

Bills Committee on Banking (Amendment) Bill 2005

**Proposal of Establishing a New Appeals Mechanism under the Bill –
Draft Committee Stage Amendments**

At the Bills Committee meetings held on 19 and 24 May 2005, Members noted the Administration's intention to adopt Members' proposal of establishing a new appeals mechanism under the Bill (vide LC Paper No. CB(1)1545/04-05(02)).

2. This paper attaches for Members' reference the draft Committee Stage Amendments (in English only) providing for the establishment of a Capital Adequacy Review Tribunal. We are prepared to explain these amendments in detail to the Bills Committee.

Hong Kong Monetary Authority
Financial Services and the Treasury Bureau
31 May 2005

Banking (Amendment) Bill 2005

**Draft Committee Stage Amendments relating to
Capital Adequacy Review Tribunal
(31 May 2005)**

Bill cl. 4; Ord s. 98A

"(3A) Rules made under subsection (1) may provide that a decision made by the Monetary Authority under those rules is a decision to which section 101B(1) applies."

Bill cl. 5A (new); Ord. new Part XVIIIA

5A. Part added

The following is added immediately after section 101 –

**"PART XVIIIA
CAPITAL ADEQUACY REVIEW TRIBUNAL**

**101A. Establishment of Capital Adequacy Review
Tribunal**

(1) There is established a tribunal to be known as the "Capital Adequacy Review Tribunal" in English and "[]" in Chinese, comprising a chairman and such number of members as may be appointed under subsection (3).

(2) The Chief Executive shall, by notice published in the Gazette, appoint to be the Chairman of the Review Tribunal a person who is qualified for appointment as a judge of the High Court under section 9 of the High Court Ordinance (Cap. 4).

(3) The Chief Executive shall, by notice published in the Gazette, appoint as members of the Review Tribunal persons, not being public officers, whom he considers suitable for that appointment, and the number of persons so appointed shall at any one time be not less than 2.

(4) The Chairman and members of the Review Tribunal shall be paid, as a fee for their services, such amounts as the Chief Executive considers appropriate; and of those amounts the amounts payable to the Chairman shall be a charge on the general revenue, and the amounts payable to members shall be a charge on the Exchange Fund established under section 3 of the Exchange Fund Ordinance (Cap. 66).

(5) The Fifteenth Schedule has effect with respect to the Review Tribunal.

(6) Subject to this section and the Fifteenth Schedule and to rules made under section 101I, the Chairman of the Review Tribunal may determine the procedures and practice of the Review Tribunal.

101B. Reference to Review Tribunal

(1) Any person who is aggrieved by a decision of the Monetary Authority to which this section applies by virtue of section 98A(3A) may, within the period specified in subsection (3), apply to the Review Tribunal for a review of the decision.

(2) An application shall be in writing and shall state the grounds for the application for review.

(3) The period specified for the purposes of subsection (1) is the period ending 30 days after the receipt, by the person making the application to the Review Tribunal for a review of the decision, of notice in writing given by the Monetary Authority informing him of the decision, or such later date as the Review Tribunal may, in the circumstances of the particular case, allow.

(4) An application to the Review Tribunal for a review of a decision does not operate to suspend the decision.

101C. Determination of review by Review Tribunal

(1) The Review Tribunal shall deliver to the Monetary Authority a copy of any application for a review of a decision under section 101B(1) that it has received.

(2) As soon as practicable after receipt of that copy, the Monetary Authority shall forward to the Review Tribunal a copy of the decision together with all other relevant papers in his possession.

(3) In reviewing a decision of the Monetary Authority, the Review Tribunal shall afford both the applicant and the Monetary Authority a reasonable opportunity of being heard.

(4) For the purpose of proceedings before the Review Tribunal, matters of fact are established if they are established on the balance of probabilities.

(5) In determining a review of a decision the Review Tribunal may –

- (a) confirm, vary or set aside the decision; or
- (b) remit the matter to the Monetary Authority with any direction that it considers appropriate.

(6) As soon as practicable after completing the review, the Review Tribunal shall deliver its determination and the reasons for that determination.

101D. Registration of determination made by Review Tribunal

(1) A determination made by the Review Tribunal shall be recorded in writing and signed by the Chairman of the Tribunal.

