

立法會
Legislative Council

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

**Verbatim transcript of meeting
held on Tuesday, 24 April 2001, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, (Chairman)
Hon Margaret NG, (Deputy Chairman)
Dr Hon David LI Kwok-po, JP
Hon NG Leung-sing
Hon Bernard CHAN
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Albert HO Chun-yan
Hon Eric LI Ka-cheung, JP
Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Henry WU King-cheong, BBS
- Public officers attending** : Miss Vivian LAU
Principal Assistant Secretary for Financial Services
- Mr Y K CHOI
Executive Director, Banking Supervision Department,
Hong Kong Monetary Authority
- Mr Arthur YUEN
Division Head, Banking Supervision Department, Hong
Kong Monetary Authority
- Mr Charles BARR
Deputy Law Officer (Civil Law)

Ms Beverly YAN
Senior Government Counsel

Ms Sherman CHAN
Senior Assistant Law Draftsman

**Attendance by
invitation**

: Mr Mark DICKENS
Executive Director, Supervision of Markets, Securities
and Futures Commission

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

Mrs Alexa LAM
Executive Director and Chief Counsel, Securities and
Futures Commission

Mr Stephen PO
Director, Intermediaries Supervision Department,
Securities and Futures Commission

Mr Eugene GOYNE
Senior Manager, Enforcement, Securities and Futures
Commission

Clerk in attendance

: Mrs Florence LAM
Chief Assistant Secretary (1)4

Staff in attendance

: Mr LEE Yu-sung
Senior Assistant Legal Adviser

Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Connie SZETO
Senior Assistant Secretary (1)1

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1 **主席：**

2
3 《證券及期貨條例草案》及《2000年銀行業(修訂)條例草案》委員
4 會現在召開會議，請政府的代表進入會議室。我們需處理上次會議的跟進
5 事項。按照原定計劃，在上次會議上應完成就第IX部的討論，但胡經昌議
6 員要求再次提出關於第IX部的問題，現在先請胡經昌議員提出有關問題。

7
8 胡經昌議員。

9
10 **胡經昌議員：**

11
12 我希望就第193條提問，因為我就這條的英文擬本，有關“regardless
13 of how the information or material has come into its possession”的部分有點
14 擔憂。其實我也曾與業界人士討論，這項權力是否過大。因為這部分提到，
15 不論證監會於甚麼情況下管有該等資料或材料也可。雖然政府告訴我們發
16 生這種情況的機會很少，但證監會會否以一些不合法的手段管有該等資料
17 或材料後，使用那些資料或材料呢？其實在較後的第X部，也訂有類似的條
18 文，但第X部第206(1)(a)(iii)條則訂明，“以威脅、承諾或其他方式，誘使
19 另一人犯任何上述違反事項”。即證監會不可採取這些威脅方式取得資
20 料。我希望詢問，第193條所訂的權力是否恰當，或是否過大。或該條應否
21 較詳盡地訂明有關情況。

22
23 **Chairman:**

24
25 Mr BAILEY.

26
27 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
28 **Futures Commission:**

29
30 I had a slight problem with the translation there, but I think as far as the use of

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1 information is concerned, it is very important that wherever the information we obtain in
2 relation to a registered or licensed person – and one has to remember the licensed person is in
3 the privileged position. He should be in a position to look at that information. What
4 relevance we give to it would have to be considered on a case by case basis, and it would be,
5 of course, available if it were used in any disciplinary proceedings. It would be made
6 available as part of the process of giving a person a reasonable chance to make representation.
7 I think it is quite important, if we do have any information, that we can make use of that; but
8 it will be used on a case by case basis, and the relevance it will be given will have to be
9 looked at on a case by case basis.

10
11 **胡經昌議員：**

12
13 主席，請問在其他法例中，是否也經常採用這種寫法？因為我對別
14 的法例並不熟悉，但這部分卻列明把這項權力給予某個機構。例如警務處
15 或廉政公署是否也擁有同樣的權力呢？如果它們沒有這項權力，並在程序
16 上有所分別，證監會的權力會否過大呢？

17
18 **Chairman:**

19
20 Maybe the Law Draftsman can help?

21
22 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
23 **Futures Commission:**

24
25 Could I just answer that?

26
27 **Chairman:**

28
29 Yes, please.

30

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

3
4 I think on that particular point we have to look at this in the context of what we are
5 looking at. Here we are looking at disciplinary provisions as far as licensed persons are
6 concerned, and there have to be certain criteria for licensed persons. They have to be fit and
7 proper, and any of the disciplinary powers are there to protect investors. So to have this
8 power of obtaining information has to be looked at in the context of what we are looking at.

9
10 If you look at the power of ICAC and the police, this is totally different, in that they
11 are looking at criminal provisions as opposed to disciplinary powers. So the requirements
12 for discipline could be quite different from that for the police and ICAC.

13
14 **Deputy Chairman:**

15
16 Mr Chairman, may I ask whether this should include, as a matter of policy,
17 information unlawfully obtained? It is said as this is drafted, regardless of how the
18 information or material has come into its possession, it could be included by unlawful means.

19
20 **Chairman:**

21
22 Yes, please.

23
24 **高級政府律師甄文蕙女士：**

25
26 主席，我們也曾就這個問題徵詢內部同事的意見，例如我們曾諮詢
27 Prosecutions Division的同事。他們的意見是，就刑事案件而言，法庭可以
28 拒絕以unlawfully means obtain的evidence，但法庭也擁有discretion，可接納
29 這些evidence。這只是by analogy，但現在我們所討論的，是disciplinary
30 proceedings。如果我沒有記憶錯誤，在現行法例中，藥劑師、大律師以及

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1 醫生的內部紀律處分程序，均有條文訂明rules of evidence do not apply。即
2 disciplinary proceedings可擁有自己的rules of evidence。

3

4 **副主席：**

5

6 主席，……

7

8 **Chairman:**

9

10 Yes, please.

11

12 **副主席：**

13

14 我認為rules of evidence通常也並不是關乎有關證據是否以不合法
15 的手段而獲得的問題，最低限度這些rules沒有指明。但第193條列明，“不
16 論該會如何得以管有該等資料或材料”，這情況便很明顯。其實這是政策
17 的問題，當局是否容許利用一些不合法取得或管有的資料或材料，例如in
18 breach of regulation而管有的資料也同樣可以使用？涵蓋範圍須否定得那麼
19 廣泛呢？

20

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

23

24 I take your point as far as obtaining information by unlawful means is concerned,
25 but I think if that information came into the possession of the Commission and it was relevant
26 to the disciplinary matter under consideration at that point in time, we should be in a position
27 that we can take that information into consideration. I think in the comparison with criminal
28 proceedings, as far as I am aware, there are situations when you can admit unlawfully
29 obtained information. But in this particular case, if that information went to the fitness and
30 properness of a licensed person against whom disciplinary proceedings were concerned, we

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1 would probably have to highlight, in the letter of mindedness setting out our concerns, how
2 the information was obtained; and when they are making representations after the details of
3 that information, it would have to be supplied. They would be under no illusion as to how
4 that information came into our possession, but if that had relevance to the fitness and
5 properness, and given the privileged position that the licensed person has, vis-à-vis the
6 investing public, I think the Commission should be in the position to use any information in
7 its possession, however it comes into its possession. It is for investor protection. I would
8 stress that point.

9
10 ***Deputy Chairman:***

11
12 Mr Chairman, of course we are here to protect investors also, but that is not a
13 talisman. That is not a magic formula which permits us just to do anything. So having that
14 as a basic aid, we still have to examine whether the provisions are correct.

15
16 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
17 ***Futures Commission:***

18
19 I do appreciate that, but I would stress the point that if the information was illegally
20 obtained, then it would have - - how the information came into our possession would be
21 highlighted in any action that we took; and the relevance we gave to that information would
22 have to be balanced against how it came into our possession and what sort of relevance you
23 could give to it. I have never seen a case that would actually fall into this category, in the
24 many disciplinary proceedings I have done, but there could be a situation where you have got
25 some extremely relevant information that might come into our possession, which, if we could
26 not use it, would be detrimental to the interests of the investing public, in that it could affect
27 how we proceeded with a certain disciplinary action. I think it is important that we have
28 such a provision.

29
30 ***Deputy Chairman:***

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1
2 Mr Chairman, may I just ask for some information, some material? The
3 Administration says that according to their advice, unlawfully obtained evidence may be
4 admissible in criminal proceedings. Can they give us some examples of instances where
5 unlawfully obtained evidence is accepted by the court – not immediately.

6
7 **Chairman:**

8
9 You may supplement the information to the Bills Committee?

10
11 **Miss Vivian LAU, Principal Assistant Secretary for Financial Services:**

12
13 Yes. We will supplement information after meeting.

14
15 **Chairman:**

16
17 Okay.

18
19 **胡經昌議員：**

20
21 主席，我認為有需要把這點紀錄在案，因為這正是關乎fitness and
22 properness的問題。其實在很多情況下，只要證監會信納或在證監會的
23 opinion中認為是可以接受的資料，已可成為證據。如果證監會擁有這項權
24 力，即使是非法取得的資料也可以利用，實在令人擔憂。我們也應講求法
25 治精神。在這情況下，即使要待證監會補充資料，我們也需把這點紀錄在
26 案，因為這點也頗為重要。

27
28 **主席：**

29
30 OK，把你的意見記錄下來吧，這是你的意見。

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1
2 讓我們開始就第X部進行討論。有關文件已分發給大家。席上放置
3 了一份文件(編號是Paper 9A/01),是政府對業界就這部提出的意見所作的回
4 應。值得大家在介紹的過程中作為參考。現在先請政府作較簡短的介紹。

5
6 Mr BAILEY, you would like to have an introduction?

7
8 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
9 ***Futures Commission:***

10
11 Yes. The objective of Part X is to provide the SFC with powers to protect the
12 investing public, by intervening in the business or affairs of a licensed corporation, and by
13 enabling it to apply to court for orders and civil remedies. Part X is largely based on existing
14 legislation. A number of changes have been made, which I will highlight. These are aimed
15 at allowing the SFC to discharge its functions more effectively, so as to ensure better investor
16 protection.

17
18 Clauses 196 to 198 preserve the SFC's existing powers to issue notices imposing
19 restrictions on the licensed corporation in relation to the carrying-on of its business. That is
20 clause 196, imposing restrictions with regard to disposal of property by a licensed corporation,
21 or with the manner in which such a corporation may deal with the property. That is clause
22 197. "...and requiring a licensed corporation to maintain assets which are sufficient to
23 ensure that it can meet its liabilities in connection with the business for which it is licensed."
24 That is clause 198.

