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 Wednesday, 16 May 2001, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon SIN Chung-kai, (Chairman) Hon Albert HO Chun-yan Hon NG Leung-sing Hon Bernard CHAN Hon Jasper TSANG Yok-sing, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Margaret NG, (Deputy Chairman) 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 Ambrose LAU Hon-chuen, 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：

各位同事，今天的會議將討論第XIII、XIV部及附表8。自上次會議後，秘書處向各位發出數份新的文件，其中一份是Linklaters and Alliance提交的第三份意見書，這份意見書只有英文本。此外，香港證券經紀業協會有限公司亦向委員會提交了一份意見書。

余若薇議員：

主席，我希望繼續就上次討論的第247條提出問題。

主席：

好的。

Hon Audrey EU Yuet-mee, SC, JP:

I would like to ask about clause 247(1).

財經事務局副局長區璟智女士：

主席，或者首先讓我們向委員解釋政府的政策目標。自從委員在上次會議席上問及在法律上如何闡釋的問題後，我們曾與法律專家覆檢該條文是否已清楚訂明政府的政策意圖，以及該條文有否其他意思。政府的政策目標是這樣的：第一，向市場失當行為審裁處提出的證據，只可以在該審裁處的研訊中使用，這項規定已十分清楚。第二，除了兩個例外情況，這些證據不得在其他研訊程序中使用。有關的例外情況已在第247條詳細列明。第一個例外情況是作假證供或提供虛假資料，這項規定與其他相若條文的規定類似。也就是說，除了就上述兩種情況進行的刑事法律程序外，其他的刑事法律程序不得使用這些證據。此外，條例草案已清楚訂明，MMT

在研訊程序中所取得的證據，可在根據第272條等提出的民事訴訟中使用。如果投資者因某人的失當行為而蒙受損失，當投資者向法院尋求賠償時，投資者可引用有關的證據。

我剛才所提到的規定，與現時《證券(內幕交易)條例》的安排是一致的。然而，在草擬條例草案的過程中，有法律意見認為，如果在審裁處進行的研訊中，受牽連的人士將某間公司的財務報表作為一項佐證，而這些財務報表其實在市場上也可以取得的，根據該條文目前的寫法，會否無意地令這些廣為人知、外界人士隨時可以取得的資料，在日後進行的其他聆訊中不可引用呢？其實這是問題的關鍵。在上次會議席上，我們察悉各位對第247(3)條可能有其他詮釋，這不是我們希望出現的情況，所以政府重新考慮是否需要訂定該項條文。由於在普通法下，有關規定也許已十分清晰，因此可能根本無需訂定該項條文。如果有關資料能夠從其他方面取得，那麼無論該等資料是否在MMT進行的研訊中提到，其他聆訊均可引用該等資料。一如我剛才所列舉的例子，就上市公司的年報或財務報表而言，其實我們隨時也可以取得這些資料，在這種情況下，可能根本無需訂明有關的規定。然而，為求謹慎起見，我們會再與律師研究是否需要訂定這項條文。如果需要訂定這項條文，我們應如何草擬這項條文，才可避免出現歧異的情況？我不知道這是否已解答了有關問題。

主席：

我們先行討論政府的政策，暫時不要討論條文的寫法。

財經事務局副局長區璟智女士：

關於政府的政策，請問各位是否有問題提出呢？

主席：

關於政府的政策目標，各位是否接受這做法？

余若薇議員：

經政府解釋後，我便清楚瞭解有關情況。然而，該條文目前的寫法，實在令人很難理解。我希望提出兩個問題：第一，除了政府剛才所提到的兩種情況外，即perjury及因有關證據的提出而引起的民事索償訴訟外，政府可否告訴我們，有關人士還會在哪些刑事或民事法律程序使用在市場失當行為的法律程序中所提出的證據？

財經事務局副局長區璟智女士：

我也想不到還會在哪些刑事法律程序中使用該等證據。此外，也不可以這樣做，因為在市場失當行為的法律程序中，有關人士並沒有保持緘默的權利，他可能被強制作出一些使自己入罪的證供。我們想不到可以在哪些刑事法律程序中使用該等證據。

至於民事法律程序方面，該等證據可以在我剛才指出的情況下使用。我們希望從普通法的角度，與其他同事再作研究，也就是說，如果在普通法下已容許某些做法，可能我們無需在法例內加以訂明。

余若薇議員：

關於政府現時所提及的證據，該等證據在某些情況下可以使用，在另一些情況下則不可使用。其實怎樣界定該等證據的範圍？政府剛才解釋，能夠從public domain取得的資料可以在任何法律程序中使用。請政府告訴我們，哪些證據屬於第247條的規管範圍？也就是說，哪些證據只可以在某些情況下使用，在另一些情況下則不可使用呢？政府所提及的證據是指甚麼證據？

財經事務局副局長區璟智女士：

政府在草擬條例草案時，並無嘗試在條例草案中清楚說明有關證據是從哪種情況下取得的。條例草案只概括地訂明，審裁處在研訊程序中取得的證據，只可在審裁處的研訊中及所引起的民事訴訟中使用。關於我剛才所提到的情況，我們需要與律師再作研究，因為有關規定可能在普通法下已十分清晰，無需在條例草案內加以訂明。

Hon Audrey EU Yuet-mee, SC, JP:

I have not made myself clear. Maybe I will try again. My question is: what is the type or the area of evidence that clause 247 is directed against? You are saying there is a body of evidence which is admissible, of course, in the MMT proceedings and used in the MMT proceedings. However, this body of evidence is not admissible in any other civil or criminal proceedings except as provided in clause 247(2), which is, for example, civil proceedings arising under this Bill, or perjury. Clause 247 is obviously directed against a certain body of evidence, not the entire body of evidence that is used in the MMT proceedings. So I am trying to understand what is the body or the nature of the evidence that this section is directed against, which would be admissible in the MMT proceedings and admissible in perjury proceedings, admissible in the civil claims arising under the Bill, but not admissible in any other criminal or civil proceedings. Do I make myself clear?

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

Self-incriminating statements is the obvious category, and that is what we are trying to do. We are abrogating the privilege against self-incrimination in the MMT. We are following that through into the civil proceedings under this part, and we are trying to limit it in all criminal proceedings except for false statement ones. What we are trying to work out is whether we need to limit it in other civil proceedings or not. But as far as we have got, we

are still discussing that with DOJ as to exactly what the common law is in other civil proceedings outside this part, once the privilege has been abrogated; and then we have to set whether the policy should be that the privilege is restored for those other civil proceedings. You remember the Honourable Margaret NG's argument that the evidence only became available for that bit. We have to work through that policy issue.

Hon Audrey EU Yuet-mee, SC, JP:

Yes. That is the other aspect.

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

Then we have to work through that policy issue. The other sorts of things it happens to apply to are: hearsay – evidence that would not normally be admissible in civil proceedings is admissible in MMT proceedings because they are not bound by the strict rules of evidence. So you might be able to get into the clause 272 civil proceedings some evidence that was not strictly admissible under the normal rules of civil litigation.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I understand that bit about self-incrimination, but it may be, of course, difficult to draw a line around the evidence that comes in because of the abolition of the privileges against self-incrimination in the MMT proceedings. That basically is part of my question. How do you define a group of evidence which becomes admissible in the MMT proceedings because of the abolition of the privilege against self-incrimination, which therefore falls within clause 247, and would only be admissible for certain proceedings but not admissible for other proceedings? That is one area – privilege against self-incrimination.

You mentioned the evidence of the other nature, which is hearsay, but the hearsay

rule has been really more or less abolished in civil proceedings anyway. I mean, there is still a discretion.

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

Significantly eroded; yes.

Hon Audrey EU Yuet-mee, SC, JP:

Yes; but it has almost been abolished, so I do not know what other categories of evidence you have in mind which would fall within clause 247. That is the initial policy area that you have got to first of all to determine. Then that has to be defined in clause 247. Then your second policy question is: once you define that body of evidence, then in which type of proceedings would it be admissible and not admissible? Then you come to the drafting aspect.

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

Okay. What we mainly had in mind was self-incrimination and the rules that go with it – exposure to a fine, penalty and forfeiture in those circumstances, because otherwise the evidence, it seems to me, would be admissible anyway, in most of these circumstances. The whole of the policy thinking is focused around self-incrimination, and that is why you get the specific mention in clause 247(2) about the false statement criminal proceedings.

In terms of the practicalities of a tribunal hearing, we have not done this, and it was not done under SIDO, which is where this section is drawn from. But you can simply restrict the statements in relation to which the person actually claims privilege before answering the question, which is what we do in SFC inquiries. You only get the privilege if

you assert the privilege; and that at least makes it easier in subsequent proceedings to know what you are arguing about. We have not done that, but it is something we could take on board to think through it.

