立法會
Legislative Council

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

Verbatim transcript of meeting
held on Friday, 21 September 2001, at 8:30 am
in Conference Room B of the Legislative Council Building

Members present	**:**	Hon SIN Chung-kai, (Chairman) Hon Margaret NG, (Deputy Chairman) Hon Albert HO Chun-yan Dr Hon David LI Kwok-po, JP Hon NG Leung-sing Hon Jasper TSANG Yok-sing, JP Hon Ambrose LAU Hon-chuen, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Eric LI Ka-cheung, JP Hon James TO Kun-sun Hon Bernard CHAN Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon Abraham SHEK Lai-him, JP
Public officers attending	**:**	Miss AU King-chi Deputy Secretary for Financial Services Miss Vivian LAU Principal Assistant Secretary for Financial Services Mr Frank TSANG Assistant Secretary for Financial Services Mr Peter A DAVIES Senior Assistant Law Officer Ms Beverly YAN Senior Government Counsel

		Ms Sherman CHAN Senior Assistant Law Draftsman
		Mr Michael LAM Senior Government Counsel
Attendance by invitation	**:**	Mr Paul R BAILEY Executive Director, Enforcement, Securities and Futures Commission
		Mrs Alexa LAM Executive Director and Chief Counsel, Securities and Futures Commission
		Mr Eugene GOYNE Associate Director, Enforcement, Securities and Futures Commission
		Mrs Mary AHERN Legal Consultant, Securities and Futures Commission
Clerk in attendance	**:**	Ms Connie SZETO Senior Assistant Secretary (1)1
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

主席：

請政府官員進來。倘若位置不適合，請自行調動。由於Chamber正在進行裝修，還沒有完工，而交通事務委員會在今天舉行特別會議，聽取各界就七號幹線提出意見，所以我們今天的會議地點改為會議室B，以便交通事務委員會可在會議室A會見公眾團體。今天我們繼續討論Schedule 8。曾鈺成議員。

曾鈺成議員：

委員會在上次會議快將結束時，討論到關於委任的問題。附表8第8條訂明，有關的研訊程序如在主席任期屆滿之前或在任何成員的辭職或離職生效之前仍未完成，行政長官可授權該人繼續擔任其職務。

關於主席的部分，我沒有問題，因為主席的任期為3年，當主席的任期終止時，有關的研訊程序可能仍未完結。但有關其他成員的部分，由於根據第5條，普通成員的委任，是就指明的研訊程序行事，也就是說，他們的委任並沒有特定的任期。有關成員只會在以下兩種情況，在研訊程序未完成而又不能繼續擔任該項職務：第一，他自己辭職；第二，一如第7條所規定，有行政長官信納的證明，顯示該成員喪失履行職務能力、破產或疏於職守等，該成員才會離職。就成員的情況而言，似乎並不存在任期未能配合研訊程序時間的問題，那麼為何第8條還要規定可授權成員繼續擔任職務？

主席：

上次會議也曾提到這問題。副局長，請你解釋一下。

財經事務局副局長區璟智女士：

這是一項靈活安排。舉例來說，當委任成員審理某一個案時，該個案的研訊程序預計會在兩至3個月內完成。有關人士接受委任。然而，該個案的研訊程序屆時可能需要多一點時間才能完成。在這情況下，有關成員可能已向主席表示，他在3個月後必需辭職，而研訊程序可能只需3個月零一星期便可以完成，但該名成員又已經辭職了。這項規定可以讓行政長官作出靈活安排，讓有關人士在該星期繼續擔任成員，無需考慮委任暫委成員或重新委任審裁處的成員以完成該個案的研訊。

我相信這是一項靈活安排。即使有關成員呈交了辭職信，行政長官可以向該名成員表示，雖然有關個案的研訊程序原本預計可在3個月內完結，但現時需要多一個星期才能完成，並詢問該名成員是否可以留任一星期，以完成有關工作，使整個報告得以完成，以便向財政司司長提交及向公眾發表該報告。

主席：

Margaret.

Deputy Chairman:

In fact I do not understand clause 8. I have no problem with it because it basically says that the Chief Executive can ask you to carry on hearings before your resignation takes effect. Before your resignation takes effect I should expect that you would go on hearing the case, so I do not see the need for such a clause here; but you seem to want it here. If Honourable TSANG Yok-sing would look at it again, it says that "...if any proceedings be commenced but not completed before the expiry of his term of office, or if his term of office has not expired...", so if his term has not expired, then I would expect him to carry on hearing the case. There is really no reason for him not to hear the case. "... or the resignation from, or vacation of, office before this resignation takes effect..." So before it takes effect – again you would expect him to carry on hearing the case anyway. I think Audrey pointed it out

last time.

Hon Jasper TSANG Yok-sing, JP:

Margaret, the provision is: "if the proceedings have not completed……"

Deputy Chairman:

That is right.

Hon Jasper TSANG Yok-sing, JP:

"Before the expiry".

Deputy Chairman:

No; not a point. You have resigned but your resignation has not taken effect yet. If there is an ongoing hearing, then would you not continue to hear the case?

Hon Jasper TSANG Yok-sing, JP:

I do not think that is the meaning of the provision, Margaret.

主席：

讓我們分幾個層次研究該條文。我們首先討論有關主席的部分。

財經事務局副局長區璟智女士：

讓我舉例加以說明。無論是主席或是成員，假如他們的任期在10月

1日屆滿，但今天主席已察覺到就該個案而言，有關的研訊程序可能需要到10月10日才完成。在這種情況下，行政長官便可以啟動第8條的機制。雖然有關人士的任期在10月1日屆滿，但行政長官可授權他們繼續擔任有關職務，直至該研訊程序完結為止。

主席：

關於主席的部分，我相信各位也明白及接受有關情況。由於主席有特定的任期，例如是3年，因此假如預計主席在任期內無法完成有關的研訊程序，行政長官授權他繼續擔任主席，以完成該個案，相信各位也會接受這做法。我相信問題並非關乎主席的部分。

副主席：

我是否可以就整條條文提出意見？

What is not made explicit here is that you anticipate that the case would still not be completed by the date your resignation takes effect, or that you have vacated your office. On the face of it, it simply means that if your resignation has not taken effect, your office has not expired. Then he can authorize you to - - let us say your office expires by 1st of January and the case had commenced on the 30th of December. If your case is expected to finish by the 31st of December, then there is no need for clause 8. It is only when you expect the case to go on beyond the date of the expiry of your office or your resignation takes effect, that this is relevant.

Hon Jasper TSANG Yok-sing, JP:

That is exactly what the provision is.

Deputy Chairman:

Well, that is how you work it out, but that is not what it addresses. I think that looking at this clause, it does not expressly address the problem. It does not have anything that tells you. I mean, you work out that it must mean that if the completion of the case is expected to be after your resignation takes effect, or the term of your office has expired - - I suppose we cannot start talking about this sort of problem now.

主席：

有沒有補充？

財經事務局副局長區璟智女士：

沒有，因為這是現有的機制。以往曾經發生一些情況，當時需要啟動這機制。

主席：

當委任一名成員時，該名成員的委任不是直至完成審理有關個案嗎？

副主席：

不是。

財經事務局副局長區璟智女士：

成員的委任直至完成審理有關個案為止，但主席有特定的任期。

主席：

關於主席的部分，我認為有關做法較容易接受。該條文是否應該將主席及成員分開處理？該條文可以訂明，就主席而言，這是指"before the expiry of the chairman's term"，這項規定相當清晰；但成員的情況則有所不同。當成員resign後，又怎能夠要求他繼續擔任有關職務呢？

財經事務局副局長區璟智女士：

我們會在這問題上再作考慮，研究是否需要將主席及成員分開處理。

主席：

關於主席的部分，有關規定相當straightforward，因為有固定的任期，所以讓他繼續完成有關的研訊程序。

高級助理法律顧問李裕生先生：

在政府就這問題再作考慮前，我希望提出一點，有關人士只是就某宗個案而獲委任成為審裁處成員。根據第8條，如果有關成員已呈交辭職信，但該成員的辭職仍未生效時，行政長官可以將他的任期延長，直至完成審理該個案為止。如果該人完成審理該個案，也就是說，該人基本上無需辭職。

此外，第7條訂明，假如出現利益衝突等情況，便可將有關成員免任。政府在上次會議亦提到，由於行內的專家為數不多，因此審裁處的成員可能從一個細小團體挑選出來。如果某成員在審理個案的過程中，發覺自己有利益衝突，並希望辭職以避免利益衝突，但行政長官又要求他不要辭職，以完成該項研訊程序。在安排上，這會有邏輯上的問題。

高級助理法律草擬專員陳子敏女士：

我希望作出補充。正如剛才法律顧問提到，第8條所提到的resignation和vacation of office，其實是針對第6條及第7條的規定，亦即任何成員都可請辭或被行政長官要求離職。至於剛才法律顧問提到邏輯上的問題，我們希望指出的是，就第7條及第8條而言，都是由行政長官負責啟動有關機制。也就是說，行政長官可要求有關成員離職，亦可根據實際情況，例如倘若行政長官認為有關情況是適合的話，要求有關成員繼續完成審理該個案的工作。

我們亦可再行研究在實際運作上這條文的重要性。由於舊有的條例載有這樣的機制，故此我們希望保留這項靈活安排。我明白這不是保留有關安排的一個重要理據，我們可以再作考慮。

主席：

請政府再作研究。即使以前也有這項安排，但在邏輯上似乎亦有問題。如果在該條文中刪除有關"member"的部分，便沒有問題了。

財經事務局副局長區璟智女士：

在草擬該條文時，陳律師希望合乎邏輯。例如有關"任期屆滿"的部分，其實是希望與第3條互相呼應；有關"辭職"的部分，則與第6條相呼應；至於因其他問題而導致成員職位出缺的部分，則與第7條相呼應。但我留意到一點，當主席的任期屆滿時，我們可能有需要運用到該項條文。至於成員請辭的情況，有時也可能需要運用該項條文，但這種情況很少出現。這是由於成員在呈交辭職信前，可能已先行通知主席。主席或會對該名成員表示，有關個案的研訊程序還有兩個星期便完成，並游說該名成員留任兩星期，以完成審理有關個案。在這情況下，可能無需啟動這機制。

我們會再行研究這機制有多大的用途及是否有需要在同一條文列出這3個可能性。

主席：

如果真的要列出這3種情況，當局應將第8條分為第8(a)、(b)及(c)條。屆時我們針對不同的個案，再研究有關情況。

副主席：

我相信曾鈺成議員也不肯罷休，對嗎？

曾鈺成議員：

我不知道有否錯誤理解副主席提出的疑問，如果將第8條兩次提到的"before"一字，尤其是有關resignation的部分作出修改，有關規定會否更清晰？如果完成有關的研訊程序，便不存在resignation的問題。既然有關人士完成其職責，便無需resign。假如將這部分改為"any proceedings have been commenced by the Tribunal but not completed when the chairman's term of office expires or when the resignation from or vacation of office by a member takes effect"，這會否更清晰？

副主席：

我認為政府需要就drafting再作研究。關於我們剛才提到的問題，雖然政府當局表示這是一項靈活安排，但我們希望清楚表明，這項靈活安排是有問題的。如果行政長官在主席的任期屆滿後授權該人繼續擔任主席，這是沒有問題的，我們認為這項靈活安排是可取的做法。然而，如果有關成員被行政長官根據第7條免任，也就是說，有證據顯示該人喪失履行職務能力、破產、疏於職守或有利益衝突，而行政長官仍可授權該人繼續審理

個案，這種靈活安排不應該存在，絕對缺乏公信力。如果行政長官根據這些理由將有關成員免任，便不能夠授權該人繼續審理個案。

主席：

請政府再行研究這問題。

財經事務局副局長區璟智女士：

多謝副主席的意見，我認為這是很有道理的。關於因第7條所述的理由而離職的情況，我們會再作考慮。

主席：

Audrey.

余若薇議員：

關於主席的部分，我希望知道，如果主席辭職，而他的辭職已生效，行政長官在甚麼情況下可要求他繼續擔任有關職務？如果主席的3年任期屆滿，而有關的研訊程序仍未完成，行政長官授權他繼續完成審訊，這一點我是明白的。但如果主席提出辭職，而他的辭職已生效，我實在想不到行政長官可基於甚麼理由而不予批准。如果行政長官游說該人不要辭職，並嘗試說服他撤回辭職要求，我則可以明白有關情況。然而，如果是這樣的話，該人的辭職便不會生效，因為該人撤回辭職要求。如果該人並無撤回辭職要求，行政長官怎可以根據第8條要求他繼續審訊有關個案？我不是很明白這種情況。

副主席：

由於"member"一字包括主席和ordinary member，因此主席的離職也包括在內。

余若薇議員：

這包括主席的，對嗎？

副主席：

該條文訂明，vacation of office by a member。

高級助理法律草擬專員陳子敏女士：

"Member"一字是包括主席的。

財經事務局副局長區璟智女士：

這其實是一項靈活安排，訂明行政長官可作出這項授權。如果對方並不同意，亦無法強迫他繼續擔任有關職務。

余若薇議員：

那不如在條例草案訂明行政長官可作出各種授權！在一些情況下，並不可以作出這樣的規定。

主席：

我們繼續討論第243條。

副主席：

我們是否已完成討論附表8？

主席：

還沒有。委員會在上次會議討論第243條時，希望瞭解有關的委任程序。

副主席：

也就是說，關於附表8，我們只完成至第13條的討論。

主席：

是的。上次會議提到一項爭議，就是名單制的問題。究竟是否應該有詳細的名單？政府表示會就這問題再作考慮，我相信現階段仍未有結果。各位可以先行討論餘下的部分。

副主席：

主席，我希望提出一些有關drafting的問題。

Can I refer to clause 243, looking at it again? If we look at subclause (3) we find that the chairman of the tribunal shall be a judge. The fact that he shall be a judge, and the fact that a judge is defined under clause 237, is repeated a number of times. Maybe that can be tidied up, because if you look at the next page, page 17 in subclause (8)(a) we have again within the bracket "... chairman of the Tribunal who is a judge within the meaning of paragraph (a)" and so on. Further down in subclause (9) we find the same thing repeated. I think also in the schedule it is repeated. So maybe that can be tidied up. If this is said once, I suppose it does not have to be repeated, but if it is repeated whenever the word "judge"

appears, then let it also reappear in subclause (3).

高級助理法律草擬專員陳子敏女士：

我可否就這一點作出解釋？

主席：

可以。

高級助理法律草擬專員陳子敏女士：

這是有特別原因的。我們希望在下文重覆關於"who is a judge within the meaning of paragraph (a) of the definition of "judge" in section 237(1)"。根據第237(1)條，"judge"一字的定義包括第(a)、(b)及(c)段所訂明的意思。第(a)段訂明，這是指在職的法官；第(b)段訂明，這是指上訴法庭的前任上訴法庭法官；第(c)段訂明，這是指原訟法庭的前任法官或前任暫委法官。

第243(3)條訂明，審裁處主席須由法官出任。該名法官可以是第237(1)(a)、(b)或(c)條所訂明的法官。至於副主席剛才提到的第(8)及(9)款，該等條文訂明，所指的是第237(1)(a)條所界定的法官。換言之，該等條文特別訂明所指的是在職的法官。在草擬有關條文時，我們希望表明第243(3)條所指的是前任或在職的法官，但第(8)及(9)款所指的是在職的法官。我們刻意採用這種寫法，以顯示意思上是有分別的。

主席：

余若薇議員。

余若薇議員：

關於Securities and Futures Appeals Tribunal的部分，該部分有否訂明類似第243(8)條的規定，亦即有關人士可獲付一筆款項，而該筆款項"shall be a charge on the general revenue"？

財經事務局副局長區璟智女士：

有的。

主席：

有的。有關款項由財政司司長決定，對嗎？

財經事務局副局長區璟智女士：

對。

主席：

但為何這裏並沒有訂明有關款項是由財政司司長決定？

財經事務局副局長區璟智女士：

該條文在第(8)款訂明這一點。

主席：

"an amount…… as the Financial Secretary considers appropriate".

這樣的規定會否過於寬鬆？我明白所支付的款項數額不會很大。

財經事務局副局長區璟智女士：

實際的運作情況是，我們會徵詢庫務局的意見，詢問他們類似組織的服務酬金的水平，然後才釐訂有關的款項。

主席：

關於第243條，各位有沒有其他問題？我相信，這條文所涉及的核心問題是，當局會否採用名單制的做法。

財經事務局副局長區璟智女士：

讓我簡單講解有關情況。各位在前日提出各項論點後，我們曾與證監會的同事討論有關問題，並希望請委員考慮我們觀察所得的幾點意見。第一，由於香港市場比較細小，因此委任有關的市場專業人士進行研訊工作的確並不容易。現時，內幕交易只是其中一種失當行為，日後失當行為的種類將會有所增加。屆時，我們需要委任不同範疇的市場人士進行研訊工作。根據證監會的經驗，如果就每宗個案邀請有關人士出任審裁處成員，這是比較容易的做法。如果委任期較長，例如兩年或3年，這其實是相當困難的。此外，我們亦需要考慮所委任的人士還要做生意，他們會顧及同業對他們的看法。

至於個別的個案，證監會其實一直也有委任expert witness協助他們進行檢控工作。他們亦面對同樣的困難。總結所得的意見是，即使擬備一份名單，名單所載的人士也未必可以協助處理就個別個案提起的研訊程序。屆時可能需要就某宗特定的個案邀請其他市場人士提供協助。如果按每宗個案的情況作出委任，這較容易找到人選。即使將有關的市場人士列入名單內，他們也未必是合適人選。我們需要視乎所涉的失當行為類別而作出委任。

曾鈺成議員：

其實是否有這樣大的分別？將有關的市場人士列入名單內，並不等於當邀請他們負責某宗個案的研訊程序時，即使他們屆時正在處理其他重要事務，也須把有關工作擱置，協助處理研訊程序。

財經事務局副局長區璟智女士：

對，最重要的是議員明白這一點。如果議員體諒到這一點，便容易作出靈活安排。

曾鈺成議員：

我相信這制度不會如此硬性規定，即使整個panel也沒有合適人選處理有關個案，也無法委任在名單以外的市場人士審理該個案。當局隨時可以將市場人士加入該panel，對嗎？這應該不是困難的事。如果有一份名單，便可讓有關專家事先有準備，讓他們知道日後可能會邀請他們審理一些個案。

財經事務局副局長區璟智女士：

現在所採取的行政措施，也是類似的安排。我們一直與香港會計師公會、香港律師會等保持聯絡，他們亦有向我們提供名單。現時所遇到的最大難題，就是委任市場人士。即使只是將他們列入名單內，他們亦會考慮這樣做會否影響其生意，他們需否作出很大的承擔。

就此問題，請Mr Paul BAILEY just to briefly explain to Members how his experience demonstrates the difficulties in identifying market candidates, and for nominating them for a period of time to take up the job.

