立法會
Legislative Council

Ref: CB1/BC/4/00/2

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

Verbatim transcript of meeting
held on Wednesday, 3 October 2001, at 8:30 am
in Conference Room A of the Legislative Council Building

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

Attendance by invitation	**:**	Mrs Alexa LAM Executive Director and Chief Counsel, Securities and Futures Commission
		Mr Eugene GOYNE Associate Director, Enforcement, Securities and Futures Commission
		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，早晨。我們多謝曾鈺成議員以很快的速度從CGO趕來出席會議，使會議無需出現流會的情況。

根據議程，我們繼續討論第XIV部。委員會在上次會議完成第1分部的討論，今天討論第2分部 — Insider dealing offence，亦即由第283條開始。如果我們今天順利完成這部分的討論，或可以提早散會。各位同事如希望就這部分提出問題，可隨便發問。當再沒有其他問題時，我們可能提早散會。現在開始討論第283條。有關的文件是CB(1)1984/00-01(01)號文件。關於page 14，各位有沒有問題？那麼page 15呢？

關於page 16，各位有沒有問題？那麼page 17呢？關於page 18，各位有沒有問題？如沒有問題的話，現在討論clause 284 — Insider dealing offence — general defences。關於page 19，各位有沒有問題？那麼page 20呢？

現在討論page 21，請問有沒有問題？那麼page 22呢？關於page 23，各位有沒有問題？現在討論page 24。

Deputy Chairman:

Mr Chairman, I cannot quite understand subclauses (7A)(a)(i) and (ii). I just cannot understand what it means. Can someone explain this? What does it say?

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

Deputy Chairman, this clause is taken from paragraph 3 of Schedule 1 to the UK Criminal Justice Act. This is the opening paragraph of a UK defence for those who are

dealing with knowledge of their own trading activities, or intentions, or those facilitating such trading. We have undertaken to the Legislative Council to table these provisions, which we will be doing shortly this week, so members can compare this provision with the United Kingdom provision.

Basically what subclauses (a)(i) and (ii) require is that a person is either themselves undertaking a dealing in listed securities or their derivatives, and you must read it in conjunction with subclause (b): "...at the time when they have knowledge as to their trading activities or intentions", and you will find the definition of market information in subclause (9).

Deputy Chairman:

That is okay.

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

If I can take you through subclause (a)(i) perhaps: "In connection with any dealing in listed securities or their derivatives, whether by himself or another person, which was under consideration or was the subject of negotiation, or in the course of such a series of dealings...", so anybody who acts in connection with such a dealing, at the time when he has market information, and with a view to facilitating the accomplishment of those dealings.

Basically, if I can simplify those words, they are these: if I, for instance, have marketing information as to my trading activities and undertake a series of dealings, I will be allowed to engage in those dealings, even though information about those dealings may in and of itself constitute insider information or relevant information as it is defined under the Bill.

For instance, to take an example, a substantial shareholder makes a decision to

purchase more shares with an unlisted corporation, or to dispose of shares with an unlisted corporation: that may in and of itself be relevant to market sentiment in relation to that corporation, and may in and of itself be inside information. This defence would allow somebody to engage in that activity without being prohibited by the insider dealing provisions.

However, perhaps more directly, it is also aimed at, for instance, a person building up a stake prior to a takeover, whereby they are building up their stake within the corporation prior to the point where the general offer obligation is triggered. They know they are going to make a takeover offer and are intending to do so. They must achieve the 30 per cent threshold as it will be under the Takeovers Code to achieve that. This will, in connection with any dealing in the listed securities, i.e. the takeover which was under consideration on the subject of negotiation in the course of series of such, with a view to facilitating the accomplishment of that dealing, i.e. building up a stake, for instance.

Alternatively it allows somebody who is acting on behalf of such a person to facilitate that dealing, for instance by hedging, prior to the acquisition of an OTC derivative. If I, as a securities dealer or an investment bank, were to acquire the underlying shares in a listed corporation prior to assisting a client of mine to engage in an OTC derivative in relation to those shares, I would be, in connection with any dealing –i.e. the OTC derivative as shares – which was under consideration, was the subject of negotiation, or in the course of a series of such OTC derivatives, acquiring the underlying shares with a view to facilitating that transaction – i.e. the OTC derivative, by lowering the cost of the transaction.

The words are quite broad. It is basically to cover any act of facilitation with a view to engaging in a transaction where that transaction may in and of itself be prohibited by the definition of "insider information", being inside information about one's trading activities.

Deputy Chairman:

I have a vague feeling of what this is about. Can I check to see if I have it right? The insider dealing is basically about prohibiting someone from dealing where he has inside information: certain things are going to happen which would affect the price. This defence is this: if you are the person who is doing the dealing which would affect the price, then you cannot help knowing what you are doing, presumably, and then you would be exempted from it. Is it that sort of thing?

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

If the information is of the type described in subclause (9) – and if you want me to go on to an examination of subclause (9) I will, but until you say that is necessary, I will not – where, for instance, the inside information is of the nature of order flow information, and I know that I am going to be purchasing a large block of shares, there is nothing in policy that should prohibit me from doing that. Otherwise I would not be able to take out the transaction itself, merely because of the nature of my individual personality and that I am a substantial shareholder of the corporation.

Alternatively, regardless of whether I am a substantial shareholder or not, the size of the transaction and the nature of the transaction of itself is very market-sensitive information that somebody is undertaking this type of transaction which will affect market sentiment. The definition of "market information" captures those sorts of information, so as you quite rightly said, it would allow the person himself to undertake that transaction; or alternatively somebody helping them to facilitate that transaction. It does have that broader effect; hence the wording of subclause (a)(ii) with a view to facilitating the accomplishment of the dealing.

Deputy Chairman:

Mr Chairman, I will try again, perhaps, when I see the UK Act. Can I ask the

legal adviser whether the Criminal Justice Act is a perfectly simple thing to get? If you have Halsbury's Statutes it should be a matter of 5 minutes. Can we ask some of our people to bring up a copy of it? I think you will have it in your library. Could we ask someone to help so that we could understand this? If they specifically say that this is a criminal - -

Mr KAU Kin-wah, Legal Adviser:

I have a copy.

Deputy Chairman:

I see. Okay. Maybe this would help, because I do not want to hold everybody up just because I am not clever enough to understand what insider dealing is all about.

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

There is very little explication of the defence, unfortunately, in the United Kingdom. This defence is worded very closely on that, and if the legal adviser has any difficulty in locating, we can provide an internet website reference to that, and expedite that matter.

Deputy Chairman:

Obviously, we were hoping you would supply us with the provision.

主席：

我們先行討論在page 24的第(8)款。關於這條文，各位有沒有問題？那麼第(9)款呢？

Deputy Chairman:

Mr Chairman, I have a problem with subclause (9). I think probably it is just linguistic. "...information does not consist of the following facts", and some of the subclauses are not really facts. They are really items of information. I just wonder if you could look at the language again. "It is not the fact that there has been, or is to be, any dealing..."

主席：

陳律師。

高級助理法律草擬專員陳子敏女士：

證監會剛才指出，這部分是參照英國的Criminal Justice Act。有關條文的寫法也是一樣。至於第(9)款載列的各個項目，一些項目描述所發生的事情，該等條文的開首採用"that"一字；其他條文則提到number, price或identity，我們會當作是一項事實或一件事情來理解。儘管如此，我們可以再行研究採用matter等字眼會否比較適合。

Deputy Chairman:

You might consider just taking out the word "fact" or substituting the word "fact" with "matter". Anyway, we will have a look.

主席：

在page 25的第(9)款列出for the purposes of subsection (7A)，"market information"的意思。該用語的定義似乎只適用於第(7A)款。請問有關定義是否適用於其他部分？

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

No. Mr Chairman.

主席：

關於在page 26的clause 285 — Insider dealing offence - defences for certain trustees and personal representatives，各位有沒有問題？

關於第286條 — Insider dealing offence - defences for certain persons exercising right to subscribe for or acquire securities or derivatives，各位有沒有問題？余若薇議員。

Hon Audrey EU Yuet-mee, SC, JP:

Can I ask whether clause 286 means that the person is allowed to, and it is proper for him, exercise his right even after he knows the relevant information, provided the right was acquired before he knows the relevant information? Is that the intention?

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

Yes.

Hon Audrey EU Yuet-mee, SC, JP:

When I looked at this subclause, I kept thinking of the banks. If they are, say, mortgagees and they have the right to sell securities under some mortgage document, is that a

right which they acquire prior to the company going down or the company getting into difficulties? I understand the position is that the bank is not allowed to deal in these shares or these securities if they then acquire insider information, such as, for example, knowledge that the company is in financial difficulties. Is that the position?

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

That is the policy intention. If the banks presently and proposedly under the Bill have mortgage rights over certain securities and are in possession of inside information that would affect those values or securities, they are not allowed to dispose of them into the market before the wider public is aware of that fact.

Hon Audrey EU Yuet-mee, SC, JP:

Is there not therefore some inequity there? Why is the bank not allowed to dispose of securities if they have insider information and they know that the shares are going down in price very soon, whereas here, under clause 286, if I am an employee and I have acquired my right, because I am an employee, to, say, share options and things of that sort, and I have inside information, can I then exercise my option because I know the price is going up?

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

Yes, you could. I think the policy distinction is this: the two parties who have negotiated the actual contract between themselves should be aware of the possibility that there is inside information arising at some time in the future, and that possibility will be factored into the exercise price of the option, if the parties are sophisticated enough to bargain over that – and they should be if they are entering into option contracts.

However, the bank will be selling the shares over which they have mortgage rights, into the open market. Those people will have had no prior negotiation with the bank as to the possibility of inside information in relation to those securities at the time of the making of that contract. So the distinction is that there is quite clear prejudice to those people. However, those who are negotiating the option contracts should be pricing into the option contracts and its exercise price the possibility that one party may perhaps have inside information at some time in the future.

Banks designing options regularly engage in this type of financial engineering. They try, to the degree that they possibly can foresee events, to price the possibility of all those future events into the exercise price of those securities or options contracts.

Hon Audrey EU Yuet-mee, SC, JP:

Eugene, you say the distinction is that in case of share options – that is, "the right to subscribe or otherwise acquire the listed securities" under clause 286 – you are talking about the contract between two persons who have already factored in the fact that both parties will be aware of the inside information?

But you can have situations where, say for example, I am a shareholder and I am not a director, so I do not have insider information. I grant you an option and you are a director of the company, and you exercise the right, when you have insider information, to acquire the shares from me. The share option agreement does not necessarily need to be made with a company.

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

That is correct, but I suppose in that circumstance you have another defence

available to you. There is a defence under subclause 283(6) where a person is entering into a contract with a person who they know to be a connected party to the corporation; that connected party has not counselled or procured the transaction, so it is an unsolicited transaction, if you will. Anybody who is dealing off-market with somebody who they know to, or have reasonable cause to be, a connected party should be exercising appropriate caution in dealing with that person. He is assumed to be a sophisticated player in the markets because it is unusual that an ordinary retail investor is engaging in these sorts of transactions.

What I would say is that in those circumstances anybody dealing with such a connected person should either require a warranty in the share sale contract or the option contract that there would be no undisclosed insider information at the time of the exercise of that option; or alternatively be asking a premium if they are the person who is disposing of the shares pursuant to that option when it is exercised. They would be, in effect, taking a premium for the risk that there is insider information at the time of the exercise of that option by the director. So they have negotiating possibilities available to them, which should enable them to contract around that risk, and share that risk with the party with whom they are negotiating, in terms of designing the option contract. That facility is not available to those who are buying shares in the open market which are disposed of by a bank, on to the stock exchange, when the bank is in possession of insider information as to a potential default by the corporation over which those shares relate; and those people who buy in the market then take the risk of no possibility of negotiating for that potential risk. They buy with the presumption that all material information has in fact been disclosed, and they have no ability on the market to negotiate the further possibility that it has not been.

Hon Audrey EU Yuet-mee, SC, JP:

Sorry, Eugene, which clause do you say I should look at in addition to clause 286?

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

Clause 284(6), where a person is charged with an offence in respect of that. "It is a defence to the charge to prove that he entered into the transaction otherwise than as a person who has counselled or procured the other party to the transaction, and at the time he entered into the transaction, the other party knew or reasonably should have known that he was a person connected with the corporation".

Hon Audrey EU Yuet-mee, SC, JP:

Sorry. I am still not following why you think it is okay. You seem to be saying that these people can protect themselves. I give you an example. Say I happen to be a shareholder of a company, and I do not possess insider information. You are a director of the company, and you have a contract to buy my shares. Now, if you have insider information as a director, I feel aggrieved that you are able to buy my shares based on your insider information, because you are able to negotiate the price with me, even with a share option. It is not a negotiation with price. At least you know when you acquire my shares, using your insider information. Are you saying it is okay because I have the power to ask a warranty from you?

