

立法會
Legislative Council

Ref: CB1/BC/4/00/2

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

**Verbatim transcript of meeting
held on Wednesday, 19 September 2001, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, (Chairman)
Hon Margaret NG, (Deputy Chairman)
Hon Eric LI Ka-cheung, JP
Dr Hon David LI Kwok-po, JP
Hon NG Leung-sing
Hon Bernard CHAN
Hon Jasper TSANG Yok-sing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Albert HO Chun-yan
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
Hon Henry WU King-cheong, BBS
- 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
- Mr Peter A DAVIES
Senior Assistant Law Officer
- Ms Sherman CHAN
Senior Assistant Law Draftsman

Mr Michael LAM
Senior Government Counsel

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

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

Mr Andrew YOUNG
Legal Consultant, Securities and Futures Commission

Mrs Mary AHERN
Legal Consultant, Securities and Futures Commission

Clerk in attendance : Ms Connie SZETO
Chief Assistant Secretary (1)4

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser

Mr KAU Kin-wah
Assistant Legal Adviser 6

Mr S C TSANG
Senior Assistant Secretary (1)7

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1 **主席：**

2

3 法定的人數已足夠，今天主要討論第XIII及第XIV部分。現在請政
4 府的同事進入會議室。由於我們昨天才收到中文本的文件，相信各位同事
5 和法律顧問也沒有足夠的時間參考中文版本，因此我們主要集中參考英文
6 本，然後才參考中文本；文件編號是CB(1)1984/00-01號。

7

8 **副主席：**

9

10 主席，可否請政府解釋一下，中文本的文件為何會這麼遲才收到？

11

12 **主席：**

13

14 局長，請解釋中文本為何會這麼遲才收到？

15

16 **財經事務局副局長區璟智女士：**

17

18 我請林律師解釋，其實我們也是很為難的。

19

20 **高級政府律師林少忠先生：**

21

22 中文本這麼遲收到，主要原因是第XIII部與XIV部是相似的，因此
23 需要前後對照，以便綜合第XIII與XIV部應該怎樣修改，所以多花了點時
24 間。我們表示歉意。

25

26 **主席：**

27

28 接著我們討論CB(1)1984/00-01(01)號文件，政府的文件編號是
29 CE12/01。有幾份文件較為有用：一份是有關業界回應的CB(1) 2016/00-01
30 號文件；一份是經修訂的文件；另一份就是有關areas of concern的CB(1)

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1 1379/00-01號文件。

2
3 現在我們討論第237條 —— Interpretation of Part XIII，有關釋義方
4 面，可能在討論時需要再研究。如果大家沒有問題的話，我們就接著討論
5 第238條。這些條款的問題可留待以後討論，相信也沒問題。

6
7 那麼，我們先進入第238條 —— Interest in securities (insider
8 dealing)；第239條；第240條把我們也包括在內。我希望在此澄清一點：在
9 這條所提及的“Connected with a corporation”，立法會同事很少會得到一些
10 公眾不能得到的消息。在公眾都掌握有關資訊的情況下，其實我們是否可
11 計算在內？第(2)既然包括了with reference to (1)，有關的情況會是怎樣？

12
13 **財經事務局副局長區璟智女士：**

14
15 我請證監會的同事作出解釋。

16
17 **Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:**

18
19 I think when you look at the definition of “relevant information” it has to be
20 information specific to a corporation, but that is not generally applicable because it causes a
21 material effect on the price of the share. The only time it would affect the Executive Council
22 and Legislative Council would be on the occasions that you might obtain price-sensitive
23 information which is not in the public domain. Once information is in the public domain it
24 would not be relevant information.

25
26 **Chairman:**

27
28 Okay. Once the information is in the public domain it would not be - -

29
30 **Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:**

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It would not be considered relevant information.

Deputy Chairman:

You can have a closed-door meeting when you ask certain parties to give an account of why they did certain things.

Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:

Again, if you were given information that was specific information about the corporation which was not already in the public domain, it could in fact be considered relevant information, but the effect of relevant information is the effect that once it became public information, what the effect would be on the market. If it did not have any market effect, then it would not fall within the definition of relevant information. So there could be a situation that you would be given specific information, and if that were not in the public domain, then you would become a connected person as far as this definition is concerned.

As I think Mr SIN has pointed out, there might have been in the way distant past a few instances where this could have happened, where you had a closed-door session about a specific market incident, and you could be given information that was not available to the public. Again, that could be considered relevant information, because if it became available to the public and had a material effect on the price of the share, that would fall within the definition.

So that would be the extreme instance, I think, where it could in fact fall into this category. It would in fact, as you pointed out, I think personally be an extremely rare occasion.

Deputy Chairman:

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1
2 I think it is right that if you receive sensitive information - -

3
4 ***Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:***

5
6 That you will be caught.

7
8 ***Chairman:***

9
10 So actually I am just considering myself. For example, I am a member of the
11 Hong Kong Housing Authority or The Hong Kong Mortgage Corporations Limited, etc. It is
12 difficult sometimes to differentiate between what information is - - I am not complaining
13 about it. I understand that we should be bound, you know, but it is quite difficult for us to
14 differentiate sometimes.

15
16 ***Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:***

17
18 I appreciate that. I think that if you were a member of any body – I think that is
19 covered by subclause 240(2)(c) – then I think any person sitting in a position of responsibility
20 always has to bear in mind that they do come into possession of what could be price-sensitive
21 information. Now, the price-sensitive information has to be looked at in context. If you are
22 sitting, say, on The Hong Kong Mortgage Corporation Limited, it is not related to a listed
23 corporation. Then it would not affect you. But if it was in fact something relating to a
24 listed corporation that was not in the public domain, I think there is an obligation on each
25 member of that body to remind themselves that they have got this price-sensitive information
26 and they have to be very careful in how they deal with it.

27
28 It is a matter of keeping information confidential and not using that privileged
29 position to act on that information when it is specific to a corporation.

30

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1 **Chairman:**

2
3 How about a situation whereby a member of a board which he sits on and that the
4 board decides on matters which affect other stocks. It does not belong to listed corporations.

5
6 **Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:**

7
8 If you are making a decision of a public body which affects the market as a whole –
9 and I can be corrected if I am wrong on this – the definition of “relative information” tends to
10 be specific to a corporation. So if you are making a decision that affects the market as a
11 whole, I think arguably that would not be covered by “relevant information”, so you would
12 not be caught. Again, having said that, my personal view again – and I hope this is not
13 offensive if I say it – is that if you are sitting on a public body and you do have information,
14 whether it falls in the definition of insider dealing or relevant information in this ordinance, or
15 otherwise, public officers do have a responsibility to take care on how they use that
16 information, and not use it to their benefits. I think whichever way you look at it, there has
17 to be caution on the part of people in that position.

18
19 **Deputy Chairman:**

20
21 Mr Chairman, of course LegCo knows nothing, but supposing you are a member of
22 the Executive Council and you have just made a decision which would affect the prices of
23 shares in a number of companies. Then I suppose you are duty-bound to make sure that you
24 do not benefit from such information. You have just made the decision, but whether
25 someone else made the decision or you made the decision, I think it is the same. In such
26 circumstances I think it is very necessary to take advice, when in doubt.

27
28 **Chairman:**

29
30 Yes. The most genuine advice is somebody trading. Audrey?

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1
2 ***Hon Audrey EU Yuet-mee, SC, JP:***
3

4 Thank you, Chairman. Mr Chairman, on clause 240 I understand that according to
5 the chart we are provided it is intended that there will be some amendment eventually to this
6 section, to provide an extra defence. Is that right? I am looking at your paper 12A.
7

8 ***Mr Eugene GOYNE, Associate Director, Enforcement, Securities and Futures***
9 ***Commission:***
10

11 The defence is actually in an amendment to clause 262 and the equivalent offence
12 in Part XIV. The concern expressed by brokers and others I think is that as they are
13 exchange participants and executing transactions on behalf of clients, have knowledge of a
14 client's dealing activities, if it were to have a material effect on the price of a share, for
15 instance, and a large substantial shareholder was reducing or increasing their stake in that
16 listed corporation, that might affect market sentiments in relation to that corporation.
17

18 The brokers themselves would have information as to those trading activities in
19 advance of the general public, because that would be executing that transaction on behalf of
20 their clients. The proposal is for a defence based on a UK defence where a person who is
21 acting with knowledge of their own trading activities or intentions, or anybody executing or
22 facilitating that transaction on their behalf should not be prohibited from trading in those
23 circumstances.
24

25 So it would not appear in clause 240, but it is to cope with the operation of clause
26 240 which automatically deems exchange participants and their staff and directors to be
27 connected persons in a privileged capacity.
28

29 ***Miss AU King-chi, Deputy Secretary for Financial Services:***
30

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1 We will answer that point in greater detail when we reach page 63, footnote 40,
2 which sets out the intention.

3
4 **Chairman:**

5
6 Okay; clause 241 — Dealing in listed securities or their derivatives (insider
7 dealing). Clause 242 — Interest in securities and beneficial ownership, etcetera (market
8 misconduct other than insider dealing). Division 2 — Market Misconduct Tribunal, 第
9 243條 — Market Misconduct Tribunal, 這條的部分問題與上次討論的問題很相
10 似。

11
12 **財經事務局副局長區璟智女士：**

13
14 我也會建議，各位可以考慮與Schedule 8一併參考，而且我們今天
15 有內幕交易審裁處的一位資深的律師Mr DAVIES，他可能會幫助我們作較
16 全面的解釋，即借鏡現在內幕交易審裁處的運作，在此處如何可以適用，
17 讓各位可以考慮。

18
19 **Chairman:**

20
21 David?

22
23 **Dr Hon David LI Kwok-po, JP:**

24
25 Chairman, you have been calling it “Market Misconduct Tribunal”. Why do you
26 not call it just “Conduct Tribunal”, because by having “Market Misconduct” you have already
27 condemned the guy to misconduct. Having a tribunal, you are saying it is misconduct.
28 Why do you not call it not “Market Misconduct” but “Conduct Tribunal”?

29
30 **Miss AU King-chi, Deputy Secretary for Financial Services:**

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1
2 It is just a name, but for example, the Insider Dealing Tribunal is called “Insider
3 Dealing Tribunal” (IDT). People who appear before the tribunal might at the end of the day
4 not be found to have committed any act of insider dealing, but going back to the Market
5 Misconduct Tribunal, one of its very purposes is to find out whether any market misconduct
6 has been committed, and to identify whether any person has been involved in such a kind of
7 market misconduct; so probably it would be clearer to people who are reading the law, to see
8 what the purposes of this tribunal are.

9
10 ***Dr Hon David LI Kwok-po, JP:***

11
12 I think the meaning is still very offensive - - Market Misconduct Tribunal. It is
13 better to have Market Conduct Tribunal.

