立法會
Legislative Council

Ref: CB1/BC/4/00/2

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

Verbatim transcript of meeting
held on Friday, 28 September 2001, at 8:30 am
in Conference Room A of the Legislative Council Building

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

各位同事，我們的quorum已經足夠，現在請政府部門的代表進入會議室。我們在上次會議結束前正討論Division 4 – Insider dealing。

各位早晨。我們今天早上將會繼續討論第XIII部第4分部 —— Insider dealing的內容。對於第261條Page 51、52、53、54及55，各位有沒有問題？如果沒有，各位對於第262條Page 56、57及58有沒有問題？接着是討論Page 59、60及61。

Deputy Chairman:

There is a footnote 38 under subclause (7) and as long as we look at the footnote it seems that we are awaiting further committee stage amendments and there are still some considerations of what further to do. Can we have a little explanation on that?

主席：

副局長。

財經事務局副局長區璟智女士：

請Eugene解釋。

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

Presently we are in discussion with the group of nine investment banks represented by Linklaters and Lines. They have submitted comments to us and we are in a stage of considering those within the Commission and then we will obviously need to discuss those

with government. I am not quite sure what the timetable is for response in the form of actual hard and fast committee stage amendments but we have received a response from them.

Primarily they are technical amendments prompted by the change to the opening words in subclause (7) which has implications for the similar opening words used in the other provisions of clauses 261, 263, 264 and the like defence provisions in Part XIV. There are also some technical issues raised by Linklaters and Lines in the scope of the draft defence in subclauses (7A) and (9) which is a defence modelled on a UK defence that they have requested and we have acceded to their request.

So they are primarily technical matters that are being reviewed and it is not really a matter of policy change that is being considered, more technical changes to the wording of the legislation.

Deputy Chairman:

Mr Chairman, are there outstanding issues and do you think there is a problem in the drafting? Obviously you must take time to make sure that what is produced is correct. I am not trying to make a comment at all but would it be possible to explain just briefly what the issue and what the problems are considered to be?

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

This is a matter that we ourselves raised. After industry requests, there was a feeling that subclause (7) was somewhat obscurely worded. "A person who enters into a transaction which is an insider dealing as a person who has counselled or procured" has now been simplified to "where a person counsels or procures." Now, the initial wording of subclause (7), "a person who enters a transaction which is an insider dealing as a person who has counselled or procured... " raises by implication a suggestion that that similar wording. "a

person who enters into a transaction" – which is used as the introductory words to many of the clauses in subclauses 260(1) and so forth, subclauses 262(3), and 264 – may mean more than merely entering into a transaction and it is a question of determining what precisely the words should be to tally with the remainder of the words within those provisions so that it covers, for instance, the act of dealing or the act of counselling, procuring or the act of disclosing that information.

It is a question of finding words that fit in with the remainder of the defence because often the word "transaction" is repeated throughout the actual body of the provision. For instance, if you were to look at subclause (5)(a), "he and the other party to the transaction entered into the transaction", so there is a question if the words in subclause (7) have been changed, the words in subclauses (1), (2), (3), (4) and (5), etc, which use those similar introductory words will also have to be changed in certain instances and that will have some on-flow wording effects throughout the scope of the provisions.

Deputy Chairman:

I see, that is if what you mean is where a person counsels or procures, then you should say so, instead of saying that the person enters a transaction in one capacity or another.

主席：

對於這個分部的構思，我們無需考慮有關利益的問題，因為insider dealing也可以是虧本的，而不一定是有利潤的，對嗎？

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

Sorry. I can not hear the chairman's question. The translation was rather …

Chairman:

There is no consideration for whether the guy who has been engaged in insider dealing, has gained certain profits from the insider dealing transactions.

Mr Gerald D GREINER, Senior Director, Supervision of Markets, Securities and Futures Commission:

There is a consideration for whether the person who has been engaged in insider dealing, but if the person does not for the purpose he has gained, and actually suffered a loss, so he will be quit by the provisions.

Deputy Chairman:

Maybe the idea is that if he has made money from the insider dealing transaction it is not part of the offence, it is not necessary for him to have made any money. Even he may have made a loss and if he had committed insider dealing, he would still have committed it. Thank you.

主席：

我們繼續討論page 61 footnote 38吧。如果各位沒有問題，接着便可討論page 62。

副局長，我嘗試很努力研究page 63的note 40，但仍不太明白它的意思，妳可否加以解釋？

財經事務局副局長區璟智女士：

對於這個問題，我相信要律師才可清楚解釋。Eugene, can you help in

explaining this?

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

There was again industry comment that the defences or, say, the insider dealing provisions, would prohibit somebody who has knowledge of their own trading intentions or activities. For instance the purchasing activities of a substantial shareholder in the shares of the company in which they are a substantial shareholder may, for instance, have an effect on market sentiment in relation to that corporation. If they are buying more it suggests that there are good prospects for the company in the future. If they are selling out it suggests that the prospects for the company are rather bad. That itself can form insider information and might prevent the substantial shareholder conducting their own transactions which, as a matter of policy, it should not. It might also prevent an intermediary acting on behalf of that person to execute or facilitate a transaction from engaging in that activity.

The Linklaters and the Law Society pointed to a defence in the UK Criminal Justice Act (1993) which embodies the UK criminal insider dealing provisions in paragraphs 3 and 4 of the schedule to that Act there is a defence for those engaging in a series of transactions or facilitating such transactions with what they call "market information" which is basically information about a person's trading intentions or activities where you are merely executing that transaction or helping somebody to facilitate that transaction.

There is really no policy objection to this, in effect. If these were insider dealing it would inhibit substantial shareholders and their intermediaries engaging in quite normal commercial activity that they should be allowed to engage in and the defence is intended to do that. It is based very closely on this UK defence. About the only change we have made is the introductory wording which , as we say, we are considering, and also changed what the UK defence refers to "acquisitions or disposals". We have used the term "dealing" because dealing is defined in our legislation as more or less as broad as what the UK defence applies.

We have received a few technical comments from Linklaters and Lines on this provision regarding its wordings and whether it covers certain activities. We are considering that at the moment.

財經事務局副局長區璟智女士：

我們先把這條款併入這部分，希望各位先考慮這個做法在原則上有沒有問題。如果各位原則上也認為這兩種活動也應獲得豁免，我們便會繼續跟業界商討，研究應如何整理有關字眼。

主席：

我希望業界人士能夠明白這條款吧。我並不是業界人士，所以我實在不太明白第(7A)款。顧先生。

Mr KAU Kin-wah, Assistant Legal Adviser:

I just want to provide some information. I think the subclause 262(7A) has been taken out of paragraph 3 and paragraph 4 of Schedule 1 to the Criminal Justice Act (1993). May I ask the Administration to provide the whole provision because, in fact, there are altogether three provisions and our subclause (7A) is only an extract of those provisions. I think subclause (7A) would be intelligible in the context of the original UK provisions but in the current context it is not that clear because, to my understanding it actually serves a purpose in the original context. I am not sure if it serves the same purpose in our context. So perhaps it may help members to understand the original UK provision in order to compare the two to see whether – well, I mean, the adoption is appropriate in the context.

Deputy Chairman:

Mr Chairman.

Chairman:

Yes, please.

Deputy Chairman:

May I make a suggestion? I understand that the Administration wants to see whether we in principle agree with this defence and I understand also at the same time that the proposal from the industry has been accepted by the Administration as being reasonable. It is very difficult for us in the absence of the background material and also the drafting to say precisely whether we support it or we do not support it. We take your word for it that this is something fairly normal and that if we do not allow it, then a lot of unnecessary hardship would be produced.

In any event, since you are going to come back to us, anyway, I think I would rather – speaking for myself, give a view whether I support it or whether I do not support it when I see the amendment. It is not because I am suspicious of you but, really, it is very difficult to say "Yes" or "No" without the background material and without the drafting before us.

主席：

我面對的困難跟副主席的不同。我並不認為附註40跟第(7A)款有很大的關係。可能我未能達致所需的水平，所以無法理解有關討論，請各位原諒。但對於這項註釋提供的解釋方面，正如剛才Eugene所說，有些人是有些sensitivity的，即他的行動可能會令市場產生敏感的反應，這是我可以理解的。所以從政策的角度來看，加入這些元素作為一個辯解，是可以接受的。但至於第(7A)款能否體現這個目的，便要留待法律顧問解決了。

財經事務局副局長區璟智女士：

我們下一個步驟是再跟法律顧問和業界商討。最重要的原則是豁免我們剛才所提到的那類活動。我們會再研究這些字眼可否很清晰地達致這個目標。當我們完成這個步驟後，才把擬本提交議員們參考。這個做法會比較好。

主席：

好的。接着是討論第64頁。對於第64頁，我覺得有點意外，因為政府在這條加入了第(9)款。我相信你們在近10年來就market information進行的法律程序已有十多個cases。這款所訂的資料是否已詳盡地document了那些cases？

財經事務局副局長區璟智女士：

其實這條條款是針對我們剛才討論的第(7A)款的豁免條款內所指的市場資料而制訂的，即我們是以第(9)款協助各位瞭解第(7A)款所提到的活動。

主席：

外國的條文有否類似的寫法？

財經事務局副局長區璟智女士：

或許我請陳律師解釋。

主席：

好的。

財經事務局副局長區璟智女士：

剛才法律顧問也提到，究竟我們在草擬第(7A)款及新加入的第(9)款時，曾參考了英國哪些資料，或我們是否沒有參考某些資料。請陳律師就這些問題作出解釋。

高級助理法律草擬專員陳子敏女士：

我們在草擬有關條款時，大致上也是希望參照英國的Criminal Justice Act 1993的。原因是市場要求我們參考這條條例，並考慮把這個辯解加入條例草案的做法是否值得。我們也曾參考Criminal Justice Act 1993的第3和4條。我們現在已參照該條例的第3條制訂這條的第(7)款；亦已參照該條例有關解釋market information的第4條制訂第(9)款。

為使條文一致，所以我們便把某些字眼修改。否則，正如剛才證監會的同事所說，這款的第一句便會出現問題。我們現時暫時採用"A person who enters into a transaction which is an insider dealing..."這句，是因為在舊有法例裏一直以來也是採用這句的。我們認為如果我們把這句突然作出修改，這個做法便會有相當的敏感度。當然，正如剛才副主席所說，我們原本是希望加入"procures or enters into a transaction"的字眼，但我們不敢貿然作出這項修改，因為畢竟舊有條例也沿用了很長時間。所以我們希望先參考市場的意見。除此以外，條例草案在字眼上亦須講求一致性。

主席：

胡經昌議員。

胡經昌議員：

我理解政府和業界正商討剛才有關第(7A)款和新增的第(9)款的問題。業界也曾向政府反映，雖然兩款是參考英國的條例後草擬的，但他們發現政府並沒有完全參照有關條例的內容。所以，這兩款的寫法或許會出現不全面的情況。我理解業界正與政府商討這個問題，而有關條款主要參照英國《1993年刑事審判法令》附表1、3和4所草擬的。業界指出政府只參照附表3而沒有完全參照附表4制訂有關條文。我把這個事實反映出來，希望當局能使第(9)款和第(7A)款一致。多謝主席。

主席：

既然是這樣，我們應否依照副主席的建議，於稍後時間再作討論呢？我們在這部分註明"懸而未決"，好嗎？

副主席：

最低限度，這個做法能讓法律顧問有機會就這方面進行研究。因為在一些字眼上出現不一致的情況，可能會造成很大的問題。如果讓法律顧問先行研究，便可免生疑問。

主席：

好的。對於Page 64及65，各位有沒有問題？如果沒有，我們接着是討論第263條 —— Insider dealing – certain trustees and personal representatives not to be regarded as having engaged in market misconduct。如果各位沒有問題，我們便可討論第264條。如果各位沒有問題，我們接着是討論Division 5 —— Other market misconduct下有關False trading的條文。

Deputy Chairman:

I am afraid the drafting here needs further polishing. Just from a grammatical point of view I have some difficulties. If one reads it, "false trading takes place" – I am reading from subclause (1) – " false trading takes place where in Hong Kong or elsewhere a person does anything or causes anything to be done with the intention that it has or is likely to have the effect of creating." There is a problem with doing something with the intention that that something has a certain effect. That something either has or does not have an effect or likely or not likely to have an effect. You cannot have an intention that it, as a matter of fact, has or is likely to have. So this is grammatically problematic and if you read it with "recklessness" – if you read just "recklessness" this may be less of a problem. But if you read it with "intention", then there is a problem.

Also, although this is not a criminal offence, this is however a quasi-criminal offence, if I can put it this way. It is done in a rather loose manner because it just says that false trading takes place when someone does something. It is not the same as saying that someone has carried out false trading by doing a certain thing. So it is a very loose way of saying something which may not be good enough for this kind of provision.

Then further with the language part, if you say that something has a false or misleading appearance "of active trading", probably I can understand that. But when you say it has a false or misleading appearance "with respect to the market", then that seems to me to be very grey. I understand that this is the original wording. Probably you have not changed it this time but still I have that difficulty.

The same difficulty is repeated in subclause (2) and if I turn over the page then, you look at subclause (5) going to page 70, you have the same problem and so on; the problem that someone does something with the intention that it has or is likely to have certain effects. That language structure I think needs further polishing.

There are other problems with language. Mr Chairman, perhaps I can go ahead to, say, page 69. Under subclause (5) I read, "Without limiting the general nature of the conduct which constitutes false trading under subsection (1) or (2) where a person" – then you list out three things that the person does; namely, enters into something, offers to sell something or offers to purchase something." Over the page then my problem begins on page 70: "Then unless the transaction in question is an off-market transaction" – I just will not think about that for the moment – you then go on to, "The person shall, for the purpose of subsections (1) or (2) be regarded as doing something or causing something to be done with the intention that, or being reckless as to whether, it has or is likely to have, the effect of creating."

Now, apart from the problem which I have just raised, which is similar to the other subclauses, I found a problem with your subsection (1) and (2) and footnote 50. Originally you confined this to subsection (1) and now you expand it to (1) and (2) and in footnote 50 you explain that this is a technical amendment, "as one may be deemed to have contravened either clause 265(1) or (2) or both", but subclause (1) or (2) has no deeming permissions. Subclause (1) is just one sort of situation and subclause (2) is another sort of situation. So I do not see the reason for your saying that both have to be included because there is some deeming effect between subclauses (1) and (2). Could you explain that before I go on?

Maybe I will just finish with this clause. Then on page 71 with your new subclause 6A, again you try to define "off-market transaction" as a transaction which has certain characteristics. In subclause (6A)(a) again you say, "It is a transaction which is not required to be recorded." That I can understand but you say, "It is not required to be notified to such a person." There I have difficulty because "notify" is a transitive verb. Then on the face of it, it is the transaction which has to be notified, not the person. I just do not know how you can have something be notified to a particular person.

You also say, "Under the rules of the person by whom the relevant recognized market is operated" – again, I wonder, if you have a person operating a market, you can only – you say, "A person operates a market", so the market is operated by the person. The

person may be able to operate some services, as you say in subclause (6A)(b) over the page, but can he operate a market? So these things probably need polishing unless this is well understood by whoever has to read the ordinance and if these are standard phrases used in a particular trade or business then I would like to have that explained.

Chairman:

That is somewhat technical. Do you want a response now?

Deputy Chairman:

I would just like to know whether the Administration will reconsider and see how it can be polished, then I do not need a detailed response now.