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

In effect, yes. I think it is a caveat emptor sort of assumption that the legislation makes. This is a defence carried over from the Securities (Insider Dealing) Ordinance, and I think the policy intention was at the time if you know you are dealing with somebody who is connected with the corporation – for instance, a director or substantial shareholder – and they have not solicited you to enter into that dealing, the defence is premised on that. If they do solicit you, they no longer have a defence because there might be a chance for undue influence or any sort of commercial skullduggery going on.

However, if it is an unsolicited transaction you are dealing with somebody you know, or reasonably ought to know, is connected with the corporation off-market – and this defence is premised on an off-market transaction. You are put on notice that you are assumed by the legislation to be sophisticated. It is not an unreasonable assumption, because many retail investors deal in listed company shares; not only company shares, but also listed company shares off-market. To negotiate appropriately so as to protect yourself, share agreements of this type quite regularly contain a whole ream of representations and warranties, for instance that the listing rules have been complied with; specifically that all material information that needs to be disclosed under the listing rules has been disclosed. Any lawyer who was acting for such a person and who did not include such a warranty in the contract I would dare say is quite clearly professionally negligent.

There are means in which these people can negotiate. Alternatively if they cannot negotiate such a warranty, they should be asking, if they are the person who allows the securities to be acquired, for a premium because they are the ones bearing the risk that there will be some favourable commercial event in future in relation to that company which will increase the value of the share; and they will not be able to retain that economic benefit. There are commercial abilities available to them to negotiate, and the assumption the legislation makes is that they are in a position to negotiate in that manner with the connected party.

Hon Audrey EU Yuet-mee, SC, JP:

Is this a protection that is available in all sophisticated markets?

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

No. I think it is quite difficult to compare the defences available under the insider dealing legislation in all jurisdictions, because the legislation in and of itself covers the same

basic wrong, but it is very, very differently drafted in United Kingdom, in the United States, in Hong Kong and in Australia. All these jurisdictions take a very different approach to insider dealing, and their defences are very different.

Generally there are defences where there is an equality of information between the two parties. Obviously there is no insider information known to either party to the transaction. There is a bargaining risk. I understand that in Australia they are contemplating a defence of the nature of the option defence that we have. I would have to check the precise nature of the UK defences to see that it is there. As their legislation is modelled on an earlier version of UK provisions, I would guess that it is probably there, but I would not want to undertake that and mislead Members, until I can verify that. We can undertake a survey and produce the results to Members, if it would please them.

Hon Audrey EU Yuet-mee, SC, JP:

Thank you, Mr Chairman. I would be grateful if this could be done, so that we are aware that similar defences are available elsewhere.

Deputy Chairman:

Mr Chairman, can I go back now to pages 24 and 25, now that I have had a look at the UK Act? I have no difficulty with the UK Act. I may not fully understand what it is all about, but at least I can read the sentence. I think the thing is that the UK Act is much more direct and simple. It does not begin with "Where a person is charged..." and so on. It says: "An individual is not guilty of insider dealing..." and so on.

I understand you cannot copy word for word. I am not asking for that, but that is very straightforward. Perhaps our drafting is problematic, also because of the use of the word "any". You see where you say in clause 284(7A)(a) "...he acted in connection with any dealing..." and so on; this becomes difficult to understand, whereas in the UK Act it says that

"...he acted in connection with an acquisition or disposal".

Then subclause (b) says that "The information out of his involvement in the dealing", so that it is definite. We know what that is about, but in our own drafting I find it difficult, and there seems that in subclause (7) where the UK Act uses "information consisting of one or more of the following facts...", at least they are facts, or they are items. They themselves serve as facts. We say that there has been, or is to be, any dealing with listed securities, and so on, or that any such dealing is under consideration. That is not a fact. If you look at the UK Act, it says: "Securities of a particular kind have been, or are to be, acquired or disposed of". That is a fact.

It seems that whenever we use the word "any" we create these kinds of difficulties. So without going into the details, I ask you to go into the drafting of subclause (9) again, to see how the word "any" is used. A fact has to be a definite fact. I find it slightly shocking that you say "information consisting of facts", but at least in paragraph 4 of the UK Act, items (a) to (e) are indeed facts. Can I just leave it there? Have a look and see if it is really a matter of grammar and language.

主席：

第287條，page 27。

Deputy Chairman:

Mr Chairman, on clause 287 can I make a general comment? The intention that it has certain effects I have made in relation to Part XIII, so may I just repeat that comment, and ask for the whole thing to be reviewed in the light of that comment? I will not repeat that today. Apart from that, I have a comment which is peculiar to clause 287 of Part XIV which defines criminal offences. Mr Chairman, I do not know if you want me to deal with that now or until you reach 30?

Chairman:

Yes, please.

Deputy Chairman:

If you look at clause 287(5), it begins on page 30. This is a deeming provision. This says that if you have done any of the offences on page 30 under subclause (5)(a),(b) and (c), then you are deemed to have done something intentionally, which would put you within the offence. If so, then anyone who has done any of these things would automatically be guilty of an offence. There is no intent attached to them. Therefore subclause (5) makes strict liabilities of offences. Can we have the justification for that?

財經事務局副局長區璟智女士：

關於這問題，當我們在以往的會議討論政策時，也曾解釋有關情況。我們在草擬有關市場失當行為的條文時，已十分小心謹慎。凡是可以把意圖寫明的，我們亦盡量清楚寫明。在這次修訂中，我們把一些有欠清晰的地方，盡量清楚寫明。然而，一些市場失當行為的意圖是很難寫明的，即使把意圖寫出來，也很難舉證。這條文所訂的市場失當行為就是其中之一。

我們在討論政策及第XIII部時亦曾提到，這類活動包括第(5)(a)款所提及的"虛售"(wash sales)。"虛售"指有關人士不斷以同一個價格與自己進行股票買賣，但該等股票的實益擁有權並無轉變。這類活動會誤導其他投資者，使外界的投資者以為有關股票在當日的行情十分暢旺，交投相當活躍，這類活動屬於市場失當行為。

那麼如何證明有關人士的意圖呢？由於這種市場失當行為的性質比較特別，條例草案訂明，假如證監會發覺該人不斷與自己進行股票買賣，而該等股票的實益擁有權並無轉變，證監會便可展開研訊程序或作出檢控。不過，條例草案亦訂有一項免責辯護條文。

另一種活動是第(5)(b)款所提及的"對銷交易"(matched orders)。舉例來說，假如我與林太約定，以兩元一手的價格售賣／購買某隻股票，並在今天不斷進行買賣，那麼基本上是由林太擁有我所持有的股票的實益擁有權，但價格經雙方約定。由於這種活動會令外界人士誤以為該股票的交投十分暢旺，因此我們認為這亦是市場失當行為。就這些市場失當行為而言，由於很難證明有關人士進行交易的意圖，根本無法舉證，所以我們嘗試採用另一種草擬方式。在考慮應如何草擬有關這兩種市場失當行為的條文時，我們參考了外國的做法。現時的做法是，證監會首先要證明發生這樣的事情，然後當事人可提出免責辯護。

主席：

這部分是新加入的，對嗎？

財經事務局副局長區璟智女士：

以往有關操控市場的條文並沒有寫得如此詳細。或者我請林太或Eugene解釋，我們參考外國的經驗草擬該等條文的情況。這些活動屬於其中兩種比較特殊的市場失當行為的交易。

副主席：

我希望提出一些意見。對於當局指能夠清楚寫明意圖的，便盡量寫明，否則也沒有辦法，我不能接受這樣的做法。我認為，問題在於甚麼可以構成干犯罪行？如果無需任何意圖，只要作出有關作為便構成罪行，而

被告人可提出免責辯獲，這做法其實是將舉證責任歸於被告人。雖然這類事情並非不會發生，但如果真的出現這種情況，當局必須提出充分理由或原因，解釋為何需要規定即使沒有犯罪意圖，只要作出有關作為，已屬違法。當局不能夠單單以很難舉證為理由而作出這樣的規定。政府可否向我們講解其他地區的做法？在出現第(5)(a)、(b)及(c)款所述的情況時，其他地區是否規定，無論有否犯罪意圖，只要作出有關作為，便負上刑事責任？其他地區的做法是不是這樣？

財經事務局副局長區璟智女士：

我請Eugene向各位解釋有關情況。

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

In Australia, certainly the case is "Yes". In Australia the prosecution need not prove criminal intent in relation to wash sales or matched orders, wash sales being subclause (5)(a) and matched orders being subclauses (5)(b) and (c). That is found in Section 998 of the Australian Corporations Law, I believe.

In relation to the United States, there is no such a presumption as a matter of legislation. However, the US over 60 or 70 years of case law has built up a de facto case law presumption that where such activities are found, the judiciary will presume intent prima facie, subjective to disproof on the preponderance of probabilities by the defendant. What the Australian legislation does is to, in effect, turn a case law presumption into a legislative presumption; and the defence is found in subclause (7) whereby the defendant must prove that none of the purposes for which they engaged in the activity was to create a false or misleading impression with respect to price, market or active trading.

In the United Kingdom, as a matter of criminal law there is no such offence as a

matter of strict liability, with a reverse onus defence. However, within the draft code of market conduct, which is subject to an unlimited fine and is viewed as a supplement and really a substitute for extensive criminal provisions in the United Kingdom, these sorts of activities will be viewed as prima facie creating a presumption of intention, as I understand the operation of the UK market abuse regime.

In all those jurisdictions – and Australia particularly, as a matter of legislation the provisions are almost identical - there is a reverse onus burden of proof on the defendant to establish that they did not have a prohibited purpose. In the United States, as a matter of case law presumption, the same situation prevails. In the United Kingdom, under the market abuse regime, this activity will, as I understand it, create a presumption that somebody is engaging in market abuse, which must be rebutted by the defendant.

Deputy Chairman:

So we rely on a proportionate presumption.

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

Yes. That is correct.

Deputy Chairman:

In effect, you already have it said in so many words. You say "... to be regarded as..." on page 31. Basically you are making this a presumption. Have you really addressed the question? I do not know about other jurisdictions. I do not know about the UK situation, whether it will be changed by the Human Rights Act, but do we have under the Hong Kong Bill of Rights Ordinance a requirement of presumption, and you know the case law that a presumption has to be justified.

One of the justifications is that it has to be proportionate. So what is the justification here that it is proportionate or that it is reasonable to put such a presumption in the law?

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

Yes. I will deal with your question in two parts. First of all, we have sought advice from the Department of Justice on this matter. They have assured us that it is compliant with the basic law and Bill of Rights requirements on this provision.

Deputy Chairman:

Did they explain why? They just say they oppose - -

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

No. They did not. Perhaps I can move on to that now. You are quite right. Your summary of the law in relation to this is correct, as I understand it. It must be a justified reversal of the onus of proof. Our justification for reversing the onus of proof is the same as we have in relation to clause 265 which my colleague Mr BAILEY explained; and that is that these types of activities are those which do appear very unusual on the matched order system on the stock exchange. Most people are watching the audit result produced by the stock exchange trading system. Buying and selling from yourself is an extremely unusual activity. It is one that cries out for explanation, because generally there is no economic justification for such activity. It is in and of itself a manipulative activity. I am buying and selling from myself at a price that will appear on the stock exchange order matching system and through the results produced by that, to the public generally to be a

genuine trade transacted at a particular price.

In relation to subclause (5)(a) we are requiring people to explain on the balance of probabilities why they engaged in this activity, because it is barely evidenced as a matter of documentary proof, and the intention is obviously within the mind of that person who engaged in that activity. We are asking them to explain why they engaged in that activity, because they are the best-placed person to produce evidence as to their intentions.

In relation to subclauses (5)(b) and (c), the answer is the same. You either place a bid saying "I will purchase a certain number of securities at a certain price", and either myself or an associate of mine who I know is engaging in the same activity, say: "I will buy those securities, about the same amount at exactly the same, or approximately the same, price". Again on the order matching system and the results that are produced to investors, this appears as very genuine independent buying and selling activity that creates an impression that there is active demand for this particular security at this particular price, when in effect it is a concerted arrangement generally to mislead the public as to that.

Now, there are generally very few circumstances in which this would be a legitimate arrangement. Again, the intention behind this activity is not usually evidenced in writing. It is in the defendant's mind, and we are again asking him to explain on the preponderance of probabilities why they engaged in those activities.

Deputy Chairman:

So in other words you say that there has just normally no reason as a matter of market activity; there is just no conceivable reason for you to do this sort of thing, but if you do this sort of thing mindlessly, without any reason, then you are going to cause a great deal of market harm. So in view of that, you think that that justifies a presumption?