25
26 Clause 199 is new, and is based on UK legislation. It empowers the SFC to
27 require a licensed corporation "...or any other person to transfer the custody of property held
28 by the licensed corporation, or property connected with the licensed corporation's business, to
29 the safe custody of the SFC or any person appointed by the SFC". The purpose of this
30 clause is primarily to cater for situations when it is suspected that licensed persons may not

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1 comply with the terms of the notice served on it - for example, a notice requiring that clients'
2 property be handled in a certain way. It is directly aimed at investor protection.

3
4 I should mention that checks and balances on the exercise of the power are under
5 clause 199.

6
7 The scope of the provision is restricted to relevant property, a term defined under
8 clause 199(7) to include "property directly or indirectly held on behalf of clients, or which the
9 SFC reasonably believes to be connected with the business of a licensed corporation".
10 Clause 199(3) requires the SFC or the person appointed by the SFC to take all reasonable
11 steps to preserve property transferred to their custody. Clause 199(4) places an obligation on
12 the SFC to apply to the Court of First Instance as soon as practicable after the custody of
13 property has been transferred, for an order in relation to such. Clause 199(5) allows the
14 party from whom the property is taken, or any other party with an interest in that property, to
15 seek an order from the Court of First Instance; and finally, clause 199(6) prescribes that the
16 transfer of property under the clause "... shall not affect any legal or equitable title to the
17 relevant property".

18
19 Clause 200 provides the circumstances that must prevail before the SFC may act
20 under clauses 196 to 199. For example, if it appears to the Commission the property of
21 clients is likely to be dissipated or dealt with in a manner prejudicial to the interests of clients,
22 the licensed corporation is no longer fit and proper to be registered, the licensed corporation
23 has failed to comply with certain regulatory requirements, "the licence of the corporation may
24 be revoked or suspended on the grounds stipulated in clause 187" – that is the disciplinary
25 action taken for improper conduct; or clause 188, which is "other circumstances in which the
26 Commission may revoke or suspend", for example, when a licensed person is insolvent, and
27 the imposition of the prohibitional requirement is desirable in the interests of the investing
28 public, or the public interest.

29
30 Clause 201 sets out the circumstances that must prevail before a requirement or

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1 prohibition is withdrawn, varied or superseded by other prohibitions or requirements. For
2 example, the Commission may not do so where the court has made an order in relation to the
3 relevant property under clause 199.

4
5 Clause 202 sets out the requirements the SFC must comply with when taking action
6 under clauses 196 to 199, and clause 201. The SFC must give reasons for its actions under
7 subclauses (2), (3) and (4). Then action is taken under clause 199 or 201, the SFC is obliged
8 under clause 202(5) to take steps to identify and notify parties affected by its actions. The
9 SFC must use its best endeavours under clause 202(10) to notify the Exchange or clearing
10 house if any of their participants is involved, before taking action, or immediately thereafter.
11 Action taken under clauses 196 to 199 and 201 takes effect from the service of a notice or the
12 time specified in that notice, if later. That is clause 202(1). With the exception of action
13 under clause 199, all other action by the SFC under these provisions is appealable to the
14 Securities and Futures Appeals Tribunal, as indicated in Part II of schedule 7. That is on
15 page C2473, items 54 to 58. Clause 199 is excluded, as the court must become involved as
16 soon as practicable after the SFC exercises the power.

17
18 Clause 203 makes it clear that if a licensed corporation subsequently has its licence
19 revoked or suspended, this does not affect the validity of notices issued under the various
20 provisions. The compliance with a notice does not constitute a contravention of clause 114.
21 That is a restriction on carrying on business. An action can be taken before revocation or
22 suspension of a licence takes effect.

23
24 Clause 204 is a new provision similar to that found under clause 178 of Part VIII in
25 regard to inspections and investigations. It allows the Commission to certify non-
26 compliance to the Court of First Instance. The court may then order compliance, and if it is
27 satisfied that the failure is without reasonable excuse, it may punish the failure as if the person
28 had been guilty of a contempt of court.

29
30 Clause 205(1) specifies that the SFC may, in the public interest, petition the court of

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1 first instance to wind up a company on the grounds that it is just and equitable. It allows the
2 SFC under subclause (2) to petition for a bankruptcy order against a licensed person, i.e. an
3 individual.

4
5 Clause 206 is modelled on existing law, and allows the SFC to petition the Court of
6 First Instance for a variety of injunctive orders against persons who have contravened, or may
7 contravene, any of the relevant provisions or any requirement issued pursuant thereto. There
8 is some expansion of the scope of the SFC's existing power, as the clause would allow for
9 action against those assisting, or participating in offending conduct. That can be found
10 under clause 206(1)(a).

11
12 Clause 207 is adapted from section 37(a) of the Securities and Futures Commission
13 Ordinance, and allows the SFC to apply to the Court of First Instance for various orders when
14 the affairs of a listed company have, for example, been conducted in a manner which is
15 unfairly prejudicial to the interests of its members, or has been fraud misfeasance towards its
16 members. Normally such action would be commenced after a limited listed company
17 inspection conducted under clause 172. The range of measures available has been expanded
18 to allow the SFC to seek an order from the court to disqualify a person from being involved in
19 the management of any corporation.

20
21 Clause 208 is new and provides that a person will be civilly liable for knowingly,
22 recklessly or negligently disclosing to the public false or misleading information that concerns,
23 or may affect, the price of securities or futures contracts. The victim who has suffered loss
24 as a result of relying on such disclosure may claim damages from the person responsible for
25 the disclosure, provided that such persons either assume responsibility with respect to the
26 victim in relation to the disclosure, or it is fair, just and reasonable that the person should be
27 liable. That is under clause 208(3). Clause 208 provides defences for a person who acts as
28 a conduit, like printers and publishers - that is under 208(4); those who reprint or transmit
29 information, for example, internet information services providers under clause 285; and
30 broadcasters under 208(6).

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1
2 I should have mentioned that the Administration realized that these powers are
3 intrusive. Therefore the exercise of the powers under clauses 196 to 199, 201, 205 and 207
4 will be non-delegable. That can be found under items 71 to 75 in Part II of schedule 2, on
5 page C2421. It will have to be exercised by the Commission at plenary level.

6
7 Market comment is dealt with in paragraphs 18 to 24 of the paper. The comment
8 is primarily in relation to clauses 199 and 208, and international comparisons can be found at
9 annexure 2 to the paper.

10
11 Thank you, Mr Chairman.

12
13 **主席：**

14
15 Thank you. 文件後部附有一個頗為詳盡的比較，是比較香港和其
16 他地區的權力的。各位同事有沒有意見？余若薇議員。

17
18 **Hon Audrey EU Yuet-mee, SC, JP:**

19
20 Mr Chairman, I have questions in relation to a number of sections in this part.
21 Can I just ask one at a time?

22
23 Clause 197: restriction on dealing with property. I understand, of course, that the
24 intention behind it is the protection of investors, and I agree with that intention; but clause
25 197 relates to property, whether of the licensed corporation or not. I do not quite understand
26 why it is that the licensed corporation can be prohibited to dispose of property or deal with
27 property, when it does not own the property, when the property does not belong to the
28 licensed corporation. How can it in law, in any way, dispose of the property or deal with the
29 property?

30

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

3
4 In this particular case, “property” from memory is defined to relate to the business
5 of the licensed corporation, and there may be instances in fact where a licensed corporation
6 has property belonging to a client, where you would want to restrict them from dealing with
7 the property of that client, because they are acting as an agent for the client. So I think it
8 clarifies the situation whereby you might have a situation where you have got to safeguard the
9 property of clients, and not just to deal with the property of the licensed corporation itself.

10
11 ***Hon Audrey EU Yuet-mee, SC, JP:***

12
13 I understand the intention behind it, but as drafted it applies to property which the
14 licensed corporation in fact has no right in law to deal with. On the face of it, it is a little bit
15 absurd, so why can it not be restricted to property which the licensed corporation can deal
16 with? For example, if a property is mortgaged to the licensed corporation, or there is a
17 power of attorney given to it, such that it can deal with it, if it is phrased in such a way, I
18 understand; but at the moment it is drafted so widely to include any property under the sun.
19 How in law can the licensed corporation deal with property which does not belong to it,
20 unless it is specified to mean "property over which it has power to deal with or dispose of"?

21
22 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
23 ***Futures Commission:***

24
25 To answer that, I understand your point. Section 40 of the Securities and Futures
26 Commission Ordinance does the same thing. I think if you look at clause 200(a), it does
27 restrict the property that can be dealt with under that provision.

28
29 ***Hon Audrey EU Yuet-mee, SC, JP:***

30

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1 Yes, I understand your point that it is lifted from some existing section, but I do not
2 think it really answers the question, because of course it could mean that the previous or the
3 existing section is right – in which case there is a good reason for it – or it is wrong, and then
4 we can be wrong a second time for failing to stop the mistake. As far as the second point
5 you made is concerned, which is clause 200, I looked at that too; but again it is very wide
6 because it says “...any property of the licensed corporation or its clients, or any property
7 concerned with the business”.

8
9 What I am simply suggesting is that it should be phrased in such a way that people
10 looking at it can understand that it has a reasonable ambit, which is that it relates to property
11 over which it has control, and not any property under the sun. That is the point. It is really
12 probably a drafting, or a point of expression. Maybe that is the intention anyway.

13
14 ***Chairman:***

15
16 Yes, Alexa.

17
18 ***Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures***
19 ***Commission:***

20
21 Thank you, Mr Chairman. Perhaps I can assist. Now, Miss EU is actually
22 concerned about property in respect of which the licensed person does not own and has no
23 right to deal with. If that is the case, he really has not right to deal with it. So the fact that
24 the Commission is using a restriction order to restrict the dealing in, or with, that property,
25 does not really impact in one way or another.

26
27 On the other hand, when you are talking about a licensed person who is in
28 imminent danger of losing his property, or taking property away, I would have thought that it
29 would be in the public interest – everybody’s interest – that the whole thing is frozen so that
30 people can actually go in and use an orderly manner to deal with the assets, which could be

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1 the only assets left.