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

I think the best analogy I can come up with is when we look for experts in insider dealing cases. I have been doing insider dealing cases for a long time, and it really is extremely difficult to find anybody who is willing to stand up and really speak against what you could say are their peers; or offend people in the market who might in fact have been quite honest about it, and given them business.

So the pool of expert evidence you are able to get is really very, very restricted, and if you look back in the history of the insider dealing cases that have been before the Insider Dealing Tribunal, I think there are only two or three people who are willing to give expert evidence. There are a few academics who are willing, but being quite open about it, the problem with academics is that they can tend to be quite theoretical, and not necessarily have the market experience.

Looking at the expert witnesses on insider dealing, we are very restricted in the pool. If you then bring it to the members of a tribunal – and remember this tribunal is not going to be just for insider dealing; it is going to expand to market misconduct – my personal view is that if you have a list, first of all people might not wish their names to be on that list purely for the reasons I have explained earlier; and you might not have a meaningful list.

I accept that you can add people to the list, but surely one of the purposes of the list is that you have a transparent list and you start looking at people, going down in sequence, as to who is to be the next person to be on the tribunal. If that person is not on there it is going to beg the question: if he is not going to sit, why not? What are the problems? You might have to try and explain that, because the other thing that does come up in these cases quite a lot is that in any case, whether it be insider dealing or market misconduct, you have questions of conflicts. Now, taking, for example, accountants, seem to be quite willing to sit on these tribunals, but the problem with accountants is that many of them have huge conflicts.

Take an insider dealing case, for example. If you have a listed company, the conflict might not just extend to being the auditor of the listed company, but might extend to the auditor to the subsidiary's associated companies, going down the chain. So the actual pool of accountants that is available, with expertise in this area, can be reduced by these conflicts. In each case you have to look at the conflicts of a particular case.

The other conflicts you might have, for example, with people in the business, are that they do business with these people. So to actually try and find people and identify suitable people - - and I would stress that I think it is quite important that on a tribunal you have a balance; you have the judge as the chairman for the legal expertise, and then the other two members should be chosen for the different expertise they might have in different areas of conduct. For market misconduct when it comes to manipulation it might be a broker. For insider dealing you might want a corporate finance adviser, an investment adviser, on there to give expertise about certain aspects – for example, takeover – on that tribunal.

What I am trying to say is that my personal view with my experience is that first of all, people might be loath to be put on a list because it puts their name up as a person who is willing to sit on a tribunal – I do not want to repeat it – again for the same reason as for insider dealing. In my view, it could have problems if you do have a list, to go down that list and you start with one, and have to jump to ten for the next person, if it is a transparent list. It is going to beg the question: why are the other nine not going to do it?

So you have other problems coming out, in my simple view of it, by having a list which I do not think would really benefit very much from the present course being taken, where people are identified for specific cases. They have the option to refuse. Conflicts have to be examined on a case by case basis, and then you have a tribunal that can sit on each case with members who have been found suitable for that particular case. It is really a problem, I think, which can be equated to experts; and I think the same thing would apply to getting suitable people on a particular tribunal. I hope that explains it from the perspective I

have seen over the many years I have been doing this.

Hon Jasper TSANG Yok-sing, JP:

Mr Chairman, must there be a rank order in the list? I mean, do you have to rank these experts when you compile the list? Why not just put them in a pool where it is a transparent list; but make sure that the order does not matter at all, so that you pick whoever is suitable for a special case? Apart from this, I cannot see any reason - - given that the pool of experts is very restricted, why someone who may be willing to sit at a specific case is nevertheless unwilling to have his or her name included in the list.

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

I understand what you are saying, and if you have a pool where you can just randomly pick people – and it is described as a pool – I can see an argument for that; but I think the other problem is actually getting people willing to put their names in that pool, from the market. They would actually say: "I am willing at any particular time to be picked for a particular case, to, in effect in some cases, judge my peers". Sometimes that might be a concept where certain people in the industry and in business might find it very difficult to do, because they see it as possibly affecting their own image in the business world. I understand what you are saying, but I think if you try and balance that out against the other problems of being identified as a person willing to do it, then that, I think, would possibly create a problem. Where you would not get a list as meaningful as you could get if you could independently pick people on different cases and approach them, explain what the case is about, and then give them a chance to say "yes" or "no" on a particular case.

Deputy Chairman:

Chairman, I am very concerned at this explanation. This complete lack of confidence in getting members for the tribunal may mean, it seems to me, that this is not

going to work, because you say that market persons are not generally willing to sit in judgment on their peers. They have got to do this. Either we are going to make this a judge affair, unassisted by experts, or assisted by experts appointed from overseas or whatever. You are going to have a situation where they are going to have to judge their peers, and this decision must be made at the beginning. Otherwise you are telling me that you may well have a case, and you will not be able to find the members to sit on the tribunal. There is going to be a high degree of opaqueness about the whole thing. This is not going to give any appearance of fairness.

I would really urge you, for precisely the reason that you have given, to try to have a panel, because when you go down the list you can at least say, when people are bound to ask you "Why him?", "We've gone down the list. These are people, the panelists before him, are unable to do it". There is a degree of transparency. If you have to get the Chief Executive to tell the person he intends to appoint every time what the case is about, then you wonder whether the case has not been prejudged at the time when the appointment was made.

It is your experience and you have described it. I do not think I can say anything further about it, but I must say that I am very worried about this. I can only invite you to think about it again in future, perhaps when it is functioning, to at least try to constitute a panel.

主席：

關於剛才曾鈺成議員提到的一點，如果有一個list，但同時政府或行政長官可作出靈活安排，訂定一個supplementary list，以便隨時可以將其他人士加入名單內，這樣做是否已經可以解決了部分的問題？當然，tribunal會盡量從原來的名單找出合適人選，倘若沒有合適人選，便加入其他人士，這做法有一定的靈活性。當局隨時可委任其他人士處理某宗個案。當找到合適人選時，該名人士除負責審理有關個案外，亦會被列入名單內。相對來說，這會否是一項較靈活的做法？除原來的名單外，政府可作出靈活安

排，訂定一個supplementary list。如果未能從原來的名單中找到合適人選，便可從supplementary list揀選有關人士。在選出有關人士後，該人便會被列入名單內。

財經事務局副局長區璟智女士：

多謝主席提出建議。剛才Mr BAILEY只是向各位講述現實的情況。當然，如果不會出現剛才所說的問題，這是最理想的。但由於香港市場是那麼細小，難怪一些市場專家會有如此的反應。然而，各位也不必太憂慮，我相信我們會找到這方面的人才。我們只是希望根據以往的經驗，訂定一些方法，以便我們較容易找到合適人選。根據以往的經驗，如果事先把他們列入名單，並將有關名單公開，以及訂明他們在以後的3年都會在名單內，某些人士可能會卻步。然而，如果當局要求他們協助處理某宗個案，例如要求他們在未來3個月協助審理某宗個案，這可能會較為容易。這就是我們現時所得的經驗。

關於議員所提出的問題，其實我們可以訂定一個非正式或正式的名單，只不過我們需要有若干靈活性。我們有時很希望邀請某些專家處理一些個別個案，該等專家或不希望長期被列入名單內。如果我們邀請他們審理某宗個案，任期為兩至3個月，他們可能會答應的。因此，假如我們在這方面有若干的靈活性，便會較容易把事情辦妥。

主席：

各位認為是否可以接受這制度？

曾鈺成議員：

政府可否告訴我們，一般來說，研訊程序需要多少時間完成？

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

How long would it last, Peter, for an IDT case?

Chairman:

You have fourteen cases……

Mr Peter A DAVIES, Senior Assistant Law Officer:

One of the problems, of course – I touched on the earlier point about the chairman – is that it is almost impossible to gauge how long these matters will last. There are two outstanding issues at the moment. One of them was supposed to last for a fortnight last year, and it is still going on. So it is very difficult, and because you have lay members and experts who have jobs there can be large gaps.

It is really very difficult, and we keep saying this word "flexibility"; but because of the system it is flexibility that is needed to make it work.

Hon Jasper TSANG Yok-sing, JP:

This is entirely impossible to invite experts from abroad, for example.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. When it comes to experts, what you need is someone who possibly was around in the Hong Kong market at the time the alleged misconduct took place. The other problem is, of course, that there are different types of expertise. Sometimes you need an analyst; sometimes you need a man who is actually engaged in trading shares in the market – a market man. You cannot even predict what sort of expertise is required, and even if you

have a fair idea, you get to the case itself and you find that the point you think is in contention or is no longer in contention; it is another aspect that the defence lawyers attack, and then you need a different form of expertise. It is very difficult all the time to gauge what is going to happen in this sort of case.

曾鈺成議員：

我還以為這類專家是很容易物色的。

財經事務局副局長區璟智女士：

所說的其實是兩回事。Mr DAVIES的解釋是，研訊程序有時可能會較長，因為需要找不同的專家解釋有關情況。我們剛才所討論的是，當局有何方法物色該兩名審裁處成員。現時，每次進行研訊時，其中一名成員通常是會計師或律師，另一名成員則是市場人士，例如經紀、投資行家或公司董事。第二類人士通常是較難找到的。

主席：

各位已提出意見，請政府再作考慮，研究怎樣可以作出平衡。

財經事務局副局長區璟智女士：

我也希望委員明白為何當局需要在這方面有靈活性。雖然可以訂定名單，但名單本身可能需要有一定的靈活性。

主席：

我們完成第243條的討論。根據上次會議的做法，我們現在應該討論附表8第14條。

副主席：

主席，由於第244條關乎proceedings或有關的procedures，我們應否先行討論第244條？

主席：

OK。

副主席：

在完成第244條的討論後，然後再討論Schedule 8第14條。

主席：

好的。第244條。

副主席：

主席，關於第244條，there is just some tidying up. In subclause (2) on page 18 I do not think you need have the word "giving to".

Chairman:

"Giving to"?

Deputy Chairman:

Yes. I think you just give notice. I do not know if you need "a notice". That is

a matter of drafting. They can think about it.

Chairman:

Okay.

Deputy Chairman:

Also, since the notice is going to be in writing and it contains a statement, do you need to say "a written statement"? These are just suggestions, Mr Chairman. Along the same vein, on page 20, there is the subclause (4)(b), and you cannot have "of him", because "of" is generative and "him" is accusative. I do not know how to tidy up the sentence, but you just cannot have "of him". On page 21, subclause (9): I would suggest that the Secretary for Justice should inform the Financial Secretary of it, rather than report to him. I think that as far as that clause is concerned, these are just some suggestions. Thank you, Mr Chairman.

主席：

我希望負責草擬條文的同事會再作考慮。關於第244條，有沒有其他問題？

副主席：

沒有其他問題。

主席：

那麼我們討論第245條 — Powers of Tribunal。

Deputy Chairman:

Mr Chairman, I have again a suggestion of drafting. (1) says "Subject to the provisions of Schedule 8 and any rules made by the Chief Justice…", because it refers to rules which are subsidiary legislation. I wonder if you could consider phrasing it in terms of "in accordance with these rules" or "in accordance with schedule 8" rather than "subject to" because it is primary legislation. I know sometimes it is used, but maybe it is better to say "in accordance with" in those terms. Thank you. Other than that, I have no comment on clause 245.

主席：

根據第260條訂立的"rules"，是否附屬法例？

財經事務局副局長區璟智女士：

是。

主席：

OK.

高級助理法律草擬專員陳子敏女士：

我們希望在採用"subject to"及"in accordance with"的字眼時，兩者會有一點區別。如果是關乎程序，我們便會採用"in accordance with"的字眼。至於第245(1)條，我們希望表達的意思是，有關方面所作出的事情，與下文的規定可能會有出入，因此我們採用了"subject to"的字眼。此外，我們希望在條例草案訂明實際可以包括制定附屬法例的權利，所以希望能夠在這條文做到互相銜接。

主席：

第245條，page 22。法律顧問。

助理法律顧問顧建華先生：

多謝，主席。我希望指出一點，根據第(1)(a)款，一般的證據法似乎並不適用。因此，我不知道這會否有任何實際的影響。

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

The LegCo analysis is in fact correct. Evidence law, the rules of civil and criminal evidence admissibility strictly do not apply, and I think this is probably - Peter can probably testify it more than I can – the greatest procedural advance the tribunal makes on having a criminal court considering matters of insider dealing or market manipulation in that the rules of civil and criminal evidence are particularly well-suited strictly to considering complex matters of white collar crime and primarily documentary evidence.

The drafting of subclause 245(1)(a) does not mean the tribunal members will not necessarily have regard to those principles; they may well have regard to them by analogy, but they are not obliged to have regard to them, and I think that is primarily the intended operation of subclause 245(1)(a).

Deputy Chairman:

Mr Chairman, if I may supplement that, this sort of provision, a set of administrative rules to the tribunal of the inquiry from the normal rules of evidence, has appeared in other legislation. I think a question was raised then and it was debated for some

time, in the Bills Committee, as to whether it would create a problem. Because especially when it goes to appeal, then you would be facing some evidence which was admitted, or some material which was considered in the tribunal, which was the excluded from a high level court. I think the discussion in that ordinance was that on balance, although there may be some difficulties, this is necessary. So in that bills committee we accepted this provision. This is just for reference.

Chairman:

Thank you.

Deputy Chairman:

Also, in this instance I have noticed subclause (a)(ii), but I think I came to the same view.

主席：

何俊仁議員。

何俊仁議員：

關於證供的規則，在外國，性質類似的審裁處是否也採用同樣的做法？

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

As I understand the Financial Services and Markets Tribunal and the existing self-regulatory bodies that examine similar matters in the United Kingdom in relation to discipline,

although the former will have a jurisdiction in relation to what the UK calls market abuse, which is very similar to market misconduct as defined under our Bill, they too can consider any evidence; and that is viewed as one of the strengths of their system, that it will operate in a similar manner, without regard to the typical rules of civil or criminal evidence.

Deputy Chairman:

I do not think it goes quite so far as to say "without regard". They are not bound by these rules.

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

No, they are not bound. That is correct.

Chairman:

The IST operates in a very similar fashion.

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

Yes.

Deputy Chairman:

Yes. Mr Chairman, I do not think that this now would make very much difference, because I think in the old days where you had the rule against hearsay, then the rules of evidence can be very complex. Once you remove the rule against hearsay, which we have done 2 years ago, if not 3, then I do not think it really makes all that much difference.

主席：

OK。關於page 22及page 23，各位有沒有問題？那麼page 24及page 25呢？我們現在討論page 25第246條 — Further powers of Tribunal concerning evidence。

胡經昌議員：

關於第246(1)條，該條文訂明，"for the purposes of any proceedings instituted under section 244, the Tribunal may, on its own motion or on the application of the Presenting Officer appointed for the proceedings, authorize the Commission in writing to exercise any of the powers specified in subsection (2) and to provide the Tribunal with any of the records, documents and information obtained as a result of the exercise of the powers"。以往其實亦曾問到，審裁處一方面負責審理有關個案，另一方面又可主動以書面授權證監會作出某些作為，這是否會有conflict呢？

財經事務局副局長區璟智女士：

第246條的規定，其實正是審裁處為了方便進行研訊程序而需要有的基本權利，這是一直處理研訊工作的同事所告訴我們的。第246條加入了一項靈活安排，除審裁處本身可以啟動這些機制外，提控官在提出個案的時候，亦可建議審裁處考慮採用該等程序。現時，內幕交易審裁處亦可啟動這些機制，不然的話，有關的研訊程序將無法進行。

主席：

Margaret.