財經事務局副局長區璟智女士：

讓我簡單地作出回應，稍候請Eugene或Sherman考慮需否就一些重點作出解釋。其實第265條的目的，是訂明虛假交易的概念，而不是訂明某人進行虛假交易後引致的後果。換句話說，這條訂明如果發生這條所訂的事情，虛假交易即告發生。

這個草擬方式類似我們剛才所提到有關內幕交易行為的草擬方式。即如果出現這些元素，有關行為即告發生。這個草擬方式較好，抑或是副主席剛才提到的另一種草擬方式，即如果有關人進行虛假交易，便須承擔某些後果的寫法較好呢？這也是個值得考慮的問題。第265條的內容大致上是根據澳洲公司法的條文所草擬的。因為有關條例已運作十多年，市場人士對那條條例也相當瞭解。所以我們參考其中的條款時，也不希望作出重大的修改。

Deputy Chairman:

In that case, Mr Chairman, I would like to see the Australian provision. I am very sorry to say that we are not the position to do all the collective drafting but when we are being asked to approve this legislation, speaking for myself I certainly would have problems.

財經事務局副局長區璟智女士：

另外，我們剛才亦提到有關市場用語的問題，即為甚麼我們會把有關虛假交易的概念繫於3個主要現象的問題。第一個現象是active trading，即交投活躍；第二個現象是行情，即market；第三個現象是price，即價格。副主席剛才也曾提問及market所指的是甚麼。

副主席：

我的問題不是market或"行情"的定義，而是在行文上，"a person operates a market"的寫法是否可以接受。

財經事務局副局長區璟智女士：

我是指妳較早前就第67頁提出的問題。就"場外交易"這個詞語作出的界定，一個人可否operate或營運交易所。證監會的同事是否希望就這方面作出解釋？

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

I think, when you are looking at (a) and (b), just to explain the two there, false appearance of active trading is …

Chairman:

Sir, which (a) and (b)?

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

On page 67, clause 265. Eugene can correct me if I am saying anything wrong legally. "A false or misleading appearance of active trading in a securities or futures contracts" means trading generally. It gives the market an impression. For instance, if there is activity, you might get people going into the market, buying a huge amount of shares and then selling a large amount with no commercial purpose to it, other than forcing the price of the share up but that is false or misleading as far as the market is concerned because people look at the market and the look at trading patterns and volume so when you have untoward volume and you have a lot of volume it can, in fact, get people into the market so false and misleading active trading is one thing.

In respect of the market for or the price, market, in fact, covers both price and the trading pattern. So it is an amalgam of the two and the price of dealings is another situation. I think the best example I can give you for price is the example of marking the close. That is when people go into the market at the end of the trading day. There might not be any trading done but they use the trading system, using the spreads to put the price of the share up so that is a very good example of where price is concerned.

When you look at market as well for futures contracts, the market for futures contracts can also include the cash market underneath so one has to look at the trading. Possibly you might have trading in the cash market because this covers both securities and futures which can give a false or misleading appearance as far as the trading and the futures contract is concerned.

Deputy Chairman:

A false and misleading appearance of what?

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

They could give a false or misleading appearance of – the price of the futures contract could be affected by the underlying market in the physical – I think the best example – I forget what media it was. I forget who was in it but it was someone said, "We'll call it the orange market" or something and then that caused the futures prices to go right up and then that was actually causing a false or misleading appearance in the market because it actually cornered – I think it was the orange supply and then they went and made a killing in the futures market because they could buy the futures market but they could not fulfill the underlying product because the futures contract does, in fact, in some cases have a physical delivery.

Deputy Chairman:

Mr Chairman, I have no doubt that this happens from time to time. My concern is really, when you say, "false or misleading appearance with respect to the market" – "with respect" is a very wide term. So, because of my occupational hazard I worry about that. Even if it is something which has been around for some time and within the community of active traders this is understood. The law is not a private contract between two parties but it is meant to be a public legislation so then we should not rely too heavily unless it is perfectly safe and absolutely necessary.

I feel in principle we should go for more exact laws, and more exact provisions. Maybe it is just because of the time pressure you have not been able to arrive at the best way of putting it.

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

Perhaps I could ask Eugene to supplement.

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

Yes, perhaps I could supplement. This is drawn from an Australian provision in the Australian Corporations Law. I do not actually have the direct reference to the provision from which it is drawn but we can provide that and a copy and I think it may actually be – here we go, actually. Section 998(1) of the Australian Corporations Law which refers to "a false or misleading appearance of active trading in any securities on the stock market or false or misleading appearance with respect to the market for or price of any securities."

So the wording with respect to the market is drawn directly from Australian jurisprudence. There have been cases specifically on section 998. I cannot say with certainty that, as specifically interpreted, the meaning of the words "with respect to"…What I would say, though, as a matter of policy – I mean, ultimately, I think the market would be interpreted by the courts and there is a host of jurisprudence in Australia and in the United States on similar provisions. It is that anything with respect to the market is exactly what you do want to catch because ultimately it is the market supply and demand which sets ultimately the turnover and also the price in a particular instrument that might be the subject of manipulative or false trading activities.

As Paul said, I think the best example of where you might want a term of the breadth with respect to the market is in relation to the cash market and any activities that might affect the cash market. A good example, for instance, is the delivery of copper supplies to warehouses or the movement of copper supplies on shipping networks which might well create an appearance with respect to the demand or supply of copper which would then have an effect, for instance, on a copper future traded on an exchange. Obviously copper futures, I do not think, are traded here in Hong Kong but you can imagine similar activities in respect of futures contracts that are traded here or, alternatively, conduct here in Hong Kong which affects the price of a futures contract overseas.

So, I think, with respect, while the words do appear broad, they are no broader than is necessary and you do actually have to cover absolutely any activity that might create a false or misleading appearance with respect to the market which, in the ultimate end is really the amalgam of all the supply and demand activities of people engaging in that activity.

財經事務局副局長區璟智女士：

對於副主席認為有關條文應採用哪個structure會較為清晰，我們稍後會就這個問題再作研究。我亦希望讓各位有較多時間參考澳洲的有關法例。

副主席：

這條條文的草擬方式並不能把它的含意完全表達出來。我無法明白這條條文希望表達的具體意思。

財經事務局副局長區璟智女士：

副主席剛才亦提到另一個問題。對於Page 71較後部分有關如何闡釋場外交易方面，一個市場為甚麼可以由一個人操作，或operated by somebody這個問題，陳律師希望加以解釋。

主席：

妳是否指第71頁第(6A)款？

財經事務局副局長區璟智女士：

是的。

高級助理法律草擬專員陳子敏女士：

對於"operate"這個字眼的概念，第III部中交代交易所認可各方面情況的主要條文第19條也是採用"operate"這個字眼的，所以這部分是呼應該條所採用的字眼。簡單來說，該條的草擬方式是"no person shall operate the stock market unless the person is so and so as stated in (i)...(ii)...and (iii)..."。所以，條例草案整體上也是採用"operate"這個字眼的。

主席：

就這方面，我只可提供一個意見。對於副主席的comment，我希望政府稍後可再作整理。但對於政府在辯解上提供較大彈性，我亦可以接受，因為市場現時的情緒越來越差，如果監管過嚴，恐怕會導致市場嚴重萎縮，所以我們要小心行事。市場興旺時情緒可能會有所不同，但我亦承認，從公眾人士的角度來看，所憂慮的是這條條例草案獲得通過時，即大約是明年年初或今年年底，市場的情緒會很差。

當然，我亦知道我們在立法時需要考慮較長遠的問題，但由於我們現在把MMT從監管insider dealing即內幕交易大幅擴大至監管多種不同的情況，我傾向為有關人士提供較強的辯解。或許待有關法例實施一、兩年後，如果發現這條法例存有不足之處，才再作修訂及制訂較嚴格的辯解要求。這是我從政策的角度作出的建議。

財經事務局副局長區璟智女士：

多謝主席。我們也有相同的想法。事實上，市場人士可能認為向他們提供"辯解"仍不足夠。他們認為，為他們提供"辯解"固然是好事，但更好的做法是清楚訂明有關動機。所以現時建議修訂的目的，是因應市場的意見，把有關動機清楚訂明。載於第66頁的附註42也有清楚指出這點。

另外，我們為甚麼在第70頁加入場外交易的概念呢？因為我們認為，場外交易對零售投資者的影響不大，所以在某些情況下，我們無須監管場外交易。由於我們要豁免場外交易的情況，所以我們便要相應地在這部分加入一個註解，闡明甚麼是場外交易。這些亦是市場人士對我們提出的好建議。

副主席：

有關的註解在哪部分？哪一頁？

財經事務局副局長區璟智女士：

即在第(6A)款下的註解。為何會把這項註解加入第(6A)款呢？因為對於第70頁所載有關甚麼是虛假銷售的定義方面，我們希望把場外交易豁免。換句話說，即使在場外交易中出現類似虛假銷售的活動，我們也不會進行監管。

副主席：

那麼，政府便應採用較好的草擬方式。

主席：

我只是考慮到這個問題對政策的implications後，才提出我的意見。胡經昌議員。

胡經昌議員：

主席，或許副主席可取得較多的資料吧。但對於我們剛才提到的澳

洲公司法第998條，或在較早前提到的英國Criminal Justice Act 1993 Schedules 1、3和4，我們並沒有資料。政府可否把這些資料一併提供給我們參考呢？

財經事務局副局長區璟智女士：

對於澳洲的公司法，我們較早前曾以文件的形式提交法案委員會。

副主席：

政府有否向委員會提供有關Criminal Justice Act 1993 的Schedules 1、3和4的資料？

財經事務局副局長區璟智女士：

我們可以稍後奉上這些資料。

主席：

謝謝。好的，政府稍後會考慮如何改善有關條文的結構。坦白說，我是贊同footnotes的內容的，但我也沒有能力辨別有關條文的草擬方式能否體現footnotes的意思。這方面留待當局作出judgment吧。

副主席：

另外，日後通過的法例是沒有footnotes的，亦不會有人為使用者從旁解釋。在這個情況下，其他人能否明白這條法例呢？如果在沒有人從旁解釋的情況下，其他人便不能明白這條法例，便會做成很大的問題。

財經事務局副局長區璟智女士：

其實這些footnotes只是解釋有關的建議修訂吧。

主席：

我是歡迎註解42等建議的方向的，亦希望有關修訂可以體現這個方向。

對於第68、69、70及71頁，各位有沒有問題？顧先生。

秘書處助理法律顧問顧建華先生：

多謝主席。我希望討論載於第67頁的第(b)款。我所提出的可能是有關草擬的問題。第(b)款提到"...the price for dealings in securities or futures contracts..."。"dealing in securities"和"dealing in futures contracts"在附表6已作出界定，其中包括3個情況。

首先，我不肯定這條條文所訂的"the price for dealings in securities"是指甚麼，因為"the price for dealings in securities"通常是寫作"the price for securities"，而不是寫作"the price for dealings in securities"的。至於"the price for dealings in futures contracts"的寫法則或可理解，因為futures contracts本身有所謂strike price，而這些strike price跟futures contracts的市場交易價是不同的。但由於附表6已把"dealings in futures contracts"界定為3個情況，我並不認為該項定義的第(b)和(c)項適用於這條的情況。所以在草擬上，當局是否應首先考慮把securities草擬為"or the price of securities"，然後再考慮應否採用price的字眼。因為在其後的條文也有採用"the price for dealings in futures contracts"的寫法的。我相信這個草擬是指期權或期貨合約的市場交易價。我知道高級助理法律草擬專員亦明白這個情況，並可提供解釋。

高級助理法律草擬專員陳子敏女士：

我們較早前已就這個字眼進行討論。或許我們稍後再作考慮吧。

主席：

各位還有沒有問題？法律顧問。

秘書處助理法律顧問顧建華先生：

主席，我希望政府再次解釋，有關條文如何處理類似NASDAQ的市場的問題。對某些人士來說，NASDAQ是一個OTC market，是全然以莊家制度運作的市場，而不是如港交所一類的市場。另外，其後的條文如何處理莊家的問題呢？

副主席：

莊家的英文翻譯是甚麼？

Mr KAU Kin-wah, Assistant Legal Adviser:

Market maker.

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

If I have to consider that I am personally not that familiar with NASDAQ cooperate, I think that the provision is probably in my uneducated view, broad enough to cover them but perhaps we can go away and consider that and come back and give you a considered answer.

Deputy Chairman:

Yes, I think the answer should tell us not only whether it covers but how it covers.

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

Sure.

主席：

Okay，胡經昌議員、法律顧問，你們對於這條條文還有沒有問題？如果沒有，我們便可討論下一條有關Price rigging的條文。根據政府當局就公眾的comment所作的回應，有關第266(1)(a)條關於onus of proof方面，政府跟公眾的意見存有很大的分歧。政府可否解釋，這個情況是否一直以來也存在？市場的comment是"The onus of proof of intention and recklessness should be on the prosecution"，而政府當局的答覆則是"The onus of proof should remain on the defendant"。

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

Perhaps I could answer that one, Mr Chairman. As far as subclause 266(1) is concerned the types of transactions there are that really have no justifiable reason other than very exceptional circumstances. If you take the example of subclause 266(1)(a) where there is no change in beneficial ownership, no one is actually going to go into the market and trade against himself in normal circumstances. There are a few exceptional circumstances to that where a person would have an explanation. For example, there might be transactions done for tax purposes and it is considered that if you have a transaction of these types, then, because the exceptional circumstance would be easy to explain by the other party, it is one of these sorts of provisions that you can put the onus on the other party to explain those transactions and the economic reasoning.

For instance, I would not go into the market and sell 100,000 shares and immediately buy it back unless I had an ulterior motive of maybe doing this for the purpose of what the clauses is provided. There might be a reason, say, at the end of a financial year for tax reasons where you wanted to do 100,000 shares and buy it back purely to realize your profit or loss for tax purposes but, in normal circumstances, there would not be an economic reason for this type of transaction. That is why the onus is shifted onto the accused in these provisions, because it is easier for them to explain.

主席：

但這條條文實際上是怎樣運作的呢？證監會如何知道有關交易"does not involve a change in the beneficial ownership"？

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

I think in normal circumstances change in beneficial ownership is quite widely defined to include associates as well and when one looks at the market activities in cases where you have a person trading. Maybe I trade in my own name but I also ask you to assist me and because in the definition of beneficial ownership you would be an associate of mine and if you have transactions going between the two parties there is no justification for those transactions. The only motive has to be to affect the price of the share.

We have had instances where that has occurred, so I think when you have a transaction where I am buying with my associates and the whole purpose is to ramp the price of the share up, then that onus should be on them to justify why those transactions are occurring. There is no change in beneficial ownership and really have no economic motive other than affecting the price of the share.

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

Commission:

Subclause (7) on page 15 is the definition of no change in beneficial ownership.

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

It is quite widely drawn.

Hon Albert HO Chun-yan:

But in reality – may I excuse myself if the question I ask is too naïve. When somebody sells his stocks, he just sells it to a machine and to the market. He does not pinpoint to a particular person sometimes.

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

That is correct but there are some instances where, in fact, if you say, for example, you have a share that is not frequently traded, even if it is done through the automated trading system because of the volume of shares, the chance of you or your associate – if you were a manipulative activity – picking up that block of shares is very high indeed. Perhaps I can give you an example of a case where this was done. It actually was not done under this provision but it would have fallen into it. Many years ago we had someone who actually used his relatives – he actually used a 3-year-old boy's name purely to try and force the price of the share up. We had an idea what the motive was but we could not prove it. That gives you an example where the trades were going backwards and forwards between all these associates, purely for the purpose of inflating the price of the share.

There is no economic reason for this type of activity. In your example, if you want to go into the market and buy a share you do so. It is then traded into the market and it is done through the normal system. But in some of the lowly capitalized shares it is quite

possible, even through the automated trading system, for other people in your sort of group of associates to be able to go to another broker and your trade is automatically matched because there just is not that activity there. It might be for purpose – going back to the previous clause – of generating activity to get more and more people in but then, of course, this provision of no change in beneficial ownership on the automated trading system would become more difficult to achieve.

Chairman:

I do not want to say more because this already exists in clause 4.

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

Well, it is not 100 per cent the same.