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

Commission:

We are saying that the damage caused to investors broadly, and the market as a whole, justifies them warranting to explain their conduct. I would not say there is no conceivable reason for which they have engaged in this, and there are; in the defence we would ask people to establish that. However, we are saying that as a matter of ordinary course on the market this should not be engaged in. Usually it is evidence of clearly manipulative activity, and we have prosecuted several people for engaging in wash sales, as other jurisdictions have around the world, and similarly for matched orders.

What we are saying is that this creates such a widespread false impression in the market. There are extremely few situations in which this would be legitimate activity with a legitimate explanation. "It will never be evidenced in writing why you've engaged in this, so please tell us why".

Deputy Chairman:

Okay. I hope you are right, that we are not going to enact a law which is unconstitutional because it will offend the Hong Kong Bill of Rights Ordinance, which is just the ICCPR. Then we will be in trouble. Thank you very much.

財經事務局副局長區璟智女士：

我希望作出補充。BOR的專家亦曾詳細研究這條款。我們也有向他們提出副主席剛才問及的問題，所得到的legal advice是："the issue is whether it might be in breach of the right to presumption of innocence. The draft provision defines where false trading takes place, and specifies conduct that may lead to false trading. The language of the provision indicates that it remains primarily the responsibility of the prosecution to prove the essential ingredients of the offence – namely the doing of an act that creates, or which is intended or likely to create, a false or misleading appearance of trading.

The person will be guilty of an offence once these elements were proved by the prosecution, unless he could establish that the purpose for which he committed the act was not for the purpose of creating a false appearance of trading...", in the expert's view, "the draft provision creates an offence which involves an absolute prohibition on engaging in the activities we have heard of in this subsection. And on the need to preserve the integrity of the securities market and for the protection of the investors, it is not unreasonable to place such an onus on the person alleged to have engaged in market misconduct."

他們繼而quote了兩個court cases，解釋為何他們認為這種分析是合理的。我不在此援引該等案件。

主席：

市場人士就第265條提出的意見，與第287條的相同。他們亦問及副主席剛才提出的問題，亦即應否訂定這些deeming provisions。政府有否再收到group of nine investment bankers或其他人士的回應，表示當局最新作出的修訂，基本上達到他們的要求？

財經事務局副局長區璟智女士：

據我所理解，他們最近提出意見時已沒有提到這一點。我請曾先生作出補充。

主席：

也就是說，當局在作出修訂後，他們曾提出意見？

財經事務局助理局長曾俊文先生：

他們在2月、3月、5月及6月提出意見時，再沒有提到這一點。

主席：

但他們以往曾向我們提出這些意見。

財經事務局助理局長曾俊文先生：

我們已在此summarize group of nine investment bankers以往提出的意見。我們在參考各界最新一輪的意見時，發覺他們再沒有提到這一點。

財經事務局副局長區璟智女士：

他們亦知道我們作出其他的修訂。

主席：

副主席。

副主席：

立法機關一定要小心謹慎，不要通過不合憲法的法例。然而，在考慮一個presumption是否違憲或不合理時，我們亦需要參考實際情況。關於市場運作的實際情況，資料來自署方。我們接受這做法，是基於署方所說的實際情況。如果他們的說法是錯誤的，將來便會出現問題。我個人認為很難再進一步討論這件事。

主席：

我提出上述的問題，是因為根據業界人士最初提出的意見，他們認為這兩部分的問題最大。我們現在繼續討論其他條文。關於page 32，各位

有沒有問題？第(7A)款提及off-market transaction。請問這大致上包括哪些交易？雖然第(7A)款載有該用語的定義，但當局可否告知我們，根據條文的規定，哪些交易無需在市場內進行？

財經事務局副局長區璟智女士：

主要是指無須在交易所記錄的交易。我請Eugene講解一下。

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

That is correct, and basically as I understand the operation of the stock market rules – and it will vary from stock market to stock market, and the basic principle is the same herein Hong Kong – any order executed through the AMS matching system is regarded as on-market, and similarly any order executed through a stock exchange participant is regarded as on-market, even if it is not conducted through the AMS system. It must under the exchange rules be reported to the exchange trading system, and will appear through the exchange trading system and be reported as a trade executed on that exchange. Anything other than that is an off-market transaction.

主席：

OK。關於page 33，各位有沒有問題？現在討論在page 34的clause 288 — Offence of price rigging。

Deputy Chairman:

Mr Chairman, I have two comments. One is that subclauses (1)(a) and (2)(a) have no intent. There is no requirement of any criminal intent. Provided you enter into a certain transaction which has a certain effect, then you have committed an offence. I would like to

hear the justification. That is question 1.

Question 2 is that subclause (1) differs from subclause (2) only in that the latter refers to overseas markets. Is there any reason why the two cannot be combined by just adding "overseas market"? Why do we have to have two subsections? Thank you.

財經事務局副局長區璟智女士：

我請陳律師首先回答第二個問題。

高級助理法律草擬專員陳子敏女士：

關於這一點，我們曾參考我們內部與政策局的要求。關於在本地市場交易的證券，我們不希望任何人在香港或外地作出有關的作為，所以我們在第(1)款採用了"在香港或其他地方"的字眼。然而，由於第(2)款所提及的是外地市場，我們不希望管制任何人在外地進行一些只影響外地市場的事情。香港無意對這些事情作出規管。所以，我們在第XIII部及這部分所採取的做法是，在編排方面，我們分兩部分訂明有關規定，希望讓讀者可明確看到兩者的分別。至於第一個問題，我們在第(5)款訂有一項免責辯護，而第(5)款是適用於第(1)(a)款及第(2)(a)款。其他同事可能希望就這方面作出補充。

副主席：

我知道該條文訂有一個defence。但正如我剛才提出的問題，這只是將舉證責任歸於被告人。

財經事務局副局長區璟智女士：

或者我首先解釋第(1)(b)款。關於第(1)(b)款及第(2)(b)款，正如陳律

師剛才提到，我們並沒有就該兩項條款訂定免責辯護，這是因為該兩項條款已清楚訂明，有關人士不得" with the intention or being reckless"作出有關作為。我們的法律顧問表示，根據這樣的寫法，證監會在舉證時，必須要證明所涉的mens rea element。

副主席：

我明白，但我並沒有就第(b)段提出問題。

財經事務局副局長區璟智女士：

第(1)(a)款及第(2)(a)款所提及的活動，其實與剛才提到有關虛假交易的misconduct十分類似。這些條款所指的情況是，當有關人士進行買賣時，所涉股票的控制權或實益擁有權並無轉變。為何該人要這樣進行買賣呢？假如該人不斷與自己進行買賣，而證監會能夠證明這一點，以及能夠證明在進行這些買賣後，有關交易的效果是影響到股票的價格。我們認為，如果證監會能夠證明這兩點，指控該人干犯這種市場失當行為的表面證據便已成立。當然，我們亦須為當事人訂定免責辯護條文。我們考慮到這種市場失當行為本身的性質，決定作出這樣的規定。

主席：

政府回應業界人士所提出的意見時，表示就這部分而言，onus of proof歸於defendant。

財經事務局副局長區璟智女士：

證監會必須證明兩點。第一，有關人士與自己進行買賣，而該等股票的實益擁有權並無轉變；第二，該等買賣的效果是影響到股票的價格。換言之，有關交易引起市場敏感的效應。

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

This is a wash sale that has a price effect rather than a purely wash sale. Again it is an extremely unusual activity that would obviously mislead investors who are watching trading through the – as reported by the Stock Exchange trading system, extraordinarily little justification for such activity. If there is a justification what we are asking them to do is provide evidence of their intention. We have explained this to you so I do not think I can add anything to what has been said.

Deputy Chairman:

In fact, clauses 288 and 287 stand or fall together.

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

Yes, that is correct.

Deputy Chairman:

It is the same justification.

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

Yes.

主席：

關於page 35，各位有沒有問題？那麼page 36呢？現在討論第289條。

Deputy Chairman:

Mr Chairman, I do not quite understand the first few lines of subclause (1), just referring to the first four lines. What is the information that this person is not allowed to disclose?

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

Information to the effect that the price of securities in a corporation will be basically affected by a prohibited transaction, a prohibited transaction being any transaction that is in breach of one or the other forms of market misconduct. So a person cannot, in effect, go around saying that the price of this particular security is going to be affected by somebody – either myself or one of my associates – engaging in market misconduct.

Deputy Chairman:

So he is not supposed to tell people that there is suspected prohibited transaction and that prohibited transaction would affect the price. This is what he is not supposed to disclose.

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

Either if they are – themselves or an associate and they are either a party to the transaction.

Deputy Chairman:

That is okay. It is a fairly long sentence.

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

Yes, it is.

Deputy Chairman:

Can I have just a minute? Do you read "to the effect"? Can you say that this person is not allowed to disclose information that the price of securities of so-and-so will be affected?

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

Perhaps to the effect, I think – if my colleague Miss CHAN could expand – would add that any information that imports that that price effect would occur, not merely that the price will rise because we are engaging in market manipulation or price rigging or whatever rather than – this will increase demand which would implicitly suggest that the price is going to be affected. I think it just broadens the - whether it is necessary as a matter of drafting or not I think is a question for someone else to answer.

Deputy Chairman:

I think it defines "prohibited transaction" somewhere. Can you remind me where this is defined?

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

Page 38, clause 289(4).

Deputy Chairman:

So he goes around telling people that someone is going to commit a market misconduct and that this misconduct would affect the price and if he does anything like that then he will be in the soup. That is the idea.

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

Yes. There is a defence for those who do so for a reward where they spread the information in good faith. For instance, if I am a reporter and by accident I am an associate through the operation of the associate definition with a person who is engaging in such conduct, I would receive the – I spread the information in good faith. For instance, I report that the price of this share is going to rise, merely because I am a reporter because it seems that somebody is engaging in market manipulation. That would not be inappropriate.

Deputy Chairman:

Look, if I go to the Commission and say, "Look, so-and-so is going to commit this market misconduct and I think if he is allowed to commit this misconduct the price would be affected", then I commit an offence. How can that be right?

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

Commission:

I think as a matter of law intention will be read into the defence within clause 289. I do not think it is explicit in the provisions but I think in Australia certainly this offence is modelled on an Australian offence and, in turn, modelled on a US offence. It is quite clear from the case law that the intention will be read in that a person must intentionally or recklessly be doing this. I agree, it would be unusual for it to apply in those circumstances, however.

Deputy Chairman:

But it is drafted and that would be an offence. I would have thought that you punish the person who is going to commit this misconduct which is going to affect the price wrongfully but instead you punish the person who reports the crime or the contemplated offence and I do not understand. Have I got it wrong or something?

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

The defence is a broad one, I would agree.

Deputy Chairman:

If I report that someone is about to do something wrong and you say, "Well, you commit an offence unless you have a defence." That sounds pretty peculiar to me.

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

The only thing I can say in response to the deputy chairman's comment is that I

think it is very hard to define the circumstances in which the offence should apply. The defence really, in effect, is prosecutor's discretion in this respect.

Deputy Chairman:

What? The prosecutor's discretion whether or not I will be prosecuted? That is very unusual, to say the least.

Can you not see that it is not an offence to be reporting the matter to an appropriate authority or something like that. Is there a saying that it is a defence?

主席：

我相信這條文的目標，就是不希望其他人把有關資料再傳遞出去。但報案的情況，則肯定不包括在內，對嗎？

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

這項policy並非關乎任何人向警方報案的情況。訂定這條文的目的，完全不是為了懲罰那些人士。至於副主席剛才提到，"the intention must be to catch the guy who committed the misconduct rather than catching this poor little guy who reported it. Now, the intention is to (1) catch the guy who committed the misconduct and (2) to deter people from going out there to make a proclamation that somebody else is committing a misconduct and, therefore, people will get affected and people will come in and buy and sell shares."

財經事務局副局長區璟智女士：

曾先生，關於這一點，你有沒有任何補充？

財經事務局助理局長曾俊文先生：

我希望補充一點，關於這項罪行，除非有關人士本身參與該項受禁交易(第(1)(a)款)，又或從中收取報酬或利益(第(1)(b)款)，只有在這種情況下，才屬犯罪。所以，如果是報案的情況，我相信不會符合上述兩項條件，所以副主席也無需感到憂慮。

Deputy Chairman:

Thank you. But that does not explain the mystery and it sounds pretty odd to me.

主席：

假如董事們在開會時提到進行這些活動，而負責茶水的女工期間聽到此事，並將此事告知其他人。如果該名女工有份參與買賣，便會干犯這項罪行。情況是不是這樣？

財經事務局副局長區璟智女士：

假如她有份參與買賣，又或收取利益，便屬違法。

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

They would have to receive a benefit as a result of the disclosure so if they are not receiving remuneration specifically for spreading the story, I do not think it could be argued to be within the main course of employment.

Deputy Chairman:

So you make sure that if he does report anything like that to the Commission that he will not be given any reward.

