SECURITIES AND FUTURES BILL
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4th Submission on the Blue Bill

by

Hong Kong Stockbrokers Association

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(Part X to Part XIII)

dated

10 May 2001

Part X

Section 197 provides that the Commission may prohibit the licensed corporation from dealing with **any** property whether of a licensed corporation or not. It is not known how this power of the Commission can be extended to any property owned by another person or corporation other than a licensed person or corporation. Similarly the Commission may also require the licensed corporation to deal with any property in a specified manner. It is not known how a licensed corporation can deal with a property not owned by it, let alone being required to deal with it in a specified manner.

Section 199 provides that the Commission may require a licensed corporation or any other person to transfer the custody of relevant property of a specified description to the Commission or to any person appointed by the Commission.

This section has been commented on in the White Bill under section 192. Most of the comments are still applicable here and they are reproduced here for ease of reference: "It is not clear how this provision can be applied to "any other person", apart from the licensed corporation. In this section there is no definition of who "any other person" is going to be, and there seems to be no link between this "any other person" with the licensed corporation. Unless this problem is resolved, one cannot see how the Commission may extend its administrative sphere to any person not related to the licensed corporation in question.

So far as land itself is concerned, custody is abstract and cannot be transferred. One can only transfer the custody of the title deeds of land, or if one wants to transfer ownership, one transfers the legal title by registration, but there is no transfer of custody of land as such.

As for choses in action, obligation, easements etc. there is no custody. One can transfer the right in a chose in action in money or the right of easement in land but there is no custody of these intangible assets to be transferred."

Section 200 provides that the Commission may on its own motion impose a prohibition on any licensed corporation in certain situations. Its seems that subsection (a) is the main purpose of the section in that it envisages a situation where property connected with the business of a licensed corporation might be dissipated or transferred to the detriment to its clients or creditors.

Regarding the other subsections it is highly debatable whether such powers of the Commission should be exercised. Subsection (b) touches upon whether a licensed corporation is fit and proper person to remain licensed. Subsection (c) is basically about failure to comply with any provision of the ordinance or requirement or condition imposed by the Commission. It is not understandable why such powers are to be exercised by the Commission on the non-compliance of **any** provision of the ordinance.

Subsection (e) touches upon interest of the investing public or public interest. It may well be in the interest of the investing public to make such prohibitions but public interest is another matter. Public interest may cover a host of nominative values in respect of education, unemployment, religion,

political ideology, morality etc. Should the Commission be concerned with these?

Section 202

Under subsection (7) we suggest that the word "may" in the first line should be amended to read "shall". In subsection (9) we suggest that it be amended as follows:
"A notice published under subsection (7) or (8) shall include a statement specifying the reasons for the imposition, withdrawal, substitution or variation (as the case may be) to which the notice relates. These suggested amendments are proposed for the sake or increasing the transparency of the exercise of such powers by the Commission. The public should be given the right to know the reasons behind such imposition, withdrawal or substitution.

Section 205 empowers the Commission to petition for the winding-up of virtually any corporation other than an authorized financial institution in the public interest. Firstly, as comments made under section 200 above, it is not understandable why the Commission should be concerned with public interest instead of interest of the investing public. Secondly, what is the basis that this power should extend to all corporations in Hong Kong (other than banks) and not restricted to say licensed corporations or listed corporations.

Subsection 206(7) deals with the question of giving an undertaking as to damages to the Court of First Instance for an interim order of injunction. Comments in this respect has been made to the White Bill :

"It is suggested that it is a matter of natural justice and established practice that where an applicant is able to show to the court that granting an interim order as pleaded in his application, pending further hearing is justified, he is able and prepared to give an undertaking as to damages if he fails in the final hearing. If the Commission is fully confident of the cause of its application for a restraining or injunction order as provided under subsection 198(2), which is a serious event by any measure, it should have no objection to giving such an undertaking to the court. If, the Commission fails, however, in the final hearing, the Court is always at liberty to order damages against it in any event if appropriate and this is irrespective of whether an undertaking has been given or not.

Therefore, this provision only seems to give the impression that the Commission is prepared to proceed to an application of this nature regardless of its outcome in Court. We suggest that this subsection be deleted."

Part XI

Section 210

The jurisdiction of the Appeals Tribunal is limited to review specified decisions as itemized in Part 2 of Schedule 7. We believe it is a more open and clearer arrangement to make all decisions appealable except certain supervisory decisions of the Commission. Such excepted decisions are certainly much less than the existing 64 items in the list. In this manner, one can clearly see what decisions of the Commission are not subject to appeal to the Appeals Tribunal and does not have to refer to the Schedule to find an answer by exhaustion. Moreover, this arrangement will have the benefit of putting all actions and decisions of the Commission into the sphere of review by the Appeals Tribunal including any decisions which do not fall squarely within the area of the itemized decisions such as actions on the Commission's own initiative.

This suggestion has a precedent in the UK model. The relevant section is copied hereunder:

"References to the Tribunal

55.--(1) An applicant who is aggrieved by the determination of an application made under this Part may refer the matter to the Tribunal.

