

立法會
Legislative Council

LC Paper No. CB(1)1654/05-06
(These minutes have been seen
by the Administration)

Ref : CB1/BC/13/04

Bills Committee on Financial Reporting Council Bill

**Minutes of the sixteenth meeting held on
Friday, 12 May 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon TAM Heung-man (Chairman)
Hon CHAN Kam-lam, SBS, JP
Hon SIN Chung-kai, JP
Hon Emily LAU Wai-hing, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon Albert HO Chun-yan
Dr Hon LUI Ming-wah, SBS, JP
Hon Bernard CHAN, JP
Dr Hon Philip WONG Yu-hong, GBS
- Public officers attending** : Mr Albert LAM
Deputy Secretary for Financial Services and the Treasury
(Financial Services)
- Mr Jackie LIU
Acting Principal Assistant Secretary for Financial Services
and the Treasury (Financial Services)
- Mr Gordon JONES, JP
Registrar of Companies

Mr Lawrence PENG
Senior Assistant Law Draftsman
Department of Justice

Miss Selina LAU
Government Counsel
Department of Justice

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

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Mr Paul WOO
Senior Council Secretary (1)3

Mr Justin TAM
Council Secretary (1)3

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- I. Confirmation of minutes of meeting**
(LC Paper No. CB(1)1452/05-06 — Minutes of thirteenth meeting held on 31 March 2006)

The minutes of the thirteenth meeting held on 31 March 2006 were confirmed.

- II. Meeting with the Administration**
(LC Paper No. CB(1)1460/05-06(01) — “Follow-up to the fifteenth meeting on 28 April 2006” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1460/05-06(02) — Revised wording of clause 51 — “Preservation of secrecy”
- LC Paper No. CB(3)713/04-05 — The Bill

- LC Paper No. CB(1)1127/05-06(01) — Marked-up copy of the English text of the Bill showing the draft Committee Stage amendments proposed by the Administration (March 2006)
- LC Paper No. CB(1)1364/05-06(03) — Marked-up copy of the Chinese text of clauses 1 to 32 of the Bill showing the draft Committee Stage amendments proposed by the Administration (April 2006)
- LC Paper No. CB(1)1460/05-06(03) — Marked-up copy of the Chinese text of clauses 33 to 50 of the Bill showing the draft Committee Stage amendments proposed by the Administration (May 2006)
- LC Paper No. CB(1)1127/05-06(02) — “Summary of outstanding issues of concern and proposed amendments to individual clauses of the Bill (Position as at 22 March 2006)” prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)166/05-06(03) — Paper provided by the Administration on “Summary of submissions and Administration’s responses”)

2. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Follow-up actions to be taken by the Administration

3. At the request of the Bills Committee, the Administration agreed to take the following actions:

Clause 51 – Preservation of secrecy

- (a) On the Administration’s advice that the Official Receiver had rarely been appointed to act as the liquidator or provisional liquidator of a company under the Companies Ordinance (Cap. 32) in recent years, a member requested the Administration to provide information on the number of cases in which the Official Receiver was so appointed in each of the past

few years.

New clause 51A – Protection of informers

- (b) A member stressed the importance of protecting the identity of informers, and that a witness should be forbidden to disclose the name or address of an informer. In this connection, he was concerned that the expression “is not obliged to disclose” in the proposed new clause 51A(2) might carry the meaning that a witness might or might not disclose the name or address of an informer in the relevant proceedings. The member suggested that as a matter of principle the expression “is not obliged to” should be substituted with “shall not”. The Administration was requested to consider the suggestion and respond in writing.

Clause 57 – Lien claimed on records or documents

- (c) A member was of the view that once a person who had the lien on a document had parted with the physical possession of the document, he would lose the lien. In this connection, if an auditor or accountant claimed a lien on any document that had been produced to the Financial Reporting Council (FRC) under Part 3 or 4 of the Bill, and if for whatever reason the FRC subsequently returned the document to another party, such as the company under investigation, the auditor or accountant would lose the lien on the document, as the document was no longer in his possession. The member considered it very unfair to the auditor or accountant concerned, and yet clause 57(c) could not address this kind of situation. He therefore urged that clause 57 be refined to guard against this situation. The Administration was requested to consider the member’s view and respond in writing.

