

立法會
Legislative Council

LC Paper No. CB(1)1839/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/10/2

Bills Committee on Companies Bill

**Minutes of the fifth meeting held on
Monday, 18 April 2011, at 10:45 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
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon James TO Kun-sun
Hon Miriam LAU Kin-ye, GBS, 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** : Hon CHAN Kam-lam, SBS, JP
Dr Hon Philip WONG Yu-hong, GBS
- Public officers attending** : **Agenda item II**
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)

Ms Rita HO
Registry Solicitor
Companies Registry

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

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

Ms Polly YIP
Assistant Principal Solicitor
Companies Registry

Ms Marianna YU
Deputy Registry Manager (Registration)
Companies Registry

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

Ms Kitty TSUI
Senior Solicitor (Company Law Reform)
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

Action

I Confirmation of minutes
(LC Paper No. CB(1)1880/10-11 -- Minutes of meeting on
14 March 2011)

The minutes of the meeting held on 14 March 2011 were confirmed.

II Meeting with the Administration

Matters arising from the meetings on 14 and 29 March 2011
(LC Paper No. CB(1)1522/10-11(02) -- Administration's paper on
overall policies of the
Companies Ordinance
rewrite (Issues relating to
the use of Notes in the Bill
(paragraphs 4 to 7 of Annex
to the paper)

Action

LC Paper No. CB(1)1879/10-11(01) -- Follow-up actions to be taken by the Administration for the meeting on 29 March 2011

LC Paper No. CB(1)1879/10-11(02) -- Administration's response to issues raised by members at the meeting on 29 March 2011)

Discussion on Part 2 and Part 12 of the Bill

(LC Paper No. CB(1)1879/10-11(03) -- Administration's paper on Part 2 and Part 12 of the Companies Bill)

Discussion on Part 9 of the Bill

(LC Paper No. CB(1)1879/10-11(04) -- Administration's paper on Part 9 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))

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

3. Members remained concerned about the use of the formulation of "responsible person" (Clause 3) and the scope of the phrase "fails to take all reasonable steps to prevent the contravention or failure". The Administration was requested --

Admin

(a) to provide cases/examples under which a director or shadow director of a company would not be liable for offences under the formulation of "officer who is in default" in the existing Companies Ordinance ("CO"), but would become liable under the new formulation of "responsible person" under the Bill, or vice versa, in order to demonstrate the effect of the new formulation;

Action

- (b) to set out the scope of offences covered by "responsible person" in the Bill and explain the reasons for using such formulation for breaches of mainly regulatory requirements; and
- (c) to provide information on provisions in the CO, other local ordinances, or comparable legislation of overseas jurisdictions which adopted the phrase of "fails to take all reasonable steps to prevent the contravention or failure", and explain the use of the phrase in the respective contexts.

III Any other business

4. The Chairman advised that the meeting scheduled for 28 April 2011 would be cancelled, and members would be informed of the date of the next meeting to be held in early May 2011.

(Post-meeting note: The next meeting was held on 6 May 2011 at 10:45 am.)

