

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1837/11-12  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/3/10/2

**Bills Committee on Companies Bill**

**Minutes of the third meeting held on  
Tuesday, 29 March 2011, at 9:30 am  
in the Chamber of the Legislative Council Building**

- Members present** : Hon Paul CHAN Mo-po, MH, JP (Chairman)  
Hon Starry LEE Wai-king, JP (Deputy Chairman)  
Hon Albert HO Chun-yan  
Hon James TO Kun-sun  
Hon CHAN Kam-lam, SBS, JP  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Jeffrey LAM Kin-fung, SBS, JP  
Hon Andrew LEUNG Kwan-yuen, GBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Hon Ronny TONG Ka-wah, SC  
Prof Hon Patrick LAU Sau-shing, SBS, JP
- Members absent** : Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Miriam LAU Kin-ye, GBS, JP
- Public officers attending** : **Agenda item I**  
Mr John LEUNG, JP  
Deputy Secretary for Financial Services and the  
Treasury (Financial Services)

Mr Nick AU YEUNG  
Principal Assistant Secretary for Financial Services  
and the Treasury (Financial Services)

Mrs Karen HO  
Deputy Principal Solicitor (Company Law Reform)  
Companies Registry

Ms Phyllis MCKENNA  
Deputy Principal Solicitor (Company Law Reform)  
Companies Registry

Miss Hilda Chang  
Deputy Registry Manager  
(Company Formation & Enforcement)  
Companies Registry

Mrs Christine Frances SIT  
Senior Solicitor (Company Law Reform)  
Companies Registry

Ms Margaret CHAN  
Solicitor (Company Law Reform)  
Companies Registry

Ms Rita HO  
Registry Solicitor  
Companies Registry

Ms Polly YIP  
Assistant Principal Solicitor  
Companies Registry

Mr Edward TYLER  
Senior Assistant Law Officer (Civil Law)  
Department of Justice

Miss Selina LAU  
Senior Government Counsel  
Department of Justice

Mr Ken FUNG  
Government Counsel  
Department of Justice

Mr Stefan LO  
Government Counsel  
Department of Justice

**Clerk in attendance :** Ms Connie SZETO  
Chief Council Secretary (1)4

**Staff in attendance :** Mr KAU Kin-wah  
Senior Assistant Legal Adviser 3

Mr Timothy TSO  
Assistant Legal Adviser 2

Ms Sharon CHUNG  
Senior Council Secretary (1)4

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Action

**I Meeting with the Administration**

Outstanding issues from previous meetings

(LC Paper No. CB(1)1671/10-11(01) -- Follow-up action to be taken by the Administration for the meeting on 14 March 2011

LC Paper No. CB(1)1671/10-11(02) -- Administration's paper on Standing Committee on Company Law Reform)

The Bill

(LC Paper No. CB(1)1522/10-11(02) -- Administration's paper on overall policies of the Companies Ordinance rewrite

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LC Paper No. CB(1)1671/10-11(03) -- Administration's paper on Part 1, Part 3 and Part 17 of the Companies Bill

LC Paper No. CB(1)1671/10-11(04) -- Administration's paper on Part 16 and Part 18 of the Companies Bill)

Other relevant papers

(LC Paper No. CB(3)412/10-11 -- The Bill

File Ref: CBT/17/2C -- Legislative Council Brief

LC Paper No. LS26/10-11 -- Legal Service Division Report

LC Paper No. CB(1)1406/10-11(01) -- Paper on Companies Bill prepared by the Legislative Council Secretariat (Background brief))

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

2. The Bills Committee requested the Administration to provide written responses to the following concerns/requests --

Part 1

*The formulation of "responsible person" (Clause 3)*

(A) In relation to the proposal to replace the formulation of "officer who is in default" in the existing Companies Ordinance ("CO") by a new formulation of "responsible person" (which is modeled on the UK Companies Act 2006) in the Bill, members expressed concern about the prosecution thresholds and legal liabilities of officers, directors or shadow directors under the two formulations. In addition, since "responsible persons" of companies providing professional services, e.g. architectural and engineering firms, are often professionals who are already subject to other statutory requirements, there are concerns that the application of the definition of "responsible person" to these firms would extend the legal liabilities of professionals of these firms. The Administration was requested --

