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 Friday, 8 May 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) Hon NG Leung-sing Hon Bernard CHAN Hon Jasper TSANG Yok-sing, JP Hon Ambrose LAU Hon-chuen, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, JP Hon James TO Kun-sun Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon Abraham SHEK Lai-him, JP
Public officers attending	**:**	Miss AU King-chi Deputy Secretary for Financial Services Miss Vivian LAU Principal Assistant Secretary for Financial Services Mr Frank TSANG Assistant Secretary for Financial Services Ms Sherman CHAN Senior Assistant Law Draftsman

		Mr Michael LAM Senior Government Counsel
Attendance by invitation	**:**	Mr Mark DICKENS Executive Director, Supervision of Markets, Securities and Futures Commission
		Mr Andrew YOUNG Legal Consultant, Securities and Futures Commission
		Mr Eugene GOYNE Associate Director, 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

主席：

我們邀請政府部門的代表出席今次會議。今天秘書處會傳閱5份文件給各位，這些文件全部由政府提供，包括：特首的書面指示、Sanctions against a recognized exchange and closure of it in emergencies、Memoranda of Understanding/Co-operative Arrangements concluded by the Securities and Futures Commission with Authorities or Regulatory Organizations outside Hong Kong 、Statistics on disciplinary actions taken by the Securities and Futures Commission，and "Misconduct" under the disciplinary regime。

今天的討論項目是第XIII部和附表8，也是這條例其中的最重要一環。在開會前，我請幾位委員對於較遲收到文件表達其不滿意見。政府的文件應該是上星期五下午才交給我們的，一般來說，秘書處下午1時就會despatch文件給我們，星期六就沒有despatch，你們星期五下午送達秘書處的文件，星期一才會送到我們的辦公室。一些較重要的文件，如對市場意見的回應，即是現時放在桌上的Paper No. 12A/01；由於這類的文件我們較重視，委員每次highlight特別關注的issue閱讀，希望有多一點時間閱讀和瞭解。先請胡經昌和Audrey發表意見。

胡經昌議員：

主席，我已多次提及此問題，我覺得很遺憾。今次的情況更甚，在開會的前一天才收到所有文件，中文文本還要現在才table，文件這麼遲才收到，法律事務部要提出意見，也需要很長時間去辛苦地閱讀文件，這情況已不是第一次了。我已多次重申需要時間閱讀文件，不能每次工作通宵到早上。沒有充足時間，我們根本無法正常進行工作。這份文件昨晚才收到，但今次的議題十分重要。我們做完工作後，有時還要由staff 跟進，現時根本沒時間與staff 商討，這是一個很大的困難。也許除我以外，其他的議員也有同樣的意見，因為這種情況是一而再地屢次出現。

主席：

客觀地說，在每星期開一次會議的那段時間，情況的確已是有所改善。現在每星期開兩次會議，對於準備文件的同事來說也是很辛苦的。希望日後他們能做到，就是假如星期二開會，最遲前一個星期五早上就將文件送到秘書處，那樣運作就應該沒問題，希望各位能注意。

胡經昌議員:

主席，開會的日期並非我們所定，而是根據時間表一早定下來的。我不清楚日後應怎樣處理，是否若我們收不到文件，就暫時不開會？例如星期二開會，而我們於前一個星期五中午1時前就要收到文件，假如仍未收到文件，會議是否暫時不進行？相信你也很難就此作出決定。我們也不能每次發表完意見就離開，因為若法定人數不足，就會流會，那時又會被傳媒誤會，這也是需要考慮處理的細節。

主席:

Audrey是否有補充？

余若薇議員:

主席，胡經昌議員比我幸運，第一，他是業界人士；第二，剛才也提到有人和他一起閱讀文件。我既不是業界人士，也沒有人幫忙，希望當局能瞭解，我們還有其他工作，我已是早上8時30分開會一直到現在，下午還有一個關於“短樁”的會議。由於這部分較為重要，第12A/01號文件載述很多團體的意見，我們也希望能閱讀，並深入瞭解和研究所搜集得來的意見，但我們到現在才收到文件，根本沒時間閱讀和瞭解，令我覺得出席會議也起不到任何作用。雖然我昨晚看了資料文件的英文本，但現在才收到那份回應，我認為這樣參與會議沒有什麼意義。如果一個星期開兩次會

議，文件便沒法準備給我們，我寧願一星期開一次會議，因為若收不到文件或沒時間瞭解文件，開會也起不到作用。

主席:

局長，希望你能明白。

財經事務局副局長區璟智女士：

各位的要求其實是合理的。主席剛才提到，由於一個星期開兩次會議，工作量的確因而增多了，但我和我的同事會盡量把工作做好。假如星期二開會，文件最遲要在前一個星期五送到秘書處，這是最低的要求，這點我是同意的。以往每個星期開一次會議時，最低限度也會預早一個星期把文件分發給各位，反而譯本會遲一些，但英文本最少也預早一個星期的時間。自從一個星期開兩次會議後，我已盡量讓各位可在周末的時間閱讀文件。在第IX、第X、第XI的3個部分，我們是做得到的。至於第XIII、第XIV部，本來上個星期可以完成有關文件，但後來因內幕交易審裁處現時有一個聆訊個案，律政司的法律顧問上星期與我們聯絡，表示文件內有些內容不適宜於現時公開，我們覺得很為難，便即時開始刪除工作，再進行另一次法律上的諮詢。有關的內容不單止在文件本身出現，由於不希望影響正在聆訊的個案，我們還要跟進每一項的市場意見，這樣便花費了兩、三天時間重新整理有關文件。不然的話，該文件是可以於上星期五交給各位的。下次在討論第XV部時，我們會爭取於今個星期五把文件分發給各位。

主席：

胡經昌議員。

胡經昌議員：

主席，我們在審議第XIII及XIV部的過程中，我們以為可以就一些問題提問，但是由於有一個個案正在審議中，你便認為該等問題不能問，這就會出現含糊不清的情況。其實我們未必要按次序逐步審議，如果出現大問題，是否可以暫時不審議這個部分，先行審議其他部分？

財經事務局副局長區璟智女士：

我相信有關的法律意見是，即使我們不在這次討論深入地交代，也不會影響市場失當行為制度的建議。

主席：

委員會已表達得很清楚，希望局長能明白我們的同事是很努力審議這法案，同時希望星期二開會前，能趕及在前一個星期五下午將文件送達議員，這樣就可以解決問題。

財經事務局副局長區璟智女士：

就第XV部的文件，我們承諾會於這個星期五下午1時之前交給秘書處。

主席：

接著請局長介紹第XIII部、XIV部及附表8。

財經事務局副局長區璟智女士：

多謝主席。第XIII部和第XIV部適宜一併地閱讀，因為有關市場失當行為的條款，內容基本上是相同的。不同的是，第XIII部分建議設立一個民事訴訟程序處理市場失當行為，而第XIV部分就建議採用一個刑事程序處

理市場失當行為。既然兩部分有這麼多共同點，一併審議，可能可以節省各位的時間。首先，簡單介紹第XIII部分的民事程序，然後把剩下的時間交給Mr Mark DICKENS，由他詳細解釋條文的釋義。正如剛才提及，第XIII部建議成立一個民事訴訟制度，其實參考的藍本就是現時內幕交易審裁處。內幕交易審裁處成立了大概10年，累積了一定的經驗，總共成功地研訊了11宗個案，其中有9宗是對有關內幕交易者施加制裁。

內幕交易審裁處的運作有一定的優點，我們希望能通過這次的法律改革，將其優點保留，並加強成為一個市場失當行為審裁處。這個審裁處除了處理一些內幕交易行為之外，也處理其他有關市場的失當行為。根據過往數年的經驗，內幕交易審裁處的優點可簡單地歸納如下：第一，在考慮證據時，審裁處可以無需受制於其他規限，例如刑事法庭所受到的證據法則規限，彈性會較大；第二，審裁處的民事程序容許審裁處可以進一步研訊以尋求真相；第三，舉證的準則是按民事準則來作出舉證，即balance of probability——相對可能性的衡量，我們認為這個準則對某些辦公室罪案(white collar crime)會較為適用。

我剛才提到，第XIII部建議成立一個市場失當行為審裁處，處理內幕交易和其他5種的市場失當行為。在草擬這5種市場失當行為的定義和條文時，我們曾參考了已落實多年的《澳洲公司法》，一方面它已有一定的經驗，該地的案例也可以讓我們司法部進行參考，有一定的作用。我稍後會請 Mr DICKENS 就實際的監管經驗，向各位解釋這幾種市場失當行為。概括簡單地說，這幾種失當行為包括製造虛假或有誤導表像的市場行情(false or misleading market appearance)，以及虛假、誤導表像的市場價格，我們嘗試把這些行為定義為市場失當行為。這些條款在第XIII部和第XIV部是共用的，市場失當行為審裁處的組成和程序，與現時的內幕交易審裁處其實很類似。