Clause 75 – Consequential amendments to the Prevention of Bribery Ordinance (PBO) (Cap. 201)

- (d) In response to the suggestion raised by the legal adviser to the Bills Committee at the meeting on 24 February 2006, the Administration undertook to propose a Committee Stage amendment (CSA) to clause 75 to add to Schedule 2 to the PBO the reference to “Financial Reporting Council”.

(Post-meeting notes:

- (a) The marked-up copy of Part 6 of the Bill showing the draft CSAs proposed by the Administration tabled at the meeting by the legal adviser to the Bills Committee was issued to members vide LC Paper No. CB(1)1485/05-06(01) on 12 May 2006; and
- (b) The Administration’s written response to the issues set out in paragraph 3(a), (b) and (c) above was issued to members vide LC Paper No. CB(1)1528/05-06(02) on 19 May 2006.)

Date of next meeting

4. The Chairman reminded members that the next meeting would be held on Monday, 22 May 2006, at 8:30 am.

III. Any other business

5. There being no other business, the meeting ended at 10:25 am.

Council Business Division 1
Legislative Council Secretariat
8 June 2006

**Proceedings of the sixteenth meeting of the
Bills Committee on Financial Reporting Council Bill
on Friday, 12 May 2006, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000-000734	Chairman	<i>Confirmation of minutes of meeting</i> (LC Paper No. CB(1)1452/05-06)	
000735-002824	Chairman Ms Emily LAU Assistant Legal Adviser 6 (ALA6) Mr Ronny TONG	<i>Matters arising from the 15th meeting</i> <u>Clause 51 – Preservation of secrecy</u> (Annex to LC Paper No. CB(1)1460/05-06(02)) (a) Briefing by the Administration on its draft proposed Committee Stage amendments (CSAs) to sub-clauses 3(b)(ix) and (3)(c) of clause 51 in order to distinguish between the different capacities under which the Official Receiver (OR) might receive information from the Financial Reporting Council (FRC) for the purposes of performing the OR's functions in the relevant capacity (i.e. in the capacity of a liquidator or provisional liquidator appointed under the Companies Ordinance (CO) (Cap. 32) or otherwise) (b) Members' concern that the proposed CSAs might still be inadequate to address the problem that the OR might, through the disclosure gateway	

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		<p>under clause 51(3)(b)(ix), receive information from the FRC about the situation of a company (“Company A”), and then be appointed as the liquidator of another company (“Company B”) which had a connection with Company A (such as being a creditor of Company A) and use the information to facilitate the performance of his duties as the liquidator of Company B, thus gaining an unfair advantage over other creditors of Company A</p> <p>(c) A member’s suggestion that in the scenario depicted in item (b) above, to avoid putting the OR in a difficult position, once the OR received information from the FRC about Company A, the OR should not act as the liquidator of Company B</p> <p>(d) ALA6’s view that although the proposed CSAs to clause 51 might achieve preservation of secrecy in most of the situations, there was still the potential risk of improper use of the information provided by the FRC when the OR performed his functions in different capacities. Moreover, different officers in the OR’s Office might, in assisting the OR in acting as a liquidator of a company, have access to the information provided by the</p>	

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		<p>FRC on a related entity. It was not clear whether any flow of information within the OR's Office would contravene the secrecy provisions in clause 51 as there might be no disclosure to a third party</p> <p>(e) The Administration's advice that:</p> <ul style="list-style-type: none">(i) when disclosing information to the OR, the FRC would explain clearly the purpose of the disclosure and the relevant capacity in which the OR was given the information;(ii) to ensure proper use of information, clause 51(1) provided that a specified person should not suffer or permit any person to have access to any matter relating to the affairs of any person that came to the specified person's knowledge in the performance of any function under the FRC Ordinance; and should not communicate any such matter to any person other than the person to whom such matter related; and(iii) in recent years, the OR had outsourced most of the liquidation cases and	