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- (a) To provide a comparison of the formulations of "officer who is in default" and "responsible person", including:
  - (i) examples to elaborate the differences in legal liabilities (including the likelihood to be prosecuted) of officers, directors or shadow directors under the two formulations;
  - (ii) clarification on whether the relevant provisions under the existing CO and under the Bill covers or will cover "negligent omissions" of officers, directors or shadow directors; and
  - (iii) explanation on the impact on the liability to be prosecuted with the deletion of "knowingly and wilfully" from the definition of "responsible person";
- (b) To explain the differences in effect of the application of the definition of "responsible person" to an officer, a director or shadow director in respect of an ordinary company and a company providing professional services, e.g. an architectural firm; and
- (c) To provide information on:
  - (i) relevant discussion on the formulation of "responsible person" during the enactment of the UK Companies Act 2006; and
  - (ii) prosecution against officers, directors or shadow directors under the UK Companies Act 2006.

Part 3 and Part 16

*Allowing a company to appeal to the Administrative Appeals Board*

- (B) Members expressed concern about the proposal under clause 104 and clause 772 which allows companies to appeal to the Administrative Appeals Board ("AAB") against certain decisions made by the Registrar instead of to the court. The Administration was requested to provide information on:

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- (a) the functions and composition of the Administrative Appeals Board ("AAB"); and
- (b) the reasons for allowing companies to appeal to AAB.

*Authorized representatives of non-Hong Kong companies*

- (C) There was concern about the legal liabilities of authorized representatives of non-Hong Kong companies for acts on behalf of such companies in Hong Kong, in particular the representatives' liabilities for acts under the instruction of such companies which would contravene local legislations. The Administration was requested to provide information on:
  - (a) the services and duties that authorized representatives of non-Hong Kong companies generally provide and perform; and
  - (b) the legal liabilities of authorized representatives under the Bill and for actions taken on behalf of non-Hong Kong companies in Hong Kong.

*(Post-meeting note: The Administration's response was circulated on 12 April 2011 vide LC Paper CB(1)1879/10-11(02).)*

**II Any other business**

3. The Chairman reminded members that the next meeting of the Bills Committee would be held on Saturday, 9 April 2011 at 9:30 am to meet with deputations.

4. There being no other business, the meeting ended at 11:35 am.

**Bills Committee on Companies Bill**

**Proceedings of the third meeting  
on Tuesday, 29 March 2011, at 9:30 am  
in the Chamber of the Legislative Council Building**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
000001-000312	Chairman	Opening remarks	
000313-002209	Administration Chairman	The Administration's briefing on major proposals and policy issues in Part 1, Part 3 and Part 17 of the Bill (LC Paper No. CB(1) 1671/10-11(03))	
<u>Discussion on Part 1</u>			
002210-003526	Ms Audrey EU Administration Chairman	Ms Audrey EU's enquiries on --  (a) the extent and scope of change to a director's liability arising from the formulation of "responsible person" under clause 3 of the Companies Bill ("the Bill") as compared with the regulatory regime under the Companies Ordinance (Cap. 32)("CO");  (b) how was the new regulatory regime (with the formulation of "responsible person" under the Bill) compared with the relevant laws in other jurisdictions;  (c) examples to elaborate the differences in legal liabilities of officers, directors or shadow directors under the formulations of "officer who is in default " in CO and "responsible person" in the Bill; and	

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		<p>(d) whether the formulation of "responsible person" covered "negligence" of a director</p> <p>The Administration's response that --</p> <p>(a) the formulation of "officer who is in default" in CO was defined as any officer of a company who "knowingly and wilfully authorizes or permits the default, refusal or contravention" but the "knowingly and wilfully" threshold rendered prosecution against officers in default difficult;</p> <p>(b) the new formulation of "responsible person" aimed to enhance law enforcement by extending the scope to cover reckless acts/omissions or negligent omissions of officers;</p> <p>(c) a director had the responsibility to put in place systems to ensure the company's compliance with the law and take all reasonable steps to prevent the contravention of or failure to comply with the law; and</p> <p>(d) Part 20 of the Bill proposed that certain minor offences would not be prosecuted and the Registrar of Companies ("the Registrar") would be empowered to compound such offences</p> <p>The Chairman's request for a written response from the Administration to address the above concerns and information on relevant discussion</p>	<p>The Administration to take action as in paragraph</p>



