

# 立法會

## *Legislative Council*

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### **Report of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2008**

#### **Purpose**

This paper reports on the deliberations of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2008.

#### **The Bills Committee**

2. At the House Committee meeting on 22 February 2008, Members agreed to form a Bills Committee to study the Bill. The Bills Committee was then on the waiting list and was subsequently activated on 28 March 2008. The membership of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon Margaret NG, the Bills Committee held five meetings with the Administration.

#### **The Bill**

3. The Bill is an omnibus bill which seeks to make miscellaneous amendments to various Ordinances. The Bill comprises eight Parts and 75 clauses. Part 1 contains the short title and commencement clauses. The proposals contained in other Parts of the Bill can be grouped into four areas -

- (a) amendments to various Ordinances containing offence provisions with the drafting formula "to the satisfaction of" an enforcement agency;
- (b) amendments to the Conveyancing and Property Ordinance (Cap. 219);
- (c) amendments to the Legal Officers Ordinance (Cap. 87) and related amendments; and
- (d) miscellaneous minor and technical amendments.

## **Deliberations of the Bills Committee**

Parts 2 to 4 - amendments to various Ordinances containing offence provisions with the drafting formula "to the satisfaction of" an enforcement agency (clauses 3 to 55)

4. Part 2 of the Bill (clauses 3 to 9) seeks to make amendments to various Ordinances in which offences with the phrase "to the satisfaction of" an enforcement agency are created. Part 3 (clauses 10 to 52) makes similar amendments to various subsidiary legislation. Part 4 (clauses 53 to 55) contains amendments to the Boilers and Pressure Vessels Ordinance (Cap. 56) and the Boilers and Pressure Vessels Regulations (Cap. 56 sub. leg. A) that are supplementary to the amendments made to the Regulations in clause 10 of the Bill.

5. The Administration has explained to the Bills Committee that Parts 2 and 3 of the Bill seek to add a requirement that no offence is committed unless the official has specified to the affected person the measures to be taken to his "satisfaction", or the person has commenced the regulated activity without approaching the official to ascertain the measures to be taken. The burden of proof in either case will expressly be on the prosecution. The proposed amendments would improve and clarify the law concerning offence provisions with the drafting formula "to the satisfaction of" an enforcement agency.

6. The Administration has advised that under certain statutory provisions, failure to perform an act "to the satisfaction of" an enforcement authority constitutes a criminal offence. In *HKSAR v Lam Geotechnics Limited* (HCMA 379/2000), the Court of First Instance has held that the drafting formula "to the satisfaction of" an enforcement agency was too vague to enable a person to ascertain the elements of the offences. Following the delivery of the court judgment, the Administration has identified a number of provisions in subsidiary legislation and principal legislation containing the drafting formula "to the satisfaction of" an enforcement agency and whose validity may become doubtful because of the *Lam Geotechnics* case.

7. The Administration has further advised that while a number of other provisions also contain the drafting formula, they are not included in the Bill because such provisions would not be ultra vires their respective enabling provisions following the judgment in the *Lam Geotechnics* case. There are three categories of such provisions -

- (a) provisions containing "... or otherwise to the satisfaction" of an enforcement agency;

- (b) provisions where the enforcement agency's administrative decision does not determine the question whether there is a breach of duty; and
- (c) provisions where there is no uncertainty despite the drafting formula.

8. Notwithstanding that the Administration does not have a list of all offence provisions which are not included in the Bill after applying the above criteria, its approach is to consult the bureaux/departments concerned by providing the inclusive list and requesting them to go through the legislation under their respective portfolios to make sure that they have not overlooked any provisions that require amendment. While the bureaux/departments have suggested some provisions for amendment, these remain excluded after applying the selection criteria. According to the Administration, the consultation exercise occurred twice, i.e. before drafting instructions for the Bill were issued and during the drafting process.

9. Members have expressed concern about requiring the person regulated to approach the relevant authorities to ascertain measures to be taken "to the satisfaction of" those authorities and whether a person who has commenced the regulated activity without approaching the relevant authority to ascertain the measures to be taken "to the satisfaction of" that authority will be subject to prosecution, even if the authority has not specified the measures to be taken to its satisfaction. Members are particularly concerned that the onus of responsibility will be put on the person regulated.

10. The Administration has explained that the provisions proposed would strike an appropriate balance between the right of the affected persons to know what action they must take "to the satisfaction of" the relevant authority, and the need for that authority to determine the measures that may be required. In the Administration's view, the provisions proposed reflect existing law and would make express, for purposes of certainty, the duties impliedly imposed under the existing legislation on both the relevant authority and the person regulated.