14
15 ***Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:***

16
17 Perhaps I could add to this. If you look at the purpose of the tribunal, the Insider
18 Dealing Tribunal is to look at potential insider dealing. Market misconduct matters are only
19 referred to the tribunal through whatever course it is going to be, through the Financial
20 Secretary or the Secretary for Justice, depending on which course is to be followed. It is to
21 look at market misconduct. It is not looking at market conduct as it says. It is looking at
22 where there is a pretty good reason to suspect that market misconduct has occurred, so I think
23 it is quite apt to call the tribunal as Market Misconduct Tribunal, and you can compare it with
24 the IDT.

25
26 Of course, on the point Mr LI has made, with the Market Misconduct Tribunal it is
27 to look into the matter. Every person has an opportunity of being heard, and the matter of
28 being heard is a suspicion of market misconduct. I think the name for the tribunal is quite
29 apt in the circumstances. It is not looking at conduct; it is looking at matters that have been
30 referred to it, which are defined as market misconduct.

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1

2 **Chairman:**

3

4 I thought I asked similar questions in the first round. I said that the United States,
5 UK and Australia use different names. We use “market misconduct”. I think the UK uses
6 “market abuse”. Some other countries use “market manipulation”. Is it? I’ve forgotten,
7 but it seems that different areas use different names.

8

9 **Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:**

10

11 For instance, I think in the UK the Financial Services Market Tribunal is also
12 looking at market misconduct. It is just a question of the title of the tribunal.

13

14 **Chairman:**

15

16 What do they call there?

17

18 **Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:**

19

20 It is the Financial Services Market Tribunal, subject to my being corrected.

21

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

24

25 Yes. It is the Financial Services Market Tribunal. I suppose if I could add to the
26 Deputy Secretary’s and Paul’s comments, in effect it could be likened to a criminal court.
27 Just because it is called Criminal Court does not necessarily mean that anybody brought
28 before it is a criminal. That is a question for the proof and the discharge of the burden of
29 that proof. People are familiar enough to determine at the end of the day that somebody
30 who is found to be innocent is innocent and has not actually been convicted by that person.

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1 The title is still descriptive, perhaps.

2

3 ***Deputy Chairman:***

4

5 Mr Chairman, if that be the comparison, then I think I am bound to say that people
6 who are accused before a criminal court receive some of the stigma even before the trial, and
7 that is why the Secretary for Justice's power for prosecution has to be used with a great deal
8 of caution. If that is the comparison used, I would tend to side with a more neutral term.

9

10 ***Mr Paul R BAILRY, Executive Director, Enforcement, Securities and Futures***
11 ***Commission:***

12

13 Just giving insider dealing as a comparison, I think you could say that, subject to
14 my being corrected, the Financial Secretary also has to exercise great care in what is referred
15 to the tribunal. In fact, some of the cases the Commission has put up have not been referred,
16 so I think there is also great care in putting things, say, to the IDT, and I cannot see any reason
17 why, in the future, the same care you are describing for the Secretary for Justice would not be
18 exercised in regard to the Market Misconduct Tribunal.

19

20 I think everyone is aware that if you put somebody before a tribunal, whatever body
21 it is, there is stigma attached, especially when hearings are being held in public, and I think
22 every person would realize that in making a referral.

23

24 ***財經事務局副局長區璟智女士：***

25

26 主席先生，我覺得那個名字正其名是很重要的：第一，是反映了審
27 裁處的工作職能；第二，可以令到市場用家，包括投資者和有份參與這些
28 活動的人士，都清楚明白此制度的用途。在我們這一年多的諮詢，市場人
29 士似乎一直很清楚地知道這個名字，知道是處理哪一些違規行為。可能是
30 因為他們對內幕交易審裁處這個名字較為熟悉，瞭解該審裁處是處理內幕

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1 交易。但如果有個新的、建基於內幕交易審裁處的審裁處，有人會問“你是
2 處理一些什麼失當行為呢？”那麼我們就回答是“市場失當行為”，並解釋
3 有幾類的市場失當行為。市場人士也頗為接受這樣的稱呼。就英國的那個
4 名字，據我理解 - - Eugene, you may correct me if I am wrong, the setup in the UK
5 indeed has a wider remit. It does not only cover market abuse, but I think other breaches of
6 FSMA rules by market intermediaries. So it is all in one sort of tribunal hearing misconduct
7 of intermediaries or listed company directors, and so on. That might not be a parallel
8 comparison.

9

10 不過，我們對此也不是有很強烈的意見，主席。其實我覺得最主要
11 是此名字可以傳達訊息給使用此法例的人，讓他們知道它是處理一些什麼
12 事件。

13

14 **主席：**

15

16 OK。第243條，你是否建議我們先討論附表8？

17

18 **財經事務局副局長區璟智女士：**

19

20 都可以的。

21

22 **主席：**

23

24 是文件的Annex C部分。我們接著討論附表8——Market Misconduct
25 Tribunal。Subclause (1)、subclause (2)——Appointment of members。關於
26 這部分，我忘記了上訴委員會是否有term limit？也是3年，是嗎？

27

28 **財經事務局副局長區璟智女士：**

29

30 是一樣的。關於第7款，正如我們昨天承諾，我們會檢討首席法官

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1 的角色究竟是怎樣。既然他在委任的時候提出建議，那在免任的時候，他
2 的角色又會是什麼？我們會考慮這個問題，日後再向議員匯報。

3
4 **主席：**

5
6 好的，即是第7款，是嗎？

7
8 **財經事務局副局長區璟智女士：**

9
10 是的。

11
12 **主席：**

13
14 OK。第4、5、6、7、8條。第8條的寫法，以往是否有這樣做過？即
15 是審理到一半的時候，有人要辭職，而特首又允許主席這樣做。

16
17 **財經事務局副局長區璟智女士：**

18
19 我相信沒有試過這樣的情況，或者我請Mr DAVIES, can you speak
20 from your past experience?

21
22 **主席：**

23
24 Subclause 8.

25
26 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

27
28 Yes. In fact it has happened once in a case which is finished now, where one of
29 the tribunal members actually resigned before the case was over, and somebody was
30 appointed in his stead there to finish off the proceedings.

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1

2 **Chairman:**

3

4 The proceedings have to start again from the very beginning?

5

6 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

7

8 No. The way it is set up, you actually have to have a hearing first. It is actually
9 broken down into two parts. You actually have to have a hearing first, and hear all the
10 evidence; and then the tribunal goes away and makes findings. It has to make its findings
11 before it can actually impose penalties. So we had reached that first stage. We had had the
12 hearing.

13

14 The tribunal then went away to make its findings. What actually happened was
15 that one of the tribunal members, during the deliberation process, misconducted himself, and
16 therefore had to resign as a result. When they came back to impose penalties a temporary
17 member was appointed to sit in his stead. Because the findings had already been made, there
18 was no injustice or anything like that, and they were able to impose penalties.

19

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

21

22 I think the Chairman's question is on clause 8. Mr DAVIES has already explained
23 to us why there is a need for temporary members.

24

25 **Chairman:**

26

27 He is answering my question.

28

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

30

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1 Is that your question?

2

3 **Chairman:**

4

5 Yes.

6

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

8

9 Because clause 8 already refers to another issue?

10

11 **Chairman:**

12

13 Yes, but the same issues. My question is: when one of the panel members
14 resigned, would the proceedings be started again from the very beginning?

15

16 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

17

18 No; not necessarily.

19

20 **Chairman:**

21

22 Not necessarily?

23

24 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

25

26 No.

27

28 **Deputy Chairman:**

29

30 I do not understand, Mr Chairman. Can we have a clarification? It was in the

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1 course of the deliberation that this particular member misconducted himself? So this
2 deliberation had not been completed.

3

4 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

5

6 Well, I am sorry. It was before the findings had been made public, but after the
7 deliberation. This is all now public. It has all come out.

8

9 ***Deputy Chairman:***

10

11 So that the deliberation is complete; they have made all the decisions there are to be
12 made?

13

14 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

15

16 Yes.

17

18 ***Deputy Chairman:***

19

20 Then the only thing which had not been done was the public announcement of the
21 decision?

22

23 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

24

25 Yes; more or less. Yes.

26

27 ***Deputy Chairman:***

28

29 How do you mean “more or less”?

30

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1 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

2
3 Well, it is rather complicated. It went on judicial review, so all the facts were
4 looked at by a higher court. That court determined that the process of deliberation had taken
5 place, that a fair finding had been made, so they put it all back into place. Basically what
6 you said is right. It was alleged, in fact, that the deliberation process had not taken place.
7 That is all. That is what I meant by that. In fact the superior court said “Yes”, that it had
8 all taken place; it had all been perfectly fair, and therefore the findings were all restored. It
9 then went back to the second part, which was the penalty hearing, and at that stage there were
10 not two lay members, so another one was appointed.

11
12 **主席：**

13
14 不過我要諮詢法律專家，在座有數位法律專家。在一個刑事的審訊
15 中，若有陪審團中有人因有事或去世而退出，是否需要再從頭開始審訊？
16 在這種情況下，再從新開始的時候，又會怎樣？雖然你解釋是分兩部分，
17 但是作為一個案件……

18
19 **財經事務局副局長區環智女士：**

20
21 我明白主席的看法，其實昨天我也曾與Mr DAVIES探討這個問題。
22 他列舉以往的這種情況為例，若要有靈活性，審裁處本身要決定是否需要
23 重新進行聆訊？他剛才所提到的個案，已經是到了最後階段，如果從再重
24 進行新聆訊的話，對其他的人士是很不公平的，因為要重新再請律師，又
25 要再浪費時間、金錢，甚至他在社會上的名譽地位又會再一次受影響。這
26 些因素都是需要考慮的。採用暫委成員的做法，可以有靈活性，當然並不
27 是說在所有情況下都適用。Perhaps, Peter, you want to elaborate further?

28
29 **Chairman:**

30

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1 This violates the principle, for example, of a fair hearing or natural justice?

2

3 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

4

5 That is something which the common law takes care of. That may then not be the
6 case. It depends upon the particular circumstances of the time, which no one can really
7 foresee. It is a question really of the tribunal sitting as fair and just meant, considering the
8 circumstances, listening to the representations that are made by counsel before it, and then
9 deciding one way or the other what should happen, whether it should continue with the
10 hearing or start afresh.

11

12 If they are wrong, of course any party aggrieved could go by a judicial review and
13 have that challenged, have the decision challenged.

14

15 ***Chairman:***

16

17 Audrey, you are former chairman of the Hong Kong Bar Association. Are you
18 happy with this?

19

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

21

22 Well, Mr Chairman, first of all you refer to clause 8. I did not read clause 8 to
23 mean what has been said, because I think the answer really applies to clause 9, on the
24 appointment of the temporary member.

25

26 ***Chairman:***

27

28 Yes.

29

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

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1
2 Clause 8: if you read it again, it says: “If any proceedings have been
3 commenced by the Tribunal but not completed” – right? – “before the expiry of the
4 chairman’s term of office or before the resignation from or vacation of office by a member
5 takes effect”. Then “The Chief Executive may authorize the chairman or the member to
6 continue to act as the chairman or a member of the Tribunal for the purpose...”