主席：

根據該條文的規定，控方必須證明該人有benefit，對嗎？即使該人參與買賣，亦可能會出現虧蝕的情況。我的意思是，第(1)(b)款提及"a benefit as a result of the disclosure"，也就是說，該人必須收取利益。如果該人參與買賣而出現虧蝕的情況，當局便不能夠對該人提出起訴，對嗎？

財經事務局副局長區璟智女士：

這條款是指該人在傳遞資料時而取收的利益，這未必涉及買賣。假如我進行內幕交易，並要求Alexa將資料傳遞出去，使其他人紛紛效法跟風，她本身未必進行有關的買賣。只要她替我傳遞資料，我便付款給她。

主席：

第(1)(a)款則訂明，只要該人參與該項受禁交易，便已足夠，我們無需理會該人有否收取利益。

財經事務局副局長區璟智女士：

對。

主席：

好的。關於page 37，各位有沒有問題？那麼page 38呢？

關於第290條，我們需要討論有關negligent的問題。在之前一、兩次

會議，政府曾詢問我們是否希望取消有關negligent的部分。

副主席：

我們在較早階段已清楚表明對此事的看法，為何政府在footnote 19表示需要再聽取我們的意見？這實在令人費解。我認為，把這種情況列為刑事罪行，實在是極不適當。雖然政府在另一footnote提到，其他條例亦有採用這種做法，把有關行為列為刑事罪行，但我認為這本身並不是一個充分的理由。每當政府希望採取這樣的做法時，必須作出解釋。我認為，就這條文而言，政府絕對沒有需要這樣做。

我們在較早階段已詳細討論這問題，所以我不打算在此再重覆。我只希望表示，我強烈反對在這項刑責中，加入"negligent"一字。此外，正如許多意見也提到，這項刑事責任的罰則是十分重。如果政府希望聽取Bills Committee的意見，以上就是我的意見。雖然我不打算長篇大論說出我的意見，但我希望署方明白我強烈反對這做法。

主席：

各委員如希望就這一點表達意見，請你們現在提出意見。各位是否同意取消有關negligent的部分？吳亮星議員。

吳亮星議員：

如果能夠考慮採取這做法，我認為是值得的。Negligence的情況其實是很普遍。經營者在日常運作中，很多時會擔心出現negligence的情況。此外，這方面也較難作出界定。政府可否說明在界定negligence時，當局可採取哪些審慎的做法？我本人傾向於取消有關"negligent"的部分。

主席：

其他同事是否希望表達意見？

財經事務局副局長區璟智女士：

上次5月開會時，副主席未有出席該次會議，其他委員當時未有拿定主意，包括主席也表示是"fifty-fifty"。委員會當時表示要先行諮詢傳媒機構的意見。至於市場人士的意見，委員會已清楚知道。政府當時亦提供了一些背景資料供各位參考。

我們主要考慮的因素是，第一，當我們訂定民事法律制度時，有意見認為虛假消息流傳於市場，對社會的傷害很大。當局就民事法律制度所訂的罰則，確實不夠嚴苛。此外，由於人權法的問題，罰款不但沒有增加，還有所減少。如果罰則過輕，阻嚇作用則不大。他們詢問可否訂定刑事法律責任？在諮詢過程中，當時政府表示會訂定刑事法律責任。當局會嘗試從那方面考慮，所以訂立了這項安排。刑事法律制度與民事法律制度是相輔相成的，希望藉此解決民事制裁的阻嚇力可能不足的問題。

與此同時，亦有意見認為，假如將"疏忽"這項元素也包括在內，這做法會否過於嚴苛？吳議員剛才問及何謂"疏忽"。我們的法律顧問表示，就上市公司的有關人士而言，假如有關人士是上市公司的財務理事，亦即Financial Director，該人作為理事的身份，市場人士對該人會有一定的期望。市場人士預期該人會符合專業操守，採取所需的步驟，然後才發放資料。如果該人違反專業操守，又或未有採取基本的步驟，也就是說，擔任該等職位的人士理應不會這樣做，那麼該人便是"疏忽"行事。這就是法律顧問給予我們的答案。

如果是這樣的話，各位又可能會認為作出這項規定是有理由的。這項規定只不過是要求專業人士達到其專業水平。但我們同時需要考慮，有關的懲罰是否過重？關於這一點，各位可能需要再作研究。我們可以在今

天的會議再討論這問題。市場上的確有意見指民事制裁的阻嚇作用不足，當局需要保障投資者在這方面的利益。但另一方面，我們亦要考慮，假如專業人士如公司董事、秘書、大股東、會計師及律師等沒有遵守專業操守或採取所需的步驟，他們應負上刑事法律責任，抑或按專業團體的守則對他們作出內部處分？透過內部處分等方法作出懲處會否比較合理？這也是市場文化的轉移。關於這方面，我們希望聽取各位的意見。

副主席：

當委員會在以往會議討論第XIII部時，當時並非逐項審議條例草案的條文，我亦有提到，在有關市場失當行為的第XIII部中，假如當局在作出紀律處分或民事制裁的條文中加入"疏忽"的元素，我可以同意這樣做。然而，在刑事制裁的條文中加入這項元素，我認為絕不適當。關於市場人士作出的市場失當行為，之前很多條文已可處理有關情況。

因此，第290條最主要是針對非市場人士。與上一部分一樣，這部分給予若干類別的人士豁免。然而，所採取的做法是，有關條文訂明每一類別的人士在某種情況下所獲得的豁免。我認為，當中一定有所遺漏。也就是說，某些人士可能會因條文有所遺漏而未獲豁免。如果訂定豁免的做法未能令人感到滿意，而前面的條文已處理疏忽的情況，我認為並無必要及理由在這條文加入"疏忽"的元素。此外，我們不能把每件事交由政府決定是否提出檢控。我認為這樣會給予當局過大的酌情權。當有關人士並非市場人士時，如果他們因疏忽而作出某項陳述，其他人是否真的相信該等人士所說的話？我認為未必會出現預期的效果。這跟有關人士與自己進行買賣，又或與他人約定以某一價格進行買賣的情況不同，因為無論該等人士有否任何意圖，他們事實上會造成一種假象或市場混亂。然而，即使有關人士疏忽行事，可能也不會產生任何效果。那麼怎可以因此而規定該等人士負上刑事責任？如果當局認為我上次沒有解釋清楚，又或以往並無提出這些意見，我可以繼續說下去。

主席：

不用了，已很清楚。

副主席：

不用了？好的。

主席：

吳亮星議員。

吳亮星議員：

副局長剛才提到何謂"疏忽"。這是指事先訂有一些基本條件或指引讓有關人士遵守，而該等人士理應知道怎樣做，不會遺漏有關步驟，但他們事實上卻有所遺漏。我認為，採用"疏忽"一詞，其實很難解釋為何會有所遺漏。如果能夠解釋箇中原因，便不屬於"疏忽"。這是十分矛盾的。他們就是無法解釋為何會有所遺漏。由於他們具備若干基礎及條件，才能夠擔任有關職位，因此實在沒有理由會有所遺漏。所以，我認為不應採用"疏忽"這兩個字。如果採用這兩個字，便很難解釋有關人士是否應該記得怎樣做，又或在知道怎樣做的情況下，為何會有所遺漏的問題。我始終認為，採用"疏忽"這兩個字，意思就是他們不應該"疏忽"的。既然是"疏忽"，又怎樣能夠說這是不應該的？我始終解決不了這問題。如果在這條文加入"疏忽"的元素，當有關人士被控違反這條文的規定時，便很難作出解釋。除非當局使用其他字眼，使前面的其他條文所訂的規定已經足夠，或者在該等條文多補一些，藉此減少使用"疏忽"一詞。

主席：

我本人的意見也是傾向取消"negligent"一字。在聽過剛才幾位同事提出意見後，假如我提出以下建議：委員會的主流意見是建議當局取消這個字，各位是否反對這說法？曾鈺成議員。

曾鈺成議員：

主席，我同意你的見解。假如沒有這項規定，而將來發生一些事情，公眾屆時如認為法例並不足以嚴厲制裁這些疏忽所造成的嚴重後果，除非有一個很充分的理由，我們才考慮加入該字眼。

主席：

李家祥議員。

李家祥議員：

主席，我非常同意你的說法。不過，我希望清楚說明箇中理由，以作紀錄。很多人做事都是很專業的，不單是證監會或條例草案所提及的人士。公務員做事也需要很專業，很多專業人士在很多情況下都需要很專業地履行其職責。但是，人始終是人，無心之失或不經意地漏了採取某些步驟，是經常發生的情況。然而，如果出現這些情況，根據很多法例的規定，有關人士需要負上民事法律責任，或負上干犯專業失當行為的責任。

事實上，在所有其他情況下，這兩項懲罰已有足夠的阻嚇作用。我相信每位專業人士並非有意作出有關的事情。如果是故意的話，也就是說，如果是有意圖的話，就已經不是negligent。我認為應該讓專業人士可安心地工作。專業人士有時可能真的漏了做一些事情，而他自己並不察覺，如果他因此而被監禁，這項威嚇對他來說是非常大的，亦很不公道，我絕對不希望出現這種情況。除非有很明確的證據證明，規定有關人士承擔專業責任及負上民事法律責任的阻嚇力仍然不足夠，如果我們認為這兩項懲罰的

阻嚇力不足，才考慮訂定刑事法律責任。但我相信，專業人士在面對可能干犯專業失當行為及被民事起訴，這已是非常大的威脅。我個人認為，不一定要訂定刑事法律責任。

主席：

讓我再次說明委員會的主流意見，就是建議當局取消"negligent"一字。

財經事務局副局長區璟智女士：

此外，正如剛才曾先生和李先生所說，我們應該不時就此事進行檢討。如果將來市場真的出現較嚴重的情況，我們再作考慮。

主席：

我曾在上次會議提到，由於現時我們進行這麼大規模的改革，將有關法例重新整理，我認為在初期應採取較寬鬆的做法。其實，現時的做法也並非很寬鬆。在法例實施後，如果發覺有關規定並不足夠，屆時可把規定收緊。"先嚴格、後放寬"的做法，較"先寬鬆、後收緊"的做法困難。Sophie。

梁劉柔芬議員：

對於這個問題，我沒有特定的看法。不過，在聽罷各位提出意見後，據我記憶所及，當時市場人士曾指出，雖然我們從很多角度探討此事，但並無從小投資者的角度來看這問題。我只是想提出一個問題，本身並無任何答案，或者你們可以給他們一些assurance。

我十分同意李家祥議員的說法。現時在整個operation中，絕大部分都是專業人士，他們根據專業守則行事。然而，在社會傳遞的消息或訊息，

有時未必來自該operation的operator，即專業人士。如果其他人無意中發放一些未經證實的資料，而導致小投資者蒙受損失，上述的情況是否這條文所涵蓋的範圍？

主席：

這問題由副局長回答，還是由證監會的同事回答？

財經事務局副局長區璟智女士：

我們很難就個別個案作出評論。如果我們取消"疏忽"一詞，假如有關人士明知資料是錯誤的，但仍然發放該等資料，這條例草案對該人有阻嚇作用。如果該人罔顧後果，也就是說，他不理會有關資料是否虛假或具誤導性，仍然發放該等資料，該人亦會觸犯這條例草案的規定。不過，如果該人疏忽行事，這便不屬於條例草案的涵蓋範圍。

然而，正如剛才提到，我們可以透過其他途徑處理這種情況，例如施加民事罰則。剛才李議員提到，專業團體本身也有專業處分制度。我們可以嘗試以那種做法處理有關情況。如果出現大亂子，或個別專業團體執法不力，而民事罰則又未能起足夠的制衡作用，屆時我們再考慮應怎樣做。我們尊重各位議員的意見，關於這方面，我們會積極考慮將"疏忽"兩個字取消。

主席：

OK。關於第39頁，各位還有沒有問題？

副主席：

我明白Sophie剛才只是提出一個問題，但她可能沒有注意到，根據

這條文的規定，不管發放有關資料有沒有後果，也不管誰人發放資料、該人所說的話及其他人是否相信該人所說的話，只要該人沒有清楚核實便發放資料，便須負上刑事法律責任。雖然我本人不談論股票，但四周的人每天也在談論股票及股市情況。即使間中談一談這話題，難道你認為這也應該負上刑責嗎？難道你希望交由政府決定是否對該人提出起訴？我認為沒有必要及無需這樣做。

財經事務局副局長區璟智女士：

我希望就梁劉柔芬議員的提問作出回應。根據這條文現時的寫法，即使有關人士發放虛假的消息，證監會也須證明這些消息會誘使其他人進行買賣，又或這些消息會令價格波動。也就是說，並非任何錯誤的消息都會導致該人負上刑事法律責任。如果該人發放資料時，表明這些資料未經證實，只是市場上的傳言，該人便不會負上刑事法律責任。由於該人已告訴其他人，他並沒有核實有關資料，如果其他人相信他所說的話，便需自行負責。