余若薇議員：

主席，我不再提問太多的問題，因為證監會表示需要加以考慮。我的意見是，關於政策方面，我並不知道哪類證據需要特別處理。在市場失當行為的法律程序中所提出的證據，哪些證據屬於這條款所指需要特別處理的證據呢？我認為至少應弄清楚這一點。既然證監會表示需要清楚考慮一下，我們暫不在此討論這個問題。

財經事務局副局長區璟智女士：

政府在草擬條例草案的過程中，曾諮詢內幕交易審裁處的律政司同事。他們傾向不嘗試將這些證據分類，因為此舉在運作上是十分困難的。此外，也很難草擬這方面的規定。再者，有關人士在提出證據時，也很難將證據分類。政府現時傾向採取的做法，就是條例草案目前所建議般，不將證據分類。MMT在研訊程序中取得的證據，均會以這樣的方法處理。在採取這種處理方式後，我們便要考慮這樣做會否妨礙其他的法律程序。所以，當局訂立第(2)及(3)款的規定。關於第(2)款，似乎各位已達成共識，認為該條款的規定並沒有問題。然而，第(3)款卻出現歧異的情況，各位認為該條款有其他的意思。因此，當局集中研究第(3)款，探討是否需要訂定該條款。如果普通法已處理有關問題，便無需在條例草案內加以訂明。不過，作為負責任的政府，如果我們心中存有疑問，較可取的做法是在條例草案內訂明這項規定。儘管現行法例在沒有這項規定的情況下亦能運作，但較可取的做法可能是在條例草案內訂明這項規定。我們需要研究如何才能把這項規定寫得清楚。當局傾向不在第(1)款加以分類，因為這做法實際上是頗困難的。至於Mr DICKENS剛才提及的意圖，我認為要把該意圖寫下來並不是這麼容易，實行起來也是十分困難的。

主席：

各位有沒有其他問題？何俊仁議員。

何俊仁議員：

關於MMT在研訊程序中取得的證據，第247條就該等證據可否在日後的民事及刑事訴訟中使用作出規定。請問該等證據可否在紀律聆訊中使用？

財經事務局副局長區璟智女士：

這問題交由SFC回答。

何俊仁議員：

這條文似乎並沒有提及紀律聆訊的情況。

Miss AU King-chi, Deputy Secretary for Financial Services:

Could we use the information in the disciplinary action?

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

The answer is "It could be", and the reason is that they are not civil or criminal proceedings in the sense of this section. The Commission can take into account any relevant material, and this would get them to fall under that category, but only for the purposes of discipline.

Hon Albert HO Chun-yan:

You are satisfied that there is no question of self-incrimination?

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

Well, let me take it in steps. The person has incriminated himself in the MMT. That is the hypothesis. It cannot be used in a criminal trial, except for false statement, so that does not matter. That is the theory. If he incriminates himself in front of us, then remember that under our investigative powers they must answer the question, even if it incriminates them. But they can claim privilege, and if they do so, it cannot be used in criminal proceedings against them, but it can be used in disciplinary proceedings. That brings this into line with the normal SFC investigation where we can ask a person, "Did you do this crime?", and in theory they have to say, "Privilege. Yes, I did this crime", but we cannot use that in the criminal prosecution. We can only use it in the disciplinary proceedings.

Hon Albert HO Chun-yan:

I see. So that is in line with the…..

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

That is in line with our investigative powers, with our current practice.

主席：

還有沒有其他問題？我希望就第290條提出問題。該條文關乎披露虛假或具誤導性的資料以誘使進行交易的罪行。我們今天一併討論第XIII及XIV部，對嗎？

我留意到，根據Linklaters等團體最近向委員會提交的意見書，他們與政府的看法仍然有很大分歧。Linklaters於2001年5月10日向委員會發出的文件(CB(1)1224/00-01號文件)，表示已參考政府的回應，認為當局的回應未能令人信服。他們亦認為有關的刑罰相當重，還強調"criminal liability should be limited to mis-statements made knowingly or recklessly"。我對這方面亦十分關注，其中一間公司也提出意見，認為"TV and newspaper commentators on securities and futures can have a large audience and be very influential. The manner in which they comment on securities and futures is similar to horse racing tipsters and they encourage a gambling ambience"。政府的回應是，有關條文"do apply to such people"。也就是說，除了受規管人士外，一些經常在媒介發言的人亦受第290條所規管。該等人士部分可能屬於受規管人士，部分並不屬於受規管人士。根據當局的回應，第290條的適用範圍亦包括該等人士。一些團體提出意見，認為只有當該等人士"knowingly"或"recklessly"作出有關作為，才屬犯罪。我也明白當局要證明有關人士明知故犯，其實是很困難的。政府對此事是否仍然維持本身的立場？條例草案這部分的要求，與美國及英國的做法是否相稱？所規管的範圍會否較海外國家的廣泛？

財經事務局副局長區璟智女士：

主席先生，我稍後會請SFC的同事向委員會解釋以下的情況：如果某人在發放資料時，忽視有關資料是否真實，海外國家會怎樣處理這種情況？有關人士需要負上甚麼刑事責任呢？根據海外國家的《證券法》，這種情況會怎樣處理？

在此之前，我希望向各位交代一下，政府在草擬條例草案時，曾與市場人士進行"密集式"的討論。當時提出的主要關注事項包括：第一，該

條文是否清楚訂明*mens rea*，即行事意圖？當局在現有的條例草案內加入一些字眼，務求清楚訂明行事意圖，這是市場人士最主要關注的事項。關於說明行事意圖的字眼，例如在第290(1)(*a*)及(*b*)條使用"誘使"一詞，該用語包含有意圖成分的存在；第二，在日常工作中，上市公司的董事或高層人員需要不斷發放資料，有些資料可能是錯誤的，但該等資料並不影響市場價格。市場人士關注到，在這種情況下，有關人士會否因此觸犯法例？政府認為應將該條文的涵蓋範圍收窄至只針對可以影響市場價格的資料。因此，第290(1)(*c*)(i)條訂明，有關資料屬於"to a material fact"，這其實是指會影響價格的資料，當局在該條款加入上述的字眼，希望有關規定能夠清晰一點。如果某些資料並不屬於事關重要的資料，即使內容有錯誤，有關人士也不會負上刑事責任。第三，也是主席剛才所提到的，關於一些向公眾發放資料的人士，通常是指上市公司的高層人士或其他擁有這些資料並再發放的人士，究竟他們需要負上甚麼責任？政府認為，我們不應容許該等人士明知故犯地作出有關的作為。此外，如果該等人士罔顧後果，明知後果仍要作出有關作為，該等人士亦應有責任承擔後果。因此，該條文也加入罔顧的成分。第三點需要考慮的，就是如果有關人士擁有這些資料，而向公眾發放這些資料可能屬於日常的工作，如果該等人士疏忽行事，我們應否將這情況納入該條文的規管範圍呢？經討論及參考海外國家的資料後，當局認為，如果這情況並不受該條文所管限，便可能會大大減少對投資者的保障，這是政府主要的政策考慮。其實當局主要考慮到公眾對這類發放資料的人士有甚麼期望。儘管如此，當局也明白到，從事傳媒工作、出版業及互聯網工作的人士，他們所發放的資料，可能是由其他人士提供的。他們可能真的不知道有關資料是否虛假。因此，該條文的後半部分亦清楚訂明，該等人士在何種情況下無需負上責任，這是對該等人士的額外保障。現請SFC的同事向各位解釋……first, it is the international comparison that we have conducted on similar provisions in the Securities and Futures Law to Members and that negligent provisions are quite different.

Mr Mark DICKENS, Associate Director, Enforcement, Securities and Futures Commission:

The very short answer is that neither the UK nor the United States criminalize negligent mis-statement. Australia, Malaysia and Singapore do criminalize it, and in Australia with the reverse onus of proof, so that the defendant has to show he exercised reasonable care. This is the provision about which Professor Larry LANG was making all the fuss – that we had reversed the onus of proof. The onus of proof used to be on the defendant. In response to the submissions we received from Linklater's clients, we modified the provisions so that the onus of proving negligence is now on the State, on the prosecution. That said, the jurisdictions in our region do criminalize negligence. The UK and the US do not criminalize negligence. That is the short answer to it.

主席：

謝謝。其實政府當局作出的回應第13頁亦提到這一點，所以我就這一點提出問題。請各位參閱政府對市場人士所提意見作出的回應第13頁。新加坡、澳洲、馬來西亞及香港均對此impose criminal liability，美國及英國並沒有這樣做。

財經事務局副局長區璟智女士：

主席，我們需要考慮本港市場的特性，例如投資者以往有否向證監會投訴過這種情況？根據目前的法例，這種情況是否很難處理.....

