立法會 CB(1)665/05-06(04)號文件
LC Paper No. CB(1)665/05-06(04)

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

## Extracts of verbatim transcript of meeting held on 17 July 2001

***財經事務局副局長區璟智女士：***

我請Mr BAILEY稍後講解有關情況。我相信，最客觀的標準是參考本港法例內的保密條款，這就是基準。

***Mr Paul R BAILEY, Member of the Commission and Executive Director, Enforcement, Securities and Futures Commission:***

Basically, when we are assessing whether or not there is adequate secrecy provisions, we do compare it with our own legislation and, in every case, we go to the legislation from the jurisdiction who is requesting it from the investigatory system. The same, of course, would apply to information sharing. I think it is under clause 366 – to make sure that the secrecy provisions are basically on par with what we have got in Hong Kong.

We have, in fact, declined to assist in certain cases until people have, in fact, got adequate secrecy provisions in place. It is done very, very meticulously on a case-by-case basis and a lot of analysis is done. If necessary we go back to the other jurisdiction to explain the provisions, how they actually operate in practice and only when we are satisfied that they are very similar to ours would we then accept that they are suitable for investigatory systems or, in fact, sharing the information.

***主席：***

關於第(6)款，各位有沒有問題？那麼第(7)款呢？關於第(8)款，各位有沒有問題？那麼第(9)款呢？

現在討論第180條。關於這條文，我們需要政府稍作解釋。

***Deputy Chairman:***

Really, the first thing I ask the Government to explain is whether there has been any substantive changes. Is it just idealistic?

***財經事務局副局長區璟智女士：***

我請陳律師解釋一下。

***主席：***

好的。

***高級助理法律草擬專員陳子敏女士：***

多謝，主席。我們把在第46頁第(2)(b)款下首3行刪除，其實是將有關規定移至剛才所討論的第172及177條中，亦即"a person is not excused from complying with a requirement....."一句。我們將有關規定移至第172及第177條，是希望在個別條文中更明確訂定有關規定。至於第180條其餘被刪除的文字，其實我們將之移至下文第(i)節。有關的內容主要是，任何人如要享有這項特權，他在作證前必須make a claim。我們將這項規定只載於第(i)節。在作出這項聲稱後，所有證據不得在刑事法律程序中接納為針對該人的證據。然而，這項規定並不適用於第(ii)節，因為第(ii)節關乎根據第XIII部提起的民事法律程序，亦即有關市場失當行為(market misconduct)的法律程序。因此，要求有關人士作出聲稱的規定，只適用於第(i)節。至於第(ii)節有關市場失當行為的法律程序，則無需作出這項聲稱。這其實是一項技術修訂，以便更清楚反映原本政策的要求。

***主席：***

Margaret.

***副主席：***

當委員會討論政策時，我對這部分有很大意見。雖然當局現時提出修訂，這只不過是採取另一說法而已，問題仍然是存在的。根據這條文的規定，當局可強制他人提供資料。我們所關注的是，當局可否使用這些資料將有關人士入罪？第(i)節訂明，有關資料不得在刑事法律程序中使用。然而，第(ii)節訂明，有關資料可在就市場失當行為而提起的法律程序中使用。當委員會討論政策時，我所提出的憂慮是，關於就市場失當行為而提起的法律程序，在這過程中，所獲得的資料全部都可以在提出刑事檢控時使用。也就是說，雖然改了另一說法，但實際情況仍然是，當局強制他人提供的資料，將來亦可用作把有關人士入罪，對嗎？

***財經事務局副局長區璟智女士：***

第XIII部主要關乎審裁處在進行研訊時，可使用有關資料。這情況相當於現時內幕交易審裁處在行使調查權力時，也可使用證監會所獲得的資料，作為在研訊過程中可考慮的證據。這其實對現時內幕交易審裁處的研訊程序具關鍵作用，讓審裁員可聽取有關資料作為證據。我們希望將現有的安排伸延至日後市場失當行為審裁處展開的民事法律程序。

***Deputy Chairman:***

In one way, what is new about this ordinance is that what you gathered at this stage can be used for the purpose of Part XIII, market misconduct, and once it is there then this Bill provides that it can be used in any civil action, but does it also not mean that what is stated as a record in market misconduct can also be adduced in criminal proceedings? Can you also use that for criminal investigation?