11. Members remain concerned that the drafting of the relevant provisions does not address the questions so raised. The Bills Committee has requested the Administration to seek the views of the relevant authorities and advise members of the actions to be taken to inform the person regulated of the specific measures to be taken "to the satisfaction of" those authorities after the relevant provisions are amended as proposed.

12. In response to the Bills Committee, the Administration has advised that with such a large number of provisions and relevant authorities involved, it will take some time for all returns to be received. There are also matters of some

complexity upon which the Administration would wish to seek clarification from the relevant authorities regarding their responses in the context of individual provisions. In the circumstances, it would be impossible, in the time remaining before the resumption of the Second Reading debate on the Bill by July 2008, to reach a properly concluded view, and to draft appropriate Committee Stage amendments (CSAs), should they be required, in respect of the many provisions which are subject to the proposed amendment. As such, the Administration has decided to withdraw Parts 2 to 4 of the Bill, and will introduce CSAs to this effect. The Administration has further advised that it will reintroduce in a future bill on the amendments relating to the drafting formula "to the satisfaction of" an enforcement agency.

13. The Bills Committee raises no objection to the Administration's proposal to withdraw Parts 2 to 4 of the Bill.

Part 5 - amendments to the Legal Officers Ordinance (Cap. 87) (LOO) and related amendments  
(clauses 56 to 63)

14. Part 5 of the Bill seeks to adopt the new post titles of "Senior Public Prosecutor" and "Public Prosecutor" for the ranks of Senior Government Counsel and Government Counsel respectively in the Prosecutions Division of the Department of Justice and introduce related amendments.

15. The Administration has pointed out that under section 3(1) of LOO, a legal officer, in respect of the matters mentioned in section 4(1), has all the rights of a barrister and a solicitor admitted under the Legal Practitioners Ordinance (Cap. 159). Under section 2 of LOO, an officer lawfully performing the functions of any of the officers designated in Schedule 1 is a legal officer. The proposed amendments seek to amend Schedule 1 by adding "Senior Public Prosecutor" and "Public Prosecutor" and deleting "Assistant Government Counsel".

16. The Administration has further pointed out that under section 13 of the Magistrates Ordinance (Cap. 227) (MO), public prosecutors include court prosecutors, departmental prosecutors and legal trainees, but not Government Counsel. Government Counsel do not require appointment by the Secretary for Justice under section 13 to be able to prosecute. Their right of appearance derives from sections 2, 3(1) and 4(1) of, and Schedule 1 to, LOO. Government Counsel will be called Public Prosecutors in the future, further to Schedule 1 to LOO as amended under clause 56 of the Bill. Accordingly, to avoid confusion, "public prosecutors" and "public prosecutor" in section 13 of MO are to be replaced with "official prosecutors" and "official prosecutor" respectively under clause 57 of the Bill.

17. The Bills Committee has not raised questions on the proposed amendments.

Part 6 - amendments to the Conveyancing and Property Ordinance (Cap. 219)  
(CPO)

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(clauses 64 and 65)

18. The proposed amendments seek to add a new section 13A to the Conveyancing and Property Ordinance (CPO). The effect is that, unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the vendor, for the purpose of giving title to that land, the delivery of original of only (i) the Government lease if it relates exclusively to that land and (ii) any document that relates exclusively to that land and is required to be produced by the vendor as proof of title to that land.

19. The Administration has pointed out to the Bills Committee that a term implied by common law in contracts for the sale of land is that the vendor is obliged both to show and pass a good (or marketable) title. This obligation must be satisfied at the date for completion of the sale and purchase. Under section 13(1) of CPO, where the Government lease was granted less than 15 years before the contract of sale and purchase, proof of title commencing with the Government lease must be produced. Where the land to be sold is held under an older Government lease, the vendor is required to produce the Government lease and evidence of title for at least 15 years before the contract, commencing with an intermediate root of title which is an assignment, a mortgage by assignment or a legal charge which deals with the whole of the vendor's interest in the land to be sold.

20. The Administration has advised that the Law Society of Hong Kong, prompted by two court judgments, namely *Yiu Ping Fong & Anor v Lam Lai Hing Lana*, HCMP No. 3617 of 1998 and *Guang Zhou Real Estate Development (Hong Kong) Co. Ltd. & Anor v Summit Elegance Limited*, HCA 1531 of 1998, has proposed to incorporate a new section 13A into CPO.