主席：

對不起，即CB(1)1187/00-01(02)號文件，或Paper No. 12A/01。這部分較具爭議性。請各位參閱該文件第13頁。Hong Kong Association of Banks、Group of nine investment bankers及The Law Society of Hong Kong提出了一項意見。政府可否告訴我們，這部分的規定是否已存在了一段時間，還是曾作出修改呢？根據法律顧問提交的補充資料，就第290條而言，部分規定似乎現時已存

在，但某些規定如第(3)至(6)款是新加入的。法律顧問，是不是這樣？

政府可否告訴我們，根據這條文，一些受規管人士或擁有特別資料的人士所受到的規管，與一些經常在媒介作出評論的人士(如分析員)所受到的規管有何分別？

財經事務局副局長區璟智女士：

如果有關人士純粹報道其他人所提供的資料，這做法並沒有問題。

主席：

那麼該等人士所作出的分析又如何？

財經事務局副局長區璟智女士：

如果該等人士自行作出分析，這屬於個人意見，亦沒有問題。每個人均有自由發表意見，就股市何時上升及下跌提出意見。

主席：

除非他知道某些資料。

財經事務局副局長區璟智女士：

對。

主席：

也就是說，政府如要根據這條文控告某人，則須證明該人知道一些

虛假資料，這樣理解對不對？

財經事務局副局長區璟智女士：

首先，政府需要證明該人意圖誘使他人進行交易。此外，亦要證明該人所提供的資料能夠影響市價，而不是任何資料。第三，就是必須符合我剛才所提到的3個測試的其中一個。我們現在所討論的，就是有關的測試應達到哪個水平。

主席：

我所擔心的是，現時英國及美國並沒有同樣的規限，即沒有施加刑事責任。香港卻採取澳洲、新加坡及馬來西亞的做法，這會否令規模較大的機構投資者不在香港活動或減少在香港活動？政府是否擔心這問題呢？

財經事務局副局長區璟智女士：

現請作為監管機構的SFC向我們講解近年來有否遇到特別的情況，使他們認為這測試十分重要，以及從市場人士的反應來看，這做法對他們有甚麼主要影響？我們又是否認為構成這些影響呢？

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

The existing law is very limited. It only applies to statements made for the purpose of inducing sales. So it is only downward statements, not upward statements, that are caught. The test there is negligence. Most of the situations we come across, where the market is harmed, the situation is where someone talks a stock up, for want of a better word. I think you need to read the operation of the section in context. If you say that you are not taking any responsibility and you are not sure whether the information is true or false, or that

it is a market rumour, the statement is that it is a rumour, and if that statement is not false, there will not be a problem, even if the content of the rumour is false, for example.

What is negligence will depend on the particular position of the person making the statement. If it is in a stockbroker's research with the letterhead on, and it is meant to be a careful analysis of the company, then a certain standard of due care will be expected. If he falls below that standard he will be negligent. If a person is doorstopped by a journalist and answers a question obviously in an off-the-cuff situation, the duty of care is much lower, so it is much, much harder to establish negligence.

The net is not as wide as it looks. There are other factors in US and UK law that discourage negligent statements that do not operate in Hong Kong. In the US there is very strict civil liability because of the ease of bringing class actions and actions for damages. In the UK it can be dealt with under the code on market abuse, and in theory, while it is not criminal, there can be unlimited fines for such conduct. As I say, the code of market abuse is still in the process of being formulated.

Yes, we are following the regional practice rather than reading international markets. No, I do not think it will discourage investors. It certainly has not discouraged large investors in Australia or in Singapore. In Malaysia the investors have been discouraged but not by the law; simply by the state of the market.

主席：

訂定第268條不是已足夠嗎？我對第290條並沒有強烈的意見，因為我還沒有清楚考慮有關的規定是否真的太嚴苛。第268條已訂有多項規定，很多時候更容易起阻嚇作用。

財經事務局副局長區璟智女士：

其實在草擬條例草案的過程中.....一如副主席在上次會議席上也提到，究竟有關刑事及民事的條款是否需要有所不同？經討論後，我們認為，如果兩項條款是一致的，市場人士對有關做法會較為清晰，也就說是，他們會較清楚在甚麼情況下可能觸犯法例。事實上，在甚麼情況下會觸犯第268條呢？其實該條文的寫法，與第290條的寫法一樣。兩者的分別在於後果有所不同。當然，兩者的舉證準則也各有不同。當局認為需要訂定第290條，這是由於在諮詢過程中，部分專業人士認為，相對於海外市場而言，這種情況在香港市場相當普遍。他們認為，政府及證監會必須正視及積極處理有關問題。他們在參閱第268條後，認為有關的民事罰則不夠嚴厲。當局曾向他們解釋，在民事制度下不能把有關罰則訂得太高。在考慮不同的意見後，政府把有關規定重寫一次，施加刑事的罰則。儘管一如主席剛才所說，絕大部分的個案可能無法達到刑事檢控標準，但條例草案保留該項條文。如果某個案的證據確鑿，當局可對有關人士施加刑事罰則。政府希望向社會人士發出清晰的信息，並提高阻嚇作用。第290條是輔助第268條的一項工具，當局可以對有關人士施加刑事罰則，這視乎個別個案的情況來決定。

主席：

各位同事可自行決定是否接納這解釋。我們日後進行討論時再研究這問題。根據委員會所收到的意見，市場人士與政府的看法相當不同。

余若薇議員。

余若薇議員：

區璟智女士及證監會在答覆主席的提問時，均表示在市價處於低水平時才發放有關消息，請問情況是否一定如此？此外，她提到事關重要的資料是指關乎價格的資料。然而，根據第290條，這不單是指價格的問題，即並非material effect as to the price。據區璟智女士所說，這是指對價格有影響

的資料，但其實涵蓋範圍應更廣泛，對嗎？這條文是指任何資料，只要是false or misleading as to material fact便可以了。舉例來說，如果某人不慎洩漏上司的學業資歷，當然有關方面可爭論這資料是否material，但這類消息亦屬於第290條的涵蓋範圍，對嗎？

財經事務局副局長區璟智女士：

政府的政策目標，是希望包括一些可以影響市價，即市場敏感資料。然而，當局無法在法例中這樣列明的，因此唯有在法例中訂明屬於事關重要的資料。該條文訂明，有關資料可誘使他人進行交易。我相信投資者在買賣股票時，所考慮的最重要一點是股票價格。因此，當我們一併考慮有關問題時，對這間公司的前景或實況而言，事關重要的資料必定是十分重要的資料，可以影響這間公司的市價，我是這樣理解的。當然，亦可能包括一些其他事關重要的資料。但長遠而言，該等資料必定會對公司的股票價格有所影響。我不知Mr DICKENS……

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

Miss AU has correctly described the policy of the section. It is only meant to apply to statements that are false or misleading as to a factor that will be price-sensitive, and that is what I have always taken "material fact" to mean. So in your particular example, while the educational qualifications of a member of the board of directors may be interesting, they would be material to the price only in very exceptional circumstances.

You can envisage a very small dotcom, for example, where the technical qualifications of the board might be the most important asset that that company has, and there it would be material. If, on the other hand, it is someone sitting on a board of a very large property company, it would not make much difference. I think, again, materiality is from context, but the policy is that definitely it should only be materiality as to price sensitivity. I

do not purport to be Law Draftsman, but that is how I read this provision, and that is what the policy is meant to be.

高級助理法律草擬專員陳子敏女士：

我希望稍作補充。

主席：

好的。

高級助理法律草擬專員陳子敏女士：

謝謝主席。這條文與澳洲的Corporations Law非常接近，寫法也是相同的。根據剛才所提到的政策目標，如果需要將material fact與價格掛鈎的話，我們可以再作研究，探討應採取接近澳洲《公司法》條文的寫法，還是需要作出修改。不過，我們需要先行與政府商討。

Chairman:

Yes, please.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I think I also share some of your concern about criminalizing negligent conduct. I mean, although the argument is that clause 290 only creates an offence when the information is likely to induce another person to subscribe, of course in the end you are applying an objective standard, whether a reasonable person would think that the information is likely to induce. So you do not normally slap criminal sanctions on somebody who is negligent, and did not realize that he was inducing another person to

subscribe; but then on an objective standard, it did induce another person to subscribe for securities and so on,. Normally if you do criminalize negligent conduct it would be very gross negligence, but this is not required by clause 290. You do not need very gross negligence.

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

You need to consider that in the content of the statement, not to the disclosure.

Hon Audrey EU Yuet-mee, SC, JP:

Yes; of course.

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

If that is what you are saying, I think we are agreed as to policy, and we have to examine the drafting.

主席：

坦白地說，有時候我也存有疑問，為何無人能夠阻止市場上某些行為的發生呢？在一些個案中，似乎已有充分的表面證據，證明某人發放資料，令市場價格波動。政府可否告訴我們，倘若有證據證明某董事發放資料，令股價波動，而該名董事在這段時間進行股票買賣，這些環境證據是否已經可以啟動MMT的運作，或使政府能夠提出刑事檢控呢？或者讓我以另一種方式提出我的問題。委員會在上次會議席上亦提到，有關向市場披露資料的行為，其實是眾多行為中公眾特別關注的部分。現時政府或證監會可選擇以兩種途徑提出法律訴訟。如果沒有訂定刑事罰則的話，有關個

案的處理方法十分清楚，就是交由MMT處理。有關人士並沒有保持緘默的權利，必須向MMT作出解釋。我所擔心的是，政府或證監會認為有足夠證據對有關人士提出刑事檢控，但最終未能將該人成功入罪。由於政府或證監會已對該人提出刑事檢控，屆時又不能將有關個案交由MMT處理。該人因此無需受到刑事或民事制裁。請問政府是否擔心出現這樣的情況？

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

Well, yes, but it goes with the turf. We cannot have double jeopardy. We are going to have to make a decision based on the evidence and the public interest criterion. We do not make the decision. SOJ makes the decision as to whether there should be a criminal prosecution. If the decision is that there cannot be, then all we have left is the MMT, and that is where the matter will be heard and dealt with. If it is a trivial matter we can bring a summary prosecution, if we have sufficient evidence.

It is not as easy as people think to prove negligence, by the way. You do have to establish that the person did not do what they should have done to check the accuracy of the statement, and what they should have done is, as I said, going to vary according to the context, whether they are holding themselves out as an expert or they are someone who was doorstopped by a TV camera and microphone shoved in their face, and asked a question.

The overlap between Parts XIII and XIV is something we have already dealt with. We have a choice of two routes. It is not fair to the defendant that he have to undergo double jeopardy, so we have to get that choice right at the outset.