2
3 *Hon Audrey EU Yuet-mee, SC, JP:*

4
5 Mr Chairman, I do not quarrel with the intention behind it. What I am saying is
6 that it is not a question of whether it impacts, or whether it takes effect. I am saying that I
7 look stupid in agreeing with a section that does not make much sense. I mean, it is no
8 answer to me to say: "Well, it doesn't make much sense, but it doesn't impact upon anybody
9 anyway". That is not the purpose of looking at legislation. If you say: "Look, the
10 section's intention is that it only applies to property over which the licensed corporation has
11 control", then put it in those terms. Then if you issue the requirement, and if the licensed
12 corporation says: "No. I'm sorry, but this property I have no control over", then that is a
13 point for argument when we come to the application under clause 204, when it comes to
14 certification. But as drafted, when you say "Well, you can issue a notice in respect of any
15 property, whether of the licensed corporation or not", and then when you go to clause 204 to
16 apply for certification, all you have to say is: "Well, look, I've issued a notice. It takes
17 effect immediately, and I certify the failure". I mean, what about the criteria that it has got to
18 be property which the licensed corporation has the right to deal with, or the right to dispose of?
19 It is sort of glossing over the point.

20
21 *Miss Vivian LAU, Principal Assistant Secretary for Financial Services:*

22
23 Chairman, we note the points made by the Honourable Member. We will go back
24 and see her comments more fully, although I would like to just make a point that this clause is
25 adapted from the existing ordinance. I know that is not a reason for keeping it, but I just
26 want to put that point down. We will go back and consider.

27
28 **主席：**

29
30 OK, 好。我也想提出一個問題。在法律顧問向我們提供的note中有

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1 關comment的部分，我也不明白。為何現時一律採用property的字眼取代
2 assets的字眼？有沒有甚麼implications，還是兩者基本上是一樣？法律顧問
3 在其comment中提到這點，可否向我們解釋，兩者有沒有實質意義上的分
4 別？

5

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

8

9 We define “property” to include a variety of assets – for instance, money, goods,
10 choses in action and land; and I think by defining “property”, in Schedule 1, I think, it is made
11 absolutely clear what we are referring to as “assets”. It is a clearer definition. It is under
12 Schedule 1.

13

14 **高級政府律師甄文蕙女士：**

15

16 即英文版的第C2391頁，而中文版是第C2384頁。

17

18 *Hon Audrey EU Yuet-mee, SC, JP:*

19

20 In other words, “property” is wider than “assets”.

21

22 *Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures*
23 *Commission:*

24

25 In fact, Mr Chairman, the intention is to make it absolutely clear what is or what is
26 not included, because if you just use the definition of “assets” there could possibly be an
27 argument that a particular interest which is an intangible interest may or may not be an asset.
28 So by defining “property” we try to make it very clear, so that people have clearer indications
29 on the way forward.

30

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1 **Chairman:**

2

3 Thank you. Is there any legal definition on “assets”?

4

5 **Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures**

6 **Commission:**

7

8 No.

9

10 **主席：**

11

12 No? OK. 請講。

13

14 **胡經昌議員：**

15

16 主席，英國的Financial Services Markets Act好像是採用“assets”的字
17 眼，而不是採用“property”的字眼。

18

19 **Chairman:**

20

21 FSMA.

22

23 **胡經昌議員：**

24

25 對，FSMA。兩者有否不同之處？

26

27 **Chairman:**

28

29 I think you can check when you go back.

30

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1 **高級政府律師甄文蕙女士：**

2
3 主席，對於這方面，我們需回去考查。其實，也要視乎該條例如何
4 define “assets”。若該條例define “assets”的方式與我們define “property”的方
5 式相同，便沒有實質的分別。我們在查證後，便會向你們匯報。

6
7 **主席：**

8
9 好。

10
11 **胡經昌議員：**

12
13 證監會好像是quote了FSMA的section 48，但FSMA的section 48是採
14 用“assets”的字眼，而不是採用“property”的字眼。

15
16 **高級政府律師甄文蕙女士：**

17
18 對。我們會在查證後向你們匯報。

19
20 **主席：**

21
22 條例草案訂有一個Schedule，界定“property”的定義。

23
24 **胡經昌議員：**

25
26因為我希望把兩者作出比較而已。

27
28 **主席：**

29
30 好。Audrey, second question ?

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Hon Audrey EU Yuet-mee, SC, JP:

I am happy to get in the queue. Thank you, Mr Chairman.

Mr Chairman, clause 199 is new. It relates to transfer of custody of property, and that, I believe, would include real property, land property. What is the intention? I know under the latest section, when it talks about taking effect, the requirement is to take effect immediately. I am trying to find the section. There is a later section.

Clause 202 says that if the SFC issues a requirement, then it takes effect at the time of service. What does that mean in relation to landed property, because normally of course property does not pass immediately, unless of course you assign the property. Then very often, upon assignment you have to pay stamp duty. I do not follow how section 199 operates. If you issue a notice or requirement for the transfer, does that mean that the company would immediately have to assign the property and pay stamp duty, and then subsequent to that, under clause 199(4), after the property has been transferred, after the stamp duty has been paid and everything, then there is an application to court. So I cannot follow that either. Then I cannot understand subsection (6) which says: "...and neither this section nor a transfer of the custody of any relevant property pursuant to the requirement imposed under subsection (1) shall affect any legal or equitable title to any of the relevant property". So what is the purpose of this transfer, if it does not affect legal equitable title?

Chairman:

Mrs Alexa LAM?

Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures Commission:

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1 Thank you, Mr Chairman. In fact the intention and purpose behind clause 199 is
2 not that we take either legal or beneficial interest or title to the property. The purpose is to
3 physically take a hold of the property so that it is safe, and therefore nobody can have access
4 to it. So we preserve that ways for purposes of protecting the investors or the creditors.

5
6 Now, Miss YU does have a point, because when you are talking about land and
7 how you take custody, that is something we can further consider. But the intention is not to
8 take legal or beneficial interest, which is why, as soon as we physically impound a particular
9 asset, we will go to court and ask the court for a direction as to how we can go forward.
10 Typically, very often you are really talking about physical, tangible, movable assets, and also
11 stock and shares; but it is quite possible that you could also be talking about land.

12
13 *Hon Audrey EU Yuet-mee, SC, JP:*

14
15 Mr Chairman, I am sorry. I cannot agree with this approach. I think it is sloppy
16 drafting, like the previous case. I mean, how can you take physical custody of things like
17 land property, or indeed shares? You can say you want to take physical possession of share
18 certificates, instruments of transfer or title deeds. Now, that I accept, but how can you have
19 a section which says: "I require you to transfer", and then say: "It doesn't affect legal or
20 equitable title"? Nobody is going to understand this properly. No lawyer is going to
21 understand this properly to mean that it means handing up the physical possession of certain
22 pieces of paper. If that is what you want, then you have to draft it in such a way that it is
23 clear to anybody reading it that what you are required to do is not sign on the dotted line of a
24 transfer document, which therefore means the handing over of legal equitable title. What
25 you actually mean is that you want to seize physical custody of certain physical documents.
26 You have to make that clear. Otherwise, what does it mean by "transfer of property".

27
28 **主席：**

29
30 其實，是否只要證監會就有關物業向地產發出injunction，以禁止他

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1 們買賣這些物業，便可解決這個問題呢？

2
3 **余若薇議員：**

4
5 不管他們如何解決這個問題，這個問題也要解決。

6
7 **高級政府律師甄文蕙女士：**

8
9 主席，讓我回答剛才的問題。究竟我們可否以發出禁制令的方式，
10 禁止持牌人變賣土地呢？其實，當我們考慮現在討論的條款背後的精神
11 時，在文件第6段也有提到，我們須應付下述情況：持牌人可能會令客戶或債
12 權人蒙受損失，以及失去財產及追索權的危險。所以，在緊急關頭時，我
13 們必須迅速採取行動。如果須要到法庭申請禁制令，我相信在時間上可能
14 會有所阻礙或延誤。

15
16 **Hon Audrey EU Yuet-mee, SC, JP:**

17
18 I am sorry, Mr Chairman. I said at the beginning, I do not quarrel with the
19 legislative intent. The problem I always have with this Bills Committees is that every time I
20 raised a question they tell me “Well, this is the legislative intent”, with which I do not quarrel;
21 but you cannot then write it in such a way that does not reflect the legislative intent, and write
22 it in such a sloppy fashion that it means something else. It is absurd to say that you have
23 transfer of property and then that it does not affect legal or equitable title. What does it
24 mean? If you say “I want physical possession” say that in clear and simple terms.

25
26 **高級政府律師甄文蕙女士：**

27
28 主席，我剛才只是回答你剛剛提出的問題，即有關為何我們不規定
29 證監會向法庭申請強制令的問題。至於余議員的意見，我們聽得很清楚。
30 我們亦會在會後考慮如何可做到最好。

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1
2 **主席：**

3
4 因為動產與不動產可能存有少許分別。Ok，第199條，anymore，繼
5 續，please. There is no more in queue.

6
7 **Hon Audrey EU Yuet-mee, SC, JP:**

8
9 Mr Chairman, I have also some queries in relation to definition of “relevant
10 property”. It seems quite sure whether there are sufficient safeguards in relation to third party
11 rights, although there are certain provisions in relation to third parties applying, and so on. I
12 think it is a matter that should be carefully looked at. I am afraid I have not had sufficient
13 time to look into this, but on the face of it it looks very, very wide. I do not think sufficient
14 attention has been given to safeguard third party rights.

