

立法會
Legislative Council

LC Paper No. CB(1)2537/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/10/2

Bills Committee on Companies Bill

**Minutes of the thirteenth meeting held on
Friday, 8 July 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)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP

Members absent : Hon Albert HO Chun-yan
Hon Abraham SHEK Lai-him, SBS, JP
Hon Ronny TONG Ka-wah, SC

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)

Ms Ada CHUNG, JP
Registrar of Companies
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 Kitty TSUI
Senior Solicitor (Company Law Reform)
Companies Registry

Mr Tim CHUNG
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

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 Meeting with the Administration

Matters arising from the meetings on 6 May, 13 May and 17 June 2011

(LC Paper No. CB(1)2636/10-11(01) -- Administration's response to issues raised by members at the meeting on 13 May 2011 in relation to the formulation of "responsible person" under Part 1

LC Paper No. CB(1)2636/10-11(02) -- Administration's response to issues raised by members at the meetings on 6 May and 17 June 2011 in relation to Parts 5, 6, 9 and 13

LC Paper No. CB(1)2439/10-11(01) -- Follow-up actions to be taken by the Administration for the meeting on 6 May 2011

LC Paper No. CB(1)2439/10-11(02) -- Follow-up actions to be taken by the Administration for the meeting on 13 May 2011)

Discussion on Part 20 and Part 21 of the Bill

(LC Paper No. CB(1)2636/10-11(03) -- Administration's paper on Part 20 and Part 21 of the Companies Bill)

Other relevant papers

Bills Committee on Companies Bill

**Proceedings of the thirteenth meeting
on Friday, 8 July 2011, at 10:45 am
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000001-000628	Chairman	Opening remarks	
<u>Discussion on the Administration's response to issues raised by members on 13 May 2011 relating to the formulation of "responsible person" under Part 1 (LC Paper No. CB(1)2636/10-11(01))</u>			
000629-001201	Administration	Briefing on the written response to issues raised by members on 13 May 2011 relating to the formulation of "responsible person"	
001202-003628	Mr Andrew LEUNG Senior Assistant Legal Adviser 3 ("SALA3") Administration	<p>Mr Andrew LEUNG's views as follows --</p> <p>(a) he welcomed the removal of the limb "fails to take all reasonable steps to prevent" from the formulation of "responsible person" under the Companies Bill ("CB");</p> <p>(b) however, under the revised formulation, a company director/shadow director/officer ("director") would still be held responsible if he "authorizes or permits, or participates in the contravention or <u>failure</u>" in relation to requirements stipulated in CB; where failure would include non-action such as failing to file annual returns on time. In this connection, the threshold for prosecution against a director under the revised formulation of "responsible person" was still low; and</p> <p>(c) given the large number of companies failing to file annual returns on time in the past three years (90 000 to 110 000 companies per year as given in the Administration's paper), the Administration should take administrative measures to rectify the</p>	

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		<p>situation, such as sending e-alerts, instead of making prosecutions against such non-compliance</p> <p>SALA3's remarks, in response to M Andrew LEUNG's enquiry on his views on (b) above, as follows --</p> <p>(a) on the interpretation of "authorizes or permits, or participates in", local precedent cases showed that the courts had taken a broad interpretation and would consider whether the defendant had taken all reasonable steps to prevent the contravention in question; whereas in overseas jurisdictions, the courts had adopted a narrow interpretation and would consider whether the defendant had the knowledge of but turned a blind eye to the contravention;</p> <p>(b) at this stage, it was unknown how the court would interpret the new formulation of "responsible person" under CB; and</p> <p>(c) as to whether all the directors of a company would have to shoulder equal responsibility for a contravention, this would be a policy matter and the Administration should consider clarifying its stance in CB</p> <p>The Administration's response as follows --</p> <p>(a) the number of companies which did not file annual returns on time constituted around 16% of registered companies in Hong Kong, which was not a large proportion;</p> <p>(b) in the event that any prosecution action was taken by the Registrar of Companies ("the Registrar"), the court usually imposed a fine against these companies for the non-compliance upon summary prosecution;</p>	

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		<p>(c) under Part 20 of CB, the Registrar would be given new power to compound specified offences including breaches of provision relating to the filing of annual returns;</p> <p>(d) under the formulation of "responsible person", a person would be a "responsible person" of a company if the person "authorizes or permits, or participates in the contravention or failure", meaning that it was essential to establish the <i>mens rea</i> for the contravention; when the Administration initiated prosecution against a director, it would consider the <i>mens rea</i> elements and the delegation of authority within the company;</p> <p>(e) clause 3(2)(b) should be interpreted with reference to the complete sentence, i.e. "a person is a responsible person of a company or non-Hong Kong company if the person <u>authorizes or permits, or participates</u> in the contravention or failure"; "failure" alone would not make a director commit an offence;</p> <p>(f) in practice, for cases of non-compliance with the timely filing of annual returns, the Administration usually brought prosecutions against the companies, not the directors;</p> <p>(g) before instituting such a prosecution, the Registrar would give an opportunity to the company concerned by sending it a notice requiring rectification of the default within a specified period; only when this notice was not observed would the Registrar institute prosecution; and</p> <p>(h) prosecution against a director would only be made when the company failed to comply with the notice of</p>	