主席：

有沒有其他問題？

Audrey.

余若薇議員：

Linklaters在該份意見書第3頁提到，他們擔心該項規定或會對給予意見的專業人士構成影響。該項條文是否牽連到很多專業人士？這類人士是否需要面對若干風險？證監會可否向我們解釋這問題？

財經事務局副局長區璟智女士：

在研究這條文時，所需要考慮的一點，就是需否將不同類別的人士分類。即使有關人士(例如委員剛才所說的專業人士)有意作出某項作為，而該人又知道有關資料並不真實，我們應否以某種方法處理這類人士呢？政府認為在這條文中，很難將向公眾發放資料的人士分類，為各類人士訂定不同的測試。我不知道這是否余議員所提出的問題？

余若薇議員：

不是，我並非要把不同人士分類。我的意思是，Linklaters在2001年5月10日發出的文件(CB(1)1224/00-01號文件)第3頁"False or misleading information"的標題下，提到對第290條的意見。該標題下第2段提到，"For example, where a listed company has issued an announcement, actions might be brought against all the professional advisers to the company who were in any way involved"。

該等專業人士會否因第290條的規定而承受風險呢？證監會或政府是否認為這些人士特別vulnerable，將會受這條文所管限？我希望證監會或政府就professional advisers的問題解釋一下，究竟證監會或政府認為該條文的規定，會否牽涉到這類professional advisers？我並非要求將不同人士分類，我的問題是：這條文會否影響這類人士？

財經事務局副局長區璟智女士：

政府並不認為這條文特別針對某類專業人士。此外，專業人士更應瞭解自己的專業責任。當專業人士受聘於一間上市公司並負責發放資料時，該等人士亦特別着重本身的專業責任。該等人士所屬的專業團體亦會訂下很嚴格的測試標準。該等專業人士在處理資料時，我相信他們必須符合法例所要求的測試，甚至需要符合更嚴格的測試。作為專業人士，他們必須清楚知道所處理的資料的內容是否真實。我相信這條文的規定，與他們現時所需遵守的專業守則或要求應該並無抵觸。Mr DICKENS或可向各位匯報這方面的情況。

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

The answer is both "yes" and "no". If you are a professional adviser and you are concerned in the disclosure and circulation, etc, of price-sensitive information, and you are negligent, and it is fair, just and reasonable for you to be liable for that negligence, then you will be liable. But you have not only got to be negligent; you have got to fit within this fair, just and reasonable thing which is meant to import what I used to call "the duty of care", which is found in clauses 272 and 296. They're talking about the potential for multiple liability and civil lawsuits. We are talking about civil litigation. They know very well we would never be prosecuted.

Hon Audrey EU Yuet-mee, SC, JP:

Mr DICKENS, clause 296- -

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

Clause 296(2).

Hon Audrey EU Yuet-mee, SC, JP:

This is in relation to several claims. Does it apply to criminal conduct ?

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

No, it does not, but what Linklaters are talking about is multiple liability and civil lawsuits against all these people, so I took it in the civil context. But in the criminal context, if they were concerned and they could be proved to be negligent beyond reasonable doubt, then they would be liable to prosecution.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, sorry. Can I clarify this, because my understanding is that if you apply the common law - and I think on the last occasion Mr BARR says the statutory liability created, certainly under the last Part we were talking about is not meant to enlarge the common law – because of Caparro and all these other cases, I thought the law is that if you are a professional adviser, you are not normally taken to have assumed liability to the public in terms of investors.

Could there therefore be a difference between the civil liability and the criminal liability in respect of professional advisers, and in civil liability they are not normally taken to have assumed liability, because it is not fair, just and reasonable? But then in criminal liability, because you have not included that particular provision, in fact you assume a higher duty to a larger group of people under the criminal law, because of clause 290.

財經事務局副局長區璟智女士：

我們需要考慮的問題是，無論專業人士或上市公司的董事，他們向公眾發放資料時……一如Mr DICKENS剛才所提到，如果控方能夠在毫無疑點的情況下證明該人疏忽行事，即negligence beyond reasonable doubt，究竟社會人士是否容忍這種行為呢？倘若能夠證明該人明知有關資料是虛假的，又或罔顧或忽視該等資料是否虛假，而所進行的test是beyond reasonable doubt，在這種情況下，無論該人是律師、會計師、大律師或公司董事也好，究竟該人應否就此負上責任？我認為這是問題所在。

余若薇議員：

主席，我希望就區璟智女士所說的作出回應。與民事訴訟的舉證責任比較，刑事訴訟的舉證責任當然較嚴格。同時，干犯刑事罪行的後果亦較嚴重，罰則也較重。我所提出的問題是：如果專業人士因疏忽而作出某項作為，就一般民事訴訟而言，根據普通法，該專業人士對公司需要負上責任，但這不一定代表該專業人士亦需對一般市民或公眾負上責任，這是由於需要經過"fair, just and reasonable"的測試。然而，第290條似乎並沒有訂明"fair, just and reasonable"的測試，那麼當專業人士因疏忽而作出某項作為時，該專業人士會否需要對更多人，包括公眾負上責任？我所提出的問題，並非關乎責任、有否疏忽或應否懲處的問題，而是在刑事檢控中，有關人士是否需要對更多人負責？與民事訴訟比較，該等人士在刑事檢控中是否需要對更多人負責？民事法律程序受到若干規範，也就是說，即使某人不小心說了一些話，並非所有人均可對該人提出起訴。我所提出的問題是：與民事訴訟比較，專業人士在刑事檢控中是否需要對更多人，包括公眾負責呢？我希望清楚知道這一點。

財經事務局副局長區璟智女士：

關於這個法律論點，我無法給予明確的答覆。我相信這視乎個別個案而定，最重要的一點是，有關資料對甚麼人士造成影響。

余若薇議員：

Mr DICKENS剛才表示，第296(2)條訂定多一項條件，亦即除非就有關個案的情況而言，某人應根據第(1)款作出賠償是公平、公正和合理的，否則該人無須根據該款作出賠償。關於這一點，據我所理解，就是Mr BARR在上次會議席上所解釋，在普通法下，如果某人說了一些話，該人無需向所有聽眾負責，只需向某些人負責，也就是說，這是一項規範，把範圍縮窄了。訂明民事法律責任的第296條載有這項條件，但訂明刑事法律責任的第290條並無載有這項條件。兩者是否有差別呢？我希望知道在刑事法律程序中，有關人士是否需要對更多人負責？

財經事務局副局長區璟智女士：

我相信並沒有百分之一百準確的答案。第296條採用民事的舉證標準，有意見或會認為所涵蓋的範圍較廣泛。但由於該條文訂明必須符合"公平、公正及合理"的測試，因此可能令所涵蓋的範圍縮窄。該條文訂明需要作出賠償的情況。

至於第290條，政府或證監會必須在毫無合理疑點的情況下，向法院證明剛才所提到的各項事宜，包括有否誘使他人進行交易、有關資料是否影響市價，以及有關人士是否有意這樣做等等。在這種情況下，有意見或會認為，只要有關資料可能對其他人造成影響，便受該條文所規管，也就是說，受管限的層面更廣泛。然而，如果考慮到所需進行的測試，亦很可能把涵蓋範圍收窄。第296條訂明需要作出賠償的情況，第290條訂明有關人士需否負上刑事責任。第290條訂明，如果有關人士向市民大眾提供資料，他們需要負上很大的責任。

主席：

何俊仁議員。

何俊仁議員：

我們在上屆立法會通過有關提供虛假資料的法例時，有關條文並沒有包括疏忽的因素。現時的條例草案是否把有關規定擴大了？

財經事務局副局長區璟智女士：

去年通過的法例並非關乎向公眾發放資料，該條例關乎向證監會提交資料的情況。

何俊仁議員：

然而，當中並無包括疏忽的因素。關於提供虛假資料的法例方面，倘若屬於刑事罪行，當中並無包括疏忽的因素。

主席：

除Linklaters外，本地的團體仍未就這部分提出意見。

何俊仁議員：

我們在上屆立法會通過有關向證監會提供虛假資料的條例時，曾就兩方面進行激烈辯論。第一，應否把有關行為刑事化？立法會最終支持把有關行為列作刑事罪行。第二，關於構成該項刑事罪行的元素方面，尤其是有關"意圖"方面，當時立法會聽取了很多業內人士的意見，把範圍大幅收窄。據我所憶及，當時曾將該條例與有關向其他部門提供虛假資料的法例作一比較。有關人士必須清楚知道那些資料是虛假的，又或完全罔顧該等資料是否虛假。因此，有關這方面的刑事罪行中，以往並不包括疏忽的

因素。

財經事務局副局長區璟智女士：

這是一項新安排。現請Mr DICKENS講解何議員剛才提到去年通過的條例。

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

Yes and no. Negligence is not part of false information provisions. It has been part of section 138 of the Securities Ordinance, but only in relation to a narrower class of statements made for the purpose of inducing, and only for the purpose of inducing a sale, not a purchase. But negligence is there, for example, and has been there for some time. The reason for putting negligence here is unlike providing false information to the SFC, this is a form of misconduct which has victims, and the victims are the people who deal in the market.

If you negligently disclose false price-sensitive information to the market, people trade on the basis of that, and they make losses. So it is not like just misleading the SFC and wasting its time while it tries to work out the real story. This is a market offence which has identifiable victims who are misled by the information; and that is why we say it should be on a higher standard of negligence, as it is in other regional jurisdictions. It is different from just misleading the SFC.