簡單來說，審裁處將由一名法官擔任主席，並有兩名市場從業員，即是審裁員，從旁協助。每次有案例時，特首就會委任兩名審裁員和主席

一起進行研訊。我們建議審裁處可以判處多項的民事制裁，其中包括：命令有關人士交出從事失當行為而賺取的利潤或者避免的損失、吊銷有關人士擔任上市公司董事的資格，以及命令有關人士支付審裁處的研訊費用。這些都是內幕交易審裁處現時可以判處的民事制裁。

有見於公眾人士，以至立法會和傳媒，均覺得應加大力度打壓市場失當行為，認為此等行為是社會所不能容忍的，所以我們希望可以加入一些額外的民事制裁來增加阻嚇的成分。新的民事制裁包括：對有關人士發出"冷淡對待令"(cold shoulder order)，即著令有關人士在一段時間內不能在市場進行交易；另外一種是"終止及停止令"(cease and de-cease order)，要求有關人士不可以再犯有關行為；另外一個是"紀律轉介令"，將有關人士干犯市場失當行為的事實轉介給該人士所屬的專業團體或其他團體，建議有關團體對該人士採取紀律行動。我們亦把現在支付聆訊費的"令"伸延至可以要求有關人士支付證監會的調查費用。如果當事人不遵守其中一些命令，可能定為刑事罪行，並判處更高的刑罰。舉例而言，倘若我們已吊銷他的董事資格而他繼續擔任董事；或者審裁處發出了"冷淡對待令"，但他繼續在市場進行買賣，又或者審裁處發出了"停止令"，命令他不可以從事同樣的行為，但他繼續這樣做，均會牽涉刑事制裁。

採用上述種種措施，是希望將現有的民事制度強化，並設立一個與之並行，但更加有效的制裁制度，從而增加阻嚇的作用。剛才所說的民事制裁的懲罰力度或者阻嚇的作用可能不夠，所以我剛才提到第XIV部會同時設立一個刑事檢控制度。

現有法例亦有若干條款，採用刑事的方法處理一些市場失當行為。現時《證券及期貨條例草案》第XIV部，將現有的刑事檢控制度保留、更新及擴大。這樣就有人會問："同一個市場失當行為，你何時會決定採用刑事方法進行檢控？"我們參考的準則主要有3大項：第一，是否有充分的證據達到刑事檢控的準則，證明當事人確實觸犯了此類罪行；第二，勝訴的機會是否很高；第三，提出檢控是否符合公眾利益。我們也參考了外國處

理類似失當行為的制度，英國、美國和澳洲均有類似民事、刑事的“雙軌”制度。我們現在的做法和他們的做法是相類似的。

值得一提的是，在一年多的諮詢過程當中，市場參與者，特別是較大規模的市場參與者，他們對市場失當行為定義最關注的一點，就是在於能否清楚訂明舉證責任由控方承擔，我們已就市場人士的憂慮詳細研究有關的條款。我們相信《藍紙草案》內的市場失當行為定義，應該清楚訂明有關的犯罪意圖，而這個意圖也是由控方證明的。舉例來說，我們會清楚寫明，除非當事人蓄意造成或罔顧後果，導致市場有失當行為出現，否則他不需要負上民事或刑事責任。舉證的責任在於控方。當然，在檢討過程中，我們發覺在兩種情況下不可以有這樣的安排，因為其中一種市場失當行為，虛假交易(false trading)中有兩種現象是沒法由控方舉證的，即使要求他舉證也可能沒有效用。關於這兩種情況，第一種稱為“虛售”；第二種稱為“對消交易”。稍後請Mr DICKENS解釋wash sales和matched orders，說明為何這些舞弊行為需要特殊處理。

剛才提過，我們在實行民事制度之餘，亦賦予一個刑事制度，希望增加阻嚇的作用。除此之外，我們也考慮到，無論是採用民事或刑事的制度，對受影響的投資大眾也可能沒有直接的得益。根據現時的《普通法》，若投資者因為市場失當行為而蒙受損失，亦可以通過訴訟尋求賠償。我們便考慮怎樣可以簡化有關的程序？我們在條例內引進第272條和第296條，希望可以簡化有關的訴訟程序，幫助投資者就賠償問題提出民事訴訟，包括：第一，清楚訂明他們可以提出訴訟的情況；第二，容許他們引述市場失當行為審裁處的裁決或刑事法庭就有關失當行為罪行作出的裁決，引用該等裁決作為他們民事訴訟的證據，使他們不需要再搜集證據來證實某一個失當行為是否真的發生。

當然，有關的條例會有一個制衡。法庭在聆訊賠償要求時須信納有關訴訟所要求的賠償是公平、公正和合理的。另外，所引述的證據，即市場失當行為審裁處或刑事法庭的判決，這些證據和他的索償是有關係和有

一定的證明效力的，才可以引用。也有市場人士向我們表達憂慮：就是同樣的行為，若無法進行刑事控告，是否可以轉介民事處理；同樣道理，可否在作出民事控告後又轉介刑事處理。我們經過考慮，覺得不應該有這兩種懲罰的安排，所以條例內也寫得很清楚，同一行為只可採用民事處理；或用刑事處理，不可以就同樣行為用兩種渠道先後或同時處理。

另外值得一提的是，在諮詢過程當中，我們也很瞭解，無論法例寫得如何清楚，由於市場活動日新月異，某些活動雖在某些情況下已列入定義內，但因為市場發展、國際趨勢，在某個情況之下，這類行為可能不再視作失當，而是可以容許的行為。我們亦參考了外國的制度，怎樣才能令監管的方法能靈活地處理特別的情況？在外國的做法，監管機構有權制定附屬法例或者 no action letter，即在某種情況下不會採取行動，以豁免某種類似市場失當行為的行為，使該行為在該種情況下應該可以容忍的，這也是為方便市場的發展。經過考慮，我們採納了制定附屬法例的渠道，在條例第273條，建議賦權證監會訂定一些“安全港” (safe harbour) 條例，因應市場的最新發展，研究在什麼情況下，某類活動可能被我們無意納入管制的範圍內。這些事情實際上是應該准許發生的，因為同樣活動，例如在倫敦和紐約，都獲得當地監管機構豁免，我們也要遵守外國大方向的做法。證監會日後若要制定“安全港”規則，將會進行充分的諮詢，在諮詢公眾和財政司司長後再制定有關的規則，當然也要經過立法會省覽。有關做法正如其他的附屬法例一樣。

我先介紹到這裏，以下時間請Mr DICKENS向各位介紹法例的條文。

Chairman:

Mr DICKENS.

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

Commission:

Miss AU has explained the general scheme. I am going to go into the particular provisions. There are six forms of market misconduct. One of them, insider dealing, essentially follows the existing law, but I will go into the particulars. The other five forms we have drawn very largely from the Australian Corporations Law. We did that for a number of reasons. One, it was the most comprehensive approach that we could find in a corresponding jurisdiction, and it was intended to encapsulate the US case law and rules that have evolved in the US over 70 years. Secondly, because it had been in force for a very long time, we could be reasonably certain that there would be no unintended consequences for legitimate market conduct like hedging, arbitrage, program trading, and other things that happen in sophisticated financial markets, because in fact there has been no impact on that conduct in Australia.

As Miss AU said, in response to public submissions, we have departed from the Australian provisions in the sense that we have made some of the defences more explicit and that we have made very clear the mental element required for the various provisions. I will mention those mental elements as I go through provision by provision.

To start with insider dealing, the provisions are essentially the same as are found in sections 9 to 12 of the Securities Insider Dealing Ordinance, with the following changes: the most significant change is that insider dealing will now be a criminal as well as a civil matter, and therefore the insider dealing provisions are replicated in Part XIII as well as in Part XIV. The other major changes are that in certain circumstances where insider dealing takes place, in securities which are not yet listed or which are not yet issued – for example, in a placement situation where the shares are intended to become listed, and do in fact become listed – the insider dealing provisions will apply. Clauses 237(2) and 277(2), the definition of listed securities, is where you find that change.

The second change is that "relevant information" has been defined so as to include

not only information about the corporation itself, but also information about its shareholders or officers, or about the listed securities of their corporation or derivatives, in the sense that they may also impact on the price of securities. The change there is to the definition of "relevant information" under clauses 237(2) and 277(2); and consistently with the approach being taken in Part XV, where the substantial shareholding threshold will be lowered from 10 to 5 per cent, the definition of "substantial shareholder" has been changed, so it includes someone who has 5 per cent interest in insider dealing.

There have also been changes or clarifications of some of the defences in the insider dealing provisions, in particular 262(4), which is the agent's defence from insider dealing. He now has to prove not only that he entered into the transaction as agent for another person and did not select or advise on the securities dealt in; he also has to show he has no knowledge or reasonable cause to suspect that the person on whose behalf he dealt had the relevant information, and that he did not counsel or procure the other person. So the defence has been narrowed. Similarly, in (5), which is a defence for two parties doing an off-market transaction, dealing directly with each other; basically it is to cover a situation where both parties are insiders, so each is meant to know the relevant information. The defendant will now have to prove that he and the other party entered into the transaction directly with each other, that at the time of the transaction the other party knew, or ought reasonably to have known, of the relevant information, and the transaction was an off-market transaction that was not required to be recorded on the stock market.