副主席：

其實這項權力並非市場失當行為審裁處獨有的。現時，即使是普通的法庭，如希望聽取有關某些方面的證據，也有權這樣做。據我所知，很多行政審裁處也會像法庭般採取同樣的做法。最近，法庭在審理有關居留權的案件時，亦可要求法律援助署署長或任何人士提供一些誓章及資料。我接受這並不是該審裁處獨有的，而是一般都有這樣的權力。當局只是在該條文中清楚訂明有關規定，因為市場失當行為審裁處是根據這條例草案設立的。

胡經昌議員：

關於副主席剛才所提到的，我希望可以澄清一點，現時的審裁處基本上是不是也有這樣的權力？

副主席：

我的意思是，很多審裁處也有這樣的權力，亦即可以"on its own motion"或應其中一方提出的申請而這樣做。

主席：

即並非MMT獨有的？

副主席：

就這方面而言，並非MMT獨有的。

胡經昌議員：

我希望作出跟進。第(2)(a)款提到"reasonable grounds to believe or suspect"，這是否也很正常？

副主席：

不是。我剛才提出的是，現時也有審裁處或進行聆訊的法庭自行要求索取一些資料。至於第(2)款的規定，亦即市場失當行為審裁處有權要求哪些人士提供資料，這條款的規定是該審裁處獨有的。我認為有關範圍十分廣闊，但我們在較早的階段已討論這問題，包括討論有關緘默權等問題，所以我不打算再次提出此事。

主席：

關於第(1)款的規定，其他審裁處或法庭也有類似的做法。至於第(2)款的規定，你希望知道是否MMT獨有的？

胡經昌議員：

對。關於第(2)款列出的權力，我希望知道其他審裁處有否類似的權力。舉例來說，第(2)(a)款提到"reasonable grounds to believe"，我認為這樣的規定也是合理的。不過，關於"reasonable grounds to suspect"的規定，這權力會否過大？其他審裁處並沒有這樣的權力，對嗎？

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

I cannot claim that I am with - - this has originated from the Insider Dealing Tribunal and the Securities (Insider Dealing) Ordinance. I do not know if we have conducted a survey of other ordinances in Hong Kong, to see if other statutory tribunals have their powers to examine evidence enumerated in the way that subclause 246(2) does. I think

what clause 246 does, in effect, is an elaboration of subclause 246(1), and in effect it is actually setting out specific statutory thresholds for the exercise of the powers in subclause 246(2), whereby the commission, once the tribunal has made a decision that there are these grounds to actually exercise the powers and discharge those through the Commission rather than directly through the Tribunal so as to remove the tribunal from the administrative task of gathering that evidence outside the tribunal room.

主席：

第26頁。

胡經昌議員：

我希望作出跟進。如果第(2)(a)款刪除有關"reasonable grounds to suspect"的部分，這會否有很大問題？我認為，假如審裁處有合理理由相信而作出有關作為，這並沒有問題。但如果審裁處可純粹因為有所懷疑而作出有關作為，屆時會否有適當的制衡，確保這些權力不會被濫用或錯用？

財經事務局副局長區璟智女士：

這其實是參考內幕交易審裁處現有的權力。該制度已運作超過10年，一直以來都沒有收到投訴，指審裁處濫用其權力。或者我請Mr Paul BAILEY就這方面向各位解釋一下，因為他負責這些個案的調查工作，在這方面較有經驗。這些權力十分重要，以便審裁處進行研訊程序。或者我先請Paul解釋為何需要這些權力。

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

I think the main reason for this provision, as was said, is to really supplement evidence in a tribunal when new matters come to light, or matters have come to light which

have to be verified. I would stress that even if new evidence does come to light, people are given natural justice and they are given the opportunity to comment on the new evidence. When it is operated in practice what happens is that we get a direction from the tribunal to look at specific matters. We are not told just to go and look at a wide range of things. They actually specify in the notice what we look at, and then we go out and look at those matters.

I do not know any complaint we have had of exercising these powers, and Peter can probably remind me of how many times we have done it. There are numerous occasions, to obtain evidence for the tribunal, which has been relevant to the tribunal's inquiries into, say, an insider dealing case. Of course this will be into market misconduct rather than just specifically for insider dealing.

I personally think the powers are extremely necessary, because it does give the tribunal the ability to obtain new evidence when people have given evidence and they think new evidence has come to light which they should look at. Of course it also gives them a chance to verify explanations given by people in the course of a tribunal, which of course can go to the interests of that person. Although the powers appear to be wide, I think it is quite important that first of all it is to go to the truth, and the other reason I would venture to say is quite important is that there are wide-ranging powers in the financial industry, whether it be with the commission or a tribunal, because it goes from the very heart of the financial operations of Hong Kong's market, which is extremely important for Hong Kong as a financial centre.

We have exercised similar powers under section 18 of the Securities (Insider Dealing) Ordinance on many occasions, and I would say that on every occasion the instructions to do this from the tribunal have been very case-specific. The tribunal does not just tell us to go on a wide front. It actually states: "Go and look at so-and-so and so-and-so, and verify the information by a statutory declaration or verify the information in whatever way you can".

I think that really is the explanation I would give. In fact in the Insider Dealing Ordinance, it does in fact say "...reason to believe or suspect", so this has actually been taken on. In the conduct of investigations of course there is clause 176, "...reasonable cause to believe". The current legislation has the same words.

胡經昌議員：

政府可否告訴我們，過去10年，當局曾否根據該條例的有關規定，基於有所"懷疑"而查閱資料？當局曾否根據Securities (Insider Dealing) Ordinance的有關條文，基於有所懷疑而查閱資料？

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

We have never had a complaint of any time of the IDT. As far as I am aware there has never been a complaint.

Deputy Chairman:

I am sorry. Mr BAILEY, there may be something inadequate about this. Henry's focus is on the words "or suspect".

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

I appreciate that.

Deputy Chairman:

Sorry. He is just wondering if it is really necessary to have those words, whether "grounds to believe" is not good enough. "Reasonable grounds to believe" should be the threshold, and not "reasonable grounds to suspect". I think that is really his question.

Mr Peter A DAVIES, Senior Assistant Law Officer:

In the past there has never been a problem with this. As Mr BAILEY said, on every occasion when this has been used - -

Deputy Chairman:

So you have the same wording?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. We do.

Deputy Chairman:

You have the same wording, and in the past no one has raised the words "or suspect" as for the reason why?

Mr Peter A DAVIES, Senior Assistant Law Officer:

No, because there must be reasonable grounds to suspect. It boils down to the same thing. "Reasonable grounds to believe or suspect" are basically the same, so there has never been a problem.

Chairman:

When you command some information from outside, or from anywhere, you write to them and ask them to have the information to the tribunal. Do you use the words that you have "reasonable grounds to suspect" or do you just simply use the words that you have

"reasonable grounds to believe"?

Mr Peter A DAVIES, Senior Assistant Law Officer:

It varies. Usually what happens in practice is that if the court requested information then I, as counsel for the tribunal, would contact the witness and say: "The court has requested this". Invariably they will say: "Oh, fine. If the court has requested it, we will give the information". So there is never really a necessity to actually spell it out, and these powers are really backup. If somebody has something to hide and is being very obstinate, it is the backup power. Then we might go back to the court itself and it would write out an order. It would follow the wording of the Insider Dealing Ordinance, which I think is "believe or suspect". The order of the court, if it had to go into writing, which is very rare, would contain those words, and it has never been a problem.

Deputy Chairman:

Mr Chairman, I think this may be out of a sense of caution, but you never needed it. If you want additional information of any kind, then you just ask for it. You do not have to say "This tribunal now has reasonable grounds to believe" or "to suspect", and then lists out those beliefs. You just ask for additional information.

主席：

OK。關於page 26，各位有沒有問題？那麼page 27呢？

關於page 28，各位有沒有問題？我希望知道，page 28第246(6)(b)(ii)條中採用"reckless"一字，這項規定是否很早已存在？

財經事務局副局長區璟智女士：

我請陳律師解釋一下。

高級助理法律草擬專員陳子敏女士：

其實舊有的法例亦採用這種寫法。

主席：

也就是說，SIDO已經有這項規定？

高級助理法律草擬專員陳子敏女士：

對。有關規定載於第18(6)(b)條。

主席：

一直以來，當局從沒有根據第(6)款提出起訴，對嗎？

財經事務局副局長區璟智女士：

以往從沒有運用過這條款。

主席：

其他法例是否普遍採用"reckless"的字眼？

財經事務局副局長區璟智女士：

罔顧後果地行事，這是相當嚴重的。

主席：

第247條 — Use of evidence received for purposes of market misconduct proceedings.

Deputy Chairman:

Mr Chairman, on page 29, towards the end of subclause (1), I think you do not need the word "other".

Chairman:

"In any proceeding..."

Deputy Chairman:

I think you do not need "other". This is a matter for the drafting team to consider.

主席：

關於page 29，各位有沒有問題？如沒有問題，我們便討論page 30。

胡經昌議員：

在第30頁，第247(2)條加入第(aa)段。我認為所涵蓋的範圍十分廣泛，因為該條文訂明適用於"proceedings instituted under section 296"。根據第296條……當局似乎對該條文也作出很多改動……我最擔憂的是，如果是適用於"proceedings instituted under section 296"，而第296條似乎……

主席：

第74頁。

胡經昌議員：

如果我沒有記錯的話，當中似乎也包括"negligence"的情況。這項規定所涵蓋的範圍會否過於廣泛？這是新加入的規定，我不清楚這項規定所涵蓋的範圍會否過於廣泛。

財經事務局副局長區璟智女士：

表面來看，我們似乎加入了一些文字，但其實這並不是一個新的概念。第296條與第272條的政策是一樣的。第272條屬於Part XIII的條文，第296條則是Part XIV的條文。該兩項條文擬達到的目標是，如果投資者因某些人的市場失當行為而蒙受損失，投資者可透過私人訴訟的渠道申請索償。第272條和第296條旨在協助有關人士進行私人訴訟。至於怎樣協助投資者呢？有關方法主要是在法例清楚訂明，投資者可以依靠審裁處作出的裁定和命令。

第247(1)條其實已包括第272條的情況，因為該條文訂明，適用於所有根據本部提出的民事法律程序，當中亦包括第272條的私人訴訟民事程序。我們進行檢討時，認為如果該條文包括第272條的情況，並無理由不將第296條的情況也包括在內，因為兩者的用作也是一樣。由於第(1)款採用了"this Part"的字眼，也就是說，當中的"本部"是指第XIII部，無法包括第XIV部的第296條。為求做法一致，我們認為，如果該條文可協助根據第272條提出民事訴訟的投資者，也應該可協助根據第296條提起民事訴訟的投資者。我們只是基於這個原因，加入第(aa)段。

主席：

第248條。

何俊仁議員：

我也希望向副局長提出以下問題：關於這類條文，當某部門強制有關人士作證及提交資料時，通常會限制該等資料的用途。舉例來說，有關方面不得利用該等資料，作為起訴該人的證據。但在民事法律程序中，該等資料是否通常都可以用呢？據我記憶所及，一些條例(例如ICAC條例)也載有這樣的權力。根據該等條例，在民事法律程序中使用有關資料，有沒有限制？

財經事務局副局長區璟智女士：

關於其他法例的規定，我需要請熟悉法律的同事回答有關問題。第247(2)條其實已清楚訂明，在哪些民事程序或刑事程序中可使用有關資料。我們嘗試在該條文清楚訂明有關情況。

主席：

請問哪位政府代表可解答何俊仁議員提出的問題？

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

Eugene, have you got any idea?

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

I think there is not a great deal of system to the provisions that abrogate common law privilege against self-incrimination, and then subsequently grant immunity in relation to

that use of information, prohibiting its use in subsequent criminal proceedings. Some provisions have certain features in common. The policy is always in common, but the drafting means which they use to achieve that is somewhat different.

Clause 247 is broadly based on section 19 of the Securities (Insider Dealing) Ordinance. It is not 100 per cent identical, but it broadly follows the pattern in section 19. I could not say that section 19 of the SIDO, however, is identical to all other use immunities granted to prohibit the use of compelled self-incriminating evidence in civil proceedings but then not being used in independent criminal proceedings. The effect of the provision is the same. We are confident that the effect complies with all the human rights obligations in relation to prohibiting use of compelled self-incriminating evidence in criminal proceedings.

Chairman:

In criminal proceedings?

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

Yes. That is right.

Deputy Chairman:

Mr Chairman, I think we have debated very heatedly and at great length on this part before. I must confess that I am still very uncomfortable with it. I do not know if I have understood the provision under subclause (1) correctly. Basically what it means is that – and I just want to check to see if my understanding is correct: the Market Misconduct Tribunal has power to require all sorts of information. Once the information is given it is part of the evidence of the hearing before the tribunal. So the question is: what can you use this evidence for, particularly in view of the fact that some of it is compelled? It would be in

breach of the right of silence so on and so forth.

You say that it is certainly not admissible for all kinds of criminal proceedings, except those listed under subclause (2), which include perjury and I think perverting the course of justice, and that kind of thing. You seem to say that it is also excluded from civil proceedings. However, it is not excluded from civil proceedings instituted under this part. So "under this part" means that if, based on the finding of a market misconduct tribunal, I have a cause of action to get compensation and so on, then I can use it. I understand the exclusion of the criminal, but the civil means that the only civil proceedings in which I can use the evidence before a Market Misconduct Tribunal is when I want to get compensation. Chances are that these are the only civil proceedings which I am interested in bringing. So it seems that the evidence before the Market Misconduct Tribunal can be used in civil proceedings for compensation under this part, which is Part XIII of this Ordinance. That is the net effect of it, is it not?

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

Yes.

Deputy Chairman:

We have been through that debate. I must confess I am still uncomfortable, but I do not want to repeat that point.

財經事務局副局長區璟智女士：

現時，內幕交易審裁處有權處理款額相當於利潤3倍的罰款，但由於考慮到人權法的問題，我們並沒有在條例草案保留這項條文。條例草案規定，有關人士只需交出所賺取的利潤，而不是3倍的利潤。

在諮詢過程中，有強烈意見指這項懲罰的阻嚇作用不大。這項懲罰較現時所訂的還要輕。關於這方面，我們曾考慮可否在條例草案加入其他的阻嚇成分。委員會稍後討論第249條時，便可以留意到審裁處可作出哪些命令。

另外，我們也考慮到副主席剛才所提出的情況，亦即一些投資者本身可能希望提出民事訴訟，所以我們便容許他們使用這些證據。我們其實亦考慮到整體的阻嚇作用是否足夠的問題。

主席：

第248條。胡經昌議員。

胡經昌議員：

在以往的會議曾提到，負責證券業務的銀行員工，他們所受到的規管，與證券經紀所受到的規管類似。在MMT中，他們是否也包括在內？如果包括在內，那麼第248條的規定，其實會否有一些差別？

財經事務局副局長區璟智女士：

我不明白胡議員的問題，但我希望指出一點，市場失當行為審裁處這個制度，是針對行為本身，而不是因為職業不同而有所豁免。

胡經昌議員：

由於銀行從業員也可能會受到審裁處的制裁或審判.....但有關privileged information的條文又訂明，有關"banker or financial adviser of a person whose conduct is the subject....."的資料並不包括在內。意思是不是

這樣？

財經事務局副局長區璟智女士：

這是指無需披露其他客戶的資料。如果該人作出市場失當行為，那些資料便要披露。

胡經昌議員：

剛才所討論的其中一項條文訂明，審裁處有權查閱資料。該條文與第248條會否有所抵觸？

財經事務局副長區璟智女士：

我請Mr BAILEY從實際經驗向你解釋一下。

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

On the question of clause 248: if you look at it, you are talking about the fact that a bank is only required to disclose information "other than that person...". Well, "that person" in that context is the person before the Market Misconduct Tribunal. Even if a bank official or an official of an authorized institution was subject to the Market Misconduct Tribunal, and there was information relevant to him in a bank, then the bank would be obliged to disclose it under here. It only extends if you were looking at Paul BAILEY and Henry WU had an account there, you would not be able to look at HENRY WU's account; but if I was the subject of a misconduct proceedings and I was a banker, you would be able to look at anything related to me. So that is really just a safeguard to say that you cannot go beyond the person who is being looked at by the tribunal, when you are asking information from authorized financial institutions. So to answer your question, yes; a person subject to market misconduct proceedings who was an employee or any person connected with an authorized

institution – this provision would not exclude him if there were information in that authorized institution relevant to him.

主席：

這條文的作用是限制審裁處的權力。第249條 — Orders, etc. of Tribunal。

Hon Albert HO Chun-yan:

Chairman, in subclause (1)(a) and (b), we see the words "without the leave of the Court of First Instance". I would like to know whether there are any provisions in this Ordinance or in any other ordinance prescribing the procedures for applications to the court for leave. Are there any statutory guidelines for the court to rely on in dealing with this sort of application?