主席：

李家祥議員。

李家祥議員：

理論上，政府官員所說的話也可以是"negligent"。

副主席：

不，政府官員在法律上是免責的。

主席：

OK，現在繼續討論第290條。關於page 40，各位有沒有問題？

副主席：

主席，我們接着討論的規定，與第XIII部有關條文的規定是一樣的，對嗎？

主席：

對。

副主席：

既然是一樣的，我在討論第XIII部有關條文時提出的意見，亦同樣適用。據我所理解，政府正考慮有關問題。

主席：

當局將第40、41及42頁載列的條文全部刪除。

副主席：

這些都是一樣的。

主席：

現在討論第43頁。

財經事務局副局長區璟智女士：

我們在該等條文中，更清楚訂明有關的免責辯護條款。除公司外，替該公司做事的員工及代理人亦受到保護。

主席：

關於第44頁，各位有沒有問題？那麼第45頁呢？

副主席：

如果當中所載的條文與第XIII部的條文有所不同，請政府向我們指出有關條文。

主席：

假如政府接受委員會的意見，取消"negligent"一字，這可大大減輕廣播界、媒介或印刷商的憂慮，對嗎？

財經事務局副局長區璟智女士：

根據委員會徵詢傳媒機構所得的意見，他們主要關注到有關"疏忽"那部分。

副主席：

是的。

主席：

也就是說，如果取消"疏忽"一詞，便解決了他們的問題，對嗎？

財經事務局副局長區璟智女士：

對，這已解決他們所提出的問題。

主席：

在上次會議，我們表示會再次徵詢他們的意見。然而，我不希望在徵詢他們的意見後，又再次要求他們提出意見。

財經事務局副局長區璟智女士：

我們現在可以作出決定。關於這一點，我們會依從議員的意見。

主席：

也就是說，政府會接受委員會的意見，取消"疏忽"一詞。如果是這樣的話，我們應如何再徵詢media的意見？

副主席：

我認為無需再徵詢他們的意見。因為一直也有諮詢他們的意見，而且他們所提出的意見，主要有關"疏忽"的問題。

主席：

如果政府接受委員會的建議，應該沒有問題了，對嗎？

副主席：

但我認為，委員會可以將有關情況通知直接向立法會提出意見的人士。

主席：

我們曾向他們發出信件，徵詢他們的意見，因為這問題對媒介來說，是比較敏感的。

副主席：

那麼我們可以通知他們有關情況。

主席：

好的。

副主席：

至於其餘的兩個部分，即有關"reckless"及"intentional"的部分，應該無人可以提出反對的。

主席：

由於我們較早前曾邀請媒介，包括香港華文報業協會及香港新聞工作者聯會等發表意見，因此我們應向他們發出簡短的信件，通知他們政府已接受委員會的意見，取消"negligent"一字。如果他們再有進一步的意見，可向委員會提出。

副主席：

在取消"疏忽"一詞後，該條文較後部分提到的辯護理由，便沒有那麼大的問題。如果把刑責範圍定得很廣泛的時候，defence變得很重要；但如果刑責的範圍定得比較狹窄的時候，就不必那麼擔心。

主席：

我們已解決有關問題。委員會秘書會致函該等媒介團體，通知他們政府已經接受委員會的意見，取消"negligent"一字。如果他們有進一步意見，可以向我們提出。關於第290條，各位對page 48、49、50及51載列的條文，有沒有問題？

副主席：

主席，我希望委員會在發信給傳媒時，提醒他們有關"intentional"及"reckless"的部分是仍然保留的。

主席：

保留該兩部分，應該並沒有爭議。

副主席：

我希望委員會向他們指出這一點。

財經事務局副局長區璟智女士：

根據他們的專業守則，他們需要符合更高的要求。

主席：

現在討論第291條。關於page 51、52及53，各位有沒有問題？那麼page 54呢？關於page 55，各位有沒有問題？

關於第291條，ISD提出comment，認為"we should only be concerned with offences involving stock market manipulation in Hong Kong and not overseas because this is neither practical nor cost effective to monitor and enforce"。政府在回應時提到globalization的問題。將來當越來越多內地公司的股票在香港上市買賣，這類活動可能有機會在國內進行，但實際上也很難作出管制，又或無法管制，因為部分活動可能涉及一些國家機構的行為。

財經事務局副局長區璟智女士：

除非我們不參加這個國際監管組織的團體，否則國際間的規管機構互相合作，是必然的事。SFC在IOSCO的地位是相當重要的。

主席：

中國證監會也是會員之一？

財經事務局副局長區璟智女士：

是的，CSRC似乎也是IOSCO的會員。作為IOSCO的會員，必須互相協助。否則，所有市場操控者會前來香港進行操控活動，香港便會變成"避風塘"，我們不可以這樣的。

主席：

如果我們察覺這些活動在國內進行，又怎麼辦？有些活動可能會在內地進行的。

副主席：

這是否應該與其他地方的處理方法一樣？條文只採用"elsewhere"的字眼。Anything which is not Hong Kong，就是"elsewhere"。

財經事務局副局長區璟智女士：

這視乎證監會有否與當地的規管機構簽訂諒解備忘錄。如果雙方簽了諒解備忘錄，事情便容易辦了。此外，亦需視乎在當地進行的市場操控活動是否影響到我們的投資者。如果沒有影響到我們的投資者，便不關我們的事。如果影響到我們的投資者，我們便有理由要求對方協助我們進行調查。由於每個地方的法例各有不同，當中必定有一些難度。

主席：

政府可否告訴我們，香港證監會在以往是否經常邀請國內證監會進行一些調查活動？

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

我們與中國證監會簽訂了諒解備忘錄。我們以往曾根據該份諒解備忘錄，要求中國證監會替我們找一些資料，或者替我們尋找有關人士，以便我們可以向該等人士索取資料。中國證監會也盡量向我們提供協助。

主席：

好的。我們現在討論page 55的Division 4 — Other offences。關於第292條，各位有沒有問題？那麼page 56呢？

Deputy Chairman:

Mr Chairman, subclause (1) – could someone explain to me what "be concerned in the disclosure" means? What does it mean, to "be concerned in the disclosure, circulation or dissemination of information"?

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

For instance, a professional assisting in the production of information as it would form part of a disclosure, for instance in terms of an offering circular that did not amount to a prospectus; an auditor's report, for instance, or alternatively a legal adviser's summarizing of the key terms of material contracts; somebody involved as, for instance, an investment adviser assisting in the production of a statement that was issued to the market. Those would be obvious circumstances but, basically, any type of participation in the production of such a disclosure.

Deputy Chairman:

Mr Chairman, this we are dealing with after a criminal provision can that be made less – can we narrow the scope? "Be concerned" seems to me to be very broad.

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

Here it is a very limited type of disclosure. It only concerns leverage foreign exchange contracts. The nature of activity is very limited activity in relation to LFETO in Hong Kong. What I would say is, in relation to narrowing it, it is more the nature of the conduct that is at issue when they state, leaving aside the question of negligence which obviously would follow clause 290 in this area and the negligence would be removed.

Deputy Chairman:

Mr Chairman, can we consider being concerned with passive. If you are concerned somehow, you say "participate". At least participate means that you actively do something. Can you consider it? I do not want to advise you how to draft but my concern is that really "be concerned" is too broad. If you assist, abet, incite or participate – I mean, one of these things that would be - -

主席：

我的意見與副主席的意見很接近。該條文採用"be concerned"的字眼，其範圍相當廣闊。此外，關於"is likely to induce"一句，我希望知道法例是否經常採用這樣的字眼？這條文所談及的是槓桿式外匯交易合約，在提出起訴時，是否需要證明有關人士induce其他人訂立有關合約呢？

副主席：

不，只要是likely便可以了。

主席：

Likely便可以？

副主席：

是的。

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

I am a bit confused. The question of whether a person is concerned is somewhat separate to the quality of the information that it is likely to induce. One relates to the degree of participation or involvement in the production of the disclosure or the act of disclosing information. The other relates to the quality of the information as causing somebody to act in reliance upon it or being likely to have that effect so it depends on what the honourable Chairman wants us to examine, dealing with; either the role of people involved or the nature of the information that is likely to have the effect of inducing people to act in response to that.

Deputy Chairman:

You want to understand what he thinks?

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

Yes.

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

I think the Chairman's question is why we have that sort of structure of words, "is likely to". I reckoned the SFC's operation experience in cases where a person is going to be induced but it happens that somebody reports to the SFC and they can take action and this structure of words, "is likely to" but if we just include "that induces another person" without the words "is likely to", then in that circumstance the SFC cannot take any action unless that person has been induced to do something. Right, Eugene?

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

Yes, that is correct. It allows us to take preemptory action in relation to something

that is likely to have induced people to rely upon it but as yet has not had that effect.

主席：

不過，槓桿式外匯交易也差不多沒有了。

Deputy Chairman:

It is not an unusual requirement in criminal provisions if you do something which is likely to intimidate someone.

主席：

我認為，槓桿式外匯交易與前者所提及的有點不同，因為外匯交易所涵蓋的範圍較廣泛。與公司的內幕交易比較，有關內幕交易的條文主要是控制一些較敏感的資料。至於外匯交易方面，這可能涉及造謠，例如訛稱打仗，以影響匯率價格。坦白地說，有甚麼會促使他人作出有關作為？每個人在作出投資時，也有一些責任，對嗎？

財經事務局副局長區璟智女士：

現時的集中點是發放虛假消息。

主席：

是的。

Deputy Chairman:

This is a very philosophical point. When you make criminal provisions you are, at

the same time, lessening the investor's responsibility in taking care of himself.

主席：

我認為，這條文的規定過於嚴苛，之前所提及的條文的規定還可以接受，因為有關消息並非整間公司每個員工也知道，但這條文關乎影響外匯價格的事宜，這差不多與所有人也有關。

財經事務局副局長區璟智女士：

當局在1994年制定Leveraged Foreign Exchange Trading Ordinance，是基於一些歷史背景的。當時有人散播一些虛假消息，使投資者蒙受損失。由於出現這種情況，於是當局便制定了該法例。

主席：

我可能有一些誤會。我還以為當時主要的問題是很多公司"夾帶私逃"，而不是發放虛假消息。

財經事務局副局長區璟智女士：

我現時真的沒有這方面的資料，或者證監會的同事可以就這方面進行調查。

副主席：

請政府研究為何需要保留這條文。

主席：

我認為，除非有一些客觀事實，顯示有關人士真的發放一些虛假消息誘使他人訂立這類合約，只有在這種情況下，才屬犯罪。此外，該條文有否訂定一項條件，訂明有關人士由於發放這些資料而從中獲利？如果該人真的由於發放這些資料而從中獲利，這樣的規定可能會較容易令人接受。

副主席：

That would be a good point. 前面提及的disclosure訂明所涉人士有benefit。

財經事務局副局長區璟智女士：

我相信現時所需要做的，就是證監會翻查以往的個案，以便我們可瞭解有關情況。當局以往必定是基於某些理由，又或出現了某些情況使投資者蒙受損失，才訂定這些條文。我們現時只不過是把現有的條文保留。

主席：

我知道。

財經事務局副局長區璟智女士：

這些個案對現時的情況來說是否已經過時呢？關於這個問題，我請證監會同事再作研究。如果有一些cases可供各位參考，議員便可能明白為何第293條還有存在的價值。

主席：

但是，我相信當局也可以考慮我所提出的意見，亦即有關benefit的

一點。

副主席：

主席，或者我們可以看一看在第36頁的第289條。該條文也是關乎披露資料的offence。

Can I also ask the word "be concerned" in this disclosure to be looked at for the same reason? If we look at clause 289 we see that the disclosure about the prohibited transaction – you require of that the person - an element of risk is that that person or his associate has entered into the transaction or that he benefits from disclosing but here it seems that clause 293 does not have these requirements so maybe we need some explanation as to why the constituents of the two disclosure offences are different.

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

I think the answer there is that the offence in clause 293 is more akin to clause 290. The requirement to prove benefit under clause 289 does not apply to a person or their associate who discloses directly or indirectly. Perhaps I can read clause 289. It has been quite some time since I read it. If you yourself are the person who is engaged in the market misconduct and then you disclose information, you yourself do not have to receive a benefit. I think the presumption is that anybody disclosing information knowingly or recklessly that is false or misleading is obviously directly engaging in inappropriate behaviour without any proof of benefit on their behalf. I think it is likely that they would benefit. Otherwise you would not have a motive to go around knowingly or recklessly disseminating false or misleading information but that is obviously a legislative presumption. I think the wrong and of itself is presumed to be that you are knowingly or recklessly telling falsehoods to people or misleading information to induce them or that is likely to induce them to enter into a type of financial instrument.