15
16 **主席：**

17
18 Ok，好的。如果大家同事沒有提問，我希望提出一個問題。我希望
19 研究文件的第16段一作出虛假或具誤導性的公開通訊的民事法律責任。其
20 實這條款已寫得相當清楚。雖然一些市場人士甚至建議取消這條條款，但
21 我相信某些國家也有類似的條款。

22
23 我的問題是，在一些情況下，有關人士不是自己披露虛假消息，但
24 市場已廣泛地報導一些有關他的虛假資料。在當事人或公司並不澄清這些
25 資料屬錯誤資料的情況下，第208條是不適用的，對嗎？即當局並無證據證
26 明有關人發放虛假資料，但市場卻廣泛地報導一些虛假的情況，而該人亦
27 沒有作出澄清，表明有關報導屬虛假。

28
29 具體來說，我相信公眾人士可能有興趣瞭解這個問題，例如有關某
30 人學歷的問題，該人已向公眾人士或監管者說明其具體情況，但這情況與

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1 公眾人士於很多報導中得到的概念並不相同。在這情況下，是否不可根據
2 第208條提出起訴？

3
4 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

5
6 主席，其實你剛才提到的問題，是關乎該人可否稱為 a person
7 responsible for communication的問題。例如他是董事局其中一名董事，而他
8 是actively，即積極地參與這件事時，他是應負上責任的。但如果他只是公
9 司其中一名處於重要的management位置的人，他知道有人發放一些不屬實
10 的消息，但他沒有active的責任澄清這件事，我相信在這情況下，第208條
11 便不適用。

12
13 **主席：**

14
15 我希望瞭解我們所訂的條款，與其他國家的條款是否不同。或許我
16 可舉出一個清楚的例子。例如某間公司的董事向聯交所或證監會申報的資
17 料顯示，他在某間大學尚未修業完畢，或曾於該間大學就讀，但不論是本
18 地報導或國際雜誌，已廣泛地報導該名董事於該間大學畢業，而他也沒有
19 向公眾作出澄清。根據現行法例，以及條例草案第208條，這似乎並不視為
20 違法，但根據美國現行的法例，當局可就這情況提出訴訟。請問我的理解
21 有否錯誤？

22
23 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

24
25 你的理解是正確的。

26
27 **主席：**

28
29 我的理解是正確的？

30

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1 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

2
3 對。

4
5 **主席：**

6
7 即香港現有的水平跟美國的水平相比，尚有一段距離，即就這方
8 面，有關水平是有所不同的，對嗎？

9
10 **財經事務局首席助理局長劉利群女士：**

11
12 主席，除了條例草案第208條是有關私人訴訟因由的條款，即反映
13 了《普通法》的情況外，剛才張女士也提到，現時條例草案的條款確實不
14 包括剛才所提到的情況。換句話說，條例草案中這條條款並不涵蓋廣大公
15 眾報導並非屬實的事件，而當事人又不作公開澄清的情況。

16
17 但我希望告訴大家一點，聯交所也訂有《上市規則》。根據《上市
18 規則》上市協議第2段的規定，上市發行人在合理切實可行的情況下，須要
19 盡快通知聯交所上市公司股東，以及上市證券的其他持有人任何以下的資
20 料：供上述機構人士或公眾人士評估有關上市公司的狀況所需要的資料，避
21 免有關上市公司的證券買賣出現虛假市場的情況所必須的資料，以及可合
22 理預期會重大影響有關上市公司的證券的買賣或價格的資料。如那些消息
23 與聯交所或證監會有關，上市協議會要求上市公司向公眾作出披露。如市
24 場上存有一些會重大影響有關上市公司的證券買賣或價格的信息，聯交所
25 會要求上市公司的負責人向公眾作出澄清聲明。

26
27 **主席：**

28
29 那麼我們便必須依賴《上市規則》。似乎無論是《上市規則》或第
30 208條，也不能針對這種情況。當然，一些廣泛報導的消息也可能是對該間

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1 公司或該間公司的業務有正面的影響的，但這些報導可能並非真確，而有
2 關公司亦沒有作出澄清。我只是嘗試從較廣闊的層面理解有關情況，而不
3 是從個人的層面進行討論。例如某公司傳出有關快將簽訂某些合約的消
4 息，.....或許這已涉及《上市規則》。但無論如何，假設該公司傳出一些具
5 體的，或非常factual的消息，但該公司卻沒有責任就這些錯誤報導向公眾作
6 出澄清時，情況會如何？根據現行法例和這條條例草案，有關公司無須就
7 別人披露的資料作出澄清，對嗎？

8

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

11

12 I think one has to look at the Listing Rules of the Stock Exchange, that there has to
13 be an informed market at all times; and if a company is aware – and I would stress “is
14 aware” – of incorrect information being disseminated in the market, it has an obligation under
15 the listing rules to clarify that. In the actual process of looking at rumours, one has to say
16 that a lot of rumours are circulating in the market, which initially the company might not be
17 aware of; and rumours spread like wildfire in Hong Kong because of the density of population
18 and the use of mobile phones. The other part of that would be the surveillance program of
19 the Enforcement Division of the Commission, which looks at untoward price movements.
20 The Stock Exchange also has a surveillance unit. If there is an untoward price movement,
21 the Exchange would be querying the company as to why the price would be going up or down,
22 depending on information that might be circulating; and the company would normally put out
23 an announcement at that point in time, whether there were any corporate manoeuvres that
24 were actually in process. Or if there were no corporate manoeuvres, they had no reason to
25 believe why the share was actually going up and down, to at least keep an informed market.

26

27 In the exceptional case where a company share price goes through the roof and it is
28 not justified by its fundamentals, the Commission has a residual power under Rule 9 of the
29 statutory Listing Rules to order the suspension of that share. So I think it comes down to the
30 point that one has to show that the company knows that rumour. Quite often it can be very,

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1 very difficult indeed, but in practical terms, because of the monitoring conducted by both the
2 Exchange and the SFC, any untoward movement that would result from rumours circulating
3 in the market would be picked up for proper disclosure by that company under the Listing
4 Rules.

5

6 **主席：**

7

8 我察悉你的答案。雖然有些公司對這條條款有所爭議，甚至建議刪
9 除這條條款，但事實上，這條條款對小投資者也會提供一定的保障。就如
10 我上述所提出的問題，為何美國的證監會有權就這些情況提出訴訟，雖然
11 能否入罪仍未可知，但在香港，如果第208條不獲得通過，就是提出訴訟的
12 機會也沒有？請問可否就這點作出比較？

13

14 胡經昌議員。

15

16 **胡經昌議員：**

17

18 我希望就第198條提問。該條提到“證監會可藉書面通知，要求某
19 持牌法團在香港及在香港以外任何指明地方保存某財產”，“某財產”並
20 不單指物業，也包括其他所有東西。這條款特別指明不單在香港，也包括
21 海外的地方，即在香港以外的地方。似乎其他的restriction等也沒有提到有
22 關在香港以外地方的問題，為何第198條會這樣提出呢？

23

24 另外，第198條也指明，“在符合第200條的規定下”。第200條的
25 規定是指，證監會如覺得出現某些情況，便可行使某些權力，其中包括證
26 監會認為某法團不是fit and proper的情況。就持牌法團在香港及在香港以外
27 任何指明地方保存某財方面，為何證監會可獲賦予這項權力呢？

28

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

**Bills Committee on
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1
2 I think the main answer to this one would be that you do have brokers in Hong
3 Kong that deal in overseas securities, so you would have to have the position where you can
4 in fact try and maintain those positions, maybe with custodians abroad, or with their parent
5 companies, to try and maintain that those assets are in fact maintained for Hong Kong clients.

6
7 **胡經昌議員：**

8
9 主席，其實我們在海外地方是否也有jurisdiction的權力，可以作出
10 這些要求？這項要求與香港在海外地方的權力會否有所抵觸呢？

11
12 **主席：**

13
14 但有關經紀在香港進行業務，對嗎？

15
16 **胡經昌議員：**

17
18 但海外地方同樣也有經紀在香港進行業務，他們所屬的司法管轄區
19 會否也有相應的措施呢？

20
21 **Chairman:**

22
23 Are there any reciprocal arrangements?

24
25 **Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and**
26 **Futures Commission:**

27
28 We believe the US has such a power, but we would have to check on it to be
29 absolutely certain. I think the point on this though, Mr WU, is to say that if you a broker in
30 Hong Kong that has control over assets elsewhere, and you put a restriction on maintaining

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1 his property in Hong Kong, if he then fails to comply with that, then the property under the
2 control of the broker, say in the United States or wherever it might be, is then dissipated.
3 You will be able to take action against him for failing to comply with that notice.

4
5 It really is purely to protect the clients dealing through that broker in Hong Kong,
6 to make sure you try and protect their interests as far as maintaining property in, for example,
7 an overseas custodian, where they might be holding shares. I think the point is to look after
8 Hong Kong clients.

9
10 **胡經昌議員：**

11
12 主席，我並不是反對這個做法。我只是希望瞭解，我們是否一廂情
13 願要迎娶別人，但別人卻不喜歡嫁給我們？主席，剛才證監會提到會在稍
14 後作出查證，我希望他們不單把這條款跟美國的條例作出比較，因為證券
15 業務已是全球性的業務。否則，制訂這條款便如同沒有制訂……

16
17 **主席：**

18
19 胡經昌議員，這也沒有影響的，對嗎？

20
21 **胡經昌議員：**

22
23 對，我只是就此提問吧了。

24
25 **Chairman:**

26
27 Mrs Alexa LAM.

28
29 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

30

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1 主席，其實第198條並非指規定中介人士取得property，而是maintain
2 property。因為剛才我的同事也曾提到，中介人士的資產，很可能不單包括
3 香港的資產，也包括香港以外地方的財產。當然，這些在香港以外地方的
4 資產屬另一個jurisdiction，但這個香港的中介人士須由證監會監管。所以，
5 如果真的出現問題，證監會必須要求該中介人士保護其所有的資產，而不
6 單是在香港的資產。我們只是要求他maintain有關的property。

7
8 **胡經昌議員：**

9
10 主席，條例草案的中文擬本更採用“保存財產”的字眼。但其實剛才
11 也提到，財產並非單指物業，也包括其他東西，例如若金錢是財產之一，
12 有關的中介人士當然會妥善地保存，但問題是這是否表示他不能動用這筆
13 金錢呢？

14
15 **Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures**
16 **Commission:**

17
18 Perhaps I can answer the member's question. I think in this case the money is
19 fungible obviously, and it is not specific money that is of issue. It is rather that a certain
20 amount be held, whether that be held in a specific bank account or in other forms. It is
21 rather than a certain amount of a certain quantity be held. If a broker in Hong Kong were to
22 take action, say, with funds held in US or Swiss or Singaporean bank accounts, to reduce that
23 level of funds that were required to be held, in the notice, below a certain level, then they
24 would be in breach of the notice. But if they were to perhaps maintain funds in another form,
25 at least if that were in compliance with the strict wording of the notice – and that would
26 depend on a case by case basis, on what the specific wording of the notice was – it would be
27 permissible. It would depend on how the notice was drafted.

28
29 **胡經昌議員：**

30

**Bills Committee on
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1 主席，其實這部分所提到的，不但是“保存”的意思，而是
2 restriction，即不能動用的意思，對嗎？因為我好像聽到例子中提到一個金
3 額……

4
5 **Chairman:**

6
7 Mrs Alexa LAM.

