Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000

Summary of Public Comments and Administration's Response on Part X of the Securities and Futures Bill

Clause no.	Respondent	Respondent's comments	Administration's response
Part X – Powers of Intervention and Proceedings			
199	Consumer Council	The Council welcomes the proposed SFC power to require brokers to transfer custody of client assets to an appropriate custodian. This will ensure that client property is protected against dissipation, misappropriation or other improper handling.	We welcome the Council's support.
204	Law Society	There is no need for the SFC to have the option to initiate certification proceedings to punish non-compliance with clause 196, 197, 198, 199 or 201 by way of either originating summons or originating motion. The SFC should have to proceed by way of originating summons which must be supported by an affidavit.	It is important that the Commission be given a choice between the two sets of procedures for the following reasons - (1) the originating summons procedure would be appropriate in cases where there is reason to believe that the person who was the subject of the original requirement (upon which he defaulted) will comply with such requirement once certification proceedings are issued. It is also a more expeditious process and saves costs. (2) The SFC should be given the option of initiating proceedings by way of originating motion in open court, in cases which may involve a complicated or important point of law, or where the defendant is likely to defend the application vigourously.
205	HKSA	This provision does not appear to restrict the SFC's power to petition for winding-up to listed and related companies (cf clause 207) which, on the face of it, would be a change in the Commission's remit which would need to be specifically justified. The Commission should be obliged to resolve, in communication with the participant, the issues that gave rise to the need for presenting the petition prior to making the application.	The SFC already has the power under s 45 of the SFCO. The SFC may need to use the power against licensees or related corporations which are not listed. An application to the Court for a winding-up order must be in the public interest and is only granted by the Court at its discretion on the well-established grounds of it being "just and equitable". A corporation that is the subject of such an application is adequately protected. In practice, the SFC would first seek to resolve the issues with the corporation and would only seek an order for winding-up as a last resort.

Clause no.	Respondent	Respondent's comments	Administration's response
205(3)	HKSA	There is a perceived risk that the trading licences of the exchange participant may be immediately suspended and if the petition for winding-up or bankruptcy is not subsequently granted, the defendant's business will potentially suffer. This section should be amended to govern the actions of the exchange company or clearing house.	The provision is designed to be an advance warning device for the benefit of the exchanges and clearing houses to prevent any possible impact on the operation of the market as a whole, if a petition against an exchange or clearing house participant is to be presented to the Court. In practice, the exchange or clearing house keeps a close eye on its participants which are on the brink of insolvency. They would act prudently to safeguard the orderly operation of the market in view of the possible insolvency of one of its participants. We do not consider it appropriate or necessary to govern the actions of the exchanges and clearing houses as suggested.
206	Bar Association	The Bar supports the extension of powers so that the SFC may obtain orders against any person who may have assisted in a contravention of any relevant law or regulation and so that a wider range of orders may be made.	We welcome the Bar's support.
206(2)(d)	HKSA	It should be made clear that appointments (as administrator of property) made by the Court may be joint and several.	Clause 206(2)(d) stipulates that the Court of First Instance may make "an order appointing a person to administer the property of another person." Section 7(2) of the Interpretation and General Clauses Ordinance (Cap.1) provides that references to the singular include the plural which, together with the ancillary orders power, gives the Court sufficient power to deal with this issue.
206(2)(d)	HKSA	There should be a power for a person appointed as administrator of another's property to approach the court for directions.	It is unnecessary to empower an administrator appointed by the Court to go to the Court for directions, as he may do so within the terms of reference given to him upon appointment.
206(2)(g)	HKSA	The power of the court under clause 206(2)(g) to make any "ancillary order" which it considers necessary in consequence of the making of any other order, leaves too much to the interpretation and discretion of the court.	The provision is based on section 144 of the SO and section 13 of the LFETO. The Court of First Instance has ample experience of exercising fairly its jurisdiction in administration proceedings. We see no need for further detail and prefer the flexibility which the clauses lend the Court in crafting appropriate orders.
206(7)	HKSA	The SFC should be obliged to give an undertaking for damages in an application for interlocutary injunction.	The original intention of the clause is to avoid the SFC from being inhibited from enforcing the law in the public interest by applications that it should give undertakings as to damages. The common law position is that the Court has a discretion whether to require a public authority to give an undertaking if it seeks to enforce the law in application for interlocutary injunctions. Our intention is not to go beyond the common law position. In light of the comments, we consider that the matter should best be left to