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		<p>compliance and there was sufficient evidence showing that the director knowingly authorized or permitted, or participated in the contravention or failure</p> <p>Mr Andrew LEUNG's view that the Administration should give clear information in its prosecution guidelines about the steps that the Registrar would take and the factors she would consider before making prosecutions against non-compliance of companies with the regulatory requirements under the new Companies Ordinance ("the new CO")</p>	
003629-004017	Chairman Administration	<p>The Chairman's enquiries on --</p> <p>(a) whether the prosecution policy regarding non-compliance with the existing CO would change when the new formulation of "responsible person" came into effect; and</p> <p>(b) whether the Companies Registry ("the Registry") would consider issuing circulars/notes in respect of its enforcement of the new CO to inform concerned parties about the steps and considerations that the Registrar would take when enforcing the new CO</p> <p>The Administration's response that --</p> <p>(a) the prosecution policy of the Administration would not change upon the coming into effect of the new formulation of "responsible person";</p> <p>(b) the Registry issued circulars/information notes from time to time to companies with a view to providing general guidelines on compliance with CO; and</p> <p>(c) before the new CO came into effect, the Registry would issue new circulars as suggested by the Chairman to inform</p>	

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		stakeholders about its prosecution policy under the new CO	
004018-004349	Dr Philip WONG Administration Chairman	<p>Dr Philip WONG's enquiry on whether the some 90 000 to 110 000 companies which did not file annual returns on time included those which had no operation, no revenues, no overhead expenses but only held a property occupied by the director</p> <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) among those 90 000 to 110 000 companies, some had no operation; (b) companies without any business operation should inform the Registrar of such and they would not be required to file annual returns; and (c) the Registrar would strike off the name of a company from the Companies Register ("Register") if she had reasonable cause to believe that it was defunct, even though the company had not informed her about its suspension of operation <p>The Chairman's enquiry on how many companies had their names struck off from the Register per year</p> <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) there were about 2 000 cases per year where the Registrar struck off a company's name from the Register; and (b) there were another some 2 000 cases of de-registration of companies where the companies voluntarily requested for removal of their names from the Register 	
<p><u>Discussion on the Administration's response to issues raised by members on 6 May and 17 June 2011 relating to Parts 5, 6, 9 and 13 (LC Paper No. CB(1)2636/10-11(02))</u></p>			
004350-010016	Administration	Briefing on the written response to issues raised by members on 6 May and	

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010017-010338	Dr Philip WONG Administration	<p>17 June 2011 relating to Parts 5, 6, 9 and 13</p> <p>Dr Philip WONG's enquiry on --</p> <p>(a) the liabilities of the president/chief executive officer of a company who was not a director but was delegated with the full responsibilities for supervising the operation of the company for the contravention of the provisions of CB, where the director was not aware of the contravention; and</p> <p>(b) whether the director, unaware of the contravention made, had to prove that he had no knowledge about it</p> <p>The Administration's response that --</p> <p>(a) "responsible person" under CB included director, senior manager and company secretary; therefore a president/chief executive officer, being a senior manager, would be a "responsible person" if he authorized or permitted, or participated in the contravention or failure; and</p> <p>(b) the onus of proof of <i>mens rea</i> vested with the prosecution</p>	
010339-011255	Mr Andrew LEUNG Administration Chairman	<p>Mr Andrew LEUNG's views that --</p> <p>(a) on the qualifying criteria for companies to prepare simplified financial reports, it was not appropriate for CB to adopt the standards set by the Hong Kong Institute of Certified Public Accountants ("HKICPA"), as these standards did not carry legal effects;</p> <p>(b) the Administration should reconsider permitting companies of any scale to opt for simplified financial reporting upon the consent of all shareholders; and</p> <p>(c) on the solvency requirement under the</p>	

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		<p>court-free intra-group statutory amalgamation procedure, if a company could not meet the cash flow test, it should still be allowed to make use of the procedure if the company showed satisfactory performance in the balance sheet test</p> <p>The Administration's response that --</p> <p>(a) it would continue to work with HKICPA to review the qualifying criteria for companies to prepare simplified financial reports and to examine whether all companies, regardless of their scale, should be allowed to prepare simplified financial reports upon the consent of all shareholders;</p> <p>(b) as HKICPA was the official authority to promulgate financial reporting standards in Hong Kong, it was reasonable for the relevant standards under the law to align with HKICPA's standards;</p> <p>(c) the criteria for companies to prepare simplified financial reports under CB would be updated, when necessary over time, by way of making subsidiary legislation; and</p> <p>(d) the solvency requirement under the court-free intra-group statutory amalgamation procedure followed the requirement for the general insolvency test, which was based on the cash flow test showing a company's ability to pay its debts in the next 12 months; whereas the balance sheet test could not serve this purpose</p> <p>The Chairman's instruction that the Clerk to invite written views from chambers of commerce and accounting firms on the criteria under CB for allowing companies to</p>	