7
8 ***Chairman:***

9
10 Okay. Yes.

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

13
14 It does not talk about replacement. To me it does not mean much, because it just
15 says “before it takes effect”. I do not even understand why the CE has to authorize him to
16 continue, because if it says the resignation has not taken effect and the expiry has not taken
17 effect, why do you need a continuation? I mean, that is how I read clause 8. It has got
18 nothing to do with the replacement of a member.

19
20 ***Chairman:***

21
22 Okay.

23
24 ***Hon Audrey EU Yuet-mee, SC, JP:***

25
26 Now, on the example that I think was mentioned, I agree entirely that at the end of
27 the day the question is to the circumstances, and if the parties are not happy they can always
28 challenge the result; but it does seem very odd to me, because even though you say the
29 misconduct happened at the end of the deliberation, more or less, I would have thought it
30 depended on how serious the conduct is, and what was the nature of the conduct – because it

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1 might be so serious as to vitiate what has happened before.

2
3 For example, if it reveals that there was serious prejudice of that particular member,
4 or conflict of interest, I would have thought the fact that the deliberations were more or less
5 completed really does not help, and you have to start all over again. I mean, we discussed
6 the question of replacement by a temporary member last time, and I think the concerns we
7 expressed at the last meeting still apply. I do not think it is really answered by the example
8 you gave. In fact, if anything, it sort of reinforces it.

9
10 ***Deputy Chairman:***

11
12 Mr Chairman, before we go into Audrey's question of replacement, can we still
13 deal with the question of whether in the middle of a hearing, before a hearing is completed,
14 someone has resigned and so on? I think the question there is really a matter of whether
15 you want to provide for the situation in statute or whether you want to leave it to the common
16 law. Unless you make express provision that it has got to go on, and there is an enabling one,
17 then it is a matter of flexibility. I do not know if any of the rules - -

18
19 ***Chairman:***

20
21 Assisting rules, you mean?

22
23 ***Deputy Chairman:***

24
25 I mean any of the provisions, express provisions. Speak to that point, that you can
26 continue, even though one of your members has resigned in the middle of a hearing which
27 had not been completed, and so on. Certainly not in clause 8.

28
29 **財經事務局副局長區環智女士：**

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1 陳律師有一些背景資料跟各位分享。

2
3 **高級助理法律草擬專員陳子敏女士：**

4
5 這是參考其他法例的。譬如我們那個Administrative Appeals Board
6 或其他很多相關的機構，他們也是有temporary member的安排，而條文的寫
7 法也是接近的。

8
9 **財經事務局副局長區璟智女士：**

10
11 主要是要有靈活性。當然剛才余議員說得對，在個別的個案而言，
12 有時是適用，有時是不適用的，要由審裁處主席視乎個別的情況而定。

13
14 **主席：**

15
16 余若薇議員提醒了我，我覺得第8條是沒有問題的。現在我們討論
17 第9條 —— Appointment of temporary members；第10條。

18
19 **Deputy Chairman:**

20
21 We are looking at clause 9 and Audrey's question. It comes in a place whether
22 this is acceptable.

23
24 **余若薇議員：**

25
26 主席，第9條的問題，與我們在上次會議上所提的Security and Futures
27 Appeals Tribunal的問題類似。第9條的寫法是：如果其中有委員生病或者沒
28 空，是可以找人代替，而代替之後，委員又可以回來；這種情況有點像董
29 事的alternate。如果一個司法聆訊可以找替工，這是難以想像的。反而我覺
30 得若陪審團的一兩位成員，在案件審理到一半的時候缺席，其餘的成員可

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1 以繼續審理下去，像這樣的情況，我還可以理解。假如雙方同意，即使本
2 來有3位成員，在只剩下兩位時仍可以繼續。但是換另外一個新人的話，感
3 覺就會是有點古怪。

4
5 我記得我做稅務上訴委員會的時候，一直有3個工作人員。有一次，
6 已經聆訊完畢，而且主席已經寫了判詞，但是其中有一位工作人員，不知
7 是去世還是有其他問題，不能夠簽署那份文件，結果我們也不可以完成那
8 份文件，而那個上訴在數年後須再重新聆訊。

9
10 **財經事務局副局長區璟智女士：**

11
12 正是這些個案，如果有這個條款，就可以解決你剛才所提到的問
13 題。

14
15 **余若薇議員：**

16
17 如果是少了一位，譬如說，如果本來有3人，但是少了一個人也是
18 可以的。如果雙方同意的話，是可以繼續。我覺得這是可以接受的。

19
20 **財經事務局副局長區璟智女士：**

21
22 即是一位加一位。

23
24 **副主席：**

25
26 不是這樣的，主席。

27
28 **主席：**

29
30 最理想的做法，就是再重新開始聆訊。

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1
2 **副主席：**

3
4 很難說怎樣才是理想。

5
6 **財經事務局副局長區璟智女士：**

7
8 始終要有時間、金錢，才可以重新開始聆訊。

9
10 **副主席：**

11
12 我覺得第9條是有問題的。我認為不公平的地方，就是立法機關通
13 過法例，訂明不應該因為其中有人在案件審理到一半缺席的時候，就要從
14 頭開始或者受到影響。事實上，我覺得是有問題的，尤其是這樣的寫法。
15 似乎是假如你放假，就可以臨時就找人代替你。我也參加過城市規劃上訴
16 委員會的聆訊，委員會設有一個主席和幾位成員，用意就是一定有條文訂
17 明，在聆訊當中，即使不是所有人都可以出席，起碼要保障能有幾個人出
18 席，或者中途有任何人不能完成聆訊，也起碼要保障有多少人簽署，文件
19 才可以生效。如果在漫長的聆訊過程中，有人基於種種原因沒有出席聆訊，
20 上述方法已可處理這個問題。但臨時找一個人代替，我覺得這樣的做法是
21 不對的。因為這不是他自己聆聽的內容，有一部分的內容他也沒有聽到，
22 而他卻作出裁決，若允許這種情形出現，我相信對被聆訊的人是很不公平
23 的；還有這樣的聆訊結果也不是安全的。

24
25 不可以純粹為了靈活性而這樣做，我不可以接受這樣的看法。

26
27 **主席：**

28
29 怎樣做才比較好？其實只有幾個方案而已。第一，如果有這樣的情
30 況出現時，再找一個新的成員重新開始聆訊，這樣做會有靈活性；或者正

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1 如剛才余若薇議員所說：在雙方同意的前題下，若有兩個成員就可以繼續。
2 我們有多少個options？

3

4 **余若薇議員：**

5

6 據我記得，如果是Appeals Tribunal，有一位Chairman就可以了。如
7 果是雙方同意的話，有一位就可以了。

8

9 **財經事務局副局長區璟智女士：**

10

11 我們是有一個條款，如果是雙方同意的話，即使只有主席一人也可
12 以。

13

14 **余若薇議員：**

15

16 也就是說3位、兩位或一位也是可以的。

17

18 **副主席：**

19

20 如果認為是對那個人不公平，因為他要再聘請律師，重新開始聆
21 訊，對他的社會名譽有影響，他可以在權衡輕重之下，寧願少一位成員也
22 接受裁決。因為法例說明若只是剩下Chairman一人也可以。若少了一個
23 Chairman，或者是其中一個Chairman的 misconduct，那當然是不可以。但
24 這樣可以令他有個選擇。不過，如果臨時委任一個人，這就是另一回事。

25

26 **財經事務局副局長區璟智女士：**

27

28 Mr DAVIES是否可以make comments？

29

30 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

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1
2 This has always worked in the past. For instance, in the case I mentioned, I think
3 the case took the best part of a year. There was then a judicial review in view of the
4 misconduct. That took, I think, 3 years. So you are talking about a 4-year delay. Because
5 we had this flexibility, when they came back to impose penalties we appointed a temporary
6 member. Had we not been able to do that, we would have had to rehear the whole evidence
7 again. By that time it could have been complained, for instance, “Well, it’s too far back”,
8 because of the time gap and the intervening appeal.

9
10 It is very important, I think, to have this flexibility, because you can never legislate
11 for any particular, peculiar circumstance that may arise in the future. In my view, if we
12 have this flexibility we can leave it to the tribunal. We have a High Court judge. We can
13 leave it to the representations made to him, and we can leave it to the common law. They
14 can decide the particular circumstance as and when it arises.

15
16 In the case I mentioned, nobody complained that it was unfair – and these counsels
17 are highly experience; I think certainly one of them was a leading counsel – and had there
18 been any unfairness whatsoever they would have come forward and made that complaint.
19 But there was never any suggestion that it was unfair. Here is an example of this clause
20 working very well.

21
22 ***Deputy Chairman:***

23
24 Mr Chairman, it may be because in that example really nothing was affected.
25 There was legislation in place so that even from what is said, the penalty had already been
26 decided. Counsel is not there to uphold just legislation; he is there to look after his client’s
27 interest. If he thinks his client’s interest is not affected, or that is the best deal he can get in
28 the circumstances, then he would not have made a complaint.

29
30 However, we are in a different position. We are looking at the future. It is not

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1 as though there is no flexibility. In that case there is always the flexibility of going on, even
2 though you are one member less.

3
4 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

5
6 I think the problem is that we have always accepted the principle that it would be
7 likely that there would be a majority verdict. Quite often, if one member disagrees with the
8 other two, it is still a valid finding.

9
10 ***Deputy Chairman:***

11
12 I do not know which is worse. I mean, let us say in your case everything is done,
13 so you appoint this temporary member just as a matter of form. It is for appearance's sake.
14 That does not seem to me to be particularly useful.

15
16 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

17
18 At that stage, you see, in the case I mentioned, where deliberation was over, they
19 produced a draft report. The report was out. All it needed to perfect it was for the
20 penalties to be imposed. We then had a second hearing, which is normal. Then the
21 question of the amount of profit gained was argued on a legal basis, so they could make their
22 minds up as to what penalty they would impose.

23
24 Now, the temporary member had the benefit of being able to read the findings and
25 read the report. From that point of view there was no injustice.

26
27 ***Deputy Chairman:***

28
29 Well, Audrey, this is really your quarrel. Clause 9 does not say this, you see, and
30 in that set of circumstances I can see why counsel on each side did not protest, because that is

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1 a separate exercise. I can see plenty of problems in a thing like that.

2
3 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

4
5 In another circumstance, let us say we had had the hearing for about 3 weeks, or 2
6 weeks – whatever – and we had not reached the finding stage; the hearing was still going on,
7 and somebody resigned. At that stage the court would halt and say “What should we do now?
8 Please may we hear representations from counsel in court?” In those circumstances,
9 depending upon the surrounding circumstances, it would make a decision. That decision
10 might be: “We’ll have a rehearing”.

11
12 ***Deputy Chairman:***

13
14 Yes. Mr Chairman, supposing we do not have a provision for a stand-in for a
15 temporary member. Then what would that tribunal do? The tribunal would say: “Look,
16 do you wish to start all over again by appointing a new tribunal? In the middle of it,
17 something else might happen. There is no guarantee that nothing will happen. Or would
18 you accept that a reduced tribunal would go on hearing your case, provided the law allows the
19 tribunal to continue to have effect with a chairman and one member instead of a chairman and
20 two members”.