There is also a new defence in 262(7), to cover the situation where party A counsels B, who is an insider, to deal with C, who knows that B is an insider, and B does not counsel or procure. In that situation, A will not be held to be an insider dealer. It is to cover a very rare factual situation, but it seemed to be consistent with the theory underlining the insider dealing provisions.

In addition to that, the Bill goes on to prohibit certain sorts of market manipulation conduct, all caught under the general heading of "Market Misconduct". The first sort is

found in clauses 265 and 287, which cover the intentional or reckless creating, causing to be created, or doing anything likely to create a false or misleading appearance of active trading in, or with respect to the market for, or price of, securities or futures contracts traded on a recognized market – that is on the Stock Exchange or the Futures Exchange, or by means of authorized ATSs, should there be any authorized ATSs.

A false or misleading appearance of active trading would be created where you traded very vigorously with your associates, in order to make it look as if the stock was highly liquid, and there was a great deal of interest in that particular stock. A false appearance with respect to the market might be created, for example, where you put a lot of orders in either the bid or the ask queue, but no transactions actually took place. However, it would look as if there was a deeper market than in fact was the case, because of all the indications of interest on the screen. A false appearance with respect to the price would be where you did a transaction at an artificial or contrived price, either with an associate or with an innocent person in the market.

Clauses 265(2) and 287(2) prohibit the same conduct by a person in Hong Kong whose conduct affects securities or futures contracts traded on a relevant overseas market. This is an approach we have taken throughout the market manipulation provisions of the Bill, that we are now making unlawful conduct in Hong Kong that is aimed at an overseas market; and you will see that that provision goes through each of the market manipulation provisions. This is consistent with the approach taken by the US, UK and many of the Australian market misconduct laws. It is considered to be particularly appropriate, one, because of the increasing globalization of securities and futures markets, which means that regulators increasingly have to help patrol what I will call "the world market place"; secondly, because Hong Kong is perhaps, more than some other markets, peculiarly exposed to risk of being seen as a haven jurisdiction. In order to make sure that we are not making unlawful conduct which is lawful in the other jurisdictions, the onus of proof is on the prosecution to prove that the conduct is unlawful in the relevant overseas market.

The second sort of false trading caught by clauses 265 and 287 is being involved directly or indirectly in one or more transactions with the intention that, or being reckless as to whether, the transaction or transactions has or have, or are likely to have, the effect of creating an artificial price or maintaining at an artificial level a price for securities or futures contracts, again on a relevant recognized market, or by means of authorized ATSs. Basically all the market regulation conduct is only in relation to the organized securities and futures markets.

Wash sales and matched orders were specifically mentioned by Miss AU because unlike the other provisions, there is no burden of proof on the prosecution to show a mental element. The prosecution needs only to show that there have been wash sales or matched orders, and the onus of proof is then on the defendant, on the balance of probabilities, to show that none of the purposes for which they engaged in those transactions was to create a false or misleading appearance with respect to active trading.

The words "wash sales and matched orders" are not actually found in the legislation in clauses 265(5) and 287(5). Wash sales are essentially transactions where you buy or sell to yourself. You start with an interest in the particular securities or futures contract, and you end with an interest in the particular securities or futures contract; but it looks as if there has been legitimate trading. Matched orders are where you do the same thing, but you buy and sell in prices and at quantities that correspond to those in which an associate of yours is taking an opposite position. Again, it gives a misleading appearance as to what is happening in the marketplace, because it looks as if there is genuine supply and demand, and in fact the supply and demand are contrived. It is just a variation, if you like, on a wash sale, where you use an associate. As I have said, the onus of proving an innocent mental element is on the defendant. That is because he will best know why he engaged in that sort of conduct and will be the person best placed to explain the reasons why he engaged in it. The burden of proof is only on the balance of probabilities.

The next form of market misconduct dealt with by the Bill is price rigging, which is

dealt with in clauses 266 and 288. They prohibit two types of conduct - wash sales, which have the effect of maintaining, increasing, reducing, stabilizing or causing fluctuations in the price of securities. There will be a similar defence to the one I have just outlined in relation to clause 265. The second element is prohibiting a person from engaging in any fictitious or artificial transaction or device with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilizing or causing fluctuations in the price of securities or futures contracts.

Clauses 269 and 291 prohibit stock market manipulation. A person will be prohibited from engaging directly or indirectly in two or more transactions in securities of a corporation that by themselves, or in conjunction with other transactions, increase the price with the intention of inducing another person to buy or subscribe for, or to refrain from selling, the securities. That is what people in the industry tend to refer to as a "market ramp", where you engage in a series of transactions designed to force the price up, the hope being that investors will believe that the price is rising; they will therefore be misled into buying the securities, and at some later stage you make a profit by selling the securities you have bought. The other form of ramp, which is comparatively rare in Hong Kong, is downward manipulation of the market, where you engage in two or more transactions, reducing the price of securities with the intention of inducing another person to sell or refrain from buying on securities; and there is a variation on that when you maintain or stabilize the price with the intention effectively of inducing people either to sell, buy or subscribe for, or to refrain from selling, buying or subscribing for. They are all forms of misconduct where you engage in a series of transactions designed either to drive the price upwards to bring people into the market, to drive the price downwards to encourage them to leave the market, or to maintain the price so that they maintain a false position in the market.

Clauses 268 and 290 deal with something that is actually quite different. So far we have been talking about offences that are essentially related to the manner in which people deal in, or arrange for dealings to take place on, the organized securities markets. Clauses 268 and 290 are aimed at information. Information is the lifeblood of the markets in the

sense that the price of securities and futures contracts is very largely a reflection of information about their underlying value or information about the corporations concerned.

Clauses 268 and 290 prohibit the disclosure of false or misleading information about securities or futures that is likely to induce investment decisions, or have a material effect on the price. The mental element is wider than in the other provisions relating to market misconduct. A person will be prohibited from disclosing, circulating, disseminating, or being concerned in the disclosure, circulation or dissemination of information likely to induce the sale, the purchase or subscription of securities, or likely to maintain, reduce, increase or stabilize the price of securities if the information is false or misleading, either by reason of a material fact or the omission of a material fact, and the person knows or is reckless – that is consistent with the other provisions – or is negligent as to whether the information is false or misleading in a material fact or through the omission of a material fact.

Because of the width of the provision there are defences for those who passively disseminate false or misleading information by others, owing to the nature or an aspect of their business. So basically there is what we call the conduit defence in clauses 268(2) and 290(3), which is intended for printers, publishers and the like, who are persons who operate a business of issuing or reproducing information given to them by others, where the information is devised by another, and they have no reason to believe that it is false, and they do not know it is false and misleading at the time they transmit it. In keeping with the electronic age and the increasing dissemination of information in the securities and futures markets through electronic means such as websites, and in response to public submissions, there is now a similar defence for those who operate a business, the normal conduct of which involves the re-transmission of, or electronically allowing access to, third party information. So basically the internet website provider who warns people that he does not himself devise the contents of the information, and that he neither takes responsibility for it, nor endorses its accuracy, and does not know it is false or misleading, will not be subject to clause 268. Similarly, a broadcaster broadcasting live information that he does not modify, and in accordance with the licence and conditions of his licence, and with any relevant code of practice, is immune from

the provision.

Clauses 267 and 289 deal with a relatively rare but nevertheless pernicious form of market misconduct, and they prohibit the disclosure of information about transactions, to the effect that the price of securities or the price of futures will be maintained, increased, reduced or stabilized because of a prohibited transaction. A prohibited transaction is defined as a transaction prohibited by the other provisions I have mentioned.

What sometimes happens in market manipulation is that in order to induce investors to come in on the ramp, the person will actually say the stock is being ramped, therefore inducing people to come in, because they believe the price will keep rising. The prohibition only applies if the person disclosing the information, or one of his associates, is the person who directly or indirectly entered into the prohibited transaction - so they have to be part of the same, i.e. concert party - or if the person disclosing the information has received or expects to receive a benefit for making the disclosure. In order to give defences to journalists, analysts and others who might be seeking, for example, to warn the public about a prohibited transaction but nevertheless will receive a reward in the form of a salary, there is a defence for those who make such disclosures in good faith, and receive the benefit from the person who is not the - a person who has entered into the transaction, so even if, for example, you are an analyst working for a securities firm, and the securities firm is engaging in the market misconduct, and you are being paid by that person, providing you made the disclosure in good faith, you are not subject to clause 267. The defences go wider than the defences in the equivalent Australian provision.

Clause 272 and clause 296 are the clauses that create the right of civil action that Miss AU referred to. Basically under clause 272, a person who has committed a relevant act in relation to market misconduct will be liable to pay damages to any other person for pecuniary loss they have suffered as a result of the market conduct, whether the loss arises from having entered into a transaction or dealing at a price affected by the market misconduct, or otherwise. The damages will only be recoverable and be payable if it is fair, just and

reasonable in the circumstances.