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011256-011358	Chairman Administration	<p>prepare simplified financial reporting</p> <p>The Chairman's enquiry on overseas practices for including both cash flow and balance sheet tests in the statutory amalgamation procedures</p> <p>The Administration's response that --</p> <p>(a) in Singapore, the United States and New Zealand, both tests were required;</p> <p>(b) in the United Kingdom, only the cash flow test was required; and</p> <p>(c) in Australia, the company concerned was required to show that its ability to pay debts would not be affected after the amalgamation</p>	
011359-012121	Mr Jeffrey LAM Administration Chairman	<p>Mr Jeffrey LAM's views that on the criteria for allowing companies to prepare simplified financial reports, the Administration should not only take HKICPA's views, but should seek and consider the views of the legal sector, businesses of various scales, etc.</p> <p>Mr Jeffrey LAM's enquiries on --</p> <p>(a) whether a senior officer of a company would have any criminal liability if he had made a decision in good faith but it was later found that his decision was wrong or had contravened requirements under the new CO; and</p> <p>(b) whether the Administration would promulgate guidelines for reference of parties concerned to assist them to comply with requirements under the new CO</p> <p>The Administration's response that --</p> <p>(a) while the formulation of "responsible person" was targeted at intentional and reckless contravention of requirements under the new CO, whether an officer</p>	

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		<p>would be held responsible for an act depended on the actual circumstances of individual cases; and</p> <p>(b) before the new CO came into effect, the Registry would update or issue new circulars/information notes on requirements under the new CO for parties concerned and publish useful information on the Registry's website to provide guidance to parties</p>	
012122-012358	Chairman	<p>The Chairman's view that for the court-free intra-group statutory amalgamation procedure, it would be sufficient to include either the cash flow test or the balance sheet test</p> <p>The Chairman's request that the Administration should provide information on the difference between the buy-back out of capital provisions in CB and the United Kingdom Companies Act 2006 regarding the treatment of "revaluation of reserve"</p>	The Administration to take action as in paragraph 2 of the minutes
<u>Discussion on Part 20</u>			
012359-013530	Administration	Briefing on Part 20 (Miscellaneous) of the Bill (Annex A to LC Paper No. CB(1)2636/10-11(03))	
013531-014333	Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong's enquiry on whether the information provided to the Registrar that contained mistakes due to "copying and pasting" existing mistakes in another document would be considered false statements; and if not, how these clerical mistakes would be handled</p> <p>The Administration's response that --</p> <p>(a) a person committed an offence if he knowingly or recklessly made a statement in a document filed with the Registrar that was misleading, false or deceptive in any material particular; and</p>	

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		<p>(b) information with clerical mistake or omission in a document would normally not be regarded as a false statement</p> <p>Mr WONG Ting-kwong's views that --</p> <p>(a) it would be difficult to determine which particulars were material; for example, the name, and identity card number of a member and the number of shares that he held were important information but careless mistakes relating to such information were very often; and</p> <p>(b) the Administration should handle these cases sensibly to avoid inadvertent contravention by directors/companies</p> <p>The Administration's response that --</p> <p>(a) when the staff of the Companies Registry found that the information submitted by a company had apparent clerical mistakes or was inconsistent with the information kept in the Register, they would contact the company concerned to seek clarification; and</p> <p>(b) if, upon the Registry's notice, the company rectified the mistakes and filed a correct record within a reasonable time, no further action would be taken against the company</p>	
014334-014736	Administration	Continuation of briefing on Part 20 (Miscellaneous) of the Bill (Annex A to LC Paper No. CB(1)2636/10-11(03))	
<u>Discussion on Part 21</u>			
014737-015210	Administration	Briefing on Part 21 (Consequential Amendments, and Transitional and Saving Provisions) of the Bill (Annex B to LC Paper No. CB(1)2636/10-11(03))	

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015211-015513	SALA3 Administration	<p>SALA3's enquiry on arrangements for applications/filings submitted by companies during the transition from the existing CO to the new CO which might not meet the new requirements under CB</p> <p>The Administration's response that --</p> <p>(a) such applications/filings, if fulfilling the requirements under the existing CO, would be deemed to be meeting the requirements under CB; and</p> <p>(b) transitional provisions were set out in Part 21 and Schedule 10, the details of which would be discussed at the clause-by-clause examination stage</p>	
015514-015957	Chairman Administration Mr Jeffrey LAM Deputy Chairman	<p><u>Date for the next meeting</u></p> <p>The Chairman's advice that --</p> <p>(a) the Bills Committee would start clause-by-clause examination of CB at the next meeting, and would begin with Part 2;</p> <p>(b) the examination of the more controversial parts would take place at meetings after the summer break;</p> <p>(c) the next meeting would be held on 22 or 26 July 2011; and</p> <p>(d) the Clerk would inform members of the confirmed date for the next meeting</p>	