21
22 If it is thought that having a member less would not affect - - they have sufficient
23 confidence in the hearing, then they would continue with a smaller tribunal, with a reduced
24 tribunal. If they are not, then they would be obliged to start all over again but if there is
25 flexibility, so to speak, for the Chief Executive to appoint another person, from the look of
26 clause 9 it seems that it is a matter for the Chief Executive, it is not a matter for the party. If
27 the Chief Executive can appoint this stand-in person, this stand-in person does not have the
28 benefit of hearing anything which had gone before. He forms his view from half of what he
29 has before him and in such circumstances, if you run it to the end of the hearing and then the
30 party is not liking the finding then takes the matter to judicial review, do you think that that

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1 will constitute more convenience, a less dealing, or what?

2
3 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

4
5 I think an analogy would be where there is a conflict of interest if somebody
6 suddenly says: "we found out this about one of the tribunal members". In my view, the best
7 party to decide that question is the tribunal itself.

8
9 **Deputy Chairman:**

10
11 But, Mr Chairman, I think there are two choices. We all want some sort of
12 flexibility so that when one person dropping out, for whatever reason, should not necessarily
13 result in the whole hearing having to be dumped and this occurs whether it is a jury trial or the
14 other kinds of appeal tribunal. We all agree that there is some flexibility. There are
15 different ways of achieving flexibility. The way offered in clause 9 is by way of a temporary
16 member and all three of us find that this has its own risks. Supposing you do not provide the
17 flexibility by means of a temporary appointment - - then I would be happy to go on when you
18 have finished. Is that all right? Okay. So if you do not provide for the appointment of a
19 temporary member, you still have the flexibility of going on with a smaller tribunal. So you
20 still have flexibility without the provision of a temporary member. The flexibility provided by
21 having a temporary member brings with it risks which may be imponderable and not curable
22 until a complaint has been made at the end of the hearing.

23
24 I think, to sum up what I say, a provision like clause 9 is (a) unnecessary if it is a
25 matter of flexibility and (b) comes with its own dangers. That is the position.

26
27 **主席：**

28
29 其實關於第9條，就是雖然曾做過一次，但從沒有人提出要在法庭
30 進行司法覆核。

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1
2 **財經事務局副局長區璟智女士：**

3
4 剛才提出了兩個可行的辦法：即是1加2、或者是1或2也可以。我們
5 現在建議的方案有暫委成員的安排；另外一個方法是設立較小型的審裁
6 處。兩個方法可能都會有一定的風險，就是與訟雙方由於有不同的意見而
7 提出上訴。但大家最後是否有信心，就要視乎對審裁處，尤其是主席所作
8 的決定，是否有足夠的信心？

9
10 現在的條款的寫法是否已加上在普通法下的制衡？是否已足夠？
11 問題就是考慮這兩點。這兩個靈活性都是好的：即委任暫委成員或當聆訊
12 已差不多到最後階段，已接近宣判，由較小型的審裁處繼續進行聆訊都是
13 可行的。同樣，我們不可以百分百排除風險，就是各方與訟人士可能會有一
14 方不贊同這個安排而提出上訴。但上訴是一個補救措施而不是預防措
15 施，各位剛才對此亦有一些疑問。

16
17 我剛才提到的預防措施是：第一，我們對審裁處處理這些個案的成
18 員，尤其是主席，是否有一定的信心？剛才Mr DAVIES亦提醒我們：就是
19 在普通法下須考慮一定的原則，這些是否已經足夠？

20
21 **副主席：**

22
23 要是足夠，就不必有暫委成員。我們只要委任一個好的主席，由他
24 全權負責，就要對他有信心；若對第9條有意見，即是對主席沒有信心，這
25 樣的說法是不成立的。這不是對一個人是否有信心的問題，而是在研究條
26 例或成立一個制度時，必須確定那個制度是否是一個適合的制度。我覺得
27 不需要有暫委成員，但如果其他同事沒有意見，那我也沒有辦法。

28
29 **財經事務局副局長區璟智女士：**

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1 主席，我想問各位，如果他們的傾向是希望有靈活性，採用一個較
2 小型的審裁處會否較好？就是如果審裁處主席覺得適合，在某些情況下由
3 兩個人進行聆訊；還是他們選擇有暫委成員的安排？暫委成員的安排只是
4 備用，可以不採用，因為一直以來只採用過一次，各位是否有這傾向？

5
6 **主席：**

7
8 Audrey。

9
10 **余若薇議員：**

11
12 主席，我覺得難處在於同一條條例須在很多不同的情況下適用。我
13 本來考慮的安排是雙方同意，但也未必可以解決所有的問題，因為可能有
14 一方希望拖延，所以說要雙方同意也是很困難的。

15
16 而另一個方法就是怎樣都可以，可以多加一名暫委成員，也可以縮
17 小規模或只有一個成員。第34條則訂明一定要經過雙方同意，所以如果我
18 們堅持這個做法，若少了一個人，就不是一個雙方同意的情況，所以剩下
19 的方法就是縮小規模或加暫委成員。

20
21 但第9條現時的規定是有點可怕，那個暫委成員似乎不是由審裁處
22 決定，雖然我知道實際上可能是由審裁處決定，才由CE決定，但是現在看
23 來，就像是有人放了假，可以隨時找一個人來代替。

24
25 **主席：**

26
27 Audrey，原則上你是否贊成有暫委成員？如果你贊成，第9條可能
28 需要改寫；但如果原則上你不贊成，暫委成員這個制度可能便要刪除。

29
30 **財經事務局副局長區環智女士：**

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1
2 這方面我們認為行政長官的地位應該是被動會較好。

3
4 **余若薇議員：**

5
6 還有可以委任暫委的情況應該收窄，不是如現在般寬鬆。

7
8 **財經事務局副局長區璟智女士：**

9
10 我們會考慮行政長官在什麼情況下可以啟動這個機制，例如是在審
11 裁處要求或CJ建議的情況下。這樣大家可能會較放心。

12
13 **余若薇議員：**

14
15 如果真的要委任一位暫委成員，政府是否可以考慮必須取得雙方同
16 意。若不能取得雙方同意，就應重新開始或縮小審裁處的規模。暫委這問
17 題是非常難處理的，如果有一方不同意，你卻堅持要委任暫委成員，便會
18 因這個做法而受到質疑。

19
20 **主席：**

21
22 根據現時的寫法，在聆訊完畢後還可以提出司法覆核，是嗎？

23
24 **財經事務局副局長區璟智女士：**

25
26 是的，可以上訴，而且不必待聆訊完畢，在委任的階段，如果各方
27 有反對，也可以上訴。

28
29 **副主席：**

30

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1 主席，真的是會很困難。例如聆訊已到了一半，我在開始時發表的
2 意見，臨時委任的人士沒有聽過，我覺得這樣是不公平的。條例是明顯地
3 准許這類的情況出現。一旦出現這樣的情況，雖然你肯定覺得不公平，但
4 除非你能提供特別的證據，法庭也不准許司法覆核。

5
6 司法覆核的意思，就是說條例本身的內容和做法已是不公平。由於
7 那是立法機關通過的法例，法庭是不可能作出這些裁決的。既然立法機關
8 認為在這樣的情況下是公平的，法庭怎可以覺得委任暫委成員是不公平的
9 做法？法庭不可能作出這樣的否決。

10
11 被審查者若認為審查員沒有聽過以前的聆訊，在聽過一半的案情後
12 就做出裁決，總覺得心裏不舒服，這個情況有時很難避免。但即使這樣，
13 我們也很難證明在開始時聽過證據、陳詞或證人，會否有不同的想法。若
14 法例出現一些這樣的情況，就是在被聆訊的人士不同意都要強加諸於他身
15 上時，是不可以利用司法覆核程序作出補救的。

16
17 **主席：**

18
19 吳亮星議員或曾鈺成議員先表達意見，好嗎？

20
21 **吳亮星議員：**

22
23 多謝，主席。我不知道業界過去對於這一類接觸，會有什麼經驗或
24 憂慮？正如剛才副主席提到，如果一位暫委成員在中途加入，以前沒有比
25 較細緻的描述。雖然我估計他會看清楚文件才審理或解決這些案件，但也
26 可能會在瞭解情節或銜接上有一些問題。所以如果能夠避免這一點，我會
27 覺得比較好，因為這裏會牽涉到很大的懲罰或影響。這不是一個一般性或
28 比較簡單的情況，所以值得三思。

29
30 不過，業界可能覺得這種情況影響不大，不必擔心。為何我所站的

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1 角度，似乎特別關注業界，因為根據現在的經驗，過去一定曾經採取這樣
2 的做法，並能幫助到業界。如果Tribunal本身能夠提供協助，使正常的事很
3 快地辦到，而不正常的事會被剔除；從監管角度來看，這是一件好事。但
4 相反地，如果各位擔心用這種方式可能會造成冤案或導致不正常的結果，
5 就要在討論的階段及早提出。

6
7 就剛才提到的暫委成員，我希望瞭解的問題是，他本身是否有很繁
8 忙的工作或公務，而他突然被委任為暫委成員會否帶來銜接問題？這是一
9 個很實際的問題。如果是很匆忙的擔任暫委成員，我就擔心有冤案或有不
10 妥當之處，即是說在銜接上因為瞭解不足夠或銜接不好而造成判案的問
11 題。否則，即使是暫委成員，假如他是投入全部精力和全職地充足處理，
12 從頭到尾瞭解那個事件的話，當然這是有不同的看法，所以要看政府處理
13 暫委成員時，是採用一個怎樣的安排？這一點我也很希望瞭解。

14
15 **主席：**

16
17 吳亮星議員，這一個市場失當行為審裁處不單影響經紀，影響的範
18 圍是很廣泛的，你和我也會受到影響，我們也會接觸那些... ..

19
20 **吳亮星議員：**

21
22 我同意，但是他們在經營當中機會會較多，當然也包括很多其他有
23 關的專業人士等等，但我覺得，經紀行業起碼要知道這樣的做法，既然涉
24 及他們的機會較高，他們有怎樣的看法呢？

25
26 **主席：**

27
28 OK，曾鈺成議員。

29
30 **曾鈺成議員：**

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1
2 關於這種加設暫委成員的辦法，假如凡Tribunal任何一個成員不能
3 夠繼續聆訊的時候，就要從頭做起，是會造成頗大的影響，但如果出現這
4 個情況的可能性不是很大，其實這個做法才是最公平的。因為就算由暫委
5 成員跟進那些事情，亦等於從頭做起。

6
7 假如在聆訊的初期階段，其中一個成員已經出現問題，如果雙方同
8 意，我也可能會考慮找一個暫委成員來替代，因為在早期階段，即使從頭
9 做起，分別也不是很大。暫委成員的安排是否那麼重要？如果根本沒有暫
10 委成員的安排，總之有成員出缺就從頭做起，是否真的有那麼大的問題？

11
12 **財經事務局副局長區璟智女士：**

13
14 主席，我們可以從3方面再作考慮。第一，剛才我們已經提到，我
15 們可以考慮啟動機制方面的制衡措施，包括行政長官究竟是否應該是在被
16 動的地位，例如他須按司法部的要求行事。第二，剛才副主席提出的問題
17 也要處理，如果 *under a scenario where there might be prejudice of natural*
18 *justice, whether the affected party can have the right to appeal. Perhaps, on*
19 *this point I would invite Mr DAVIES to speak on later.*。第三，就是剛才曾議
20 員提到，從以往經驗來看，是否覺得沒有這個暫委的制度會造成一些很大
21 的不方便？這一點或者SFC或律政司的同事可以再解釋。按照以往的經驗，
22 如果沒有這個制度，會出現什麼情況？

23
24 **Chairman:**

25
26 Mr DAVIES?