Time marker	Speaker	Subject(s)	Action required
		during the enactment of the UK Companies Act 2006	2(A) of the minutes
003527-004730	Prof Patrick LAU Administration	<p>Prof LAU's concerns/enquiries about --</p> <p>(a) the formulation of "responsible person" in the Bill would lower the prosecution threshold, thus tightening the regulation of companies; and</p> <p>(b) as "responsible persons" of companies providing professional services, e.g. architectural and engineering firms, were often professionals who were already subject to other statutory requirements, the new formulation would increase their burden; and</p> <p>(c) the differences, if any, in the application of the definition of "responsible person" to an officer, a director or shadow director in respect of an ordinary company and a company providing professional services</p> <p>The Administration's response that --</p> <p>(a) the new formulation of "responsible persons" did not impose strict liability on directors, and mental element (<i>mens rea</i>) was required for the prosecution to secure a conviction;</p> <p>(b) the new formulation of "responsible person" would help strengthen corporate governance in</p>	

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		<p>Hong Kong by reminding directors and officers of companies of their responsibilities for ensuring companies' compliance with the law;</p> <p>(c) there is no difference in the application of the formulation of "responsible person" to various types of companies;</p> <p>(d) company directors could hire the professional services of company secretaries to help them fulfill the obligations under CO; and</p> <p>(e) if directors had put in place compliance systems and/or delegated to appropriate personnel the responsibilities for compliance with provisions of the Bill, they would not be regarded as having failed to take all reasonable steps to prevent a contravention</p> <p>The Chairman's request for the Administration to provide a written response to address members' concerns</p>	<p>The Administration to take action as in paragraph 2(A) of the minutes</p>
004731-005041	Ms Audrey EU Chairman	Ms Audrey EU's request that the Administration should clarify whether "negligence" would constitute default, vis-à-vis the Administration's explanation in paragraph 5 of the paper (Annex A to LC Paper No. CB(1) 1671/10-11(03)) and its response in paragraph 17 to the comments of the	

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		<p>Hong Kong Institute of Directors which seemed to be in conflict</p> <p>The Chairman's request for the Administration to provide written response to Ms EU's concern</p>	<p>The Administration to take action as in paragraph 2(A) of the minutes</p>
005042-010113	Mr Albert HO Administration	<p>Mr Albert HO's enquiries about the legal consequence of removing "knowingly and wilfully" from the formulation of "responsible person", and whether strict liability would be imposed on a director for contravention of provisions of the Bill</p> <p>The Administration's replies that --</p> <p>(a) the removal of "knowingly and wilfully" aimed at lowering the prosecution threshold and the new formulation of "responsible person" would ensure that directors of a company would not be able to deliberately turn a blind eye to their obligations and responsibilities under the Bill, which would help enhance corporate governance in Hong Kong;</p> <p>(b) the formulation of "responsible person" did not impose strict liability, and the prosecution needed to prove <i>mens rea</i> in relation to each element of an offence;</p>	

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		<p>(c) in the new formulation of "responsible person", the terms "authorizes or permits, participates in" all required knowledge;</p> <p>(d) in the context of the Bill, the phrase "fails to take all reasonable steps to prevent the contravention or failure" would cover those negligent omissions where either nothing at all had been done to prevent a breach, or what had been done was so inadequate that it could not have been reasonably expected that a breach would have been prevented by such steps; the crux would be whether or not the director had acted reasonably; and</p> <p>(e) in considering whether an officer had failed to take all reasonable steps to prevent a breach in a criminal context, the court would take into account all relevant facts and circumstances</p> <p>Mr Albert HO's request for a written response about prosecutions against directors/officers relating to "knowingly and wilfully" authorizing a contravention of provisions under the UK Companies Act 2006</p>	<p>The Administration to take action as in paragraph 2(A) of the minutes</p>
<p>010114 010713</p>	<p>Mr Jeffrey LAM Administration</p>	<p>Mr Jeffrey LAM's enquiries about --</p> <p>(a) why the Administration had not accepted comments expressed by local organizations on major issues during the consultation on the rewrite of CO but had chosen to</p>	