(2) A determination made by the Review Tribunal may be registered in the Court of First Instance; and a determination so registered shall be deemed to be an order of the Court.

(3) The determination of the Review Tribunal is final and, except as provided in section 101H, is not subject to appeal.

(4) For the purposes of any proceedings in a court of law, a document purporting to be a record of a determination of the Review Tribunal signed by the Chairman of the Review Tribunal shall, in the absence of evidence to the contrary, be regarded as a determination of the Review Tribunal duly made and signed, without proof of its making, or proof of signature, or proof that the person signing the determination was in fact the Chairman of the Review Tribunal.

101E. Powers of Review Tribunal

- (1) For the purposes of any review, the Review Tribunal may –
 - (a) receive and consider any material by way of oral evidence, written statements or documents, whether or not the material would be admissible in a court of law;
 - (b) determine the manner in which any such material is received;
 - (c) by notice in writing signed by the Chairman of the Tribunal, require a person to attend before it and, subject to subsection (2), to give evidence and produce any article, record or document in his possession or control relating to the subject matter of the review;
 - (d) administer oaths;
 - (e) examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purpose of the review;
 - (f) order a witness to provide evidence for the purpose of the review by affidavit;
 - (g) stay any of the proceedings in the review on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;

- (h) order that costs be paid to any party to the review or any person who is required to attend before it for the purpose of the review;
- (i) hear an application for stay of proceedings for a review at any time before its determination is made; and
- (j) exercise such other powers or make such other orders as may be necessary for or ancillary to the conduct of the review or the performance of its functions.

(2) Nothing in subsection (1) empowers the Review Tribunal to require –

- (a) the technical consultant or adviser of an applicant to disclose any information relating to the affairs of any person other than the applicant; or
- (b) a solicitor or counsel to disclose any privileged communication, whether oral or written, made to or by him in that capacity.

(3) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to proceedings of the Review Tribunal as they apply in relation to civil proceedings in a court and, accordingly, a person may not under subsection (1) be required to give, produce or provide any evidence or document if he could not be required to do so if the proceedings of the Review Tribunal were civil proceedings in a court.

(4) No person shall –

- (a) fail to comply with an order, notice, prohibition or requirement of the Review Tribunal made or given under or pursuant to subsection (1) or the Fifteenth Schedule;
- (b) disrupt any sitting of the Review Tribunal or otherwise misbehave during any such sitting;

- (c) having been required by the Review Tribunal under subsection (1) to attend before the Tribunal, leave the place where his attendance is so required without the permission of the Tribunal;
 - (d) hinder or deter any person from attending before the Review Tribunal, giving evidence or producing any article, record or document, for the purpose of a review;
 - (e) threaten, insult or cause any loss to be suffered by any person who has attended before the Review Tribunal, on account of such attendance; or
 - (f) threaten, insult or cause any loss to be suffered by the Chairman, or any member, of the Review Tribunal at any time on account of the performance of his functions in that capacity.
- (5) A person who, without reasonable excuse, contravenes subsection (4) commits an offence and is liable –
- (a) on summary conviction, to a fine at tier 5 and to imprisonment for 6 months; or
 - (b) on conviction on indictment to a fine at tier 8 and to imprisonment for 2 years.
- (6) A person is not excused from complying with an order, notice, prohibition or requirement of the Review Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate the person.

101F. Sittings of Review Tribunal to be held in private

- (1) The sittings of the Review Tribunal shall be held in private.
- (2) A participant in proceedings for a review shall not, at the time of the proceedings or at any other time, publish or otherwise disclose to any person any

information about the review or any information that comes to his knowledge in the course of the review.

(3) Subsection (2) does not apply to a disclosure, by a participant in proceedings for a review –

- (a) made to another participant in the same proceedings, where the disclosure is necessary for the proper carrying out of the first-mentioned participant's functions in relation to the review; or
- (b) necessarily made for the purpose of an appeal to the Court of Appeal under section 101H in relation to the review.

(4) A person who contravenes subsection (2) commits an offence and is liable –

- (a) on conviction upon indictment, to a fine at tier 8 and to imprisonment for 2 years; or
- (b) on summary conviction, to a fine at tier 5 and to imprisonment for 6 months.

