

立法會
Legislative Council

LC Paper No. CB(1)2050/09-10
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/09/2

**Bills Committee on Companies (Amendment) Bill 2010 and
Business Registration (Amendment) Bill 2010**

**Fourth meeting on
Monday, 3 May 2010, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Hon Paul CHAN Mo-po, MH, JP (Chairman)
Hon Albert HO Chun-yan
Dr Hon Margaret NG
Hon CHAN Kam-lam, SBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
Hon Starry LEE Wai-king
Hon CHAN Kin-por, JP

Public officers attending : Financial Services and the Treasury Bureau

Mr John LEUNG, JP
Deputy Secretary for Financial Services and the Treasury
(Financial Services)

Miss Grace KWOK
Principal Assistant Secretary for Financial Services and the
Treasury (Financial Services)

Companies Registry

Mrs Karen HO
Deputy Principal Solicitor (Company Law Reform)

Ms Elizabeth MO
Deputy Principal Solicitor (Company Law Reform)

Miss Wendy MA
Assistant Registry Manager

Inland Revenue Department

Mrs Brenda LEE
Assistant Commissioner

Department of Justice

Mr Edward TYLER
Senior Assistant Law Officer (Civil Law)

Ms Leonora IP
Senior Assistant Law Draftsman

Miss Amy CHAN
Senior Government Counsel

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Mr Noel SUNG
Senior Council Secretary (1)4

Mr Fred PANG
Council Secretary (1)5

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)1678/09-10 — Minutes of meeting on 30 March 2010)

The minutes of the meeting held on 30 March 2010 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at the meeting on 30 March 2010

(LC Paper No. CB(1)1638/09-10(01) — Administration's response to issues raised at the meeting on 30 March 2010

LC Paper No. CB(1)1680/09-10(01) — Summary of views submitted by various organizations on the Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010 and the Administration's response)

Submissions on multiple statutory derivative actions

(LC Paper No. CB(1)1638/09-10(02) — Submission from Ms Linda CHAN, Barrister (English version only)

LC Paper No. CB(1)1638/09-10(03) — Submission from The Chinese Manufacturers' Association of Hong Kong (English version only)

LC Paper No. CB(1)1638/09-10(04) — Submission from Ms Eirene YEUNG, Member of the Hong Kong Institute of Chartered Secretaries (English version only)

LC Paper No. CB(1)1638/09-10(05) — Submission from The Law Society of Hong Kong (English version only)

LC Paper No. CB(1)1638/09-10(06) — Submission from The Taxation Institute of Hong Kong (English version only)

LC Paper No. CB(1)1653/09-10(01) — Submission from Hong Kong Bar Association (English version only)

LC Paper No. CB(1)1653/09-10(02) — Submission from Mr David M. WEBB) (English version only)

LC Paper No. CB(1)1680/09-10(02) — Submission from the British Chamber of Commerce in Hong Kong (English version only))

Relevant papers previously issued

(LC Paper No. CB(3)390/09-10 — The Bill on Companies (Amendment) Bill 2010

LC Paper No. CB(3)391/09-10 — The Bill on Business Registration (Amendment) Bill 2010

LC Paper No. CB(1)1201/09-10(01) — Marked-up copy of the Bill on Companies (Amendment) Bill 2010 prepared by the Legal Service Division

LC Paper No. CB(1)1201/09-10(02) — Marked-up copy of the Bill on Business Registration (Amendment) Bill 2010 prepared by the Legal Service Division

LC Paper No. CB(1)1294/09-10(01) — Letter from Assistant Legal Adviser to the Administration dated 22 February 2010 on Companies (Amendment) Bill 2010

LC Paper No. CB(1)1343/09-10(01) — Administration's response to the letter from Assistant Legal Adviser dated 22 February 2010 on Companies (Amendment) Bill 2010

LC Paper No. CB(1)1294/09-10(02) — Letter from Assistant Legal Adviser to the Administration dated 22 February 2010 on Business Registration (Amendment) Bill 2010