Clause no.	Respondent	Respondent's comments	Administration's response
			the Court's discretion in the circumstances of each case. We would therefore propose a Committee Stage Amendment to remove clause 206(7).
207	HKSA	It may be appropriate for the Commission to be empowered to make the application under this clause only following a complaint from a minority shareholder, given that the section seeks to protect the interests of minority shareholders.	The provision substantially reproduces the existing s 37A of the SFCO. There is no such restriction in the SFCO. The power is intended to allow the SFC to apply to court to remedy unfair prejudice to a listed corporation's shareholders, or fraud or misconduct in a listed corporation. In practice, the SFC may apply for such an order following a clause 172 inquiry, the grounds of which will often stem from, but are not limited to, a complaint from such a corporation's minority shareholders. It is important that the SFC retain independent authority to act in various circumstances. The requirement for prior consultation with the Financial Secretary and that the Court has discretion to refuse an order are sufficient protection.
207(2)(c)	HKSA	The provisions of clause 207(2)(c) are not sufficiently self-contained in terms of the powers and duties of the persons appointed as a receiver or manager of the property or business of the listed corporation concerned. The appointments under clauses 206 and 207 could expose appointees to significant risk. Under the circumstances, the legal framework governing them should be more substantial. It is likely that practitioners would be reluctant to take up this work without adequate indemnities from the Commission.	Administrators have been appointed under the predecessor provision of section 37A of the SFCO without any problem. The provisions are sufficiently detailed but allows flexibility for the Court to craft appropriate orders to suit the circumstances of each case. The analogous provisions of section 15 of the Bankruptcy Ordinance and section 216 of the Companies Ordinance support this approach.
207(2)(c)	HKSA	Provision could also be made for remuneration of the receiver or manager appointed by the court to be agreed between the SFC and the appointee (as an alternative to the Court fixing the remuneration).	The discretionary power of the Court to fix the remuneration of the receiver or manger appointed is an appropriate concomitant of the Court's jurisdiction in making the appointment for the benefit of minority shareholders in the first place. Under the analogous provision of section 15 of the Bankruptcy Ordinance, the court may fix the remuneration of a special manager. We consider that the Court is a better position to fix the remuneration than the SFC.
207	HKSA	The inter-changing of terminology in this clause is confusing. Clause 207(1) refers to "a listed corporation", although clause 207(1)(d) indicates	The policy intention of the clause is to allow orders to be made in relation to a corporation which was listed at the time of the misconduct, even if it is no longer so listed. This is to enable issues of misconduct which come to light (for example, during an inquiry initiated

Clause no.	Respondent	Respondent's comments	Administration's response
		that the company needs no longer be listed at the time that the SFC petitions the Court. Clause 207(2) reverts to using, "a listed corporation". Clause 207(5) on the other hand refers to "a company", possibly to limit the effect of this specific provision to Hong Kong-incorporated companies (see the definitions in Schedule 1).	under clause 172) to be remedied. The mere fact of delisting should not prevent this. Shareholders in a delisted corporation may be at worse risk of prejudice as they may no longer have a ready means to exit the corporation at a fair value and are just as in need of protection. We will study the clause in detail in view of the comment and identify room for improvement in drafting to enhance clarity. Clause 207(5) is restricted to "a company" as it is the intention to restrict the application of the sub-clause to Hong Kong incorporated companies.
208	Consumer Council	The Council welcomes as an additional protection for investors the incorporation of clause 208 in the Bill.	We welcome the Council's support.
208	Bar Association	Clause 208 goes beyond the common law in several respects in that it appears to create a statutory right of action that extends beyond common law tortious negligent misrepresentation. It should be carefully considered whether clause 208 may expose issuers of relevant statements to liability for "an indeterminate amount for an indeterminate time to an indeterminate class" subject only to the limits of "assumption of responsibility" and what is "fair, just and reasonable". Clause 208(2) imposes liability on any person who is "responsible for" a statement including any person who makes or issues it and any person who participated in or approved the making or issuing of it. Certain specific classes of people are exempted under clause 208(4)-(6). Who has participated in making a statement is unclear. It is not certain whether those who give information	Clause 208 is a concise and helpful signpost to lay persons and the financial community at large of the circumstances which have to be satisfied in order for a duty to be careful to arise in making statements concerning securities or futures or which are price sensitive. Policy-wise, we strongly believe that investors should be made explicitly aware of their rights in this regard for the better protection of their interests. We have considered the Bar Association's comments carefully and researched a number of recent Court cases. The research supports our position that the test of assumption of responsibility and the test of "fair, just and reasonable", as stipulated in clause 208(3), are indications of the criteria which have to be satisfied if liability is to attach. We have no doubt that they are the two touchstones at common law to determine the existence of a duty of care in respect of economic loss arising from negligent misstatements. We remain of the view that expressing the duty to be careful not to make false or misleading statements on the basis of the assumption of responsibility or "fair, just and reasonable" is accurate. A number of Ordinances create a statutory cause of action in respect of which an action may also be brought separately under common law. The common law develops side by side with the statutory provisions. Plaintiffs commonly plead their cases alleging breach of the statutory provision "further or in the alternative" to liability at common law. In this respect, we have put it beyond doubt in clause 208(10) that the common law is to remain unaffected. We have been cautious throughout to maintain a balanced position between the plaintiff and the defendant. Clause 208 is not intended to be a substitute for the inquiry or findings with regard to the