8
9 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

10
11 主席，或許讓我再作解釋。“保存”的意思是，如果共有20萬元，
12 該中介人士便必須保存20萬元。當然，金錢是無法識別的，所以，當中介
13 人士有需要作出流轉時，是可以的，但在流轉的過程中，他仍須保存這20
14 萬元，因為這筆款項將來須用作償還給香港的投資者的用途。

15
16 **胡經昌議員：**

17
18 主席，即使這是金錢方面的情況，物業方面又如何呢？如果有關物
19 業是海外的物業，證監會有甚麼權力要求該人出售物業，而將出售物業所
20 得的款項作償還之用呢？

21
22 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

23
24 該權力不是在於證監會在海外亦擁有權力，而是在於這名中介人士
25 須由證監會監管。當出現問題的時候，即使是海外的物業，證監會也會要
26 求該人保存，目的是為了將來他可能要償還給香港的投資者。該權力其實
27 是證監會對中介人士本身的監管權力，而不是證監會遠赴美國，禁止該人
28 出售物業的權力。

29
30 **胡經昌議員：**

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1
2 其實所謂“保存”，跟“凍結”有甚麼分別？意思是否不容許該人
3 買賣有關物業呢？

4
5 **Mr Mark DICKENS, Executive Director, Supervision of Markets, Securities and Futures**
6 **Commission:**

7
8 Mr WU, if you were to look at clause 198(1)(b), the power there is that the property
9 is maintained in a manner that will enable the licensed corporation “...at any time freely to
10 transfer or otherwise dispose of the property”. So the idea is that the property be available to
11 be liquidated in the interest of the corporation’s clients or creditors, and restrictions, or that it
12 be not dealt with in a way that would inhibit dealing with it, so it was available to those
13 creditors or clients.

14
15 **主席：**

16
17 但你也需參考第200條的條文。我明白你有些.....

18
19 **胡經昌議員：**

20
21 主席，第200條的英文版本已列明，“if it appears to the Commission
22 that...” ，但(b)款已訂明“...not a fit and proper person to remain
23 licensed”。這部分所指的不是“and”而是“or”。即只要證監會認為符合
24 某一段的情況，便可施加有關的禁止或要求。反而第(d)款所列的
25 “revoked”或“suspended”，則是合理的做法。

26
27 假如證監會覺得該法團並非繼續持牌的適當人選，便可施加禁止或
28 要求，這是否有些過分呢？就第(d)款而言，假如該人的牌照已被撤銷或暫
29 時吊銷，施加禁止或要求也算合理。

30

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1 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

2
3 主席，我相信我們應從另一個角度理解，由於整個結構也是為了保
4 障投資者和中介人士的客戶，當然最終也要使兩者取得平衡，所以，假如
5 真的出現問題，那些資產便十分重要，因而應盡量保存，使受害人將來可
6 獲得補償。

7
8 假如證監會覺得該人出現問題，不再是fit and proper時，應否於該
9 剎那便要求該人maintain那些property呢？

10
11 第一，證監會只是要求該人maintain那些property，而不是要求該人
12 變賣那些property。

13
14 第二，該人可就這個決定向證券及期貨上訴審裁處提出上訴。當
15 然，即使該人就該決定提出上訴，證監會亦可要求即時執行這個決定。但
16 即使證監會要求即時執行這個決定，該人亦可向審裁處申請暫緩執行令，
17 然後即時處理這個case。

18
19 我相信到最後的情況，便應由請大家作出balance。

20
21 **主席：**

22
23 OK. 余若薇議員。

24
25 **Hon Audrey EU Yuet-mee, SC, JP:**

26
27 Yes, Mr Chairman. As I said earlier, I have a number of red flags in relation to
28 this part. Can I follow up on the question you asked about section 208 first?

29
30 **Chairman:**

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Yes.

Hon Audrey EU Yuet-mee, SC, JP:

This is the civil liability. This section relates to “person who is responsible”. Does that include “company” – because if you look at the Chinese it refers to “人” as opposed to “公司” – company. I do not know whether the word “person” and the Chinese word “人” applies to “company”. That is my first question in relation to section 208.

Chairman:

“...if the company makes false statements”?

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

讓我們首先討論關於“人”的問題。根據《釋義及通則條例》第1章，“人”包括“自然人”和“法人”。

Hon Audrey EU Yuet-mee, SC, JP:

So it includes “company”.

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

對。

Hon Audrey EU Yuet-mee, SC, JP:

I cannot understand sub-clause (3)(a). What does it mean when it says “...unless

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1 he has assumed responsibility with respect to other persons in connection with the relevant
2 communication”? What circumstances would entail assuming responsibility with respect to
3 other persons in connection with the relevant circumstances? That is my second question.
4

5 My third question is the relationship between this clauses 208 and 107, civil
6 liability for inducing others to invest money in certain cases. There are certainly
7 circumstances which may fall within both clauses 107 and 208. However, clause 208(9)
8 provides that this section does not apply if it falls within clause 107. I am not quite sure
9 whether there would be a difference in the damages payable under clauses 107 and 208, and
10 whether in those circumstances a person can elect whether to sue under clause 107 or to sue
11 under clause 208. Of course, the problem is that it puts it in such a term in clause 208(9).
12 Does that mean the person has to elect before he knows which section will provide the larger
13 amount of damages? Can you explain the different circumstances under clauses 107 and
14 under 208, and why it is that you want to put it in two different clauses?
15

16 A question related to this of course has been raised by the legal adviser, which is
17 that he is not quite sure what would be the standard basis, whether it is contractual or tortuous,
18 or some other different base, because this clause 208 provides very clearly that it is in addition
19 to any other remedy you have in law, which means that it is in addition to contractual remedy,
20 in addition to tortuous remedy. So it is a new kind of statutory right, and therefore what
21 would be the basis for calculating the damages under clause 208? That is, I think, also the
22 question raised by the legal adviser.
23

24 ***Miss Vivian LAU, Principal Assistant Secretary for Financial Services:***
25

26 Chairman, may I invite Mr BARR to answer the Honourable Member’s question?
27

28 ***Chairman:***
29

30 Yes, Mr BARR?

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1
2 *Mr Charles BARR, Deputy Law Officer (Civil Law):*

3
4 Yes. Thank you. I think as Common Law lawyers we are at something of a
5 disadvantage in thinking of things in terms of causes of action. We have always thought –
6 - and indeed every lawyer who has looked at this, and that has been a large number, has said:
7 “Is this a contract that you’re suing in respect of, or is this a tortuous relationship, or some
8 other?” I think it is important to get off on the right foot, that we are not trying to emulate a
9 contractual cause of action, and we are not trying to emulate a tortuous cause of action. We
10 have made it quite clear that the Common Law will, and should, develop independently.
11 (See subsection (9)).

12
13 What we are trying to do is to make it quite clear that there may be a duty of care
14 for the purposes of clause 208, and there may be a cause of action for the purposes of the
15 other clause 107, in certain circumstances. We did not want, if I understand the instructions
16 that have been given to the department correctly, to create strict liability. We could not see
17 why plaintiffs in medical injury cases should be at a disadvantage compared with plaintiffs
18 who have suffered financial loss in the market. Conversely, we did not want to impose just
19 liability where there was deceit or fraud. We wanted to impose a morally fault-based system
20 for both provisions. We wanted to do it by statute, so it was visible and transparent, easily
21 signposted.

22
23 Looking at the fault-based systems for certain statements, the courts have been
24 agonizing over that since at least 1964, with Hadley Byrne and Heller. There have been a
25 large number of cases. We think we are familiar with all the significant ones, and we are
26 happy to share the lists with you. We have been in dialogue with the Bar Council. In our
27 White Bill, we wanted to use the test of fair, just and reasonable, to establish where that duty
28 of care may arise, because we think that with the clearest signposts now, at the highest level,
29 that that is the moral standard where a duty of care may be found to arise. We are
30 encouraged by some of the recent House of Lords decisions in the UK on that, particularly the

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1 KPMG case.

2

3 However, when we put this in the White Bill to a consultation, the Bar Council got
4 in touch with us and said they preferred assumption of responsibility as the test. We
5 produced a paper which, as far as we know, the Bar Council is comfortable with. We have
6 not heard any dissent so far. But we could not see any problems in putting both of the tests,
7 assumption of responsibility or fair, just and reasonable, in sub-clause (3).

8

9 So we do not want to establish strict liability. Nor do we wish to only target fraud
10 and deceit. We want a fault-based system. We have looked at the Common Law to get the
11 lessons learnt over the last 36 years since Hedley Byrne, and longer if you go back to the
12 earlier duty of care principles – much longer. We think we want to use the benefit of that, to
13 take the benefit of that, in the knowledge that the Common Law may develop differently in
14 the next 5, 10, 15 or 20 years. Then of course we will have to look to see whether or not the
15 ordinance should or should not be amended.

16

17 Three examples immediately come to mind of where we have created statutory
18 wrongs. We did it in the Occupiers Liability Ordinance.

19

20 ***Hon Audrey EU Yuet-mee, SC, JP:***

21

22 Mr Chairman, can I stop that? I am not querying the creation of a statutory
23 wrong. I am simply asking the question: what does it mean when you say somebody
24 assumes responsibility? Does that mean somebody signs it, or does it mean somebody has to
25 say “I assume responsibility”, or somebody has to utter a statement? What does it mean? I
26 am not querying the creation of statutory liability. I accept that entirely.

27

28 The other question I ask is: what is the basis for calculating damages? Is it the
29 contractual basis, a tortious basis, or some other basis? That is all I am asking. I am not
30 saying “This should be scrapped”. So there is no need to tell me that there are statutory

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1 liabilities and occupiers' liability. I accept all that.

2
3 ***Mr Charles BARR, Deputy Law Officer (Civil Law):***

4
5 I am grateful for that, and I would like to answer it in this fashion, if I may. With
6 the three statutory wrongs that have been created, none of those refer to the calculation of
7 damages. Having practised in this area for some time, plaintiffs plead in the alternative.
8 They plead breach of the statute under the Occupiers Liability Ordinance, the common duty
9 of care; and they plead breach of the duty of care in standard duty of care principles.