Hon Albert HO Chun-yan:

My concern is that our legal policy in general terms is not to criminalize negligent conduct, even in the context of giving statements for the benefit of the public. So you really are creating a new type of offence which covers negligent conduct, and we have to be extremely cautious. Unless we are satisfied that is the law in other comparable jurisdictions,

otherwise we are starting something rather draconian in Hong Kong. Is there any necessity to do so? Bear in mind, though, that there is no argument that reckless conduct, dishonest conduct where you know the person who disseminates the information either knows or is reckless as to the truth of the statement, and he would be found liable. But negligence is something that really causes concern.

財經事務局副局長區璟智女士：

各位需要就這問題作詳細考慮。政府剛才已向各位提供一些背景資料。現在讓我再歸納有關的論點。第一，這做法並非沒有先例可援引的。正如Mr DICKENS剛才提到，澳洲、新加坡及馬來西亞的《證券法》均載有這項規定，除此之外，本港的《證券條例》亦有類似的條款。雖然與條例草案所建議的涵蓋範圍比較，現有條文的涵蓋範圍較狹窄，但該項規定並非一項香港獨有及嶄新的安排。第二，就本港的市場而言，某些問題是否較嚴重呢？答案是肯定的。傳媒以往曾報道有關情況，各位也曾收到投資者的投訴。在是次改革中，委員會需要考慮在打壓這類行為時，應否施加較嚴厲的刑罰？也就是說，需要考慮現時本港市場的情況。第三，除疏忽的元素外，各位應一併考慮其他的測試。作為一項配套，有關的保障是否已經足夠？正如我剛才所說，當局已經在有關條文中清楚列明意圖的成分。如果我們將各項規定所涉的範圍收窄，例如把所涉資料的涵蓋範圍收窄，這樣做是否已經足夠？我希望各位可從上述3個角度詳細考慮。

委員會在日後需要考慮的是，既然條例草案已訂有民事法律責任的條款，那麼是否需要加強法例的阻嚇作用，訂定刑事法律責任呢？如果沒有訂定刑事法律責任，情況又會如何？經過這次改革後，是否真的能夠協助投資者處理這種情況？這是政府最主要考慮的問題。

何俊仁議員：

可否把這問題記錄下來？我真的需要慎重考慮這一點。

主席：

我的意見也是一樣。因此，我剛才表示，我並非不同意政府提出的所有理據。不過，在某些個案中，政府或能夠對有關人士提出刑事檢控，但根據法例的規定，又似乎無法成功檢控該等人士。

財經事務局副局長區璟智女士：

讓我向各位提供一些補充資料。當政府參考澳洲的法例時，澳洲的《公司法》在該項條文訂明……或者Eugene or Mark, you do have to remind me if I am wrong, but in Australian Corporations Law, the power of provisions in their law, I think, has put the onus of proof on the defendant.

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

Quite correct.

Miss AU King-chi, Deputy Secretary for Financial Services:

Not on the prosecution in the criminal rules, or on the presenting officer in the civil rules. So we have indeed bent over backwards to address markets concerned about the importance of assumed innocence at the beginning of a civil proceeding or a criminal trial, so much so that in this Blue Bill provision we have clarified the *mens rea* element. By clarifying the *mens rea* element we have *de facto* put it very clearly that the prosecution will have 100 per cent responsibility to prove that that person had the intention to engage in this kind of misconduct. So by putting the onus of proof clearly on the prosecution, we have made life for the prosecutor much more difficult – much more difficult – especially for this kind of white collar crime.

Hon Albert HO Chun-yan:

That is the general rule. The burden is always on the prosecution. There is nothing special about it.

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

Not in some other jurisdictions.

Hon Albert HO Chun-yan:

I think it would make a lot of difference if you could provide a defence available to the accused who can establish honestly a good defence to this prosecution. So this burden has shifted to the defendant, once false information is proven.

主席：

政府可否告訴我們，甚麼情況會構成第290(1)(*c*)(ii)條所指的negligence？

財經事務局副局長區璟智女士：

這問題交由政府律師回答。

主席：

政府可否列舉一些例子？

何俊仁議員：

隨便列舉一些例子。

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

Do you want them taken from actual case study, or do you want some hypotheticals? We can come back with case studies.

We will have to take the names out, but we can do that.

Chairman:

Yes. I would be very pleased. You can cross the names out but have some examples so that we as legislators can really understand the SFC needs such power to - -

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

Everyone can generate their own hypotheticals, but we will try and bring back some case studies.

Chairman:

Good.

何俊仁議員：

余若薇議員剛才所提出的問題是：一旦該法例生效後，主要報道財

經新聞的報紙的專欄會否消失？這是由於不敢刊登筆者的意見，我希望知道該法例生效後所帶來的效果。

主席：

讓我highlight一些機構提出的意見。舉例來說，Charles Schwab曾提出這方面的意見，擔心這項規定會打擊報紙披露消息的做法。一些機構曾提出這方面的關注。各位可參考公眾就《證券及期貨條例草案》第XIII及XIV部提出的意見第5頁，關於第268及290條，CSHK表示，"The definition of the 'disclosure.……' will chill the production of electronic investor information"。我們必需小心處理這問題。

何俊仁議員：

此外，有關的免責辯護只適用於即時廣播的情況。也就是說，有關人士無法核實資料。如果是報章所載的報道，有關人士必定能夠核實資料。屆時，對於專家就某公司的財政狀況所作出的分析，證監會可質疑該報章的編輯為何不核實資料。在這種情況下，有關報章便不敢刊登專家的特稿。

財經事務局副局長區璟智女士：

政府預期不會出現這種情況。現請Mr DICKENS解釋一下：What would be the position of the journalist under this provision?

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

The problem with this is that it is all very context-specific, but it depends very much on what the journalist says. If the journalist reports that the director of the company has said something is going to happen, then the journalist is all right because it is true that the

director said it. What the director said may not true. If the journalist reports that there is a rumour that something may happen, and there is such a rumour, then that is a true statement as well, although the rumour itself may not be true. So in both those situations the journalist is protected.

If the journalist says "I have reason to believe", and he does not have reason to believe, "that this stock is going to go up because they're about to find gold in Outer Mongolia" or something, or "They've got a super computer project with the Mongolians", and that is not true, and he has no reasonable basis for that belief whatsoever, then if he said it as if it were true, without attributing it to anyone else, then he would possibly have a problem under this provision, if he did not have any reasonable basis for that statement. Most journalists do, and most of what journalists do is report what other people tell them; and because it is what other people tell them, the journalist is reporting a true fact, the true fact that Mark Dickens said such-and-such. Mark Dickens may have a problem.

Hon Albert HO Chun-yan:

Yes. Leave aside the writer, you know, or the author for the time being. How about the editor? Would the editor be faced with the situation that he had to check virtually every article?

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

My answer is "No", because the articles themselves all include those sorts of statements. The editor might consider it prudent to lay down a policy for his financial journalists on how they should report stories, but that would be a mere matter of prudence. It is certainly not required by this law. The individual stories themselves: as I say, if they attribute the statements to other people, then that is going to take them outside this clause, although the other people may find themselves inside this clause.

Hon Albert HO Chun-yan:

Yes, but the publisher or the editor is also, under the law, in fact a party publishing the statement, technically speaking. So if the statement is found to be untrue or is false in a material extent, one can say that if the editor has spent some time to find out whether or not the statement is true or false, the matter should have been avoided. All the mistakes should have been avoided. Hence the editor is eventually found to be negligent. Would he be caught?

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

I am saying it is unlikely. If he were found to be negligent, then he would be caught. What I am saying is that because of the way most newspapers report the news, attributing statements about companies to other people or to rumour, rather than asserting them, they do not normally fall within this section to start with. But if a newspaper were to do a story, an analytical piece, say, on a particular company, and were to just recite a whole list of facts without attributing them to people, and the facts were false and they had not taken due care to check them, then there would be that sort of liability if the information were price-sensitive. Yes.

Hon Albert HO Chun-yan:

So you impose duty on the editor to check – as simple as that? – the accuracy of statements - -

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

Yes; the editor or the columnist.

Hon Albert HO Chun-yan:

- - complained of, in all these articles or columns.

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

To check that reasonable care had been taken; yes.

Hon Albert HO Chun-yan:

With reasonable care?

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

Yes.