27
28 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

29
30 From a practical point of view, one of the successes of the insider dealing tribunal

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1 has been the complete flexibility which the ordinance has given to the tribunal itself so if the
2 ordinance says to the tribunal, “You can decide upon your own procedure; you can decide
3 what evidence you admit”, it is completely flexible. It has been a great success in many
4 ways. I think it might be a mistake if we try to limit that. I think once you give them this
5 flexibility other things have to go hand in hand with it and because of this flexibility and
6 because they have no fixed procedure, the number of situations which might arise are that
7 many more. For instance, you could have a situation where a member resigns or can no
8 longer sit but it may have been previously that you did not hear evidence. It may have been
9 because of the flexible procedure you merely looked at documents and, therefore, it would be
10 perfectly fair perhaps for a temporary member to be appointed and to have a short
11 adjournment and you could easily reconsider the evidence again. It may not be the case. It
12 may be very unfair for him to be appointed in those circumstances but the point I would like
13 to make is that it is very difficult to legislate for these circumstances because of this flexibility.
14 You are given this very peculiar and very successful tribunal.

15
16 The other point is that you have with you two lay members. They carry on
17 businesses. They are working part of the day even when they are sitting and the chances of
18 this sort of thing arising and gaps arising are that much more. If, for instance, you have a
19 situation which any party deems unjust, at any part of the proceedings there is the judicial
20 review route and, make no mistake about it, these parties before the tribunal have taken every
21 point available to them in the past and in my experience.

22
23 Now if, for instance, a temporary member were appointed in circumstances where it
24 was not fair and somebody did not like it, they could go and challenge the appointment and
25 the superior court would look at all the circumstances and justice would prevail. Now, my
26 experience has been where a High Court judge - if there is any doubt at all thrown on the
27 fairness of the proceedings, he has gone the other route. He has gone against it. If there is
28 any reasonable doubt shed upon the appointment of a temporary member, my view is that a
29 judge would reject the appointment and start over again. But to go back sometimes to the
30 situation where you have to have a complete new hearing may lead to enormous cost and

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1 expense and somebody, in fact, getting away with something that he should be convicted for.
2 One of the problems we have had is the length of these proceedings in the tribunals.
3 Sometimes they can be delayed and sometimes they can go on. They do last for many, many
4 weeks and there are not that many cases being heard per year – maybe one or two a year – so
5 we are trying to improve on that situation and, with respect, I think we should give maximum
6 flexibility in this regard.

7

8 ***Deputy Chairman:***

9

10 Mr Chairman, I do not know why we are quarreling with Mr DAVIES. Obviously,
11 he is providing work for counsel at judicial review and, in fact, if you look at a provision in
12 the Bill and if we think this is likely to give rise to a lot of appeal from such decisions, that is
13 a very serious reason for us to amend, to avoid that kind of situation.

14

15 Now, looking at the provisions for the appointment of temporary members, you
16 may be looking at a series of temporary members. You may appoint a temporary member
17 and he has had enough of it. He resigns and nobody can prevent a person from resigning.
18 Are you going to appoint another one? There is no restriction, no mechanism as to how you
19 operate this.

20

21 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

22

23 My experience is – and I have done six or seven of these as counsel to the tribunal –
24 that the people who are appointed are of the highest calibre. They are dedicated, they are
25 interested and it has never happened. Nobody has ever said, “I want to be able to leave in
26 August. I don’t want to sit. I’ll resign.” It has never happened.

27

28 ***Deputy Chairman:***

29

30 When your knowledge is founded on people involved being of the highest calibre

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1 and of very strict morals, it is bound to be looking for trouble because you cannot make such
2 assumptions about people. Can you look for some sort of solution to this? You might
3 provide flexibility. You will not provide any safeguards as to how this flexibility is used.

4
5 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

6
7 Well, with respect, the safeguard is the High Court judge under common law
8 principles.

9
10 ***Deputy Chairman:***

11
12 That is not acceptable because that is not a safeguard. That is a remedy should
13 something go wrong and it costs a lot of money and the ambit of judicial review is limited. I
14 would much rather put in a kind of mechanism which would prevent this sort of thing from
15 arising. Where is the provision to tell me how this temporary member – the mechanism of
16 appointment of a temporary member would be.

17
18 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

19
20 Can I go back to perhaps practice? There is a case. It has been completed
21 now – and in that case we had several weeks of hearing and then other implicated persons
22 joined in. I think under the Insider Dealing Ordinance, what was meant to then happen is
23 they join in and then the tribunal continues on with the hearing but the counsel at court
24 opposed that. They said, “Were these people giving evidence not represented. They didn’t
25 realize when they were giving evidence as witnesses earlier on that they might be facing
26 charges.” They wanted the whole thing to start again and this illustrates the point –
27 Mr Chairman, which I said earlier, if there is any doubt that justice may not be done, if there
28 is any possibility of prejudice against defendants before the court, the judge always leads in
29 that direction. He will always go down that route and that is what practice has shown.

30

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1 **主席：**

2

3 關於這類型的問題不只這個Tribunal，我認為這些在其他情況也應
4 該如是。

5

6 **副主席：**

7

8 其他的不是如此。

9

10 **主席：**

11

12 Alexa?

13

14 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

15

16 多謝，主席。Could I invite the Honorable Members to take another look at clause
17 9 of Schedule 8? It says, "Subject to sections 11 and 12, the CE may appoint a person to
18 act." In fact, this is not an absolute right given to the CE. What does CE has is, in fact, a
19 discretion. When he exercises that discretion, it has to be subject to the authorizing
20 principles of natural justice.

21

22 **Deputy Chairman:**

23

24 If it is for the CE to exercise that discretion, is it his absolute discretion? The CE
25 is not a party of the hearing. How does he exercise that discretion? On what basis does he
26 do that?

27

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

30

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1 It has to be on the basis of natural justice.

2

3 ***Deputy Chairman:***

4

5 The CE now looks at the proceeding which has been interrupted and he tries to ask
6 himself, "Shall I appoint a temporary member or not?" So he is considered at this point.
7 Now, can you show me what guides the CE? I mean, natural justice is just the name of a
8 principle. How does he apply that principle in fact? Does he consult the chairman? Is
9 there any provision for him to say that he has to consider? Are there any restrictions? For
10 example, if it is halfway through a complex case he will not do it and because the CE himself
11 is not at the hearing, he cannot make the decision out of the blue. There has to be some
12 bases for him to make it, if it is entirely a matter for the CE.

13

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

16

17 Right. I take your point.

18

19 ***Deputy Chairman:***

20

21 Then it is not a safeguard.

22

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

24

25 Mr Chairman, maybe I could just continue what I have just said earlier. In fact,
26 there are two areas where we could consider introducing some sort of safeguard into this so-
27 called flexible arrangement. The first one is what I have just mentioned. We can put the
28 CE in a more passive position by adding provisions like, "The CE may act on the
29 recommendation of the Chief Justice or on the recommendation of the Tribunal Chairman."
30 That is the first area of safeguard.

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1
2 The second area of safeguard – and I need to consult my legal adviser in the
3 Department of Justice – is whether we can have express provisions saying that in making
4 these arrangements, one must have regard to the fact that we shall not prejudice the natural
5 justice. All I know is already in the common law principle and one cannot act against it and
6 that can be a point of appeal; but we are quite happy to consider ways to stipulate this point
7 clearly in this provision.

8
9 **主席：**

10
11 各位同事是否有補充？以我個人的看法，現在只有3個選擇：第一，
12 從頭開始；第二，保留暫委成員的這個建議；第三，余若薇議員所提到的
13 較小型panel。就優先次序方面，我認為最合情理的是從頭開始；否則就是
14 第二個選擇，在雙方同意的情況之下縮小panel；對於第三個選擇，我認為
15 要在很exceptional的情況下才用，或應該加rider，例如在雙方同意的情況
16 下。但若要雙方同意，結果可能是雙方都不同意。

17
18 **財經事務局副局長區璟智女士：**

19
20 關於雙方同意的問題，剛才余議員提到的情況或會出現，就是有人
21 可能利用這個理由拖延整個審訊程序，以致達不到我們的理想目的。

22
23 **主席：**

24
25 如果利用這因素拖延整個審訊程序，一面聆訊，一面卻進行司法覆
26 核，必然令到整個審訊不如由頭開始，這樣便不必作任何解釋了。事實上
27 由頭開始的代價有多大呢？剛才曾鈺成議員也曾提問這個問題，以往的10
28 年內，有人需要中途辭職的類似個案只有一兩個，在這些少數的個案中，
29 我們是否不可以afford由頭開始？假設個案是處於剛開始的階段，由頭開始
30 不會造成很大的損失；如果審理的個案已到了尾聲，然後才委出暫委成員，

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1 暫委成員一直都沒有參與聆訊，若要他作出決定，則不如從頭開始。

2
3 **財經事務局副局長區璟智女士：**

4
5 主席，回應你所提到的問題：即使有少許危險會導致損害公平的研
6 訊，這類條款亦不應該啟動。但我們的法律顧問一直表示，這個原則已包
7 含在普通法內，不需要特別訂明。既然各位有這樣的憂慮，我們也會考慮
8 類似這樣的制衡可否較清楚地演譯出來。如果根本有這個原則，你剛才所
9 擔心的情況不應該發生。

10
11 **主席：**

12
13 不是的。我認為即使已多加一個制衡，訂有兩個recommendations，
14 假使上述的個案真的出現，在有人辭職後再委出暫委成員，暫委成員需要
15 做些甚麼工作？他是否需要由頭開始聆訊？Can they answer my questions?
16 If anybody was appointed as a temporary member – a responsible temporary member may
17 call for all the evidence that the tribunal has been hearing of, so the meaning is they will
18 restart again.

19
20 **Miss AU King-chi, Deputy Secretary for Financial Services:**

21
22 Perhaps Mr DAVIES can explain the hearing which may continue with the
23 appointment of a temporary member over the implication of different parties in terms of costs,
24 time and the consideration of natural justice.