LC Paper No. CB(1)1477/09-10(01) — Administration's response to the letter from Assistant Legal Adviser dated 22 February 2010 on Business Registration (Amendment) Bill 2010)

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

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Follow-up actions to be taken by the Administration

3. To address members' concern that the existing and the proposed company incorporation systems would be susceptible to exploitation by persons with ulterior motives due to the lack of appropriate measures to verify the identities of those submitting applications for registration, the Administration was requested to -

- (a) explain whether and how the Administration would put in place appropriate safeguards under the proposed new regime for incorporation and documents delivery; and
- (b) provide detailed information, in tabular form, about the relevant practices and procedures of other comparable jurisdictions (including United Kingdom, New Zealand, Singapore and any other jurisdictions that the Administration was aware of), in particular what safeguarding measures were available in those jurisdictions for verification of identities of the parties submitting applications for registration and/or authentication of the information contained in the applications.

III Any other business

Date of next meeting

4. The Chairman informed members that the next meeting would be held on 17 May 2010 at 5:30 pm.

5. There being no other business, the meeting ended at 6:30 pm.

Council Business Division 1
Legislative Council Secretariat
27 May 2010

**Proceedings of the
Bills Committee on Companies (Amendment) Bill 2010 and
Business Registration (Amendment) Bill 2010
Fourth meeting on Monday, 3 May 2010, at 4:30 pm
in the Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000457 – 000706	Chairman	Confirmation of minutes of meeting on 30 March 2010 (LC Paper No. CB(1)1678/09-10)	
Meeting with the Administration			
000707 – 000924	Chairman Administration	Briefing by the Administration	
000925 – 002702	Mr Ronny TONG Administration	<p>Mr Ronny Tong raised concern about the proposed scope of "multiple" statutory derivative actions (SDA). He considered it questionable to give standing to a shareholder of a subsidiary company to commence or intervene in proceedings on behalf of its holding company and/or another subsidiary company of the same holding company, as the principle of SDA was that a shareholder commencing or intervening in SDA proceedings was to seek remedy in the name of and for the benefit of the company, and not for a party who was not a member or a shareholder of the company concerned. He was also concerned that the proposal might open a floodgate of frivolous or vexatious derivative actions.</p> <p>Mr TONG opined that the Administration should withdraw the proposed legislative amendments which sought to extend standing to bring SDA to -</p> <ul style="list-style-type: none"> (a) members of a subsidiary of the wronged company; and (b) members of another subsidiary of the holding company of the wronged company. <p>The Senior Assistant Law Officer (Civil Law) (SALO(CL)) made the following points -</p> <ul style="list-style-type: none"> (a) The current provisions on SDA in the Companies Ordinance (CO) (Cap. 32), which were introduced in 2004, provided for the retention of common law derivative actions. (b) The implementation of a statutory remedy was 	

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		<p>based on the provisions in the relevant legislation, and common law principles would no longer be applicable unless such principles were specified in the legislation for the statutory remedy.</p> <p>(c) In a statutory "multiple" SDA, membership of a company was no longer relevant. Instead, the party commencing or intervening in such proceedings should have a legitimate interest in seeking the relief.</p> <p>(d) The proposed extension of SDA to cover members of a "related company" was rational and logical in order to protect the interest of minority shareholders. The proposed scope of "multiple" SDA was similar to the arrangement in Australia, and was more limited in scope compared to the arrangement in Singapore which included "any other person" who the court considered a proper person to commence or intervene in proceedings on behalf of a corporation.</p> <p>Mr TONG pointed out that based on the only example given by the Administration for justifying the extension of "multiple" SDA to members of a subsidiary company, i.e. a subsidiary company of a holding company might be prejudiced by the depletion of the holding company's assets when the subsidiary company had provided guarantee for the holding company's liabilities, there were avenues under the existing legislation for the subsidiary company to seek remedy from the holding company by acting as a creditor.</p> <p>SALO(CL) responded that as a subsidiary company was under the control of the holding company, it might be forced to provide guarantee for the holding company's liabilities. It was therefore necessary to extend the "multiple" SDA to individual companies belonging to the same holding company in order to protect the interests of the minority shareholders. The proposed extension of "multiple" SDA to give standing to any member of a related company would not result in frivolous or vexatious derivative actions being taken, as the leave requirement in section 168BC(3) of the CO operated as a filter on</p>	