5. There being no other business, the meeting ended at 12:40 pm.

Council Business Division 1
Legislative Council Secretariat
11 May 2012

Bills Committee on Companies Bill

**Proceedings of the fifth meeting
on Monday, 18 April 2011, at 10:45 am
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
Agenda Item I - Confirmation of minutes			
000001-000343	Chairman	Confirmation of minutes of meeting on 14 March 2011 (LC Paper No. CB(1)1880/10-11)	
Agenda Item II - Meeting with the Administration			
<u>The use of notes in the Companies Bill</u>			
000344-001204	Senior Assistant Legal Adviser 3 ("SALA3") Ms Audrey EU Mr Andrew LEUNG	<p>SALA3's comment that --</p> <p>(a) in general, the notes in the Companies Bill ("CB") served to provide examples of the situations in which the relevant provisions would apply, or draw the reader's attention to other relevant provisions of CB;</p> <p>(b) notes in CB, being part of the Bill, might have impact on the understanding and interpretation of the relevant provisions of CB;</p> <p>(c) the use of notes in bills concerned policy matters which were under the purview of the Panel on Administration of Justice and Legal Services ("AJLS Panel"); as the Panel would discuss the subject of drafting issues in bills at the meeting next month, members might consider referring the issue of use of notes in bills to the Panel for</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>consideration in a holistic approach; and</p> <p>(d) the Administration should prepare necessary information to facilitate discussion of the subject by AJLS Panel</p> <p>Ms Audrey EU's remarks that --</p> <p>(a) during the scrutiny of the Motor Vehicle Idling (Fixed Penalty) Bill, members of the then Bills Committee had raised concern on the use of examples in the Bill, as it was unclear whether the examples would affect the interpretation of the relevant provisions in the Bill; and the Administration eventually accepted members' views and deleted all examples from the Bill; and</p> <p>(b) while she had no strong view against using notes in CB sparingly to give a few examples, if notes were used extensively, there might be impact on the interpretation of the Bill</p> <p>Mr Andrew LEUNG's views that the Bills Committee should study the use of notes in CB carefully and thoroughly</p>	
001205-001652	Administration	<p>Briefing by the Administration on the use of notes in CB (Annex to LC Paper No. CB(1)1522/10-11(02)) that --</p> <p>(a) Clause 2(6) of CB stipulated that "a note in the text of the Ordinance is</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>provided for information only and has no legislative effect";</p> <p>(b) there were about 30 notes in CB serving three different functions - to draw the reader's attention to other relevant provisions of the Bill, to provide examples, and to give factual supplementary information;</p> <p>(c) the legislative effect of notes in CB was different from the examples in the Motor Vehicle Idling (Fixed Penalty) Bill;</p> <p>(d) the Administration would provide supplementary information about the use of notes in CB when the Bills Committee examined the Bill clause-by-clause; and</p> <p>(e) notes for information only with no legislative effect were found in the Arbitration Ordinance (Cap. 609) and the Legislative Council Ordinance (Cap. 542)</p>	
001653-002059	Mr Albert HO Chairman	<p>Mr Albert HO's views that --</p> <p>(a) notes in CB though described to have no legislative effect, could affect interpretation of the provisions, because the court and other parties would make reference to the notes in interpreting the relevant provisions, especially when there were grey areas;</p> <p>(b) if notes were used in provisions relating to enforcement where</p>	

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		<p>examples of how the provisions would work were set out, legal disputes might arise when there were differences in the interpretation of the provisions; and</p> <p>(c) he kept an open attitude to the use of notes in CB and agreed that the issue should be discussed by AJLS Panel</p> <p>Members' agreement that the subject of use of notes in bills be referred to AJLS Panel and the Bills Committee would revisit the issue during the clause-by-clause examination of the Bill</p>	
<u>The formulation of "responsible person"</u>			
002100-002736	Administration	<p>The Administration's briefing on its response to issues raised by members at the meeting on 20 March 2011 (LC Paper No. CB(1)1879/10-11(02)) -- the formulation of "responsible person" (Clause 3)</p>	
002737-003823	Ms Audrey EU Administration	<p>Ms Audrey EU's enquiries --</p> <p>(a) whether negligent omission of an officer/director of a company ("director"), who had delegated his duties to another director would constitute an offence; and</p> <p>(b) whether a director's negligent omission of action to prevent another director's conduct of fraud would become an offence under the new formulation of "responsible person"</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's response that --</p> <p>(a) to fulfill his obligations under the Companies Ordinance ("CO"), before delegating his duties to other persons, a director should take reasonable steps to prevent the contravention or failure, such as to ensure that the persons had the relevant qualifications and experience, the company had a proper system in place to monitor the persons' work, etc.;</p> <p>(b) the case of <i>R v Lo Hon Yiu Henry</i>, (paragraph 17 of the paper (LC Paper No. CB(1)1879/10-11(02)) was an example where the Court held that statutory non-compliance was not an offence if reasonable steps had been taken to ensure compliance; and it was a question of fact whether or not what had been done by a director amounted to all reasonable steps; and</p> <p>(c) the formulation of "responsible person" mainly applied to directors'/officers' compliance with the regulatory requirements under CB; whereas conduct of directors/officers, such as frauds, were offence under other laws</p> <p>Ms EU's request for the Administration to provide cases/examples under which a director would not be liable for offences under the formulation of "officer who is in default" in CO, but would become liable under the new</p>	<p>The Admin. to take action as in paragraph 3(a) of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
		formulation of "responsible person" under CB, or vice versa, so as to demonstrate the effect of the new formulation	
003824-004102	SALA3	<p>SALA3's views that --</p> <ul style="list-style-type: none">(a) it was not clear in CB whether an objective or subjective standard was applied to the act of the responsible person;(b) under CO, where an "officer who is in default" was defined as "an officer of the company who knowingly and wilfully authorizes or permits the default, refusal or contravention", a subjective standard was applied, meaning that when the officer was not aware of the default, refusal or contravention, he would not be held liable;(c) under CB, where "knowingly and wilfully" had been removed and a director was expected to take all reasonable steps to prevent contravention or failure, it seemed that an objective standard would be applied to his act;(d) as to what steps were reasonable and what had caused the director to fail to take all reasonable steps, objective standards would also be involved; and(e) the issue with the new formulation of "responsible person" was what objective standards would be	