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

The new clause mentions the element. The existing clause in Hong Kong law does not deem the mental element. This clause will deem the mental element as well as the physical element. Just as what the Australian provision does. The existing Hong Kong provision only deems the physical element. You will not be deemed to have the intention of doing this in Hong Kong, but in Australia you will be deemed to have strict liability as a defence.

Deputy Chairman:

Mr Chairman, this sort of drafting is very disconcerting, this whole structure, because again you do not say that you have committed market misconduct if you do the following things. You say that a kind of market misconduct has taken place if someone does

the following things. Then you do not say what happens to that somebody. You then do it in subclause (4) as a "by the way" and say that a person also by reverse, that he is not and say that a person shall not be regarded as having engaged in market misconduct. Nowhere do you say that a person has engaged in price rigging if he does certain things. It is all very loose. It is operation by juxtaposition and not by direct provision. I do not know how far you can go on doing this sort of thing. You describe a situation when you say a person is engaged in it but you do not even say a person is engaged in it. You say a person will not be regarded as having engaged in it if he can establish certain kinds of what you might call "defences". I do not know why you have chosen this way of legislating and how long that sort of thing can go on.

財經事務局副局長區璟智女士：

主席先生，正如我剛才提到，這個草擬方式是其中一個方法，而已運作十多年的《內幕交易條例》，也是採用這個草擬方式的。這條條文解釋，如果存有這條所訂的元素，有關行為便已發生。另外，在諮詢市場的過程中，專業人士或市場人士對這個草擬方式的意見也不大。他們明白這條所表達的是甚麼意思。就操控價格這方面，他們的關注反而是有關元素是甚麼。例如對於第(1)(b)款，大家的憂慮可能不是很大，因為第(1)(b)款提到，控方須要舉證，證明當事人存有intention，即動機；或當事人是"reckless as to whether..."，即罔顧後果的。大家對於這點也是沒有問題的。

主席剛才提到的市場意見，其實是針對第(1)(a)款而提出的。如果當事人進行一項交易，而有關證券或期貨合約的實際擁有權並無變動，控方怎樣舉證呢？所以我們唯有訂明，如果有關證券或期貨合約的實際擁有權並無變動，而當事人進行的交易影響有關證券或期貨合約的市價，則操控價格的行為即告發生。

但採取這個寫法，怎能令人安心呢？所以我們便在較後部分的條款，例如在第(4)款訂明，舉例來說，如果當事人能作出解釋，證明他進行

有關交易的目的，並不是造成一個虛假的現象等，該人便不會視為曾從事市場失當行為。事實上，根據證監會多年的監管經驗和海外的經驗，這類行為是很難舉證的，即為甚麼當事人不斷進行買賣，而實際擁有權並沒有變動呢？在這種情況下，當事人便要作出解釋及提供資料了。

Deputy Chairman:

I have not managed to make myself understood. I am not quarrelling with the policy. I am not quarrelling with when someone is supposed to have committed an offence. I am worried about the form of the legislation. I have to confess that when I showed this draft to some of my fellow members of the bar they are scandalized. For a quasi-criminal offence not to be defined in the active voice, not even connecting the person in clear terms, is a very difficult thing for a lawyer to accept. This is not a private document between the market and the part of the government regulating the market. This is a piece of legislation which is supposed to bind the world and, therefore, has to be acceptable and understandable by the world.

You know, looking just at clause 266, what I see is that you describe a conduct and then you do not even alert the person to it except by a kind of backhand, that he is thought to be regarded as having been engaged in it if he can establish certain things. I am just expressing – I do not know why I am unable to get myself understood but perhaps that is a malaise of the times.

For example, you can say that when someone is poisoned or killed then a murder has taken place. We do not define murder like this. If someone commits murder then he does certain things. You do not say that a murder has taken place when there is a person who does certain things. I am just concerned about the form of the legislation. You show me the Australian legislation. The Australian legislation does it in the active voice, not the passive.

財經事務局副局長區璟智女士：

我們稍後會再作研究。但我希望提出一點，市場失當行為審裁處日後的工作，首先是找出有否出現失當行為，其次是找出誰曾參與這個行為。

主席：

副局長，妳的意見跟副主席的意見是兩回事。坦白說，妳們兩者的論點也是正確的。副主席所關心的，是條文的草擬方法。但妳最終也需考慮她提出的問題，因為最終在審裁處使用有關條文的正是律師……

副主席：

主席。這不是技術上或草擬上是否妥善，或負責草擬的同事是否處理不當的問題，而是當局在制訂法例上需要符合立法標準的問題。這是最基本的要求。假定當局制訂了一些法律條文，內部人士十分清楚這些條文是甚麼意思，並已就在哪些情形下不會拘捕當事人等達成共識。若我們遇到這種情況，是否即使有關條文的草擬不夠清晰，也照樣通過這些條文呢？這是不可能的，因為我們若要通過一些法例，便要確保有關法例符合一些基本的原則。

我實在很憂慮，這些條文究竟是否距離我們的基本原則很遠。我不知道法律顧問有甚麼意見，但我卻越來越擔憂。首先，我認為制定法律是不應受時限影響的。另外，我亦希望政府不要再繼續採取這個做法，因為這個做法確實是很不安全的。

財經事務局副局長區璟智女士：

我希望副主席是過慮吧。其實在這兩年期間，我們絕對沒有跟專業人士或市場人士閉門討論。我們只是認為他們也明白這些字眼的意思吧，

其中包括香港大律師公會。陳律師希望發言。

高級助理法律草擬專員陳子敏女士：

對不起，主席。我們稍後會就副主席剛才提出的意見再作考慮。我只是希望解釋為甚麼選擇這個草擬模式。第一，根據過往的情況，內幕交易審裁處的做法，是先決定有否存在內幕交易，然後才找出誰曾參與有關內幕交易。因此，內幕交易審裁處的工作是兩方面或兩個層次的。所以我們也希望保留內幕交易審裁處過往的做法，這個做法一直以來亦行之有效。

為了達致這個目的，我們也曾參考舊有的條文。對於有關的舊有條文，正如副局長解釋，有關的寫法是先界定何謂發生內幕交易，然後才討論誰人曾參與有關交易。所以在草擬上，我們也要配合這個情況。我剛才請教負責內幕交易的同事。他表示較合適的做法是先決定有否發生內幕交易，然後才讓被告人解釋他有否意圖作出有關行為，或有否任何辯解。這便是第一點。

第二，副主席曾提及有關刑事的問題。在這方面，我們確保會以當事人的情況界定有關條文。因為我們無需受到內幕交易審裁處的做法所影響，所以我們便可直接訂明，某人在甚麼情況下會視為犯罪，以及他可以甚麼作為辯解。這是較為直接的草擬方式。所以，對於這兩方面，我們所需考慮的問題是有所不同的，亦要配合內幕交易審裁處的做法。希望議員可瞭解我們在考慮時所採取的方向。無論如何，我們稍後也會就這個問題再作考慮的。

副主席：

主席，我希望就內幕交易的情況與刑事罪行的不同之處，多提出一點。例如，在一宗謀殺案件的審訊過程中，控方在陳述證據時，亦須先證

明已發生有關罪案。如果他無法證明有關罪案已經發生，何需討論甚麼人觸犯這項罪行呢？所以，即使是刑事法庭，控方亦要清楚指出，在某年某月某日，某人被發現在某地方處於某種狀態等。換句話說，控方也要指明罪案已經發生，並指出corpus delicti，即他必須具有證據，證明有關事情已經發生，才可表示有關人與已發生的罪案有關。

所以，內幕交易的形式並不是很獨特的。而訂明審裁處如何處理內幕交易案件的條文，亦須要採用有關刑事罪行的條文的草擬方式。今天我不會就這個問題繼續追問，但我實在希望各位可再作考慮。多謝主席。

財經事務局副局長區璟智女士：

我們討論第XIV部時，便會發現該部所採用的寫法是有些不同的了。

主席：

余若薇議員。

余若薇議員：

主席，我希望就第266條有關舉證責任方面提問。根據第266(4)款，部分的舉證責任在被告。他要證實他進行有關交易的目的。有關條文的英文本是"...if he establishes that the purpose..."。第266(1)(b)條提到，須證明被告作出有關行為時，是"……with the intention that..."或"...reckless as to whether..."。據我的理解，這些意圖是由控方證明的。換句話說，第(1)(a)和(1)(b)款提到的事實，包括這些意圖，是須由控方證明的，對嗎？

主席：

Sorry，第(1)(b)款所提到的事實，是須由控方證明的，但第(1)(a)款……

財經事務局副局長區璟智女士：

控方也要講述第(1)(a)款所提到的事實。

主席：

第(1)(a)款的意思是控方須證實有關事實，而第(1)(b)款的意思是控方須證實有關事實及動機。

余若薇議員：

沒錯，正是動機的問題。換句話說，第(1)(b)款所訂的intention，也須由控方證實的。我的問題是，如果根據第(1)(b)款，控方須證實當事人的意圖，第266(4)條是否只關乎第(1)(a)款，而與第(1)(b)款無關呢？

財經事務局副局長區璟智女士：

我相信情況應該是這樣。

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

The intention is that if the prosecution is required as a matter of affirmative law and evidence to establish the mental element under subclause (b), there is no need for a reverse onus defence for the defendant to establish, in effect, a purpose or that they go negative mens rae, if you like, although that term is not applicable here as it is civil. They will still obviously have an evidentiary burden that they may wish to discharge but certainly there is no

legal burden on them to prove any innocent mental purpose.

余若薇議員：

主席，另一個問題是第266(3)條指出控方須證明當事人的意圖，但又指出有關意圖屬"not conclusive"。這是甚麼意思呢？

財經事務局副局長區璟智女士：

其實我們是嘗試以這條條文保障被告，有關罪行是civil罪行，所以有關人不可稱為被告。對於一些如期權等市場交易來說，稍後Eugene或許可為我解釋，在進行買賣時，各方已就行使價達成協議。由於這類情況可能會受到有關條文管限，所以我們便嘗試在這條條文訂明有關情況。

余若薇議員：

但是我不明白，如果第(1)(b)款已訂明，有關意圖是證明存有操控價格行為的其中一項要求，即it is a prerequisite to price rigging, but then in subclause (3), you said it is not conclusive. Then what is the point of putting the intention there as a requirement?

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

The purpose of subclause 3 is to say that merely the fact of an agreement has effect according to its legal terms, which are obviously intended by the parties because they agree those terms, does not necessarily mean that, in effect, it is not a sham or fictitious or artificial transaction.

Hon Audrey EU Yuet-mee, SC, JP:

Sorry. I am still not following.

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

A transaction may be sham or artificial even though it would have effect according to its intended terms. The terms might be quite legitimate but the purpose for which it has been entered into is artificial or fictitious so as to achieve a manipulative effect in terms of price rigging. The fact that an agreement has operation according purely to its legal terms without any subterfuge in terms of breaching those terms or perverting them is not determinative of whether somebody's intention is such to manipulate the market through a fictitious or artificial transaction.

Hon Audrey EU Yuet-mee, SC, JP:

I see. I follow now when you are saying. When you say, "intended to have effect according to its terms", you mean the conceptional terms of the agreement.

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

Yes. That's correct.

主席：

考慮到公眾提出的comments，當局會否在第(4)款較清楚地訂明何為"for the purpose of subsection (1)(a)"呢？

主席：

第(1)(a)和(2)(a)款，對嗎？總而言之，控方與當事人各須承擔一半的舉證負任。Okay，法律顧問。

秘書處助理法律顧問顧建華先生：

我希望政府解釋，為何第(1)(a)、(2)(a)和(4)款在提及不涉及實際擁有權的轉變時，只提及證券，而沒有提及有關期貨合約的情況。

財經事務局副局長區璟智女士：

由於Paul在這方面較有經驗，我請Paul作出解釋。

Chairman:

Mr BAILEY.

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

I think with futures you cannot actually do it because it is what is called novation where you have – I think it is the clearing corporation – the contract has to go through the system and you cannot have two transactions by two parties that can connect together because they are actually concluded on each side of the transaction. It is quite difficult to explain. Eugene, can you explain?

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

It is difficult to explain. In effect, once you sell, if you like, or dispose of a futures contract, the person on the other end of that transaction is not getting the same futures

contract. They are getting a new contract with exactly matching terms. That is a new contract with a clearing house. When I dispose of a futures contract, the futures clearing house takes out, in effect – this is a very rough summation of what occurs – a contract with exactly opposite an opposing characteristic that cancels the first transaction and that is called a "novation" and when another person acquires that futures contract, there is, again, the creation of a new futures contract between that person and the clearing house.

So there is not the terms of the continuity of the single instrument in which you can have a beneficial interest. There is, in fact, the creation of an entirely new bundle of contractual terms and a new legal instrument, in effect.

主席：

我們接着是討論第267條 —— Disclosure of information about prohibited transactions。對於這條，公眾沒有提出那麼多comments。如果各位沒有問題，我們接着是討論第268條。

對於第268條，我希望提醒各位，我們在今年5月16日的會議上曾建議去信新聞界，邀請他們就第268和290條提供意見。香港華文報業協會、香港新聞工作者聯會有限公司、香港記者協會及香港新聞行政人員協會均獲邀提供意見。他們的意見書分別是立法會CB(1)1403/00-01、CB(1)1603/00-01、CB(1)1827/00-01和CB(1)1874/00-01號文件。立法會CB(1)2016/00-01(01)號文件第17和18頁大致上已撮述有關意見，即各位可以參考載於有關政府當局就公眾的comment所作回應的文件。

一般而言，有關機構的人士提出了以下意見：他們均認為這兩條條文會對新聞界的工作造成負面影響。They are opposed to imposing criminal liability for the offence. There are concerns about whether the provisions are consistent with the relevant articles of the HK Bill of Rights Ordinance and those in the International Covenant of Civil and Political Rights (ICCPR) as

well as about the broad scope of the provisions. 新聞工作者亦希望當局能在第290條為他們提供豁免。Okay，這部分涉及較重大的改動，請政府就有關改動作簡單介紹。

財經事務局副局長區璟智女士：

主席，由於並不是每位議員也曾參與上次的討論，請容許我以兩、三分鐘，歸納政府在這幾個月來接獲的意見。對於大家就民事和刑事的雙軌制度進行的討論，我的理解是，大家認為，有關發放虛假資料以誘使其他人進行買賣或使價格變動的民事安排，問題不大。但大家認為有關的刑事安排則存有問題，尤其是有關條文就刑事安排方面所訂的3個不同的意圖標準，包括明知故犯、罔顧後果及疏忽行事。對於疏忽行事，我們當時也曾解釋有關的背景。其後，大家也建議徵詢傳媒機構的意見。

事實上，我們和傳媒界一直以來也保持聯絡。我們的印象是他們對有關的民事安排意見不大。亦認為作為專業的行業，傳媒也不應疏忽地報道事實的真相。疏忽的標準是根據有關業界在當時的情況下應遵守的守則而釐定的。但對於刑事安排方面，他們確實存有憂慮。

或許讓我向各位提供我們當時曾提出的背景資料，供各位參考。在草擬這條條款時，我們曾參考外國的經驗。我們最後決定參照澳洲的有關法例進行草擬，因為正如剛才Eugene提到，有關法例在澳洲已運作十多年，因而有先例可援。但在諮詢過程中，我們曾進行一項很重要的修訂，把大部分的舉證責任從辯方轉移至控方。各位也可參考這點。

至於人權法跟ICCPR有否抵觸方面，我們也曾很深入研究，而答案是沒有的。另外，在討論時，大家亦認為有關的民事安排並無不妥。但大家亦要求政府考慮，應否在刑事安排方面加入有關疏忽的元素。

我們也曾就這方面進行一些研究。香港法例亦存有把疏忽行為或有

關人不遵守行內的行事標準刑事化的情況。應否把這些情況刑事化的主要考慮因素是：第一，就我們現時的情況來說，有關行為對投資大眾的影響是否很深遠。第二，以虛假消息誤導投資者的行為，對香港作為國際金融中心的形象會否造成很大的打擊。第三個考慮是負責向投資大眾發放有關訊息的當事人有否方法和能力採取措施，以核實有關資料。希望各位再次考慮這三方面的問題，因為這些問題也是我們考慮是否把有關行為刑事化的重要因素。