10
11 The courts work out the damages in that case essentially by reference to the
12 tortious principles. They look to see proximity; they look to see what is a reasonably
13 foreseeable loss; and we would expect them to do the same here, and not be troubled by this
14 concept. We are understandably reluctant to tell the court how to calculate the damages.
15 We did not do so in the three other statutory instances, and we do not see why we should do it
16 now. The courts are more than able to do that. The thought that they might take us back to
17 the primeval slime, with some proximate cause, is not the concern we have. They will be
18 sensible in the formulation of what is a loss that follows from the reckless, negligent or
19 fraudulent statement.

20
21 I have been asked whether clause 208 is going to go off on tortious principles.
22 The answer is: it is many of the characteristics of a tort, and I would expect the court, when
23 they see the words "assumption of responsibility" and they see the words "fair, just and
24 reasonable", to be thinking in that constellation of stars where tort is concerned. Tort is civil
25 wrong, non-contractual, whereas with clause 107, I would expect the courts to be looking
26 more at the contractual nature of the responsibility, where the measure of damages, I would
27 expect, could be calculated differently. For purposes of clause, on the basis of what would
28 have been the basis if the contract had been properly performed according to its terms and
29 what was in the reasonable contemplation of the parties.

30

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1 The strength of clause 208, if you look at the wording of sub-clause (1), is that it
2 deals with omissions, where there may be a duty to make a statement. It deals with where
3 someone has refrained. So that, to us, indicates that it is unlikely to go off on contractual
4 principles, because as far as we are aware, there is never any contractual liability if you do
5 nothing. You will not have contracted; whereas clause 107 is rather different.

6
7 As far as the election point is concerned – could a plaintiff elect for clause 107 or
8 elect for clause 208, and could he leave it to the last moment, thereby presumably unsettling a
9 defendant? This would be a matter of pleading. He would have to be careful in his
10 pleadings as to how he does it. He would certainly not be able to plead both of them by
11 reference to the word "further". He would have to plead one or the other. If he failed under
12 clause 107 then he would presumably allege facts which might bring him within clause 208.
13 Yes, it would be for the plaintiff to be careful in his pleadings and to make an election in
14 drafting the statement of claim.

15
16 ***Hon Audrey EU Yuet-mee, SC, JP:***

17
18 Yes, Mr Chairman. I think from the very long answer I get the short answer to the
19 point, which is that it is tortuous. In relation to sub-clause 3(a), I still have not got from your
20 long answer what is meant by "He has assumed responsibility". How does it add to sub-
21 clause (1)(a), because sub-clause (1)(a) starts off by saying "A person is responsible for a
22 relevant communication he made", and of course there are later on certain exceptions in
23 relation to people, like, for example, broadcasters or people just passing on information. I
24 can understand that. So we start off by saying a person is responsible for the relevant
25 communication, and then we look at sub-clause 3(a), and it says: "No person shall be liable
26 unless he has assumed responsibility with respect to to the other person". It means of course
27 that it requires something additional to a person being responsible, so what I am asking is:
28 what does it encompass? How would a person be taken to have assumed responsibility with
29 respect to the other person? Does that have to be made clear in some specific way, and what
30 would that be?" or simply a person made a statement and somebody relied on it; or it has to

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1 be specially made to the person. A has communicated with B, and said “I assume
2 responsibility to you, Mr B”. Is that what is meant?
3

4 ***Mr Charles BARR, Deputy Law Officer (Civil Law):***
5

6 I am a little bit taken aback at the question, if I may say. The assumption of
7 responsibility is a test that the courts have been using for some 46 years. I have never heard
8 it said that there has to be a statement at the time – “I assume responsibility for what I say” –
9 although of course there may be, but it is unlikely, I suggest. What it is trying to do is to
10 look at the circumstances of the relationship and to say “In those circumstances, would it be
11 appropriate for a defendant to be responsible civilly for certain losses which have flowed from
12 the statement that he has made?”
13

14 The example that is given, I think, is: at one end of the spectrum you would have a
15 casual statement made in the most obvious and harmonious social circumstance, where a
16 person is talking in a very free manner. You would not expect that to be giving rise to an
17 assumption of responsibility. At the other end you may have something in writing – very
18 formal, very considered, very deliberate – which is issued, where there would be more likely
19 to be an assumption of responsibility. But to answer the question in simple terms – “Would
20 somebody sign something? Would somebody have to say ‘I’m assuming responsibility’” –
21 this is a much more subtle, a much more useful and a much more realistic test than is
22 suggested.
23

24 ***Hon Audrey EU Yuet-mee, SC, JP:***
25

26 Mr Chairman, Mr BARR says that it has been around for 46 years or something.
27 The normal way I thought it was expressed is that you make a statement and you would
28 reasonably expect somebody to rely on it. That is the way that is normally understood.
29 You should expect reliance. So when I look at section 3(a) where it says “He has assumed
30 responsibility with respect to the other person”, is it meant the same way, that you would

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1 expect somebody to rely on your statement, and therefore you are liable? Or are you saying
2 something in addition to that, that you have to actually do something else to assume
3 responsibility? I mean, that is the simple question I am asking.

4
5 ***Mr Charles BARR, Deputy Law Officer (Civil Law):***

6
7 I think it is more complex than that. I think the first reference to responsibility in
8 the section is talking about a rather blunt instrument, largely causative and factual. The
9 second reference in subsection (3) is talking about the complexity of whether a person should
10 morally be responsible in those circumstances, for the financial loss that he causes. There is
11 a difference, I suggest, between making a statement - being responsible for a statement, as I
12 am at the moment when I am speaking, in the sense that I am speaking - and the moral
13 consequences of loss that may follow from that. To apply to these circumstances, I would
14 not expect people listening to me to be making financial investments on the strength of my
15 comments at the moment in the Bills Committee. But I do accept responsibility for the
16 utterances that I make, in the sense that I am controlling those statements.

17
18 ***Hon Audrey EU Yuet-mee, SC, JP:***

19
20 Mr Chairman, I do not really want to get into a long argument, and it is not my
21 intention to argue. Can I simply ask one last time? Does section 3(a) mean anything more
22 than that the person who made the statement should reasonably expect the listener to rely on it?
23 Does it mean anything more than that?

24
25 ***Mr Charles BARR, Deputy Law Officer (Civil Law):***

26
27 It may do, because the statement that you have put to me is not the normal
28 formulation of the duty of care in these circumstances, although I have no doubt that there are
29 paraphrases to that effect; but it is not the usual, the most commonly-used expression in
30 circumstances which give rise to a fault-based system for economic loss flowing from

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1 carelessly-made statements.

2
3 **副主席：**

4
5 主席，我們討論中文文本時，草擬科的同事再三強調，希望採用某
6 些中文草擬的方法，使公眾人士較容易明白；他們認為草擬英文本方面，
7 則不需要採用其他方法，因為英文較容易明白。但現在看起來，英文擬本
8 卻是很難明白，正如在剛才的對話中，Mr. BARR好像是針對余若薇議員本
9 身作為律師，與她討論採用一些法律的語言。其實，我相信大家也希望明
10 白第208條第(1)款和第(3)之間的分別。第(3)(a)款提到，“……有關通訊有關
11 連的情況下就該另一人承擔責任”。即“有責任”、“承擔責任”和“對某些人承
12 擔責任”之間是否有分別呢？表面看來便好像有所分別。但實質分別何在
13 呢？我們只是希望使公眾明白第(3)(a)款是甚麼意思。但我們聽來聽去，也
14 聽不出有何分別，以及“承擔責任”有甚麼意思。

15
16 若英文本是難以明白，既然中文本較易明白，我們便只好參考中文
17 本。中文版第(1)(a)款提到，有關人士對於發出的有關通訊是負有責任的，
18 而第(3)(a)款指出若有關人士向某位人士承擔責任，才須作出賠償，否則便
19 不用作出賠償。所以我便希望知道何謂“有責任”，何謂“對另一個人承擔責
20 任”，問題就是這麼簡單而已。可否採用非法律的語言解釋現時有關係文所
21 訂的內容呢？

22
23 **Deputy Chairman:**

24
25 You don't have to speak Chinese, although I did, and although I referred to the
26 Chinese version.

27
28 **Mr Charles BARR, Deputy Law Officer (Civil Law):**

29
30 I am not going to embarrass myself by trying. To some extent I feel that the Bar

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1 Council might helpfully answer that question, because we have put in section 3(a) "...he has
2 assumed responsibility" at their request. It is their preference to have an assumption of
3 responsibility test.

4
5 ***Deputy Chairman:***

6
7 I do not wish to be disrespectful, but all sorts of people suggest all sorts of things to
8 the Bills Committee, and to the Administration.

9
10 At the end of the day unfortunately we shall not be holding the Bar Council,
11 especially the public - - the public will not then go to the Bar Council for remedy. I assume
12 that if the government accepts our suggestion, the government identifies with it and thinks it
13 is a jolly good idea. So I think that neither Audrey nor I feel any compulsion to defend a
14 suggestion simply because it comes from the Bar Council. So if you could explain it to us as
15 you see it, so that we do not have to have the Bar Council standing between us, it would be
16 much easier for us.

17
18 ***Mr Charles BARR, Deputy Law Officer (Civil Law):***

19
20 The reason I was mentioning that is because I do not feel it adds anything to what is
21 in (b), "fair, just and reasonable". But the Bar Council took the view that it did, that there
22 were some shades of meaning there, and that the Common Law was developing in two ways;
23 and they thought that assumption of responsibility was an appropriate test nowadays, an
24 appropriate benchmark.

25
26 The House of Lords decisions have said you can use one or the other, the opposite
27 side of the coin in one case. So on that basis I am happy to include it. I have no particular
28 problems with including it, and I endorse it on the basis that it adds very little to what is in (b),
29 which is what was in the White Bill and our preference, and what we believe is a correct
30 statement of the duty of care in the circumstances.

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1
2 I understand that in subclause (1)(a) the word “responsible” there is, as I mentioned,
3 a rather blunt test for establishing who issued, who caused it to be published, who uttered it,
4 who had control over its dissemination. That is the purpose, I understand, of the word
5 “responsible” in subclause (1)(a) as I read it, but that does not in any way deal with the
6 special relationship, to use the old-fashioned expression, which may or may not exist between
7 the person who is responsible for uttering or publishing or disseminating the information, and
8 the person who has received it and acted upon it. That is the relationship.