For a little bit of background there certainly was retail trade activity, as I understand. This predates my arrival in Hong Kong so I cannot affirmatively attest to this but there was retail activity in relation to leverage foreign exchange transactions and I understand that it was ordinary retail investors from the streets who were being induced into these transactions, although they were of a rather unusual and exotic nature. It was not just activity as between sophisticated parties. It was ordinary people who were of the nature who would be normally investing in stocks and that is why the provision is quite similar to clause 290, I think, rather than a requirement of direct proof of benefit. That does not necessarily mean that such a provision should not be added, of course, but I think that is the background that is similar to clause 290.

主席：

OK，現在討論page 57。"Negligent"一字將會取消，對嗎？第58、59及60頁載列的條文全部刪除。現在我們討論在第61頁的條文。

副主席：

那些條文與前面的條文是一樣的。

主席：

是的。

副主席：

所以，我們的意見也是一樣。

主席：

關於第62、63、64、65、66、67及68頁，各位對於這部分有沒有問題？如果沒有問題，我們現在休息10分鐘，會議於上午10時45分繼續。

(上午10時35分 — 會議暫停)

(上午10時45分 — 會議隨而恢復)

主席：

我們現在討論第294條 — Offence of falsely representing dealings in futures contracts on behalf of others, etc.。關於第68頁，各位有沒有問題？那麼第69頁呢？

財經事務局副局長區璟智女士：

我們因應市場人士的意見而作出修訂。原本舉證責任在於辯方，現改為由控方負責舉證。

主席：

當局把第294(4)條取消了。現在討論第5分部 — Miscellaneous。關於第295條 — Penalties，各位有沒有問題？

Deputy Chairman:

Mr Chairman, with respect to clause 295(2) it seems that in sentencing a sentencing judge takes into consideration the decision in the Market Misconduct Tribunal. I think it is something like that and this is reflected also in subclauses (3)(b) and (3)(c). I just wonder if this is appropriate for a court to do. I do not know if the legal adviser can help us. I think that sentencing – because normally sentencing has to do with the facts of the offence. Then

even if you have a previous record, your previous record, unless expressly provided by statute, does not increase your penalty so it seems here that the court is – I am sorry. Perhaps I should divide the comment into two parts. One is that in sentencing the court seems to be able to take into account an increased penalty on matters other than the facts of the offence. This is number 1.

Number 2 is that in the penalties, the court is given a power to make a number of orders set out in subclause (2)(a), orders which are really the Market Misconduct Tribunal sort of orders, if I am not mistaken. It seems to me that because – we ask the question. Now, it sounds familiar, now that I mention it. Is the court equipped to do this sort of thing in a criminal prosecution? Is the court equipped to consider this type of order? So these are two different questions about this section.

Also with subclause (7) on page 73, compliance of that order becomes an offence, in itself constitutes an offence. I am rather concerned as to whether this whole arrangement is appropriate. I am sure it was explained at an early stage. Maybe I can be reminded of that explanation.

財經事務局副局長區璟智女士：

以往似乎並無問及法院的管轄權應否包括這項權力。

副主席：

不，我記得以往我們似乎曾討論這問題。由於以上所討論的是刑事罪行，因此基本上需要由刑事法庭處理。在訂定這些刑事罪行後，該條文在第(2)(a)、(b)及(c)款讓法庭有權頒布一些命令。我的意思是，由法庭作出這些命令，這做法是否適當？法庭是否瞭解市場的實際情況或慣常做法？我並非質疑法庭是否有這樣的權力或管轄權。由於法庭在判刑時，通常是考慮有關的案例，我不知道法庭會否考慮市場的運作情況，或從市場的角

度考慮應該怎樣做。我希望先行處理這個問題。

財經事務局副局長區璟智女士：

關於第295(2)條，據我記憶所及，當政府在1999年第一次將有關條文提交立法會時，何俊仁議員曾經提出，就民事罪行所作出的命令，例如規定有關人士不得擔任董事，又或規定該人不得在交易所進行買賣(即發出"冷淡對待"命令)，是十分有用的，因為這樣不但可以對該人施加懲罰，還可以避免其他投資者繼續受損。當時，何議員問到，就民事罪行所作出的命令，可否同樣適用於刑事法律制度？其後我們詢問律政司這方面的專家，他們在參考MMT可作出的命令後，認為在該6至7項命令中，這3項命令亦可由刑事法庭作出。

副主席：

他們有否解釋為何刑事法庭只可作出這3項命令，並不可以作出其他命令？

財經事務局副局長區璟智女士：

我不大記得有關原因。Frank，你是否記得箇中原因？

財經事務局助理局長曾俊文先生：

我們當時曾徵詢律政司的意見。他們認為，讓刑事法庭可作出這些命令，應該並沒有違反法律政策的原則。我們可以翻查當時所收到的法律意見，然後提供給委員會參考。

副主席：

好的。請政府稍後向我們解釋有關情況。我所提出的第二個問題是，根據第(3)(b)款，法官在作出以上的命令時，可考慮該人以往曾否被審裁處裁定作出市場失當行為。第(3)(c)款與第(3)(b)款是有關連的。也就是說，法庭在判刑時，可考慮這方面的事情。政府可否告知我們，這樣做是否適當？法庭在量刑時，一直所採取的原則是，只考慮該人就該項控罪所作出的事情。即使根據該人的刑事紀錄，該人以往曾干犯同樣的罪行，法庭也不會因此而加重對該人作出的懲罰。至於其犯罪紀錄以外的事情，更不用說了。我希望知道，與以往一直沿用的sentencing principle比較，這樣做是否適當？

財經事務局副局長區璟智女士：

關於第(2)款，我們會翻查為何其他命令並不適用，也就是說，為何只有這3項命令才適用。

陳律師剛才提醒我，根據《公司條例》，法庭可頒令規定有關人士不得擔任公司董事，因此法庭以往也有這方面的經驗。至於第(3)款，該條文只是訂明法庭在作出命令時，可考慮該人曾在市場所作出的事情。我們可以再詢問政府律師，法庭在頒布這些命令時，可否參考以往的資料？嚴格來說，這也不是量刑的一部分。法庭根據第(2)款作出的命令，目的是希望避免其他人繼續受損害。

副主席：

第295條訂明penalties，因此當中所提及的命令，其實也是刑罰的一部分。在審訊終結時，如果有關人士被裁定罪名成立，法庭接着發出的命令，除非關乎沒收證物等，否則便是刑罰的一部分。規定有關人士不得擔任董事，當然是刑罰的一部分。這與規定有關人士不得在某段時間內駕駛車輛，亦即停牌一樣，也是一項刑罰。一般來說，如果法庭作出一項命令，而有關人士違反該項命令，便屬於蔑視法庭。然而，在第73頁的第(7)款訂

明，假如任何人沒有遵從法庭根據第(2)(a)或(b)款作出的命令，即屬犯罪，這與一般的做法有別。我希望知道當局有何理據這樣做。

主席：

我希望政府跟進Margaret提出的comment。

財經事務局副局長區璟智女士：

我們會詢問政府律師的意見。

主席：

法律顧問。

高級助理法律顧問李裕生先生：

我希望談一談量刑的普通原則。剛才副主席也提到，在量刑的時候，首先需要參考案件本身的案情的嚴重程度，這是最基本的原則。法庭在量刑時，亦會參考被告人過去的紀錄。一般來說，在被告人被定罪前，主控官會將被告人以往的紀錄讀出來。這樣做的目的，主要是讓法庭有機會參考該人有否重覆干犯以往曾作出的作為。法庭在考慮有關的量刑是否足夠時，首先需要考慮有關的刑罰能否起阻嚇作用。在這種情況下，法庭可能需要知道該人是否重覆干犯有關罪行。如果該人重覆干犯有關罪行，法庭亦會考慮將刑罰酌量加重，法庭以往亦有這樣的做法。

Deputy Chairman:

If the judge had said anything of the sort, I think the sentence would be liable to an appeal because I think you can take into consideration the record, not from any reduction but I

do not think that you can increase the sentence on account of the record. I may be wrong. I have not seen the authorities for some time. Also, as far as subclause (7) is concerned, let us say, if you have been sentenced to pay a fine and then if you do not pay the fine, not paying that fine is not an offence but here subclause (7) says that if the court makes a certain order – for example, that you stop being a director – if you do not obey it, that in itself constitutes an offence. Do you have anything like that? Why do you need it?

高級助理法律顧問李裕生先生：

就該條文來說，第(7)款訂明，如果有關人士沒有遵從根據第(2)(a)或(b)款作出的命令，即屬犯罪。法庭可根據第(2)(a)或(b)款作出命令，規定有關人士不得作出某些事情。在這種情況下，如果該人繼續作出該等事情，第(7)款便會生效，也就是說，該人可被判罰款甚或監禁。第(7)款的作用，就是執行第(2)(a)及(2)(b)款所訂該人不得作出有關事情的罰則。這與剛才提及的情況不同。如果法庭判處某人罰款，該人不繳交罰款，便屬蔑視法庭。也就是說，沒有再進一步的懲罰。現時的條文訂明該人沒有遵守某些規定的情況。

副主席：

我知道。不過，一般來說，當法庭判處有關人士罰款時，如果該人不繳交罰款，根據有關條文的規定，不繳交罰款便要監禁。此外，假如法庭判處有關人士停牌，如果該人在停牌期間駕駛，本身就是一項罪行。然而，我所不明白的是，根據第(7)款的規定，當法庭判處某項刑罰時，如果有關人士並沒有遵從法庭的命令行事，本身便會構成一項刑事罪行，為何會有這樣的做法？這可能需要署方清楚解釋一下。

財經事務局副局長區璟智女士：

我們會再徵詢法律意見。

關於第(7)款的做法，從政策層面來說，我們當然希望有關人士會遵守這些命令。訂定第(7)款，至少可增加效力，使有關人士遵守該等命令。我們希望該等人士會遵守命令，並無擔任董事或繼續參與市場的運作。我們只不過是希望其他投資者不會再受到該等人士所影響。

主席：

余若薇議員。

余若薇議員：

主席，由於我剛才需要出席另一個會議，所以我不知道委員會較早前有否討論第72頁的第(2)(b)款的條文，亦即法庭可命令有關人士不得參與市場的買賣。政府可否告訴我們，這條文是新訂的，還是一直以來也有這項刑罰？關於第(2)(a)款所訂的命令，我知道Company Ordinance亦有這項規定，即命令該人不得擔任董事。然而，第(2)(b)款規定法庭可命令該人不得購買股票。即使該人買入少量股票作退休、儲蓄或投資之用，這也不可以嗎？是否一直以來也有這項刑罰？其他地方有沒有類似的刑罰？當局怎樣執行該條文的規定？即使他只是買入一、兩手，也不可以嗎？

財經事務局副局長區璟智女士：

當我們訂定MMT的民事罰則時，有意見認為阻嚇力不足，因為《人權法》的問題，所訂的罰款有所減少，不能夠保留"3倍罰款"。因此，我們研究MMT可作出哪些命令，以便能夠起阻嚇作用。證監會的同事曾參考現有的《上市規則》和《收購及合併守則》，當中載有"cold shoulder" order，即"冷淡對待"命令，以限制有關人士進入市場，使他不會再損害其他投資者。正如余議員剛才提到，該人在某程度上喪失他的權利。該人不可直接進行投資，但或許可以找其他人替他進行投資。

余若薇議員：

根據這條文的規定，該人不可"directly or indirectly"參與市場的買賣。

財經事務局副局長區璟智女士：

對，無論直接或間接也不可以。但各界也很接受這項建議。當時，立法會認為這項cold shoulder order是一項不錯的建議，並提議政府考慮在刑事法律制度下引入這做法。我們曾與政府律師商討這問題，他們認為刑事法庭也可頒布這些命令，所以條例草案便有這樣的規定。至於可否落實這項規定，我需要證監會的同事講解有關情況，因為現時證監會負責執行《收購及合併守則》所載的規定，可能以往也曾發出過這些命令。

主席：

余若薇議員，這條文也訂明，有關的命令"not exceeding 5 years"。

副主席：

Five years是一段很長的時間。

余若薇議員：

5年也是一段很長的時間。該人在5年內不准買賣。

財經事務局副局長區璟智女士：

這條文訂明，該命令的有效期最長為5年。

余若薇議員：

對，有效期最長是5年。我所不明白的是，這條文剝奪了該人進行投資的權利。假如該人再操控市場，當局可以再對該人提出起訴，這樣做並無任何問題。如果該人再作出market misconduct，當局可以對該人提起研訊程序。然而，這條文規定可命令該人不得進行投資。第(2)(a)款訂明可命令該人不得擔任董事，這一點我是明白的。然而，如法庭可命令該人不得買賣任何股票，當局實際上能否執行這項規定？這項刑罰是否合理？

主席：

Alexa.