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		<p>applications, and experience in other jurisdictions where SDA had been extended did not indicate that the floodgate would be opened.</p>	
002703 – 002857	Ms Miriam LAU Administration	<p>Noting that only simple SDA procedure was provided for in the legislation of the United Kingdom (UK), Miriam LAU enquired whether the Administration had made reference to the experience in UK in proposing the scope for "multiple" SDA. SALO(CL) said that Hong Kong's SDA procedure under the Companies (Amendment) Ordinance came into operation in 2005, whereas the SDA legislation in UK was implemented in 2006. Hong Kong had more experience in dealing with SDA cases.</p>	
002858 – 003153	ALA2 Administration	<p>ALA2 pointed out that in the Companies (Amendment) Bill 2010, common law derivative actions were proposed to be retained in parallel with those for SDA. Mr David Webb pointed out in his submission that in its ruling in the <i>Waddington</i> case, the Court of Final Appeal (CFA) had urged the Administration and the Legislature to remove the duplication of common law rights and statutory rights regarding derivative actions. Mr Webb queried why the Administration had not done so and had not given any reason for not removing the duplication.</p> <p>The Administration responded that the issue as to whether the existing right to take a common law derivative action should be preserved or abolished was included in the first phase public consultation on the draft Companies Bill commenced in December 2009. The issue would be further studied during the Companies Ordinance re-write exercise.</p>	
003154 – 003516	Administration	<p>The Administration briefed members on the electronic company registration procedures. The Administration pointed out that the proposed on-line application system for company incorporation was more stringent than the existing paper-based application system, as an applicant had to submit copies of his identification documents or relevant overseas company registration certificates as documentary proof before he could register as a user of the electronic system.</p>	

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003517 – 005932	Mr CHAN Kin-por Dr Philip WONG Administration Ms Miriam LAU Mr WONG Ting-kwong	<p>Mr CHAN Kin-por and the Chairman expressed concern that an applicant might use a forged identity/company registration document for registration as a user of the on-line application system, and any subsequent enforcement action against the user would be futile given the forged information provided, especially in the case where the registered user was located outside Hong Kong.</p> <p>Dr Philip WONG shared the concern and opined that proper safeguards should be built in the system.</p> <p>The Administration responded that an overseas/Mainland applicant might have difficulty in submitting the identity and company registration documents in person for verification. Prohibiting overseas/Mainland applicants from using the on-line application system would undermine the operation of the business sector as directors of companies operating in Hong Kong might come from overseas countries and/or the Mainland. An applicant providing false information would be liable to criminal offences. Enforcement agents could still make use of information such as credit card details and/or email address to investigate into any forgery. The Administration pointed out that given the large number of company registration applications, and notifications for change of the companies' directorship and/or other particulars, the Companies Registry would have difficulty in verifying the authenticity of the documents for each and every application/notification. The on-line application system in other jurisdictions did not include procedures for verifying the identity of the applicants, although in Singapore, foreign residents had to apply for company registration through a local professional company service provider. The Administration explained that the Singapore system was not proposed as the compulsory employment of a professional company service provider would increase the cost for company registration and might not be to the best interest of the business sector. A separate licensing system might also have to be set up to regulate the professional company service providers.</p> <p>Ms Miriam LAU shared the concern about the</p>	