另外，我們也曾就釋除市場的疑慮方面考慮不同的方案。事實上，引進這條條款的背景，是基於市場、傳媒和立法會不斷提出不同的意見，表示有必要提升上市公司，尤其是公司董事、公司的高層人員及公司的大股東等向公眾發放的資料的質素及準確度。這也是市場人士目前所咎病的問題。所以市場人士要求政府在今次改革時嘗試糾正這個現象。這便是制定有關條款的背景。

所以，這些條文所針對的，是剛才我提及的幾類人士，但在草擬條文時，實在難以指明這些人士。所以我們在參考澳洲、美國及英國的做法後，嘗試在有關條文訂明有關的行為。但採取這個草擬方式後，其他行業便可能會存有憂慮，因為他們在日常工作中可能涉及發放資料的情況。為了釋除他們的疑慮，我們便以豁免的形式，使作為發放資料渠道的人士不會觸犯有關法例。這便是制定有關條款的背景。

主席：

Okay，各位是否沒有問題？

副主席：

不知當局在草擬有關條款後，有沒有機會把這個擬本提供給關注這個問題的人士參考？

財經事務局副局長區璟智女士：

事實上，有關人士並不是很憂慮現在的草擬方式，因為我們一直以來亦有跟他們討論有關方式。大家憂慮的問題反而是有否能力在進行日常的專業工作時，遵守有關的專業守則。萬一他們有所疏忽，他們應怎麼辦呢？我相信這便是他們的憂慮。

副主席：

主席，很多人曾經閱讀條例草案原來的擬本，並表示有所擔憂。而政府現時已因應他們的意見作出改動。在作出改動後，政府有否把最新擬本提供給同一批人參閱呢？他們有沒有機會閱讀這個新擬本呢？

財經事務局副局長區璟智女士：

有關人士在白紙條例草案於去年4月出版時所表達的憂慮最為嚴重。當時大家最大的爭議點是應由誰人承擔舉證的責任。當藍紙條例草案出版後，我相信大部分曾就這方面發表意見的人士已可釋疑，因為我們把大部分的舉證責任放在證監會身上。我們後來跟市場人士討論的內容，反而是應怎樣草擬有關發放資料渠道的細節。

副主席：

換句話說，政府並沒有讓傳媒等人士參閱條例草案這個擬本，對嗎？

財經事務局副局長區璟智女士：

傳媒人士曾閱讀藍紙條例草案。

副主席：

主席，你剛才提到很多人曾表示憂慮的問題，是否關乎白紙條例草案？

主席：

是藍紙條例草案。現時的問題涉及兩類人士，一類是市場人士，另一類是傳播媒介。我相信有關市場人士的憂慮，現時已是差不多完全釋除。現時的問題是有關媒介的憂慮。我們向他們提供的是藍紙條例草案。他們有否參閱現時的修訂稿呢？

財經事務局副局長區璟智女士：

即使他們曾經參閱藍紙條例草案的修訂稿，也未必能解決他們整體的憂慮。這份修訂稿的目的，其實是針對市場人士的憂慮，使有關渠道的草擬方式較為清晰。現在我們已就這方面更清晰地訂明。以廣播公司為例，現時的草擬本不但涵蓋公司的老闆及高層人員，亦涵蓋每名職員。

副主席：

主席，既然我們沒有向這批人提供條例草案的修訂稿，而他們也曾向法案委員會發表意見，我們大可再向他們提供修訂稿，對嗎？

主席：

可以的。

財經事務局副局長區璟智女士：

主席剛才的意見是正確的。我相信傳媒機構並不會滿意於僅豁免有關渠道，而是要求整個傳媒行業獲得豁免。我曾閱讀傳媒機構的人士向法案委員會提交的意見書，他們確實曾提出這個意見。

主席：

這些機構是希望置身於刑事責任以外。

財經事務局副局長區璟智女士：

對。

副主席：

我認為沒有理由不讓傳媒人士參閱這份修訂稿，因為他們曾就藍紙條例草案提出意見。

主席：

好的，關乎媒介的問題確實是較為敏感的。

財經事務局副局長區璟智女士：

正如主席所說，我的意思正是這個修訂也不能解決他們的憂慮。

主席：

各位是否同意向媒介提供這份修訂稿？我相信這個做法是沒有問題的。我們可特別highlight第268和290條。但第290條是我們尚未討論的，

或許我們要稍後才可討論這條吧。

副主席：

事實上，我不怎明白第268條現時的擬本。

主席：

我們去信媒介，alert他們我們已作出這項修訂，看看他們有否further comment，好嗎？

財經事務局副局長區璟智女士：

他們的主要憂慮是有關刑事安排的問題，對於民事安排，他們的意見不大。

副主席：

我希望就一些字眼的解釋提問。

Chairman:

Which page?

副主席：

例如在第81頁……

I think we have to start reading from page 78 where we see the beginning of the subclause, about a person not being regarded as having engaged in market misconduct.

Then on page 81 it says that if the disclosure has taken place by reason only of the issue or the production of information – what is the meaning of, "by reason only of"?

財經事務局副局長區璟智女士：

請陳律師解釋。

高級助理法律草擬專員陳子敏女士：

對於這些字眼的解釋方面，其實這款的用意是訂明，如果有關人作出其他行為，而該行為同時亦等同於一個disclosure的行為，他便不可以以下的條文作為辯解。換句話說，如果有關人只是因他曾issue或reproduce information而引致他作出disclosure的行為，而他亦可符合第(a)、(b)、(c)及(d)款所訂的要求，他便可建立他的辯解。換句話說，他不可同時作出其他disclosure的行為，並以這款作為他的辯解。這個"by reason of"的字眼，是很多辯解條文也會採用的。這部分最主要是指出當事人只是作出有關行為，而沒有同時作出其他等同於disclosure的行為。

Deputy Chairman:

I notice that you have used the same phrase in a number of cases but you say that when something has happened "by reason of", it has two meanings. One meaning is that this was what caused it and, secondly, this is the channel through which it is done. I do not take the meaning that the disclosure – what constituted the disclosure was issuing and reproducing information. What constituted the disclosure is only the issue and reproduction of information, which is what you seem to be telling me and when you say something had happened by reason or there is a disclosure – disclosure is a fact.

"By reason of" does not really suggest that the same thing can be – is it possible to rethink the use of this term? It is neither my case nor the function of this committee to

suggest how something should be done but I just hope the Administration would consider that. "By reason of" is repeated in a number places. For example, on page 83 in subclause (3), "disclosure has taken place by reason of retransmission of" – I must confess that I could not read (a). Perhaps that is perfectly obvious to others but I read it about 10 times and I could not understand it.

財經事務局副局長區璟智女士：

我們稍後再作研究吧。

主席：

余若薇議員。

余若薇議員：

主席，我相信問題是，正如副主席經常提到，這款開始的部分的寫法是"Disclosure of false or misleading information inducing transactions takes place when, in Hong Kong or elsewhere, a person discloses,..."，接着是"(a) to induce another person..."，然後在較後部分是"if – (ii) the person knows that, ..."。在一般情況下，如果在同一句內提到兩個persons，包括"a person discloses..."和"induces another person"，在提到第二個person，即"the person knows that,..."時，亦會說明所指的是哪一個person的.....

副主席：

妳是指哪頁？

余若薇議員：

第78頁。

副主席：

謝謝。

Hon Audrey EU Yuet-mee, SC, JP:

Maybe I should use English. It is probably easier. At page 78, the third line, when you say, "disclosure takes place when a person discloses (a) to induce another person", so the subclause refers to two persons. Then when you move on to after midway in the page, you will see "If (ii) the person knows that." Generally when you have a subclause which refers to more than one person then the next time when you refer to the person you make it clear whether you are referring to the first person or the second person but, in this case, I guess the meaning is quite clear so the fact that you do not adopt it probably it is clear enough in the context but my difficulty is that in (ii) this is the requirement, that you must have the person aware or the person is reckless or the person is negligent. It is only when the person knows – in other words, when the false information takes place – if a person does not know this does not take place.

Then if you look at subclause (2) which is really the exclusion, you say, "A person shall not be regarded as having engaged in market misconduct by reason of disclosure of false or misleading information, inducing a transaction, if" – and then we go to page 81 – "the disclosure has taken place by reason only of the issue or reproduction of the information and he establishes that." Then at page 82 you say, "(d), at the time of the issue or reproduction, he did not know that it was false." My reading and my difficulty is that if you start off by saying, "This only takes place if the person knows that", then you have the exclusion and say, "The person is exempted if he does not know that", then it does not take place in the first place. That is the difficulty when I read it. I do not know whether I misunderstood.

Deputy Chairman:

You have the advantage of me. I thought you might have misunderstood, I just thought that I did not understand.

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

Perhaps I can answer the honourable member's question. One is, as you correctly say, through the operation of subclause (2) an offence or a civil wrong requiring a mental element of knowledge, recklessness or negligence. Subclauses (2), (3) and (4) are defences which, in effect, are strict defences only. Do they exclude somebody who has knowledge through the operation of provisions like the one you referred to in subclause (2)(d). If subclause (2)(d) was not there, a person would have the benefit of a defence because they belong to a certain occupational category and engage in a certain type of activity associated with that occupational category. For instance, you are a printer and you have disseminated the information in the course of printing. If subclause (2)(d) did not exist, even if you knew that the information was false or misleading and you printed it anyway, you would have a defence in effect purely because you are a printer and you printed this information. Subclause (2)(d) is necessary to remove printers who do have knowledge from the scope of that defence.

Hon Audrey EU Yuet-mee, SC, JP:

Can you first answer this question? In subclause (1) in the third line, you see, "a person discloses circulated disseminates… " Let us call him "Person A". Then when you look at subclause (2) you say a person shall not be regarded as" and then "if" and then you go to subclause (2)(d) "at the time of the issue or the reproduction he did not know." Now, is that Person A?

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

Yes.

Hon Audrey EU Yuet-mee, SC, JP:

Then my difficulty is that, in subclause (1) you say this only takes place if a person knows something but in subclause (2) you say that this person is not regarded as having engaged in this conduct and, therefore, this has not taken place if he does not know. Is that not odd? How can, under subclause (1) something has taken place if person A does not know?

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

The person might perhaps be negligent and subclause (2) give somebody strict defence. That's to say, "Well, if you do know, you will not have that defence." Or, alternatively, recklessness. I can see what you are getting at and this was, in fact, discussed, I think, between us and the Director of Public Prosecutions in the context of the criminal provisions. I cannot presently honestly recall what the content of that discussion was but we did analyze it. Perhaps if we could go away and rethink and produce the same explanation to you that we produced to the Director or Public Prosecutions. It is a little bit complex and it does seem certainly on the face of it, I do admit, but there is a sensible reason why it was structured this way. It is a little bit difficult to grasp and if we can perhaps take the leisure of explaining it to members in writing so they have the benefit of considering and see whether they agree with us on that.

Hon Audrey EU Yuet-mee, SC, JP:

I must say, when I first read it, I thought maybe what you were trying to say is that a misconduct takes place when person A does something and then person B does not commit the misconduct if he proves that he did not know but that is not your intention. You intend to refer to the same person but then, if that is right, then under subclause (1) you do also say that the misconduct takes place when somebody knows and in subclause (2) you say he is exempted if he does not know. That is my difficulty.

財經事務局副局長區璟智女士：

請甄律師解釋。

高級政府律師甄文蕙女士：

我們當時的想法是如果我們要證明有關人有罪，便要證明他存有3個意圖的其中一個，第一是他知道有關行為是披露虛假或具誤導性的資料以誘使進行交易的行為，第二是他罔顧後果地作出該等行為；第三是他因疏忽而作出該等行為。然後，subclause (2)訂明，如果有關人是一個printer，而他知道有關行為是錯的，subclause (2)的defence便不適用。但如果有關人是一個printer，而他因罔顧後果或疏忽而作出該等行為，他仍然可establish subclause (2)的defence。至於他是罔顧後果或疏忽，便要由控方證明了。

余若薇議員：

對不起，我仍然不明白有關重疊的問題。第(1)款指有關人知道有關行為是misconduct，但第(2)款則指他不知道。第(2)款所訂的是"he did not know"，但第(1)款卻訂有"the person knows"的字眼。為甚麼要兩次提到"know"呢？為甚麼不乾脆撇除"know"的字眼？為甚麼不採用"the person is negligent"的寫法呢？我不明白為甚麼"know"的字眼會出現兩次，一次是有關人會視為犯罪；而另一次是有關人不會視為犯罪。

曾鈺成議員：

主席。

主席：

曾鈺成議員。

曾鈺成議員：

主席，我的理解是第(2)款所訂的defence是available to printer的。換句話說，如果有關printer符合第(2)款所訂的第(a)、(b)和(c)項，但亦同時知道有關行為是失當行為，他亦會視為犯罪。如果有關printer只是reckless or negligent，他便不會視為犯罪。如果有關人不是printer這類人士，這3種犯罪意圖也是適用的。

財經事務局副局長區璟智女士：

對。

副主席：

不是這樣吧。

主席：

有人同意，有人不同意，你可否再解釋一遍？

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

If somebody have direct knowledge that what they are printing and disseminating on behalf of another is false or misleading they should refrain from that activity because they will know the consequences of their action and that information. However, if they were subject to a mental element of recklessness or negligence, it puts on them a duty which they cannot, because of their occupational category, really be expected to discharge – of looking at information, asking questions and verifying it, if necessary, and that, because of their occupational category as printers or publishers or whatever, as a pure conduit for information is an onerous one to impose upon them and inappropriate from a policy perspective. Thank you.

Deputy Chairman:

Mr Chairman, this just illustrates how very unsatisfactory this form of provision is because it is not readily clear from the legislation what you are getting at. It requires a sort of piecing together. This is not a piece of legislation. This is a piece of algebra. You have to fit all the blocks together and then you work out and this is by hands. What really the symbolic logic is, Mr TSANG？You have this piece and you have the intersection and it is only at the intersection that you are in trouble and out of the intersection you exclude a set within the intersection. This way of legislation is very tough on the public.

Hon Audrey EU Yuet-mee, SC, JP:

I think all lawyers like them. That is why lawyers make money.

Chairman:

That is why lawyers do not understand the legislation.

Deputy Chairman:

It is very unfair.

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

I am not saying that for defence but I really want to point out that clause 268 does indeed intend to cover a wide range of scenarios. That is why it is structured in such a way and I remember the provision in the original White Bill did not have the mental element as expressly provided as in the Blue Bill so that structure is relatively simpler because the sort of key phrase there is whether that sort of information could or is likely to affect the price in the stock but the market was then feeling uncomfortable. They want to see this clearly provided in the law. That is why we have used the concept of knowingly, recklessly and negligently perhaps to assure them that the prosecution – or, in the context of MMP, the presenting officer – must provide evidence to demonstrate the mental element in each and every case.

However, having said that, we are still feeling that we owe something to those people who are acting as conduits in disseminating information. That is why we go to great trouble in drafting subclause (2), to assure these conduits that it will be safe. That is why the clause becomes a bit – you know, very complicated.

Deputy Chairman:

Mr Chairman, I am not finding fault with the secretary or the drafting team or anybody. I think, given the history, this is a miracle of dutifulness and listening to public opinion. Everybody should receive a medal. However, if this is a miracle given the history, in fairness to the public, the public does not want to know the history. The public is left with a piece of legislation and the courts are left with a piece of legislation which they have to construe so no matter how we are justified by history, we still have to look at the end product and see how far the end product is from a satisfactory piece of legislation. This is what I am getting at. Whatever I say really has nothing – please do not take this personally. I do not

intend to blame anyone. I understand the history and so on. It is just that, if we could improve on the product – I have great difficulty with the product.