9
10 **副主席：**

11
12 主席，簡單來說，情況是否這樣：第208條第(1)款及第(3)(a)款的分
13 別，在於首先必須發生第(1)款所訂的情況，即在這個情況下，便會引致須
14 作出賠償，而第(3)(a)款則訂明誰人可要求有關人士作出賠償，即有關人士
15 只須向其承擔責任的人作出賠償？如果是這樣，有關人士如何對該人承擔
16 責任呢？

17
18 假設我曾發表一些言論，是所有人士也可聽到的。那麼是否必須是
19 我曾對他承擔責任的人，才有權因我所發表的言論，要求我作出賠償？

20
21 **Mr Charles BARR, Deputy Law Officer (Civil Law):**

22
23 Assumed responsibility or in circumstances where it is fair, just and reasonable.
24 Yes.

25
26 **副主席：**

27
28 So in that case, 我們.....對不起，讓我繼續使用中文，似乎以中文
29 發言較好。我們是否仍須討論，哪類行為才包括在內？即我希望瞭解，你
30 所提到的須視乎有關通訊的人是否對該人承擔責任，那麼哪類行為才算對

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1 該人承擔責任呢？

2

3 **Mr Charles BARR, Deputy Law Officer (Civil Law):**

4

5 I think a large number of issues will have to be looked at. Obviously the
6 transaction itself is important – the context in which it was made; the experience of both the
7 speaker and the person who has listened and acted upon it; whether any disclaimers were
8 issued at the same time; whether it would have been appropriate to have issued any
9 disclaimers; whether there is any element of one person instructing another, of education; the
10 history of the relationship between the parties – whether this is a one-off or whether this goes
11 back a period of time; whether this is a business-building exercise or whether this is a
12 marketing exercise.

13

14 My colleagues in the SFC will perhaps have other examples of where there may or
15 may not be a relationship such as I have described in sub-clauses 3(a) and 3(b). But I do not
16 want to do, Chairman, is to try and limit it to circumstances where a person has said: “I accept
17 responsibility”, or “I assume responsibility”, and he signs on the dotted line. That would be,
18 in my view, quite wrong. This is a dynamic; this is a subtle provision when you look at all
19 the circumstances.

20

21 **副主席：**

22

23 主席，我可否提出一個有關政策的問題，而並非一個有關草擬的問
24 題？例如在第208條第(3)(a)款，有關政策的目的，是涵蓋哪些人士及摒除哪
25 些人士呢？即該款的目的，是令哪些人士可獲得賠償，而哪些類別的人士
26 不可獲得賠償？可否舉出一些例子？制訂第(3)(a)款必然存有目的。我們希
27 望明白，該款的目的是保障哪些人士，而認為哪些人士不應受到保護，以
28 及不可追討賠償。

29

30 **Chairman:**

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1
2 Mrs Alexa LAM.

3
4 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

5
6 主席，或許我以中文簡單地，並以一般人採用的方式解答副主席提出
7 出的問題吧。我認為我們可作這樣的理解：第208(1)(a)條的目的，是幫助法
8 庭決定，應由誰人對有關的statement負上責任。即有關statement是由該人作
9 出的，還是由該人負責請別人替他作出的。其實這條的目的，是用作作出
10 這項決定的。

11
12 而第208(3)條方面，其實正是剛才Audrey所提到的該點。由於這做
13 法其實是侵權的行為，即可以tortuous的concept來理解，所以，其實第208(3)
14 條的目的，是幫助法庭決定，在哪些情形下，負責作出有關statement的人，
15 才須對控告他的第三者負上duty of care。我不知這個解釋會否較易解理.....

16
17 **副主席：**

18
19 對不起，請你重複最後的一句。

20
21 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

22
23 據我個人的理解，第208(3)條的目的，是幫助法庭決定，在哪些情
24 形下，負責作出有關statement的人，才須對控告他的第三者負上duty of
25 care。

26
27 **副主席：**

28
29 剛才你不是說會以中文作出回應嗎？

30

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2
3因為我的中文不太靈光。

4
5 **副主席：**

6
7 主席，但從表面看來，第208條第(1)款列明有關“賠償另一人”的部
8 分，英文本是“any other person”，即指任何人，而第208條第(3)款，則將
9 該範圍重新收窄至該人須有理由指出，有關人士曾對其承擔責任。至於有
10 關人士有否承擔責任，妳的說法是既然法庭的能力如此高，便交由法庭考
11 慮所有情況後作出決定。妳的意思大致是這樣吧。

12
13 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

14
15 我認為第208條第(3)款的目的是，是根據Common Law中duty of care
16 的原理所草擬的。至於該款是否真正能清楚顯示如何計算duty of care，我
17 們可繼續就這點進行討論。但我認為有關的目的，並非是使所有人都須負
18 上責任，而只是使有須要負上責任的人才須負上責任。

19
20 **主席：**

21
22 我希望再跟進有關第208條的問題，因為我對該情況較為關心。其
23 實，在公眾提出的意見中，有些意見是相當強烈的，例如提出取消整條條
24 例草案。但我認為，提出取消這條條例草案的人士所屬的母公司所處的監
25 管地區，例如美國，可能也訂有類此的嚴厲法例。

26
27 你們提交的文件第17段，即與其他國家的比較的部分，亦提到美國
28 的情況。請問政府可否就引用cause of action的問題上，美國如何處理有關
29 披露虛假資料方面的情況，多作一些研究的工夫。如果香港的水平較美國
30 遜色，我們也不會介意，但我們亦希望知道香港的水平較美國的水平低多

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1 少。最低限度，對於某些情況，在香港是不能提出訴訟的，但在美國卻是
2 可以提出訴訟的。因為公眾人士要求我們取消這條條例草案，但我們卻把
3 它保留，所以我們希望就這方面的情況作出比較。希望政府跟進這件事情。

4
5 余若薇議員。

6
7 **余若薇議員：**

8
9 主席，第204條第(1)款及第(2)款提到不同的情況。我希望詢問，因
10 何須訂有第(2)款，因為第(1)款已訂明，證監會已行使權力，對有關人發出
11 禁止或要求，但該人沒有遵從，所以證監會便向原訟法庭證明該人沒有遵
12 從，要求法庭命令該人遵從該項禁止或要求，否則便是藐視法庭。即這便
13 已表示該人沒有遵從該項禁止或要求。

14
15 但第(2)款則訂明，如有合理可能該人會不遵從有關的禁止或要求，
16 證監會可向法庭申請命令，飭令該人遵從。

17
18 其實按理第(1)款應已包含第(2)款的情況。如果證監會已要求該人
19 遵從有關的禁止或要求，但該人沒有遵從，證監會便可提出證明，該人沒
20 有遵從有關的禁止或要求，那為何須制訂第(2)款呢？是否因為在某些情況
21 下，證監會可能會要求該人在10天的期限內作出某件事情，而到了第5天，
22 雖然10天的期限仍未屆滿，但證監會已懷疑，即使10天的期限屆滿，該人
23 也不會遵從，所以在第5天便根據第(2)款提出申請，認定該人即使到第10
24 天也不會遵從有關的禁止或要求呢？這是否分別所在，還是有其他原因，
25 須要訂明(1)和(2)的分別呢？

26
27 **Chairman:**

28
29 Mrs Alexa LAM.

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1 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

2
3 主席，或許我嘗試回應這個問題吧。其實該款的意思與剛才Audrey
4 所提出的差不多。第(1)款是originating summons procedure，是較快捷簡單
5 的程序。在一般的情況下，如果證監會覺得有關人士會遵從其指示，便會
6 採取這個程序，因為這個程序較為快捷便宜……

7
8 **余若薇議員：**

9
10 不對，第(1)款是指該人沒有遵從有關指示。請細心閱讀第(1)款，
11 該款是指證監會向該人發出禁止或要求，但該人沒有遵從，證監會才應用
12 第(1)款。

13
14 **Chairman:**

15
16 ...“fails to comply”.

17
18 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

19
20 對。對不起，讓我再看一遍。

21
22 **高級政府律師甄文蕙女士：**

23
24 或許我可先回應關於這條條文的內容。第204(1)條確實是指若該人
25 沒有遵從有關的禁止或要求，證監會便可向法庭申請，要求法庭判處該人
26 藐視法庭罪或發出其他命令。

27
28 而第(2)款確是指一個合理可能，即有“reasonable likelihood”該人會
29 不遵從有關指示，所以證監會便可向法庭申請命令，要求該人作出或不作
30 出某些行動，其實有關情況與禁制令有一些相似，即要求該人於一段過渡

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1 時期內，作出或不作出某些行動，這是在該人不遵從有關指示的情況尚未
2 發生前適用的。

3

4 **余若薇議員：**

5

6 第(2)款的情況是在限期尚未屆滿時，證監會已懷疑該人在限期屆滿
7 前也不會遵從有關指示，所以便根據第(2)款先作出申請，要求該人在限期
8 屆滿前必須遵從有關指示，是否這個意思呢？

9

10 **高級政府律師甄文蕙女士：**

11

12 對。

13

14 **余若薇議員：**

15

16 因為根據證監會對一些詢問作出的回覆，證監會表示兩者有所不同，
17 一個程序較為快捷便宜，另一個程序較為緩慢昂貴，但我卻看不出有
18 快捷便宜和緩慢昂貴的分別，因為兩者也是透過同樣的程序進行，兩者也
19 是根據originating summons或originating motion進行。我惟一看到的分別，
20 是其中一個情況是限期尚未屆滿，而另一個情況是限期已經屆滿，並已超
21 出有關限期。

22

23 **高級政府律師甄文蕙女士：**

24

25 其實制訂第(2)款的目的，主要是針對originating summons和
26 originating motion的分別。這兩者分別於第(1)款和第(2)款出現，即第(1)款
27 和第(2)款說明這兩個方式有何分別。所以，制訂第(2)款的目的，並不是針
28 對第(1)款和第(2)款的分別，而只是針對originating summons和originating
29 motion的分別。

30

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1 **余若薇議員：**

2
3 主席，另外我希望就第205條提問。有關清盤令及破產令的第205條
4 訂明，證監會可申請將任何一類公司清盤。為何須作如此廣泛的草擬方式，
5 以涵蓋任何公司，而不是只限於licensed corporation？這款的意思是否證監
6 會可申請將全港任何公司清盤，而不單是從事這個行業的公司？涵蓋範圍
7 是否真的需要那麼廣泛呢？

8
9 **主席：**

10
11 證監會是有權申請將上市公司清盤的。

12
13 **余若薇議員：**

14
15 對於上市公司，處理方法也是一樣。即第205條提到任何公司，而
16 第207條提到上市公司時，也是指任何上市公司的。

17
18 **主席：**

19
20 我明白妳提出的問題。妳的問題是上市公司和licensed corporation
21 方面也沒有問題，但除這兩者以外，會否還有其他公司。Audrey，對嗎？

22
23 **余若薇議員：**

24
25 對，即現時的涵蓋範圍廣泛至包括所有公司。我明白在一些情況
26 下，證監會可能也希望申請一併將該公司的附屬公司或有關公司清盤，但
27 正如我最初提出的疑問，如果有關的立法意圖是使證監會有權申請將某一
28 類公司清盤，便應列明該類別的公司，而不能草擬至證監會可申請將全港
29 所有公司清盤。

30

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1 **主席：**

2
3 我相信其他有關公司的條例已訂明，政府有權要求公司清盤，問題
4 是證監會應否具有這項權力，對嗎？

5
6 我的意思是如果是基於其他理由，其他政府機構也可要求公司清
7 盤，但證監會當然是由於須履行某些責任，才有權要求公司清盤。

8
9 Mr BAILEY.