***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures Commission:***

Perhaps I can clarify these things and if you could correct me if I have misinterpreted you. (ii) – the "criminal" there only refers to criminal proceedings for the purposes of Part XIII which are ancillary provisions, criminal provisions to the operation of the Market Misconduct Tribunal and the proceedings before that Tribunal are quite clearly civil. The criminal offences that appear in Part XIII are not the substantive criminal provisions for the criminal punishment of market misconduct as such as in 10 years' jail or a $10,000,000 fine. Rather they are the more minor offences that go towards whether orders of the MMT to compel evidence have been complied with or to misleading evidence as given to the Market Misconduct Tribunal and so forth.

***Deputy Chairman:***

Mr Chairman, may be the substantive question could better be dealt with when we come to Part XIII but the relative part here is, what is the ultimate effect of clause 180, whether there has been any change. My question is really this. If we are concerned with self-incrimination, it is not good enough to say that it will not be used directly in criminal proceedings against you. Because it can be used in market misconduct, and I do understand that that is not criminal. That is intended to be a kind of civil procedure and I think I can still remember the kind of sanction you are liable to if you are found guilty before the Market Misconduct Tribunal.

Nevertheless, because the proceedings and the materials used in the Market Misconduct Tribunal is available for civil claims then (1) it can be used for civil claims. But I believe that that once being open and publicly available material, that material can also be used as a foundation for other criminal sanctions against you. Would that not be the case?

***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures Commission:***

No, not that I think, derivatively. Certainly the statement itself compelled under clause 180 – compelled under the investigatory provisions or the information governing the powers under Part VIII could not be used. Derivative evidence, I think, if that is what you are referring to – derivatively obtained evidence in terms of documents obtained flying from that statement – Clause 180 clearly does not govern those, if that is what you are asking about. If you are asking about the derivative use of the statement as tendered before the MMT, I think again (i) would prohibit the use of that in any other criminal proceedings. We can look at that and examine it if further changes need to be made to that clause.

In this respect, clause 247 is relevant. If I can summarize it - that any evidence in term tendered before the MMT is not available in criminal proceedings against that person other than proceedings in the nature of the falsity of the statement for perjury or the ancillary criminal offences in Part XIII, that I referred to earlier going to the mechanics of the operation of the MMT in giving false evidence, failing to provide information.

***Deputy Chairman:***

I will have another look.

***主席：***

關於第181條，各位有沒有問題？那麼第182條呢？

***Mr KAU Kin-wah, Assistant Legal Adviser:***

Thank you, Mr Chairman. Could I come back to 180? The progress of this afternoon is faster than I expected and I have not got with me the copy of the United Kingdom Financial Services and Markets Act. There is a similar provision as to the prohibition of the use of evidence – statements obtained by compulsion, of using them in criminal proceedings. I think the wording there is quite different and I would suggest that we follow the wording in

the Act.

***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products, Securities and Futures Commission:***

The wording is very different in several respects. It is both wider and narrower, depending on which part of the provision you are looking at. In the UK you do not have to make a claim for privilege. It is based on the fact that the evidence is elicited under compulsion. But the use that can be made of the evidence in one respect is significantly wider because if the person who has made the statement and at a subsequent criminal trial puts in evidence – in other words, leads evidence – about the making of the statement, then it is all open. Then the prosecution can lead evidence about the interrogation and question and answer.

So if, for example, at a subsequent trial the defendant is putting forward a defence and on cross-examination there was a suggestion that this was a recent invention and the defendant says, "No, it isn't. I told the FSA this when they asked me some questions and this is what I told them", it would all be in then. You could actually lead all the other evidence. So there are very significant differences, not just about whether this is based on privilege or compulsion and I think the scope of the UK section is quite different to the scope of these provisions. It would be a very significant change and we would want to consult the industry very carefully on.

