

立法會
Legislative Council

LC Paper No. CB(1)826/04-05
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/04

Bills Committee on Companies (Amendment) Bill 2004

**Minutes of the third meeting held on
Thursday, 13 January 2005, at 8:30 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Audrey EU Yuet-mee, SC, JP (Chairman)
Hon Albert HO Chun-yan
Dr Hon LUI Ming-wah, JP
Hon CHAN Kam-lam, JP
Hon SIN Chung-kai, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon TAM Heung-man

Public officers attending : Miss Emma LAU
Deputy Secretary for Financial Services and the Treasury
(Financial Services)

Mr Alan LO
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)

Mr Jackie LIU
Assistant Secretary for Financial Services and the Treasury
(Financial Services)

Mr K F CHENG
Senior Assistant Law Draftsman
Department of Justice

Attendance by invitation : Hong Kong Institute of Certified Public Accountants

Mr Roger BEST
Immediate Past President

Ms Elsa HO
Assistant Director (Financial Reporting)

Clerk in attendance : Miss Salumi CHAN
Chief Council Secretary (1)5

Staff in attendance : Miss Mona LAI
Assistant Legal Adviser 7

Ms Connie SZETO
Senior Council Secretary (1)4

I. Confirmation of minutes of meeting
(LC Paper No. CB(1)642/04-05) — Minutes of second meeting held on 16 December 2004)

The minutes of the meeting held on 16 December 2004 were confirmed.

II. Meeting with the Administration
(LC Paper No. CB(1)453/04-05(15)) — “Follow-up to the first meeting on 8 November 2004” prepared by the Legislative Council Secretariat

LC Paper No. CB(1)453/04-05(16) — Paper provided by the Administration on “Follow-up actions arising from the discussion at the meeting on 8 November 2004”

- LC Paper No. CB(1)668/04-05(01) — Submission dated 22 December 2004 from The Hong Kong Mortgage Corporation Limited
- Annex A to LC Paper No. CB(1)668/04-05(03) — Administration's response to the submission dated 22 December 2004 from The Hong Kong Mortgage Corporation Limited
- LC Paper No. CB(1)692/04-05(01) — Submission dated 10 January 2005 from The Hong Kong Mortgage Corporation Limited
- LC Paper No. CB(1)692/04-05(02) — Administration's preliminary response to the submission dated 10 January 2005 from The Hong Kong Mortgage Corporation Limited
- LC Paper No. CB(1)692/04-05(03) — The Hong Kong Mortgage Corporation Limited's letter dated 11 January 2005 commenting on the paper provided by the Administration (LC Paper No. CB(1)668/04-05(03))
- LC Paper No. CB(1)647/04-05(01) — Submission dated 31 December 2004 from the Hong Kong Capital Markets Association
- LC Paper No. CB(1)681/04-05(01) — Administration's response to the submission from the Hong Kong Capital Markets Association
- LC Paper No. CB(1)681/04-05(02) — Administration's response to the submissions from the Company & Financial Law Committee of The Law Society of Hong Kong and Linklaters
- LC Paper No. CB(1)668/04-05(05) — "Proposed work plan" prepared by the Legislative Council Secretariat)

2. Mr CHAN Kam-lam declared interest that he was a director of the board of the Hong Kong Mortgage Corporation Limited (HKMCL).
3. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

(Post-meeting note: The submission dated 12 January 2004 from the Hong Kong Institute of Certified Public Accountants was tabled at the meeting and issued to members vide LC Paper No. CB(1)709/04-05(01) on 14 January 2005.)

Follow-up actions to be taken by the Administration

- Admin 4. At the request of the Bills Committee, the Administration agreed to take the following actions:

(a) Operation of the “dominant influence test”

To facilitate members’ understanding of the operation of the “dominant influence test” for determining the relationship between parent undertakings and subsidiary undertakings, and the preparation of group accounts accordingly, the Administration was requested to provide a paper, with the aid of diagrams/charts/tables, covering the following points:

- (i) To illustrate with examples the operation of the “dominant influence test” and the preparation of group accounts under various possible scenarios, with reference to the proposed definition of “undertaking” in section 1 and the proposed provisions in sections 2 and 3 of the proposed Twenty-third Schedule to the Companies Ordinance (CO). Some of the possible scenarios were as follows -
 - A parent undertaking (“A”) had a subsidiary undertaking (“B”), which in turn was the parent undertaking of other undertakings (“C” and “D”);
 - A parent undertaking (“E”) had a subsidiary undertaking (“F”), which was not a body corporate and held certain voting rights of the parent undertaking.
- (ii) To clarify whether the proposed definition of “undertaking” in section 1 of the proposed Twenty-third Schedule to the CO was intended to cover “an individual”;
- (iii) Section 2(1) of the proposed Twenty-third Schedule to the CO set out the various criteria under which an undertaking was defined to be a parent undertaking in relation to another undertaking. As pointed out in the Assistant Legal Adviser’s letter dated 24 December 2004, it appeared that more than one undertaking could satisfy the criteria and become the parent undertakings of a

subsidiary undertaking. The Administration was requested to clarify the policy intent in this aspect and the obligation of these parent undertakings under the CO in preparing the group accounts;

- (iv) In respect of section 2(3) of the proposed Twenty-third Schedule to the CO, the Administration was requested to clarify the policy intent and consider the need to improve the drafting to reflect the policy intent; and
- (v) Section 3(3) of the proposed Twenty-third Schedule to the CO provided that “[t]he voting rights in an undertaking referred to in subsection (1) shall be reduced by any rights held by the undertaking itself”. The proposed provision was not clear. In particular, the following points needed to be clarified:
- What was “an undertaking referred to in subsection (1)”? In the various possible scenarios under item (i) above, which of the undertakings would be covered by section 3(3)?
 - What was the meaning of “any rights held by the undertaking itself”?
 - How was the off-setting of voting rights between the concerned undertakings conducted? What would be the impact on the concerned undertakings if the result of off-setting was zero?

(b) Impact of the Bill on the asset-securitization market in Hong Kong

To facilitate the Bills Committee’s consideration of the impact of the Bill on the development of asset-securitization market in Hong Kong, the Administration was requested to compile information about the provisions, rules, and practices adopted by other jurisdictions for special purpose entities (SPEs) in relation to the preparation of companies’ group accounts, including whether carve-outs and off-balance sheet treatment were provided for SPEs.

(c) Proposed “true and fair view override” provisions

To address members’ concern that the proposed amendments to section 126 of the CO were inconsistent with those to section 128(3), the Administration was requested to review the proposed provisions and provide the following information:

- (i) The policy intent for introducing the proposed amendments to section 126 and section 128(3) of the CO;
- (ii) On the proposed subsection (3)(c) of section 128 of the CO, how the directors of the undertaking could determine whether the disclosure of information was “harmful to the business” of the undertaking or of any of its subsidiaries;
- (iii) On the proposed subsection (3)(d) of section 128 of the CO, why the Financial Secretary was empowered to exempt an undertaking from the requirement of disclosing information relating to its

- subsidiary; and
- (iv) Provisions of relevant legislation in other jurisdictions.

Meeting with deputations and academics

5. The Chairman pointed out that HKMCL had requested to appear before the Bills Committee to present its submissions dated 22 December 2004, 10 January and 11 January 2005 and to give views on the Administration's written response to its submission dated 22 December 2004. As the Bills Committee had met with various deputations including HKMCL at the meeting held on 16 December 2004, the Chairman invited members' view on whether the Bills Committee should meet with HKMCL again.

6. Members were generally of the view that given the grave concern expressed by the securitization industry about the possible negative impact of the Bill on the development of asset-securitization market in Hong Kong, the Bills Committee should meet with HKMCL again. Members also agreed that the Hong Kong Capital Markets Association (HKCMA), the Asian Securitization Network (ASN), and academics of the relevant field should be invited to give views on the subject and/or to meet with the Bills Committee. In this connection, members noted the Administration's advice that it was collating relevant information about overseas jurisdictions and would report its findings to the Bills Committee at its fifth meeting tentatively scheduled for 24 February 2005. Members therefore agreed that HKMCL, HKCMA, ASN and academics of the relevant field be invited to attend the meeting on 24 February 2005.

Proposed work plan and meeting schedule

7. Members endorsed the proposed work plan and meeting schedule set out in paragraphs 3 and 4 of the paper (LC Paper No. CB(1)668/04-05(05)).

(Post-meeting note: The meeting schedule from February to May 2005 was issued to members vide LC Paper No. CB(1)700/04-05 on 14 January 2005.)