財經事務局副局長區璟智女士：

我請陳律師解答這問題。

高級助理法律草擬專員陳子敏女士：

在條文上，我們並沒有特別訂明原訟法庭處理申請批准的情況。不過，我相信高等法院的規則或法庭的規則應該有交待有關情況。事實上，舊有的法例第23(1)(a)條也訂明這項要求。我相信這項規定在實際運作上已曾用過。我不知道證監會或Mr DAVIES有否任何補充？

財經事務局副局長區璟智女士：

據我所瞭解，第249條其實是參照《公司條例》類似的條文。《公司

條例》的有關條文訂明，可命令有關人士不得擔任上市公司的董事。該條文的寫法也是一樣。我們可以再作研究，以確定高等法院的規則是否已訂明有關的程序。《證券(內幕交易)條例》載有這項條文，據我所瞭解，《公司條例》也有這項條文，寫法也是一樣。有關的程序可能載於其他條例內，我們可以核證這一點。

何俊仁議員：

以前也有很多類似的申請？

財經事務局副局長區璟智女士：

是有的，但不是很多。

何俊仁議員：

是有的。

主席：

關於審裁處可作出的命令，當中並沒有加入任何新的命令，對嗎？

財經事務局副局長區璟智女士：

條例草案加入了一些新的命令。

主席：

哪些是新加入的命令？

財經事務局副局長區璟智女士：

例如第(1)(b)款的命令。我們簡稱該項命令為"冷淡對待"命令，以市場語言來說，就是"cold shoulder order"，亦即命令有關人士在指明的時間內，不得參與市場活動。我們希望這項命令可以起到一些阻嚇作用。

主席：

換句話說，命令有關人士"停賽"。

財經事務局副局長區璟智女士：

對。這可以說是一個market stigma，作用是告訴市場人士，該人做了一些不應該做的事。此外，第(1)(c)款參照美國SEC的一些做法。他們稱有關命令為cease and desist order，中文可譯為"終止及停止"命令。該項命令的意思是，假如今天某人干犯市場失當行為，審裁處可命令該人以後不得再作出有關的市場失當行為。表面上，作出這項命令似乎是多此一舉。但為何要作出這樣的命令呢？因為根據第(9)款，如果任何人違反審裁處作出的order，可能會負上刑事責任。我們希望這可以令有關人士以後不作出有關的市場失當行為。

此外，第34頁第(1)(g)款的命令也是新加入的，目的是希望借助其他專業團體本身的處分制度，對有關人士採取處分行動。我們可以將該人轉介給其他團體，讓他們採取適當的處分行動。

主席：

但那些團體可選擇不處分有關人士？

財經事務局副局長區璟智女士：

對。不過，正如我剛才提到，由於有關人士已有一個"標籤"，因此負責任的專業團體會慎重地考慮是否暫停或取消該人的會籍等等。

主席：

何俊仁議員。

何俊仁議員：

關於第(1)(e)款，我不知道以前有否討論過這條文。這條文關乎作出調查的費用。如果這是指律師費等，我是可以理解的，因為較後部分提到引用高等法院的規則第62條。然而，有關的調查費用是如何計算出來？這是否舊有的規定？就中介人而言，是否由敗訴的一方負責支付有關費用？

財經事務局副局長區璟智女士：

現有的條例應該也載有這項條文。第(1)(f)款是新加入的。關於第(1)(e)及(f)款，我請Eugene向各位解釋一下。現有的《證券(內幕交易)條例》第27條也有類似的安排。

Eugene, would you like to explain to us?

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

I think Peter is really the appropriate one to speak with regard to the government in relation to the Tribunal.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes, it is already in the existing ordinance for the Insider Dealing Tribunal. It is very normal. Where there have been tribunals where there has been a finding of guilt, this sort of order always follows. It is really just duplicating from what is already in the Insider Dealing Ordinance.

Hon Albert HO Chun-yan:

How would you compute the cost incurred incidental to the investigation?

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

You can equate this to what we have under section 33 of the SFC Ordinance, where we can get costs of the investigation in, for instance, a prosecution. What we actually do on this is to work out the time it has taken for the investigation for the staff involved. It is not just the salaries of the staff involved, but what we would call the on-costs, the costs of providing them with accommodation and all the other costs which make up the total cost of an individual person. Then we present that to the court at the end of a hearing. So subclause (f) is new. It is not in the Insider Dealing Tribunal. This is new for the Market Misconduct Tribunal, and I think it is quite right that the costs of any investigation should be recouped in a situation like that. I would envisage that the same sort of procedure we now adopt for section 33 would be done here. Where you would have to keep time costs, and then the time costs would be given to our personnel department that works out the total costs of that individual person within the Commission, which as I mentioned is not just the salary costs, but is the on-costs for that person. In all cases we have had before the courts, in the Magistrates' Court, the majority of them have been accepted in full. Occasionally they have given lesser costs to us, but not on the basis that we have computed it wrongly. They felt that the person should not have to pay so much. That has been done on many, many occasions over the years in prosecutions before the Magistrates' Court.

Hon Albert HO Chun-yan:

So it include not only staff costs. There may be other costs.

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

It is expenses. It is what we actually call the on-costs, which are the total costs which it costs the Commission to keep that person within the Commission. So it would represent part of the different costs associated, like the benefits that might be paid in kind for medical insurance and things like that. It is the total costs of keeping that person in the Commission. I think that is done in government as well. They call it on-costs, which gives you the total. The salary is one thing; the additional costs for keeping a person within government is a lot greater than the salary, because you have the other benefits like the pension, medical benefits, etc, that you take into account on that. I think it is an accepted formula for assessing costs of this kind.

Hon Albert HO Chun-yan:

You mentioned on-costs. Would it include the housing and clerical support and all these sorts of things?

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

It would include secretarial support as a separate item. If we are using secretaries or any person actually involved - - if you take a particular investigation you have the investigators; then you have the various levels of supervision, so you work out the actual man hours spent for each person in that, and then you work out the total costs, as I have explained, for that particular person, to the Commission in totality, which has an additional element above the actual salary.

If you use a secretary, that would be put down. If you use, say, two managers for investigation, the total time would also be put down. The normal procedure then is that it goes through a chain of authorization, because there are delegations for certain things. If there is a delegation for a prosecution, it would either be with a senior director or the Chief Counsel. So the time taken for the senior director, Chief Counsel or people advising on the case in legal services would all be accumulated to work out the total costs. There is an element of requirement to keep timing for what has been incurred in an investigation.

The same would apply to this. If, say, a tribunal instructed us to take action, we would then be obliged to work out the time it has taken for us to do that, so that we can present a proper figure to the tribunal.

主席：

根據過往的經驗，有關的費用大約是多少？由於審裁處最多可以裁定有關人士支付$1,000,000，但這些費用可能會多於$1,000,000。

財經事務局副局長區璟智女士：

我們訂定第(1)(f)款的命令，是因為審裁處可根據第(1)(d)款命令有關人士繳付的款項，遠較現時的規定為少。第(1)(d)款訂明，審裁處可命令有關人士繳付的費用，金額不得超過該人所獲得的利潤。根據現時有關條文的規定，審裁處可命令有關人士繳付的費用，金額可達該人所獲得的利潤的3倍。由於考慮到人權法的問題，我們不能保留3倍罰款的條文。我們的法律顧問曾考慮如何才不會大幅削弱條文的阻嚇作用，這也是其中一個補救辦法。

何俊仁議員：

我所擔心的是，如果是計算訟費，我們清楚知道有關的計算方法，因為法庭有規則規定應如何審查訟費是否合理。然而，如果是計算調查費用，當中可包括處長的薪金、各項fringe benefits及租金。很多項目也可以是調查費用的一部分。此外，調查費用應從何時起計算？是不是從收到投訴及開始作出調查的一刻計算？各位也知道，在作出調查時，很多方面的事情可以同時進行。有關當局可能從很多方面作出調查，但結果可能只有其中一方面的調查是有用的，在計算調查費用是，是否把全部都計算在內？我所擔心的是，當局用甚麼準則釐定調查費用？這費用可能是有關罰款的10倍。如果是複雜的調查，我不知道會否出現這種情況。

主席：

判處有關人士繳付利潤兩倍或3倍的罰款，真的與人權法有所抵觸？

財經事務局副局長區璟智女士：

我對這點存有疑問。

Deputy Chairman:

There is still the question about whether it is criminal, whatever the label is, in substance. I think that is the argument. You may label it a penalty civil or disciplinary, but if it is very large then it may be taken as a penalty of a criminal nature.

主席：

當然，我們需要尊重《人權法》，但對市場來說，根據以往的規定，他們知道如因不當行為而令他賺取$1,000,000的利潤，一經被檢控及定罪，可處罰款$3,000,000。他們可計算有關的機會成本。但第(1)(e)及(f)款，則

是無底深潭。

Mr Peter A DAVIES, Senior Assistant Law Officer:

Perhaps I could add this. When the court actually fixes the penalty, one of the principles is one of totality. It stands back and looks at the particular case, how severe it was, and what the amount to be awarded is, what are these civil awards; then he can add on these costs, or he may not. It is pure discretion, and they often say: "We're not giving any of those costs at all" or "We're giving a third of them. We're giving a third of the amount". That principle is carried out all the time, so this is a pure discretion.

The court will look at the overall picture. If it is a small matter and there is a million involved, as you say, in those circumstances it would balance it out and refuse to give the whole amount.

Deputy Chairman:

Mr Chairman, is subclause (e) discretionary? Costs, of course, are always discretionary, subject to the usual rules. Are expenses discretionary?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Well, yes. They would be. If costs and expenses – and we do not normally draw that much of a distinction – came to a sum, whatever it might be, they would look at that sum and say: "Well, we don't feel in these circumstances we can give any amount at all. Maybe we'll award half of the costs and expenses". They will apply the principle of totality. They will look at the overall penalty that this person is suffering in the particular circumstances.

Deputy Chairman:

I do not think anyone would be wise to rely on indications of this kind.

Chairman:

Alexa.

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

If I may say, in a reading of subclause (f) in fact it says in the third line: "The sum that the Tribunal considers appropriate...". The Tribunal does have a discretion.

Deputy Chairman:

Mr Chairman, I do not think anyone should be advised to rely on this kind of assurance, because you see, different principles work for costs and for expenses. In fact in all sorts of situations, quite often the penalty is in the expenses of investigation, so that the government may well say: "Okay. As a matter of policy you've got to pay the expenses, because user pays, since the person who pollutes must pay for cleaning up the pollution. Since you committed the market misconduct and we have gone into a lot of trouble to investigate and you have to pay the expenses". The government will be able to pay and make all sorts of other rules. For example, in disciplinary matters of the Hong Kong Law Society, one of the sources of complaints is that maybe the fine, the actual penalty, may be very small, but the investigation expenses can be very high.

Since these differentiated costs and expenses costs will follow specific rules or are generally under Order 62, expenses may well be governed by something else, unless you have something expressly provided. Otherwise I would think that you are quite vulnerable to all

the expenses, and here you have a real worry, because in normal criminal proceedings you have done all your investigation before proceedings start, but in this MMT you investigate as you go along. Much of it may be wholly for the benefit of educating the members of the Tribunal. I share the worry, but I do not know what I can do about it.

主席：

其實所需要的是作出一個平衡。我明白第(1)(e)和(f)款有其作用，但該兩項條文並沒有訂明一個具體的款額。如果是罰款，有關條文會清楚訂明一個款額。舉例來說，第(9)款訂明可處罰款$1,000,000。第(1)(d)款訂明，審裁處可命令有關人士繳付的款項，金額相等於該人所賺取的利潤。我認為以往的做法比較好，不過如果不能採用以往的做法，問題較難解決。

副主席：

如果是costs，其實也沒有一個具體的金額。

主席：

問題在於即使有關罰款只是$1,000,000，但所涉的調查費用可能已足以令有關人士破產。舉例來說，最高的罰款額是$1,000,000或$500,000，而該人因不當行為而賺取了$200,000的利潤。將兩者加在一起，有關金額是$700,000。但調查費用可能是$10,000,000，那麼該人屆時便要破產。

財經事務局副局長區璟智女士：

我希望指出一點，第(1)(e)款是現有法例的規定；第(1)(d)款所訂的金額，較現有法例所訂的少；第(1)(f)款是新加入的條文。我們現在顧及證監會在這方面的支出，以前的做法只顧及政府在這方面的支出。

何俊仁議員：

請問審裁處需否根據任何程序，以審議有關的費用？很多時候，審裁處可能會裁定有關人士需要支付訟費及一切開支。有關金額是否由他們自行計算出來？他們會否像法庭般，根據有關清單逐項審議每個項目？

財經事務局副局長區璟智女士：

或者我請證監會解釋日後如何執行第(1)(f)款。

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

There is no taxation on it, but as I explained to you, what has happened in practice is that we normally give a breakdown of the costs of the individuals involved, prepared by our personnel department. As far as I know, there has never been a challenge on that. With the costs of investigation, we have not always got the full amount back. It is at the discretion, say, of the Magistrates' Court, but in general we have produced this ever since the Commission was established. There has never been a problem on it, and we break it down basically according to the individuals involved, the number of hours involved, and the costs computed by our personnel department. That is how it has been done.

I would add that I do not think you could see subclause (f) as a penalty. In fact it purely is the cost of an investigation. It is not a penalty at all.

Hon Albert HO Chun-yan:

I know.

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

Personally – I would add to that – I think that if a person is in fact found guilty of market misconduct, he has had to have this investigation conducted and he should be subject to this.

Deputy Chairman:

There you are, you see.

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

He should be subject to this, so it is not a penalty.

Hon Albert HO Chun-yan:

Chairman, suppose there is disagreement on the amount of expenses incurred. Can the objecting party call upon the Tribunal to scrutinize item by item, or at least certain items in your bill? Is there any such procedure?

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

Excuse me. Presumably it is open to the tribunal to do that. We have not considered that. Subclause (f) is new in relation to the Tribunal, so they have not looked at SFC's investigation costs before. As Paul has explained, in magistrates' prosecutions done by the Commission itself, they are commonly claimed and they are commonly looked at by the court. I think Paul has explained that. We did look at making investigatory costs under subclause (f) taxable as costs of the government prosecution, if you like, of presenting office costs in arrears are taxable.

We formed the view, after considering that taxing officers would not be familiar

with investigatory costs. As you say, they are of a different nature to legal costs – and would not have the expertise in looking at investigatory matters, and that the taxation schedules of the High Court are not really adapted to investigatory matters. They are really adapted to civil matters. Investigatory matters are obviously of a different nature.

It would be open, and the tribunal procedures are broad enough, I would think – perhaps Peter could correct me if I am wrong – to, if there were a dispute on costs before the order was made, for those costs to be scrutinized by the Tribunal. How that would occur I do not know, but the tribunal procedures would be flexible enough for that to occur.

Under subclauses 249(3) and also 250(3), certainly a person must be granted an opportunity to be heard before the penalty is imposed; so there are granted natural justice in relation to that, and that is why I say that procedures are broad enough to allow for a scrutiny of related costs and objective costs. Lastly I would add that once a cost order had been made under subclauses 257(2) and 258(2), there is scope for appeal of that as of right to the Court of Appeal. At which time under subclause 258(2) the Court of Appeal can vary, reverse, strike down and/or substitute any decision on costs it considered appropriate, as it could with any other penalty decision of the tribunal under subclause 249(1)(a) to (f).

Deputy Chairman:

Mr Chairman, I think that given subclause (f) which is enacted with the policy endorsed by the legislature, expenses should be recovered from the person who has been found guilty of market misconduct. Then I do not know what submissions you can make before a Court of Appeal on any proper expenses imposed on you. You would have to say something exceptional, and even if you happen to be bankrupted by this sort of thing, the court can only say that the legislature must have foreseen this when they enacted this. I would not rely very heavily on a submission of this kind. I do not think hardship would be, generally speaking, the kind of thing you can say. Although you say there is a channel of appeal, I do not really know what grounds you can have.

Now, subclause (f) would also give people in the market a proprietary interest in the salaries of the Commission at every level, because you say "I had an officer Grade" – whatever it is – "spend 3 months full-time on it, and you must put his salary multiplied by three into it", there you are. I do not know what arguments you can use against it. So Mr Chairman, can we have some idea of the kind of expenses in the past that you have asked for? This can be very expensive, or it can be a very small sum. I do not know what we are arguing about, so could we have some idea of what it is?

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

As far as that is concerned, would you be happy just with, say, the prosecutions we have had? We have got lists of costs awarded in various prosecutions.

Deputy Chairman:

Why do we not have a look at those investigatory costs?

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

Quite obviously, I think except for one or two cases, they have been relatively small.

Deputy Chairman:

If we could have some information in writing, then maybe we do not need to discuss it and take up time. If there is something serious, then maybe we will think again. Mr Chairman, while I am speaking, can I suggest a small amendment on page 32? It is just a matter of drafting. Under subclause (1), in the third line, instead of "making one, or more than one," can I suggest "making one or more of the following"?

財經事務局副局長區璟智女士：

我請陳律師講解一下。

高級助理法律草擬專員陳子敏女士：

我們可考慮作出修訂。不過，我知道條例草案有很多地方也採用類似的寫法，我們會考慮條文的一致性，並作出跟進。

主席：

副局長，請問你有沒有補充？

財經事務局副局長區璟智女士：

沒有。

主席：

何俊仁議員。

何俊仁議員：

關於調查費用方面，待政府提交有關資料後，我們再討論這問題。目前可以做的，我希望當局可考慮在第(1)(e)及(f)款加入一些字眼。就第(1)(e)款而言，我建議在"incurred"之前加入"reasonably"一字，以及在"by the Government"之後加入"or any part thereof"。

財經事務局副局長區璟智女士：

我們可以考慮一下，把它改為"reasonably incurred"。

何俊仁議員：

以及"by the Government, or any part thereof"。

主席：

你所指的是第(1)(e)款？

何俊仁議員：

對。此外，我亦建議就第(1)(f)款作出同樣的修改。

主席：

胡經昌議員。

胡經昌議員：

註解19清楚訂明為何加入這些字眼，有關修訂"旨在確保政府可收回所有可適當予以追討的訟費及開支"。既然這是該項修訂的目的，也就是說，有關方面將會取回全部費用。這註解是否已清楚訂明，有關方面其實將會取回所有費用？

副主席：

不，註解19所指的是costs。Costs與expenses是不同的，對嗎？主席。

主席：

我無法將兩者區分。副局長，你能否將兩者區分？

財經事務局副局長區璟智女士：

我請律師解釋為何要加入這兩個字。

高級助理法律草擬專員陳子敏女士：

由於第249條加入了第(5A)款，我們希望確保在討論"costs"的時候，副主席及議員剛才提及的《高等法院規則》第62號命令可適用於評估該等costs，因此我們在第(1)(e)及(f)款加入這兩個字。我們主要希望《高等法院規則》第62號命令可適用於評估該等costs。

胡經昌議員：

註解19訂明是訟費及開支。我所擔心的是，既然這是該項修訂的目的，審裁處日後會否因而盡量讓有關方面取回所有費用？與各位同事一樣，我也擔憂這問題。

主席：

你更憂慮這問題。

胡經昌議員：

不，屆時我可能不用再做了。

副主席：

我也希望就這一點提出意見。如果註解19只是提及costs，那麼"19"這個數字應該放在"costs"之後，而不是放在"and"之後。如果放在"and"之後，可能會令人產生疑問。註解19提及的"all costs"，其實是指《高等法院規則》第62號命令的costs，而不是指all costs and expenses的意思。我希望將這一點記錄在案。

主席：

關於page 35，各位有沒有問題？那麼第36頁，各位有沒有問題？法律顧問。

Mr KAU Kin-wah, Assistant Legal Adviser:

Thank you, Chairman. I am not sure whether subclause (9) would allow prosecution against a person who has difficulty in paying the costs awarded to the government or the Commission, in which case poverty would be a crime.