25
26 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

27
28 Yes. The costs, of course, will be enormous. The effect will be enormous
29 because you get to these situations where if you have to start again, the first thing that
30 happens – if he is a good counsel, leading counsel and very able, he will say, “I’m sorry. I

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1 can't start again. I've got further commitments", so the repercussions are quite wide. It is
2 not just costs which can be enormous. It is not just time which can be enormous. It is lots
3 of practical repercussions.

4
5 As I say, there can be so many circumstances which I cannot foresee now but which
6 I can in the future because of this flexible procedure whereby it would be perfectly just to
7 continue. To take the earlier case I have given as an example, where one of the lay members
8 misconducted himself, it really had to start again. The repercussions have been enormous
9 and we had this flexibility, you see, that the judge – a very experienced, very able judge, was
10 able to say, "Well, I'm very happy with this. In my experience, no justice will be worked."
11 He asked the court. Nobody in court stood up and said, "No. I think this is unjust." It
12 worked. We had that flexibility and, therefore, we were able to put the case away and
13 everybody was very happy with the result. That is all I am saying. We need this flexibility, if
14 you give them a flexible procedure.

15
16 **Chairman:**

17
18 You said the repercussions were enormous. To whom does the repercussions
19 apply?

20
21 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

22
23 Well, the person before the court. His counsel can say, "I'm sorry. I start a 6-
24 month case next week and I cannot – if it is to be reheard, you will have to get another
25 counsel." So you can see it will have a dramatic effect on the person before the court. So
26 he would like the option to have the temporary member stepped in and for it to continue on or
27 put it away - - realize it was over.

28
29 **Chairman:**

30

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1 You said “he”. That is the guy being heard?

2

3 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

4

5 The so-called defendant.

6

7 **主席：**

8

9 Then if you get a rider, such as “both parties agree”? 如果你覺得那
10 位人士是受屈的，如果他同意，則沒有問題；但剛才余若薇議員表示他一
11 定不會同意。如果他一定不同意時……

12

13 ***Mr Peter A DAVIES, Senior Assistant Law Officer:***

14

15 Ms EU is perfectly right. In those circumstances, the chances of delay and might
16 be so great and I think in most circumstances they would object and say, “We object to this.”

17

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

19

20 It is not the fault of either party that one of the three members cannot make it, either
21 because he resigns or he misconducts himself so I think the Chairman’s point is that it is not
22 really for the parties to pay for the consequences. Indeed, to get the benefit of the
23 consequences if one of the parties wants a delay and, therefore, it seems to me that since you
24 have provided for a three-member tribunal and if one of the members cannot make it, then the
25 right course is either to say, “Restart”, which is the normal course, or alternatively allow the
26 parties by consent to choose their options which is, you can have a temporary member; you
27 can have a reduced tribunal whether it is to two or to one. What you cannot do is to force
28 any party to have an additional temporary member in place of the original tribunal. If one of
29 the parties wants to delay and, therefore, he says, “Therefore, I want to restart again”, I think
30 the risk is, so be it because it is not his fault in the first place that somebody misconducts

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1 himself or that the tribunal is less one member. He is entitled to have a three-member
2 tribunal, if you look at it this way. I think the main difference between Mr DAVIES and us
3 is that you almost start with a premise that all this preparation has been gone into and
4 everybody knows this guy is very likely to be found guilty of misconduct, anyway, and really
5 hold up whole lot of time and expense and public funds and so on when he is really delaying.
6 If he gets the benefit of delay and he did not cause it and if he is entitled to a three-member
7 tribunal in the first place, he should be given the three-member tribunal unless he agrees to a
8 smaller tribunal or unless he agrees to an additional member.

9
10 I think it is not just the long meeting we had today. We had the discussion in the
11 last meeting when Albert HO was here. He also had great concerns about this and you heard
12 from the two other members who did not speak last time so I think the consensus really is that
13 we are quite concerned about this temporary member business. If we look at it as a matter of
14 principle, why not having a rehearing unless the parties agree to a different form?

15
16 ***Deputy Chairman:***

17
18 Mr Chairman, can I add a rider to this? I would say that even where parties agree
19 there has to be the consent or the agreement of the chairman who is the judge because it must
20 be also a matter for him to see whether in that case he could carry on. After all, he is the
21 chairman of the hearing. He knows to a certain extent how things are going and where it is
22 likely to lead. If it is very likely to lead to injustice, then it should not – he should not permit
23 that to happen but apart from that I would agree with Audrey. Even if we want flexibility,
24 the flexibility cannot be for its own sake. It must come with safeguards.

25
26 When you look at clause 10, Mr Chairman, I become even more concerned because
27 even the judge or the chairman could be apparently replaced in midstream. I really find this
28 rather astonishing.

29
30 ***主席:***

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1
2 吳靄儀議員，這一部分我們已討論得很詳盡，政府亦聆聽了我們的
3 意見，我覺得需要考慮的是：第一，這個市場失當行為審裁處是一個新的
4 機構，作為公眾，我寧願新的審裁處可以建立比較高的公信力，整個制度
5 是較為嚴格，以此作為起點。以前的Insider Trading Tribunal只是很小型的
6 審裁處，如果這個基本的版本擴大到包括多種行為，我認為這方面的轉變
7 是需要的，我們所要求的公信力或嚴格程序是比較強，剛才的flexibility需
8 要增加很多制衡。

9
10 在綜合其他人的意見後，我認為第一個選擇可能是restart；第二個
11 選擇是在雙方同意下reduce；第三個選擇也是要雙方同意，並且需要增加一
12 些我亦支持的recommendations，例如要由法官主動提出，而且也是雙方同
13 意的。但可能亦有一些情況是由於明知會敗訴，因此不願再從頭開始。

14
15 某些情況若由頭開始，正如Mr DAVIES提到，可能令他受更大的折
16 磨。因此，可能有一些情況下是有flexibility，但以我的看法，如果雙方其
17 中有一方不同意，覺得受屈，亦不應這樣做。我們日後需要建立公信力較
18 高的委員會，我擔憂當委員會開始運作後，工作量比以前的Insider Trading
19 Tribunal更大，事實上以前只有很少的個案。

20
21 **財經事務局副局長區環智女士：**

22
23 主席，我完全明白你們的憂慮。我們對啟動點再作考慮：第一，首
24 席法官的角色應該是怎樣的；第二，是否可以給予與研訊有關的各方一個
25 反對權；假如可以基於妨礙正義的伸張或研訊的公正執行為理由而提出反
26 對，我們可以對此作出考慮。

27
28 雖然各方都可以提出反對，但我們亦需要列明反對的原因，這可能
29 解決了余議員關於拖延問題的憂慮。如果反對的原因是影響整個公平審
30 訊，則有理由反對。我們還要考慮如何草擬。

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1
2 **副主席：**

3
4 主席，我認為不是這樣。余若薇議員剛才提到，他所擁有的權利是
5 由3位人士組成的審裁處聆聽他的聆訊，他不需要因為現在再找另外一位人
6 士代替會影響公平審訊而提出意見。如果他有這個權利，只可以說是他同
7 意自動放棄這個權利，而不需要提出任何的理由，我認為應該考慮到這一
8 點。

9
10 **財經事務局副局長區璟智女士：**

11
12 關於這個問題，我希望各位考慮剛才Mr DAVIES提到的資源問題，
13 其實不單與訟人的一方須承擔法律費用，納稅人亦付錢，司法部也要使用
14 資源，我們亦要平衡各個方面的考慮。

15
16 我明白副主席的看法，按照這個看法，根本不需要解釋，不要這個
17 安排就可以了。但各位應該考慮到會出現很多不同的個案，利用這種方法
18 拖延整個審訊程序。

19
20 **副主席：**

21
22 剛才提到由3位人士組成的審裁處，如果在審訊的過程中，被聆訊
23 人士提出種種原因，這就是造成的拖延；但有委員離開，卻是基於他所不
24 能預見的情況，這樣對他也不公平，應該如何對他作出補償呢？我們不能
25 因為是納稅人的錢就... ..既然有這樣的制衡，則應該保護他所擁有的權
26 利。最重要的是主審法官認為這樣做未必會妨礙到公正，只要雙方的同意，
27 被聆訊的人士亦同意這樣做，或有足夠的保障。不應因為資源方面的原因，
28 而不去保護被聆訊人士的權利。這種情況當然是不可能接受的。

29
30 **財經事務局副局長區璟智女士：**

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1
2 我認為需要優先考慮公正、公平的審訊。正如剛才 Mr DAVIES 提到，
3 審裁處出現的情況有很多不同種類，譬如他剛才所列舉的例子，在那種情
4 況之下，若與訟雙方均有選擇，其實一方可能選擇拖延審訊程序。

5
6 **余若薇議員：**

7
8 據我的理解，那種情況是有很多種的，無論如何草擬，每個個案都
9 不能預先照顧得很周到。剛才我的意思是，一般而言最合理的安排是甚麼？
10 對於確有犯罪的人，若他希望拖延時間，他會在這個情況下得益。但一般
11 而言，如果要平衡另外一種情況，就是有些人並無犯錯，亦不是他所造成
12 的影響，硬加一位暫委成員，對他來說也是不公平。

13
14 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

15
16 Perhaps I could add just one point.

17
18 **Deputy Chairman:**

19
20 No, I am sorry. She has not finished. Because you are in conference I think it is
21 not right for her to go on.

22
23 **主席：**

24
25 余若薇議員。請繼續跟進。

26
27 **余若薇議員：**

28
29 主席，既然兩個都是不公平的情況，如果要作出平衡，我寧願選擇
30 的情況是，雖然可能浪費納稅人的資源，但如果令明知確有犯罪的人因為

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1 這個理由而拖延審訊進度，我也情願有這個不好的情況出現。至少他有一
2 個權利，即審裁處從一開始就有3位人士，總比存在一個對另一方不公平的
3 機制較好。另一方原則上在一開始時是沒有罪的，需要經過公平審訊，而
4 公平審訊須由3位人士組成的審裁處主持，而且由始至終都應是那3位人
5 士。既然不是他的錯，若要他解釋為何不可以換人，則對他不公平。正如
6 區局長提到有不同的情況，我們的目的就是可以選擇比較公正的做法，讓
7 無辜的人亦可以受惠。

8
9 **主席：**

10
11 但有一點要注意的是，犯罪的人如果因為這個理由而可以拖延審
12 訊，純粹是他的運氣，因為若有人辭職，並不是他所導致。如果當個案審
13 訊到一半有人辭職，正如余若薇議員提到，他應該有此權利。我們已很詳
14 細討論此問題。

15
16 **財經事務局副局長區璟智女士：**

17
18 我們會考慮這個建議，即要求在雙方同意才可以啟動暫委機制。

19
20 **主席：**

21
22 會否考慮縮小審裁處規模的option？

23
24 **財經事務局副局長區璟智女士：**

25
26 關於這個問題，由於涉及投票的安排，可能會比較困難。我們需要
27 考慮一下。

28
29 **余若薇議員：**

30

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1 我認為可以利用第34條，當時因為已經太遲，不能利用第34條。第
2 34條是只剩下一個人。在審訊途中少了一個成員，若這時我寧願引用第34
3 條，是否不可以？

4
5 **財經事務局副局長區璟智女士：**

6
7 那是前期的工作。

8
9 **高級助理法律草擬專員陳子敏女士：**

10
11 現時的條文的本來寫法是提及未有聆訊前的，如果需要改動，固然
12 是可以，但要看政策方面是否適合，或視乎各位議員的意見。

13
14 **財經事務局副局長區璟智女士：**

15
16 市場人士可能認為，如果主席有兩位專家協助，他們比較安心。但
17 1加1的安排則少了一位專家，在投票方面則變成主席有一個casting vote，
18 我們需要研究如何安排。關於這一點，我們暫時還沒有向市場人士提出這
19 個可行辦法。

20
21 **主席：**

22
23 第10、11、12和13條是關乎整個制度，我們一併研究。

24
25 **副主席：**

26
27 主席，第10條比第9條更加困難。第10條提到可以換主席，是否可
28 以這樣做？

29
30 **財經事務局副局長區璟智女士：**

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如果加上剛才提議的雙方同意，各位的考慮是否會有所不同？剛才余若薇議員提到有不同的情況，可能某些情況是可以，但大部分情況則不可以。

主席：

這樣難度會更大。因為在整個制度而言，概念是由兩位非法官人士或專業人士或專家協助法官，如果法官不能參與審訊... ..