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		applied and whether they were reasonable	
004103-004244	Chairman	<p>The Chairman's concern about --</p> <p>(a) how a responsible person could ensure that he had taken "all reasonable steps"; and</p> <p>(b) the difficulty in setting a standard for "all reasonable steps"; for example, when a company director had set up a risk management system for his company and hired a compliance officer to implement the system, whether the director had to examine and monitor the compliance officer's work closely in order to meet the requirement of taking "all reasonable steps"</p>	
004245-004631	Mr Andrew LEUNG	<p>Mr Andrew LEUNG's declaration of interest of being the non-executive director of a number of companies and his views that --</p> <p>(a) while he supported efforts to enhance corporate governance of companies, the requirements for directors to take "all reasonable steps" to prevent contravention and to know their duties in situations where they "ought to have known" would put a heavy burden on them, in particular non-executive directors who might not be involved in the daily operation of the company and thus would have difficulty in taking "all reasonable steps" to prevent the contravention; and</p>	

Time marker	Speaker	Subject(s)	Action required
		(b) as liability on "responsible person" under CB involved criminal offences, the threshold of prosecution should not be lowered and "all reasonable steps" should be codified in an objective manner	
004632-004905	Mr Albert HO	Mr Albert HO's views that it would be difficult for companies with diverse businesses to ensure that all reasonable steps had been taken to prevent the contravention of the provisions of CB, and it would be useful to issue practice guidelines to assist implementation of the provisions	
004906-005054	Deputy Chairman	The Deputy Chairman's declaration of interest of being a director of a number of public bodies, her enquiry about court cases relating to the formulation of "responsible person" in other common law jurisdictions, and her views that the Administration should give clear information about the circumstances under which a director would be held liable for the contravention of the provisions of CB	The Administration to take action as in paragraph 3(c) of the minutes
005055-005325	Ir Dr Raymond HO	<p>Ir Dr Raymond HO's views that --</p> <p>(a) independent non-executive directors usually would not be involved in the daily operation of a company, and they could only make best effort to ensure the company was doing business on the right track and shareholders' interests were duly protected; and</p> <p>(b) requirements on the duties of non-executive directors of</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>companies should be reasonable and clearly set out, and these directors should not be held liable for acts outside their scope of duties</p>	
005326-005339	Chairman	<p>The Chairman's declaration of interest of being a director of a number of companies</p>	
005340-010716	Administration	<p>The Administration's response that --</p> <p>(a) there were about 170 offences under CB that imposed liability on the "responsible person", most of such offences were regulatory in nature, e.g. giving notice to and filing documents with the Registrar of Companies, and the offences were summary offences punishable by fines; these offences should not be confused with fraud and other serious offences;</p> <p>(b) there were provisions under CO where directors were criminally liable for failing to take reasonable steps to secure compliance (paragraphs 13 and 14 of LC Paper No. CB(1)2132/10-11(02));</p> <p>(c) under CO, prosecution of an "officer who is in default" was very difficult, given that the evidential burden for the prosecution to prove "knowingly and wilfully" was very high;</p> <p>(d) the proposed formulation of "responsible person" was based on the relevant provisions of the UK</p>	