主席：

胡經昌議員。

胡經昌議員：

我對於中文本和英文本的字眼，有兩個問題。根據甄律師剛才的解釋，negligent是一個疏忽的行為，但這條中文本所採用的字眼是"忽視"。我不肯定這個字眼是否正確，但根據中文的用法，"疏忽"和"忽視"是兩回事，"忽視"似乎是較接近"ignore"的意思。我並不是咬文嚼字，但我實在想不通因何當局要採用"忽視"這個字眼。根據甄律師剛才的解釋，其實這部分所指的是"疏忽"。"疏忽"是較為貼切的字眼，但我不知道政府過往……

主席：

在法律用語上，"疏忽"和"忽視"的意思是否一樣？

財經事務局副局長區璟智女士：

我們請林律師解釋。

主席：

就中文的理解方面，我跟胡經昌議員有所不同。雖然我不知有關法律用語的情況，但"忽視"似乎是指有關人對情況略知一二，並存有輕視的意思，而"疏忽"是指有關人對事情完全不知道，即毫不知情。

胡經昌議員：

我的理解是"疏忽"的意思較接近"ignore"的意思。

主席：

是的。"忽視"的意思似乎是有關人知道某些事情，但不加理會。

副主席：

作出"疏忽"行為的人是有錯的，但因"忽視"而作出某些行為的人可能有錯，亦可能沒有錯。

財經事務局副局長區璟智女士：

似乎林律師需要就這方面請教法律草擬專員的意見。

主席：

我們對"negligent"的理解是"不小心"，或"毫不知情"。

財經事務局副局長區璟智女士：

我們在解釋有關條文時也是採用"疏忽"的字眼的。我們剛才也是採用"疏忽"的字眼的。

主席：

好的。我希望作出最大的貢獻：我們休息15分鐘。

胡經昌議員：

主席，讓我先提出這個問題，可以嗎？

主席：

可以。

胡經昌議員：

我希望就第268條向政府提問。這條條文提到有關人作出誘使他人進行交易的行為時，並沒有劃分他在哪裏進行有關行為。這條條文的有關部分訂明，"如任何人在以下情況下在香港或其他地方……"。我認為採用"以外地方"較採用"其他地方"的字眼為佳。在過往兩天，證監會執行董事曾接到一些試圖誘使他購買股票的電話。我認為這是很嚴重的問題，因為該人不是誘使他購買香港的股票，而似乎是誘使他購買美國的股票。

假設該人是持牌經紀，如果他不是持牌經紀，他的行為當然是不合法的。但若該人是持牌人，我的問題是這些人是否受到有關條文管限。因為現時這條條款提到，有關人在香港或其他地方誘使他人進行涉及香港股票的交易。從另一角度來看，究竟這條條例涵蓋哪些人呢？我們暫且不理會有關資料是否虛假資料吧，但這次事件實在是涉及虛假資料。如果有關人以虛假資料在美國推銷香港的股票，他會否納入這條條款的管限範圍呢？我不知道這條條款所管限的是哪類人。實在事有湊巧，該人竟然在太帥頭上動土，試圖以虛假資料誘使證監會執行董事進行交易。所以我希望瞭解，這條條款的目的究竟是管限哪些人。

財經事務局副局長區璟智女士：

有關的政策目標是很清晰的，無論有關行為是在香港或香港以外地

方進行，只要該人是以香港的投資者為目標，便會納入這條條款的範圍。當然，如果有關行為在海外發生，在執行上便會有一定的難度。至於能否執行這條條款，很大程度上取決於證監會和海外的有關監管機構能否緊密合作。現時證監會已在一定程度上與有關的海外機構互相合作。證監會亦已跟海外的監管機構簽訂多份諒解備忘錄，以方便雙方在進行類似的執行工作上互相幫助。這便是有關的政策目標。我們明白證監會在執行上會遇到一定的制肘，但我們亦不得不採取這個草擬方式，因為如果不採用這個草擬方式，可能很多人便會誤會，如果他們在海外誘使香港的投資者進行交易，政府便拿他們沒有辦法。

胡經昌議員：

主席，我希望就剛才的問題再作補充。對於overseas market的問題，我相信我們的目標是一致的，問題只是如何才能在這方面做得較好吧。條例草案訂有有關overseas market的條款，但證監會實際上卻沒有權力執行有關條款，使有關條款形同虛設，這會否產生問題呢？就overseas market方面，當局可否較清楚地訂明有關條文所指的究竟是哪類overseas market，以免令人產生錯覺。

財經事務局副局長區璟智女士：

我們在討論以下的條文時，可就境外活動的問題，抽出有關條款，讓各位參考我們嘗試以甚麼方法規管這些境外活動。

主席：

那麼請妳們稍為留步，再作討論，好嗎？我們現在休息10分鐘，於10時45分繼續討論。

(上午10時35分會議暫停)

(上午10時45分會議恢復)

主席：

各位同事，我們繼續討論第268條，Page 82及83。藍紙條例草案的效用已經不太，請各位參考條例草案的修訂稿吧。胡經昌議員。

胡經昌議員：

主席，我剛才曾提出問題，當局只是就問題的第一個部分作出回應。問題的另一個部分是，就我剛才提及有關Mr BAILEY接到電話的個案，這條條款可否涵蓋那類人呢？或有關條款究竟是涵蓋哪些人呢？

主席：

但副局長已就這部分作出回應。她的意思是若任何人作出的有關行為，是以香港的投資者為目標，便會納入有關條款的範圍。另外，她的回答是，若在海外進行的活動是以本地的投資者為目標，即使在執行上較為困難，但也是當局的規管目標之一。所以，雖然在執行上較為困難，但並不表示這些活動不包括在條例的涵蓋範圍。

胡經昌議員：

主席，條例草案訂有有關海外市場的條款，但在實際執行上當局可採取甚麼行動。

主席：

你是否建議不在條例草案內訂明這些情況？

胡經昌議員：

不是。我的意思是建議當局使有關條款較為清晰，以免令人產生錯覺，認為我們對於這些情況也是無可奈何的。我剛才與Mr BAILEY談及這個問題時，他表示那人是從日本打電話給他的。

財經事務局副局長區璟智女士：

我明白胡經昌議員的意思。第268條第(1)款第2行訂明"in Hong Kong or elsewhere..."或"在香港或其他地方"的字眼。採用這個草擬方式的目的，是嘗試把在香港以外地方發生的有關行為，也納入這條條例草案的涵蓋範圍。另外，至於剛才胡議員提出，如果該產品不是香港產品的問題，或許請Paul向大家解釋我們的處理方法。

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

The situation here is that the definition of "securities" is pretty wide, so if a person from overseas, as in the case you referred to yesterday, where someone telephoned me from Japan, trying to sell me some stock, would in fact be caught. I think the main problem is that one has to look into the future on this. At the moment there are restrictions on how you can actually enforce this. As the different MOUs and investigative arrangements develop, one would hope that in the future it becomes a lot better.

It is difficult at this point in time if someone contacted me, as in the case you are referring to, and we put out a press announcement, to really do anything about it, because they are outside the jurisdiction; but if there are in some jurisdictions we certainly have arrangements where hopefully we an do something against them. It might not be directly, but we could possibly refer it to that jurisdiction, saying it is a breach of our law, "and because this is a breach of your law, can you see if you can do anything in your jurisdiction?"

I think one of the reasons why you are looking at this type of transaction, where conduct occurs in an overseas jurisdiction, is this: I have been in enforcement, as you know, for a long time, and with occurrences in the last few years we are getting more and more reciprocal arrangements, and arrangements whereby you can have overseas investigatory assistance and vice versa. I think the developments in this type of enforcement activity will only go one way. There will be more and more international enforcement. I think one has to cater for that, and even though enforcement at this point in time may be difficult, I will not be here, but maybe in 10 years' time it will be a different ball game altogether.

I think you can see, even with the events that happened in the United States on the 11th of September, that there seems to be a general thrust now towards international cooperations on illegal activity, whatever it might be. This has certainly been the thrust in the enforcement area in securities and futures regulation, and I personally think it will go only one way. So I think even though at the moment there are difficulties, one has to recognize this in the law today, to cater for the future.

主席：

余若薇議員。

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I am sorry. I still cannot resolve my difficulty with clause 268. If you say case 1, which I understand applied to many different kinds of persons, then subclause (1) refers to a disclosure. Do you mean that person's disclosure? Then when you come to subclause (2), which is the exclusion, when you say "a person", it does not necessarily refer to the same person. It can be, as you said, the printer.

Then you go on to say: "If the disclosure has taken place by reason only of...", then what disclosure are you referring to? Are you referring to the disclosure by the printer

or are you referring to disclosure by, say, the company director? "The disclosure has taken place by reason only of...". Whose disclosure are you referring to? Therefore if you read subclauses (1) and (2) as referring to different persons, and disclosure by different persons, then I have a problem with the words "The disclosure has taken place by reason only of the issue of production..."; if you say "No", then we have to read subclauses (1) and (2) together to refer to the same person, if they refer to the printer, for example. Then my difficulty is the overlap, because in subclause (1) you clearly require the printer to know. Then in subclause (2) you say there is an exemption if the printer does not know. It is absurd to make it a requirement of the law to say the printer must know, and then to say: "Well, in fact if it hasn't taken place, if misconduct hasn't taken place, even if the disclosure is such-and-such, and he did not know..."

It is my difficulty. I am not quite sure. It seems to be trying to do too many things at the same time. Maybe one of the reasons is the passive way in which it is written. You are never clear when it says "a person". Who are you referring to?

財經事務局副局長區璟智女士：

我請林太或Eugene回應。

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

If I can answer the Member's question, in relation to subclause (1) I think there could be several people involved in a disclosure, and it applies not only to a person who discloses, but also to a person who authorized, or is concerned in, a disclosure which may be by another party; and in relation to each of those persons involved in a disclosure, you must adamantly consider the application of one in relation to each of them. Are they a person who made a disclosure? Or alternatively are they a person concerned in, or who has authorized the disclosure by another?

When you come to subclause (2), that is a blanket defence, and I can only really return to what I said earlier. I apologize if I am restating my previous point. Subclause (2) is a strict defence for persons of a category. A publisher, for instance, might be involved in a disclosure by a listed corporation, in that they are concerned in it, or alternatively you may take the act of publication by a publisher or printer to the listed company as being a disclosure, in and of itself, even if there is a subsequent further disclosure by that listed corporation to the outside world and its shareholders, and the market generally.

I think because of the broad nature of the drafting of subclause (1), if you were to look at it as a prosecutor or alternatively even as an investigator or a defence lawyer, you would have to consider its application to each person involved in the facts and circumstances. Obviously that raises some complexities, but that is more arising out of, I think, the breadth of subclause (1) and the complex fact situations that you might encompass.

Hon Audrey EU Yuet-mee, SC, JP:

I have no difficulty with what Eugene is explaining. I understand the purpose of the objective. I have no difficulty following that. My difficulty is with the logic in the way it is drafted, that when you talk about "a person", and if you refer to different persons, then you cannot have the disclosure "by reason of..." because you are talking about different disclosures.

Then if you are talking about the same person, let us say in subclause (1) the printer, and in (2) you are also talking about the printer, then you cannot have in subclause (1) a misconduct taking place when the printer knows, and then in subclause (2) say "Well, misconduct hasn't taken place because the printer didn't know". It is the logic in the drafting that I find difficulty with. Eugene keeps telling me the purpose and the objective, and I understand that. Honourable TSANG Yok-sing has also referred to it, and I understand that too. My difficulty is how to read this section. It is in the drafting, not with

what it is trying to do.

Chairman:

Wait a minute. May I ask Honourable TSANG Yuk-sing first?

Hon Jasper TSANG Yok-sing, JP:

Can I suggest that the disclosure of false information knowingly – the case of disclosure knowingly – be dealt with separately from the other cases? If you disclose false information knowingly, then none of the defences are available to you, no matter to which category of people you belong. The defences in the subsequent subclauses are only available when it is a case of recklessness or negligence. Is this the case?

Disclosure of false information where the person knows the information is false, means you are trapped. This is whether you are a printer, a broadcaster or any other of the categories defined there. But if you are reckless or negligent in the disclosure, then the defence is available. Would that solve the problem?

高級助理法律草擬專員陳子敏女士：

我希望提出一點。其實對於這個問題，我們也曾作出討論。議員或許可參考第85頁。我們希望交代的，是某些其他人士除了可表示他們不知道有關資料是虛假或具誤導性資料外，這些人士亦可表示他們知道有關資料是虛假或具誤導性資料，而他們已採取所需的步驟。在這兩個情況下，他們亦是可以免責的。因此，在條文中刪除當事人不知情的情形，是不可行的做法，因為在某些情況下，即使當事人知道有關資料是虛假或具誤導性資料，他也是可以免責的。所以我們需要再研究，應怎樣處理這種情況。我只是暫時提出這點而已，但其中一些免責辯護是較為複雜的。即使當事人知道有關資料是虛假或具誤導性資料，只要他已採取所需步驟，這仍可

成為他的免責辯護。曾鈺成議員剛才所建議的，對於第(2)款來說，也是一個可行的辦法。

主席：

在某些情況下，在草擬時把不同情況分別處理，也是有好處的。我也認為曾鈺成議員提出的意見是可以考慮的方法。我有一個小小的問題，在第84頁所載條文"where the business was carried on by him, himself or any officer,..."中，"him"與"himself"有甚麼分別？

高級助理法律草擬專員陳子敏女士：

對不起，其實在"him"一字後的部分已由逗號分隔。較前部分提到，"the contents of the information were not, wholly or partly, devised by – (i) where the business was carried on by him, ..."。在這個情況下，所指的人便是devised by "himself or any officer ,employee or agent of his"，接着的情況是"where the business was not carried on by him"，所指的人便是devised by "himself。如果議員認為有需要，我們可以把"by"一字置於第(i)和(ii)節內，這可能會使條文較易明白。

主席：

我還是不明白。

財經事務局副局長區璟智女士：

換句話說，你需要把這部分跟這段開始的部分一併理解。我在最初閱讀時也覺得十分困難，但多讀數遍便可以明白了。

高級助理法律草擬專員陳子敏女士：

我再讀一遍，好嗎？這段所訂的是"the contents of the information were not, wholly or partly, devised by –"。接着的第(i)和(ii)節的內容便交代所指的是甚麼人。我們分別提到兩個情況。第一個情況是"where the business was carried on by him"，所指的人便是"himself or any officer ,employee or agent of his"，或在第(ii)節的情況下，即"where the business was not carried on by him"的情況下，所指的人便是"himself"。

主席：

要理解這部分，難度很高。

高級助理法律草擬專員陳子敏女士：

其實為了使草擬方式統一，我並沒有特地把"by"一字置於這兩節內，所以當各位提出這個問題時，我立即便明白各位的問題。

主席：

把置於"devised"後的"by"一字抽出來，然後把這兩節寫成為"by himself"。

高級助理法律草擬專員陳子敏女士：

對。

主席：

接着是討論Page 85。

財經事務局副局長區璟智女士：

主席，第85頁只是一個例子，指出在甚麼情況下，即使有關人知道有關資料是虛假或具誤導性資料，他也是可以免責的。如果有關行業是進行一些再傳送資訊的工作的，例如互聯網的某些營運者，而有關人在傳送資訊的過程中可能已知道有關資料是存有錯誤，但如果他在其工作崗位上無法糾正有關錯誤，他也是可以豁免的。

主席：

接着是討論第86頁。對於這部分需要討論有關negligence的問題，副局長，妳建議現在處理還是留待討論第290條時再行處理？

財經事務局副局長區璟智女士：

我認為較好的做法，是在討論第290條時一併處理。

主席：

Okay，好的。

財經事務局副局長區璟智女士：

我的理解是，就我們現正討論的這幾頁來說，如果conduit的草擬方式妥善，以及較前部分有關意圖方面的草擬清晰，市場人士即證券界人士基本上是可以接受的。但立法會諮詢的對象只局限於傳媒人士。整體來說，他們並不是對"渠道"這方面存有問題，也不是對意圖方面，例如明知故犯及罔顧後果等存有問題。但就刑事方面，他們對"疏忽"方面卻存有問題。這是我們需要解決的問題，但在討論第290條時一併解決這個問題較為合適。

主席：

可以。

Deputy Chairman:

Mr Chairman, as far I remember, as far as disciplinary kinds of offences are concerned, the public interest really lies in the protection of the public. I think at an earlier stage I have showed that in fact the way we have ended up is really too much on the side of market operators, and too little on the protection of the investors. Let it be.