主席：

即使立法會接受這部分的規定，政府也可能需要向……解釋……

何俊仁議員：

主席，我認為需要聽取有關行業的意見。我不希望有關行業日後投訴條例草案對他們的工作構成影響。根據該條文的規定，編輯可能需要核實所有文章，即稿件的內容。各位也知道，主要報道財經新聞的報章載有很多文章分析市況。報館在收到該等文章後，通常在很短時間內便需要把

文章付印。編輯是否真的需要核實所有稿件呢？此外，撰寫該等文章的人全部也是專家。編輯或出版商有沒有時間核實所有稿件的內容？要求他們按照當局所說核實有關資料是否真確，這做法是否切實可行？該條文訂明，只要他們忽視有關資料是否虛假，便已違法。我認為較實際的做法是瞭解他們如何運作。

財經事務局副局長區璟智女士：

在現實生活中，如果這是一間負責任的報館，該報館應有一些內部指引，所採取的做法應符合香港記者協會公布的指引，也就是說，撰寫文章的人也需要負上合理的責任，核實有關資料的來源。如果文章所載的內容屬於個人分析，那麼該分析員需要負上責任。如果該分析員表示，這是他在研究各項市場消息後得出的個人意見，便應該沒有問題。最重要的一點是，正如Mr DICKENS剛才提到，有關人士在向市民報道收集所得的資料時，有否故意發放一些虛假的資料，以誘使他人進行交易，甚至從中獲利？倘若真的出現這種情況，我們應否對有關人士作出懲處？

何俊仁議員：

如果負責撰寫文章的作者作出欺詐行為，我不反對懲處該作者。但是編輯或出版商應否受到懲罰呢？

主席：

在審議這條例草案的整個立法過程中，傳媒並沒有向委員會提交意見書。政府或證監會會否考慮……

何俊仁議員：

主席，這交由委員會負責好嗎？委員會負責審議這條例草案，因此

由委員會致函傳媒，徵詢他們的意見。委員會應諮詢他們，因為這對他們有直接影響。

財經事務局副局長區璟智女士：

我希望補充一點，Mr DICKENS剛才也提到，編輯怎樣才算是盡了合理的責任呢？我認為如果編輯訂定了內部監控措施，便算是盡了合理的責任，因為編輯無法核對每篇文章的各個用語。

主席：

各位有沒有問題？是否需要進行諮詢？委員會並沒有收到傳媒對第290條提出的意見。

何俊仁議員：

我認為應聯絡傳媒。

主席：

曾鈺成議員。

曾鈺成議員：

我們應與傳媒聯絡，邀請他們發表意見。

主席：

這是值得做的，對嗎？

何俊仁議員：

秘書應致函傳媒，指出這條文可能直接影響到出版商，並諮詢他們的意見。

主席：

好的。委員會諮詢傳媒對第268及290條這兩項條文的意見，對嗎？委員會是否只需邀請他們提交書面意見，無需安排他們口頭申述意見？

何俊仁議員：

首先邀請他們提交意見書。

主席：

所諮詢的對象是各大報章，對嗎？

何俊仁議員：

是否應該包括月刊及周刊呢？徵詢月刊及周刊出版商的意見亦十分重要。

主席：

但本港有很多月刊及周刊。

何俊仁議員：

然而，關於財經的月刊及周刊，數目並不多。

主席：

這是一項技術問題。本港似乎有一條法例列出各大報章的名稱，但未有列出各本雜誌。本港載有一名單，列出所登記的報章。我們可以根據該名單致函各報館。

何俊仁議員：

主席，在法例內，報章的定義十分廣泛，包括月刊和周刊。

主席：

但至少有一個list。

何俊仁議員：

對，政府有一份名單。

主席：

那麼委員會可以根據該份名單徵詢有關人士的意見，因為市場上實在有太多雜誌，秘書處無法逐一聯絡各本雜誌的出版商。

何俊仁議員：

此外，也可以致函香港報業公會等組織，對嗎？

主席：

如果是這樣的話，委員會應致函有關機構、協會及professional bodies，以徵詢他們的意見，而不是致函各報館。各位對這做法有沒有意見？

財經事務局副局長區璟智女士：

我認為如果委員會致函有關組織，這做法會較容易協調。

主席：

對，致函有關組織較容易協調。

財經事務局副局長區璟智女士：

在會議室旁聽的傳媒，部分屬於財經版的。如果他們有意見的話，應已經提出有關意見。

何俊仁議員：

他們對事件的看法或有所不同。他們可能沒有想到自己也……

財經事務局副局長區璟智女士：

他們可能認為並沒有任何影響，因為他們已經盡了本身的責任，確定資料的來源，即確定資料是否屬實。

主席：

我所擔心的是，可能報業人士還未察覺到這問題。各位同事，你們是否已作出決定？是否決定徵詢有關組織的意見？

何俊仁議員：

對，我們諮詢有關組織的意見。本港共有幾個這類組織。香港新聞行政人員協會等幾個組織也具影響力。

主席：

委員會將會致函香港記者協會、香港新聞行政人員協會、香港報業公會等傳媒組織。我們諮詢該等組織的意見，因為這做法較具代表性。

余若薇議員：

主席，倘若我們完成就第290條進行討論，我可否提出另一個問題？這問題與該條文是有關的。

主席：

可以。

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, just now I think Mr DICKENS mentioned clause 296, which is civil liability for contravention of this Part, and in particular he mentioned sub-clause (2). I just wanted to ask whether, when compared to clause 208(3), which also deals with civil liability - -

Chairman:

Audrey, can you repeat the clause? Clause 296?

Hon Audrey EU Yuet-mee, SC, JP:

Yes. Clause 296(2) provides a limitation in respect of civil liability. That is: "No person shall be liable to pay compensation unless it is fair, just and reasonable in the circumstances of the case that he should be so liable". I just want to compare this to clause 208, which is also civil liability for false or misleading public communications concerning securities and futures contracts. Under clause 208(3), which has a sort of similar qualification, there are actually two parts. Sub-clause (3)(a) has an additional part, which is that he is not liable unless he has assumed responsibility with respect to the other persons in connection with the relevant communications", or "(b)" – that part, that it is "fair, just and reasonable" is similar to clause 296(2). I just want to ask whether the two qualifications are meant to be parallel. If so, then why is sub-clause (3)(a) missing in clause 296(2)? Is there any particular reason, other than historical? I think that sub-clause (3)(a) was added because of some comments from the Bar Association, but having considered that particular comment, whether the two qualifications and the two sections are meant to be parallel and consistent, whether there is any particular reason to have the additional qualification only in clause 208(3), but not in clause 296(2).

Thank you, Mr Chairman.

財經事務局副局長區璟智女士：

我們曾與律政司的專家討論有關問題，並答應提交一份文件，將這些類似的條文作一比較。一些條文是否因應市場提出的意見而加入條例草案呢？現在重新參閱有關條文時，或會認為沒有必要加入該等條文。這是因為如果條例草案加入有關條文，會把範圍縮窄，反而無法協助投資者。

主席：

關於第XIII及XIV部，各位有沒有其他問題？

何俊仁議員。

何俊仁議員：

關於操縱證券市場的罪行方面，據我所理解，現時也有類似的條文。政府在1998年入市後，我曾詢問當局為何不可以利用有關條文處理當時的情況。政府的回應是很難利用有關的條文。政府可否解釋，這類條文實際上是否真的難以運用？假如在1998年的情況下也無法運用，日後在何種情況下才能運用第291條？

財經事務局副局長區璟智女士：

這需要視乎個別個案的情況。

主席：

請問政府曾否引用該項條文的規定？

財經事務局副局長區璟智女士：

這次立法的其中一個目的，就是希望堵塞現有法例的漏洞。至於在《證券條例》中，類似條例草案第291條的條文曾否被引用，我也需要請教Mr DICKENS。Whether we have invoked the previous stock market manipulation provisions?

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

The predecessor has been invoked before. We have had a number of minor

prosecutions, summary prosecutions, in the last few years, for very obvious false trading offences. The reason we are asking for this - most of Parts XIII and XIV, the new market manipulation provisions - is that the existing provisions are not very efficacious. They do not work in the sorts of situations that Mr HO is referring to, and we need these provisions to plug the loophole.

However, every so often we do get something which we can squeeze into the existing words of section 135 of the Securities Ordinance. We do minor prosecutions, and you will notice some of the submissions complain that the penalties are too low. That is because the prosecutions are taken in the Magistrates' Court. But 291 has not previously existed in Hong Kong. It exists in Australia and it draws on the United States law. It has been used in quite big cases there. The biggest was the Namoura case, which was a cross-market manipulation case involving the whole of the futures and securities markets at the close, to influence the price of a futures contract. We do not have anything in existing law that is that strong. That is why we are asking for more teeth.

何俊仁議員：

政府可否告訴我們，其作用是堵塞現時哪方面的漏洞？政府可否列舉一些實例，說明如何可以運用該項條文？

主席：

市場人士對第291條並沒有提出很多意見。他們或認為根本不可能出現這種情況。請問政府是否享有豁免?

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

None of this binds the State. None of this binds the government.

Hon Albert HO Chun-yan:

None of this binds the government.

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

That is the normal test. We can give you examples. We will probably take most of them from the Australian case law because it is less controversial, but we can give you examples.

Hon Albert HO Chun-yan:

How are the existing loopholes closed? What are the improvements?

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

There are so many that it is very hard to list them all out, but if I can direct your attention – I hope you have a copy – to section 135 of the Securities Ordinance, it has a very limited definition of what constitutes creating a false market. So it is sales and purchases transacted by persons acting in collaboration with each other – and here comes the hard bit – for the purpose of securing a market price that is not justified either by the assets of the corporation or by the profits of the corporation.

You have to prove not only that they moved the market price from where the market price would have been, but that it is a wrong price by reference to some criteria of their value. Frankly, that is impossible, so that provision is never used. "...or the market price is raised, depressed, hedged or stabilized by means of any act which has the effect of

preventing or inhibiting the free negotiation of market prices for purchase or sales of the securities, or..." – and this one we have kept but have widened it a bit – "the employment of any fictitious transaction or device or any other form of deception or contrivance".

If you look at preventing or inhibiting a free negotiation, it might apply to some of the things that we now mention in clause 291, and in the other provisions in clause 287. It does not apply to all of them because you need this concept; you have to prove a prevention or inhibition, not just that the free market was distorted, but that negotiation was prevented or inhibited.