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

多謝，主席。根據現時的Takeovers Code，其中一項sanctions是cold shoulder order。當然，負責執行Takeovers Code的是一個independent panel。雖然該panel是SFC的一個committee，但這是一個independent panel。他們過往曾多次發出cold shoulder orders。該等命令的有效期各有不同，一些命令的有效期較長，另一些則較短。Cold shoulder order其實是一項頗嚴厲的懲罰，但問題是，如果有關人士完全不尊重市場規則，以這樣的做法處事，作出市場失當行為，並且令market integrity受損，我們便應該杯葛該人，不容許該人參與市場。這項規定並非香港獨有，倫敦及新加坡也有類似的做法。

Deputy Chairman:

Criminal sanctions?

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

不，這是Takeovers Code內的一項sanction。

Deputy Chairman:

We are talking about criminal sanctions?

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

我們當時與立法會討論Part XIV的時候，何俊仁議員建議我們考慮將MMT的civil sanctions列為criminal sanctions，使它們有更大的阻嚇作用及為市場和投資者提供更佳保障。我們和律政司研究後，他們建議我們可加入現時第(2)(a)、(b)及(c)款。

副主席：

主席，我本人並不接受這說法。就市場失當行為而言，當局所處罰的人，是市場人士。當局規定經紀不得買賣股票，就是規定他們不得執業，情況就像是我們所說的suspension。

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

不，並非規定經紀不得進行買賣，而是規定干犯失當行為的人士不得進行交易。該人可能是經紀、普通人或董事。我作為經紀，不能做他的生意，但我可以做其他所有人的生意。

副主席：

對，我明白。但當這是刑事罪行時，我們首要注意的，就是該人可

能是一個普通人。所以，如果條文規定該人不得買賣股票，也就是說，該人所dispose of的股票，可能是他擁有的股票，該等股票不一定屬於其他人，因為該人不一定是要替其他人做事。所以，我認為當局需要考慮這項order的social consequence。我剛才其實也曾問到為何當局認為法庭可以發出這3項命令。

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

關於該項"冷淡對待"命令，其實當中也有一定的彈性，因為該條文訂明，有關命令是"an order that the person shall not, without the leave of the court……"。也就是說，如果情況特殊，例如有關人士必須將股票賣出，該人可向法庭申請許可。該項命令針對有關人士干犯失當行為，而這項行為直接對市場運作及integrity造成嚴重影響，所以這是一項protective order。各位也accept該人的行為是不當的，我們需要杯葛該人。這就是"冷淡對待"命令的concept。

副主席：

對不起，我還希望提出一個問題。請問這些offences在哪裏審理的？

主席：

在法庭審理。

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

法庭。

副主席：

我知道。Criminal charges are tried in courts, thankfully。請問在哪一級的法庭審理？

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

如果以簡易程序提出，便在Magistracies審理，其他的在High Court審理。

主席：

李家祥議員。

李家祥議員：

我對於這項條文持較開放的態度。我相信，一般來說，使市場秩序很混亂的人士，也就是說，需要當局採用"冷淡對待"的方式作出懲處的人士，通常都不是一般的投資者。此外，這需要經過SFC提出檢控，並由法庭作出裁斷。如果法庭認為這是恰當的懲罰，在某程度上，這也有一個限制。

我在決定是否支持這項規定之前，我希望知道，當何俊仁議員提出這項意見時，他提出了甚麼論據或事項，以證明該項懲罰載於Takeovers Code並不足夠，而必須將該項懲罰列為刑事制裁措施，才有足夠的阻嚇力？我當時可能並不在場，也沒有特別留意到這一點。他當時的論據是甚麼？我希望知道，為何政府支持他的說法？

財經事務局副局長區璟智女士：

何俊仁議員沒有說《收購及合併守則》的規定無效，他不是這個意思。剛才我們提及《收購及合併守則》，是因為這項"冷淡對待"命令源自這些市場守則。市場人士對這些命令有一定的認識。我們只是說明這項命令

來自這些市場守則。

如果我沒有記錯的話，何俊仁議員當時表示，既然政府挖空心思去想如何加強阻嚇作用，不如由他提出一個意見。如果民事的罰則可以引伸到刑事，便把有關罰則引伸到刑事。這做法讓法庭可選擇施加不同的罰則。判處有關人士監禁或罰款，這些罰則未必一定有效。對某些人來說，如果法庭命令他們在兩、3年內不得在市場運作，這樣做可能更有效。

我們經考慮後，認為這是一項不錯的建議，因為法庭可選擇如何配合各種不同的罰則。最重要的一點，就是能夠起阻嚇作用，以及盡量減少這類市場失當行為。

李家祥議員：

我希望作出跟進，剛才Alexa提到倫敦及新加坡都有類似的做法，以收阻嚇作用。我希望知道，他們將這項命令列為刑事制裁措施，或是《收購及合併守則》的規定？

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

對不起，我剛才可能沒有清楚說明這一點。我剛才的意思是，我們借用了《收購及合併守則》內的其中一項sanctions。我剛才提到倫敦及新加坡也有類似的做法。我的意思是，倫敦及新加坡也有類似的《收購及合併守則》，而他們的《收購及合併守則》也同樣有該項冷淡對待的sanction。

李家祥議員：

但這不是刑事制裁措施？

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

這是《收購及合併守則》的一項sanction，並不是刑事制裁措施。然而，我們借用了這項sanction，因為我們認為這也可以send out a message，表示該人在市場內做了這樣的事情，是不可以接受的。

主席：

吳靄儀議員。

副主席：

市場失當行為審裁處的主席必須是一名法官。從這一點可以知道，政府也認為負責處理這些事宜的主席需要屬於某一職級，並且具備相當的經驗。如果當局決定保留第(2)(a)、(b)及(c)款這3項命令，當局也需要考慮究竟應否由裁判法院發出這些命令。

財經事務局副局長區璟智女士：

我們可以徵詢法律意見，研究可否規定這些命令只適用於以公訴程序提出檢控的情況。

副主席：

政府需要make sure tribunal有這樣的能力去做。

主席：

我也有一個意見，關於吳靄儀議員剛才提出哪一級法院可處理這些事項，我也贊成當局就這一點再作考慮。我現時的意見是，這部分我也可以接受並支持。但當局可否考慮放寬有關collective investment scheme的規

定呢？

至於其他情況，我是理解和接受的。例如"dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract……"，我認為這些也是比較直接的投資工具。相對來說，CIS是比較間接的。有關人士如要再操控市場，是比較困難的。如果當局放寬有關規定，我認為可以考慮放寬這方面的規定。這與何俊仁議員所說的概念也沒有甚麼分別。我相信，CIS是比較間接的。

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

Mr Chairman, The structure of CIS so that it was an indirect sham means that if the professional investor was your associate and that would potentially operate quite a large loophole in relation to the cold shoulder order.

財經事務局副局長區璟智女士：

我們會研究collective investment scheme在Schedule 1的定義。根據現時的寫法，該用語的涵蓋範圍相當廣泛。

主席：

OK，現在討論第73頁。

李家祥議員：

對不起，我還有一些問題希望提出。關於"冷淡對待"命令這部分，如果市場的守則已訂有處理方法，而刑事方面又訂有處理方法，我希望知道有關的程序會是怎樣。如果有關人士真的干犯了所訂的罪行，而tribunal

已根據守則的規定作出處分，那麼SFC還能否作出刑事處分，即會否出現"on the same treatment"的情況？這會否有double jeopardy的問題出現？政府屆時會否需要作出選擇，究竟是根據Takeovers Code作出懲處，還是將之視為一項criminal sanction呢？因為兩者也訂有這項處理方法，似乎可能會出現重疊的情況。我不大明白如何運作，屆時由誰作出選擇呢？關於這一點，我感到有些混淆。

財經事務局副局長區璟智女士：

我明白你的問題。各位可參閱在page 80的第298條，該條文清楚訂明，同一項市場失當行為，只可以民事或刑事兩者之中的其中一種方法處理。也就是說，當局不可以在未能成功以刑事法律程序將被告入罪時，向該人提起民事法律程序，反之亦然。

證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：

我希望就Takeovers Code的部分作出補充。Takeovers Code所針對的問題，與現時有關市場失當及Part XIV所針對的問題是不同的。Takeovers Code所針對的問題是，如果某人控制了一間公司35%以上的股份，無論是他本人持有該等股份，又或與concert parties共同持有該等股份，其實整間公司也差不多由該人控制，因為上市公司有很多股份由散戶持有，35%已佔很大的比例。在這種情況下，該人應該向所有小股東提出一個general offer，即總收購，如果該人沒有這樣做，Takeovers Panel可以向該人施加sanction，而其中一項sanctions是"冷淡對待"。然而，有關市場失當行為的制裁和Part XIV所訂的刑事制裁是不同的，因為這關乎另一些操控市場的特殊行為，所以兩者並不相同。

主席：

李家祥議員，政府是否已解答你的問題？

李家祥議員：

只解決一部分。

主席：

我們現在討論第296條 — Civil liability for contravention of this Part。

副主席：

這條文的第(1)及(2)款，與第272條的一樣。所以，我當時提出的意見，亦同樣適用於這條文。

此外，關於在第75頁的第(4)款，我不大明白，讓我先看清楚我的筆記，然後再提出問題。

主席：

這部分與李家祥議員剛才提出的問題也有一點關係。現在討論第76頁。

Deputy Chairman:

My question is, I do not understand the difference between bringing an action under clauses 296(1) and 272(5) or is there any difference at all? We are talking about civil actions and we are talking about bringing an action on the basis of something which has constituted the misconduct, or the offence. Is there any difference? That is on page 97 of Part XIII.

財經事務局副局長區璟智女士：

原意其實是一樣的。不過，各位也留意到，關於剛才所討論的Part XIV第5分部，當中所提到的刑事罪行，在民事法律制度下是沒有的。也就是說，第4分部所提及的其他罪行，即第292條、第293條及第294條所訂的罪行，在前面的民事法律制度下是沒有的，因為這些屬於欺詐、訛騙等刑事罪行。但其他的宗旨及政策，與第272條的一樣。

Deputy Chairman:

You see, if you compare subclause 272(5) with subclause 296(4); that seems to be rather different.

主席：

陳律師。

高級助理法律草擬專員陳子敏女士：

讓我解釋這條文的原意，其實這條文主要避免有關人士提出爭拗。該條文訂明，其他人可就該人違反第XIV部的規定而針對該人提出民事索償。我們擔心在提出民事索償的時候，被告可能會提出爭議，表示當局還沒有展開刑事檢控程序，或該人本身未被定罪。為避免這類爭拗，我們在第(4)款訂明，任何人即使未被定罪，又或即使政府未有對該人提出檢控，其他人仍可就該人違反第XIV部任何條文的規定而針對該人提出民事索償。也就是說，並不存在任何免責的爭議。這其實是為免產生任何疑問。第XIII部的情況也是一樣，該條文訂明可就該人違反第XIII部任何條文的規定而針對該人提出民事索償。由於我們擔心會有人提出爭議，所以我們在第(5)款訂明，即使該人未因違反第XIII部任何條文而被定罪，其他人也可以提出民事索償。

主席：

OK。應該是第XIV部，對嗎？

余若薇議員：

我還是不大明白第272條和第296條的關係，政府可否再簡單解釋兩者的分別？

高級助理法律草擬專員陳子敏女士：

在政策方面，我們希望第272條和第296條就各自部分的條文說明有關情況。如果任何人違反該兩部分的條文，其他人有權就該項違反而針對該人追討民事法律責任。除了訂明這樣的權利外，亦可在舉證責任方面，提供一些幫助。舉例來說，如果有關個案已進行研訊，如審裁處將有關人士定罪，有關證據可以作為呈堂證供。

基本上，第272條和第296條是獨立的。第272條訂明，如果其他人能夠證明有關人士違反第XIII部的規定，可向該人追討民事法律責任。第296條的情況也是一樣。其他人如能夠證明有關人士違反第XIV部的規定，可向該人追討民事法律責任。

表面上，第XIII部及第XIV部的條文相當類似，兩者可能沒有很大分別。不過，在第XIV部，正如剛才進行討論時提到，"疏忽"一詞可能會取消，而副局長剛才也提到，這部分另外加入了3項罪行，所以兩者有一點分別。不過，這兩部分原則上是大致相同的，這兩項條文都是向有關的原告人提供一個追討民事法律責任的途徑。然而，第XIII及XIV部的內容，亦即所違反的事項，是有不同的。正如我剛才所說，第XIII部的條文包括"疏忽"的元素。此外，這部分亦沒有該3項特別的罪行。第XIV部某些條文並不包括"疏忽"的元素，並且加入了3項罪行。兩者背後的理念是一樣的。

