

**立法會**  
***Legislative Council***

LC Paper No. CB(1)1107/03-04  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/18/02

**Bills Committee on Companies (Amendment) Bill 2003**

**Minutes of the thirteenth meeting  
held on Thursday, 12 February 2004, at 10:45 am  
in Conference Room B of the Legislative Council Building**

**Members present** : Hon Audrey EU Yuet-mee, SC, JP (Chairman)  
Hon Albert HO Chun-yan  
Dr Hon Eric LI Ka-cheung, GBS, JP  
Hon CHAN Kam-lam, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Emily LAU Wai-hing, JP  
Hon Henry WU King-cheong, BBS, JP

Non-Bills Committee Member  
Hon Miriam LAU Kin-yee, JP

**Members absent** : Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP  
Hon SIN Chung-kai

**Public officers attending** : Financial Services and the Treasury Bureau  
  
Ms Shirley LAM  
Principal Assistant Secretary for Financial Services and  
the Treasury (Financial Services) 4  
  
Mr Arthur AU  
Assistant Secretary for Financial Services and  
the Treasury (Financial Services) (4) 1

Companies Registry

Mr G W E JONES  
Registrar of Companies

Mr Edward LAU  
Secretary, Standing Committee on  
Company Law Reform

Department of Justice

Mr Allen LAI  
Senior Government Counsel

**Clerk in attendance** : Ms Anita SIT  
Chief Council Secretary (1)6

**Staff in attendance** : Miss Monna LAI  
Assistant Legal Adviser 7

Mr Matthew LOO  
Senior Council Secretary (1)3

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**I Confirmation of minutes of meeting**

LC Paper No. CB(1)970/03-04 - Minutes of meeting on 29 January 2004

1. The minutes of the meeting held on 29 January 2004 were confirmed.

**II Meeting with the Administration**

LC Paper No. CB(1)2504/02-03(01) - Submission dated 22 September 2003  
from the Chinese General Chamber of  
Commerce

- LC Paper No. CB(1)2521/02-03 (03) - Administration's response to written submissions from the Association of International Accountants, the Chinese General Chamber of Commerce and the Stock Exchange of Hong Kong Limited
- LC Paper No. CB(1)2504/02-03(04) - Submission dated 5 September 2003 from Consumer Council
- LC Paper No. CB(1)2521/02-03(04) - Administration's response to written submission from Consumer Council
- LC Paper No. CB(1)2504/02-03 (05) - Submission dated 16 September 2003 from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)2521/02-03 (05) - Administration's response to written submission from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)2504/02-03 (11) - Submission dated 22 September 2003 from Linklaters
- LC Paper No. CB(1)798/03-04 (01) - Administration's response to written submission from Linklaters
- LC Paper No. CB(1)2504/02-03(12) - Submission dated 22 September 2003 from the Stock Exchange of Hong Kong Limited
- LC Paper No. CB(1)2504/02-03 (13) - Submission dated 22 September 2003 from the Hong Kong Institute of Company Secretaries
- LC Paper No. CB(1)798/03-04 (02) - Administration's response to written submission from the Hong Kong Institute of Company Secretaries
- LC Paper No. CB(1)2521/02-03 (01) - Submission dated 25 September 2003 from the Hong Kong Chinese Enterprises Association

- LC Paper No. CB(1)2521/02-03(02) - Submission dated 25 September 2003 from School of Business, Hong Kong Baptist University
- LC Paper No. CB(1)798/03-04 (03) - Administration's response to written submission from School of Business, Hong Kong Baptist University
- LC Paper No. CB(1)185/03-04 (01) - Submission dated 27 October 2003 from Hong Kong Society of Accountants
- LC Paper No. CB(1)798/03-04 (04) - Administration's response to written submission from Hong Kong Society of Accountants
- LC Paper No. CB(1)934/03-04 (03) - Submission dated 2 February 2004 from Hong Kong Society of Accountants
- LC Paper No. CB(1)217/03-04 (01) - Submission dated 21 October 2003 from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)798/03-04 (05) - Administration's response to written submission from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)786/03-04 (01) - Submission dated 12 January 2004 from Mr Winston POON, SC, Mr Godfrey LAM, Barrister, Ms Linda CHAN, Barrister
- LC Paper No. CB(1)971/03-04 (01) - Administration's response to written submission from Mr Winston POON, SC, Mr Godfrey LAM, Barrister, Ms Linda CHAN, Barrister
- LC Paper No. CB(1)946/03-04 (01) - Submission dated 5 February 2004 from Mr Winston POON, SC
- LC Paper No. CB(1)971/03-04 (02) - Summary of written submissions and the Administration's response on Schedule 4 of the Bill (Position as at 11 February 2004)