I think the problem about negligence is that negligence is acceptable where disciplinary offences are concerned. It is not acceptable where criminal provisions are concerned. That is why it is not a problem in this part, but it would be a problem, or was a problem, in the criminal part. That is how I remember it.

主席：

Okay，接着是討論Page 86。如果各位沒有問題，接着是Page 87及Page 88。

財經事務局副局長區璟智女士：

第88頁所訂的是另一個例子。例如當事人是一名廣播員，即使他知道有關資料可能是錯誤的，在某些情況下他也是無罪的。換句話說，他不會視為觸犯這類行為，因他是沒有辦法防止這種事情發生的。

主席：

對於Page 89頁，各位有沒有問題？這頁提到有關"issue"的問題。Okay，如果各位沒有問題，接着是討論第268條Page 90。法律顧問。

秘書處助理法律顧問顧建華先生：

主席，我只是希望提出，現在提及的所有辯護理由，只適用於3類人士，包括他的主要業務涉及再傳送有關資訊的人士、從事發行報章工作等的人士，以及從事廣播，即傳播工作的人士。但如果有關人曾積極參與披露虛假或具誤導性資料以誘使進行交易的行為的任何部分，他仍然是會受到第268條第(1)款的管限的。

余若薇議員：

即例如graphic artists，對嗎？

秘書處助理法律顧問顧建華先生：

對，即包括web designers or advertising agents who prepare things like that; and in an extreme case a part-time employee of the offending company。

財經事務局副局長區璟智女士：

當然大家也需參考第(1)款有關舉證。

副主席：

哪頁？

財經事務局副局長區璟智女士：

第78頁，即有關構成這個行為的元素的部分。控方須要證明當事人曾作出某些行為，然後再證明有關資料是否錯誤，並須證明有關資料可誘使他人進行買賣或影響有關證券或期貨合約的價格等。大家也需再參考這個部分。

主席：

Okay，各位有沒有further questions？

副主席：

主席，其實副局長並未能解答法律顧問提出的問題。當然，我們或許會認為，即使沒有為這些人士提供免責辯護，也不成問題。但這是另一回事，跟第(1)款無關。現在的情況是當局提出一些抗辯理由，但這些人士卻不會獲得抗辯理由。除非當局的意思是反正這些人士也不會牽連在這些事情上吧。但我認為無論如何，這些條款也訂明了抗辯的範圍，即這些人士並不在抗辯的範圍內。因此如果他們被牽涉在作出失當行為的整體範圍內，他們便會遇到困難。

余若薇議員：

主席，我認為"concerned in"所涵蓋的範圍是很廣泛的。我認為在第(1)款所訂的"a person discloses, circulates or disseminates, or authorizes or is concerned in the disclosure..."中，"concerned in"是包括剛才法律顧問提及的其他"邊緣人士"的。

但我相信這款有關"the person knows that, or is reckless or negligent..."的部分，可有助解決某些人是否"concerned in"有關行為的問題。當局可能需要考慮，這些"邊緣人士"有否責任考慮有關資料是否真實。

例如他是一名繪圖員或廣告從業員，明顯地，該名繪圖員是沒有這個責任的，但該名廣告從業員則或許須承擔這個責任。我相信某些人士可能會遇到這類的問題，因為"concerned in"的涵蓋範圍實在很廣泛。

主席：

我相信以"discloses, circulates or disseminates"及"authorizes"失實資料的行為作為釐訂有關人有否作出失當行為的標準也是沒有問題的，因為作出這些行為的人應是目標人物。

副主席：

主席，我認為你不應這麼肯定，因為這條條文不是採取這個處理方式。根據這條條文，如果某人作出某些行為，市場失當行為便告發生。當市場失當行為發生後，才找出哪些人與這行為有關連。這便是這條條款所採取的處理方式。我認為就這方面產生的麻煩已很多，所以我不希望再製造麻煩，因為在實際運作上，證監會也無閑起訴graphic artists等的人士。從原則來看，這些條款是存有問題的，但從實際角度來看，既然問題不牽涉刑事責任，我便不再多提，但我其實並不接受這個做法。

主席：

如果刪除"is concerned"，政府方面會否遇到很大的困難呢？

副主席：

會的。

主席：

會有困難，是嗎？換句話說，刪除"is concerned"的字眼是行不通的。但若不刪除這個字眼，有關條款的涵蓋範圍便會過於廣泛。

財經事務局副局長區璟智女士：

我認為剛才余議員的論點非常正確，有關行業本身應存在一個合理的測試，而大家對有關人應否進行有關工作也存有合理的期望。如果他只是負責繪圖的，我們又怎能合理地期望他核對有關內容呢？

余若薇議員：

但廣告公司便可能須承擔責任了。

財經事務局副局長區璟智女士：

廣告公司也未必須要承擔這個責任。

余若薇議員：

其實廣告公司是負責直接發放有關消息的，即在資料的"disclosure"上，廣告公司是承擔較為直接的角色的，而不僅是負責設計工作。可能有關公司的名字亦會在宣傳單張上出現。

主席：

如果採取這種推論方式，負責繪圖的也須要承擔責任。

余若薇議員：

正如在樓宇銷售時我們見到有關樓宇的artists' impression一樣。

主席：

對了。圖畫的威力可能比文字的威力還要大。例如有關繪圖員在明知的情況下誇大實際情況，以吸引市民購買，情況跟作出有關失當行為是沒有區別的。文字的影響力可能不及漫畫的影響力大，因此實在難以決定。

曾鈺成議員。

曾鈺成議員：

我希望跟進副主席提及的問題。我留意到訂明有關民事責任的條文的草擬方式與較後部分有關刑事責任的對應條文的方式是不同的。有關刑事責任的條文是以"a person shall not..."開始的。

另外，有關的大標題"Division 5 – Other market misconduct"等，是否同樣具法律效力？因為根據現時的草擬，在每項misconduct的定義內，並沒有指明有關行為便是market misconduct。例如第1項是false trading，該條所訂的是"False trading takes place when..."，但並沒有提及這項便是market misconduct。

財經事務局副局長區璟智女士：

有的，這部分的第一個clause是有訂明的。

副主席：

或許妳講明頁數吧。

曾鈺成議員：

在哪部分？

副主席：

第3頁。曾鈺成議員，我也曾有同樣的疑問，所以我便翻查條例草案，後來才翻至第3頁。

財經事務局副局長區璟智女士：

載於藍紙條例草案第3頁的第237條。

副主席：

我實在不喜歡這部分的草擬方式，但實際上這部分已經處理你的問題。

曾鈺成議員：

多謝。

主席：

我們繼續討論Page 90第269條 —— Stock market manipulation。如果各位沒有問題，接着是討論Page 91和Page 92。

何俊仁議員：

主席，我希望就第269條有關Stock market manipulation的概念提問。這個概念是否不包含cross-market manipulation的概念？Cross-market，

即不同market的manipulation。例如包括外匯市場或類似的情況。另外，我相信這個概念已經包括futures market的情況，對嗎？

財經事務局副局長區璟智女士：

這個概念只針對證券市場的情況。至於跨市場的情況，例如第(1)款訂明，如果有關行為在香港或境外發生，只要該行為影響香港的投資者，便會被包括在內。載於Page 92的第(2)款亦提到，若有關行為在香港發生，但卻影響海外的投資者，亦會被包括在內。

我們亦體會到，當局在執行這些條款方面會遇到困難，但這些條款的目的，是希望與其他國際金融中心的做法一致，因為英國、美國和澳洲亦採取這種做法。如果我們不採取這個做法，香港便會成為一些不法之徒的避難所，其他投資者亦會因而受到影響。所以，我們是出於國際合作的精神，把這條條款納入條例草案。當然，大前提是有關市場失當行為在當地亦是非法的行為，否則我們便不能採取任何行動。至於你剛才提到的不同產品的市場，應該是不包括在這個範圍以內的。

何俊仁議員：

不同產品是否指futures等的產品？

主席：

即不包括政府在1998年入市時提供的產品？

何俊仁議員：

1998年的情況是包括匯市的。當時市場的特色是連同匯市一併manipulate，所以不會包括在這部分之內的，對嗎？

財經事務局副局長區璟智女士：

這部分只是針對證券市場。

何俊仁議員：

只是針對證券市場。

財經事務局副局長區璟智女士：

請Mr BAILEY解釋what actually stock market manipulation includes。

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

Perhaps I can answer your point, Mr HO. You are talking about really the position of affecting the cash market when you are trading futures contracts. If I could refer you back to subclause 265(1) in particular, and subclause 265(3), they are pages 66, 67 and 68. Both those provisions would allow you to look at the cash market as well as, say, the futures market, and would allow you to look at the conduct you are referring to. When it comes to currency, of course, unless it is a currency contract traded on the futures market, currency in itself would not be covered; but you would be able to look at activity in an underlying futures product, under those provisions.

主席：

接着我們繼續討論Page 93和page 94。如果各位沒有問題，我們可討論第270條。對於第270條，在技術上，作出起訴會否較為困難？實際上當局可否成功地作出起訴呢？

財經事務局副局長區璟智女士：

關於這個問題，我希望就兩方面作出回應。第一，現有的《內幕交易條例》已清楚列明高層人士的責任。第二，對於過往的內幕交易案件有否牽涉高級人員，我亦需要翻查資料。

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

I think in fact it was one case going back many years – International City Holdings. This is purely from memory, and I apologize if I have got it wrong, but a number of directors of Cheung Kong Holdings, I think were basically found to have allowed the circulation of a resolution that was price-sensitive, to people who dealt in securities, within the group who dealt in securities, without warning those people not to deal in those securities. They were found culpable of insider dealing, not under the Securities Insider Dealing Ordinance, but under the old provisions in the Securities Ordinance. There is one particular case I can remember where this provision actually came in.

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

ICH was certainly one where directors were held culpable.

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

Just to qualify that, that case actually went to judicial review, because initially there was dishonesty claimed in regard to a number of people later. It was found to have been a pure negligence, I think for all but one person. This is purely from memory, but it certainly went to judicial review on that one. That was basically not stopping people dealing when this price-sensitive circular went around about a particular deal.

主席：

Okay，對於第271和272條，各位有沒有問題？

Deputy Chairman:

Mr Chairman, I do not know how we envisage that this clause would be construed by the courts. It seems that it is very wide. It is very uncertain. For example, I start from the beginning: "A person who has committed a relevant act in relation to market misconduct...". I understand that "a relevant act" is not a special term, because you do not have a definition of "a relevant act"; so again it is not clear what the relevant act is. Then "...he shall be liable to pay compensation to any other person who sustained loss as a result of the market misconduct". How wide is this liability? This is the first question.

Secondly, I have read the last four lines many times, and I am not able to understand it. Can someone explain to me what that refers to? I know you say this is for greater clarity. I can only imagine what lack of clarity would mean. There are just two questions about the first part and the ruling of the last three and a half lines. Thank you.

財經事務局副局長區璟智女士：

副主席，對於"relevant act"的定義，各位參閱這條的第(3)款時，可能會考慮"有關行為"的定義是否正確……

副主席：

對不起，我遺漏了這部分。

財經事務局副局長區璟智女士：

對於另一個問題，我亦需要我的律師同事幫忙。請陳律師或Eugene解釋。

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

Subclause 272(3) basically tracks those provisions, and I think subclause 244(4) enabled the Insider Dealing Tribunal to identify - -

高級助理法律草擬專員陳子敏女士：

副局長剛才已經根據第(3)款解釋"relevant act"。至於這款最後4行的問題，我們關注到，未經修訂的草擬未必能清楚表明，"or otherwise"的字眼應跟這款的哪部分有關。現在我們已明確訂明，引致有關損失的原因無論是否由於該人曾參與有關交易，只要該項交易的價格是受到市場失當行為所影響，當事人亦須作出賠償。但對於在這款加入這項特別要求的原因，相信證監會可加以解釋。

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

Sorry. If I could explain briefly, hopefully it will shed some light on this. "...whether or not a loss arises from the other person having entered into a transaction or a price dealing affected by the market misconduct". For instance, a person may continue to hold securities during the period in which market misconduct is affecting a security. They may not have sold or bought, but they will still have suffered a loss as a result of the market manipulation or insider dealing. We believe these people should be compensated even if they have not sold or disposed of their securities during the market misconduct.

Deputy Chairman:

This is the only situation you cover, or are there others?

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

There may be circumstances alternatively where a person refrains from purchasing because of market misconduct, and in those circumstances as well a person should have a defence. Alternatively you may consider a corporation that has suffered loss because of insider dealing. The corporation is not itself engaged in a transaction, but a director has, in effect, misappropriated information, if you could call it that, from the corporation. The corporation may wish to recover. You might view it as a statutory equivalent to an accounting of profit or loss from that officer. This wording would allow it to do so, even though the corporation itself had not entered into a transaction.

There are several circumstances. I would guess those are the major ones you would wish to catch, where somebody continues to hold securities and futures which are affected. Somebody may not actually purchase securities or futures during the period of misconduct, yet still suffer loss; or alternatively there may be a corporation wishing to recover the proceeds of insider dealing by one of their staff or somebody else, in a sort of constructed trust-style situation.

However, there may be more. This is relatively similar in concept, if not in wording, to the policy principle used in quite a few US Securities Acts, civil recovery provisions whereby they use what is called "the fraud on the market doctrine", and whereby anybody at the time of market misconduct, even if they have not engaged in the transaction, will be able to recover loss or profit during that time.

Deputy Chairman:

It could be quite large – in the hundreds and the thousands.

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

That is right.

Deputy Chairman:

And even larger. Okay. They can be joint or several. You can have many people. If one person lost a million dollars and there are others, then basically you have unlimited liability if you have committed a market misconduct and lots of people got hurt by it. They can all be after you to pay them compensation. Is that the situation?

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

I think the limiting concept comes in in terms of subclause (2) which embodies what we are legally advised to be the current principle at common law for the imposition of a duty of care upon somebody in relation to tort misconduct. "Fair, just and reasonable", as we understand the case law prevailing in the United Kingdom and in Hong Kong at present, is the test for whether a duty of care will be imposed at common law. That is where I think you will find the limiting principles in relation to that.

Deputy Chairman:

Mr Chairman, does it mean that subclause (1) has the effect of extending it widely? If you committed a market misconduct, then practically anybody who has suffered loss as a result of your market misconduct will potentially have a civil claim on you, to the extent of

their loss. However, whether you can actually rely on subclause (1) to bring an action against someone for loss and damages, will depend on (ii) of subclause (2); that is to say, it will depend on whether it is fair, just and reasonable – which is a very open-ended concept. Is that the mechanics or the logic or the subset?