財經事務局副局長區璟智女士：

第(9)款只cover根據第(1)(a)、(1)(b)或(1)(c)款作出的命令。第(1)(a)款訂明，審裁處可命令有關人士不得擔任董事；第(1)(b)款訂明，審裁處可命令有關人士不得參與市場運作；第(1)(c)款訂明，審裁處可命令有關人士不得再作出該項市場失當行為。至於無法支付審裁處根據第(1)(e)及(f)款命令該人繳付的款項，則不屬刑事罪行，可循民事途徑處理。

主席：

如果無法付款，有關人士便宣布破產，對嗎？

財經事務局副局長區璟智女士：

可循民事程序追討有關款項。

主席：

我們在現階段有一個合理的暫停，讓各位休息10分鐘。

我們繼續開會。我們剛才完成第249條的討論，現討論Schedule 8。請各位翻到第4頁 — Written statements for institution of proceedings，我們現在討論第14條。.

Deputy Chairman:

Mr Chairman, I have three different kinds of questions. First, I think I have made that suggestion before, about the written statement; whether you need the word "written". Other than that I have no problem with it.

主席：

關於第14條，各位有沒有其他問題？如沒有問題，現在討論第15條。

Deputy Chairman:

Mr Chairman, a suggestion of drafting: instead of "perpetrated any conduct", I think the Administration has used the words "have been engaged in some conduct". Can I suggest that?

何俊仁議員：

請問哪一頁？

主席：

附表8。有關文件第5頁，第15條。

何俊仁議員：

我們剛才有否討論temporary members的問題？

主席：

我們已經討論該部分。由於需要在邏輯上作配合，所以需要同時研究第XIII部及附表8。由於附表8內有些條文影響主體法例，所以一併進行討論。

關於第14條，各位有沒有問題？

關於第15條，副主席建議將"perpetrated"改為"engaged"。請政府考慮一下。

財經事務局副局長區璟智女士：

陳律師剛才告訴我，現有的《證券(內幕交易)條例》也是採用"perpetrated"一字。我剛才詢問陳律師，如果現時改用另一用語，會否影響case law……

Deputy Chairman:

No, it is just as a matter of language, you may perpetrate a misconduct, but you do not perpetrate a conduct.

財經事務局副局長區璟智女士：

我明白。不過，the word "perpetrate" is probably used in insider dealing and that is a misconduct.

Deputy Chairman:

You may perpetrate misconduct. I would say that that is a violation of language. You perpetrate misconduct. Perpetrating misconduct I think is over-stating the case.

財經事務局副局長區璟智女士：

但如果我們read on，下文所提到的是市場失當行為。該條文的寫法是，"perpetrated any conduct which constitutes market misconduct". Would that explain it?

Deputy Chairman:

Mr Chairman, whatever it is, if "perpetrate" is supposed to govern conduct, then it is a problem. To perpetrate any misconduct which constitutes market misconduct, then maybe; but you just do not perpetrate conduct. Anyway, this is a drafting point. Really it can only be a suggestion. I do not want to get into drafting. I am not the law draftsman.

主席：

關於第15條，各位有沒有其他問題？那麼第16條呢？

Deputy Chairman:

Mr Chairman, I have several problems with clause (16). On page 6 there is "perpetrating conduct" and I have made that suggestion. Also as a matter of drafting, the financial product, which is the subject of the market misconduct – I do not know if a financial product can be subject of market misconduct specified, this stretches to several provisions.

What seems to be generally conceived is this: you start with a statement which is rather equivalent to a charge or indictment, or something like that, stating who you are accusing of having committed misconduct; what he is supposed to have done; what the financial problem involved, and so on. You provide the particulars. This is how you start it. Then it seems that you contemplate that in the course of the hearing, some people who were not mentioned in the earlier part, may become involved later on. Is that the case? Have I got that right?

If that is the case I am somewhat disturbed because then further down you also say that someone ought to be represented. This is a fundamental rule of natural justice, that if you are accused you should know from the start that you are accused. You should know from the start what you are accused of, so that you can prepare, make representation and make such intervention as your interest, because you are accused and it entitles you to it.

But, if in the course of a hearing this can change and someone who may be giving evidence suddenly finds in the middle of it that this written statement is amended, and then he suddenly becomes the accused person. How do you cover his interests and his rights in the earlier part of the proceeding when he has not yet been accused? I understand that the Administration is very keen on flexibility, but has flexibility really gone so far that you no longer give adequate regard to the rights and interests of someone who stands accused of something fairly serious, whether you call it a market misconduct or whatever?

財經事務局副局長區璟智女士：

其實這涉及兩方面的考慮。我們以往也曾討論過，當財政司司長指令展開研訊程序的時候，是否只有司長才有權辨識哪位人士涉嫌有份參與這些行為。當時我們解釋，根據現時內幕交易審裁處的情況，其實這只是啟動點。當展開有關的研訊程序後，審裁處也有權辨識有否其他人參與這些失當行為。由於一些證據有時只能夠從研訊過程中得到，所以這做法對審裁處本身也有好處。

然而，我們也考慮到副主席剛才提到的一點，也就是說，可能在展開研訊程序後一段時間，審裁處才發覺另一些人士也有份參與這些行為。因此，我們在註解5提到，當局現正考慮提出一項修正案，向審裁處提供另一選擇。假如除了財政司司長在書面陳述中所指明的人士外，審裁處發覺還有其他人有份參與市場失當行為，審裁處可選擇重新進行研訊程序，又或選擇只就財政司司長在書面陳述中指明的人士進行研訊，同時告知財政司司長哪些人士亦涉嫌有份參與有關的市場失當行為，並建議財政司司長就這些人士提出另一個研訊程序。我們現正考慮提出這樣的修正案。

主席：

這不應該是一項建議。審裁處在審理財政司司長在書面陳述中所指明的人士時，如果發覺另一些人士也可能有份參與市場失當行為，審裁處的責任只是recommend財政司司長就這些額外的人士作出調查，如有需要，便另行展開研訊程序。

財經事務局副局長區璟智女士：

對，這就是我們現時考慮提出的修正案。

Deputy Chairman:

Mr Chairman, I have read the part that the Deputy Secretary refers to. Against the last sentence I have noted: "I should hope so". You say then "...might also arise the legal necessity to start the proceedings all over again". I hope so. Suppose I have not been following these proceedings because I have not been involved; in the middle of it you say I am accused. How do I know what has been said in the proceeding?

I do not think it is a matter of discretion. I think there should be clear provision that there has to be safeguards that this sort of thing cannot happen. It cannot be open to the Tribunal to choose that even though you have not been involved in half the proceedings, you may nevertheless be added to the proceedings in the middle of it. At least there has to be provided some express mechanism for you to be heard as to why you should not be involved at this late stage of the hearing. As it stands, I am just not comfortable with it.

What sort of procedure would it be? Can you change this in the middle? Is it just a very informal thing and it would be within the Tribunal's discretion to decide? Or what safeguards are there?

財經事務局副局長區璟智女士：

讓我以Apollo的case為例子加以說明。該案件現時已差不多審理完畢，Mr DAVIES稍後可以作出補充。在該宗個案的研訊程序進行期間，加入了一些人士，主席決定重新進行研訊。我們現時的構思是，可讓審裁處建議FS展開另一個研訊程序，以處理該等新加入的人士。

Deputy Chairman:

But Mr Chairman, I do not understand why this is necessary. I think it should be as a matter of course. The general course of events is that even if in the middle of it you discover that others may also be implicated and they should also stand accused, it would appear to me that there would be separate proceedings. Rather, if you were to bring them in

at this late stage there has to be clear justification. It should not be just an additional good thing.

財經事務局副局長區璟智女士：

現時的寫法並無授權審裁處可建議FS提起另一個研訊程序，因此我們希望提出一項修正案，讓審裁處可以這樣做。

副主席：

我認為不應該容許財政司司長在研訊程序進行期間，加入另外一些人士。

財經事務局副局長區璟智女士：

不是財政司司長，而是審裁處本身，即法官本身。

副主席：

不，我並非在談論CSA的內容。根據現時條例草案的規定，財政司司長可在研訊程序進行期間，加入一些新的人士。

財經事務局副局長區璟智女士：

第14條訂明，財政司司長可在書面陳述指明看來曾作出市場失當行為的人。第16條容許審裁處作出修訂。

主席：

我們首先討論政策。各位是否認為，在研訊程序進行期間，不應該

加入其他人士？也就是說，審裁處在審理A君及B君期間，如覺得C君及D君也涉嫌有份參與有關的市場失當行為，屆時必須就C君及D君展開另一個研訊程序。各位是否認為應採取這做法？

副主席：

正常的處理程序應該是，如果某人涉嫌犯了事，法庭在展開聆訊時會告訴該名人士，該案件關乎他作出某些事情。如果條例草案並沒有就這方面作出規定，那麼便不會出現在研訊程序進行期間加入其他人士的情況。現時的寫法是，在研訊程序進行期間可加入其他人士。我們首先要考慮是否接受這做法。如果我們接受這做法，然後才考慮政府擬提出的修正案，亦即縱使在研訊程序進行期間可加入其他人士，但審裁處可選擇不採取這做法。我認為條例草案根本不應該訂有這樣的條文，容許在研訊程序進行期間加入其他人士。

財經事務局副局長區璟智女士：

內幕交易審裁處的其中一個強項，就是容許審裁處在研訊程序中，亦即在尋找真相的過程中，找出有關的涉嫌人士。由於這些是商業罪行，FS在發出書面通知時，可能未有把所涉的有關人士全部包括在內。FS發出書面通知，這可以協助展開研訊。因此，我們認為政策上應該容許審裁處有權加入一些額外的人士。儘管如此，我們也考慮到在加入一些額外的人士時，審裁處可能需要重新進行研訊，又或審裁處認為應該展開另一個研訊程序。因此，我們建議在研訊程序進行期間可加入一些額外的人士，但審裁處可按個別情況決定有關的研訊程序。審裁處可要求FS就這些額外的人士展開另一個研訊程序，即把他們交由另一個法庭審理。

副主席：

我認為這違反了最基本的原則。副局長說這是一個強項，我不知道

為何副局長會認為危及自然公義的做法是一個強項，但我們不要爭論這問題。我認為，當採取如此不正常的做法時，當局需要提出充分理據，說明為何應容許這樣做。在任何刑事程序及紀律聆訊中，也不會在程序進行期間加入一些人士。即使是民事程序，如果在程序進行期間需要加入一些人士，也需要向法庭申請。為何財政司司長可以在研訊程序進行期間加入一些人士呢？

財經事務局副局長區璟智女士：

不是財政司司長，而是審裁處。各位以往曾關注到財政司司長會否偏心。當時我們解釋，這只是一個啟動點。即使財政司司長在書面陳述指明就A君及B君展開研訊程序，審裁處也有權將有關研訊擴大至包括C君及D君。當然，審裁處需要有合理的原因。此外，我們也有就這方面訂定制衡措施。涉嫌作出市場失當行為的人有權獲得陳詞機會，並享有由律師作其代表等等的保障。

副主席：

……對不起，容許我提出意見。

主席：

請你繼續說下去。

財經事務局副局長區璟智女士：

我其實也差不多說完了。我只是希望向各位解釋有關背景，內幕交易審裁處在以往10多年能夠順利運作，就是因為有這項安排。

副主席：

在以往10多年，審裁處是否經常在研訊程序進行期間加入其他人士？

財經事務局副局長區璟智女士：

也不是的。

副主席：

請問在甚麼情況下會加入其他人士？政府可否提供一些背景資料，說明以往在甚麼情況下，在研訊程序進行期間加入一些人士，以及說明有關加入其他人士的機制。審裁處是否需要根據一些規則、程序或原則行事呢？政府可否提供這方面的背景資料讓我們參考？

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

I think the primary safeguard, and the honourable Deputy Chairman has already referred to it, is really the overriding obligation to grant natural justice to any party, and the adding of a party I do not think deviate from that overriding obligation; and I think the chairman as a judicial officer will be all too well aware of his obligation in response to the motion to add a party, coming from the counsel assisting or, in this case, the presenting officer who has the power to move that a party be added, who is identified in the course of proceedings, will in deciding whether to add that party or whether to commence proceedings again, or alternatively under the proposed CSA refer them for separate proceedings.

He will have regard very carefully to whether adding a party at that stage would result in the fact that that person could not be granted any substantial degree of natural justice, sufficient for them to adequately defend themselves before the Tribunal. It is a question of

flexibility, I think, as was referred to before. Certainly the flexibility should not derogate from that overriding principle of natural justice.

I think that looking for certainty in that is the means of dealing with it, perhaps, but what we are saying, I think, is that there are circumstances in which it may be possible to add a party early in the proceedings. Then the Tribunal Chairman, after considering the matter with the help of his colleagues, will form a view that it is possible to accord natural justice to a person by adding them to those proceedings.

However, it may be such that it is too late in the proceedings for that to occur, so that either the Tribunal has to be re-commenced or alternatively they have to be subject to separate proceedings, if that were to be the case. I cannot say much more than that. I think Peter may be able to assist in this. The parties will obviously have a chance to speak before they are added as parties, and the Tribunal certainly would wish to hear a person before they were added as a party to the tribunal proceedings under clause 16.

Deputy Chairman:

Before Mr DAVIES starts to assist you, my question is really asking for background information. When in the past have you – I do not know what you call these persons suspects, or new accused?

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

"Implicated persons" is the present term.

Deputy Chairman:

Has that happened, and if so, what were the circumstances in these particular cases?

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

Just say the facts about the Lippo case. Okay?

Mr Peter A DAVIES, Senior Assistant Law Officer:

As you go along people, often quite innocent, are dragged in. It is happening all the time. In Apollo we started off with two implicated persons as defendants. I think we ended up with eleven or twelve. In Lippo, which has just started, we started off with three; we have ended up with, I think, eleven.

Deputy Chairman:

What are the circumstances? In these cases were they all considered to be safe to do so?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Not in my opinion.

Deputy Chairman:

Is there any process of hearing the parties? Was there any discrete deliberation on this question?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. What happened in Apollo was: when this came up somebody, because of this very wide definition, was attacked. He was just a witness. So he was then made an

implicated person. I will call him "a defendant". And then because of the circumstances several other people were made defendants. He was then given the right to representation. So they had a short adjournment of a couple of days; he came back with his counsel. His counsel said: "I haven't been here so far. I didn't know my client was the subject of charges, so I want the whole thing heard again, and I also want the tribunal to stand down, because the tribunal has pre-judged the issue against my client". That is what is happening at the moment.

Deputy Chairman:

So in the past was there any experience of there being implicated people added to the list?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes.

Deputy Chairman:

And it proceeded without starting all over again?

Mr Peter A DAVIES, Senior Assistant Law Officer:

No. It had to start all over again. As I said, the tribunal had to step down.

Deputy Chairman:

I should think so. Thank you very much. In fact that is why I do not think you should allow that sort of thing. I do not think you should provide for people to be brought in in the middle. Consider the prejudice. That person is unprepared. How far can you go in

a submission, because you really do not know anything. You have not had the time to prepare, but you have to fit into the momentum of the hearing, which has already begun and maybe has gone some way down. You would have tremendous pressure of resisting it. I really do not think this is a useful provision. I think that if, in the course of the hearing, it appears to the Tribunal that other people may be implicated, then they refer that matter to the Financial Secretary and make a recommendation to the Financial Secretary.

I think in any legislation that would permit or appear to permit this kind of addition of defendants, as you put it and make it even stronger, this would be very disturbing.

Mr Peter A DAVIES, Senior Assistant Law Officer:

I cannot disagree with that.