Clause no.	Respondent	Respondent's comments	Administration's response
		to a company which is then used in an announcement, or executive and non-executive directors are caught.	factors that the courts usually take into account in an action at common law to determine whether the defendant is liable. It is also not intended to dispense with inquiry into causation and remoteness of damage. We believe that this approach and the wording of clause 208 are in line with the analysis of the law in our legal research and have no reason to believe that a court would dispense with such inquiries. The plaintiff will have to prove the existence of a duty of care, the breach of the duty and that the loss was not too remote. Therefore, we do <u>not</u> agree that the provision potentially makes issuers of relevant statements liable "in an indeterminate amount for an indeterminate time to an indeterminate class". Further, we think it is necessary to mention explicitly in clause 208 the knowledge or state of mind of the statement-maker and we have done so in clause 208(1). If in future the common law departs from clause 208 in a material respect, there is nothing to stop the plaintiff framing his action in such a manner that is most advantageous to him. Further, we will review the provision in future and consider introducing amendments to it as necessary for the better protection of investors.
208	Bar Association	Clause 208 also potentially overlaps with clause 107.	There is no overlap with clause 107 because clause 208(9) provides that clause 208 does not apply where clause 107 (or s 40 of the Companies Ordinance) applies.
208	HKAB	In view of clause 107, clause 208 is redundant.	The policy objectives behind clauses 107 and 208 are different. The former is to deter a person from using fraudulent, reckless or negligent misrepresentation to ***induce*** another person to invest money. The latter is a statement to lay persons and the financial community at large of the criteria which have to be satisfied if liability is to arise for failing to be careful in making statements concerning securities and futures contracts or which are price sensitive. We believe the present approach of spelling out the causes of action in distinct clauses provides greater clarity as to the circumstances in which an investor may resort to a private action.
208	Group of nine investment bankers & HKAB	Clause 208 is too broad. It should be deleted. It seems to apply to any communication to the public, when it should only apply to announcements to the public at large (eg through public media) and to communications to listed corporation shareholders. It also imposes liability on too wide a range of persons.	The major purpose of clause 208 is to send a signal to the market that any person responsible for issuing public communications concerning securities or futures contracts or which are price sensitive, has the duty to ensure that the communications are not false or misleading. Otherwise, he might be liable to a person who suffers financial loss as a result of reliance on the public communication. Investors should be made aware of their rights in this regard. In particular, we see no reason to restrict it to announcement through public media.

Clause no.	Respondent	Respondent's comments	Administration's response
		If the provision is to stay, it should be limited to situations where the person who disseminated the information knew that the information was likely to have a material effect on the price of specific securities. It should not apply to the futures market.	Clause 208(3) already states the applicable criteria which have to be satisfied before anyone can be held liable under the clause and would protect those who should not be subject to liability under the provision.

Details of Submissions Referred to in the Comment / Response Table

Date received	Respondent
18 January 2001, 31 January 2001	Hong Kong Society of Accountants ("HKSA")
23 January 2001	Hong Kong Association of Banks ("HKAB")
23 January 2001, 15 February 2001	Linklaters & Alliance representing - Bear Stearns Asia Limited - Credit Suisse First Boston (Hong Kong) Limited - Dresdner Kleinwort Wasserstein - Goldman Sachs (Asia) L.L.C. - Merrill Lynch (Asia Pacific) Limited - JP Morgan - Morgan Stanley Dean Witter Asia Limited - Salomon Smith Barney Hong Kong Limited - UBS Warburg ("Group of nine investment bankers")
23 January 2001	Law Society of Hong Kong ("Law Society")
14 February 2001	Hong Kong Bar Association
19 February 2001	Consumer Council

Securities and Futures Commission
Financial Services Bureau
23 April 2001