As explained in relation to clause 208, that formula is intended to replicate the common law test of when a duty of care arises in cases of pure economic loss. Findings of the market misconduct tribunal will be admissible in evidence in an action under clause 272 or clause 296, and the courts will be able to impose injunctions in addition to, or substitution for, damages. The section is so phrased as not to affect in any way in any common law rights, or any other statutory rights of action a person may have.

Clauses 273 and 297 contain the safe harbour provisions that Miss AU referred to. They basically empower the SFC to make rules which create exceptions to the market misconduct, civil and/or criminal provisions. So theoretically the power is wide enough to enable the SFC to make a rule that exempts a particular conduct from the criminal provisions but not from the civil provisions, and vice versa; or to create a safe harbour from both.

The SFC has to release the draft rules to the public to invite submissions, must consult the Financial Secretary before it modifies the rules, taking into account the public submissions and the rules that are subject to the usual vetting by LegCo. The only safe harbour rule that is currently under active consideration is in relation to what is called e.g. stabilization in an IPO. In overseas markets, in particular the US but also now in the UK, it is common for the underwriter to undertake to stabilize the price of securities in the trading period immediately after an IPO takes place, in order to make sure that the securities do not fall artificially because there are just too many new holders who wish to make an instant profit, or rise too quickly because there is an over-demand for the shares. There are very detailed rules in the US and the UK as to the circumstances in which that stabilization is permissible. The UK is currently reviewing its rules, and the SFC is intending to come forward with draft rules once the UK has refined its draft rules in relation to stabilization.

That constitutes the end of the dual regime, but Part XIV also goes on to create some criminal offences that do not have an MMT counterpart. They are found in clause 292,

which covers acts of fraud or deception involving securities or futures contracts. Basically they prohibit a person from employing any device, scheme or artifice with intent to defraud or deceive, or to engage in any course or practice of business which is fraudulent or deceptive, or would operate as a fraud or deception. The reason they are not found in the market misconduct tribunal regime as well as in the criminal regime is that it is an element of the offence that it be engaged in a particular transaction; so it more in the nature of a one-on-one fraud than a fraud that deceives, and conduct that misleads the market as a whole.

Clause 293 replicates the dissemination of false or misleading information provision, but in relation to leverage foreign exchange contracts, and again the state of mind is that the person knows that, or is reckless or negligent as to whether the information is false or misleading as to material facts, subject to the normal conduit defences.

Clause 294 prohibits a particular form of conduct found in relation to futures markets, known in the trade as "bucketing". Essentially what happens is: a person thinks he is engaging in a futures contract that is going to take place on a proper Futures Exchange. If the contracts take place on a proper Futures Exchange two things apply. One is that the price of that contract will be set by market forces, and reflect supply and demand in the market as a whole. The second is that he will end up with a contract with the clearing house, so he does not have counter-party risk other than clearing house counter-party risk. In bucketing, basically the person with whom he is dealing takes the bet, so that his counter-party is the person with whom he is dealing, not with the clearing house; nor is the price necessarily set by a market, so that he is in a much worse position than he believes himself to be in.

The elements of the offence are spelt out in clause 294: "A person shall not represent to another person that he has on his behalf dealt in, facilitated, or arranged for dealing in a futures contract on a recognized futures market when he has not in fact so dealt, facilitated or arranged". It is a defence for the person accused of bucketing to prove that up to and including the time he made the representation, he acted in good faith and did not know,

and could not reasonably have known, that he had in fact not executed it on a recognized exchange". So in fact if he genuinely believes he has passed the order to a recognized market, but for some reason something has gone wrong and it has not been executed there, the person will not have committed the offence. That concludes the bucketing provisions.

Miss AU has referred to most of the market comments. I will just check to make sure that we have covered everything. One thing I have already adverted to is that the group of investment bankers was quite concerned that the market misconduct provisions might outlaw legitimate business conduct such as price stabilization. I have already mentioned that price stabilization in IPOs is intended to be the subject of a safe harbour rule. Index arbitrage, program trading and so on: we believe, after considerable study – and particularly after clarifying that there must be a state of mind amounting to intention or recklessness – that legitimate commercial conduct such as arbitrage and program trading will not be caught. We have carefully examined the experience in the Australian market, which is very active in these respects, and found no evidence that that conduct has been significantly impacted at all by the Australian laws, which have been in force for the last 20 years.

There was also concern about, in the White Bill, what is now the disclosure of false and misleading information provision, which was originally an offence of strict liability with a defence of due diligence. We have now turned that around so the onus of proof of negligence is on the prosecution, and we believe that negligence is the appropriate standard in that situation. There is no negligence standard as such in the UK. There is no negligence standard as such in the US, but the US civil litigation tends to have a very strong deterrent effect on negligent misconduct. Negligence has, however, been criminalized in Australia, Malaysia and Singapore, and we feel that Hong Kong should have market standards at least as high as those markets.

Another public comment that was made is that mortgagees and pledgees, such as banks who take shares in a listed corporation as security, should be free to sell those shares in the knowledge of a default, even though the default would be price-sensitive information were

it generally known. We have carefully considered that, and we believe that it is a classic insider dealing situation where the bank is in fact taking advantage of privileged information at the expense of other market users, and consistently with the theory underlining the insider dealing provisions, the conduct should remain unlawful.

Another comment that was made, and it has some force, is that the provisions are overlapping. Some forms of market misconduct will fall under more than one provision, and that is quite true. It is also true in relation to the UK code on market abuse, and the US and Australian law. It is better, we feel, to spell out all the things that are prohibited, so that the market is left in no uncertainty, even if that means certain conduct may be prohibited more than once, than to leave gaps. We have also made some minor technical amendments to the provisions on stock market manipulation. There was concern that those provisions applied in the White Bill to one transaction only. We have now made it clear that they need to apply to only two or more transactions.

There was concern that the onus of proof in relation to wash sales and matched orders is placed on the defendant. As I hope I have explained, we believe that wash sales and matched orders are so extraordinary that they require explanation, and the person who is best placed to explain why he did not intend to give a false or misleading appearance of trading to the market is the person who engaged in the conduct.

That brings me to the end of the provisions.

主席：

謝謝你們的詳細介紹。我們用了〝market misconduct〞的字眼，在英國用〝market abuse〞，在美國用〝market manipulations〞。可否解釋他們的分別？使用不同的字眼是否會有影響？但幾個地區都用各有特色的字眼，是否有implications？

財經事務局副局長區璟智女士：

我們其實主要採用澳洲的《公司法》作為藍本，澳洲稱之為market misconduct。名字是次要的，最重要的是條例所作出的定義，market misconduct也可以改為market abuse，但定義始終都是一樣的。陳律師會同意我的講法，在草擬方面會就這個名稱對我們提問一些問題，例如：有關的名稱代表怎麼樣的行為；這些行為如何舉證；是否需要免責辯護；是否需要"安全港"規則？草擬專家會對這些名稱進行提問，不管名稱為何，問題的答案亦都會是一樣的。

主席：

因為有監察證券事務的國際性組織，你們是否需要有共通的語言，覺得用哪一類字眼會有更佳效果？

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

We have a consensus as to what we should prohibit, and all major jurisdictions, and in fact many minor jurisdictions, now prohibit insider dealing and market manipulation. The reason for the choice of the term "market misconduct " was that we needed something that covered both insider dealing and market manipulation, so we could not just talk about market manipulation. The choice essentially was then between "market abuse" and "market misconduct". We chose, rightly or wrongly, to go for the less emotionally-loaded term "misconduct" rather than the term that we saw as being somewhat emotionally-loaded, "abuse".

It is probably fair to say that some of the conduct we are making unlawful is considered by more market players in Hong Kong to be acceptable than in, say, the UK, which is a much more developed market. Rather than throw around somewhat pejorative-

sounding words, we thought we will make it unlawful, but we will use an emotionally unloaded term, if possible.