財經事務局副局長區璟智女士：

假設審裁處在研訊程序進行期間希望加入其他人士，如果有關的聆訊由同一個審裁處重新展開，各位是否可以接受這做法？我們現時打算作出的修訂是，由另一個審裁處處理，亦即展開另一個研訊程序，要求CE委任另一個審裁處，這是其中一個方法。另一個方法是由同一個審裁處負責處理，但該審裁處需要重新進行所有研訊程序。

主席：

兩個方法也可行，亦是可以接受的。我們不能夠接受的做法，就是在半途中加入一些人士，這是不可能的。

財經事務局副局長區璟智女士：

我們從這方面再作考慮。

主席：

法律顧問。

高級助理法律顧問李裕生先生：

由於審裁處只有一名主席，副局長剛才提到另一個審裁處，意思是否指委任一名暫委主席？

財經事務局副局長區璟智女士：

審裁處可以有很多不同的分部。

主席：

也就是說，並非由該名主席及該兩名成員處理，對嗎？

財經事務局副局長區璟智女士：

亦即由另一名主席及另外兩名成員處理。審裁處可以有多個這類組合。

副主席：

如果在研訊程序進行期間加入了一些人士，而審裁處因此需要重新展開研訊程序，這對一直接受審訊的人士並不公平，因為導致研訊程序需要重新展開的原因，是由於控方未有對所有牽涉在該事件中的人提出研訊程序。舉例來說，如果有關的研訊程序已經進行了15天，他們已花費了很多錢，控方就該項研訊程序又招致了剛才所提到的expenses。如審裁處在研

訊程序進行期間認為需要加入一些人士，因而需要重新展開所有研訊程序，該15天所花的費用豈不是浪費了嗎？是否真的要這樣做？

我建議委員會不要在今天就這件事作決定，因為我們真的需要清楚考慮這問題。如果在研訊程序開始時指明哪些人涉嫌作出市場失當行為，審裁處在該項研訊中只應處理該等人士。如果在研訊程序進行期間，審裁處發現還有一些人可能牽涉在內，應該對他們進行研訊的話，審裁處可向財政司司長提出該項建議，由財政司司長決定該怎樣做。審裁處則繼續進行原來的研訊，直到完成為止。我認為這做法比較直接。

至於副局長剛才提出的新做法，即在研訊程序進行期間可以加入其他人士，及因而要重新展開研訊程序，這做法牽涉到許多人士的利益。當局如何作出平衡呢？我相信政府在政策上也要重新考慮有關問題。

財經事務局副局長區璟智女士：

這兩種做法對原來的第一批人士是有影響的。不過，如果展開另一個研訊程序，有關的evidence可能會較容易available，因為已經有了紀錄。至於屆時審裁處是否接受有關的evidence，則是另一回事。兩個方法也會有這種情況。如果展開另一個研訊程序，由新的審裁處審理，可能也是邀請同一批人士作證。不過，在這種情況下，由於第一個研訊程序已經完成，在展開另一個研訊程序時，該等人士將會以證人的身份作證。他們亦要花一些時間參與有關的研訊程序。不過，由於已經知道有關該宗個案的證據，只視乎審裁處是否接受，因此在另行展開研訊程序時，進度可能會比較快。

副主席：

我需要考慮是否接受有關做法。如果真的要在今天作出決定，我便不會接受有關做法。我明白署方很希望這類聆訊能夠有多些靈活性及多些選擇。

我們現時其實只是考慮兩種做法。第一種做法是，審裁處完全不可作出選擇。如果在研訊程序進行期間發覺需要加入其他人士，審裁處便建議財政司司長展開另一個研訊程序處理該等額外的人士。至於財政司司長怎樣做，則是另一回事。審裁處會繼續就第一批人士進行研訊。我認為這做法會比較安心。第二個做法是，審裁處可以在研訊程序進行期間加入其他人士，但如果加入其他人士的話，便要重新展開所有研訊程序。至於選擇哪種做法呢？這需要視乎很多條件而定，或者需要讓所有人士有機會陳詞及討論。

至於選擇哪種做法，我需要詳加考慮，因為這必定會影響很多人的利益，以及需要研究這做法是否公正。

至於另一種做法，即審裁處在研訊程序進行期間可以加入其他人士，同時又可以無需重新展開研訊程序，我認為不應該容許審裁處有這樣的安排。

主席：

我明白你的意思。現時note 5所建議的做法，即展開另一個研訊程序的做法會較容易接受。我相信各位也會接受這做法。

財經事務局副局長區璟智女士：

最主要的一點，就是保留審裁處有權識辨另一些人士。現時的問題是，要怎樣處理第二批人士才是公平的做法。就這類失當行為而言，可能無法一開始便找出所有牽涉在該事件中的人。

主席：

OK。第17條。

副主席：

關於第17條的寫法，我有一個建議。Just before (a) we have the words "subject, however, that..." and you have (a), (b), (c), (d) and so on. I wonder if the Administration would consider "provided that" and "is subject to certain things". "Subject that" does not seem to be the right wording. Second, the drafting question is: under (a), for example, you have "shall remain the same". I think this should be "remains" rather than "shall remain", and the same thing occurs on page 8, immediately before paragraph 18. You have "shall remain" again. I wonder if it should just be "remain". These are just drafting points for the Administration's consideration. I do not need an answer.

主席：

關於第17條，還有沒有其他問題？那麼第18條呢？

Deputy Chairman:

Mr Chairman, I have some difficulty with clause 18. I do not understand what is meant by "the Tribunal shall have jurisdiction exercisable by reference to a written statement". I mean, either the Tribunal has jurisdiction or it does not have jurisdiction. If it has jurisdiction it would be able to exercise it, and I am not sure what is intended by the words "by reference to a written statement" and so on.

Chairman:

Mr DAVIES.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. I think the reason for this being necessary is that the Financial Secretary gives the Tribunal its jurisdiction under the earlier section. So he gives a notice to the Tribunal to institute proceedings into misconduct, and they get jurisdiction from that order. Now, if during those proceedings somebody is brought in – this refers back to the earlier discussion – and a new notice is given to the Tribunal in respect of that person, this clarifies the fact that the Tribunal also has jurisdiction in respect of that matter.

I think it is open to argument that somebody would say "At this stage the jurisdiction was defined earlier by the Financial Secretary and therefore anybody brought in is not within the jurisdiction of the Tribunal". Does that explain it? That is what this is about.

Deputy Chairman:

Thank you. First, I imagine that in the light of the foregoing discussion, you would be reconsidering clause 18.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes.

Deputy Chairman:

Perhaps we need not go into great detail, but I would just say that because the word "jurisdiction" has not appeared before, to my recollection, there may well be a different way of putting it.

Mr Peter A DAVIES, Senior Assistant Law Officer:

It springs from a matter which is before the court at the moment, in respect of jurisdiction. It is being argued in November. It is being done in private, so I cannot go any further into it.

Deputy Chairman:

That is fine. I am sure you do not put it in there just for fun, but because when the question of jurisdiction had not come up so far, to see "jurisdiction exercisable by reference to written statements" is not readily understandable. Maybe when you decide on the policy you may be able to put it in such a way as to make it more directly understandable – "may" or "has power" or something to that effect. I think your note 8 is also part of the discussion which has gone before, so I will not raise that again.

主席：

關於第19條，各位有沒有問題？那麼第19A條呢？

胡經昌議員：

關於第19A(b)條，該條文訂明，"market misconduct in question is any other market misconduct, securities or futures contracts as defined in Schedule 1"。然而，Schedule 1只載有futures contract的定義，並沒有securities contract的定義。

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

That comes from our securities and futures contracts; hence "securities contracts"

does not appear.

胡經昌議員：

Schedule 1只載有"futures contract"及"securities"的定義。第19A(b)條是不是提及兩種contracts？這會否有問題？這條文的寫法令人覺得所指的是securities contract及futures contract，亦即有兩種contracts。但Schedule 1只載有"futures contract"的定義，該用語字尾並無加"s"。此外，亦載有"securities"的定義。

高級助理法律草擬專員陳子敏女士：

第XIII部提到構成market misconduct的行為時，所採用的字眼是futures contracts，所以我們便使用這字眼。至於附表1界定"futures contract"的定義時，該用語字尾並無加"s"，其實在用作單數時所界定的意思，亦適用於用作複數的情況，所以應該沒有問題。此外，由於"securities"及"futures contracts"經常在第XIII部出現，因此應該可以明白到所指的是"securities"以及"futures contract"。

主席：

關於第21條，各位有沒有問題？那麼第22條呢？現在討論第23條。關於該條文，各位有沒有問題？那麼第24條呢？

關於第25條，各位有沒有問題？那麼第26呢？現在討論第27條。

Deputy Chairman:

Mr Chairman, this is part of the discussion which has gone before, so I look at it particularly with regard to note 12. Here you say in the main text that this person shall be

entitled to be heard, but the point is that if he has not been named until the middle of the hearing, then he would hardly know that he has to be heard at an earlier stage. That is part of what the Administration probably has to reconsider. That part is also relevant. I need not go into the details since it is under reconsideration.

主席：

現在討論page 14第28條。

Deputy Chairman:

Mr Chairman, I make the same point. It says "notwithstanding anything in Part XIII unless a person is entitled to be heard...". In fact, I do not quite understand who would be a person not entitled to be heard. We are not talking about whether he had an opportunity of being heard. You say that he is entitled to be heard. What is the class of people that you have in mind?

財經事務局副局長區璟智女士：

我們希望在該項修訂清楚訂明，在研訊程序中最後有可能受罰的人士，必須獲得陳詞機會及享有律師作其代表的權利。這並不等於其他人沒有該等權利。我們在這裏訂明這一點，表示有關人士一定有該兩項權利，讓他們感到放心。

第27條訂明哪些人士享有這些權利。如果並沒有這些權利，該等人士便不會受罰。他們不會被識辨為作出這些失當行為的人士，亦不會受審裁處的命令所影響。

主席：

我們暫時將第27及28條擱置，待政府先行決定如何處理剛才提出的問題。當局可採取兩種做法。第一種做法是重新展開研訊程序；第二種做法是讓另一名審裁處主席及另外兩名成員負責審理有關個案。當局在決定如何處理該問題後，才研究是否需要訂定第27及28條。

Deputy Chairman:

Mr Chairman, I quite understand that. It is just that quite independently I wonder if "entitled to be heard" is intended to cover having an opportunity of being heard. Anyway, I suggest it here maybe that when the Administration reconsiders the whole thing, they will reconsider the drafting here too.

主席：

關於第29條，各位有沒有問題？

何俊仁議員：

主席，關於第13頁第27(a)條，該條文提到"officer of the corporation"，這是不是指董事？獲授權的代表是否包括在內？該用語有沒有定義？

財經事務局副局長區璟智女士：

附表1載有該用語的定義。

何俊仁議員：

有關人士必須是負責管理的人士。第二個問題是，第27(b)條訂明，在審裁處許可下，可由任何其他人陳詞。該等人士通常會是甚麼人？審裁

處怎樣行使這項權力，以批准有關人士作為代表？

財經事務局副局長區璟智女士：

除了律師之外，其他專業人士也可能作為代表。不過，我請Peter根據他的經驗，向各位說明以往有沒有其他人士可以作為代表。Paul，你希望講解這方面的情況？

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

I think as far as "any other person", in that context, is concerned, it might be someone who might want to be represented by someone like a financial adviser who could give evidence in the context of what was being heard. That is one thing that would come to my mind immediately. It would be relatively rare, I would think.

Hon Albert HO Chun-yan:

Normally it should be a person who has certain professional expertise in the matter.

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

That is correct.

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

That would normally be our expectation, that they would be legally represented. However, for instance, before the Takeovers and Mergers Panel which adjudicates matters on the interpretation of the Takeovers Code and disciplinary matters pursuant to that, there is scope for people to be represented by advisers other than legal advisers, if a person thinks on

their own election that such a person can afford them an adequate defence. Here I think that is much less likely, because tribunal proceedings are obviously quite complex, and I imagine you would usually want to be represented by an experienced civil or criminal barrister. However, if a person considers that somebody else might ably represent them, and the Tribunal agrees that it will not prejudice their rights of representation, I do not think it is necessarily harmful to allow that person to suggest, for instance, that a financial adviser who perhaps was not admitted as a solicitor or counsel but had legal qualifications, could represent that person.

Hon Albert HO Chun-yan:

Apart from the nominated financial adviser to represent him in part of the proceedings, in another part he will get a lawyer. Can that be done?

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

Possibly. I think it is unlikely. It would be more likely, perhaps, that they would have a team of people, maybe a financial adviser or an analyst, and part assisted by counsel. I think it would be unlikely that they would want to chop and change between representatives. It would be more likely that they would perhaps have a multi-discipline team assisting them.

Hon Albert HO Chun-yan:

Okay. It would be in the hands of the tribunal anyway.

主席：

關於第29及30條，各位有沒有問題？那麼第31條呢？

Deputy Chairman:

Mr Chairman, I think that we discussed the purpose of clause 18, and perhaps you could briefly explain to us what is the purpose of a preliminary conference.

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

我們上次討論SFAT時也有提及，或者我請Mr Peter DAVIES briefly explain to us what the purpose of a preliminary conference is. Meanwhile we would propose to Members that perhaps the words in the last two lines can be deleted – that is "or such ordinary member or other person as he may specify". I recall last time a Member asked the purpose of these conferences, and how can the chairman allow other people to preside over it. So on second thought we do not think the chairman should really assign the job to any other person. Perhaps we should first ask Peter to briefly explain to us what would be the purpose of these preliminary conferences.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. Again, what has happened in the past is this: because you have a tribunal constituted by two men who can be quite busy, we found in the past that people have asked to have access to the tribunal to discuss a certain matter at very short notice; and one of the members has been away at that time. It is rarely the judge, because the judge is doing it full-time, but the members are not. They have their own jobs to do.

A lot of these matters are very small matters, matters incidental to the proceedings, and of small consequences, but they need to be attended to very quickly. I have always felt that some provisions like this would be very helpful to us, because it gives the power of the chairman to call a conference. We only do this if everybody agrees and he thinks it is appropriate, and he could deal with things very, very fast. It gives us a faster procedure than we have at the moment, because sometimes you have to say: "I'm sorry. We'd like to meet,

but we can't because member A is away until next Thursday. We can't deal with this until then".

There are a lot of ancillary small matters which need to be dealt with very quickly, and I think a provision like this is very helpful.

Chairman:

But what would be done in the conference?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Again, I have said earlier that you have given the Tribunal complete flexibility as to its procedure. Nobody knows what any one procedure is going to be. It will vary every time. A lot of these matters will be procedural matters, and one of the parties who is a defendant may want to go in and say: "Look, I agree to everything you're saying about me, except for this one thing. I'd like to cut the hearing down because I don't want to have to pay all the costs at the end of the day. I'd like to go before the Tribunal and mention what this issue is, through my counsel. Maybe we can cut the whole procedure down. I may want to make certain admissions". There are all sorts of things which can be done at these conferences.

Chairman:

Why they can not be done in the tribunal?

Mr Peter A DAVIES, Senior Assistant Law Officer:

They can, but as I say, what we have seen in the past is this: because people have been away there have been large gaps, if you look at the history of it. You do not have the

same speed. A lot of these matters concern procedure, and only the chairman would be involved really. He normally sits with his members. He would do all the thinking and the talking, because there would be legal matters, procedural matters, which would be in his own peculiar purview; and these are the matters I foresee he could deal with. He could sit with one member if he wants.

Chairman:

Why does the Deputy Secretary not propose someone like an ordinary member and other persons?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. We think that is a good idea, on reflection.

Chairman:

You just deleted it. It would be presided over by the chairman?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Always by the chairman, with the consent of the party.

Chairman:

Would it be too difficult if we narrow the scope of the conference to some procedural matters? Do you discuss any matters other than procedural matters?

Mr Peter A DAVIES, Senior Assistant Law Officer:

I would have a difficulty defining "procedural matters", because it would be so wide anyway.

Deputy Chairman:

From the drafting it is not clear what sorts of things may be dealt with in those sittings. It merely says that after proceedings have started you can have a little proceeding on the side. This may give rise to uneasy feeling or conjecture as to what can go on. I hear several words being used, for example it is procedural or that it is ancillary. If you can think about some way of characterizing the kinds of things, so that people can see what it is.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. I see.

Deputy Chairman:

I remember when we were discussing it in relation to the other tribunals, Audrey wondered, since you say that after the material has given submitted you have a conference, whether it is a pre-trial conference for people to consider the possibility of settlement and so on. It may give rise to different expectations. If you could characterize it so that people can see that it is to settle ancillary matters, and perhaps also add that any decisions reached in these conferences would be reported in the Tribunal when it convenes, it could be helpful.

Chairman:

Yes. They are good suggestions, and I think this change also applies to the Bill.

關於第32條，各位有沒有問題？那麼第33條呢？現討論有關chairman as sole member of Tribunal的部分。關於第34條，各位有沒有問題？

關於這條文，我們在上次會議是否提到"需要雙方同意"等問題？

副主席：

關於這個clause，我並無任何問題。

何俊仁議員：

當聆訊展開後，第34條的規定便不適用，對嗎？

副主席：

對。

何俊仁議員：

對。

主席：

需要雙方同意。

副主席：

在聆訊展開後，屆時並不能夠要求主席以審裁處單一成員身分單獨作出裁定。

主席：

OK，關於第36條，各位有沒有問題？

何俊仁議員：

政府可否澄清一點，剛才所提到的expenses，是否包括審裁處及presenting officer的費用？

財經事務局副局長區璟智女士：

是包括的。

何俊仁議員：

那麼tribunal members，即主席及那兩名成員的費用又如何？

主席：

主席是受薪的。

何俊仁議員：

但是他也需要進行investigations及搜集資料。也就是說，法官及另外兩名成員的薪酬也包括在內？

主席：

這是cost of the Tribunal.