If you go to (c), which is probably your best bet, you need to prove that there was a fictitious transaction or a form of deception or contrivance. So you have quite a strong *mens rea* element. Now, as I say, we have kept "fictitious transaction" and "artificial transaction", but we have added all the Australian provisions, to try and plug the loopholes. Also in section 135 of the Securities Ordinance there is our old friend, the purchase or sale which involves no change in beneficial ownership. We have got that concept here, although we have widened it a bit. It is essentially the wash sale.

Then we have got our friend – we have made it a lot longer in the new Bill – "circulation or dissemination of information to the effect that the price of securities will rise or fall because of the market operations of one or more persons, which are prohibited". But because we have prohibited much more in this Bill, that has a much wider effect in this Bill, whereas all you have in the Securities Ordinance is section 135.

Then you have something we have picked up again, which is the prohibition of "...device, scheme, artifice to defraud a person in a securities transaction". We have kept that pretty much, but it is not about market-wide conduct. It is about a particular fraud of a particular person in a particular transaction. There is a thing in section 137 of the Securities Ordinance that was meant to prevent market rigging, but it does not quite work. We can give you a paper on this, but basically none of the existing law works terribly well.

Hon Albert HO Chun-yan:

Just take a concrete example. Suppose I sell short a number of futures contracts. Then shortly after that I immediately sell a large volume of blue chips, with a view to push down the futures index. Now, would that by itself constitute a market manipulation?

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

Not under the existing law.

Hon Albert HO Chun-yan:

Not under the existing law? But how about under clause 291? It is purely that the sale of the blue chips is with a view to push down the futures index. It is as simple as that. Suppose there is a meeting amongst directors showing the consensus that we sell all the existing stocks with a view to pushing down the futures index. Then the evidence is clear.

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

Then you are caught under the Bill.

Hon Albert HO Chun-yan:

It is caught?

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

Commission:

Yes. I am referred to clauses 287(3) and 287(4), but we could probably get it in one or two of the other provisions as well; but definitely those apply. "A person shall not take part in..." etc, etc, "one or more transactions with the intention that, or being reckless as to whether it or they has or have, or are likely to have, the effect of creating an artificial price".

主席：

政府可否告訴我們，第291條多處出現"in Hong Kong"的字眼，如果一些人士並非在香港作出這類行為，例如透過Internet trading或致電回港操縱證券市場，該等人士是否受第291條所規管？

何俊仁議員：

這類行為很多時候是在overseas作出的。

財經事務局副局長區璟智女士：

其實政府也考慮到這問題。因此，在"市場失當行為"的定義條款中，我們在適當地方加入"香港或其他地方"，即"in Hong Kong or elsewhere"的字眼。也就是說，無論有關人士在哪個地方作出這樣的行為，問題的關鍵在於這類行為是否針對香港投資者而作出的。

主席：

但第291條並沒有訂明"in Hong Kong or elsewhere"，只訂明"in Hong Kong"，對嗎？

財經事務局副局長區璟智女士：

不對。與第287(3)條一樣，這條文亦採用了有關字眼。

主席：

然而，在第291條中，某些條款採用"in Hong Kong or elsewhere"的字眼，其他條款則沒有。

財經事務局副局長區璟智女士：

第291條也有採用……

主席：

第291(1)條採用"in Hong Kong or elsewhere"的字眼，但第291(2)條則沒有。

財經事務局副局長區璟智女士：

現請陳律師向各位講解這方面的問題。

高級助理法律草擬專員陳子敏女士：

這條文由兩部分組成。如果是針對香港的市場，有關條款採用"in Hong Kong or elsewhere"的字眼；但如果是針對外國的市場，有關條款便採用"in Hong Kong"的字眼。這條文因應不同的市場來決定犯罪的地方。

主席：

明白了。證券商協會有限公司認為無需草擬第291(2)條。關於這部分，各位有沒有其他問題？

胡經昌議員。

胡經昌議員：

關於第XIII及XIV部，政府較早前強調在草擬這兩部分時，曾參考澳洲的法例。有關的法例是很難找到的，而且這方面的法例篇幅浩繁，但我最近取得了一些有關這方面的資料，該等資料主要關乎第XIII及XIV部market misconduct的規定。我發現這兩部分的條文主要是以澳洲的法例為藍本。然而，據我觀察所得，我希望提出以下兩點：第一，關於第293(1)(*b*)條，該條文的寫法是"the person knows that, or is reckless or negligent as to…"；而澳洲有關securities的法例只訂明"the person knows"及"reckless"的部分，當中並沒有"negligent"的字眼。政府可否告訴我們，既然當局表示澳洲在這方面的法例已運作多年，行之有效，那麼為何澳洲的有關條文並沒有"negligent"的元素，條例草案卻加入這元素呢？

第二，關於第292(2)條，該條文相等於澳洲法例中有關"prohibited conduct"、"misleading or deceptive conduct"的條文。第292(2)條訂明，"a person who contravenes subsection (1) commits an offence"。然而，澳洲法例的規定剛好相反，有關條文是第995(3)條。該條文訂明，"person who contravenes this section is not guilty of an offence"。請問第292(2)條是否抄漏了"not"一字？由於我在昨天下午才取得這份資料，因此我還未有時間閱覽整份文件。

政府可否告訴我們，當局是否完全按照澳洲法例的規定來草擬這兩個部分？還是曾就有關規定作出修訂？請問當局曾就哪些規定作出增減？

多謝主席。

財經事務局副局長區璟智女士：

在Mr DICKENS或Mr GOYNE作出回應前，讓我先行概括地解釋當局在參考澳洲的法例時，兩者有甚麼不同之處。兩者最主要不同之處是，第一，澳洲的法例並沒有清楚描述行事意圖。然而，就香港的情況而言，當局考慮到市場人士的憂慮，所以在行事意圖方面有較清楚的描述。這是兩者主要不同之處。那麼有關的後果將會是怎樣？關於我們剛才所討論的有關發放虛假資料以誘使他人進行交易的罪行的條文，在澳洲，檢控當局無需證明有關人士意圖誘使他人進行交易，控方只需證明有關資料是虛假的便可以了。然而，在香港，有關規定經修訂後，藍紙條例草案訂明，檢控當局除了需要證明有關資料是虛假的，還要證明有關人士意圖誘使他人進行交易。這是其中一個例子。在香港，條例草案對行事意圖有較清楚的描述。這符合本港市場的訴求，當局希望合法地進行交易的人士可安心繼續進行他們的活動。

至於胡議員剛才提到某項條款在文字上的差異，請問Mr DICKENS或Mr GOYNE現時有沒有資料可以補充？當局其實打算把澳洲有關法例的副本送交各位參閱。

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

Both examples you give, Mr WU, come from Division 4 of Part XIV. Division 4 of Part XIV is the bit that are not based on the Australian law. Up until Division 4, Parts XIII and XIV work in parallel. For every provision in Part XIII there is a provision in Part XIV. Those are what we call the market misconduct defences, and they are the things that the MMT can do, or the criminal courts can do. When you get to Division 4, it is purely criminal jurisdiction. There is no MMT and there is no direct Australian equivalent either.

To take the first one you raised, clause 293 is about leverage foreign exchange

contracts. Australia does not have provisions about leverage foreign exchange contracts, because it does not regulate them in that way. That said, I think you have a very fair point about the insertion of negligence, because it is out of line with some of the other provisions, and we can consider that clause 292 is not parallel to section 995 of the Australian Corporation Law. 995 is a general anti-misleading or deceptive conduct provision. It prohibits misleading or deceptive conduct of any sort in the corporations and securities industries base, and the futures industry. It is a civil provision which creates civil rights of action, but not rights under the MMT or for criminal prosecution.

Clause 292 is about fraud in a transaction involving securities. So it is about a particular fraud in a particular transaction, and it is a much, much harder thing to be guilty of than it is to contravene section 995 of the Australian provision. Section 995 is a very broad provision. It is what I call an ambulatory provision. It has been developed a lot by the courts, because it covers any form of conduct which is misleading or deceptive at all. We chose not to adopt that because it took us a lot wider than what we were looking at, which was essentially market manipulation and insider dealing. It prohibits things like, for example, brokers misleading their clients about anything. It prohibits corporations misleading the public about anything. But it does not result in a criminal offence at all. It is purely a civil provision. Is that correct?

