person holding capital markets services licence and representatives

12.3.17 A person holding a capital markets services licence to deal in securities or trade in futures contracts, or a representative of such a person does not contravene section 12.3.6(2) or section 12.3.7(2) by subscribing for, purchasing or selling, or entering into an agreement to subscribe for, purchase or sell, securities that are traded on the stock market or futures market if:

- (a) the licensed person entered into the transaction or agreement concerned on behalf of another person (in this section called the *principal*) under a specific instruction by the principal to enter into that transaction or agreement which was not solicited by the licensed person; and
- (b) the licensed person has not given any advice to the principal in relation to the transaction or agreement or otherwise sought to procure the principal's instructions to enter into the transaction or agreement; and
- (c) the principal is not an associate of the licensed person;

but nothing in this section affects the application of section 12.3.6(2) or section 12.3.7(2) in relation to the principal.

Parity of information defences

12.3.18 --(1) In a prosecution brought against a person for an offence against section 12.3.6(2) or section 12.3.7(2) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession:

- (a) it is a defence if the Court is satisfied that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 12.3.3(2)(b)(i); and
- (b) it is a defence if the Court is satisfied that the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.

- (2) In a prosecution against a person for an offence against section 12.3.6(3) or section 12.3.7(3) because the person communicated information, or caused information to be communicated, to another person:
- (a) it is a defence if the Court is satisfied that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 12.3.3(2)(b)(i); and
 - (b) it is a defence if the Court is satisfied that the other person knew, or ought reasonably to have known, of the information before the information was communicated.