10
11 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
12 ***Futures Commission:***

13
14 In practice we have got this – as far as the winding-up is concerned – in section 45
15 of the Securities and Futures Commission Ordinance. It has really been used in two
16 circumstances. Following a limited company inspection we have applied, from memory, I
17 think on two occasions for winding-up; and as far as brokers who find themselves in extreme
18 financial difficulties are concerned, I think we have applied on about five occasions for that.

19
20 I would add that we have got this, but we have to go to the court and we have to
21 show that it is - - the court has to be satisfied that it is just and equitable that the corporation
22 be wound up. So those are the situations that we have in fact applied in the past – either
23 following a listed company limited inquiry, and for brokers who have found themselves in
24 extreme difficulty.

25
26 It is the existing law, and it has been used actually quite sparingly. It is one of
27 these provisions where the Commission has to make the decision. It is not a delegable
28 function. It is actually made by the full Commission.

29
30 ***Chairman:***

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1
2 I think we are still asking the same questions – whether it is appropriate for you to
3 have the winding-up procedures only applying to either the listed company or the licensed
4 corporations. Beyond these two types, what other possible reasons could that trigger your
5 winding-up?

6
7 ***Hon Audrey EU Yuet-mee, SC, JP:***

8
9 Mr Chairman, may I also point out that in the document, in the Administration’s
10 response to HKSA, it is said: “The SFC may need to use the power against licensees or
11 related corporations which are not listed”.

12
13 ***Mr Paul R BAILEY, Member of the Commission and Executive Director, Securities and***
14 ***Futures Commission:***

15
16 There would be situations, even with a listed company – there might be situations –
17 where you would want to look at a subsidiary licensed company. You might want to look at
18 related corporations if their conduct is affected.

19
20 ***Hon Audrey EU Yuet-mee, SC, JP:***

21
22 Yes, Mr Chairman, but if the interest, the widest scope expressed in this document,
23 is only licensees or related corporations, should not the same phrase be used in the statute? I
24 think this is the question that we are asking for an answer.

25
26 ***Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures***
27 ***Commission:***

28
29 Would you please repeat your question?
30

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1 *Hon Audrey EU Yuet-mee, SC, JP:*

2
3 In the document in which your response to HKSA is summarized under section 205.
4 You say that the SFC already has the power under section 45 of the SFCO. “The SFC may
5 need to use the power against licensees or related corporations which are not listed”. So you
6 have put an ambit to the possible use. Could you use the same phrase? It is a good idea to
7 use the same phrase, rather than just broaden it to “any corporation”.

8
9 *Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures*
10 *Commission:*

11
12 The definition of “related corporation” is actually in Schedule 1 on page C2403.

13
14 *Hon Audrey EU Yuet-mee, SC, JP:*

15
16 “Related”?

17
18 *Mrs Alexa LAM, Executive Director and Chief Counsel, Securities and Futures*
19 *Commission:*

20
21 Now, in the case of a listed company, I think it is quite obvious that with respect to
22 a subsidiary that is not listed, there may be ample public-interest reasons to also cover the
23 winding-up of this company. In relation to registered persons, we are not just talking about
24 registered persons. They could have nominee companies; they could also have custodians.

25
26 *Hon Audrey EU Yuet-mee, SC, JP:*

27
28 The term “related corporation” is in fact defined. Why should the same ideas not
29 be incorporated into section 205? You are not seeking to wind up just any company or
30 corporation in the world. You just want to use the power against licensees or related

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1 corporations, which are defined. So maybe the Administration should consider narrowing it
2 by pointing it out.

3
4 ***Miss Vivian LAU, Principal Assistant Secretary for Financial Services:***

5
6 We will do that.

7
8 ***Chairman:***

9
10 Okay. Audrey?

11
12 ***Hon Audrey EU Yuet-mee, SC, JP:***

13
14 That answers the question in relation to clause 205. Mr Chairman, in relation to
15 clause 206(2)(d) on injunctions, there are a number of orders that can be asked for. (d) on
16 the face of it is very, very wide. “An order appointing a person to administer the property of
17 another person...” can be any person. Again, for the same reason, I hope that these sorts of
18 drafting can be tightened a little bit. I mean, I understand the flexibility that the SFC wants,
19 but on the other hand I really do not like drafting that applies to everybody, every corporation.
20 It is really the same point. If you really want to extend the order to a class of person, you
21 specify that, just to tighten up the drafting.

22
23 Also sub-clauses (7) and (8): there have already been a number of queries raised in
24 relation to sub-clause (7), which is “...the Commission shall not be asked to give an
25 undertaking of the damages”. I do not agree with that, and I note that in the
26 Administration’s response, the Administration has agreed to delete this, which I think is a
27 welcome stand. As far as sub-paragraph (8) is concerned, again I have some queries in
28 relation to that.

29
30 ***Chairman:***

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1
2 What do you mean by subparagraph (8)? 206?

3
4 ***Hon Audrey EU Yuet-mee, SC, JP:***

5
6 That is C1949, which is clause 206, the same section we are looking at, which is
7 “injunction”. Sub-paragraph (8) is (a), an order which means an injunction may be made
8 whether or not it appears to the court that a person intends to engage again, or continues to
9 engage, in these acts; or (b), the person against whom the order is made has previously
10 engaged in any of these acts; or (c), if there is any imminent danger of the person engaging in
11 these acts. Whether or not these circumstances exist, an injunction can be made – which is
12 contrary to the normal principles for making an injunction. There probably is some good
13 reason for putting it as widely as that, but can we have the reason?

14
15 ***Miss Vivian LAU, Principal Assistant Secretary for Financial Services:***

16
17 Chairman, on the Honourable Member’s comments on this clause, we will consider
18 after the meeting, and come back to you.

19
20 ***主席：***

21
22 我相信時間也差不多了。Audrey，你是否已把妳所有的問題提出？

23
24 ***余若薇議員：***

25
26 主席，今天開會時才收到新發出的Paper 9A/01，所以我尚未有時間
27 仔細閱讀一遍。我閱讀第X部時，已貼上了很多表示危險的紅色信號旗，因
28 為證監會獲賦予的權力很廣泛。當然，我明白需給予證監會很大的彈性，
29 但我很擔心，由於草擬方式過於鬆散，不但licensed corporation會受到影響，
30 第三者也會受到影響。

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1
2 很多方面的涵蓋範圍也很廣泛，雖然當局的意圖是證監會不會如此
3 廣泛地行使這些權力，但草擬時使範圍如此廣闊，也不是太好的做法。所
4 以，我希望證監可加以留意，我也希望立法會秘書處的法律顧問可仔細閱
5 讀這部分。我認為這部分存有許多法律上的問題。例如有關禁制令方面，
6 草擬方式非常廣泛，以致牽涉很多有關第三者的權利，我也不知當局會否
7 就這方面制訂適當的保障措​​施。當然，我是同意有關保障投資者的大前提
8 的，我也同意在行使權力方面，應賦予證監會彈性。但即使以這兩者為原
9 則，也仍有可作出改善的地方。

10
11 **主席：**

12
13 大家同事可就這方面作出討論，或許也讓我提出我的看法。當執行
14 這些法例的時候，在緊急情況下，資產可能會不斷地被他人透過不同途徑
15 被取走。當資產不斷地被他人取去，而執法行動又緩慢時，小投資者原本
16 可取得6成的賠償，最後或許只可取得4成、3成、兩成的賠償，甚至無法取
17 得賠償。這存在一個危險的情況。當然，證監會在應用這條條款時，必須
18 非常小心。我們稍後可就這方面進行討論。首先，在使用這些條款時要非
19 常小心，但一旦應用這條條款，有關人士便可能要作出賠償。我們同事間
20 可能也需就這個問題進行討論，因為若把這條條款收窄，亦會存有問題。

21
22 **副主席：**

23
24 主席，我有另一個看法。一般人可能會覺得，有關的涵蓋範圍越是
25 廣泛，有關的權力便越容易行使。其實情況並不是這樣。當涵蓋範圍越是
26 廣泛時，在法律上亦會產生很多不明確的地方，而在執行時便會出現問題。
27 我認為較佳的做法，是當涵蓋範圍十分廣泛時，我們便就每個涵蓋範圍廣
28 泛的情況，研究為何要以那麼廣泛的方式草擬，以及研究須否真正有需要
29 使涵蓋範圍那麼廣泛，或是否可採取較明確的草擬方式，把範圍收窄。如
30 果情況真的不許可，並真正有必要使涵蓋範圍如此廣泛，我們才同意，而

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1 不是在草擬時已原則上使涵蓋範圍十分廣泛。

2

3 **主席：**

4

5 好。大家可就這個意見進行討論。這情況事實上是有討論的空間
6 的。

7

8 我希望就時間表作出報告，請大家給我兩分鐘的時間。我們現時的
9 進度與原定的時間表只相差一個會議。我們今天的會議原定是討論第XI
10 部，現在我們只是就第X部進行討論。

11

12 第二，數個在5月份的星期二舉行的會議在時間上出現問題。我會
13 向大家發出notice，通知大家有關會議的時間。如果大家不能出席，請在
14 notice上表明後交回。我們在5月份應舉行3個會議，但只得5位委員可出席。
15 所以，我會向大家發出notice，待大家回覆後，我便可決定會否更改時間或
16 取消某個會議。若有需要，我們亦會發出revised work schedule，多謝大家。

17

18

19 m2755