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		<p>adopt provisions of overseas legislation in the Bill;</p> <p>(b) the justifications for including "reckless acts/omissions" in the formulation of "responsible person";</p> <p>(c) the Administration's assessment on the impact of the new formulation of "responsible person" on a director's duty to exercise reasonable care, skill and diligence in his acts, in particular, those directors of small-to-medium-sized enterprises ("SMEs"); and</p> <p>(d) the justifications for requiring private companies to prepare a business review in the directors' report</p> <p>The Administration's response that --</p> <p>(a) the inclusion of reckless acts/omissions in the formulation of "responsible person" aimed to ensure that company directors would not be able to deliberately turn a blind eye to their obligations, duties and responsibilities under the Bill;</p> <p>(b) the standards of care, skill and diligence expected of company directors would be discussed under Part 10 of the Bill, and there was a judicial trend in other comparable jurisdictions towards the use of a</p>	

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		<p>mixed objective/ subjective test in this aspect; and</p> <p>(c) the requirement for inclusion of business review in the directors' report would be discussed under Part 9 of the Bill under which there were provisions for private companies to opt out the requirement by special resolutions</p>	
<b>Discussion on Part 3</b>			
010714-011057	Chairman Mr Albert HO Administration	<p>Mr Albert HO's enquiries on whether Part 3 involved any new policy</p> <p>The Administration's reply that the amendments under Part 3 aimed to facilitate business operation and modernize CO</p>	
011058-011641	Senior Assistant Legal Adviser 3 ("SALA3") Administration Chairman	<p>SALA3's enquiry on the impact of abolishing the Memorandum of Association of private companies which might contain provisions that enshrined shareholders' agreements regarding the share capital of the companies</p> <p>The Administration's response that --</p> <p>(a) the initial agreement signed by the founders of a company would remain a historical item in the company's articles of association; and</p> <p>(b) new provisions regarding share capital, including the transitional and saving provisions, would be dealt with under Part 4 of and Schedule 10 to the Bill</p>	

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011642-012445	Administration	The Administration's briefing on major proposals and policy issues in Part 16 and Part 18 of the Bill (LC Paper No. CB(1)1671/10-11(04))	
012446-013109	Mr Albert HO Administration	<p>Mr Albert HO's enquiries on --</p> <ul style="list-style-type: none"> <li>(a) reasons for introducing the proposal for appeals on the Registrar's directions relating to the names of companies be lodged with the Administration Appeals Board ("AAB") instead of the court;</li> <li>(b) the composition of AAB; and</li> <li>(c) other ways for making appeals against the decisions of AAB besides judicial review</li> </ul> <p>The Administration's response that --</p> <ul style="list-style-type: none"> <li>(a) where the Registrar was satisfied that the name of a company gave a misleading indication of the nature of its activities and this was likely to do harm to the public, that the name constituted a criminal offence, or that it was offensive or otherwise contrary to the public interest, he might direct the company to change its name;</li> <li>(b) AAB did not handle all issues related to names of companies, it only heard appeals against change-of-name directions/notices issued by the Registrar in the three scenarios set out in (a) above; other legal disputes on names of</li> </ul>	

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		<p>companies would continue to be heard by the court;</p> <p>(c) The Administration would provide information on the composition and functions of AAB; and</p> <p>(d) judicial review would be a channel for reviewing AAB's decisions</p>	<p>The Administration to take action as in paragraph 2(B) of the minutes</p>
<u>Discussion on Part 18</u>			
<p>013110-013730</p>	<p>Chairman Ms Audrey EU Administration SALA3</p>	<p>Ms Audrey EU's enquiries on --</p> <p>(a) whether document in electronic form would be accepted for the purpose of "any legal proceedings"; and</p> <p>(b) the meaning of "document that is issued for the purpose of any legal proceedings" (in paragraph 3 of Annex B to LC Paper No. CB(1)1671/10-11(04))</p> <p>The Administration's response that --</p> <p>(a) documents for the purpose of any legal proceedings, e.g. writs of summons, shall not be issued in electronic form;</p> <p>(b) under clause 815 of the Bill, which restated existing section 356 of CO, provided that documents issued for the purpose of legal proceedings may be served by post to, or leaving it at, the company's registered office; and</p> <p>(c) the requirements for the issuance of documents for legal proceedings</p>	