財經事務局副局長區璟智女士：

這是政府需要繳付的款項，亦即納稅人需要繳付的款項，所以也包括在內的。

何俊仁議員：

我的意思是，那些款項會否被視作調查費用的其中一部分？

主席：

如果不是調查費用，便是costs。

財經事務局副局長區璟智女士：

這是第(1)(e)款所指的款項，而不是第(1)(f)款所指的款項。

何俊仁議員：

也就是說，會被視作costs？

財經事務局副局長區璟智女士：

對，因為有兩種命令。

主席：

第(1)(e)款是指審裁處本身的費用，第(1)(f)款是指調查費用。第(1)(e)及(f)款的費用也包括在內。根據以往的規定，審裁處可就第(1)(e)款所指的款項作出命令。現在條例草案加入另一項命令，就是讓審裁處可就證監會的費用作出命令。

副主席：

當局是否可以預先列明某些費用的金額？

財經事務局副局長區璟智女士：

我想或者可以預先列明租金等項目的款額。

副主席：

不。我的意思是，會否有一個列表，清楚列出審裁處每日的costs。無論實際上所需的費用是多少，審裁處也會按照列表收取費用。在費用方面，當局應盡量加入多一些穩定的因素。以調查費用來說，該筆費用可以是無底深潭。假如律師表示無法預先計算所收取的費用，這會引起市民很大的反應。我希望政府可以說明有關費用的收費基礎，例如審裁處每日進行聆訊所收取的費用等。我希望政府盡量預先列出每個項目的收費。

財經事務局副局長區璟智女士：

我們可以向各位提供一些資料。

副主席：

我並非向政府索取這方面的資料。我的意思是，將來在推行的時候，政府至少應讓一般人可以知道部分expenses的費用是多少。

財經事務局副局長區璟智女士：

也就是說，希望藉此收阻嚇作用，讓該人在作出市場失當行為時要再三考慮。

副主席：

不，很多條例均會訂明政府所收取的費用。舉例來說，如果某人filing with court，有關條文便會訂明court costs的費用。因此，如果expenses包括審裁處的費用，我希望政府可以盡量列出各項費用，例如審裁處每日所收取的費用。我認為，in fairness，應該讓人知道這些費用是多少。

財經事務局副局長區璟智女士：

你其實希望讓市民大眾還是讓作出市場失當行為的人知道有關費用？

副主席：

法例也會訂明法庭的收費，有關費用是公開的，因此問題並不在於讓犯罪的人知道有關收費，抑或是讓市民知道有關收費。總之，政府的收費應盡量具透明度，讓公眾可以事先知道有關的金額。列出收費的目的並非為了收阻嚇作用。

何俊仁議員：

可否訂明有關費用不能超過所涉的costs的某個倍數？即訂明expenses與costs之間的關係，也就是說，不能超過若干目數。請問是否能夠這樣做？

財經事務局副局長區璟智女士：

我不明白這樣做的目標。我們現時收到的市場意見是，取消了"3倍罰款"的規定，實在是太可惜。雖然他們明白及理解當局受到人權法的制肘而這樣做，但此舉會使阻嚇力不足。他們希望當局想辦法作出補救。我們

認為這些規定或能夠回應市場人士的憂慮。

Deputy Chairman:

If expenses is part of the penalty, you would be in some troubles.

主席：

以前的制度比較好。

財經事務局副局長區璟智女士：

收回成本是可以的。

Deputy Chairman:

If you say you should pay, it is a government policy; it is general; it is the financial policy of the government. That is quite apart. But if you say that "because the fines are not sufficient, deterrent, so that we cannot increase the fines, why don't we increase the penalty by a sort of back door". I do not think it is acceptable. They have to be separate principles.

何俊仁議員：

由於有關數字是很難估計的，與訟費比較，可能完全不成比例，數額十分龐大。我擔心會出現這種情況。我認為我剛才建議的做法，是比較清晰的。

財經事務局副局長區璟智女士：

甄律師表示並不同意這說法。

高級政府律師甄文蕙女士：

根據以往的經驗，與聘用御用大律師或律師的費用比較，其實tribunal的expenses是少幾倍的。

Deputy Chairman:

I should hope so.

高級政府律師甄文蕙女士：

如果把法官及政府聘用律師的所有費用計算在內，通常我們的expenses是幾十萬元，而被懷疑作出市場失當行為有關人士的律師費用則可能是幾千萬元或一千幾百萬元。

何俊仁議員：

我並非計算costs。我們今早討論過costs及expenses，我目前所指的是調查費用，而調查費用包括證監會的費用。

財經事務局副局長區璟智女士：

我們會向各位提供一些個案作參考。

何俊仁議員：

好的。

主席：

關於審裁處的開支，所涉問題較輕微。至於新加入的第(1)(f)款，所涉的調查費用則難以估計。

委員會已完成附表8的討論，我們現在討論主體法例第250條。該條文在文件編號CB(1) 1984/00-01(01)的page 37。

副主席：

我希望再提出一點意見。現時也有向公眾人士披露進行仲裁的費用。因此當局也可以參考這做法，列明有關審裁處的費用。

主席：

關於第250條 — Further orders in respect of officers of corporation，各位有沒有問題？關於page 38由subclause (3)開始的條文，各位有沒有問題？那麼page 39的條文呢？現在討論第251條，各位有沒有問題？那麼第252條呢？

何俊仁議員：

第252(1)條分為第(a)及(b)段。第(a)段所提及的是證人；第(b)段是指與程序有關的人，可能是被查訊及調查的人。第(a)段訂明，審裁處可就證人因有關程序所招致的costs，判給他們一筆費用。請問證人的costs是指甚麼？如果是指證人的開支，那我是明白的。

財經事務局副局長區璟智女士：

或者我請Mr Peter DAVIES to explain what clause 252(1)(a) would cover it.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. I think it has been drafted this way, and I could be corrected, because of Order 62 of the Rules of the Supreme Court, which apply. The word "costs" in there is defined, and includes, I understand, the word "expenses" also.

Hon Albert HO Chun-yan:

It includes "expenses"?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. Order 62 of course would only relate to legal expenses.

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

I think the Honourable HO is asking about expenses to a witness.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Under subclause (a)?

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

Yes.

Mr Peter A DAVIES, Senior Assistant Law Officer:

I am sorry. A witness would be called. He would go along, and he would lose a

day's wages, or he would have taxi fares to get to the court, or whatever. That is the sort of costs you are talking about there – witness expenses.

Hon Albert HO Chun-yan:

So it would include legal costs incurred by the witness?

Mr Peter A DAVIES, Senior Assistant Law Officer:

No. It is where it is being required for the purpose of the proceedings. That is only a witness who is brought there at the behest of the Tribunal. At the end of his evidence he will be asked: "What are your costs and expenses?" and he would say "Well, I've been here a day. I've lost a day's wages. I catch a taxi to get here. I've got to go home by taxi". It is just those things that is talking about.

Deputy Chairman:

Mr Chairman, I seem vaguely to recall another part of the ordinance which also refers to witnesses who attended hearings. There were some provisions for the sort of things the witness may be reimbursed for, or paid for. I do not really remember which, but if there is something like that, maybe that would also help.

財經事務局副局長區璟智女士：

我們查看一下。

何俊仁議員：

關於第(2)款，該條文訂明，這些費用由政府支付。也就是說，這些費用不可向被告索取的，對嗎？

財經事務局副局長區璟智女士：

對。

主席：

關於第(3)款，各位有沒有問題？那麼第(4)款呢？關於第(5)款，各位有沒有問題？現在討論page 42第253條 — Contempt dealt with by Tribunal。法律顧問，你是否希望提出問題？

Mr KAU Kin-wah, Assistant Legal Adviser:

Thank you, Chairman. In respect of subclause 4, I have some reservations as to the effectiveness of that.

Chairman:

Which subclause ?

Mr KAU Kin-wah, Assistant Legal Adviser:

Subclause 253(4) on page 43. I have some doubt that the provision would be effective to achieve its purpose, because contempt does not need particular proceedings, and could be punished by the tribunal as the relevant person appears in the course of the hearing of the tribunal. I think this is actually a drafting matter. I do not know if the draftsman would consider that.

主席：

陳律師。

高級助理法律草擬專員陳子敏女士：

第(4)款訂明no proceedings，也就是說，先決條件是必須有一個proceedings for contempt。我剛才與Mr DAVIES談論到，嚴格來說，contempt也會有一個proceedings。雖然tribunal本身可能會即場處理有否出現contempt的情況，但嚴格來說，這也是一個proceedings以決定有否出現contempt。Mr DAVIES，你有沒有補充？

Mr Peter A DAVIES, Senior Assistant Law Officer:

That is right. It would be a proceeding. This is a contempt in the face of the court, as it were, and it is dealt with on the spot. At the same time it would be a proceeding and there would be certain procedures which would have to be followed to ensure justice.

Deputy Chairman:

Mr Chairman, I think I understand the legal adviser's concern. You are really saying that that person should not be punished for contempt of court for that sort of thing; not that the proceedings may not be instituted. There are a number of ways of dealing with contempt. One way of dealing with it is that even in the course of, say, some civil proceedings, you might wish to cite someone for contempt, and then you may file summons for the contempt proceedings, although there are proceedings within the proceedings.

Nevertheless you have separate summons starting the proceedings for contempt, but it may be dealt with on the spot, without proceedings being brought. So when you say "no proceedings" there is at least ambiguity there as to whether, when it is dealt with on the spot merely by asking the person concerned to show cause, it could be described as "proceedings"; whether it is just part of the larger proceedings so that it is not a separate proceedings.

When you say: "no proceedings may be instituted", it is not only the word "proceedings", but "instituted". So it is an institution of proceedings. This is very concrete and very definite, and if I were to represent anyone who is caught here, I would certainly take the hard line and say that it has to be separate proceedings, discretely and separately instituted. If that is not intended, maybe the drafting can be modified to represent that, because the policy should not depend on whether, as a matter of procedure, separate proceedings are brought or not.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Maybe we could consider amending the word "instituted", so it becomes something like "taken", "conducted", or something like that.

Deputy Chairman:

It is a matter for you, but I think just to avoid the ambiguity.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Yes, thank you.

Chairman:

Page 44.

何俊仁議員：

主席，我亦希望就第253(2)條提出問題。第253(2)(a)條訂明是"without reasonable excuse"，為何第253(2)(b)及(c)條並沒有這樣訂明呢？

主席：

第(2)(c)款提到拒絕或沒有遵守order的情況。

何俊仁議員：

這也可能有特別的原因。

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

The definition of the conduct in subclauses 253(a), (b) and (c) is that the conduct is without reasonable excuse.

Hon Albert HO Chun-yan:

Yes. It is already there.

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

Yes. "...where relevant in relation to the intentional or reckless giving of false or misleading information", for which we think there is no reasonable excuse, obviously.

Hon Albert HO Chun-yan:

How about subclause (c)?

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

Commission:

Obstructing. I think this debate has gone on in the context of course of Part XVI, has it not, Chairman? "...subject to reasonable excuse".

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

The Honourable HO is talking about subclause 253(2)(c).

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

Obstructing?

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

Orders imposed by the MMT. Right? Not obstruction.

高級助理法律草擬專員陳子敏女士：

或者讓我講解一下。這需要視乎有關條文所訂的罪行本身有否"without reasonable excuse"這個條件。如果有這條件的話，我們便加入"without reasonable excuse"的字眼，如果沒有的話，便不會加入該等字眼。有關條文只是互相對應。

何俊仁議員：

第249條並沒有訂明這條件？

高級助理法律草擬專員陳子敏女士：

第253(2)(c)條主要提到第249(9)條提述的命令。由於第249(9)條的寫法是，"任何人拒絕或沒有遵從根據.....作出的命令，即屬犯罪"，所以我們在第253(2)(c)條也採用同樣的寫法，即"拒絕或沒有遵從第249(9)條.....提述的命令"。兩者也沒有提到"without reasonable excuse"，所以我們貫徹條文的一致性。總括來說，這條文希望保留與原本罪行相同的元素。

Deputy Chairman:

This is a different offence. This is contempt.

高級助理法律草擬專員陳子敏女士：

對。如果某人干犯罪行，並可以將該人入罪的話，法庭或審裁處可即時處理contempt的問題，無需另外展開刑事法律程序。在這情況下，我們希望法庭或審裁處也可處理該人藐視法庭的情況，所以我們希望有關的元素也是一致。

何俊仁議員：

在這情況下，該人便要受罰兩次？

主席：

如果該人並無遵從命令，已屬犯罪，但同時又干犯contempt的罪行懲罰該人，是不是這樣？

高級助理法律草擬專員陳子敏女士：

所以第(4)款訂明不得就某行為使有關人士兩次受罰。假如已就該行

為對該人提起刑事法律程序，我們便不可以控告該人藐視法庭。如果已控告該人藐視法庭，便不可以對該人提出刑事法律程序。我們希望第(4)款可以做到這一點。

主席：

OK.

Deputy Chairman:

Mr Chairman, then I have a problem. I thought I did not have a problem. Now I see the light and I do have a problem. Mr Chairman, normally when you punish anyone for contempt of court, there has to be contempt. Contempt can be characterized or defined in various ways, but in layman's language, there has to be some contempt. You cannot say that just because the court makes an order, and somehow I did not carry out the order, that in itself would constitute a contempt. I think then you are in breach of the order, but that is not necessarily a contempt.

However, when the court summons you to appear before it, they will say: "This seems to me that I issued an order and you did not obey that. That seems to be in contempt. What do you have to say?" You can then say why, although you were unable to do it, there was no contempt of court. If the court accepts your reason, then there is no contempt of court. There may be other things. But if it is written in the way as subclause (2), then "the tribunal shall have the same powers as the court of first instance to punish for contempt, as if it were contempt of court." The failure by itself, whether or not there has been any intention or any element of contempt, would be punished as if it is contempt. That would go beyond the court's inherent power of punishment for contempt.

主席：

如果是這樣的話，其實也可以取消第(2)(c)款，對嗎？

財經事務局副局長區璟智女士：

或者我請林太或Eugene解釋一下，因為第253條有它的用途。此外，根據第256條，審裁處的命令可在原訟法庭登記。

主席：

讓我先行提出一個問題，然後一併回答。In this part, even if we delete subclause 253(2)(c), it works, because it automatically becomes a criminal offence.

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

Yes. That is so. Your observation is correct. It will still remain a criminal offence. Perhaps I could make an observation on subclause 253(2). I think subclause 253(2) – my interpretation is this, at least – is actually an empowering provision in relation to jurisdiction. It grants in the various circumstances set out in (a), (b) and (c) the jurisdiction to the tribunal as though it were the Court of First Instance, to punish for contempt.

However, the contempt jurisdiction still remains a discretionary one, and nothing is mandatory or obligating that the tribunal actually make a finding of contempt in these circumstances.

Deputy Chairman:

Yes. I understand. Because it is a tribunal, it does not have an inherent power. A court has an inherent power to punish contempt. A tribunal does not have that power, so if

you want the tribunal to have that power, you have to provide for it by statute. I have no quarrel with that, but I would say that a contempt must have an element of contempt. Even for the Court of First Instance, the inherent jurisdiction of the court does not make a strict liability of – if I may borrow the analogy – certain acts as contempt; but you seem to do so here.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Perhaps I could come in there, Chairman, if I may. There are two forms of contempt. It is a very involved and difficult subject, and very old, but there are two forms of contempt, that is, civil contempt and criminal contempt. Civil contempt is as the example you gave earlier, Mr Chairman, where somebody is ordered perhaps to pay a sum of money and does not pay. Then he said there is an application made by the party owed to go before the court and for the other party to give reasons why he has not paid. Then the court may say: "I give you 7 days to pay". If he does not pay within 7 days, the other party goes back again and the court says: "Unless you pay within this period, I will contend that you are in contempt". It is that sort of contempt. The other form of contempt is where you do it in the face of the court, and you are contemptuous in the face of the court. It is criminal. I think, to back up what was said earlier, subclause (c) is, if I am right, to give us extra power in civil contempt. That is my reading of it.

Deputy Chairman:

Mr Chairman, with due respect, whatever the cause giving rise to contempt, you cannot punish anyone for contempt unless there is an element of contempt as understood by the layman. You define what constitutes contempt, whether criminal or civil. It is never the failure to carry out an order of the court. It is by itself not enough for contempt. For example, if there is an order for me to pay a certain sum of money within 7 days, and I fail to do so, and I am cited for contempt and go before the court, and I say "Look, in fact I was in prison. I was kidnapped by the big spender and I was taken outside the jurisdiction within

that period of time. I have been able to pay. I would have done so", in those circumstances the court may say: "Then we accept that there is no contempt".

Here it seems to me that you make the failure to pay, in itself, without more, contempt; so that I can say whatever I like, but it will still constitute contempt.

Mr Peter A DAVIES, Senior Assistant Law Officer:

If I could amplify my earlier response, we agree certainly that failure to pay an order should not itself be contempt. I do not think, with respect, that that is the intention of the clause, but perhaps that can be examined and altered if necessary.

Deputy Chairman:

Yes.

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

I think the intention of the clause – my reading of clause 253(2) – is to say that in the circumstances of subclause (c), where somebody fails to comply with an order, the court or tribunal, acts within its jurisdiction and the powers of the Court of First Instance as though these circumstances were contempt. Again I return to my earlier statement: this does not mandate that the tribunal has to make a finding of contempt in these circumstances. It has the jurisdiction and the discretion of the Court of First Instance in those circumstances.

I think your interpretation is that subclause (2)(c) is a deeming provision. It deems these circumstances to amount to contempt.

Deputy Chairman:

That suggests that to me, particularly when you remove things - - I do not want to go any further. I think my concern is clear, so perhaps, Mr Chairman, speaking for myself, I could ask the Administration to look at this clause again to see whatever the intent is. We are agreed on the purpose. My concern is whether the legal effect, as drafted, may give rise to those sorts of doubts. Perhaps it could be looked at again, so that I can be assured whether or not it has that.

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

Just to change it from a deeming provision to a jurisdiction provision, or to clarify that it is in fact a jurisdiction provision rather than a deeming provision.

Deputy Chairman:

But it does not go beyond that.

主席：

OK。第254條 — Report of Tribunal。

Deputy Chairman:

Mr Chairman, on page 45?

Chairman:

Yes.