- LC Paper No. CB(1)2425/02-03 (01) - Letter dated 29 August 2003 from Assistant Legal Adviser 7 (ALA7) to the Administration on Schedule 4 of the Bill
- LC Paper No. CB(1)849/03-04 (01) - Administration's response dated 17 January 2004
- LC Paper No. CB(1)934/03-04(01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 29 January 2004 on Schedule 4
- LC Paper No. CB(1)798/03-04 (06) - Administration's paper on follow-up actions arising from the discussion at the meeting on 2 October 2003 on Schedule 4
- LC Paper No. CB(1)798/03-04 (07) - Administration's paper on international comparisons of shareholders' remedies
- LC Paper No. CB(1)971/03-04 (03) - List of issues requiring follow-up actions by the Administration on Schedule 4 of the Bill (Position as at 11 February 2004)

2. The Bills Committee continued the scrutiny of Schedule 4 of the Bill (Amendments relating to shareholders' remedies).

3. The Administration undertook to provide information on the following matters -

- (a) To clarify the policy intent and the relevant common law principles with regard to the manner in which the relief provided under proposed new sections 168A(2A) to (2C) should be awarded in the following circumstances -
  - (i) the member presenting the petition has suffered a loss but the company has not suffered a loss in respect of the same affair of unfair prejudice;
  - (ii) the loss of the member presenting the petition is merely reflective of the specified corporation's loss; and
  - (iii) the loss of the member presenting the petition is additional to that suffered by the specified corporation.

Examples of real-life situations and/or court cases should be provided for illustration. The concern of how to prevent the award of the respective losses being overlapped should be addressed.

- (b) To elaborate the examples of "personal wrongs" that may initiate an action on unfair prejudice as quoted in paragraph 16.10 of the "Consultation Paper on Proposals made in Phase I of the Corporate Governance Review" of the Standing Committee on Company Law Reform.
- (c) To clarify whether under proposed new sections 168A(2A) to (2C), the court may award damages and any interest on the damages to those members who have not petitioned to the court but whose interests as a member of the specified corporation were unfairly prejudiced by the same affair as in the case of the member who has petitioned to the court.
- (d) To clarify the relationship between the proposed new provisions on unfair prejudice and those on derivative action, and to clarify the policy intent as to whether a member may initiate action under both sets or either set of the new provisions in respect of the same affair of a specified corporation.
- (e) To explain the rationale for providing the additional form of relief (i.e. the court may award damages) in Hong Kong's legislation, bearing in mind that no such relief is provided in the legislation of the United Kingdom, Singapore and Australia. In this connection, information on how far this form of relief has been available under common law in the said jurisdictions should also be provided.
- (f) To consider whether the provision under proposed new section 168A(2A) should be subsumed under section 168A(2).
- (g) To explain why the wordings "whether or not with a view to bringing an end the matters complained of", as distinct from the wordings "with a view to bringing an end the matters complained of", are used in proposed new sections 168A(2A) and (2C).
- (h) With regard to whether there should be a limitation period for a past member seeking relief under proposed sections 168A(2B) and (2C), the following issues should be addressed -
  - (i) whether an action taken under the above proposed sections is subject to the Limitation Ordinance (Cap. 347);
  - (ii) whether the court would have the discretion of applying the relevant common law principles in determining the case petitioned under the proposed section 168A(2B); and