主席：

好的，這個純粹是我感興趣的問題，因為幾個地區所採用的字眼似乎有所不同。余若薇議員。

余若薇議員：

多謝主席，可否提問3個問題。

主席：

可以。

余若薇議員：

第一，附表7和附表8下設有兩個審裁處。一個是上訴審裁處，另一個是市場失當行為審裁處。為什麼會有兩個不同的審裁處審理不同的失當行為？證監會是否有考慮過由一個審裁處，還是兩個不同的審裁處處理失當行為會較好？

第二，刑事和民事的責任的條文在第XIII及XIV部是相對應的，譬如第265條對第287條；第268條對第290條；第267條對第289條。有關條文在刑事和民事制度下的主要分別在哪裏？讓我們閱讀那些條例的時候，可以知道刑事和民事責任的分別。

第三，第XIII和第XIV部之下有很多民事的責任，但《證券及期貨條例草案》的其他部分之下，也有很多民事的責任，例如我們上次提到第

208條(第X部)。我希望知道，這部分的民事責任和其他部分的民事責任會否重疊？

財經事務局副局長區璟智女士：

我嘗試回答，然後或由證監會或律政司的同事補充。

制定政策時，我們沒有考慮將上訴審裁處和失當行為審裁處合併，主要是基於現有的經驗。我們覺得兩者的司法管轄權力相當不同，以及兩個機構都能專責地做好本身的工作。我們上兩次也討論過，希望上訴審裁處能加快處理個案，以彌補現有的不足，使輪候的時間沒有那麼長。還有最重要的一點，就是能培訓一班審裁員，他們對個案的確十分瞭解，明白上訴牽涉到個別持牌人士的委屈，能夠比較迅速地聽完他們的上訴。基於現有內幕交易審裁處的運作，都應知道市場失當行為審裁處所處理的事情非常專門，確實須由一名全職的法官花費很長的時間處理個案。根據現在的經驗來說，他每年只能處理一至兩宗個案。舉例而言，內幕交易審裁處的法官目前有一宗個案現正在進行研訊，並就另一宗個案進行研究調查，稍後才可以進行研訊。另外還有兩宗個案已交到秘書處，但現時在排期階段，不可以公開。兩者的工作量和性質等各方面其實都不同，我們希望他們可以專注地完成其管轄下的工作。

第二個是很有用的問題，我們也有考慮過，就是究竟在民事和刑事的制度下，個別市場失當行為的條款有何定義，控方要作何舉證或辯方有何免責，以及在民事和刑事兩個軌道下面是否需要有一些分野。我們已經商量過，為方便用家瞭解，他在何種情況下干犯失當行為，他會如何被舉證，或者他可以如何反對舉證，我們覺得要有一致的準則，這樣可使用家很清晰地瞭解在什麼情況下是合法，在什麼情況下是不合法。但是我們考慮到，若保留一致，會否令民事或者刑事的運作出現問題。因為若失當行為的定義是一樣，除了方便用家之外，會否令制度沒有那麼有效。我們經考慮後，覺得應該是可以的，因為正如我剛才提到的，這個做法保留了民

事審裁的優點：第一，聽取和採納證據的過程比較彈性，不受一般刑事證據的規則制肘;第二，在研訊過程中，審裁處可以一邊研訊，一邊尋求真相，並可以要求其他人士提供證據，讓我們在這方面保留彈性;第三，審裁處所採取的舉證標準是一個民事的舉證標準，這又比較容易一點。

我們覺得，這個民事研訊過程的特色，就是現在所研究的內幕交易審裁處的特色，若能保留下來，應該可以將民事和刑事制度作出分野。我們經考慮後作出的結論，就是就何謂市場失當行為，保留下來的條款是一致的。

第三點，其實是我們欠議員們的功課。條例草案中有3處是建議一些條款，說明投資者在什麼情況之下可以採取民事訴訟，要求賠償。我們現在正和律政司的專家草擬一些文件，較詳細的利用法律觀點去研究這些不同條款之間的不同，分開在不同的部分訂明，會令投資者得到較佳的保障和較清晰。我的同事有沒有補充？

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

I will just pick up on two points. One is the last point. It is easy to envisage scenarios which could be pleaded under both clauses 208 and 272, in relation to false and misleading information. It is not so easy to construct scenarios which would fall under one, and could not at least be argued to fall under the other. However, one of the procedural differences between the two is: if you go under clause 272 you can use MMT evidence. If you go under clause 208 you cannot. Clause 208 has carve-outs for information. It also falls within section 107 and section 40 of the Companies Ordinance. Clause 272 does not. So there is an overlap. There are some scenarios where you would plead both sections, or I would plead both sections. Whether I would plead them further or in the alternative is something I would need to wait for the DOJ paper to know. I understand that a paper is being prepared on the gaps and overlaps, and that situation. There is some overlapping in

the factual scenario.

Secondly, as I understand the main distinction between the civil and criminal regime, the elements of the offences, for want of a better word, are meant to be identical; and I believe that is the case when the drafting is carefully analyzed. The difference is purely in terms of the admissibility of evidence and the burden of proof. When we are undertaking a criminal prosecution we are under the strict rules of admissibility, and the burden of proof is "beyond reasonable doubt".

In the MMT it is express as being the civil standard of proof. In practice, the Insider Dealing Tribunal has applied what is called the high civil standard of proof, where there must be proof to a fair degree of satisfaction. I do not have anything to add on the logistical problems of the SFAT and the MMT, but historically an Insider Dealing Tribunal has found that one case fully occupied it for quite a considerable period of time. Were that to be the case in future, it would interfere with the rights that we are hoping to give appellants to a quick hearing, if they are appealing an SFC decision, because they would have to wait in the queue.

余若薇議員：

主席，剛才Mr DICKENS答我第三條問題的時候，他提到有些民事的侵權行為，可以同時根據第208條和第272條提出檢控，兩者可以同時列在告票或"稟"。那是否會有兩個不同的法庭？市場失當的行為會去MMT，觸犯第208條就會去另外一個法庭。我不能理解的是：如果同一件事有兩個追討的途徑，在同一個法庭處理會很容易明白，但如果是在兩個不同的審裁處或者法庭，那怎麼辦？我希望知道的是先後次序。

關於第一條問題，我明白是有一個歷史的因素，也明白到有關個案的性質和時間的快慢有所不同。但是政府有沒有考慮過，其實快慢不是問題，如果個案需要加快審理的話，任何法庭都可以加快審理的。會否有些

情況，就是所牽涉的問題，不但市場失當行為審裁處需要考慮，附表7的上訴審裁處也同樣會考慮的。但是，現在的安排就須由兩個不同的審裁處審理，而編排都是一個法官和兩個市場的人士。我明白市場失當個案是需要很長的時間進行審理，但是不要緊，一個審裁處也可以分為很多部分。某個部分的法官，如果他剛剛接了一宗市場失當的處理聆訊，要花費他很多時間，這個法官沒有時間去處理另一宗個案，但由於是同一個審裁處，可以由另外一個分部去處理另一宗個案，但是至少就會都屬同一個機構和審裁處，所提到的都是很專門的問題，即關於市場的行為或者市場人士的行為，為什麼這樣做法不可行呢？另外，在附表7和附表8下有很多條例提到這兩個審裁處的運作程序，我想知道附表7和附表8下的程序程是否有顯著不同？

財經事務局副局長區璟智女士：

是有顯著不同的地方，但律政司負責這部分的專家今天不在場，SFC的同事可否幫忙解答這些問題？

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

In relation to the first point made by the Honourable Member, the civil rights of action for damages are all in the Court of First Instance. So the MMT proceeding is itself purely about whether someone has committed market misconduct and whether they ought to be sanctioned. If you therefore were damaged by false or misleading information in the marketplace, you have a number of choices. You can bring an action under – let us assume the right sort of facts – 208 and/or 272, irrespective of whether the market misconduct tribunal has been convened. You can wait to see if a market misconduct tribunal is being convened, because if one is, and it finds the market misconduct, it is going to assist you with your evidence in your civil case. That is an argument bringing it under 272. But the actual action for damages is not in the MMT itself. It is in the Court of First Instance. I think that

is point number one.

The chief differences between schedule 7 and schedule 8, so far as I am concerned – and I stand to be corrected by my colleagues – are that the machinery provisions are much the same. The Chief Executive appoints a judge; the Chief Executive appoints panel members; there is provision for temporary members and so on. But it is when you get down to around about clause 14 of schedule 8 that we come in to what I think of as the natural justice provision, where the Financial Secretary, when he institutes proceedings, has to provide a written statement under which he sets out the particular provisions by reference to which a person appears to have perpetrated misconduct, and brief particulars sufficient to disclose reasonable information concerning the nature and essential elements of the misconduct.

Unlike an appeal, where the appellant puts up his appeal and the SFAT can then confirm, vary or modify, this is a constrained proceeding. When you go through the clauses, as other people are identified who may be the subject of an adverse finding, there is a similar procedure for them. So there is this natural justice set of provisions in clauses 14 through to 19, which make sure that people are put on notice of, the case they have to answer etc. That is stating it very broadly.

Clause 20 sets out the particular role of the presenting officer who is not found in the SFAT. The SFAT essentially works with an appellant and a respondent, but here there is this person called the presenting officer who has particular duties to present the evidence to the tribunal. That is a difference between the two.

The sittings procedures are similar, but it is specifically provided that the MMT "shall sit in public unless it determine in the interests of justice a sitting, or part thereof, shall not be held in public", and I am told it is the same as the SFAT. The preliminary conferences and consent orders are not dissimilar. They are the same. The chairman as sole member is the same, and the privileges and immunity provision is the same. So it essentially relates to

what I call the natural justice elements and the role of the presenting officer.

