

SECURITIES AND FUTURES BILL: A BAD PRECEDENT

SUMMARY

The Hong Kong Journalists Association (HKJA) opposes as a matter of principle sections in the Securities and Futures Bill which penalise "disclosure of false or misleading information inducing transactions".

The HKJA understands the government's aims in incorporating these provisions in the bill. However, it believes that by creating new and very serious criminal offences for the peaceful exercise of free speech, they set a

bad precedent. Despite the government claiming that these laws protect investors, the prosecution does not need to actually prove any investor was disadvantaged. The sections are excessively broad, and give too much discretion to the Secretary for Justice in bringing forward prosecutions.

The HKJA also questions whether these provisions are consistent with Article 16 of the Hong Kong Bill of Rights Ordinance (and therefore Article 19 of the International Covenant on Civil and Political Rights).

The provisions in question should be removed. If the government wishes to target specific sections of the securities industry involved in "share ramping" or other activities, it should introduce more narrowly targeted legislation.

INTRODUCTION

The proposed bill contains four sections with similar broad themes. They

appear to be based on long-standing Australian provisions. The most important section is the following:

290. Offence of disclosure of false or misleading information inducing transactions

(1) A person shall not, in Hong Kong or elsewhere, disclose, circulate or disseminate, or authorize or be concerned in the disclosure, circulation or dissemination of, information that is likely---

(a) to induce another person to subscribe for securities, or deal in futures contracts, in Hong Kong;

(b) to induce the sale or purchase in Hong Kong of securities by another person; or

(c) to maintain, increase, reduce or stabilize the price of securities, or the price for dealings in futures contracts, in Hong Kong, if---

(i) the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and

(ii) the person knows that, or is reckless or negligent as to whether, the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact.

(2) Subject to subsections (3) to (5), a person who contravenes subsection (1) commits an offence.

Section 3 creates a defence that would absolve publishers from liability for advertisements they carry; section 4 creates a defence for network and telecommunications companies; and section 5 creates a defence for broadcasters carrying live broadcasts.

The government has explained that it prefers to legislate for types of behaviour, rather than against specific groups. It says its aim with these provisions is to enhance Hong Kong's status as an international financial centre by increasing the quality of all forms of communication regarding financial markets.

The Australian corporate code appears to be well accepted by international

investors, and the offence being imported appears never to have been used against journalists, as far as the HKJA can ascertain. However, the circumstances in Australia and Hong Kong are fundamentally different. As the HKJA has argued many times, laws that are accepted when proposed by a democratically-elected government subject to electoral pressure cannot be imported wholesale into Hong Kong. The dismal nature of Hong Kong's democratic development means many safeguards present in other jurisdictions are missing, and the statute-book therefore needs extra safeguards to make up for this shortcoming. Assurances that the Secretary for Justice will not abuse the wide powers granted in the law are simply no replacement for a good law.

AGAINST HUMAN RIGHTS NORMS

The HKJA further believes that the proposed offences run counter to human rights norms, set a dangerous precedent, are excessively broad and fail to tackle the ills they are supposed to cure.

Article 16 of the Hong Kong Bill of Rights Ordinance states:

Freedom of opinion and expression

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

This article clearly states the boundaries for restricting free speech. These boundaries have been further clarified by case law, most notably

in HKSAR vs Ng Kung Siu and Lee Kin Yun. While agreeing that the laws protecting the national and regional flags and symbols are constitutional and that those who deface them face prosecution, Court of Final Appeal judge Sir Anthony Mason stated:

If these restrictions are permissible, where does it stop? It is a perfectly legitimate question. And the answer, as I see it, is that it stops where these restrictions are located. For they lie just within the outer limits of constitutionality. Beneath the national and regional flags and emblems, all persons in Hong Kong are - and can be confident that they will remain - equally free under our law to express their views on all matters whether political or non-political: saying what they like, how they like.

Here, the government is proposing a criminal offence far more serious than that contained in the National Flag and National Emblem Ordinance. The maximum penalty in that law for "willfully burning, mutilating, scrawling on, defiling or trampling on" the National Flag is three years. Under section 290 of the Securities and Futures Bill, it is 10 years. The government is, in effect, stating that an inaccurate news report on financial matters is more serious than the burning of the flag of the People's Republic of China.

The HKJA has previously argued that the laws protecting the national and regional flags and symbols are disproportionate and an unnecessary restriction on free speech. Yet the government is now proposing an even harsher penalty, for simply writing an incorrect newspaper article about stock prices.

Clearly, this fails the tests set out in the Hong Kong Bill of Rights Ordinance in 3(b), as there is no question of necessity "for the protection of national security or of public order (ordre public), or of public health or morals."

Courts around the world have held that any restrictions on free speech under the International Covenant on Civil and Political Rights must be

arrowly defined and proportional to their aim. The "Oakes Test", set out by the Canadian Supreme Court in 1986 and consistently applied since, states:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

A general desire to "clean up" discussion of financial matters certainly fails this and other similar tests.

AN EXCESSIVELY BROAD LAW

It may be that journalists or those in other professions may be motivated by ulterior motives when passing on information about financial matters. However, the proposed offence attempts to use a hand-grenade for surgery.

Rather than attacking those engaged in illicit schemes, it in effect criminalises a wide range of behaviour, and then invites the Secretary for Justice to use her mercy not to prosecute journalists who may be inexperienced or have low professional standards. The offences are indeed wide: There is no need for the Secretary for Justice to prove that any single investor was disadvantaged by an inaccurate report. There is not even any need for proof that the price of a security has responded to a report. Indeed, the Secretary for Security could take action before the market even opens for business.

There will undoubtedly be a chilling effect. In addition, the civil provisions in the bill will open the door for "nuisance litigation".

AN INEFFECTIVE PROVISION

Journalists will of course strive to ensure that their work is accurate. But there can never be a guarantee that every article will be 100% accurate. In this respect, threatening journalists with 10 years in prison will certainly not be a meaningful strategy for improving professional standards.

Some commentators have claimed that the new offences are necessary because some journalists or columnists are engaged in price manipulation, buying up shares, tipping them, and then selling them at a profit.

The new offence would do nothing to stop this practice. Why? Because by their very nature such share-tipping operations can only exist if they have access to true information. Only those who appear to be repeatedly "on target" can garner enough following to move the price of shares. An offence of disclosing inaccurate information would therefore make no impact.

A DANGEROUS PRECEDENT

It is often said that a major factor in Hong Kong's advantage over other cities in China is its commitment to individual rights and the free flow of information.

The HKJA has explained above why it believes the proposed law is a threat to both of these. In effect, the government is saying that in the name of improving Hong Kong's status as a financial centre, it is worth compromising fundamental rights. The HKJA believes, in contrast, that by violating those rights, the proposed offences would in fact damage its status as a financial centre.

HKJA Executive Committee

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