- (iii) the rationale for extending the statutory unfair prejudice remedies to a past member of a specified corporation with the only qualification that the affairs being complained of should be in relation to the affairs of the specified corporation at the time when he was a member, bearing in mind that in the United Kingdom and Singapore the statutory remedies are not available to a past member and in Australia, the scope of "past member" is confined to a person who has ceased to be a member of the company if the application relates to the circumstances in which he ceased to be a member.
- (i) To provide court cases on excessive remuneration of directors for illustration of unfair prejudice remedies under section 168A; and
- (j) To provide a substantive response on whether section 168A(2D) should be deleted or revised.

## **II Any other business**

### Date of next meeting

- 4. Members noted that the next meeting would be held on Friday, 20 February 2004 at 10:45 am. The Bills Committee would continue to scrutinize Schedule 4 of the Bill (Amendments relating to shareholders' remedies) at the next meeting.
- 5. There being no other business, the meeting ended at 12:40 pm.
- 6. The index of proceedings of the meeting is at **Appendix**.

Council Business Division 1  
Legislative Council Secretariat  
25 February 2004

**Proceedings of the meeting of the  
Bills Committee on Companies (Amendment) Bill 2003**

**13th meeting on Thursday, 12 February 2004, at 10:45 am  
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 – 000420	Chairman	Confirmation of minutes of meeting on 29 January 2004  Welcoming and introductory remarks	
000421 – 001014	Chairman Administration	<p>Administration's response to written submissions relating to Schedule 4 of the Bill [CB(1)871/03-04(01)]</p> <p><u>Clause 4 - Alternative remedy to winding up in cases of unfair prejudice</u></p> <p>Administration's response to the concern raised by the School of Business, Hong Kong Baptist University (SB, HKBU) that the proposed amendments under <b>section 168A(2A)</b> to award damages to a petitioning shareholder for the reason that the company had suffered a wrong was inconsistent with the common law principle</p> <p>Similar concern about double recovery or that the unfairly prejudiced member would benefit at the expense of the company's creditors under <b>proposed section 168A(2A)</b> was raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN.</p>	



Time marker	Speaker	Subject(s)	Action required
000421 – 001014 (Cont'd)		The Administration would consider adding a doubt-avoidance provision to make it clear that the proposed arrangement should not override the relevant common law principles.	
001015 – 001459	Chairman Mr Albert HO Ms Miriam LAU	Examples of "personal wrongs" that might initiate an action for unfair prejudice <i>[Paragraph 16.10 of the "Consultation Paper on Proposals made in Phase I of the Corporate Governance Review"]</i>	Administration to take follow-up action set out in paragraph 3(b) of the minutes
001500 – 001729	Chairman Ms Miriam LAU Administration	Relief provided under the <b>proposed sections 168A(2A) to (2C)</b> for cases involving third party's interests, such as creditors' interests	
001730 – 002148	Chairman Mr Albert HO Administration	Awarding damages to members who had not petitioned to the court but whose interests were unfairly prejudiced by the same affair as in the case of the member who had petitioned to the court	Administration to take follow-up action set out in paragraph 3(c) of the minutes
002149 – 003100	Chairman Administration Mr Albert HO	The manner in which relief would be awarded or otherwise under new <b>sections 168A(2A) to (2C)</b> under different circumstances.	Administration to take follow-up action set out in paragraph 3(a) of the minutes
003101 – 003409	Chairman Administration	The Administration was considering the drafting of the proposed doubt-avoidance provision under <b>section 168A</b> .	