財經事務局副局長區璟智女士：

我希望請陳律師補充，概括而言，怎樣啟動機制是有不同的，上訴是由受屈的一方啟動。至於MMT或現有的內幕交易審裁處，在經過證監會的調查後，再將個案交給財政司司長，財政司司長徵詢律政司司長，並覺得證據齊全，就會啟動內幕交易審裁處的機制，而將來就是MMT的機制。

另外，在研訊過程中有一個專門人員，我們稱之為presenting officer，即提控官；在上訴的過程中並沒有這名人員，只是由當事人陳述他的個案；但就內幕交易或市場失當行為，會有律師向審裁處解釋案情。

另外，根據附表8的第25、26及27條，審裁處或提控官可以主動要求多邀請些人出席，提供更多證據。這是研訊的過程，而且這是在大方向上的不同之處。

高級助理法律草擬專員陳子敏女士：

多謝主席。

正如區小姐提到，在啟動方面是不一樣的；因為兩個審裁處所處理案件的性質基本上並不相同。在第XI部有一個appeal panel，即審裁團挑選成員；但這在第XIII部分是沒有的，所以要特別委任。

另外，第XI部處理上訴案件，就有一個擱置之前決定的條文，因此第XI部的附表裏特別處理了這件事情，而第XIII部就沒有這個需要。

主席：

Margaret。

副主席：

主席，可否這樣說，其實SFAT基本上是兩方相對，是adversarial的，一方提出上訴，而另一方則是被上訴的。但這個MMT就是inquisitorial，也就是調查性質的。後者在運作的過程中會加入一些問題，由MMT的主席加入一些問題以進行調查。因此，被調查的一方事先未必知道所有針對他的證據，甚至是針對他的是哪些問題，並在運作的過程中加入問題，不過他會有辯護的機會。

主席，我想問的是，審裁處的inquisitorial性質，即是經過調查作出裁決的這個性質，以香港的制度而言是否屬獨特？即是唯有這個審裁處是這樣的？

其次，針對着一些同樣的行為，即市場失當行為而言，在美國的制度下，審裁處是否具有同樣的inquisitorial性質？再以英國為例，性質又是否相同？

財經事務局副局長區璟智女士：

其實我也曾與證監會的同事商討。根據他們與海外監管機構交往的經驗，似乎外國的監管機構頗為羨慕我們的這套制度。在處理這種個案方面，這套制度似乎頗為有效。

副主席：

對不起，主席，我現在暫時想問關於事實的問題。

財經事務局副局長區璟智女士：

至於獨特的問題，我想邀請Mr DICKENS看看英國與美國的取向是否相近。

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

The answer is that amongst the developed jurisdictions the IDT and therefore the MMT are unique or precedent-setting. I am advised on my right that the market abuse provisions will operate in a similar way in the UK, but they are not yet up. They are to some extent drawn on the Hong Kong experience, but the tribunal is different. So the IDT has been a uniquely Hong Kong institution so far as developed markets are concerned.

What has happened in this Bill is that the role of the presenting officer has been made a lot clearer, so the proceedings are, for want of a better expression, less inquisitorial and more adversarial. But they are still not party-party in the sense that the SFAT is, which is a straight party-party fight. The MMT has the role of finding out the facts, although it is envisaged that that will happen through the presenting officer presenting to the tribunal such available evidence, including any evidence which the tribunal requests, as shall enable the tribunal to reach an informed decision. But yes; it is unique.

Hon Margaret NG:

Mr Chairman, I am a bit concerned about this uniqueness because I understand that in one of the cases which went on for a very long time before the Insider Dealing Tribunal, which subsequently went into appeal, there was quite a lot of question about procedure, whether it had been fair and, I think, some natural justice question. Because the MMT really makes up this

procedure as it goes along, to some extent, and it sets its own standard, when you say that now that the rules are improved, the role of the presenting officer is made clear. I am sure part of it is in order to deal with those situations. Could you describe more clearly and perhaps elaborate somewhat, the procedure before, in the Insider Dealing Tribunal, and the new procedure or role of the presenting officer that you are trying to introduce; and why you think that will deal with the problem.

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

I am compelled to take refuge in authority for two reasons. We have been advised that we need to be very careful how we deal with that particular question in light of the proceedings against the Insider Dealing Tribunal at the moment, so if I may ask your indulgence, could we take that question in writing and attempt to deal with this matter carefully rather than quickly and orally?

In relation to the more general proposition, we did receive a submission from the Hong Kong Bar Association basically saying they felt that in the light of the new schedule and the greater detail in Part XIII about the tribunal, and in the light of the Paragon decision, where the Court of Appeal laid down some very firm guidelines as to what was and was not permissible in an inquisitorial tribunal, they felt that there was sufficient guidance to prevent a recurrence of the unfortunate situation that did arise in that case. But I think it is probably best to deal with the detail in writing, because we need to choose our words with considerable care.

主席：

我比較感興趣的是第XIV部有關written statement by the Financial Secretary。為什麼證監會在完成調查，再提交審裁處的時候，不讓證監會直接向律政司徵詢意見，而要透過財政司司長才作出起訴；其作用何在？

財經事務局副局長區璟智女士：

財政司司長目前所考慮的個案，也是研究證監會的調查證據和資料；律政司就要看證據是否足夠，由於很多其他個案都是由律政司處理，在這方面應有較廣泛的經驗。財政司司長也是基於法律的論據，並考慮到SFC作為一個監管機構而作出處理；而律政司也要研究完這些不同的個案才作出處理。

香港政府有很多不同的執法經驗，可以提供法律意見，協助財政司司長歸納兩方面的意見，從而作出決定。

主席：

我的問題是，現在代表政府作出起訴的，是律政司，證監會諮詢律政司，這是必然的，也是可以接受的。但是，財政司司長的作用是什麼？似乎沒有這步，也是可以的。

財經事務局副局長區璟智女士：

財政司司長還要考慮公眾利益，以及跨市場的活動等各方面的問題。SFC所着重的是其作為監管機構的經驗，而律政司所着重的是法律方面的觀點。這是以往...

主席：

這點我明白。但另外一個條文(Part II)已經說明財政司司長可以給

證監會一些指示。

財經事務局副局長區璟智女士：

在第II部財政司司長只可向SFC索取資料。

主席：

個案交給財政司司長時，財政司司長只有兩個選擇：一個選擇就是同意繼續提交MMT；如果不同意的話，他須就拒絕SFC提出一個理由。一般來說，所提出理由都是基於法律的意見。在這樣的情況下，律政司基於沒有足夠證據提出控告作為理由是否已經足夠；否則的話，財政司司長是基於什麼理由而不繼續起訴呢？

財經事務局副局長區璟智女士：

根據財政司司長以往處理個案的經驗，其實最主要還是考慮監管者的意見和法律的意見，他是作為一個最終保障公眾利益的人，研究這些個案如何開始。

副主席：

我不大明白這點。既然是證監會提出的個案，肯定是認為在監管方面有很有力的理由才這樣做，也是它的職責所在；至於律政司方面，肯定會從法律的觀點考慮在法律上能否站得住腳？在證據方面是否完備？既然基於監管的公眾理由和法律的理由，都認為要提出，財政司司長有什麼理由不讓這件事進行？還是他認為證監會沒有足夠的理據，而律政司司長也認為沒證據也要去進行？這個是不可想像的。若證監會認為不夠理據，律政司司長又認為法律上“站不住腳”，財政司司長還是一定要進行，這是不可能的。唯一可能的是證監會要進行，律政司司長認為有法律理據，但

財政司則基於不知什麼理由而不進行。這會是什麼理由？

財經事務局副局長區璟智女士：

根據以往的經驗，從沒發生過過證監會和律政司都同意，但遭財政司司長否決的情況。從來沒有這種情況發生。正如主席所說，這種情況是不可能出現的。但我相信這是權責的分配，就是財政司司長負責香港金融市場的政策與發展，負責財經市場監管的政策。律政司司長在這裏的角色，就是提供全部的法律意見，由證監會進行啟動。這個安排就是這樣的，就是由誰監管金融市場的政策、規管和發展。

的確有時會出現一些論點，就是證監會就這宗個案應該是審理哪幾個人，律政司則要研究有關證據在法理上是否有根據。

副主席：

主席，我希望補充一句，我們別忘了MMT純粹關乎市場失當。市場失當不就是證監會的監管責任嗎？還要考慮什麼？

財經事務局副局長區璟智女士：

將來還會有一個考慮是我們剛才沒有解釋清楚的。同一市場失當行為可以用民事方法處理，也可以用刑事方法處理。即使證監會認為某個行為應利用民事方法啟動MMT，但律政司司長可能會向財政司司長提供意見，認為這樣的情況用刑事方法處理會比較好。財政司司長擔任中間人的角色，他可能會通知證監會，表示就個案徵詢了律政司司長的意見，覺得用刑事處理會更適合。法例將來會較清晰地訂明這個“雙軌”制度，現在並不是那麼齊全。

主席：

劉漢銓議員。

劉漢銓議員：

主席，現在提到的是MMT內的procedures，是指在MMT進行的法律程序，還是牽涉到另外一個情況？比如作出刑事檢控的時候，若律政司司長認為要提出起訴，是否要徵詢其他人的意見，又是否可以不提出起訴？財政司司長怎樣牽涉在內？

我明白MMT與財政司司長的關係，但我希望詢問，在提出刑事檢控的時候，假如律政司司長說“這宗個案可以起訴”，但要徵詢財政司司長的意見，究竟是否可以有這種情況出現？

財經事務局副局長區璟智女士：

我想涉及兩個問題：第一個問題，我不知道有否誤會劉議員的問題，你是否想知道，在決定啟動民事或刑事渠道的時候有何考慮，是否有人認為不應進行便不進行？剛才我們也作出解釋...