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		under the Bill followed the High Court's civil procedure	
013731-014357	Ms Audrey EU Administration Chairman	<p>Suggestions from Ms Audrey EU and Chairman that the Administration's papers should provide more background information and explanation on each proposal, in particular, where there were changes to CO and involved complex issues; and if new provisions were introduced, brief information on comparable provisions in legislation in other jurisdictions should be provided</p> <p>The Administration's response that—</p> <p>(a) major proposals in each part of the Bill were elaborated in the paper and a comparison table was provided in the appendix to give information on the derivations with brief explanation; and</p> <p>(b) the Administration would take note of members' views in improving the content of the papers</p>	
<b><u>Discussion on Part 16</u></b>			
014358-015445	Mr Albert HO Administration Chairman	<p>Mr Albert HO's enquiries on --</p> <p>(a) the duties of an agent or an authorized representative of a non-Hong Kong company (i.e. a company incorporated outside Hong Kong that had established a place of business in Hong Kong) under Part 16 of the Bill;</p> <p>(b) the liability of an agent or authorized representative of a</p>	

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		<p>non-Hong Kong company who authorized or permitted a contravention of provisions in Part 16 of the Bill ("Administration's response" in paragraph 17 of Annex A to LC Paper No. CB(1)1671/10-11(04) refers);</p> <p>(c) the liability of an agent or authorized representative of a non-Hong Kong company for illegal acts on behalf of the companies, e.g. money laundering activities; and</p> <p>(d) whether an agent had the responsibility to maintain a system for its client to ensure compliance with the requirements under CO</p> <p>Mr Albert HO's view that with a view to ensuring proper regulation of non-Hong Kong companies, it would be important to hold the agents of non-Hong Kong companies responsible for the acts of the companies in Hong Kong; and that non-participation in decisions made by the company overseas should not exempt the agents from liabilities</p> <p>The Administration's response that --</p> <p>(a) there were views collected in past consultation exercises that imposing same liabilities on the agents of non-Hong Kong companies as those on the directors might be onerous; the Administration had therefore revised the offence provisions in Part 16 of the Bill to the effect that</p>	<p>The Administration to take action as in paragraph 2(C) of the minutes</p>

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		<p>only the agents who had authorized or permitted a contravention would be held liable so as to be in line with the current position in section 340 of CO; and</p> <p>(b) by the definition of "authorized representative" in Part 16 of the Bill, the main duty of an agent was to accept on behalf of a company service of any process or notice required to be served on the company; while an authorized representative was commonly found to be entrusted with other duties for the company, e.g. filing of returns, these other duties were not specified under CO</p> <p>The Chairman's request for the Administration to provide a written response about the duties and liabilities of authorized representatives under the Bill</p>	
015446-020305	Mr Andrew LEUNG Ms Audrey EU Chairman Administration	<p>Mr Andrew LEUNG's view that to facilitate the Bills Committee in the deliberation of policy issues relating to each part of the Bill, the Administration's paper should provide more detailed information comparing the current provisions of CO and those in the Bill</p> <p>Ms Audrey EU's views that the supplementary information to be provided by the Administration should illustrate with examples the extent of changes to existing provisions; and for</p>	

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		<p>new provisions, the paper should state clearly the reference sources</p> <p>Ms EU's enquiry on whether there were provisions in the Bill prohibiting a director from seeking reimbursement from his company for payment of fines for offences convicted under the Bill</p> <p>The Administration's response that the permitted indemnity provision was in Clause 460 of the Bill; and that an indemnity against a fine imposed on the director in criminal proceedings shall be void</p>	
020306-020353	Chairman	Date of next meeting	