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		<p>had rarely been appointed to act as the liquidator or provisional liquidator of a company under the CO</p> <p>(f) Request for the Administration to provide information on the number of cases in which the OR was appointed as liquidator or provisional liquidator in each of the past few years</p>	<p>The Administration to take action under paragraph 3(a) of the minutes</p>
002825-003201	Ms Emily LAU Administration	<p>(a) Member's enquiry about the penalty for the OR if he used the information obtained from the FRC in a capacity other than that of a liquidator appointed under the CO to facilitate the performance of his duties as a liquidator</p> <p>(b) The Administration's advice that clause 51(11) set out the penalties for commission of an offence under clause 51(10)</p>	
003202-004037	ALA6 Ms Emily LAU Administration	<p>(a) ALA6's view that the Administration had assumed that there was an implied duty of the OR to use the information disclosed to him by the FRC only for performing his functions in the relevant capacity. There was no express statutory requirement for the OR not to use the disclosed information for performing his functions in another capacity. Hence, the OR might not use the information only in the way as</p>	

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		<p>intended. In the end, it would be for the court to decide as to whether the OR had acted in compliance with the provisions in clause 51</p> <p>(b) The Administration's advice that:</p> <p>(i) clause 51(7) empowered the FRC to attach such conditions as it considered appropriate to the proper use of the information disclosed by it pursuant to clause 51(3)(a), (b) or (c); and</p> <p>(ii) with the proposed CSAs to clause 51, there would be sufficient safeguard for preservation of secrecy. The Administration did not see the need for introducing further amendments relating to the FRC's power to attach conditions for the use of the information disclosed by it</p>	
004038-004413	Chairman Administration	<p><u>Disclosure of information under clause 51(2)(c), 51(5) and 51(6)(c)</u></p> <p>(a) Request made by a member at the 15th meeting on 28 April 2006 for the Administration to explain the policy intent of clause 51(2)(c), 51(5) and 51(6)(c) (Item 2 of the list of follow-up</p>	

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		<p>actions to be taken by the Administration (LC Paper No. CB(1)1460/05-06(01))</p> <p>(b) The Administration's advice that:</p> <p>(i) the subclauses provided for the disclosure of information for the purposes of seeking legal or professional advice by different persons at different stages and on different matters. The disclosure mechanism under clause 51(2)(c) and 51(6)(c) therefore would not result in duplicated purpose and undue disclosure of information; and</p> <p>(ii) the disclosure mechanism was modelled on similar provisions in the Securities and Futures Ordinance (SFO)</p>	
004414-004511	Mr SIN Chung-kai Administration	The Administration's advice that clause 51(11) set out the penalties for commission of an offence under clause 51(10)	
004512-004659	Chairman	The Chairman's advice that the Administration had provided the marked-up copy of the Chinese text of clauses 33 to 50 of the Bill showing the draft CSAs proposed by the Administration (LC Paper No. CB(1)1460/05-06(03)). The	

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		<p>Chinese text would be considered by ALA6 in tandem with the English text to ensure that the two were consistent with each other</p>	
004700-005644	Administration Ms Emily LAU ALA6	<p><i>Clause-by-clause examination of the Bill with draft CSAs proposed by the Administration</i> (LC Paper Nos. CB(1)1127/05-06(01) and (02))</p> <p><u>Proposed new clause 51A – Protection of informers</u> (Pages 9 to 11 of Annex A to LC Paper No. CB(1)1364/05-06(02))</p> <p>(a) Briefing by the Administration on its draft proposed CSA to add a new clause 51A to encode in statute protection of the identity of informers or “whistle-blowers” providing information to the FRC. The Administration advised that the proposed provisions were drafted with reference to section 30A of the Prevention of Bribery Ordinance (Cap. 201) (PBO) and section 57 of the Dangerous Drugs Ordinance (Cap. 134) (DGO). The Administration had consulted the Hong Kong Institute of Certified Public Accountants (HKICPA) and the Securities and Futures Commission, which accepted the proposed amendment</p> <p>(b) ALA6’s advice that no problems had been encountered</p>	

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		<p>in the operation of the similar provisions in the PBO</p> <p>(c) In response to a member's enquiry on the proposed new clause 51A(4)(a), the Administration advised that the basic principle was that the identity of an informer should be protected. But in individual cases, it would be for the court, the magistrate, the Market Misconduct Tribunal or the Disciplinary Committee constituted under the Professional Accountants Ordinance (PAO), as the case might be, to decide whether the identity of a relevant person should be disclosed, having regard to all relevant factors including, in particular, the requirement of a fair trial and justice to the parties</p>	
005645-010607	Mr Ronny TONG Administration ALA6	<p>(a) In response to a member's enquiry on the proposed new clause 51A(2), the Administration advised that a witness before the proceedings of the court, the magistrate, the Market Misconduct Tribunal or the Disciplinary Committee constituted under the PAO was not obliged to disclose the name or address of an informer but he was not forbidden to do so. ALA6 advised that a witness would not normally disclose the identity of an informer except when being cross-examined</p>	

