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12 September 2005

Ms Connie Szeto
Clerk to Bills Committee on Financial Reporting Council Bill
Legislative Council
Central
Hong Kong

Dear Ms Szeto:

Re: Written Submissions on the Financial Reporting Council Bill

1. The idea of having an overarching body to receive and investigate complaints concerning the accounting irregularities of listed companies is most welcome. Such a body would help to co-ordinate the efforts of the various regulatory and law enforcement bodies, promote greater accountability in the accounting profession, enhance the corporate governance of companies, and ultimately deter and detect accounting failures which could have potentially serious consequences for the public.
2. The proposed Financial Reporting Council (FRC) has been well designed to further these aims. It has been given powers beyond those of the law enforcement bodies to investigate accounting irregularities and regulatory non-compliance. It is well within the contemplation of the Financial Reporting Council Bill (Bill) that the FRC will work closely with law enforcement in the investigation of suspected criminal activity. Indeed, the arrangements provided contemplate that in some cases the FRC will serve as an extended investigatory arm of law enforcement capable of obtaining incriminating evidence admissible in a criminal prosecution which would otherwise be unobtainable by any law enforcement body.
3. The most significant implication of being an arm of law enforcement is that the actions taken by the FRC, where it leads to the arrest, charge, trial, punishment or discipline of a person, could attract constitutional challenge under the Basic Law and/or Hong Kong Bill of Rights. Needless to say any successful challenge could undermine the credibility of the FRC and potentially compromise many worthy investigations. Thus at the legislative stage it is very important to subject the prescribed powers of the FRC to close scrutiny against the human rights standards provided for in the Basic Law and Hong Kong Bill of Rights.
4. With these general considerations in mind, I make the following specific comments about the Bill.

Abrogation of the privilege against self-incrimination (ss. 30 & 44)

5. The FRC has been given extraordinary powers to compel persons to produce documents, provide assistance, provide statutory declarations, and answer questions. All powers may be exercised without any prior judicial authorization. A person who fails to comply with the investigator's demands can be summarily punished for contempt of court by the Court of First Instance or be charged with a criminal offence.

6. At common law, an individual's privilege against self-incrimination entitles him to refuse to answer any questions or participate in any conduct which could result in his direct incrimination. Sections 30 and 44 expressly abrogate this privilege and require the individual to comply even if compliance would result in the materialization of self-incriminating evidence. The only saving grace is a claim-based use immunity given to the individual. In other words, where the individual makes an express claim of the privilege the ensuring answers, which still must be given, cannot be used against the individual as evidence in any subsequent prosecution. It follows that those answers which are not prefaced or qualified by a claim of privilege can be used as incriminating evidence at trial. The claim-based use immunity is to be contrasted with a blanket use immunity, ie one which by statute automatically confers immunity over all of the incriminating answers given by the individual.¹

7. For both principled and practical reasons the Bills Committee should consider conferring blanket use immunity for all answers given under compulsion. Blanket use immunity would affirm the fundamental importance of the privilege against self-incrimination in Hong Kong's post-1997 common law legal system. Where as proposed in the Bill there is a serious abrogation of the common law privilege, use immunity should be given to individuals as a matter of right and should not be something that must be claimed on an ad hoc basis. Claim-based use immunity imposes a burden on the individual and operates on the premise that the individual is presumed to have waived his privilege unless he expressly indicates otherwise. It must be remembered that use immunity does not preclude law enforcement from using the compelled answers to find further incriminating evidence which could be admitted at trial (ie so-called derivative evidence).²

8. The claim-based system can be awkward in practice as it can interfere with the free-flow of the interview. One can imagine innocent reasons for why an individual might fail or forget to make the necessary claim before providing a potentially incriminating answer (eg feeling under pressure, poor legal advice, misunderstanding of one's rights, etc.). It would be unfair to allow the government to use the conscripted answers against such individuals at trial. Having blanket use immunity also obviates the need to warn the individual of the right

¹ Section 13 of the Canadian Charter of Rights and Freedoms is an example of a blanket use immunity provision. It provides that "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." While this provision is not specifically found in the Basic Law or Hong Kong Bill of Rights, its underlying principle can be found within the fundamental right to a fair trial which is provided for in our constitution.

² With a similar provision in the Companies Ordinance, the Court of Final Appeal was unable to deduce a common law immunity for derivative evidence where the legislature had abrogated the common law privilege and provided a use immunity provision: see *HKSAR v Lee Ming Tee & Another* (2001) 4 HKCFAR 133 (CFA).

to claim the use immunity and thus avoids potential legal wrangle in cases where the investigators have failed to give the required warning.

Duty to consult regulatory bodies and consequences for failure to consult (s. 29)

9. It is not clear from section 29 what the consequences are to the investigator and/or investigation where he fails to consult the required regulatory body before embarking on the exercise of his powers. Is it the case in this situation that the investigator would be acting without jurisdiction and all the information and evidence gathered could not be used for any purpose? The answer to this question must turn on the purpose of section 29 (and by contrast section 42). In any case, the consequences for failing to consult should be made clearer.

Enlisting the contempt jurisdiction of the Court of First Instance (ss. 32 & 45)

10. A person who fails to comply with a demand by the investigator can either be charged with a criminal offence or face contempt of court proceedings in the Court of First Instance. The obvious question is whether the contempt power is really necessary given the availability of a host of criminal offences in section 31 for which the recalcitrant individual could be prosecuted. It is noteworthy that even the Independent Commission Against Corruption have not been given recourse to a contempt power where there is non-compliance with authorizations issued pursuant to section 13 of the Prevention of Bribery Ordinance (Cap 201).

11. The difficulty with the proposed contempt mechanism is that imprisonment for contempt can occur without the usual safeguards of the criminal process. What seems to be contemplated is punishment (up to at least two years of imprisonment) after an inquiry (not a trial) by the Court of First Instance. The rules of evidence in criminal proceedings would not apply to this proceeding, and thus hearsay evidence would be generally admissible.³

The criminal offences and strict liability (s. 3)

12. There is no apparent reason why the offence in section 31(1) should be one of strict liability. One can imagine many situations where someone might innocently fail to comply with an investigator's demand and should not be subjected to a criminal prosecution. It is recommended that the *mens rea* requirement of 'knowingly or recklessly' be expressly added to this offence.

Admissibility of the investigator's report in criminal proceedings (ss. 35 & 47)

13. This proposal is probably the most controversial one of all and deserves serious attention before enactment. The Bill proposes to create a hearsay exception to make the facts asserted in the investigator's report admissible for their truth in criminal and other proceedings. There seems to be no justification for creating this exception (at least insofar as it applies in criminal proceedings).

14. As in all criminal trials, the investigator should be required to attend the proceedings as a witness and be subjected to full cross-examination as to his or her findings. Written reports of this kind will most likely contain hearsay upon hearsay, mere suspicions and other

³ See *Aqua-Leisure Industries Inc & Others v Aqua Splash Ltd (No 2)* [2002] 1 HKLRD 241 (CFI).

innuendoes which would not normally be admissible in a criminal trial. There is nothing inherently reliable in these types of reports. Police officers are not allowed to submit their investigation file as admissible evidence at trial, and there is no reason why investigator's reports should be treated differently.

15. The Hong Kong Law Reform Commission is currently studying the reform of the hearsay rule in criminal proceedings. It is highly recommended that the possible enactment of any hearsay exception in the Bill be deferred and made consistent with the reforms of the hearsay rule which may flow from the Commission's study.

I appreciate the opportunity to partake in this legislative process.

Yours truly,



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