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		<p>Companies Act 2006, and lowering the prosecution threshold was targeted at company directors who were reckless or had deliberately turned a blind eye to their responsibilities; and</p> <p>(e) although the phrase "knowingly and wilfully" would be removed, the prosecution needed to prove <i>mens rea</i> in relation to the offence, in assessing whether or not a director had taken all reasonable steps to prevent a contravention, the Court would consider whether or not the director knew that he was under a duty or obligation to take all reasonable steps to prevent the contravention as well as the knowledge of the director of other relevant circumstances leading to and/or surrounding the occurrence of the contravention</p>	
010717-010823	Chairman	The Chairman's request for the Administration to provide information setting out the scope of offences covered by "responsible person" in CB and explaining the reasons for using such formulation for breaches of mainly regulatory requirements	The Administration to take action as in paragraph 3(b) of the minutes
010824-011514	Ms Miriam LAU	Ms Miriam LAU's enquiry on how and to what extent <i>mens rea</i> was applied in court in relation to the offences of "responsible person", and whether sloppiness of a director would be considered a kind of <i>mens rea</i>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) if there was contravention and the director failed to take all reasonable steps to prevent such contravention, the required <i>mens rea</i> would generally be established; (b) in considering directors' liabilities for default, the court would take into account all the facts and circumstances of each case; and (c) negligent omissions and recklessness would be covered under the new formulation of "responsible person" 	
011515-011822	Mr Ronny TONG	<p>Mr Ronny TONG's views that --</p> <ul style="list-style-type: none"> (a) the court would need to make an inference from the defendant's act and all the facts and evidence available in establishing <i>mens rea</i> for an offence; if the defendant insisted that he had no intention to commit the offence, it would be difficult to secure a conviction; (b) for strict liability offences, convictions were based on a set of objective criteria; if the defendant could not give reasonable defence, he could be convicted; and (c) as far as compliance with regulatory requirements under CB was concerned, conviction should only be made upon establishment of <i>mens rea</i> 	