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		<p>(b) The member stressed the importance of protecting the identity of informers, and that a witness should be forbidden to disclose the name or address of an informer. In this connection, he was concerned that the expression “is not obliged to disclose” in the proposed new clause 51A(2) might carry the meaning that a witness might or might not disclose the name or address of an informer in the relevant proceedings. The member suggested that as a matter of principle the expression “is not obliged to” should be substituted with “shall not”. The Administration agreed to consider the suggestion</p>	<p>The Administration to take action under paragraph 3(b) of the minutes</p>
010608-011109	Administration Mr Ronny TONG ALA6	<p><u>Clause 52 – Avoidance of conflict of interest</u> (Pages 11 to 17 of Annex A to LC Paper No. CB(1)1364/05-06(02))</p> <p>Briefing by the Administration on its draft proposed CSAs to clause 52</p>	
011110-011359	Chairman Administration	<p><u>Clause 53 – Immunity</u></p> <p>Briefing by the Administration on its proposed CSA to recast clause 53, having regard to the discussions at the meetings on 20 December 2005 and 12 January 2006, to:</p> <p>(a) provide that a person who complied, during investigations</p>	

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		<p>or enquiries, with the relevant information-gathering requirements imposed under the FRC Ordinance should not incur any civil liability by reason only of that compliance; and</p> <p>(b) clarify the Administration's intention that a person did not incur civil liability in respect of anything done, or omitted to be done, by him in good faith in the performance or purported performance of the functions of the FRC, the Audit Investigation Board, a Financial Reporting Review Committee and any committee established by the FRC</p>	
011400-011701	Administration Ms Emily LAU Mr SIN Chung-kai	<p><u>Clause 54 – Immunity in respect of communication with Council by auditors of listed entities</u></p> <p>(a) Briefing by the Administration on clause 54. As advised by the Administration, the provisions were drafted with reference to section 381 of the SFO</p> <p>(b) In response to an enquiry of a member, the Administration advised that the identity of an auditor referred to in clause 54, who communicated in good faith to the FRC any information or opinion on a specified matter in relation to a listed entity, would not be</p>	

Time marker	Speaker	Subject(s)	Action Required
		disclosed to the entity concerned	
011702-011737	Administration	<p><u>Clause 55 – Legal professional privilege</u></p> <p>Briefing by the Administration on clause 55</p>	
011738-011824	Administration	<p><u>Clause 56 – Production of information in information systems</u></p> <p>Briefing by the Administration on clause 56 and the draft proposed CSA. As advised by the Administration, the provisions were drafted with reference to section 189 of the SFO</p>	
011825-012519	Administration Mr Ronny TONG	<p><u>Clause 57 – Lien claimed on records or documents</u></p> <p>(a) Briefing by the Administration on clause 57</p> <p>(b) A member was of the view that once a person who had the lien on a document had parted with the physical possession of the document, he would lose the lien. In this connection, if an auditor or accountant claimed a lien on any document that had been produced to the FRC under Part 3 or 4 of the Bill, and if for whatever reason the FRC subsequently returned the document to another party, such as the company under investigation, the auditor or accountant would lose the lien</p>	The Administration to take action under paragraph 3(c) of the minutes

Time marker	Speaker	Subject(s)	Action Required
		<p>on the document, as the document was no longer in his possession. The member considered it very unfair to the auditor or accountant concerned, and yet clause 57(c) could not address this kind of situation. He therefore urged that clause 57 be refined to guard against this situation. The Administration was requested to consider the member's view and respond in writing</p>	
012520-012637	Administration	<p><u>Clause 58 – Destruction of documents, etc.</u></p> <p><u>Clause 59 – Service of notice, etc.</u></p> <p>Briefing by the Administration on clauses 58 and 59, and the draft proposed CSAs to clause 59</p>	
012638-012756	Administration Ms Emily LAU	<p><u>Clause 60 – Amendment of Schedules</u></p> <p>(a) Briefing by the Administration on clause 60</p> <p>(b) The Administration's advice that amendments made pursuant to this clause to Schedules 1 to 6 would be subject to the negative vetting procedure by the Legislative Council in accordance with section 34 of the General and Interpretation Ordinance (Cap. 1)</p>	