劉漢銓議員：

我的問題是關於刑事方面的。

財經事務局副局長區璟智女士：

以我的理解，刑事政策已經是很清楚，就是：證據是否充足、是否有勝訴機會和是否合乎公眾利益。若律政司司長在作出考慮後建議按照刑事的方法進行，證監會也要跟隨這個決定，不能堅持認為採用民事的方法會較好，因為律政司司長最後是刑事方面的專家，而且根據Basic Law，這

也是他的權力。至於另一個問題，就是說啟動民事審裁處的.....

劉漢銓議員：

我不是問這個問題，我關心的是關於刑事方面。比如，律政司司長認為這件事應該用刑事檢控，他還需不需要諮詢任何人才決定啟動刑事機制？

財經事務局副局長區璟智女士：

是不需要的。

劉漢銓議員：

這裏提到SFC現在有權啟動一些簡易程序的刑事起訴。根據現時香港的法例，有哪幾個部門是有這樣的權力？即不是直接由律政司司長作出決定，而是將權力下放給其他部門或官員。而該下放機制的情況是否與現時的下放機制完全一樣，因為這裏訂明會根據一個檢控政策。我希望知道，除了政策以外，實際上還有什麼機制，而那個機制是否和現時的機制是一樣的？

財經事務局副局長區璟智女士：

我相信政府和其他的審裁處可能都有雷同的轉介機制。可能我們剛才講得不夠清楚。假如證監會進行了一個調查，認為有證據啟動民事的機制，但根據《基本法》，律政司司長始終有責任告訴證監會刑事訴訟可能會較適合，那證監會便可能進行刑事訴訟。但經過諮詢後，若律政司司長也覺得民事是適合時，我們覺得，在這麼重大的事項上，而且可能會影響到整個金融市場運作的發展，這個啟動權還是放在財政司司長那裏最適合。

劉漢銓議員:

可能我的問題不夠清楚。文件CB(1)1160/00-01(01)的第20段講到SFC，英文是："the SFC will also have the residual capacity to institute in its own name summary criminal proceedings for less serious criminal market misconduct offences"，所以我就希望清晰地瞭解，第一，類似這個形式的做法，根據香港現時的法例，有哪幾個部門是這樣的情況？

第二，第21段提到證監會的一些檢控方式政策，在下放這個權力時，所建議的方式實際上是否和現有的方式一致？

財經事務局副局長區璟智女士：

證監會現時也有簡易程序檢控權，而在徵詢的法律意見後認為是沒有違反《基本法》的。律政司司長也有最後的反對權，這個做法只不過將證監會現有的權力保留。其他的執法機構也有，或者我問問陳律師有沒有這方面的資料。

高級助理法律草擬專員陳子敏女士：

據我記憶所及，入境處的人員應該有這樣的權力，ICAC可能會有，但我須查看一下。條文方面就是第XVI部第376條，該條列明證監會可以在什麼情況下以這個簡易程序提出檢控。最後加上第3款，訂明這個條文不損律政司司長就刑事罪行提出檢控的權力，換句話說，律政司司長任何時候均可以取回個案作出檢控。就這項條文，其實我們曾向基本法小組詳細諮詢他們的意見，他們在研究過現有法例後，已經同意了這項條文。

主席：

我的看法可能有些不同。

副主席：

主席，簡易程序當然是由裁判處處理，裁判處的laying of information是誰都可以做的。如果我認為劉漢銓做了一些事是可以起訴的，我也可以去告他。但律政司司長隨時都可以將案件接過來自己做，甚至不做也可以。所以我覺得這並非法律上的問題。反而我覺得財政司司長的問題要解決。

主席：

我覺得這一步並無需要。根據你剛才的解釋，證監會在完成所有調查後，他會選擇兩個途徑，一個是民事途徑，即是提交MMT，或者是提出起訴。

若是刑事方面，非簡易的那些個案他自己可以提出，嚴重的個案必須提交律政處，而《基本法》第六十三條已賦予律政司絕對的權力，個案不需要再提交別處。至於民事的那些個案，如果證監會認為應提出民事檢控，就要交給律政司司長研究。

財經事務局副局長區璟智女士：

是交給財政司司長研究，財政司司長會徵詢律政司司長的意見。因為根據《基本法》，律政司司長會再進行研究。即使證監會決定提出民事起訴，但在財政司司長諮詢律政司司長後，可能發覺原來不應提出民事起訴，而是有充分的證據作出刑事檢控，也可能會有這樣的情況發生。

雖然財政司司長不是負責財經機構的規管，但他也要再諮詢同事，根據所掌握的證據，在這個情況之下，是不是提出民事檢控最好。

主席：

不錯，就是這個問題。如果證監覺得在MMT提出民事訴訟的信心大、夠證據和容易入罪，但案件交到律政司司長手上時，律政司司長可能覺得提出刑事檢控會較好。若出現不同意見的時候，為什麼是由財金的官員而不是法律的官員去作出決定?

財經事務局副局長區璟智女士：

究竟是民事或刑事，財政司司長也沒有權作出決定。那個個案會轉介給律政司司長處理，若律政司司長也同意證監會的看法，認為應該用民事渠道，律政司最初仍會挑選例如10宗個案讓審裁處研究，而在這10個人當中，覺得只有5個人證據足夠的，便先聽這5人的陳述。根據以前的經驗，財政司司長會啟動審裁處的機制。

但在第一個written notice，即陳詞書內，可能只有這5個人的名字，因為他也要聽從法律專家的意見。這就是說在啟動機制之餘，首先把什麼人納入研訊範圍，也會經過這個諮詢過程，這也綜合了以往經驗發生的事情。

主席：

Audrey是不是也是提問這部分?請你提問。

余若薇議員：

主席，剛才提到XIII部那個presenting officer，我想知道他其實是代表哪一位？因為你解釋了，附表8的機制一定要由財政司司長啟動，一般刑事檢控當然由律政司司長代表政府，但這個卻不是，而是要由財政司司長向MMT發出通知才開始做。

附表8下第20項那個提控官其實代表律政司司長還是財政司司長？因為第21項指出，律政司司長可以隨時更換提控官或者獲委任為提控官的人。在一開始時不一定是代表律政司司長，因為剛才吳靄儀議員在提到些簡易程序時也提到，任何人都可以作出提控，但律政司司長可以把提控官撤走，自己作出提控，所以我在看到第21項時，並不清楚是否表示第20項在一開始時並不是律政司司長進行提控，尤其是有關程序一定要由財政司司長啟動。

理論上是否可以出現這情況，就是律政司司長建議以刑事處理，但是財政司司長卻不肯啟動那個程序，這個情況理論上是否會出現，並會否和《基本法》第六十三條有所抵觸。

財經事務局副局長區璟智女士：

證監會負責民事的程序，即是如果財政司司長決定啟動審裁處的機制，那他會建議行政長官委任審裁員，而律政司司長的角色是委任一個提控官，將那些事實告知審裁處。剛才所提的情況也不會出現。就是倘律政司司長在進行諮詢以後，覺得應完全由刑事處理，那財政司司長就不可以再有另一個意見，個案應該由刑事去處理。也就是說附表8就不適用了，因為附表8只訂明民事的程序。

如果律政司司長指出，今次證據確鑿、勝算高、符合公眾利益；雖然證監會建議用民事程序處理，但律政司司長覺得應該由他用刑事的方法主理個案，這樣，律政司司長就可以全權主理了。

余若薇議員：

主席，我們暫不談及民事的情況，只討論刑事方面。在證監會認為應作刑事處理，而律政司除了從法律的角度看是否站得住腳外，還要視乎是否合乎公眾利益，也就是說大家接受了，他認為應該用刑事的方式處理

較好。但是，在這麼多條例草案中，是否有哪一處寫明財政司司長並無選擇權，他一定要啟動，一定要作出通知，啟動市場失當審裁的聆訊，情形是否這樣，還是有另外的情形？

主席：

刑事就不需要問財政司司長，啟動MMT才需要。

財經事務局副局長區璟智女士：

余議員剛才憂慮的是，如果律政司司長的意見和財政司司長不同，雖然財政司司長說不提出刑事起訴，要用民事處理，但律政司長卻認為證據確鑿，不同意證監會用民事處理的做法而必須用刑事處理。在這樣的情況之下，財政司司長在這部分是沒有權力硬要啟動民事或刑事的機制。

主席：

在這樣的情況之下，我想不到財政司司長在什麼情況下可以overturn證監或律政司的.....