財經事務局副局長區璟智女士：

或聽到最後，可能已經到向FS提交報告的階段，如果有這樣的安排是否可以？

副主席：

主席，我認為這只可以是一種很形式的做法。審裁處參考法庭的做法，所以才有法官，雖然在某程度上有靈活性，但在最基本的原則方面，亦在相當程度上希望按照法庭的原則行事；只有在無傷大雅的情況下，更換主席才安全。立法機關一定要研究最起碼的安全措施。如果聆訊完全還未開始，所完成的只是聆訊前的準備工作，或個案已經聆訊完畢，只是透過宣佈，則沒有問題。但這些事都是需要說明的，否則便不知道如何執行。如果是更換其中一位成員，擔任主席的法官可以衡量應否這樣做。如果主審法官亦要更換時，則可能不知道應由誰作出決定？

財經事務局副局長區璟智女士：

或許是CE in Council。

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1 **副主席：**

2
3 區局長，這是不行的。司法機關的特色是，每個法官的獨立都是個
4 人獨立的，並不是上級可以決定的。一個法官在聆訊案件途中，若不可能
5 再聆訊，這種情況應怎樣？並不是由上級法官、首席法官去決定，而是一
6 定要由法律決定。首席法官並沒有出席聆訊及參與其事，他當然是不可以
7 作出決定。如果需要更換主席，一定要用條文的方式規定何時才能更換主
8 席，在哪個階段才是安全的。

9
10 **財經事務局副局長區璟智女士：**

11
12 我們會再作研究，如何把更換主席的安排清楚地納入法例內。如果
13 無法納入，則將有關條款取消。

14
15 **主席：**

16
17 我們討論第11、12和13條。我希望提到第11條的內容：“A temporary
18 member appointed to act in the place of a member may at any time resign his
19 office by notice in writing to the Chief Executive”，如果成員接二連三地辭
20 職，即使雙方同意，我也認為只可以接受一次，如果一而再地出現辭職的
21 情況，不如由頭開始審訊。顧先生。

22
23 **助理法律顧問顧建華先生：**

24
25 多謝，主席。

26
27 既然辭職會帶來這麼大的後果，如果有一位成員在開始聆訊時辭
28 職，會否考慮規定他一定要有可以接受的原因，譬如要向法庭申請，法庭
29 接受他的原因才能辭職。例如陪審員亦不可以隨時辭職。

30

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1 **財經事務局副局長區璟智女士：**

2
3 我認為是比較困難的。陪審員是作為公民的義務，但某些專業人士
4 做免費的工作，如果有那麼多的關卡，要找適當人選可能更困難。

5
6 **副主席：**

7
8 主席，我不同意這種說法。普通市民還可以用普通尺度衡量，但假
9 如是專業人士，他既接受了公職的委任，居然可以允許隨時辭職，這個是
10 無法接受的。如果他隨便提個條件就可以辭職，納稅人如何能接受？

11
12 **主席：**

13
14 曾鈺成議員。

15
16 **曾鈺成議員：**

17
18 主席，我剛才亦希望就此提問。既然審裁處的成員在聆訊中途辭職
19 有可能造成嚴重的後果及資源的浪費，他應該有一定的責任。他在接受委
20 任時，到底有什麼責任？我們現在所研究的，是在有人中途辭職時的處理
21 方法，以便盡量不影響個案和不浪費資源。關於這點，似乎從立法方面已
22 給予他一個印象，由於已有所有保證，他隨時離開似乎無關重要。正如政
23 府所說，能受委任的成員都有high calibre和情操高尚，但副主席亦指出謂
24 不能只靠這些因素。他在接受委任時到底表示有什麼承擔？這裏是否應有
25 一個明確的表示？

26
27 **財經事務局副局長區璟智女士：**

28
29 我們先參考一下其他的辭職安排，在法例內是如何寫明，再作一個
30 平衡。因為找專業的人士並不容易，當然他們在市場上都有一定的地位，

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1 相信亦不會冒失地作出不負責任的決定。但究竟這些不負責任的決定，是
2 否需要清楚的列入法例內？怎樣處理這類人士？這是另一個考慮。

3
4 **主席：**

5
6 我同意你的說法。請你參考其他法例，但事實上，在 Market
7 Misconduct Tribunal成立後，將來會有很多landmark cases，類似的個案會有
8 很大的影響。

9
10 **財經事務局副局長區璟智女士：**

11
12 在前天的會議雖提到上訴審裁處有份名單，但成員人選是個案出現
13 後才找的。現在提到的6種市場失當行為，大家必須首先肯定有關人選是那
14 方面的專家。當每次有個案出現後，行政長官會委任主席及兩位成員處理
15 個別案件，這安排與上訴審裁處有所不同。

16
17 **主席：**

18
19 就委任的程度而言，亦同樣困難。

20
21 **財經事務局副局長區璟智女士：**

22
23 是不容易找到人選。

24
25 **主席：**

26
27 我知道不容易找到人選。

28
29 **財經事務局副局長區璟智女士：**

30

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1 以前只有內幕交易一種失當行為，日後再有其他種類的失當行為，
2 亦要找一些令各方面市場人士均可接受的專家人士，而他們必須充分知道
3 在某種市場情況下，若干行為是否為市場人士所接受。

4
5 **主席：**

6
7 其實圈子很小。請政府再研究辭職程序。余若薇議員。

8
9 **余若薇議員：**

10
11 主席，關於辭職程序方面，我不是很希望條例內規定有關人士怎樣
12 辭職、為何辭職或就辭職的理由作出規定。如果那個人不想做的話，一定
13 有理由。如果他的理由不符合條例內的理由，而不批准他辭職，並迫他繼
14 續工作，我覺得這並不是伸張正義的做法，所以我並不太過傾向要規定辭
15 職的理由。

16
17 我是否可以就委任的情況作出提問？因為區局長提到，這個審裁處
18 與上訴委員會不同，必須有個案才可作出委任。我有些憂慮，但我不知道
19 可否預先找到一批合適的人選。第一，出現個案才找委員聽審，這安排本
20 身就有問題；第二，聽審人士是否平時亦要遵守一些規矩？舉例而言，稅
21 務上訴委員會對其委員亦有一些限制，例如律師不可以接辦類似的上訴案
22 件。作為聽審員，在聽審的同時，不可能以律師的身份指出上訴的決定不
23 正確，所以有些規定是要遵守的。將來的市場失當行為審裁處，是否有些
24 規矩須聆訊成員遵守？

25
26 **主席：**

27
28 余若薇議員，暫時不啟動這類問題，到討論委任的部分時再詳細研
29 究。因為在研究有關條文時，不單要討論是否有限制，而首先要討論為何
30 沒有一份名單。我相信政府一定會作出解釋。

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1
2 就第9、10、11、12、13條，是否有問題？我們已提出意見，希望
3 政府就出現接二連三的辭職問題再作考慮。

4
5 **副主席：**

6
7 哪裡提到委任的問題？

8
9 **主席：**

10
11 第11條，這裏提到 “A temporary member appointed to act in the place
12 of a member may at any time resign his office by notice in writing to the Chief
13 Executive”。如果temporary member又再辭職時，一定要批准的，現時條例
14 內imply他辭職後再找另一個temporary member。我是考慮到即使有
15 temporary member的制度，是否restricted？即只是一次過？

16
17 **財經事務局副局長區璟智女士：**

18
19 我們會作出考慮。

20
21 **主席：**

22
23 第12和13條。第12條是否需要recommendation from CJ？政府會否考
24 慮這點？

25
26 **財經事務局副局長區璟智女士：**

27
28 其實對這個安排最瞭解的人士將會是審裁處的主席及成員。我覺得
29 應該讓審裁處的主席可以有主動權。

30

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1 **主席：**

2

3 好的，第13條。

4

5 **副主席：**

6

7 主席，剛才你提到appointment of member時，普通委員與主席是分
8 開的，但臨時的就沒有分開；這樣的話，除非第10款被刪除，否則第12款
9 的暫委成員也包括主席在內。

10

11 **財經事務局副局長區環智女士：**

12

13 我們再考慮一下。各位既然如此憂慮，我們會考慮在作出平衡後，
14 可能取消這個彈性，大家可能會較安心。我也明白第10條不可能是包括主
15 席，可能是CJ。

16

17 **副主席：**

18

19 如果保留第10條，第12條就應該分開。

20

21 **主席：**

22

23 第13條？我們還沒有討論主體法例的appointment of members，現在
24 是討論Schedule 8第14條。

25

26 **余若薇議員：**

27

28 主席，你說Appointment of members在主體法例，是否附表8第4條？

29

30 **主席：**

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1

2 主體法例是有的，是嗎？

3

4 **財經事務局副局長區璟智女士：**

5

6 主體法例不是很詳盡。

7

8 **副主席：**

9

10 即是主體法例的第243條，而第243條即是Schedule 8，在第2段至第
11 8段提到。

12

13 **主席：**

14

15 我們現在就討論這部分，好嗎？

16

17 **副主席：**

18

19 我們在討論procedure之前，應該先討論appointment。

20

21 **主席：**

22

23 好的。附表8第4條？

24

25 **副主席：**

26

27 主體法例的第243條第(1)及(2)款提到審裁處的成員，第(3)款提到這
28 些人士的類別，詳情載於附表8的第2段至第8段。

29

30 **主席：**

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30

現在就是討論委任的問題，請余若薇議員提問。

余若薇議員：

我希望提問：如果預先製訂一份名單，政府是否做不到，或是不切實際的做法？

財經事務局副局長區璟智女士：

借鏡內幕交易審裁處的安排，剛才Mr DAVIES提到，有些個案可能要審7個月，一年可能有幾宗個案，如果已找來一些專業人士，我們並不知道什麼時候需要這些專業人士，而且還要適合有關個案；但上訴的聆訊則不同，所需的時間很短，可能一個星期或幾天就行了，在這情況下，若事先有一些專業人士，這會較好。但在這段時間要清楚知道他們在未來的6個月是否在香港，可能用途並不大，同時在找人選方面的確很困難。