余若薇議員：

也就是說，第272條和第296條的規定，基本上很大部分是重疊的。其實當局可以將第272條和第296條的規定合併為一項條文，訂明任何人如違反第XIII部和第XIV部的規定，可向該人追討民事法律責任。其實當局可以在一項條文中列出該等規定，只不過現時的做法是把有關規定分為兩部分，對嗎？兩者其實在很大程度上是重疊的，對嗎？

高級助理法律草擬專員陳子敏女士：

是的。根據現時的情況，兩者在很大程度上是重疊的。然而，我們不知道日後會否作出任何改動。舉例來說，正如剛才提到，我們將會取消"疏忽"一詞。此外，日後可能會訂定其他的免責辯護。我們在草擬條文時，希望保留一定的彈性。最重要的一點，就是讓有關的原告人有權追討民事法律責任。至於該兩項條文的規定，需要視乎該兩個部分的內容。

我同意余議員剛才所說，其實第XIII及XIV部也可能載有同一項違反事項。如果就該項違反追討民事法律責任，有關人士可根據第XIII部第272條提出，又或根據第296條提出。

主席：

即使將有關規定分兩部分列出，也沒有太大問題，對嗎？如果涉及第XIII部的條文，有關人士可根據第272條行事。如果涉及第XIV部的條文，有關人士可根據第296條行事。當中不會涉及很大的問題。

余若薇議員：

問題在於現時訂有兩項不同的條文，使人覺得所涉及的是兩個不同

的範圍。但原來兩者在很大程度上是重疊的。一般來說，我們不會預期兩項條文在很大程度上是重疊，我們會以為兩者有很多不同之處，但其實原來不同的地方，只是有關"疏忽"的部分及加入3項罪行，而當局把有關規定重覆寫了一次。由於一般來說，我們不會預期兩者是重覆的，所以需要問清楚有關情況。

副主席：

我們要瞭解這些內容，工作量也因而增加。當看完所有規定後，最後所得的結論是兩者並沒有很大分別。

主席：

這對將來採用這條例草案的人士是否有幫助？

副主席：

除非該人認為無需聘請律師，否則律師也需要研究兩者是否有分別。

主席：

關於第74及75頁，各位有沒有問題？那麼第76頁呢？現在討論第77頁。

副主席：

關於第296(7)(b)段，我不大明白該條文部分的意思。

What is the "reception of any admissible evidence for the purpose of serving as

evidence of the determination or identifying the facts"? I just do not understand these few lines. Can someone explain these few lines to me? We are under subclause (7), about "admissibility of evidence".

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

The words are talking about a line of authority that excludes one determination of a UK court that is persuasive in Hong Kong. It affects the "presumption arising from the admission of evidence." With this wording, as we understand it on advice from the Department of Justice, it is more likely that the "presumption arising from the admission of evidence" would be a substantive one that must be rebutted by the defendant by the leading of actual evidence rebutted.

Deputy Chairman:

What is the presumption?

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

This affects the weight of the presumption arising from the fact of the determination of the court being led before a civil action. Without this wording, as we are advised, the presumption arising from that evidence would be very easily displaced without leading any great evidence by the defendant. We understand that the effect of this wording is to give the presumption arising from the fact of a conviction or a finding of the MMT or a criminal court much greater evidentiary weight so that the defendant must actually lead evidence to rebut that presumption on the balance of probabilities.

Deputy Chairman:

In other words, if one is found by the MMT or a criminal court to have committed certain acts which constitute either the market misconduct or the offence, right now you can take it as prima facie evidence. Without subclause (b) you can take it as prima facie evidence. That was indeed done or what? Does it go that far without subclause (b)? Does it give you a prima facie case at the moment? Because, if it does, then the defence would still have to either adduce evidence or put forward arguments which would displace the prima facie case. If so, the further question is, how much stronger does subclause (b) make it if it is more than a prima facie case? Maybe the legal adviser can help as to the current law, whether a prima facie case - -

財經事務局副局長區璟智女士：

陳律師可以幫忙。

高級助理法律草擬專員陳子敏女士：

多謝，主席。由於前一段提及審裁處所作的裁定，第(b)段訂明可參考審裁處報告的內容，而有關內容可獲接納為證據。儘管前面的條文提到任何裁定都可獲接納為證據，但怎樣找出該等裁定呢？我們在第(b)段訂明，可參考這報告的內容，也就是說，該報告具有作為證據的價值。

接着便提到怎樣提供這些證據或怎樣找到這些證據。整個部分的條文其實是參考《證據條例》第62條。第62條提到，如果某人被裁定干犯刑事罪行，我們可以怎樣參考刑事定罪的資料，以便在民事法律程序中引用。這部分的條文是參考第62條而草擬的。

至於副主席剛才提出的問題，第(b)段其實訂明該報告可用作提供資料，說明審裁處所作出的裁定，也就是說，該報告具有作為證據的價值，故此可以參考。

Deputy Chairman:

What does "reception" refer to?

Ms Sherman CHAN, Senior Assistant Law Draftsman:

"Without prejudice to the reception of any other admissible evidence for the purpose of serving as evidence for the determination or of identifying the facts on which the determination was based." Here, "reception" refers to the receiving of any other admissible evidence for the purpose" set out in the paragraph.

Deputy Chairman:

Does it simply mean admission or admissibility or does it mean something else or does it refer to weight or something?

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

It refers to admissibility, I think.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Yes, admissible evidence.

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

It does not go towards the weight. Subclause (b) just goes to back up the

presumption with actual evidence if it is disputed.

Deputy Chairman:

So it would be rather like without prejudice to the admissibility of any other admissible evidence or would it be more than that?

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

No. I do not think it goes beyond that.

Deputy Chairman:

All right. And the word "serving" here – is this evidence being served on anyone or is it notice of the evidence – what does the word "serving" refer to?

Ms Sherman CHAN, Senior Assistant Law Draftsman:

The use of the word "serving" is intended to convey the idea it is used as – for the purpose of being used as evidence of the determination.

Deputy Chairman:

I see. Thank you. Can you then say "admissible evidence as evidence"? I mean, do you need "for the purpose of serving"?

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Would you consider something like "without prejudice to the reception of any other

admissible evidence as evidence of the determination or for the purpose of identifying the facts on which - -"?

Deputy Chairman:

Except if you think that "reception" is just admissibility then maybe that would help because "reception" to me may mean something to do with weight or something else.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

We can consider that.

主席：

現在討論第78頁。

Deputy Chairman:

I am sorry. Mr Chairman, the question – I have just been told that this is supposed to increase the weight. The word "extend" does not increase it.

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

What I was referring to as evidence of the determination which I previously misunderstood your question to relate to – subclause (b), if I can clarify, merely allows evidence to be tendered being the report or the fact of the conviction as recorded in the court records. Subclause (a) the words "as evidence of the determination" and "where the fact" merely increases the degree of the presumption, not beyond the prima facie presumption but there are lines of authorities, as I understand, that suggest that it is not a strong evidentiary

presumption as to the weight of evidence. It is easily displaceable by merely, for instance, counsel argument to the contrary rather than by the tendering of evidence to the contrary. The wording would require the tendering of evidence to the contrary to displace the prima facie presumption. It does not raise it beyond the prima facie presumption.

Deputy Chairman:

Thank you.

Chairman:

Audrey.

Hon Audrey EU Yuet-mee, SC, JP:

I think this very complicated sentence – I read it to mean something very simple. It simply says that you can tender the report or the determination as evidence of the facts stated therein or you can tender some other evidence, some other admissible evidence for the same purpose. It is a very simple – it has nothing to do with increase of weight, as you just mentioned. I do not read it to say anything that you said it is intended to say. If you look at it again, it just says that you can put in a copy of the report, either the report of the MMT or a report published under clause 254 and the evidence of the contents – namely, that a determination has taken place – or that person referred to in the report has engaged in market misconduct and, without prejudice to this, you can prove it by any other means provided as admissible evidence. Is that not what it says?

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

Yes. That is correct. I had previously misunderstood the deputy chairman's

question to relate to the words "where the fact that" in the opening words of subclause 7.

Deputy Chairman:

Can you hugely simplify this? I mean, in fact, you do not even need this because under the Evidence Ordinance you can already adduce a court report and a judgment and verdict and things of this kind; notes of proceedings and so on. I do not mind you putting it there so long as you just say that these things are admissible as evidence.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

We thought that by putting this in, users would know where they are and they can find the report and know certainly that they are admissible. I would have thought that would serve the purpose in that the users know where they are. However, on the question of amendment of the particular wordings, we will go back and consider.

Deputy Chairman:

I think once you say that it is admissible then you do not have to tell them for whatever purpose. Any more on 77? Page 78, any questions? 79? Clause 297 – Conduct not to constitute offences.

主席：

現在討論"安全港"。關於page 80，各位有沒有問題？那麼第298條呢？OK，我們已完成審議條例草案英文本第XIV部的條文。法律顧問，請問現時中文本的進度如何？

高級助理法律顧問李裕生先生：

讓我作一個簡單的報告。關於第XIII及XIV部的中文本，我們已參閱政府提交的中文草稿，並已提出一些意見。這些並不是中英文本在法律上存有歧義的問題，而是將中英文本盡量配合的問題。有時候，中文本與英文本並非完全一致。舉例來說，在insider dealing的情況，中文本只訂明是"交易"，而不是"內幕交易"。這些只是行文上的問題。我們已將意見送交法律草擬專員，雙方暫時還未決定會怎樣做。

讓我簡單說明將會怎樣處理這些問題。如果雙方未能達成共識，我們會將問題交由委員會處理。如果只涉及行文上的問題，而法律草擬專員同意作出適當修改的話，有關修訂將會在最後提交的委員會審議階段修正案列出，不會再另行向委員會發出文件。

主席：

各位有沒有意見？顧先生。

Mr KAU Kin-wah, Legal Adviser:

Thank you, Chairman. May I come back to subclause 297(4)?

Chairman:

OK. Subclause 297(4).

Mr KAU Kin-wah, Legal Adviser:

I am not sure why this subclause is really necessary because it seems to say that what has been prescribed in subclause (1) does not constitute an offence. That would nevertheless be grounds of defence in case that person is being charged of the conduct which is supposed to be described by the rules not to be an offence. I am not sure whether I

understood it correctly because it seems to, as I understand it, be slightly in conflict with subclause (1). In my thinking it is not to be regarded as constituting an offence and that person would not be prosecuted and the question of raising a defence should not have arisen. I may have missed something.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Subclause (1) is a subsection setting out the statutory power so as the Commission may make rules to prescribe circumstances in which conduct will not be regarded as constituting an offence. We are concerned that somehow this power would create provisions which would be seen as being inconsistent with the main provisions in the main ordinance so far as any defence is set out in the rules, then we must say that this is certainly a defence for the purpose of it seems to make things clearer because the defence as set out in the rules. So we want to make it very clear that any defence set out in the rules will be regarded as defences for the purposes of the ordinance.

Deputy Chairman:

We think that perhaps the good intentions of putting it beyond doubt have not worked with our legal adviser. Is it right that what you are saying is that, although broadly certain offences are already laid out, nevertheless the Commission can make rules exempting certain kinds of conduct, whether we felt that the exempted conduct will no longer constitute an offence?

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Yes.

Deputy Chairman:

So maybe what one can try to do is to distinguish between two kinds of situations. One is that you are within the ambit of an offence but that you have a defence and if you have a defence then you will not be found guilty. That is one type of situation. Another type of situation is that, although there is a broadly defined offence, under certain circumstances you are not considered to have committed that offence. In other words, if that is the second situation, you should say that a person does not commit an offence if, rather than that he has a defence. That you have not committed an offence is not a defence.

Ms Sherman CHAN, Senior Assistant Law Draftsman:

Actually, what we have sought to do is, under clause 297(1), we enable the Commission to set out rules to prescribe circumstances in which any conduct will not be regarded as an offence so we refer to the conduct, the circumstances.

Deputy Chairman:

I understand. You see, here you say, "shall not be regarded as constituting an offence." You do not say, "shall be regarded as a defence to the offence" so that in subclause (4) what you are saying is that it is a defence to the charge. You should not be charged because you have not committed an offence, so perhaps you could consider the wording of subclause (4).

主席：

我們現已完成審議條例草案英文本第XIII及XIV部的條文。下次會議在10月5日舉行，今天的會議到此為止。

財經事務局副局長區璟智女士：

如果各位希望就中文本提出問題，現時可以提出有關問題。

主席：

我相信仍未作好準備。根據會議時間表，委員會在10月5日的會議討論中文本，屆時各位可以就中文本提出問題。如果屆時並無問題，我們便討論Banking (Amendment) Bill 2000。委員會以往曾參閱該條例草案的某些部分，但未有逐項審議該條例草案的條文。關於《證券及期貨條例草案》的中文本，我們仍未審議有關第IX部的條文。我們在下次會議討論第IX、XIII及XIV部的中文本及BAB的條文。

多謝，各位。

m3064