財經事務局副局長區璟智女士：

我們的看法，其實並不是說這個角色是用作反對證監會的建議。

第一是權責的分野，在特區政府範圍內，財政司司長是負責金融市場的規管、政策的發展，既然這是一個重要的決定，由他作出這個重要的決定，我們覺得是適當的。第二，在考慮的過程當中，根據以往我們的經驗，證監會可能會做一個內幕交易的調查，初步找到20幾個和個案可能有關的人士，但他從未從法律的觀點認真研究證據是否足夠的問題。律政司司長可能會再進行研究，在所找到20多位人士中進行初步研究，並根據初

步的資料，認為前面的10位人士可能是最有關係的。

在這樣的情況之下，根據以往的經驗，財政司司長會根據證監會的建議，認為有內幕交易的情況，而律政司司長認為這幾個人是最有牽連的人士。財政司司長便基於這兩個意見而啟動那個機制，當然，在機制啟動後，審裁處還可以傳召其他有關人士。在這幾個人陳述完畢後，若審裁處發覺還需要多一些證據，可以繼續傳召和個案有關的其他人士作出陳述。這個主要是尋求真相的過程，不是財政司司長要推翻某些決定，而是啟動機制時要考慮到審理的個案的各個方面。財政司司長發出書面意見給審裁處啟動機制的時候，會在信內列明個案的時間，例如請審裁處就某公司在某年由有關人士所參與的活動，是否有內幕交易的情況作出聆訊，最終是要劃定一個範圍，讓審裁處去啟動這個機制。

主席：

Margaret。

副主席：

主席，財政司司長的身份是一個政治官員，是政策方面的。我們現在牽涉的是證監會的獨立問題，它是independent regulator —— 一個獨立的監管機構。我們需要研究的是，香港特別行政區證監會這個監管機構，與外國的監管機構，在獨立性方面是否無法相比。英國的FSA，其主席由財務大臣委任，但獲委任後，主席便獨立進行監管工作。在美國，SEC在獲委任後也是獨立進行監管工作。為什麼在香港，我們一方面有獨立的監管機構，但另一方面，當監管機構要行使法律下的職權去處理或審裁一些市場失當的行為的時候，卻要向財政司司長諮詢，才可以決定能否展開程序？

財經事務局副局長區璟智女士：

主席，我想澄清一點。在法例內，我們無意賦權證監會做審裁的工作。我們現在提到的第XIII、XIV部，只是訂出市場失當行為的定義，證監會只是擔任調查的角色。至於是否基於調查的結果而啟動一個獨立的審裁機制，應該交由財政司司長決定。財政司司長會在有關過程中諮詢律政司司長，這是我們的構思。

副主席：

主席，對於這點我不明白。

財經事務局副局長區璟智女士：

你可以不同意，但這個構思就是：在法例內，我們沒有將角色混淆。

副主席：

你沒有聽清楚我的意思。我的問題是：證監會是進行監管和調查的工作，在進行調查之後就要採取行動，而證監會是一個獨立的機構，在經過調查後認為某些人士有市場失當的情況，才會採取行動；它不會在不知情的情況下，就讓財政司司長作出決定。在監管機構認為已經有市場失當的情況，就可以直接行動。如果它需要法律意見，就像其他的政府部門或者公營的部門，向律政司司長徵詢法律意見，怎麼會牽涉到財政司司長的介入？

財經事務局副局長區璟智女士：

現在的安排，其實最可以確保證監會在調查方面的獨立性。它可以獨立進行一項調查，它的確與律政司司長不同，並沒有那麼多的專業人材，可以就刑事或民事方面審議有關的資料及證據是否充足。它在那方面未必是強項，但在調查方面卻是強項，對市場各方面的不法活動的認知會比較

高。但在審議個別資料的證據是否足夠，律政司司長才有這方面的專業知識。

副主席：

我的問題不是關於律政司司長，而是關於財政司司長。

財經事務局副局長區璟智女士：

我正在解釋整個過程，即是證監會運用調查權力作出一個獨立的調查，把所有資料交給財政司司長，財政司司長不會立刻啟動機制，他會諮詢律政司司長。基於這些調查結果，究竟證據是否足夠啟動一個民事機制或者刑事檢控？

財政司司長基於證監會給他的資料，再諮詢律政司司長的意見，在這兩份資料提交後，律政司司長所提出的意見是，不進行刑事起訴，但可以民事起訴。他就根據律政司司長的建議，覺得證據確鑿，進行這方面的研訊，他所作出的決定與證監會的調查結果，在範圍上會較為廣泛或狹窄一些，以便有效地啟動機制又不會浪費審裁處的資源。

舉例來說，證監會找到很多可能有牽連的人士進行研訊，由於是利用納稅人的錢進行研訊，所牽涉的過程可能很長，範圍也並不集中。根據以往的經驗，律政司司長會向財政司司長提供意見，指明所啟動機制的範圍，是就某個時段某間公司的一些人士所干犯的違規行為進行研訊；起碼在啟動的時候，盡量把範圍縮小，資源的運用就會較為有效。當然在聆訊的過程中可以多花一些時間，因為是研訊過程，可以傳召多一些有關的人士。由於以往的程序是如此，將來也想保留這個程序，而並非想影響證監會的調查；但是財政司司長的地位，就是他可以吸納兩方面專家的意見，方便審裁處有效地開始善用資源去作研訊。

副主席：

現在是證監會通過財政司司長諮詢律政司司長，為何證監會不可以直接向律政司司長諮詢法律意見？

財經事務局副局長區璟智女士：

因為證監會是一個獨立的監管機構，它通常會通過行政當局進行諮詢，當然中間是有溝通的，我想請Mr DICKENS解釋。

Hon Margaret NG:

What is the value added?

主席：

我不知我提出的比喻是否恰當？進行任何檢控時，警察都不會諮詢保安局局長的意見，只會諮詢律政司司長的意見，對嗎？

副主席：

廉政公署都不會諮詢行政長官的任何意見。

財經事務局副局長區璟智女士：

剛才吳議員說得對，這是一個獨特的研訊過程，一個尋求真相的審裁過程。

副主席：

那麼更加不需要。

財經事務局副局長區璟智女士：

我有相反的意見，因為財政司司長的地位可以觀察到財經市場的發展。

副主席：

有否出現一些情況，就是在財政司司長審理後，雖認為證據確鑿，但不可以進行起訴？

財經事務局副局長區璟智女士：

這種情況沒有發生。

副主席：

既然沒有發生，又何需找財政司司長？我就想知道: What is the value added? Nothing. What you say is that you give it to the Financial Secretary; the Financial Secretary would refer it to the Secretary for Justice. Why need him to refer? I mean, the SFC has nothing to prevent it from coming directly.

財經事務局副局長區璟智女士：

證監會進行獨立的調查，找到的20位人士可能與個案有關係。

副主席：

對的。證監會找到20位與個案有關係的人士，可以直接向律政司司

長諮詢意見。

財經事務局副局長區璟智女士：

律政司司長的意見可能只是有10位人士有關。

副主席：

Maybe，但不用由證監會知會財政司司長說有20位人士，然後財政司司長就說有20位人士，而當律政司司長說只有10位時，財政司司長就說：只有10位，是否用得著這樣的做法？問題是有什麼主要的原因需要採取這樣的做法？

財經事務局副局長區璟智女士：

我想問問，在剛才的過程中，若證監會覺得有20個人是需要調查的，但律政司司長反對，認為根據以往的經驗，只有這10個人是有嫌疑的，就你剛才所提到的情況，證監會不同意律政司司長的意見，認為啟動機制就要調查所有20位人士，若證監會聽取了律政司司長的意見而採取行動，反而影響了獨立性。

副主席：

當然不是。主席，你諮詢法律意見.....

財經事務局副局長區璟智女士：

不聽取意見的後果會怎麼樣？

副主席：

區局長，容許我先提問。律政司司長在任何時間都可以提供法律意見。諮詢或要求一個法律意見，不等於法律意見會影響你的獨立性，因為你是否接受這個法律意見，是由你作主。

財經事務局副局長區璟智女士：

如果是律政司司長提出的法律意見，財政司司長一定會跟隨，因為律政司司長是財政司司長的法律顧問，這是最大的關鍵。我們希望審裁處不會浪費資源，進行一些無謂的聆訊。我們覺得這個意見是很重要的。

副主席：

你的意見是：律政司司長覺得證監會時常浪費人力資源，但證監會不理會。

財經事務局副局長區璟智女士：

我的意思不是這樣。但是我不想勉強證監會聽取一些律政司司長強諸實行的意見，這樣反而更加影響其獨立性。我們想證監會進行獨立的調查，然後交給政府，由政府決定。

副主席：

證監會為什麼要交給政府？這一點我無法明白。

財經事務局副局長區璟智女士：

你可以不接受財政司司長在這方面的角色。

副主席：

我不瞭解他的角色。

財經事務局副局長區璟智女士：

副主席，你是不接受他的角色，我已經說明他的角色。

主席：

我們暫停會議。我們於星期五的會議再討論這部分，對於這部分還需要一段時間的辯論。多謝各位。

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