***Mr KAU Kin-wah, Assistant Legal Adviser:***

I just would like to make a point. I only referred to that part of the UK provisions that is the actual prohibition, which, if I remember correctly, states that such statement cannot be used and no questions should be put in relation to this thing.

***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***

***Securities and Futures Commission:***

I think actually again this provision is tighter and it is a wider protection for the person. It is not just a question of asking questions. I think we would need to look very carefully at whether that UK provision, in fact, was a broader protection. I think this is a broader protection. It is a much more general expression of the prohibition. It is obviously a question of interpretation.

***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures Commission:***

Basically, we spoke to the FSA in relation to clause 174(2)(b) which the Legal Adviser is referring to. It is, in some respects, a little bit broader in that no question may be asked in relation to the statement. I think, as Mr PROCTER has said, the situation in the UK in relation to evidence law is significantly different. Particularly in relation to admission of guilt and also late defences as is referred to.

As we understand it, the Court of Final Appeal in a case that was handed down in about May of this year comprehensively ruled out questions that the UK legislation was dealing with there and we feel that the legal foundation in Hong Kong common law as set out in the case is somewhat different to that that exists in the United Kingdom. Hence, the provision is somewhat inappropriate for Hong Kong on the basis of the differences in common law between Hong Kong and the United Kingdom.

The situation is a little bit complicated and I think it is somewhat difficult to explain orally and if you need further we may be able after appropriate research to set something up.

***Deputy Chairman:***

Mr Chairman, I think really the better way to deal with this question is to take it as a separate and self-contained problem so that we can have the Legal Adviser perhaps provide us with the exact wording of the UK Act that we have been referring to; and also the appropriate authorities so that we can look at it together because this is a rather serious point.

Mr Chairman, I just turn forward to clause 247 about the use of evidence received for the purpose of market misconduct proceedings. There is no question that evidence gathered under clause 180 can be used in market misconduct proceedings. Now, you see here under (2) – of course, (2)(b) I can see that criminal proceedings - where the evidence cannot be used in criminal proceedings where the person is charged with an offence under Part V of the Crimes Ordinance, or for perjury, and so on, but (3) is rather difficult to understand. (3) says: "The evidence given by any person at or for the purpose of any proceedings instituted under section 244" – that is, market misconduct proceedings – "as referred to in subsection (1) is admissible in evidence against that person in any other proceedings, civil or criminal, in a court of law where, had there been no such proceedings instituted under section 244, the same evidence would have been admissible in evidence in such other proceedings under the law or proceedings applicable to such other proceedings in that court." I just find it frightfully difficult to understand, so I do not know exactly to what extent one is protected under clause 180. That is a difficult point because clause 180 is where you exercise a power to compel someone to give you - -

***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products, Securities and Futures Commission:***

The proposal is to delete that provision, actually. I think…

***財經事務局副局長區璟智女士：***

我們上次進行討論時，副主席其實也提出同樣的問題。當局在作出檢討後，認為無需訂定第247條第(3)款。由於我們還未討論第XIII部，所以

沒有向各位提出這一點。關於這方面，確實有令人混淆之處。

***Deputy Chairman:***

Sorry. I have not quite remembered that.

***Chairman:***

Mr LI has come back.

***Deputy Chairman:***

I have no further questions on clauses 180, or 181, for that matter. In fact, I have no questions for the rest of this Part.

***余若薇議員：***

關於第(2)(b)(i)款，副主席在今天早上表示對"聲稱"一詞感到十分敏感，我希望就這方面提出問題。為何需要規定有關人士在作出解釋或提供資料前，必須作出"聲稱"，才可享有不使自己入罪的權利？為何在時間上訂定這樣的要求？

***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures Commission:***

Basically, this is what we understand the situation is at common law. If the claim of privilege against self-incrimination is not made, all the evidence is then subsequently admissible in criminal proceedings. So all we are seeking to do is state that you must, before answering questions, do what you would have to do in the ordinary situation at common law and say, "I claim privilege against self-incrimination." The difference under the statutory