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		<p>verification of the authenticity of the applicants' identity and company registration documents. Ms LAU said that there were merits in the Singapore company registration system in that the company service providers, e.g. accountants, solicitors and company secretary firms, would verify the authenticity of the applicants' identity and documents before submitting the applications for company registration. Ms LAU said that consideration could be given to adopting the Singapore system, even though a licensing system might have to be established to regulate the company service providers.</p> <p>Mr WONG Ting-kwong shared the same concern and pointed out that even for driving licence application and vehicle registration, an applicant had to provide documentary proof of his identity and address.</p>	
005933 – 010138	Chairman Dr Philip WONG Mr CHAN Kin-por Administration	<p>Dr Philip WONG expressed concern that if the company registration system did not include necessary safeguards, an applicant with ulterior motives might produce impersonated identity document and/or false information which would make any subsequent enforcement actions against the applicant/company impossible.</p> <p>Mr CHAN Kin-por pointed out that the Society of Chinese Accountants and Auditors, the Hong Kong Institute of Chartered Secretaries and Tricor Services Limited also expressed concern about the need to verify the authenticity of the applicants' identity and their supporting documents.</p> <p>Members requested and the Administration agreed to further consider the issue, taking into account members' concerns.</p>	The Administration to take action as set out in paragraph 3 of the minutes.
010139 – 010639	Chairman Administration ALA2	<p>The Chairman drew members' attention to the "Summary of views submitted by various organizations". (LC Paper No. CB(1)1680/09-10(01))</p> <p>ALA2 pointed out that Tricor Services Limited had expressed the view that the proposed legislative amendments relating to removing obstacles to the</p>	

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		<p>introduction of paperless holding and transfer of shares and debentures should be deferred until the outcome of the consultation paper on "A Proposed Operation Model for Implementing a Scripless Securities Market in Hong Kong" was available.</p> <p>The Administration advised that the public consultation by the Working Group on Scripless Securities Market on the proposed operational model for implementing a scripless securities market in Hong Kong ended on 31 March 2010 and the views collected were being analyzed. The current proposed amendments were technical changes intended to remove or provide exceptions to the existing limitations in the CO that compelled the issue or use of paper documents of title and transfer. This was an important first step in the entire legislative process for implementing the scripless initiative. The proposed legislative amendments would be brought into operation only when there was general market consensus on, and readiness to implement, the proposed scripless operational model. They would not pre-empt the scripless operation model.</p>	
010640 – 011005	Chairman Administration	<p>On the Law Society of Hong Kong (LSHK)'s concern about the authority of the Registrar of Companies in approving company name registration, the Administration explained that a company name which was "similar" to a name which the Registrar of Companies had directed to change might not itself be objectionable. It would not be appropriate to restrict the registration of such name automatically without allowing an opportunity for the complainee to explain his case, similar to the arrangement for complaints that a company name was "too like" another on the register of company names.</p>	
011006 – 012226	Chairman Dr Philip WONG Administration	<p>Dr Philip Wong enquired whether the Companies Registry would seek the views of existing companies with similar names when it received an application for registration of a new company name.</p> <p>The Administration advised that the company registration procedure did not include such a requirement, as companies could lodge a complaint to the Companies Registry if they considered that</p>	

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		<p>the name of a new company was "too like" the name of their companies, within 12 months of the registration of the new company. On receipt of such complaint, the Registrar of Companies would consider whether the new company should be directed to change its name.</p> <p>In response to Dr WONG's concern that companies might not be aware that the name of a new company was very similar to the names of their companies, the Administration advised that experience showed that some companies did check the register of company names on a regular basis to ensure that a new company did not use a name similar to theirs, and the period of 12 months was appropriate for companies to lodge a complaint against the registration of a new company name.</p> <p>On Dr WONG's concern about the situation where the name of a new company was identical or similar to a registered trademark, the Administration advised that if a trademark owner considered that there was a case of passing off, it might seek remedy in court. The company name and trademark registration systems were governed by different ordinances and were distinct and independent from each other.</p>	
012227 – 013130	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU, Dr Philip WONG and the Chairman were concerned that a staff of a company or an off-shore company might attempt to defraud a company by registering a new company name which resembled the name of an existing company.</p> <p>The Administration responded that under the existing and proposed systems, an application for registration of a new company name would be vetted by the Companies Registry. If the new name was identical to an existing company on the index of company names, the application would be rejected. If a new company name was very similar to that of an existing company, companies were given 12 months to lodge a complaint, and the Registrar of Companies might direct the new company to change its name. The Administration advised that they had discussed with the business sector regarding registration of company names which were "too like" those on the index of company names, and adjustments to the relevant</p>	