財經事務局副局長區璟智女士：

讓我嘗試解釋這條條文的背景，但亦未必能直接回答副主席的問題。第272條有兩方面的背景。第一，在草擬過程中，確實有不同的投資者及消費者團體提出，要求我們在改革過程中，為投資者提供渠道，讓投資者可選擇就蒙受的損失追討賠償。第二，在草擬過程中，我們經考慮到有關人權法的問題後，把有關民事罰則減輕。曾經有人質疑，減輕民事罰則會否減低阻嚇作用。但我們認為在條例草案中列入民事法律程序，可能已足以彌補失去的阻嚇作用。

對於第(1)款，法律顧問們或可協助我解釋。根據我們的法律顧問，訂有第(1)款只可幫助投資者進行有關啟動民事訴訟機制的第一步，使對方不可質疑投資者是否有權提起民事訴訟以追討賠償。所以，這款只是避免雙方發生爭議。但投資者有權提出訴訟，並不表示他必然會獲得賠償。他會否獲得賠償，仍須視乎個別個案的情況而定。至於第(2)款， Eugene剛才也提到，這款只是為法庭提供指引或參考，使法庭知道需要考慮哪些因素，例如公平、公正和合理等。我們亦希望這個做法可平衡原告和被告的利益。

副主席：

主席，副局長提到制訂這條的背景，但我卻希望討論這條的法律效果。根據第(1)款，基本上，只要是任何人作出市場失當行為，而令當事人蒙受損失，當事人便可以提出起訴。根據第(2)款，有關索償必須符合公平、公正和合理的條件。一般市民當然認為，由於有關人犯錯而導致當事人蒙受損失，該人向當事人作出賠償是公平、合理和公正的做法。所以，這條

條款會否令市民的期望過高呢？這條條款會否沒有增加明確性，反而造成不明確的情況呢？

You may be increasing the uncertainty in the law. You may give people a false hope that they could get compensation out of this terrible person who has committed this misconduct but as a matter of fact, they really do not know where it takes them. My exclusive concern at this point is, what is the legal effect of this clause, whether it adds to uncertainty or whether it provides an additional course which is fairly reasonably certain.

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

Thank you, Deputy Chairman. I was advised by my legal adviser that, first, clause 272 serves at least to remove any further arguments that there is a presumption of right for the aggrieved investor to seek compensation through a private course of action so that will confirm that there is a presumption of such rights for an aggrieved investor. That is the first value added element.

The second value added element that clause 272 seeks to achieve is to allow such an aggrieved party to make use of a determination handed down by the Tribunal and such determination, because of clause 272, will be admissible in this kind of civil proceedings. I would like to invite Alexa to further explain on that.

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

Thank you, Mr Chairman. In fact, I heard what the deputy chairman said just now and I was thinking about this myself. I think clause 272 will actually add a level of certainty. Let me explain. What clause 272 does is to provide very clearly in the statute that when somebody commits a market misconduct, a person who is hurt as a result of that misconduct can bring an action so that puts beyond doubt any question as to whether or not, if somebody

commits an offence under the law, I, as a third party, can bring a personal action. It puts that beyond doubt.

However, obviously one has to draw some limits somewhere because we cannot just have a situation whereby somebody, having committed a market misconduct, is liable to the end of this world, so somewhere a line has to be drawn and it has to be drawn very fairly. Now, we thought about that long and hard and we also talked to various people in the market, the Department of Justice, within the Commission, with the government and we felt that the best way of providing some kind of a fair and predictable limitation would be to bring in the common law concept of fair, just and reasonable because, subclause (1), it tells you that you have a right of action; subclause (2), it tells you that in determining how far that goes how you should be compensated and how much you should be compensated for, you have to go back to the common law principles which obviously the courts are very adapt in applying and this is why we feel that no one shall be liable to pay compensation unless the court decides that it is fair, just and reasonable for compensation to be paid so we believe that it does provide a level of certainty.

Now, whether or not you will get compensation definitely is a question for the court and it must say that no one has a hundred percent certainty.

Deputy Chairman:

Mr Chairman, I was wondering whether subclause (2) really cancels out subclause (1) because what subclause (1) says – and I do not have a great deal of personal experience in this sort of thing, but it says that in principle you are within the contemplation of the statute; that is, you are one of those persons who, when the legislature passes the law, thinks ought to be compensated, given other conditions but then when you have opened it so wide, would not the principles of fairness, justice and reasonableness mean that a person who has committed one act of market misconduct cannot be responsible for a whole load of people who are losing hundreds of millions of dollars. Is that principle clear enough to know how much is carved

out? Does it still permit a spectrum from virtually cancelling out subclause (1) so that it could only allow people with more direct things to do with you to be within the compensation range so this is one end of the spectrum or the other, but it just does not take out anything. To what extent subclause (2) are limited? Is it cancelled out altogether or it actually puts no limit to it? Does the SFC have an idea how far it will go or is this only a suspension of judgment and say, "Well, I don't actually know. Why don't we put in a clause and let the courts decide?"

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

Perhaps I can try to answer the deputy chairman's question. Certainly in Australia and in the jurisprudence of the United States and in Canada there are provisions similar to this and they, in fact, go further in the wording in that they do not use the wording into "fair, just and reasonable". They basically set out a statutory right of action for anyone who has suffered pecuniary loss or other loss, purely through a breach of any provision of the statute or, if there are more narrower provisions, through engaging in a particular act that is prescribed by the statute.

However, through experience in the United States, Canada and Australian case law, the courts, in construing these provisions, turned very readily to analogy with breach of statutory duty and also with common law tortious principles when they look at this. We thought, when looking at this, that this would occur, anyway, but however, fair, just and reasonable as the common law test of the imposition of the duty of care at common law we thought would add greater certainty to this process and we have no doubt that the courts would turn to other Commonwealth jurisdictions and also the United States in construing and borrowing from the case law the ready willingness of the judiciary when confronted by provisions like this, to turn to principles that they were familiar with derived from the common law, such as causation, foreseeability, remoteness of loss and everything else, that a common law judge feels very comfortable in working with.

Now, there is an element of uncertainty with that, obviously. However, I think the uncertainty is probably no greater than in respect of the common law itself where the principles are developed through the accretion of case law and their application in any one particular instance. It is not a hard and fast matter of judgment. We usually turn to counsel's opinion before launching a legal action to see if you think that recovery is likely and in what quantum and I think that is where clause 272 leaves us with here. It leaves us with the flexibility of the common law. It says quite clearly that you do have a right of action in these areas. Subclause (2) brings in the principles of common law analogy for fair, just and reasonable and then you are left with a flexibility but also the certainty to the degree that the common law provides us.

Deputy Chairman:

Thank you. Mr Chairman, again this is another bit of algebra. Here is "fair, just, reasonable." These words are signals for you to click open the case law on similar wording. Can I ask – there seems to be a number of cases which have already taken place in the United Kingdom and in Australia and in the United States and from what you say it seems to be there is already a body of decisions.

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

Not in the United Kingdom because I do not think they are as keen on these sorts of statutory provisions but certainly so in Australia and the other Commonwealth and US jurisdictions.

Deputy Chairman:

Can I ask you what these decisions seem to show are the limits in these cases which

are already decided? What is the limit that the court has set?

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

I think it depends very much on the nature of the statutory provision and the circumstances so it is very difficult to give a blanket answer of any sort. If you were to imagine, for instance, a fact, circumstance with, for instance, an auditor – and auditors are obviously sort of key in the mind of most people because they are heavily insured – it really comes down to – again it depends on the precise statutory provision and it turns on which jurisdiction you are examining but the auditors have to bear in mind under their reasonable contemplation that a person is going to – for instance, if it is a question of disclosure of false or misleading information, those people are going to rely upon that information. So it brings very much in terms of – at least in terms of auditors which is a readily comprehendible situation – the existing common law in respect of that.

Deputy Chairman:

Can you give me just one or two examples so that I know the sort of what happened?

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

I would really have to turn to case law and actually produce something in writing for you; otherwise, I would be at the risk of misleading you. An auditor is something that I can think of off the top of my head but it really does depend very much on the nature of the case, the case circumstance and the nature of the statutory provision that you are looking at.

Chairman:

Audrey.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, first of all, the phrase "fair, just and reasonable" is used in some cases to really circumscribe the duty of care in the common law but this is really used in cases like what Eugene mentioned; for example, an auditor of a company and he was negligent in looking at the company accounts or in producing some statements which are then directed to a limited class of people, namely, shareholders of that company. Then the question may be whether the auditor has a duty just to the company or to the shareholders and whether, therefore, in law, it is fair, just and reasonable for the auditor to be held responsible for the losses of the shareholders.

However, here we are talking about a different thing which is market misconduct and you are not talking about a body of shareholders. You are talking about the entire market; not only just the players in the market who bought and traded on the market as a result of market misconduct but those who could have traded but did not trade because of the market misconduct. So if anybody under the sun can potentially say, "Look, I suffered a loss as a result of your market misconduct" – so we are talking about a much larger body of people. Therefore, the question is, when you are saying where is a duty of care at all, I think maybe the answer to the question from the vice-chairman is that if we can be given some cases or a summary of some decided cases, on what is fair, just and reasonable in the context of market misconduct, not auditors of a company as such, not dealing with shareholders but market misconduct, in what sort of cases would it be fair, just and reasonable for compensation to be paid. To what class of people who suffered a loss as a result of market misconduct – if this is the term used, "as a result of market misconduct."

Also, contrasting that with what would be the cases which fall outside the fair, just and reasonable regime, where these people would not be compensated for their loss as a result

of market misconduct because it is not fair, just and reasonable. If you can give us some typical categories of people who fall within and people who fall outside, by using the relevant case law, cases that have already been decided, wherever they have been decided, whether in Australia or elsewhere, that would perhaps, I think, assist in defining the parameters of subclause (2).

財經事務局副局長區璟智女士：

事實上，這個概念最早期是由律政司的法律顧問向我們提供的，目的是向公眾表明他們擁有這項權力。

副主席：

副局長，我明白這點。我們現時的要求是很清楚的。

What we want is a summary of cases decided. Give us such cases as you have in relation to market misconduct; cases where the court has decided on the term "fair, just and reasonable" to demarcate certain people as inside or outside the scope of liability. If we could have that, we could take a look at it and see if that helps.

Chairman:

Alexa.

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

Thank you, Mr Chairman. As Eugene has just said, fair, just and reasonable in the context of this problem in an attempt to try to build a regime or a system that works. Now, in the US, as you know, they have a similar third party action regime but they do not build it

around the technical concept of fair, just and reasonable, nor does Australia, but I think we can still go back and look for some of those cases where, for instance, somebody commits something such as market manipulation – stock market manipulation, I mean, price rigging or insider dealing. So for those kinds of cases we can probably come back and demonstrate to you what kind of a third party action has been brought and what kind of damages we are talking about because, after all, do not forget, we are talking about serious conduct that affects the market, the market intention.

Deputy Chairman:

We have no problem with your policy. Do not let me waste any further your time to argue. It is just whatever you think are the most proximate cases. All right?

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

Okay.

主席：

法律顧問。

秘書處助理法律顧問顧建華先生：

多謝主席。請政府亦提供資料，解釋澳洲在有關方面的法例。有關的澳洲法例並不是十分簡單的，受害人只可在有關情況發生後的6年內才可提出起訴。對於個別責任，這條法例亦有很詳細的規定。這並不是很籠統的法例。

副主席：

可否提供這條法例給我們參考？

秘書處助理法律顧問顧建華先生：

可以。

主席：

Okay，接着是討論Page 97。如果各位沒有問題，接着是討論page 98、99、100、101和102。

何俊仁議員：

主席，第273條的政策目的，是否使證監會日後可制定規則，以達致修改有關這方面的法例的效果？這條似乎可制定一些答辯理由，使有關行為不視為失當行為。這條的意思是否這樣？

主席：

這些是safe harbour，對嗎？

財經事務局副局長區璟智女士：

請容許我作出解釋。在草擬過程中，我們亦曾參考外國的做法。市場失當行為的概念，會隨着市場的發展而演變。我們明白，若在某時段及某些市場環境下，有關行為為市場人士普遍接受，並且不會影響公眾利益，我們亦會設法使有關行為獲得豁免。

對於這種情況，外國有兩種做法。第一，英國的FSA會制定一些可

稱為安全港條例或Safe harbour rules的法例。例如在英國正制定並相信即將落實的Market Abuse Code內列明，在某種情況下，某些market abuse不視為market abuse，以方便市場發展。在另一些司法管轄區，監管機構有權發出一些no action letter，表示在某種情況下，有關人不會因作出某些行為被起訴。

我們考慮這兩個不同的方案後，認為為達致清晰及統一的目的，應以附屬法例的形式，告訴市場人士在所訂的情況下，有關人並不視為違法。這做法應一視同仁，所有個別參與者在該種情況下作出有關行為，亦是不會被起訴。

這亦是其他國家的監管機構的傾向採用的做法，以期提供彈性，避免妨礙市場的發展。我們亦嘗試在這條款中清楚訂明，證監會須作出足夠的諮詢。對於這項彈性安排，市場人士普遍表示歡迎。

主席：

何俊仁議員。

何俊仁議員：

這些附屬法例當然須經立法會審議，但對於這個概念的唯一問題是，現時的做法似乎是容許以附屬法例達致修改法例的效果。對於這方面，我有點不同意。但我唯一可以接受的，是有關附屬法例的目的，是訂立一些豁免，而不是訂立犯規行為，否則，我認為這個做法是不可接受的。

從概念上看來，當局應否考慮以修訂條例的形式訂立這些豁免呢？當然，政府的解釋可能是這個做法過於複雜，並且外國在訂立豁免時，也採取制訂附屬法例的形式。

財經事務局副局長區璟智女士：

請證監會的同事們解釋，我們希望在所謂的安全港條款中，包括哪些活動，並解釋因何國際上亦認為這種做法較為適合。

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

Perhaps I can answer Mr HO's question. Certainly in Australia and in the United States there are very extensive powers to modify laws, including criminal offences that are attached to those laws through subsidiary legislation, typically made by the securities regulator and, in fact, broad swathes of US criminal law are basically made by US regulation. Now, the intention under clause 273 so far as can be envisaged there is only to provide exemptions. It certainly will not be to broaden the scope of the principle offences. That will not be possible. It will only be possible to pass certain minor defences in relation to those provisions.

In my experience in Australia this is certainly quite necessary and I think the volume of US regulations in the US issued by the SFC also indicate that in some instances there are activities that look as though they amount to market misconduct – or however it is defined in other jurisdictions – but has quite a legitimate purpose; whereas, the industry would not be comfortable to rely purely on the reassurance of the regulator or the criminal prosecutors that they would not prosecute in these circumstances. They want certainty, particularly in relation to the legality of the transactions that they are entering into, that they are not void or voidable for illegality. They like to see rules of this nature that are flexible and that can be changed as industry practices change.

For instance, market stabilization is a perfect example but is legalized in the United Kingdom through subsidiary legislation regulations made in the Financial Services Act by the Financial Services Authority. Similar to the United States, under their offering rules and

dozens of other things, the SEC creates safe harbours but the SEC can even go further, actually. The whole of the insider dealing legislation in the United States is basically a regulation made by the SEC. It has no independent statutory existence in the form of an act passed by Congress in the United States. So what we are asking for here is basically a much more limited power than the experience of regulators in other jurisdictions have found is quite necessary.

主席：

就這個問題，我當然歡迎第273條所訂的制度，但如果當局希望在市場上作出迅速的轉變，這種制度亦及不上SEC的power。例如在"911"事件後，一些在一般情況下視為違法的市場行為，在很短時間內便可獲得豁免。但若採用我們現時建議的這種制度，亦不能為某些市場行為迅速提供豁免，因為當局最終也要以附屬法例的形式對法例作出修訂。

法律顧問。

秘書處助理法律顧問顧建華先生：

我希望政府澄清，就第(5)款提到有關"unlawful"的問題，如果有關監管機構發出no action letter，有關行為會視為"lawful"還是"unlawful"。美國證監會發出no action letter，只代表該會不採取行動，並不代表有關行為本身沒有違反有關法規。

財經事務局副局長區璟智女士：

我們沒有考慮這些細節上的問題。

秘書處助理法律顧問顧建華先生：

在技術上，有關行為仍屬違反法例，只是監管當局不採取行動而已，對嗎？

主席：

不是這樣吧。

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

I think in relation to no action letters, certainly I think that is an indication as I understand them in the US. I am not an expert in US practice but you are quite right. It does not change the legality of that conception. It is an indication by the SEC that they will not take regulatory action in those circumstances. I think we would have to look at the effect of such matters under US law and then we can report back to you. It is a matter of some complexity, I think, but certainly I think what is envisaged is primarily where they certainly do pass instruments that do have statutory effect or effective delegated legislation that would clearly not be unlawful. I think we just have to look at what we have raised in terms of no action letters.