(5) In this section, "participant", in relation to proceedings for review of a decision, means the Chairman and members of the Review Tribunal, the party who applies for review of the decision, and any witness, counsel, solicitor, or other person involved in the review but, without prejudice to section 120(1), does not include the Monetary Authority.

101G. Use of incriminating evidence given under compulsion

Notwithstanding any other provision of this Ordinance, where the Review Tribunal –

- (a) requires a person to give evidence under section 101E(1)(c);
- (b) requires a person to answer any question under section 101E(1)(e);

- (c) orders a person to provide evidence under section 101E(1)(f);
or
- (d) otherwise requires or orders a person to provide any
information under section 101E(1)(j),

and the evidence, answer or information might tend to incriminate the person, then the requirement or order as well as the evidence, the question and answer, or the information shall not be admissible in evidence against the person in criminal proceedings in a court of law other than those in which the person is charged with an offence under section 101E(4)(a), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the evidence, answer or information.

101H. Appeal to Court of Appeal

(1) A person who was a party to proceedings for review before the Review Tribunal may, if dissatisfied with a determination in the proceedings, appeal to the Court of Appeal against the determination on a point of law.

(2) Where an appeal has been lodged under subsection (1) the Court of Appeal may, on application made to it by any party to the review proceedings, order a stay of the proceedings, or of execution of the determination, of the Review Tribunal, subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Court of Appeal considers appropriate; but the lodging of an appeal under subsection (1) does not of itself operate as a stay of the proceedings, or of execution of the determination, of the Tribunal.

(3) The Court of Appeal may affirm, set aside or vary the determination appealed against, or may remit the matter in question to the Review Tribunal with such directions as it considers appropriate.

(4) The Rules of the High Court (Cap. 4 sub. leg. A) apply in relation to such an appeal to the extent that those Rules are not inconsistent with this Ordinance.

(5) In an appeal under this section, the Court of Appeal may make such order for payment of costs as it considers appropriate.

101I. Power of Chief Justice to make rules

The Chief Justice may make rules –

- (a) providing for matters of procedure, or other matters, relating to applications for review, or reviews, under this Part, which are not provided for in this Part or section 4 of the Fifteenth Schedule;
- (b) providing for the issue or service of any document (however described) for the purposes of this Part or section 4 of the Fifteenth Schedule; or
- (c) prescribing anything required to be prescribed under this Part or section 4 of the Fifteenth Schedule."

Bill Schedule, Part 1, s.1(2); Ord. s. 2(1)

"Review Tribunal" means the Capital Adequacy Review Tribunal established under section 101A.

Bill Schedule, Part 1, s. 4A (new); Ord. s. 120(5)

4A. Official secrecy

Section 120(5) is amended by adding –

"(da) to the disclosure of information to the Review Tribunal;"

Bill Schedule, Part 1, s. 5; Ord. s.132A

[Amendment to s. 132A to be deleted]

Bill Schedule, Part 1, s. 6; Ord. s. 135

(1) Section 135(1) is amended by repealing "Seventh or Eighth" and substituting "Seventh, Eighth or Fifteenth".

Bill Schedule, Part 1, s. 10A (new); Ord. new Fifteenth Schedule

10A. Schedule added

The following is added –

"FIFTEENTH SCHEDULE [ss. 101A, 101I & 135]

PROVISIONS RELATING TO CAPITAL ADEQUACY
REVIEW TRIBUNAL

1. **Interpretation**

In this Schedule –

"Chairman" (主席) means Chairman of the Review Tribunal.

"parties" (雙方), in relation to an application to the Review Tribunal for a review of a decision of the Monetary Authority, means the person making the application and the Monetary Authority;

"member" (成員) means a member of the Review Tribunal.

2. **Tenure of Chairman**

(1) The term of appointment of a person as Chairman shall not exceed 3 years.

(2) A person whose term of appointment or reappointment as Chairman has expired is eligible for reappointment.

(3) A person appointed as Chairman may resign his office by giving notice in writing to the Chief Executive, and the notice shall take effect on the date specified in the notice or, if no date is specified, on the date of receipt of the notice by the Chief Executive.