Deputy Chairman:

Mr Chairman, on page 45 under subclause (2)(b)(ii) I expect that you put "as reasonably practicable" because sometimes you may not be able to locate that person and you have tried your best and so on; but it is difficult for me to see what giving a copy "so far as reasonably practicable" should limit. Could you just say, for example, "make available a copy"? Then you would leave the question of being reasonably practicable alone. This is just a suggestion.

主席：

我希望提出有關政策方面的問題。根據以往的經驗，這類審裁處是否經常提交報告？

財經事務局副局長區璟智女士：

審裁處會就每宗個案提交報告。現時的安排是，假如審裁處在今天向財政司司長提交報告，審裁處亦會在當天即時發表該報告。也就是說，審裁處同時根據第(a)及(b)段的規定行事。

主席：

第255條。

Deputy Chairman:

Mr Chairman, before we move on to clause 255 on page 46 in subclause (4): I wonder if the Administration really means a person is not liable in civil or criminal proceedings, because what you are saying is that even if civil or criminal proceedings are brought against that person, he will not be found liable. If that is the case, either he is not

made liable or he is not liable in these proceedings.

主席：

關於第255條 — Form and proof of orders of Tribunal，各位有沒有問題？那麼第256條呢？法律顧問。

Mr KAU Kin-wah, Assistant Legal Adviser:

Thank you, Chairman. I wonder whether in subclause (1) of 255, it is necessary really to specify when the order is made. That tends to be a bit too restrictive if it so happens that the chairman has forgotten. I do not see really the need to specify that time.

主席：

這部分是否現時的規定？

財經事務局副局長區璟智女士：

是的。Do you have very strong reasons for the operation of the IDT?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. This is part of the existing legislation in this form, and it is always followed. Once a penalty is made we register the order.

Deputy Chairman:

But, Mr Chairman, what happens when, for whatever reason, the Tribunal made the order, and presumably announced the order and does it orally at the end of the hearing? He

can do that, can he not? The chairman of the tribunal can announce that?

Mr Peter A DAVIES, Senior Assistant Law Officer:

It is always done in the form of a report. They come back and they just issue the report, or sometimes they do not need to; it just comes out and it is published. It is only at that stage that you know they have decided.

Deputy Chairman:

I see. I was wondering that when he did it, when he gave the order, and did not put it in writing, is the situation open to remedy? Does he have to hear the whole thing again?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes.

Mr KAU Kin-wah, Assistant Legal Adviser:

If I may add, "the order herein referred to" does not necessarily mean the order that the Tribunal would make at the end?

Mr Peter A DAVIES, Senior Assistant Law Officer:

That is right; yes. There is some doubt earlier about it. It could be an order, of course, "may join the proceedings".

Deputy Chairman:

So what happens if he makes an order and he somehow overlooks the record?

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. The orders that are made for joining the proceedings are never registered. We have never had that problem. The one we need to register is at the end when the tribunal has done its work, goes home, has made its orders, and then we have to collect the money. That is the one I was referring to earlier. We register that.

Deputy Chairman:

I know.

Mr Peter A DAVIES, Senior Assistant Law Officer:

We have the problem of getting the money, which can be quite difficult.

Deputy Chairman:

Yes. One faces all sorts of difficulties sometimes. For example, if it is one of those conferences where we just examine at the sittings, to clear housekeeping matters, for example. In the course of that the chairman makes an order by consent and so on, but somehow that was not recorded in writing, and then afterwards the parties discover that it has not been made in writing – normally in a normal civil procedure you then just ask if the order could be recorded at a later stage.

Mr Peter A DAVIES, Senior Assistant Law Officer:

In writing; yes.

Deputy Chairman:

But even if you have the words "when the order is made", that means it is beyond remedy. If it is not recorded in writing at the time the order was made, then that cannot be remedied.

Mr Peter A DAVIES, Senior Assistant Law Officer:

That would be right.

Deputy Chairman:

You may prefer to run the risk. Rules are always provided for the unthinkable and unimaginable and so on.

財經事務局副局長區璟智女士：

我們會就這問題再作考慮。

主席：

關於第256條，各位有沒有問題？那麼我們討論第3分部 — Appeals, etc.。關於第257條 — Appeal to Court of Appeal，各位有沒有問題？那麼page 48呢？

Deputy Chairman:

Mr Chairman, the legal adviser tells me that this form of drafting is quite usual, but I wonder if it is an appeal under subclause 257(2), then can the court in addition to confirming or varying or setting aside or substituting the order, also allow the appeal, or dismiss the

appeal. There does not seem to be any incompatibility. It seems that this is very specific here. The provisions are very specific. I just do not know whether it is necessary to so restrict the Court of Appeal. I expect that the court would decide when it is a matter to be remitted, when it is a matter that has no need to be remitted, when something can be confirmed and when some substitution should be made. Or there may exist circumstances when it is an order which the Court of Appeal feels a need to be varied, but because of the facts concerned, does not want to provide its own substitute order, but would prefer the Tribunal to reconsider and come up with a different order. Does subclause (2)(b) allow the court to remit to the tribunal to vary the order?

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

Peter, do you want to make any comments on this?

Mr Peter A DAVIES, Senior Assistant Law Officer:

I think it is already there.

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

I do not see a problem.

Mr Peter A DAVIES, Senior Assistant Law Officer:

We do not see a problem.

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

In remitting it to the Court of Appeal, it is not just copying the previous law.

Deputy Chairman:

Since when have we adopted this? What is the origin of this form of drafting?

Chairman:

IDT, it was.

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

It was IDT, I think.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

This is in section 32, subsections (1) and (2). They tried to divide this scenario into two parts. For the first part it referred to the appeal on the finding and determination, and the second part, subsection (2), refers to the appeal on the costs, orders and other things. In the first part it refers to "... allow the appeal, dismiss the application, and remit the matter to the original tribunal". In the second part it refers to "... quash the order appealed against, or substitute another order". So it is similar to our scheme here.

Deputy Chairman:

Section 23 of the Insider Dealing Ordinance?

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Yes it is.

Deputy Chairman:

Thank you. Is that the first time we have used this form of drafting?

Ms Sherman CHAN, Senior Assistant Law Draftsman:

As the legal adviser advises, it is rather common in our laws.

Deputy Chairman:

Yes, but I wonder when we started doing it. It is not important, but you have all these computerized, and it is very easy for you to find out. If it happens to be handy, I would really like to know. Thank you.

主席：

關於第258條，各位還有沒有問題？那麼我們討論page 50第259條 — No stay of execution on appeal。

Hon Albert HO Chun-yan:

It appears that only the Court of Appeal has the power to grant a stay of execution, and not the tribunal. Why not?

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

I am just interpreting, but I would guess this is taken over from the Insider Dealing Tribunal again. I think if the Insider Dealing Tribunal were to have reached the decision that penalties were appropriate, then it would be of a mind to grant a stay of its own penalty

decisions, in effect. Really that is a matter to be dealt with on appeal, and left to the appeal body, which in this case is the Court of Appeal. I am just thinking what was the original drafting intention behind the Insider Dealing Tribunal. I cannot say it was definitely that consideration that led to it.

Hon Albert HO Chun-yan:

Even the Tribunal may think that the point to be taken to the Court of Appeal would be highly contentious and there is the likelihood that it may be overturned. So even the tribunal may consider that it may be a proper case for a stay. Bearing in mind that there is a time lapse, of course, between the date of the ruling of the tribunal and the date of hearing of the appeal.

財經事務局副局長區璟智女士：

審裁處在提交及發表報告後，工作已經完成。審裁處已完成任命。如果有關人士對審裁處作出的命令感到不滿或希望擱置該命令，向上訴法庭提出或會比較適合。Peter比較熟悉有關的研訊程序。Peter，你可否講解在這方面所得的經驗？

主席：

審裁處成員屆時可能已離任。

財經事務局副局長區璟智女士：

對，他們已完成有關工作。

何俊仁議員：

這視乎如何制訂有關的程序。審裁處在作出裁決時可詢問有否這方面的申請。

Mr Peter A DAVIES, Senior Assistant Law Officer:

In practice, there has never been a complaint in this regard. One of the problems is, I think, that the Tribunal completes its report and it is delivered; it is published. It is only then that somebody knows what is happening, what they have decided. There is then a period of 6 weeks, I think, when they can lodge an appeal. I think it has always been in the interests of justice that we can start looking at the penalties and start looking at a possible enforcement.

It is very easy to go before the Court of Appeal and to ask for a stay of execution, if that is what they feel. It is not really practical, in my experience, for the tribunal to actually hear this, because of course all the proceedings are over. The tribunal cannot hear it at the time of the penalties hearing. So there is this long wait. You are waiting 6 weeks, and you do not know until that 6 weeks has passed whether or not they are going to appeal. On the last day of the 6 weeks they may stick in an appeal.

It is not easy to get the tribunal back to consider an application, in any event. It is more logical and more practical for those people who have decided at the last minute to appeal to go to the Court of Appeal and ask for leave. In certain cases where somebody has written to us and said "We're going to ask for a stay of execution", we have not proceeded. We have just waited to see what the Court of Appeal says. The solicitors have written and said: "We intend to apply for a stay of execution", and we say: "Well, we'll wait and see what the Court of Appeal says".

The other point is that 6 weeks is not that long in respect of enforcement. What we would want to do is to try and get payment. Six weeks is not that long. It is only when there is a much longer period that we start actually going towards enforcement. That is we

take action against them - legal proceedings. That would be much longer. In practice – I know it is a point which is hard to understand – it has never proved to be a problem. It has proved to be a quite logical procedure to do it this way.

Hon Albert HO Chun-yan:

I think in some cases the penalty may be more than of a pecuniary nature. There may be a caution order or depriving the party of the qualification to be a director – that sort of thing. The consequence may be quite serious, and very minor in some cases. The point may be contentious, even if a tribunal concedes that it may be strongly arguable. It may well be the case that even tribunal members and the presenting officer have no problem with a stay; and let the point to be tested in the High Court. Why not allow the tribunal to have the power? It is entirely a matter of how you structure the proceedings.

Mr Peter A DAVIES, Senior Assistant Law Officer:

Yes. The stay of execution is only – this is what it actually means – in respect of money. An execution is where somebody will not pay; so then you take action. You may move to sell his flat to get payment. It is those matters which it is all about, and they do not take place for a very long time afterwards.

There is always plenty of time for somebody to say: "We contest the money award. Please don't move against us, because we're going to contest this in the Court of Appeal". The other orders are not affected by this phrase "stay of execution".

Deputy Chairman:

I can see that in fact you have some difficulties about applying to the Tribunal for a stay, because there is no tribunal. The Tribunal has ceased to exist. Once it has given its decision, the report, then it has finished. Even if you have the chairman still hanging around,

the other two members' membership is over. You would have to reconstitute the Tribunal.

Hon Albert HO Chun-yan:

How about the question of costs? We have just been told this morning that the Tribunal may be called upon to consider whether costs should be awarded, and whether certain items are reasonable and should be allowed. You know, that is something that can only be dealt with after the report is concluded.

Mr Peter A DAVIES, Senior Assistant Law Officer:

No. What in fact happens, with respect, is that it is in two parts. They make their findings. They say: "We find you are an insider dealer". There is then another hearing when they hear you in mitigation and the amount of penalty to be paid. They then retire again and complete their report. Their report comes out, and after that they go.

Hon Albert HO Chun-yan:

But why cannot the application for a stay be dealt with in the same hearing, when the question of costs is also dealt with?

Mr Peter A DAVIES, Senior Assistant Law Officer:

That would be possible; yes.

Hon Albert HO Chun-yan:

So it is not impossible. It is a matter of policy?

Mr Peter A DAVIES, Senior Assistant Law Officer:

It is not impossible.

Hon Albert HO Chun-yan:

I can understand that the Tribunal would be very reluctant in most cases to grant a stay, but there may well be exceptional circumstances so that even the tribunal would think it appropriate to grant a stay.

Mr Peter A DAVIES, Senior Assistant Law Officer:

It is very difficult at that stage to say when you are mitigating, "My client's a good chap", this, that and the other. "Please don't penalize him too much", and at the same time say, "However, if you do go ahead we'll appeal and we'll bring a stay of execution". They just do not know at that stage whether they are going to appeal anyway. It is only when the report comes out and they see the size of the penalty – and that does not happen until a second stage, when it finally comes up – and they see what is going to happen to them. It is only at that stage they can really sit down and consider whether or not they are going to pay the penalty or whether they are going to appeal. It really would not be very practical at the earlier stage to make that application to the Tribunal.

Hon Albert HO Chun-yan:

I still have some problem with that. I would have thought that the party can always make an application for a stay, even before the conclusion of the report, and then let the tribunal make the decision. Then state in the report as well as to whether or not, in case there is an appeal, an interim stay will be granted.

Mr Peter A DAVIES, Senior Assistant Law Officer:

If it is a monetary order, you see, at the earlier hearing you do not know how much the monetary order is going to be, so you cannot say at that stage "I'm going to appeal you". It is very difficult to say at that stage "I'm going to appeal this. It's too much". You are making an appeal against the size of the monetary order; then you can only really make your mind up after the report has actually been published.

Hon Albert HO Chun-yan:

Then can we empower the tribunal to deal with this residual question, even after the conclusion of the report?

Mr Peter A DAVIES, Senior Assistant Law Officer:

You could.

財經事務局副局長區璟智女士：

我們在會議初期亦提到，要物色市場人士出任審裁處成員，其實是相當困難的。當審裁處提交報告後，該審裁處便會解散。我們需要考慮的問題是，第259條所訂向上訴法庭提出擱置執行命令的渠道是否足夠？如果這是一直以來的運作方式，而各位又認為足夠，同時也不希望令審裁處的工作延長的話，這可能亦是一個折衷辦法。

Deputy Chairman:

Mr Chairman, if justice requires that the tribunal have such power, I am not going to make the members work harder, but I think we have to consider whether the provision of applying to the Court of Appeal for a stay of execution is sufficient on balance to cover the need. I suppose that if we feel that is insufficient, then we would consider giving the Tribunal such power; but up to now I am not convinced that the hardship would be so great

that it cannot be dealt with expeditiously by the Court of Appeal at the time when you appeal against the decision, the penalty awarded by the Tribunal.

主席：

何議員，你也可以想一想，這類工作是否需要由該兩名成員進行呢？

副主席：

我認為是需要的。

何俊仁議員：

我希望指出的是，有時候問題並不在於上訴法庭何時審理該宗上訴，而是在申請上訴時，有關方面也可能需要一些時間作好準備。由於審裁處所判處的懲罰可能不單是罰款，如果執行了有關的命令，所造成的後果可能是我們不希望見到的。雖然上訴法庭可能最終會裁定有關人士敗訴，但如果該人上訴得直的話，那又怎麼辦？如果純粹因為審裁處的運作而訂明上訴不擱置執行，我認為理據並不充分，因為在審裁處完成任命後，要求審裁處處理擱置執行命令的申請不會需要很多時間。根據一般的法定程序，有關法庭有權批准延期執行命令的申請。

副主席：

在發表報告後，即使要求該審裁處處理擱置執行命令的申請，該審裁處亦需排期進行聆訊。由於並非當場作出宣布，因此也需要訂定一個時間，以便審裁處成員及雙方代表可以出席有關的聆訊，也就是說，這亦會有一段時間等候進行聆訊。

何俊仁議員：

如果由Chairman單獨處理該項申請，那又如何呢？

副主席：

我認為這未必是最好的做法，因為是由3名成員決定penalty，所以不應由1名成員決定是否擱置執行命令。此外，Court of Appeal無需完成審理有關上訴後，才處理stay of execution的申請。你剛才提到，有關方面需要一些時間作好準備，以進行上訴。其實上訴法庭無需完成審理整個上訴，才處理擱置執行命令的申請。假如上訴得直，屆時根本無需提出擱置執行命令的申請，因為這問題已不再存在。因此，所需要考慮的問題是，如果Court of Appeal具有這項權力，有關方面是否需要等候一段長時間，上訴法庭才可處理其申請？

何俊仁議員：

我明白。但如果提出上訴的話，有關人士至少要有一些把握其上訴將會得直。此外，法庭亦不會隨便批准有關延期執行命令的申請。我認為，該tribunal本身應清楚有關的觀點會否有很大的爭議，但即使有很大的爭議，該審裁處也需作出判決。那麼為何不給予審裁處權力，以處理延期執行命令的申請？這不過是一項靈活安排。如果是一宗複雜的個案，有關方面也需要一些時間作準備，然後才可告知法庭為何他們認為有關上訴應該得直。

副主席：

我並沒有很大的成見。我的意思是，兩者的差距不是那麼大，以致我認為需要加入這樣的一項權力，其他同事可能有不同的看法。

何俊仁議員：

政府是否可以作出考慮？

財經事務局副局長區璟智女士：

副主席剛才所說的也很實在。我們較早前已提到，要找合適的成員也相當困難，他們也可能未能抽出時間進行這些額外的工作。正如副主席剛才所說，要求另外兩名成員回來處理有關申請，亦未必容易，因為他們可能已返回外地，我們需要等他們回來。我認為，第259條的規定，可能是一個更方便的做法。

何俊仁議員：

對於這做法，我自己有一些保留。我會考慮是否提出修訂。

主席：

關於第260條 — Rules by Chief Justice，各位有沒有問題？如沒有問題的話，我們討論第4分部 — Insider dealing。關於第261條，各位有沒有問題？

副主席：

主席，我建議提早散會，因為這次會議到下午12時45分便結束。如果現在開始討論第4分部，我們可能還未完成第261條的討論便要結束會議。

主席：

好的。下次會議在9月28日舉行。多謝各位。

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