Time marker	Speaker	Subject(s)	Action required
003410 – 004454	Chairman ALA7 Mr Albert HO	<p>Comparison between the proposed provisions on unfair prejudice and those on derivative action</p> <p>ALA7 advised that the common law position was that under unfair prejudice claims a shareholder could not recover a loss which was simply reflective of the company's loss to prevent double recovery or the shareholder being awarded damages at the expense of the company. Hence, a doubt-avoidance provision was desirable if the policy intent was that the common law position would not be overridden by the proposed new provisions.</p>	
004455 – 005424	Chairman Ms Miriam LAU Administration ALA7	The manner in which relief would be provided under <b>proposed section 168A</b> for cases relating to excessive remuneration of directors	
005425 – 005542	Chairman Mr Albert HO Administration	<p>The Administration explained that the three main purposes of the proposed amendments to <b>section 168A</b> were-</p> <p>(a) to make it clear that the court had the power to award damages by way of a remedy to shareholders in circumstances of unfair prejudice. [<i>Paragraph 16.27 of the "Consultation Paper on Proposals made in Phase I of the Corporate Governance Review"</i>];</p> <p>(b) to allow members of non-Hong Kong companies to seek unfair prejudice remedy under the Companies Ordinance (CO); and</p> <p>(c) to allow past members to seek unfair prejudice remedy under the CO.</p>	

Time marker	Speaker	Subject(s)	Action required
005543 – 010559	Chairman Ms Miriam LAU Mr Albert HO ALA7	Chairman requested the Administration to clarify the relationship between the proposed provisions on unfair prejudice and those on derivative action.  ALA7 advised that derivative action was one form of relief for unfair prejudice which might be ordered by the court under existing <b>section 168A(2)(b)</b> .  Unfair prejudice remedies under <b>section 168A</b> for cases relating to excessive remuneration of directors	Administration to take follow-up action set out in paragraph 3(d) of the minutes.  Administration to take follow-up action set out in paragraph 3(i) of the minutes
010600 – 010942	Chairman Mr Albert HO Ms Miriam LAU Administration ALA7	In reply to Mr Albert HO's enquiry, the Administration advised that there was no statutory requirement in <b>section 168A</b> for a shareholder to go through all other domestic remedies before unfair prejudice remedy was initiated.	
010943 – 012259	Chairman Administration ALA7 Ms Miriam LAU	Administration's response to concern raised by SB, HKBU about the drafting of <b>new section 168A(2A)</b>  Relationship between <b>proposed sections 168A(2A) and 168A(2)</b>	Administration to take follow-up action set out in paragraphs 3(f) and 3(g) of the minutes
012300 – 012319	Chairman Administration	Administration's response to concern raised by the Consumer Council	
012320 – 012959	Chairman Administration ALA7 Ms Emily LAU	Administration's response to concern raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on whether <b>section 168A</b> remedy should be extended to "unregistered companies" as defined in <b>section 326</b> .	Administration would consult Standing Committee on Company Law Reform and relevant stakeholders on this issue, and the issue would be dealt with in the next exercise of amending the CO.

Time marker	Speaker	Subject(s)	Action required
013000 – 013029	Chairman Administration	Administration's response to the concern raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on the drafting of the proposed new provisions under <b>section 168A</b> .	Administration would move Committee Stage amendments (CSAs) to replace the words "made" and "making" by "presented" and "presenting" when referring to a petition.
013030 – 013049	Chairman Administration	Administration's response to the concern raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on <b>proposed section 168A(2A)</b>	
013050 – 014058	Chairman Administration ALA7 Mr Albert HO Ms Miriam LAU	Administration's response to the concern raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on the need of providing a limitation period for past members to seek relief under proposed <b>section 168A(2B)</b>	Administration to take follow-up action set out in paragraph 3(h) of the minutes
014059 – 014214	Chairman Administration	Administration's response to the concern raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on <b>proposed section 168A(2D)</b>	Administration to take follow-up action set out in paragraph 3(j) of the minutes
014215 – 014259	Chairman Administration	Administration's response to the concern raised by Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on <b>sub-section (5C) of section 168A</b>	Administration would move CSA to delete sub-section (5C)
014300 – 014808	Chairman Administration ALA7	Comparison with corresponding provisions on unfair prejudice remedies in United Kingdom, Singapore and Australia [CB(1)798/03-04(07)]	Administration to take follow-up action set out in paragraph 3(e) of the minutes
014809 – 015008	Chairman Mr Albert HO	Date of next meeting	