(4) If the Chief Executive is satisfied that the person appointed as Chairman –

(a) has become bankrupt;

- (b) is incapacitated by physical or mental illness; or
- (c) is otherwise unable or unfit to perform the functions of Chairman,

the Chief Executive may, after consultation with the Chief Justice, by notice published in the Gazette, revoke the person's appointment as Chairman; and upon such revocation the office becomes vacant.

(5) If the hearing of a review by the Review Tribunal has been commenced but is not completed before the expiry of a person's appointment as Chairman, the Chief Executive may extend the person's appointment as Chairman until the determination of the review.

3. **Tenure of members**

(1) The term of appointment of a member shall not exceed 3 years.

(2) A member whose term of appointment or reappointment has expired is eligible for reappointment.

(3) A member may resign by giving notice in writing to the Chief Executive, and the notice shall take effect on the date specified in the notice or, if no date is specified, on the date of receipt of the notice by the Chief Executive.

(4) If the Chief Executive is satisfied that a member –

- (a) has become bankrupt;
- (b) is incapacitated by physical or mental illness;
- (c) is otherwise unable or unfit to perform the functions of a member; or
- (d) has become a public officer,

the Chief Executive may, by notice published in the Gazette, revoke the member's appointment.

4. **Procedure**

(1) The Review Tribunal shall convene on such occasions as the Chairman considers necessary to determine a review.

(2) The Chairman may, at any time after an application for a review of a decision has been made, give directions to the parties to the review concerning –

- (a) procedural matters to be complied with by any of the parties; and
- (b) the time within which such procedural matters are to be complied with.

(3) The quorum for any sitting of the Review Tribunal shall be the Chairman and 2 members.

(4) At a sitting of the Review Tribunal –

- (a) the Chairman shall preside; and
- (b) every question before the Review Tribunal shall be determined by the majority of the votes cast by the Chairman and members present, except that a question of law shall be determined by the Chairman alone.

(5) If, for any period, the Chairman is precluded by illness, absence from Hong Kong or any other cause from exercising his functions, the Chief Executive may appoint a person who is qualified for appointment as a judge of the High Court under section 9 of the High Court Ordinance (Cap. 4) to act as Chairman and as such to exercise and perform all the functions of the Chairman during that period.

(6) If, for any period, a member is precluded by illness, absence from Hong Kong or any other cause from taking part in proceedings of the Review Tribunal, the Chief Executive may appoint a person to act as a member and as such to take part in proceedings of the Review Tribunal during that period.

(7) The hearing of a review may, with the consent of the parties to the review, continue notwithstanding any change in the persons appointed as Chairman and members, or the appointment of any person to act as Chairman or as a member, of the Review Tribunal.

(8) The right to be heard conferred by section 101C(3) of this Ordinance may be exercised –

- (a) in person; or
 - (i) in the case of a corporation, through its officer or employee; or
 - (ii) in the case of the Monetary Authority, through a person appointed under section 5A(3) of the Exchange Fund Ordinance (Cap. 66) to assist the Monetary Authority; or
- (b) through counsel or a solicitor or, with the leave of the Tribunal, through any other person.

(9) The Chairman shall prepare or cause to be prepared a record of the proceedings at any sitting of the Tribunal, which shall contain such particulars relating to the proceedings as he considers appropriate.

5. **Miscellaneous**

Except as otherwise provided in this Ordinance –

- (a) the Review Tribunal, its Chairman and its members; and
- (b) the parties to, and any witness, counsel, solicitor, or any other person involved in, a review,

shall have the same privileges and immunities in respect of the review as they would have if the review were civil proceedings before the Court of First Instance."

Bill Schedule, Part 2, s. 1A (new)

Electronic Transactions Ordinance

1A. Proceedings in relation to which sections 5, 6, 7 and 8 of this Ordinance do not apply under section 13(1) of this Ordinance

Schedule 2 to the Electronic Transactions Ordinance (Cap. 553) is amended –

- (a) in paragraph (zp), by repealing the full stop and substituting a

semicolon;

(b) by adding –

"(zq) the Capital Adequacy Review Tribunal established under the Banking Ordinance (Cap. 155).".