主席：

其實還會產生另一個問題。當然，我知道現在Insider Trading Tribunal也是同一做法，但如果有個案，委員是否知道會審理哪些案件？

財經事務局副局長區璟智女士：

是知道的。

主席：

是否已經知道？

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1 **財經事務局副局長區璟智女士：**

2
3 如果有利益衝突，他需要提出。

4
5 **主席：**

6
7 其實他可能沒有利益衝突，但有私人恩怨，那又怎樣？

8
9 **財經事務局副局長區璟智女士：**

10
11 第一，要看那個人是否在香港；第二，我們未必將個案告訴他。但
12 我們首先會考慮是否有利益衝突？當事人自己亦要申明，如果他有利益衝
13 突時，要向法官說明，而不是告訴我們。他也可能在那時已拒絕審理這件
14 案。

15
16 **主席：**

17
18 是否不可能在香港找到一批合適的專業人士？

19
20 **財經事務局副局長區璟智女士：**

21
22 其實是比較困難的。剛才考慮到，即使有這一批人士，亦未必知道
23 何時需要他們，因為這些個案一年不知道有多少宗？每一宗可能需要審理
24 一段時間。可能有關專業人士首6個月在香港，後來6個月不在香港。倒不
25 如有需要時才找他們，可能比較有用。

26
27 **主席：**

28
29 那些人士是否需要持有香港居民身份證？

30

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1 **財經事務局副局長區璟智女士：**

2
3 我們沒有這個規定，最主要的是他對市場有認識。

4
5 **主席：**

6
7 也就是可以是美籍或英籍人士。

8
9 **財經事務局副局長區璟智女士：**

10
11 都可以的。我們亦有找過外籍人士。

12
13 **副主席：**

14
15 主席，是否有其他類似這樣的做法，按每宗個案委任成員？

16
17 **主席：**

18
19 其他的tribunals是否有這樣的例子？

20
21 **財經事務局副局長區璟智女士：**

22
23 只有內幕交易審裁處是這樣。

24
25 **主席：**

26
27 很多年來已是這樣？

28
29 **財經事務局副局長區璟智女士：**

30

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1 十多年了。

2

3 **副主席：**

4

5 按每宗個案委任成員？

6

7 **財經事務局副局長區璟智女士：**

8

9 是的，按每宗個案委任成員。

10

11 **副主席：**

12

13 共審了多少宗個案？

14

15 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

16

17 I do not know. I think it is about 12. That is about right. The present procedure
18 with IDT is that there is available a list of people who are prepared to act and what happens is,
19 once a tribunal is constituted, the judge actually will look down the list and contact people
20 and then interview them. He is given a list of players so we give him a list which includes
21 every possible name that might come up during those proceedings so he talks to them from
22 the point of view of prejudice. Then he talks about their expertise and whether he would get
23 on with them and whether he could sit with them so it works quite well at the moment.
24 There is nothing in the ordinance about that but actually – that is the situation in practice and
25 it seems to work quite well.

26

27 **Chairman:**

28

29 Actually, you have already had a long list.

30

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1 **Mr Peter A DAVIES, Senior Assistant Law Officer:**

2
3 Yes. We have a list of people who say, "We are prepared to act" and then, of
4 course, as Miss AU said, he may be on that list and he may not be contacted for a year and he
5 may not be able to act at that stage so it is very difficult to have a permanent list.

6
7 **Chairman:**

8
9 Mr BAILEY?

10
11 **Mr Paul R BAILEY, Executive Director, Enforcement, Securities and Futures Commission:**

12
13 Just to clarify, in fact the IDT came into existence with the Securities (Insider
14 Dealing) Ordinance. There used to be a tribunal under the old Securities Ordinance and the
15 same procedures, from my memory, were adopted then. From my memory there were three
16 cases that I can recall which were heard by that tribunal and that was constituted by a High
17 Court judge and two lay members so it does, in fact, go further back in history than the
18 Securities (Insider Dealing) Ordinance. It goes back to the old Securities Ordinance. I
19 think the provisions are around the 145 mark, around there, so you had the cases - I think
20 from memory Hutchison Whampoa vs International City Holdings and there was one done by
21 the Commission. That was under the old office of the Commissioner for Securities and there
22 was one done by the Commission, Latterday Holdings, which was the last one done under
23 those provisions. Then the Securities (Insider Dealing) Ordinance came in and basically the
24 tribunal was constituted under that but there was a tribunal before the Insider Dealing
25 Tribunal constituted by the Securities (Insider Dealing) Ordinance.

26
27 **Chairman:**

28
29 How does the Financial Service Market Tribunal in the UK work? Do they work
30 in a similar way?

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1

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

4

5 In a similar manner. The rules have only just been promulgated a couple of
6 months ago. As I understand it, the tribunal is not in operation at the moment and it is made
7 up of a similar composition. There is one legally qualified member who is chosen by the
8 Lord Chancellor's department, a barrister or senior solicitor of some 10 years' experience or
9 standing as a minimum. Then, as I understand it, other members are appointed as lay
10 members. Whether they are appointed from a roster list or appointed on a case by case basis
11 and how they are appointed is not apparent from the legislation, nor from the rules.

12

13 *Deputy Chairman:*

14

15 Mr Chairman, from what Mr DAVIES has just told us, however informal, there is a
16 list and then you choose for each case out of the list but we already have a list. What we are
17 hearing now is – you start from scratch. When there is a case, then you start hunting for
18 people and the person will have a shock. It is never contemplated that he might be sitting
19 with the chairman of a tribunal. I think we are concerned about that sort of situation. If
20 there is a list and the people on the list have all been vetted in whatever is necessary – for
21 example, he already answers all the basic requirements and you know that these are proper
22 people, reputable people for you to appoint and so on, there is a question of whether these
23 people – which of the people on the list will be appointed to a particular case so long as you
24 have that. Then it answers our concerns but if you do not even have a list to begin with and
25 you have to hunt around, I do not think it is very practicable, even in terms of time. The
26 people on the list to begin with – since they have accepted to be on the list or to be appointed
27 to the list – I do not mind very much how you describe it – then there is already an acceptance
28 of an obligation that, subject to availability and absence of conflict of interest he will be
29 available. If you start hunting for people from scratch at the time you have a hearing, I do
30 not know how long this would take. So is it necessary for you to do a completely different

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1 thing? Not having a list to begin with is completely new. There is no precedent.

2
3 **財經事務局副局長區璟智女士：**

4
5 正如Mr DAVIES提到，非正式的名單，當然是有用的，將來可能亦
6 要再作修訂。 Mr DAVIES亦提到，以往歷來亦都有這個的安排，這個名單
7 一直是有的。將來我們可能通過一些非正式的方法物色到一些人士，並列
8 入非正式的名單內。但這個做法並不是委任，因為委任他亦未必有時間做，
9 或有利益衝突。但相當來說，有一個名單對將來的運作是會有幫助。我們
10 會參考內幕交易審裁處現時行政上的安排。

11
12 **主席：**

13
14 各位一起考慮應否有一個名單？上訴委員會就有一分類似的名
15 單。

16
17 **財經事務局副局長區璟智女士：**

18
19 法例內明文訂明須就上訴委員會委任一組成員，但對市場失當行為
20 審裁處而言，法例內就沒有提到一定要委任。不過，剛才Mr DAVIES提到，
21 我們會參考現有的運作，我相信這個運作可以繼續作為借鏡，不過將來可
22 能要物色更多這樣的人選，名單可能要較詳細。但仍會採用每個個案委任1
23 加2，即1個主席2個委員的安排。

24
25 **主席：**

26
27 余若薇議員。

28
29 **余若薇議員：**

30

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1 我希望提問SFAT的名單。

2

3 **財經事務局副局長區璟智女士：**

4

5 不是list，而是panel。

6

7 **余若薇議員：**

8

9 那些人士即使不用聽聆訊，是否每年都有車馬費？

10

11 **財經事務局副局長區璟智女士：**

12

13 我需要查核現有的安排。根據現有的法例，財政司司長可以制定一
14 些規則，訂明服務酬金的安排。我們相信亦需要參考其他上訴機制，瞭解
15 活躍及非活躍委員的酬金安排。

16

17 **余若薇議員：**

18

19 主席，若只是把他列入名單，無論是否用他，都要支付費用，這亦
20 是一個考慮。如果沒有牽涉任何公帑開支，只要經他同意，就可以將他列
21 入名單，讓人知道有個機制，若有人想調查這份名單，亦可以方便查詢，
22 或預先知道自己的名字有否列入名單。在正式與非正式的問題上，我覺得
23 應該是正式較好。

24

25 **主席：**

26

27 如果沒有聆訊，則無需支付費用。

28

29 **財經事務局副局長區璟智女士：**

30

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1 我們可以考慮一下，但正如我剛才提到的困難之處，就是這些專才
2 可能並不多。若法官現在有一份非正式的名單，則可以預先知道有一批人
3 士隨時可以協助聆訊，及哪些人士願意列入非正式的名單。但如果是正式
4 的名單，則須通過法律委任程序，這樣做法會否令有關人士有所猶豫。

5
6 **副主席：**

7
8 主席，很多專家都沒有困難，不知為何金融界的專家會有這樣大的
9 困難？同時剛才亦提到，這裏牽涉到一些實際問題：第一，臨時才到處找
10 人的做法是不切實際的，其次，亦涉及一些原則的問題，委任哪些人士，
11 他們平時的操守如何；第三，一個更基本的原則是，一般而言，我們最不
12 願採取的做法，是在開審一個個案時，才去找法官。舉個例子，馬天敏法
13 官審訊環保案例的情況是很特別的，為某一件個案去找法官的做法是極不
14 可取的。公眾會質疑審訊是否公平？如果已有一份審裁員的名單，只要其
15 專長是合適和沒有利益衝突的話，就可以找他，這會令公眾覺得更公平。
16 這個做法遠比開審一個個案時，才找法官為佳；因為第一，找到合適的人
17 選比較困難；第二，公眾會覺得不公平。

18
19 **主席：**

20
21 時間已經差不多，下次會議於星期五上午10時45分繼續。今天所提
22 到的問題，政府這兩天亦需要進行詳細的考慮。

23
24 **余若薇議員：**

25
26 我希望作出補充，既然現在新成立的委員會希望有較高的公信力，
27 我相信名單具透明度對公眾會有好處。剛才副主席提到，這些人士平時的
28 言行，亦會影響公眾對他們的信心。

29
30 **主席：**

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- 1
- 2 多謝。
- 3 m2931