Chairman:

Audrey.

余若薇議員：

剛才何俊仁議員提出的問題，並不是質疑應否設有safe harbours，或設立safe harbours的目的，而是在立法程序上，如果在法例內訂明有關行為是市場失當行為，可否以附屬法例的形式，使有關行為不屬市場失當行為。我亦希望就這方面詢問法律顧問。我知道其他法例亦有類似的情況，

但這個草擬方法有否問題呢？這個做法會否違反一般的立法程序，即可否以附屬法例修改主體法例的原則呢？

主席：

法律顧問。

秘書處助理法律顧問顧建華先生：

多謝主席。如果主體法例容許藉附屬法例制定例外的情況，即若主體法例已訂明准許出現例外的情況，並訂明應把有關細節列於附屬法例內，則這個做法並沒有改變以主體法例作為先導的原則。

事實上，我認為政府現時的趨勢，是在很多情況下，尤其是以附表形式制訂的法例，也容許以附屬法例的形式修訂法例，甚至容許局級以下的官員直接修訂主體法例的附表，而無須提出修訂法案。所以，我認為應由議員們斟酌，有關的個別情況會否危害主體法例的有效性，抑或只為方便配合實際的需要。關於這點，我認為不可純粹以法律觀點作出判斷。請議員們斟酌在這個情況下採取這個做法是否適宜。

主席：

何俊仁議員。

何俊仁議員：

坦白說，對於這方面，我實在有點矛盾。從憲制的角度來看，容許附屬法例修訂主體法例，不是很好的做法。但如果我要堅持這個觀點，並為了照顧向市場提供靈活性的需要，唯一的方法是把失當行為的定義併入附屬法例內。但我亦不願意採取這個做法，因為對於一些會造成懲罰性後

果的情況，宜以制定主體法例的形式審慎處理。

我的矛盾是，如果把所有有關市場失當行為的條款納入附屬法例的範圍，便能達致貫徹一致的效果。但坦白說，我也不太喜歡這個做法。政府現時的做法是只在提供豁免時才採用附屬法例的形式。我認為這是較易接受的做法。但如果以附屬法例的形式制訂新的失當行為，我便認為不可接受。就我記憶所及，過往也有若干條例草案訂有類似條文，容許藉附屬法例修訂主體法例。當時我亦強烈反對，而政府最終也沒有通過有關條文。

但現時的情況，正如剛才副局長提到，是希望可以迅速的方法作出修訂，而外國亦採取這個做法，但我仍不希望把市場失當行為納入附屬法例的範圍。

主席：

好的。對於第274條 —— No further proceedings after Part XIV criminal proceedings，各位有沒有問題？就這條的政策，當局已多次作出解釋。如果各位沒有問題，接着是討論第275條 —— Market misconduct regarded as contravention of provisions of this Part。如果各位沒有問題，接着是討論第276條。顧先生。

秘書處助理法律顧問顧建華先生：

主席，我憂慮到第276條的措辭可能會造成一個後果，使凡沒有作出這個特別聲明的條文，便會具有追溯力。因為這條條文只在這部分出現，而很多較前部分的條文也沒有提到追溯力的問題，加上適用於這些條文的行為，也不一定在《證券及期貨條例草案》成為法例後才發生的，所以如果這條採用這個沒有限制的草擬方式，則會隱含着其他條文也具追溯力的意思。

主席：

這是否畫蛇添足的做法？

財經事務局副局長區璟智女士：

我們會就這個問題作出研究。

主席：

就第XIII部進行的審議已經完成，剩餘的時間也很長，我們可開始就第XIV部進行討論。

副主席：

這部的中文本如何處理？

主席：

中文本？我們還沒有討論。先審議第XIV部的英文本，好嗎？

副主席：

為甚麼不先審議這部的中文本呢？

主席：

好的。

秘書處助理法律顧問顧建華先生：

主席，就這部的中文本，我們曾提出一些觀點，但政府方面尚未作出最後的回應。他們的想法似乎是留待最後才把所有問題一併考慮。由於其中亦涉及一些技術性的問題，可否留待下次會議才處理這部的中文本呢？

主席：

請秘書稍後提醒我們，我們會先完成審議第XIII和XIV部的英文本，然後才審議這兩部的中文本。

高級政府律師林少忠先生：

多謝主席。基本上，對於秘書處法律事務部較早前提出的意見，我們雙方已達成協議。剩下的問題只是秘書處法律事務部前數天向我們提交的意見而已。我們尚需花些時間考慮這些意見。

主席：

那麼我們先完成審議第XIV部的英文本，然後才審議第XIII部的中文本吧。

高級政府律師林少忠先生：

主席，對於剛才提到第268條有關"忽視"的問題，我們會考慮"忽視"能否包含"疏忽"的意思，然後在下次會議上再向各位匯報需否作出修正。

主席：

即在我們審議有關條文的中文本時一併處理，謝謝。我們現在開始

審議第XIV部第277條。

副主席：

主席，第277條是釋義的條文。這條與第XIII部的釋義條文的內容有否分別呢？純粹以項目來說，這兩部分在很大程度上也是相同的。當然，其中一些項目只在第XIII部出現，而沒有在第XIV部出現，例如"審裁處"等。但在第XIV部出現，而沒有在第XIII部出現的項目只有一個。所有項目的定義是否也完全相同，還是有所分別呢？請就這些項目的釋義有否不同作簡略的回覆。

財經事務局副局長區璟智女士：

我請陳律師向各位解釋。

高級助理法律草擬專員陳子敏女士：

多謝主席。我們大致上亦希望使這兩部的釋義一致，但有關釋義條文部分的字眼存有輕微分別。這是由於這兩部分別關乎民事和刑事的情況，否則，我們可保證這兩部的釋義條文是一致的。

另外，正如吳議員提到，這部的釋義條文加入了一些項目，例如"違例事件"等。因此，其他條文提到的"違例事件"便在這條條文內界定。即第5頁訂明的"違例事件"或"relevant contravention"。這定義在第XIII部並沒有出現。例如第5頁第(c)段所訂的"securities which, at the time of the relevant contravention..."，便採用了這個字眼，但第XIII部的對應部分便有所不同。我們在第XIV部只是作出這類改動而已。

副主席：

可否把第277和237條合併，以在第277條訂明，第237條的定義對這部亦是適用的，然後才加入剩餘不相同的項目，使運用這條條例的人士，無需就逐項釋義作出比較呢？這個做法是否實際可行呢？

高級助理法律草擬專員陳子敏女士：

如果我們採取這種做法，第一，條例草案便會存有很多referential legislation，即提述其他定義的條文。我們盡量避免出現這種情況，因為在運用上，例如作出刑事起訴時，當局可獨立根據第XIV部行事。我們希望第XIV部訂有獨立的條文，使有關檢控亦只需參考第XIV部的條文。我們亦同樣希望第XIII部訂有獨立的條文。

另外，對於我們剛才提到，在某些定義下會出現不同字眼的情況，如果採用這種草擬方法，便會出現類似"subject to necessary modifications as follows"的字句，使條文的意思未必容易掌握。我們亦曾就這個問題作內部討論，正如各位就有關定義應置於哪部分作出討論一樣。我們最後的結論是如果把有關釋義訂於某部可方便使用者，我們便寧願把有關釋義在該部重複訂明。

因此，由於第XIII和XIV部在運用上亦相當獨立，所以我們便採用現時的做法。多謝。

主席：

Okay，我們繼續討論第277條。對於page 1、2、3、4、5、6和7，各位有沒有問題？如果沒有，接着是討論第278和279條。各位對於page 8、9和10有沒有問題？把"大股東"擁有有關法團的股本權益的面值，訂於不少於該法團的有關股本面值的5%，是否國際認可的norm？

副主席：

我們似乎曾就這方面作出比較。

主席：

這部分載於第10頁的subclause (3)。

Deputy Chairman:

I think we have a paper at some stage comparing the different jurisdictions. Maybe the Clerk can look it up and tell us which it is in due course. How do you count what goes into the percentage and so on.

財經事務局副局長區璟智女士：

這條條例採用了兩個概念。第一個是有關控制人的概念。我們參考現有的《上市規則》、《收購守則》等的有關概念後，把公司或法團的控制人擁有有關公司或法團的權益面值訂於33%的水平。另一個常用的概念便是有關大股東，即substantial shareholder的概念。就這方面，我們以5%股本面值的水平作出界定。

各位在參考第XV部時，亦可發現該部訂明，若有關人擁有有關法團的有關股本的權益的5%，他便是該法團的大股東，他因而須披露其有關的擁有權。事實上，我們亦曾就這方面進行研究，希望使這個概念貫徹一致。條例草案中很多部分也是以股東擁有權的percentage作為標準的。

主席：

對於第280及281條，各位有沒有問題？如果沒有問題，各位對於第282條有沒有問題？

財政司司長有否from time to time就第280條(2)(h)款"by notice published in the Gazette"指明有關的法人團體。

財經事務局副局長區璟智女士：

雖然財政司司長獲賦予這項權力，但他從來也沒有就這方面作出公布。這是一項剩餘條款的安排，如果這條款就有關人士方面有所遺漏，便可藉這個方法把遺漏了的有關人士加入條款之內。

主席：

剩餘條款？當局是否預期會存有這些人士？

財經事務局副局長區璟智女士：

其實這段所提到的，可能是一些由政府委任，或透過其他方法成立的public bodies或公司，而有關董事或高層人員可能掌握一些特別的內幕資料。因此，他們進行交易時，便需特別小心。其實這段是泛指這類人士，他們的公職或他們任職的公司與公眾利益有十分密切的關係，而他們亦掌握一些內幕資料。

主席：

我認為既然當局制訂第(2)(h)款，心目中應具有一份有關公司的名單。妳剛才提到的public bodies，已在第(g)段訂明。第(2)款所指的有關人士，亦包括行政會議成員、立法會議員、"a member of a board, commission, committee or other body appointed by or on behalf of the Chief Executive or the Chief Executive in Council under an Ordinance"。 我歡迎當局制訂第(2)(h)款，但如果訂有這款，財政司司長便要作出公布。

財經事務局副局長區璟智女士：

我們再作考慮吧。

副主席：

也不一定。While subclause 280 (2)(g) refers to a body corporate incorporated by ordinance, subclause 280 (2)(h) would refer to a body corporate other than incorporated by an ordinance. Would that be what it means?

財經事務局副局長區璟智女士：

可以包括在內。

副主席：

Does that include subclause (g) or does it not? It does not have to include subclause (g) because if you are body incorporate incorporated by an ordinance you will already be caught by subclause (g). It is only when you are not caught by subclause (g) that you might need subclause (h). So it is a body corporate – a non-statutory body corporate.

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

What I said was that it would include what you have just described. I cannot think of any other residual elements. Subclause (h) may include other bodies as well.

Deputy Chairman:

So it would be a non-statutory body.

主席：

可包括The Hong Kong Mortgage Corporation Limited、外匯基金投資有限公司等團體。

李家祥議員：

對，涉及的金額達一千多億元。

財經事務局副局長區璟智女士：

我們會在條例生效後，考慮需否describe類似的bodies。

副主席：

主席，我們請署方就body corporate which is non-statutory which you think you may wish to include here方面作出考慮吧。

Chairman:

Yes.

Deputy Chairman:

Let us cast our minds in this particular area and see what we come up with.

何俊仁議員：

主席，第(c)款所包括的，是很多由行政長官委任的委員會。有沒有

一些委員會不是由行政長官委任，例如由財政司司長委任，但亦擁有很大權力的呢？外匯基金委員會是否由行政長官委任，以及是否擁有很大權力呢？

主席：

外匯基金委員會是由財政司司長委任的。

何俊仁議員：

如果外匯基金委員會是由財政司司長委任的，當局沒有理由不把它包括在這段之內吧。這個委員會的工作也是很重要的。另外，亦應包括處理涉及聯繫匯率或exchange fund等工作的委員會……

Chairman:

Exchange Fund Advisory Committee?

何俊仁議員：

對。

李家祥議員：

那個委員會主要是在海外進行投資的。

主席：

我知道Exchange Fund Advisory Committee主要是在海外進行投資的，例如投資於國庫債券或Euro等。

何俊仁議員：

但一些由FS委任的委員會也會擁有很大權力的，不知應否把這些委員會加入這款之內？

副主席：

主席，可否請署方考慮這個問題。

財經事務局副局長區璟智女士：

我們會再作考慮。

副主席：

由於這款所涵蓋的委員會是會掌握某些資料的，原則上是否應把這些委員會限於行政長官委任的委員會呢？是否由其他人委任的委員會也會擁有類似的資料呢？如果會，當局也可考慮在這款加入FS等委任的委員會。

主席：

引伸Albert HO的意見，一些類似Town Planning Board等的委員會是否也會擁有某些重要資料呢？這類委員會的數目是很多的。

財經事務局副局長區璟智女士：

這個委員會可能也是由CE委任的，但我要翻查資料才可證實。

主席：

這個委員會會否有並非由CE委任的成員？

財經事務局副局長區璟智女士：

在一般情況下，委任最重要成員的權力也會由CE擁有。

何俊仁議員：

一些成員可能是由CS委任的。

財經事務局副局長區璟智女士：

這情況只是由於CE根據香港法例第一章，把權力下放吧，即CE把有關權力轉授給CS或FS。

副主席：

但亦有一些委員會是指明由FS委任的。

財經事務局副局長區璟智女士：

對於這方面，我們再作研究吧。

主席：

我肯定亦存有一些由FS委任的委員會。

財經事務局副局長區璟智女士：

我相信我們亦需與政府其他部門進行內部諮詢。由於《內幕交易條例》早在10年前已經實施，我們會找出這10年內有否產生不同的機構，而這些機構並不是由CE委任，但卻掌握市場的敏感資料。如果存在這種情況，我們便需要修改這條條款了。

主席：

我相信對於第(h)款，政府心目中應具有一份名單的。

財經事務局副局長區璟智女士：

我們再作考慮吧。

主席：

好的，謝謝。接着是討論第281條 —— Dealing in listed securities or their derivatives (insider dealing offence)。如果各位沒有問題，接着是討論第282條。對於Page 13, 14 up to Clause 282, any questions? 法律顧問。

秘書處助理法律顧問顧建華先生：

主席，我剛才觀察到，第XIII、XIV部提及上市的證券時，亦有提及衍生工具，但其他部提及上市的證券時，卻沒有提到衍生工具。我當時曾就這個問題詢問政府當局。政府當局認為，證券的定義已經包括衍生工具。政府可否再考慮，在這兩部作出這項提述會否影響條例草案的其他部分。另外，我留意到這部對證券訂有另一個定義，政府可否就這方面作出解釋？

財經事務局副局長區璟智女士：

陳律師對這個問題有所解釋。

高級助理法律草擬專員陳子敏女士：

第XIII和XIV部訂有有關證券的定義，所以這兩部便採用這個有關"證券"的定義，而不採用載於附表1有關證券的定義。事實上，該兩部有關證券的定義是較附表1狹窄的，但我們可就這個問題再行研究。

主席：

法官會否知道這條條例在數個部分訂有有關證券的定義呢？

高級助理法律草擬專員陳子敏女士：

會知道的。因為這條的第(1)款訂明，如果有關用語另有定義，這部的定義便不適用。事實上很多條例也採用這個做法。

主席：

如果各位沒有其他問題，我們這次會議討論至第282條。我們在下次會議上進行的審議工作，將會從第283條開始。

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