(2) an authorised person who is aggrieved by the exercise of the Authority's own-initiative power may refer the matter to the Tribunal."

The Commission is an executive arm of the Government and as such is vested with administrative powers. It can exercise its powers by its own initiative and make its own policies and decisions. If one is aggrieved by the exercise of the Commission's powers, in the interest of public justice, one should be entitled to appeal to an independent body without any restrictions. We therefore suggest an all-embracing right to review and appeal by an aggrieved party instead of the present definitive rights in the Bill.

Section 211

An application for review of a specified decision of the Commission shall have to be made within 21 days after service. We suggest that 28 days will give the appellant more time to consider and when he decides to appeal, more time to prepare a proper appeal. In certain circumstances where delay is unavoidable, it is suggested that this appeal period can be waived by the Tribunal. We believe that the jurisdiction of the Tribunal to hear cases should not be barred by a mere technical time factor. The following provision may be added to remedy this situation (as contained in the UK model):

"The Tribunal may allow a reference to be made after the end of that period."

Section 220 provides:

"(1) a person who has made an application for review may, at any time before the review is determined by the Tribunal, apply to the Tribunal for a stay of the specified decision to which the application relates."

The present Bill does not therefore provide for stay of execution during review unless by application to the Tribunal and before stay of execution is granted the decision of the Commission shall prevail. In some instances such as those decisions contained in the sections listed in section 224(2), damage may have occurred and no later review can alleviate the situation.

Section 224

Subsection (2) deals with the situation where certain decisions of the Commission shall take effect despite an application for review. The sections under this category are listed. They include the power of the Commission to impose or amend or revoke conditions regarding granting of licences for licensed corporations or licensed representatives and the imposition of a pecuniary penalty. We believe if these powers affect materially the ability of the licensees to continue their businesses, they should be a grave matter and an application to the Appeals Tribunal for review should postpone the decisions taking into effect, otherwise, if the decision is taken into effect, damage done is irreversible and no review can change the situation for appellant.

Section 225

We are of the opinion that there should not be any “excluded decisions”. We suggest that all applications for review or appeal under the Securities and Futures Ordinance should go to the Securities and Futures Appeals Tribunal. We do not agreed that the status of exempt persons should remain and even if it were to stay, we consider that the whole class of exempt persons should be treated alike with licensed corporations in the judicial process of appeal. This is not only fair to the licensed corporations but fairness must also be seen to be so by the rest of the people who may not be involved in the industry.

It remains to be said that the CE in Council is part of the Government and is not an independent court or tribunal. With due respect to its integrity, the Council sits in a closed session and there is no transparency for the public to know how it functions. To have the Commission’s decisions being heard in appeal by the same Government does not instill any greater confidence in the eyes of the public.

Part XII

Comments on this Part are contained in the response to the consultation paper entitled : “Proposed New Investor Compensation Arrangements”. Please refer to another attached file.

Part XIII

Section 240 deals with the receiving of information in relation to a corporation by a public officer or a specified person. The list in subsection (2) consists of public bodies and it includes exchange participants and their employees.

We would have thought that exchange participants couldn’t be the first people receiving such information in a privileged capacity. If any people in the private sector were to receive such information, they would more than likely be bankers, financial advisors, underwriters or accountants. It is not understandable why exchange participant is the only class of people named in the subsection and not being a person in a public office.

Section 245(1)(a) empowers the Tribunal to receive and consider any material whether by way of oral evidence or documents even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law. However, subsection (7) of section 244 provides that the standard of proof required to determine any question or issue before the Tribunal shall be that applicable to civil proceedings in a court of law.

If during a hearing before the Tribunal, an issue of evidence appears, for example, whether the Tribunal should receive some hearsay evidence, it is not known how it can reconcile these two provisions without causing conflict in their application.

Section 246

The Tribunal can on its own motion authorize the Commission to exercise powers to investigate, extract evidence and gather information and material for the purposes of market misconduct proceedings under section 244. This goes to the root of the principle that a court is an independent body not to be influenced by any other person in hearing a case before it. Here the Tribunal is seen as the motion behind the Commission in gathering information and evidence and the Commission is seen as an agent for the Tribunal. Despite the fact that the Tribunal may act as fair and just as ever, however, in the eyes of the public, it has entirely lost its stance as a neutral umpire in determining facts and applying the law fairly and impartially in any case before it.

Section 250(1) provides that where a corporation has been identified as having engaged in market misconduct and it is directly or **indirectly** attributable to a breach by any officer of the corporation, then the Tribunal may make such orders as if he has been identified as engaging in market misconduct. We believe this to be entirely unjust. The threshold of proving a person being “indirectly” culpable is so low and uncertain that we suggest it is unworkable. The provisions in any

law should be just, clear and unambiguous. We do not think that this subsection measure up to these basic requirements.

Section 265 deals with the market misconduct of false trading. Subsections (3) and (4), in determining the misconduct, use the terminology of "..to have the effect of creating an artificial price, or maintaining at a level that is artificial.."