21. The Bills Committee notes that the Law Society is concerned that the effect of the two court judgments is that, notwithstanding section 13 of CPO, a vendor has the duty to produce the "originals" of "all" title deeds and documents relating "exclusively" to the subject property to fulfil his duty to give a good title. This duty would theoretically include the duty to produce original title deeds that were made before the required intermediate root of title. The Law Society has observed that solicitors, based on their previous interpretation of section 13(2) of CPO, have not been too concerned about obtaining the original pre-intermediate root title deeds. The practice has been to accept copies of title documents either certified by a solicitor or a Government public officer, or attested by two solicitors' clerks. According to

the Administration, the proposed amendments would help to alleviate potential problems for many property owners.

22. On the implications of the proposed amendments, the Administration and the Law Society have highlighted that -

- (a) from the perspective of the vendor, it is expected that many, mainly older, properties which currently have doubtful titles, may be made good or marketable as a result of the proposed amendments;
- (b) a sharp downturn of the property market may tempt many purchasers to decline to complete on the ground of the inability of vendors to produce pre-intermediate root title documents. The proposed amendments will avoid a potentially large number of lawsuits that may result from such action;
- (c) from the perspective of purchasers, the proposal would assist them to purchase a property of their choice without any future concern about doubts in the title caused by, in some cases, technical defects appearing in pre-intermediate root title documents beyond the statutory requirement of 15 years;
- (d) the everyday conveyancing work of solicitors who act for both vendors and purchasers would be facilitated and simplified since any documents that are pre-intermediate root would no longer need to be traced for the purpose of proving and giving good title;
- (e) the risk of the purchaser acquiring a defective title by reason of the existence of third party rights in or against the land as a result of the operation of the new section 13A is likely to be very remote. The interests and rights of the mortgagees will be expressly protected under the new section 13A(4); and
- (f) the new section 13A(1) recognizes the general principle of freedom of contract under common law and the parties are expressly allowed to stipulate by express agreement that documents other than those required to be produced by the vendor as a proof of title should nevertheless be produced on completion.

23. According to the Administration, it has published a consultation paper on the proposal to amend section 13 of CPO in April 2006. All the responses received were supportive of the proposal.

24. The Bills Committee notes that the Law Society has raised concern about the inconsistency in wording between section 13 of CPO and the proposed new section 13A, and has requested the Administration to further consider the drafting of new section 13A. Instead of following the wording of section 13(1) which emphasizes the purchaser's right ("a purchaser of land shall be entitled to require from the vendor, as proof of title to that land ... .."), the new section 13A(1) put the emphasis on the vendor's obligation ("a vendor of land shall, for the purpose of giving title to that land ... .."). The Law Society has pointed out that it will plainly be desirable for there to be consistency in the wording of section 13 and the proposed new section 13A.

25. The Administration has advised that the effect of new section 13A is consistent with the legislative intent of section 13, i.e. to limit the period for deducing title back to a good root of title at least 15 years prior to the date of the sale and purchase agreement, and will help alleviate potential problems for many property owners. As regards the drafting of the proposed new section 13A, the Administration considers that it is grammatically sound to say "a purchaser of land shall be entitled to require from the vendor, as proof of title to that land ... .." but not "a purchaser of land shall be entitled to require from the vendor, for the purpose of giving and making title to that land ... .." as proposed by the Law Society. As in the latter case, the person who is obliged to give title is the vendor, not the purchaser. Hence, the Administration considers that its proposed version clearly imposes such obligation on the vendor and better defines the policy to be achieved.

26. Members have also raised a concern on whether the word "original" should be added to the proposed new section 13A(1) to give effect to the court judgments. Members are of the view that the provisions of new section 13A should not create any uncertainty regarding the meaning of "original" documents which may give rise to future litigation in which the current legislative proposal is seeking to avoid. They have asked the Administration to review the drafting of new section 13A(1).

27. The Administration has subsequently advised that having considered the views of the Bills Committee, it will introduce a CSA to the proposed new section 13A(1). In gist, it will specify that a purchaser of land shall be entitled to require the vendor to deliver to him, for the purpose of giving title to that land, the original of both of the Government lease and any document relating exclusively to the land and is required to be produced by the vendor as proof of title to that land under section 13(1)(a) and (c). The Law Society has indicated its agreement to the Administration's proposed CSA.