Date of next meeting

8. The next meeting of the Bills Committee would be held on Thursday, 3 February 2005, at 8:30 am.

III. Any other business

9. There being no other business, the meeting ended at 10:30 am.

Council Business Division 1
Legislative Council Secretariat
31 January 2005

**Proceedings of the third meeting of the
Bills Committee on Companies (Amendment) Bill 2004
on Thursday, 13 January 2005, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000-000316	Chairman	(a) Confirmation of minutes of meeting on 16 December 2004 (b) Welcoming and introductory remarks	
000317-001228	Administration Mr CHIM Pui-chung Chairman Hong Kong Institute of Certified Public Accountants (HKICPA)	<u>Scope of application of the Bill</u> (LC Paper No. CB(1)453/04-05(16)) The Administration's confirmation that - (a) only Hong Kong incorporated companies were required to prepare group accounts in accordance with the requirements of the Companies Ordinance (CO); (b) listed companies in Hong Kong were required to comply with the Listing Rules of the Stock Exchange of Hong Kong, which required listed companies to prepare group accounts in accordance with either the Hong Kong Financial Reporting Standards or the International Financial Reporting Standards; and	

Time marker	Speaker	Subject(s)	Action Required
		<p>(c) accounts of all subsidiary undertakings falling within the criteria set out in section 2(1) of the proposed Twenty-third Schedule to the CO (23rd Schedule), irrespective of whether they were incorporated, registered, or formed in Hong Kong, were subject to consolidation in the group accounts prepared by the relevant Hong Kong incorporated parent undertaking</p>	
001229-001806	<p>Administration Chairman HKICPA</p>	<p><u>Operation of the “dominant influence test”</u> (LC Paper No. CB(1)453/04-05(16))</p> <p>HKICPA’s advice that -</p> <p>(a) International Accounting Standard/Hong Kong Accounting Standard (HKAS) 27 provided that only one undertaking could have dominant influence or control over another undertaking; and</p> <p>(b) an undertaking having a “joint control” together with others over a jointly controlled entity was not required to prepare groups accounts, but its interests in the jointly controlled entity were accounted for by proportionate consolidation or equity accounting methods under HKAS 31</p>	

Time marker	Speaker	Subject(s)	Action Required
001807-003154	Mr Ronny TONG Administration Mr CHIM Pui-chung HKICPA	<p><u>Determination of “control” and “dominant influence” relationship between parent undertakings and subsidiary undertakings</u></p> <p>(a) Administration’s advice that the same concept of “control” and “dominant influence” were adopted in relevant provisions in the UK Companies Act 1985, Australia Corporations Act 2001, and Singapore Companies Act</p> <p>(b) HKICPA’s advice that accountants should have no difficulty in operating the “dominant influence test” proposed in the Bill</p> <p>(c) Administration’s explanation on the operation of the “dominant influence test” under different scenarios</p> <p>(d) Request for illustration on the operation of the “dominant influence test” and the preparation of group accounts in respect of a situation where a parent undertaking had a subsidiary undertaking, which in turn was the parent undertaking of other undertakings</p> <p>(e) Request for clarification on the policy intent of section 2(3) of the proposed 23rd Schedule and review of the drafting of the</p>	<p>Administration to provide a paper under paragraph 4(a)(i) of the minutes</p> <p>Administration to provide a paper under paragraph 4(a)(iv) of the</p>

Time marker	Speaker	Subject(s)	Action Required
		provision	minutes
003155-004426	Assistant Legal Adviser 7 (ALA 7) Administration	<p><u>Proposed section 2B of the CO (clause 2 of the Bill) and proposed 23rd Schedule</u></p> <p>(a) Differences between the provisions in the Bill and the relevant provisions in the UK Companies Act 1985 relating to the criteria under which an undertaking was defined to be a parent undertaking in relation to another undertaking. In UK, the same criteria were adopted for all the provisions of the UK Companies Act 1985 except that the “dominant influence test” was added for the provisions relating to consolidation and financial disclosure. In Hong Kong, a subsidiary undertaking which was a body corporate was proposed to be distinguished from a subsidiary undertaking which was not a body corporate and different criteria were to be adopted under the Bill</p> <p>(b) Request for information to clarify -</p> <p>(i) whether more than one undertaking could satisfy the criteria set out in section 2(1) of the proposed 23rd Schedule under which an undertaking was defined to be a parent undertaking in relation to another</p>	Administration to provide a paper under paragraph 4(a)(iii) of the minutes