We are of the opinion that price is determined by demand and supply and any bid or offer is by nature artificial. They happen because people in the market decide, according to their judgment and decision, that they should be so offered. They are purely artificial. At any price level, a buyer has his reason to buy, so is a seller having his own reasons to sell. What distinguishes a normal trading and a false trading? Unless "artificial price" can be defined, the elements of which can be clearly proved and substantiated, we certainly do not believe that the concept of "artificial price" is going to help. It simply misses the point.

Section 269

The provisions under stock market manipulation is so widely drafted that they virtually catch all market consumers. There is no time span specified for the interval between the 2 transactions in the "2 or more transactions" concept. Can it be an hour or one-day or one month?

In subsection 269(1)(a) the English version is "2 or more transactions..", whereas in the Chinese version it is: " more than 2 transactions..". One wonders which one shall prevail.

Section 270 imposes a statutory duty on every officer of a corporation to ensure that proper safeguards exist to prevent the happening of market misconduct.
We suggest this liability shall become unavoidable for any officer whose corporation might involve in market misconduct. If the measures taken are reasonable, if the safeguards which exist are proper, the misconduct would not have happened. It follows in logic therefore, that the fact that the misconduct happened will show that the safeguards are not proper. Where is the possibility of a defense for an officer of a corporation involved in these circumstances?

敬啓者：本協會日前就《建議的新投資者賠償安排》諮詢文件作詳細討論。首先大家都同意建議將現時對交易所的交易徵費由 0.01% 增加 0.012%，並繼續維持現時對期交所執行的合約每邊徵收 0.5 元徵費的做法，使新投資者賠償基金的經費來源達至用者自付的公平原則。至於本協會對建議內容的意見則列述如下：

- 對於第 4 項建議累積賠償基金儲備至 10 億的水平方面，本協會認爲到了 10 億元水平後應再行檢討和考慮，希望能增加賠償儲備基金，爲投資者提供比原定最多爲 15 萬元更高的賠償額。
- 本協會同意第 43 項所述，賠償基金是爲買賣香港交易及結算所的金融產品提供保障，尤其賠償基金的組成來自交易徵費，不應該包括其他海外或其他市場的產品。
- 本協會對於第 48 項所指證監會在新賠償安排下仍維持代位權並不贊同，由於索償者已經蒙受一定的損失，在可能的情況下，應盡量給予這些苦主更多的補償，尤其賠償基金的組成已完全來自交易徵費，更應以投資大眾的利益爲保障原則。因此，除了賠償基金的賠款外，經清盤程序中討回的額外款項，應該全數由索償者攤分，證監會不宜從中獲得任何分配。
- 本協會除了同意第 83 項所述，賠償基金是爲買賣香港金融產品的散戶投資者提供保障，不論散戶投資者所使用的是交易所參與者、非交易所參與者的持牌人或獲豁免認可機構，都應獲得保障外，同時更認爲凡經證監會註冊之持牌人士，所買賣或代客戶持有的產品，甚至是早期積存的股票或在海外市場成交的產品等，無論是否透過香港交易所進行買賣，又以前曾否繳付交易徵費，

只要是香港交易所現有的產品，均受新賠償基金的保障。

- 本協會建議賠償的計算方法，應該以證監會發出經營不同產品的每一個牌照作爲一個單位，每一個單位可獲一份賠償，然後按索償客戶在已倒閉公司所持有之不同產品的戶口數目，再統計其獲賠償的份數。（即同一客戶於同一公司內每一牌照產品，獲每一份賠償最高額 15 萬。）
- 本協會茲舉出以下情況爲例，查詢有關處理方法：
  現有一間屬交易所參與者的證券公司，其下有多間獲證監會發出註冊證券商牌照（Registered Dealer）的駁腳公司，這些公司均直接爲其客戶進行買賣、交收及發給支票和單據等。假設上述交易所參與者之證券公司不幸倒閉，按照現行之賠償方式，則其下之每間駁腳公司均只可分別申請索償，而最高賠償額爲 15 萬元，至於駁腳公司的客戶，未必能按戶口數目收到賠款。如果駁腳公司的客戶希望直接就該交易所參與者之倒閉申請索償，是否須要在駁腳公司亦同時宣佈倒閉的情況下，方可直接申請賠償？唯在惡劣環境下，將引發連鎖性但不必要的公司倒閉風潮。

最後，本協會亦關注由於新賠償基制的成立，必會導致市場的競爭更白熱化，非交易所參與者的證券公司及獲豁免認可機構採用以本傷人或割喉式的壟斷競爭手法，對交易所參與者形成的不公平威脅，亦必更爲嚴峻。對於市場上除保障投資者利益外，是否能維持有效的公平競爭，實在不容忽視。

鑒於新投資者賠償安排對本行業影響嚴峻，希望

貴會詳加考慮本協會之意見，並祈回覆以上提問，如有任何問題須加以解釋或互相討論，歡迎隨時與本協會聯絡。

此致

證券及期貨事務監察委員會

市場監察部執行董事

狄勤思先生

主席 **范佐浩** 謹啓

二 OO 一年四月四日