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012757-013828	Chairman Administration Ms Emily LAU	<p><u>Part 6 of the Bill – Consequential and related amendments</u> (LC Paper No. CB(1)1485/05-06(01) – Marked up copy of the consequential and related amendments)</p> <p><i>Companies Ordinance (CO)</i></p> <p><u>Clauses 61 to 64</u></p> <p>(a) Briefing by the Administration on clauses 61 to 64 and the draft proposed CSAs</p> <p>(b) On clause 61, the Administration advised that a company failing to comply with the proposed new section 141E(3) of the CO should be guilty of an offence (punishment at level 5) and liable to a daily default fine of \$700 as proposed under clause 64</p> <p>(c) On clause 63, the Administration advised that it would consider proposing a CSA to specify that the relevant regulations made under section 359A(3) of the CO would consist of offence provisions. The regulations would be made as soon as possible after the enactment of the Bill</p>	

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013829-013859	Administration	<p><i>Insurance Companies Ordinance</i></p> <p><u>Clause 65 – Secrecy</u></p> <p>Briefing by the Administration on clause 65</p>	
013900-014534	Administration Ms Emily LAU	<p><i>Professional Accountants Ordinance (PAO)</i></p> <p><u>Clause 66 to 73</u></p> <p>(a) Briefing by the Administration on clauses 66 to 73 and the draft proposed CSA to add the new clause 70A</p> <p>(b) On the proposed new clause 70A, the Administration advised that it had consulted the HKICPA on the disciplinary provisions, which would be incorporated in section 34 of the PAO</p>	
014535-014622	Administration Chairman	<p><i>Banking Ordinance</i></p> <p><u>Clause 74 – Official Secrecy</u></p> <p>Briefing by the Administration on clause 74 and the draft proposed CSA</p>	
014623-014739	Administration	<p><i>Prevention of Bribery Ordinance (PBO)</i></p> <p><u>Clause 75 – Public bodies</u></p> <p>(a) Briefing by the Administration on clause 75</p>	

Time marker	Speaker	Subject(s)	Action Required
		(b) In response to the suggestion raised by the legal adviser to the Bills Committee at the meeting on 24 February 2006, the Administration undertook to propose a CSA to clause 75 to add to Schedule 2 to the PBO a reference to “Financial Reporting Council”	The Administration to take action under paragraph 3(d) of the minutes
014740-014753	Administration	<p><i>The Ombudsman Ordinance</i></p> <p><u>Clause 76 – Organizations to which this Ordinance applies</u></p> <p>Briefing by the Administration on clause 76</p>	
014754-014818	Administration	<p><i>Companies Registry Trading Fund</i></p> <p><u>Clause 77 – Services to be provided by the Trading Fund</u></p> <p>Briefing by the Administration on clause 77 and the draft proposed CSA</p>	
014819-014829	Administration	<p><i>Mandatory Provident Fund Schemes Ordinance</i></p> <p><u>Clause 78 – Authority may disclose certain information despite section 41</u></p> <p>Briefing by the Administration on clause 78</p>	
014830-014842	Administration	<p><i>Personal Data (Privacy) Ordinance</i></p> <p><u>Clause 79 – Interpretation</u></p>	

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		Briefing by the Administration on clause 79	
014843-014920	Administration	<p><i>Securities and Futures Ordinance</i></p> <p><u>Clause 80 – Orders, etc. of Tribunal</u></p> <p><u>Clause 81 – Preservation of secrecy, etc.</u></p> <p>Briefing by the Administration on clauses 80 and 81</p>	
014921-015134	Administration	<p><u>Schedule 1 (Part 1) of the Bill</u></p> <p>Briefing by the Administration on Schedule 1 (Part 1)</p>	
015135-015239	Administration	<p><u>Schedule 1 (Part 2) of the Bill</u></p> <p>Briefing by the Administration on Schedule 1 (Part 2)</p>	
015240-015300	Chairman	Date of next meeting	