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		<p>guidelines had been made. Consideration would be given to setting up a tribunal, similar to that in the United Kingdom, for dealing with "name hijacking" cases if the situation so warranted.</p>	
<p>013131 – 014030</p>	<p>Chairman Administration Ms Miriam LAU</p>	<p>The Chairman referred to LSHK's concern about the procedures for issue of certificates of incorporation and business registration certificates under the proposed simultaneous application system, and sought clarification on the Administration's written response in CB(1)1680/09-10(01).</p> <p>The Administration advised that if the applications were submitted through electronic means, both certificates would be issued to the applicant electronically. The Administration further advised that the business registration certificates to be issued under the new system, including those issued through the paper-based application procedure, would be in A4 size and white in colour, instead of the existing A5 size blue certificates, so as to facilitate applicants downloading and printing the certificates from computer. The business registration certificates would be bar-coded so as to prevent forgery.</p> <p>Pointing out that at present a company had to apply and pay for a separate business registration certificate for each branch office, Ms Miriam LAU was concerned that a company might make photocopies of the electronic certificates issued under the new system for display at its branch offices. Ms Miriam LAU also expressed concern that small business operators might have difficulty in finding space in the commercial premises to display an A4 size business registration certificate.</p> <p>The Administration responded that the intention of issuing A4 size business registration certificates under the new system was to facilitate applicants to download the certificate from computer, and consideration would be given to issuing a smaller size certificate. In any case, the format of the certificate issued through both the electronic and the paper-based registration systems would be the same. Enforcement officers would conduct on-site inspections and make reference to departmental records to check against forged</p>	

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		business registration certificates.	
Clause-by-clause examination of the Bill			
014031 – 014546	Chairman ALA2 Administration	<p>Members agreed to scrutinise the English version of the Bills first, starting with Clause 3 of the Companies (Amendment) Bill 2010 by reference to the marked-up copy of the Bill.</p> <p>Part 2</p> <p>Amendments Relating to Company Formation</p> <p><u>Clause 3 – Signature of memorandum</u></p> <p><u>Clause 4 – Printing and signature of articles</u></p> <p>Members raised no question on clauses 3 to 4.</p>	
014547 – 015815	Chairman Administration Mr Albert HO ALA2 Dr Philip WONG	<p><u>Clause 5 – Incorporation form</u></p> <p>In response to Mr Albert HO's enquiry about the need for a company limited by guarantee to indicate the number of members with which the company proposed to be registered on its incorporation, the Administration advised that the information was necessary because, unlike companies limited by shares which had to pay a fee based on the authorized capital, the registration fee for a company limited by guarantee was based on the number of members to be registered by the company. If a company increased its registered number of members subsequently, it would have to pay additional fees correspondingly.</p> <p>ALA2's reference to and the Administration's response on the drafting aspect that "his" and "him" were used in the existing section 14A(2)(h) and (i) of the Companies Ordinance (Cap. 32) whilst "he or she" was used in the new section 14A(2)(k) and (l). In addition, the Chinese character "他" (but not "他或她") was used as the Chinese rendition of "he or she" in the new section 14A(2)(k) and (l).</p> <p>In response to Dr Philip WONG's enquiry, the Administration advised that the "founder member" of a company was different from a "legal entity".</p>	

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015816 – 020115	Chairman Administration	<u>Clause 6 – Conclusiveness of certificate of incorporation</u> <u>Clause 7 – Section 18A added</u> <i>18A – Delivery of consent of director</i> Members raised no question on clauses 6 to 7.	
020116 – 020122	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
27 May 2010