Time marker	Speaker	Subject(s)	Action Required
		<p>undertaking; and</p> <p>(ii) the policy intent of section 2(1) of the proposed 23rd Schedule and the obligation of parent undertakings subject to this section in preparing group accounts under the CO</p>	
004427-010439	<p>Mr Ronny TONG Administration HKICPA Chairman Ms Miriam LAU ALA7</p>	<p><u>Sections 1, 2, 3 of the proposed 23rd Schedule</u></p> <p>Request for information about -</p> <p>(a) whether the proposed definition of “undertaking” in section 1 of the proposed 23rd Schedule was intended to cover “an individual”;</p> <p>(b) how the “dominant influence test” was operated and group accounts was prepared in a scenario where a parent undertaking had a subsidiary undertaking which was not a body corporate and held certain voting rights of the parent undertaking (sections 2(1)(b) and 3 of the proposed 23rd Schedule); and</p> <p>(c) to illustrate, with examples and the aid of diagrams/charts/tables, the operation of the “dominant influence test” and the preparation of group accounts under various possible scenarios, with reference to</p>	<p>Administration to provide a paper under paragraph 4(a)(i), (ii) of the minutes</p>

Time marker	Speaker	Subject(s)	Action Required
		<p>sections 1, 2 and 3 of the proposed 23rd Schedule</p> <p>(d) Request for information to clarify the following issues about section 3(3) of the proposed 23rd Schedule -</p> <p>(i) What was “an undertaking referred to in subsection (1)”?</p> <p>(ii) In the various possible scenarios under which the “dominant influence test” might be operated, which of the undertakings would be covered by section 3(3)?</p> <p>(iii) What was the meaning of “any right held by the undertaking itself”?</p> <p>(iv) How was the off-setting of voting rights between the concerned undertakings conducted? What would be the impact on the concerned undertaking if the result of the off-setting was zero?</p>	<p>Administration to provide a paper under paragraph 4(a)(v) of the minutes</p>
010440-010540	Chairman	<p>Impact of the Bill on the financial reporting requirements on companies (Annex B to LC Paper No. CB(1)453/04-05(16))</p>	
010541-013351	<p>Administration Chairman Mr Ronny TONG</p>	<p><u>Meeting with deputations and academics</u></p>	

Time marker	Speaker	Subject(s)	Action Required
	<p>Mr CHAN Kam-lam Ms Miriam LAU Mr Albert HO Miss TAM Heung-man</p>	<p>(a) Members' concern about the possible negative impact of the Bill on the development of asset-securitization market in Hong Kong</p> <p>(b) The Hong Kong Mortgage Corporation Limited (HKMCL)'s request to meet with the Bills Committee again</p> <p>(c) The Bills Committee's decision to invite HKMCL, the Hong Kong Capital Markets Association, the Asian Securitization Network, and academics of the relevant field to attend the meeting to be held on 24 February 2005</p> <p>(d) Request for information about provisions, rules, and practices adopted by other jurisdictions for special purpose entities (SPEs) in relation to the preparation of companies' group accounts, including whether carve-outs and off-balance sheet treatment were provided for SPEs</p> <p>(e) A member's declaration of interest as a director of the Board of HKMCL</p>	<p>Administration to prepare the information under paragraph 4(b) of the minutes</p>
013352-015120	<p>Administration Mr Ronny TONG Mr Albert HO</p>	<p><u>The proposed "True and fair view override" provisions</u> (LC Paper No. CB(1)453/04-05(16))</p> <p>(a) The Administration's emphasis on its commitment to enhance</p>	

Time marker	Speaker	Subject(s)	Action Required
		<p>the standards and transparency of financial reporting of companies</p> <p>(b) Member’s concern about the inconsistency of the proposed amendments to section 126 of the CO with those to section 128(3)</p> <p>(c) Request for information about -</p> <p>(i) the policy intent for introducing the proposed amendments to section 126 and section 128(3) of the CO;</p> <p>(ii) on the proposed subsection (3)(c) of section 128 of the CO, how the directors of the undertaking could determine whether the disclosure of information was “harmful to the business” of the undertaking or of any of its subsidiaries;</p> <p>(iii) on the proposed subsection (3)(d) of section 128 of the CO, why the Financial Secretary was empowered to exempt an undertaking from the requirement of disclosing information relating to its subsidiary; and</p> <p>(iv) provisions of relevant legislation in other</p>	<p>Administration to provide the information under paragraph 4(c) of the minutes</p>

Time marker	Speaker	Subject(s)	Action Required
		jurisdictions.	
015121-015625	Chairman	<u>Proposed work plan and meeting schedule from February to May 2005</u> (LC Paper No. CB(1)668/04-05(05))	

Council Business Division 1
Legislative Council Secretariat
31 January 2005