Time marker	Speaker	Subject(s)	Action required
011823-012050	Administration	<p>The Administration's response that --</p> <p>(a) there were already provisions under CO where directors were criminally liable for failing to take all reasonable steps to secure compliance on keeping books of account, laying the balance sheet and the profit and loss account before the company in an annual general meeting, etc.; and</p> <p>(b) the new formulation of "responsible person" would deter directors' non-compliance, enhance corporate governance in Hong Kong, and help ensure directors would take all reasonable steps to comply with regulatory requirements, e.g. notifying the Registrar of Companies of change of address, change of directors, etc., which were important in maintaining accurate records of the Companies Register</p>	
012051-012538	Ir Dr Raymond HO Chairman	<p>Ir Dr Raymond HO's views that --</p> <p>(a) instead of introducing the new formulation of "responsible person" under CB, education and publicity were more effective means to enhance company directors' understanding of their obligations/responsibilities; and</p> <p>(b) imposing onerous requirements on company directors might discourage people from taking up the posts of independent non-executive</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>directors, thereby defeating the purpose of enhancing corporate governance</p> <p>The Chairman's views that --</p> <p>(a) CB did not differentiate the responsibilities of non-executive directors and executive directors, in other words, both had the same responsibilities under the Bill; and</p> <p>(b) it should not be difficult for companies to comply with regulatory requirements such as keeping books of account; moreover, such records were extremely useful when a company was undergoing liquidation or under an investigation by the Inland Revenue Department</p>	
012539-013004	Mr Andrew LEUNG SALA3	<p>Mr Andrew LEUNG's enquiry for SALA3 on the scope of offences covered by the formulation of "responsible person"</p> <p>SALA3's response that the offences covered mainly, but not only, regulatory offences under CB; and negligence was covered under the formulation of "responsible person"</p> <p>Mr Andrew LEUNG's concern that --</p> <p>(a) the scope of offences covered by the formulation of "responsible person" was not confined to regulatory requirements, and a director was expected to do more than setting up</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>and implementing a compliance system;</p> <p>(b) the Administration should provide a paper to clearly set out the scope of offences to be covered by the formulation of "responsible person";</p> <p>(c) the majority of local companies were small or medium-sized enterprises and their directors were fully engaged in business activities, it would be unfair to impose criminal liabilities on these directors for not fulfilling filing obligations; and</p> <p>(d) it was against the principles of common law to lower the prosecution threshold just because the evidential burden was high</p>	
<u>Administrative Appeals Board</u>			
013005-013139	Administration	The Administration's briefing on its response to issues raised by members at the meeting on 29 March 2011 (paragraphs 24 - 29 of LC Paper CB(1)1879/10-11(02)) - Administrative Appeals Board ("AAB")	
013140-013336	Chairman Administration	<p>The Chairman's enquiry about the composition of AAB and the background of its members</p> <p>The Administration's response that --</p> <p>(a) the Chairman, Deputy Chairmen and members of AAB were appointed by the Chief Executive</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>taking into account the suitability of each member; and</p> <p>the Chairman and the Deputy Chairman were legal professionals qualified for appointment as District Court judges, and the others were lay members; many of them were professionals from various sectors of the community</p>	
013337-013406	Mr Andrew LEUNG Administration	The Administration's reply to Mr Andrew LEUNG's enquiry that the appellant could have legal representation at a hearing of AAB	
013407-013617	Administration	The Administration's briefing on its response to issues raised by members at the meeting on 29 March 2011 (paragraphs 30-36 of LC Paper CB(1)1879/10-11(02)) - authorized representatives for non-Hong Kong companies	
<u>Residential addresses and identification numbers of directors and company secretaries</u>			
013618-014514	Administration	The Administration's briefing on Part 2 of CB - Registrar of Companies and Companies Register (Annex A to LC Paper No. CB(1)1879/10-11(03))	
014515-015409	Mr Abraham SHEK Chairman Administration	Mr Abraham SHEK's views that it would be unreasonable to charge companies for making applications to change the existing records in the Companies Register to withhold information on the residential address and identification numbers ("ID numbers") of directors and companies secretaries from public inspection since the proposal of restricting public access to such information was initiated by the Administration	

Time marker	Speaker	Subject(s)	Action required
		<p>The Chairman's enquiries on --</p> <ul style="list-style-type: none"> (a) the estimated fee to be charged on companies for withholding the director's residential address and ID card number; (b) the reason for no longer requiring company secretaries to provide residential addresses under CB, while the requirement would continue for directors but such information would be restricted from public access; and (c) the details on Clauses 50 and 51, i.e. the Companies Registrar may disclose the director's residential address on the Companies Register for public inspection (paragraph 29 of Annex A to LC Paper No. CB(1)1879/10-11(03)) <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) the charge was meant to cover the administrative cost for amending the records in the Companies Register and the Administration would work out the relevant fees at a later stage; (b) it would be an option, rather than a duty, for a director/company secretary to remove his residential address and ID number from existing records in the Companies Register, it was reasonable to require fees to amend the records; 	

Time marker	Speaker	Subject(s)	Action required
		<p>(c) if the service of amending the records was to be provided free of charge, there might be a huge number of requests from companies which might not be manageable by the Companies Registry;</p> <p>(d) in the UK, applications and fees were also required for withholding information on residential addresses and ID numbers of directors/company secretaries from public access;</p> <p>(e) as company secretaries did not usually have management power of directors and did not owe fiduciary duties to the company in the same manner as directors, they were no longer required to provide residential addresses under CB; and</p> <p>(f) under Clauses 50 and 51, in case communication with a director at his correspondence address was not effective, the Registrar of Companies could put the director's residential address on the Companies Register as the director's correspondence address for a period of five years and thereby making it available for public inspection; similar provisions were found in the UK Companies Act of 2006</p>	

Time marker	Speaker	Subject(s)	Action required
015410-015500	Chairman	Cancellation of the meeting scheduled for 28 April 2011 The next meeting would be held in early May and members would be informed of the date and agenda in due course	

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11 May 2012