28. In response to the legal adviser to the Bills Committee's enquiry about the rationale for not including reference to section 13(1)(b) in the proposed new

section 13A(1), the Administration has explained that the object of the vendor's duty to "give" title is the protection of third party interests so that the lack of the relevant original documents will alert the purchaser to the existence of possible adverse equitable claims which should put the purchaser on further inquiry. The main purpose of requiring production of documents mentioned in section 13(1)(b) is to prove the content of the relevant subsisting rights and, as such, production of their certified copies should be sufficient. The mere lack of the original of the documents mentioned in section 13(1)(b), when the originals of all other title deeds mentioned in section 13(1)(a) and 13(1)(c) relating exclusively to the property will be produced, should not result in any prejudice to third party interests.

29. The Administration and the Law Society have pointed out to the Bills Committee that the risk of the purchaser acquiring a defective title by reason of the existence of third party rights in or against the land as a result of the operation of the new section 13A is likely to be very remote. In practice, the third parties whose rights would be relevant would be equitable mortgagees by way of deposit of title deeds. However, in Hong Kong, most mortgages are effected by written legal or equitable charges. Even if equitable mortgages by way of deposit of title deeds exist, the interests and rights of the mortgagees will be expressly protected under the new section 13A(4).

30. While noting that the risk of affecting the third party's right or interest is very remote, members consider that the right or interest of any person other than the vendor and the purchaser should not be affected as a result of the operation of the proposed new section 13A. Taking into account the views of the Bills Committee, the Administration has proposed to introduce a CSA to the proposed new section 13A(4) to make clear that nothing in new section 13A shall affect the right or interest of any other person who is not a party to the contract for the sale and purchase of that land. The Law Society raises no objection to the proposed CSA.

31. On the need for transitional provisions, the Administration has advised that the proposed new section 13A of CPO will only apply to transactions in which the sale and purchase agreement is signed on or after the commencement of the proposed amendments. The proposed new section 13A will therefore have no effect on past transactions completed before commencement nor on transactions in which the sale and purchase agreement has been signed before commencement but is completed after commencement. The Administration considers that there is no need for transitional provisions. The Law Society agrees that the new section 13A of CPO should apply to transactions being entered into after the enactment of the Bill.



Part 7 - amendments to provisions containing references to repealed subsidiary legislation under District Court Ordinance (Cap. 336)  
(clauses 66 to 74)

32. The Administration has advised that the District Court Civil Procedure (General) Rules (Cap. 336 sub. leg. A) and the District Court Civil Procedure (Costs) Rules (Cap. 336 sub. leg. B) were repealed following the enactment of the Rules of the District Court (Cap. 336 sub. leg. H). The proposed amendments seek to amend various Ordinances to replace references to the repealed Rules by references to the Rules of the District Court.

33. The Administration has further advised that following the passage of the Pneumoconiosis (Compensation) (Amendment) Bill 2008 at the Council meeting on 9 April 2008 and the commencement of the amended provisions on 18 April 2008, the titles of the Pneumoconiosis (Compensation) Ordinance (Cap. 360) and the Pneumoconiosis (Compensation) Appeal Rules (Cap. 360 sub. leg. C) have been amended as the "Pneumoconiosis and Mesothelioma (Compensation) Ordinance" and the "Pneumoconiosis and Mesothelioma (Compensation) Appeal Rules" respectively. In this connection, the reference to the Pneumoconiosis (Compensation) Appeal Rules (Cap. 360 sub. leg. C) in clause 66 should be amended accordingly. The Administration will move a CSA to this effect. The Bills Committee has not raised questions on the proposed amendments.

Part 8 - amendment relating to Rating Ordinance (Cap. 116)  
(clause 75)

34. The Bills Committee has not raised any questions on Part 8 of the Bill which seeks to make a minor and clerical amendment to the Rating Ordinance.

**Committee Stage amendments**

35. The Bills Committee notes that consequent to the proposal to withdraw Parts 2 to 4 of the Bill, the Administration further proposes to delete clause 2 of the Bill to the effect that the Ordinance will come into operation on the day on which it is published in the Gazette.

36. The CSAs to be moved by the Administration are supported by the Bills Committee.

**Resumption of the Second Reading debate**

37. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 2 July 2008.

### **Consultation with the House Committee**

38. The Bills Committee reported its deliberations to the House Committee on 13 June 2008.

Council Business Division 2  
Legislative Council Secretariat  
23 June 2008

**Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2008**

**Membership List**

**Chairman**

Hon Margaret NG

**Members**

Hon Martin LEE Chu-ming, SC, JP

Hon James TO Kun-sun

Hon Miriam LAU Kin-ye, GBS, JP

Hon LI Kwok-ying, MH, JP

Hon Ronny TONG Ka-wah, SC

(Total : 6 Members)

**Clerk**

Miss Betty MA

**Legal adviser**

Mr Timothy TSO

**Date**

18 April 2008