財經事務局副局長區璟智女士：

第292條是根據現有的《證券條例》、《商品交易條例》及《槓桿式外匯買賣條例》中有關欺詐行為的條文而訂定，所採用的措辭基本上並無變動。

胡經昌議員：

區璟智副局長剛才提到稍後會向委員會提交一份澳洲相關法例的副本。其實我只是迅速地參閱有關資料，發覺有關條文十分類似，但當局

表示兩者有所不同。各位在收到有關文件後，可仔細研究有關條文。至於剛才提到的"negligent"一字，該字眼不單在第293條出現，其實很多條文也載有"negligent"一字。舉例來說，第290條也載有該字眼。我的意思是，其實很多條文載有"negligent"一字，該字眼不單在Division 4出現，我只希望指出這一點。

至於我們在上次會議席上提到的"artificial pricing"一詞，其實Australian Law並無載有這用語，有關條文的寫法也有所不同。政府已就這方面作出解釋。待政府提交澳洲相關法例的副本後，法律事務部可否將兩者作一比較，以確定有關條文是否一如政府所說是有所不同的，抑或兩者是相同的？由於有關法例篇幅浩繁，請問當局何時可以提供這些資料供我們參考呢？

財經事務局副局長區璟智女士：

陳律師希望作出補充。

高級助理法律草擬專員陳子敏女士：

雖然政府會再作研究，但我希望指出一點，就是根據澳洲相關法例第999條，雖然該條文並無採用"negligent"一字，但該條文載有"ought reasonably to have known"或"does not care"的字眼。

主席：

余若薇議員。

余若薇議員：

多謝主席。

主席，關於Linklaters最近致委員會的信件，當中提到一些他們仍然認為有問題的條款。除了這信件所提及的問題外，他們是否已經與證監會或政府處理以往所提出的問題？委員會是否只需要研究餘下的問題？此外，我希望政府及證監會與委員會一起研究這信件所提出的問題，並解答有關問題。政府是否打算在稍後時間才向委員會發出文件，以回應該信件所提出的問題呢？如果可以的話，我希望政府在今次會議就該信件作出回應，那麼委員會便無需在稍後時間再處理這信件。

Linklaters在信中提出數個問題。舉例來說，關於false trading方面，Linklaters提到associated companies之間證券的轉換，他們詢問可否訂明這種情況不受有關條文的規管。關於price rigging方面，他們認為，如果有關人士並無意圖這樣做的話，該等人士不應被視作作出市場失當行為。由於我們剛才已就第290條進行討論，除第290條外，政府可否就這些問題作出回應？

財經事務局副局長區璟智女士：

主席，我請Mr DICKENS與各位詳細研究Linklaters最新提交的信件。我們所理解的，與余議員所理解的一樣。當局與Linklaters一直進行密集式的討論，關於他們以往所提出的多項意見，他們都接受了我們的解釋。這信件似乎是Linklaters就條例草案這兩部分，亦即他們認為餘下有問題的條文所提出的意見。關於這些residue points，I would like to ask Mark to walk us through.

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

There are a lot of points, but to start on page 2 at false trading. The first point is that they are concerned that if a person intentionally does something which, in the view of a tribunal or court, has the result of misleading the market, he would be guilty of false trading, even though he did not intend, and was not reckless, as to whether this conduct created a false

or misleading appearance. We have no disagreement with Linklaters on what the policy of the provision should be. In other words, we think that he should intend or be reckless as to whether his conduct creates a false and misleading appearance. It is a question of whether the drafting achieves that. Our view is that it does, but we will re-examine it, because we do not disagree on the policy.

The next point raised by Linklaters on page 2 is clause 265(5), which deems certain transactions to constitute false trading, subject to establishing a defence that it was not, for a certain purpose. One of the examples they cite is that the clause, read literally, would prohibit off-market transfers of securities from a company to an associated company, which occur very regularly and have no market impact whatever. We agree totally that off-market transfers occur very regularly. We agree they have no market impact whatever. We agree they should not be caught. It may be that we need to refine the drafting to refer to transactions on, or reported to, a market. Maybe we do not. We need to look at the drafting, but we have no policy disagreement.

In the third dot point in that paragraph, they talk about a large securities firm in effect hitting its own orders. That happens because they are operating behind Chinese walls and the two parts of the firm are operating without reference to each other. So one part of the firm is buying; one part of the firm is selling. We are prepared to look at that further, but my initial reaction is that they could make out a defence that none of their purposes was a prohibited purpose. If I could just turn to clause 265, the defence is on page C2053 in subsection (6): "A person shall not be regarded as having engaged in market misconduct……if he establishes that the purpose for which he committed the act was not, or where there was more than one purpose, the purpose for which he committed the act did not include the purpose of creating a false or misleading appearance of active trading in securities."

We think in a Chinese wall situation that defence could be made out very easily because we do not have a purpose. One part of the firm has a purpose of buying; one part of

the firm has a purpose of selling, and there is no purpose at all of affecting the market one way or another. We have not had time to, but we are prepared to discuss with Linklaters why they do not think that defence works, and no one is trying to catch things on Chinese wall transactions. So again we have no disagreement with them as to the policy. It is simply that we think the drafting achieves something. They are not sure that it achieves. Do you want me to keep going on the price rigging ones?

Hon Audrey EU Yuet-mee, SC, JP:

Yes. Can you do the other ones as well – walk us through the price rigging? On false trading, can I just check whether it is meant to apply an objective standard on the words "intentionally or recklessly"? Although you are talking about *mens rea* the court will ultimately apply an objective standard in finding the *mens rea*. Is that right?

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

Well, while as we have to do is subjective but proved by objective facts. It is meant to be *mens rea* in the classic sense.

Hon Audrey EU Yuet-mee, SC, JP:

Yes. Thank you.

Chairman:

Is that all right?

Hon Audrey EU Yuet-mee, SC, JP:

Can Mr DICKENS also walk us through the price rigging part?

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

The first point is that they (Linklaters & Alliance) think it is unnecessary, and our answer to that is that it is both necessary and useful to spell out, if necessary, two or three times in slightly different words, the sorts of things we do not want people in the market to do, so they will know what it is that they cannot do. I note that they do not say it is harmful. The next thing is that they pick up on our comment which is in paper no. 12A/01, that it will be circular, unnecessary and confusing to extend the defence in clause 266(4) to all the categories of offences set out in clause 266.

If I can take you to clause 266(4), which is on page C2055, it is the purposed offence. If you engage in a transaction that does not involve a change of beneficial ownership, you have to establish that you did not have a purpose of creating a false and misleading appearance of active trading. The reason we say we do not have to repeat that defence for everything is that we say clause 266(1)(b) involves *mens rea* anyway, and if the prosecution has to prove *mens rea* anyway, it would be strange to have a reverse onus of proof on the defendant.

I do not know whether you accept that argument, but that is our argument. They go on to say: "If it were clear that the offences in clauses 266(1)(b) and (2)(b) require proof of intentional recklessness, as to all the elements of the offence, including artificiality", they would agree with us. Let me make it quite clear. As far as we are concerned, the elements of intention or recklessness should apply to all the elements of the defence. It is for the legal advisers to tell us whether the section does that, but again there is no policy disagreement. It is purely a question of how the *mens rea* is read back into the section; but the mens rea is clearly there.

Over the page, they then say: "If this is not done we consider there should be a defence available". We consider that it is done, and therefore no defence should be available. We have already discussed false and misleading information, and their next point, going down the page, relates to fraudulent or deceptive devices. That is clause 292, and someone will very shortly tell me what page it is on. It is on page C2115. It is the clause that was just raised by the Honourable Mr WU, and basically the argument there relates to the use of the word "deceptive".

The section is aimed at transactions involving securities futures or leverage Forex, and prohibits employing any device, scheme or artifice with intent to defraud or deceive, or to engage in any act, practice or course of business which is fraudulent or deceptive, or would operate as a fraud or deception.

We are all agreed that what we are trying to catch is fraud or deception. Their worry, which we do not share, is that the word "deceptive" will somehow import an objective standard rather than a blameworthy state of mind. I am not really much of a lawyer, but "deceive" is the verb; "deceptive" is the adjective: and "deception" is the noun. To us they all connote the same thing. Ms ASHALL does not agree with us, but that is the extent of the disagreement. There is no disagreement as to what should be caught.

Falsely representing dealings in futures contracts: this is the bucketing provision on page C2121. What they want there is a defence where the broker makes a mistake, an honest mistake. We have a defence at the moment for a mistake made in good faith, and reasonably. This comes back to the sort of point that the Honourable Mr HO was raising about whether you should have to show reasonable mistake, or just mistake. Consistently with what we have said before, we are prepared to re-examine that. I think it is something we need to work through reasonably carefully. That is the end of their submissions.

There is a submission on page 1 on insider dealing that I have not dealt with, and in the last paragraph on page 1 they give the example as a transaction that is caught by the

provisions of a substantial shareholder wishing to increase his stake in a listed corporation, where the fact that the stake is to be increased may itself constitute relevant information. We agree with that example. They say: "Therefore the substantial shareholder cannot buy because it would constitute insider dealing". We agree that that is the effect of the present drafting; we agree that it should not be the effect of the present drafting, so we need to fix it. In the process we also need to have a look at the position of the agent for that person, and make sure that he is not caught if the principal is not caught.

Basically we agree with a great deal of what Linklaters are saying as a policy matter, and we need to re-examine the drafting to see if it could be made clearer.

Hon Audrey EU Yuet-mee, SC, JP:

Thank you, Mr DICKENS. Can I just clarify one point? Is there any difference between the words "deceive" and "defraud", or "deceptive" and "fraudulent"? Is it meant to add anything? Is that the usual way of drafting in respect of fraudulent conduct or intention to defraud, that you always add the word "deceive", or is this new?

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

I am in the hands of the Draftsman as to that one.

Chairman:

Sherman.

高級助理法律草擬專員陳子敏女士：

其實我們以往曾討論這問題。由於現行法例載有這類字眼，因此政

府將之保留。我們認為，deceive, deceptive及fraudulent這些字眼的意思十分相近，但我們可再作詳細研究。

主席：

下次會議將於2001年5月18日上午10時45分舉行，屆時將會討論第XV部。委員會已將所有文件送交各位，我們在星期五再舉行會議。

謝謝各位。

m2775