

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1249/03-04  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/18/02

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

**Minutes of the fifteenth meeting  
held on Thursday, 26 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 SIN Chung-kai  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Henry WU King-cheong, BBS, JP

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

**Members absent** : Hon CHAN Kam-lam, JP  
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP  
Hon Emily LAU Wai-hing, JP

**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)1107/03-04 - Minutes of meeting on 12 February 2004

The minutes of the meeting held on 12 February 2004 were confirmed.

**II Meeting with the Administration**

LC Paper No. CB(1)1108/03-04 (01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 12 February 2004 on Schedule 4

- LC Paper No. CB(1)1108/03-04 (02) - List of issues requiring follow-up actions by the Administration on Schedule 4 of the Bill (Position as at 25 February 2004)
- 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)1041/03-04 (03) - Administration's response to written submission from Mr Winston POON, SC
- LC Paper No. CB(1)1041/03-04 (04) - Summary of written submissions and the Administration's response on Schedule 4 of the Bill (Position as at 19 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)1041/03-04 (01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 5 February 2004 on Schedule 4
- 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

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

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

- (a) To consider whether the relief provided under proposed new sections 168A(2A) to (2C) should be confined to the personal loss of a member or part of the members(s) of a specified corporation, which was not a loss merely reflective of the specified corporation's loss, or reflective loss could be recovered provided that there would not be double recovery; and in either case, to consider revising the proposed provisions to make clear the policy intent.
- (b) To reconsider whether the wordings "whether or not with a view to bringing to an end the matters complained of" should be used in the proposed new sections 168A(2A) and (2C); if it is considered preferable to use these wordings, the intended situations to be catered for should be explained.
- (c) In connection with (b) above, to provide the relevant court case in Ireland.
- (d) To provide court cases in New Zealand for illustration of the application of the unfair prejudice remedy under the New Zealand Companies Act 1993 to former shareholders of a company.
- (e) To confirm whether there is any statutory limitation period for actions to seek unfair prejudice remedy in other jurisdictions where unfair prejudice remedy is available to past members of a company.

### **III Any other business**

#### Date of next meeting

4. Members noted that the next meeting would be held on Saturday, 28 February 2004 at 9:30 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 12:55 pm.

6. The index of proceedings of the meeting is at **Appendix**.

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

**15th meeting on Thursday, 26 February 2004, at 10:45 am  
in Conference Room B of the Legislative Council Building**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
000000 - 000252	Chairman	Confirmation of minutes of meeting on 12 February 2004 Welcoming and introductory remarks	
000253 - 000315	Chairman Administration	Administration's response to members' concerns raised at the meeting on 12 February 2004 relating to unfair prejudice remedies <b>under section 168A</b> [CB(1)1108/03-04(01)]	
000316 - 001827	Chairman Administration	Policy intent of <b>proposed new sections 168A(2A) to (2C)</b> Briefing by the Administration on decided court cases under existing <b>section 168A</b> relating to "wrongs to members"	

Time marker	Speaker	Subject(s)	Action required
001828 - 002238	Chairman Administration Ms Miriam LAU	<p>Members noted that for the first group of cases involving "wrongs to members", the court usually made a share purchase order in favour of the member.</p> <p>Members noted from the Administration's paper that mere failure to pay dividend might not be regarded as sufficient to attract relief under <b>section 168A</b>, and the court would be more ready to act if the failure was accompanied by other improprieties or with intent to squeeze out minority shareholders.</p> <p>Members noted that for the case of <u>Re a Company, ex parte Glossop [1988] BLCL 570</u> cited in the Administration's paper, the decision was only concerned with an application for leave to amend the petition, and not a ruling on the petition itself.</p>	
002239 - 002641	Chairman Dr Philip WONG Ms Miriam LAU Administration	<p>Dr Philip WONG considered that the proposed new provisions to expressly empower the court to award damages as relief were problematic as there were no complementary provisions specifying the situations under which the relief was applicable and the manner in which the damages should be assessed.</p> <p>Ms Miriam LAU shared Dr WONG's concern.</p>	



Time marker	Speaker	Subject(s)	Action required
002642 - 003855	Chairman Administration	<p>Briefing by the Administration on decided court cases under existing <b>section 168A</b> relating to "wrongs to company with separate wrongs to members".</p> <p>The Chairman considered that it was not clear why the loss suffered by the petitioning member under this group of cases was not reflective of the company's loss. Moreover, as the relief ordered by the court in these cases was restricted to purchase of the petitioner's shares by the respondents, the cases could not illustrate how the court would award damages under <b>proposed sections 168A(2A) to (2C)</b>, though she appreciated that the cases cited were decided cases instituted under existing section 168A.</p> <p>The Administration explained that as the existing section 168A did not explicitly empower the court to award damages as relief, the court was inclined not to resort to this relief, but other types of relief expressly provided under section 168A.</p>	
003856 - 004455	Chairman Administration	Briefing by the Administration on decided court cases relating to "direct wrongs to company with indirect wrongs to members"	

Time marker	Speaker	Subject(s)	Action required
004456 - 012400	Chairman Administration Ms Miriam LAU Dr Philip WONG ALA7 Mr Albert HO	<p>Members considered that clearer guidelines were required for the court to award damages under <b>proposed sections 168A(2A) to (2C)</b>.</p> <p>The Administration said that they were considering to add a doubt avoidance provision to make it clear that the <b>proposed sections 168A(2A) and 168A(2C)</b> should not have the effect of entitling a member to damages when the company had a claim for damages in respect of the same matter to prevent double recovery.</p> <p>Members sought clarification on whether the Administration's intention was to allow the award of damages to the petitioning member in respect of his/her loss which was merely reflective of the company's loss insofar as the company did not institute a claim for the loss.</p> <p>The Administration advised that based on decided cases, the principle was that a member did not have a right to seek unfair prejudice remedy if the member's loss was merely reflective of the company's loss.</p> <p>ALA7 advised that under common law, a shareholder could not recover a loss which was simply reflective of the company's loss.</p> <p>ALA7 also pointed out that "Gower and Davies' Principles of Modern Company Law" maintained the view that awarding damages to a shareholder prior to a company's claim would effectively move assets out of the company to the potential detriment of other shareholders and creditors of the company.</p>	

Time marker	Speaker	Subject(s)	Action required
004456 - 012400 (Cont'd)		Members asked the Administration to critically consider whether the relief of awarding damages should be confined to personal loss, which was not reflective of the company's loss, of a member or part of the member(s) of a specified corporation, or reflective loss could be recovered provided that there would not be double recovery, taking into account relevant common law principles and the scope of application of the relief in other jurisdictions.	Administration to take follow-up action set out in paragraph 3(a) of the minutes
012401 - 012503	Chairman Administration	Administration's response to members' concern about the provision of remedy to members other than the petitioner as set out in the Administration's paper	
012504 - 012627	Chairman Administration	Administration's response to members' concern about the relationship between the proposed provisions on unfair prejudice and those on statutory derivative action as set out in the Administration's paper	
012628 - 012714	Chairman Administration	Administration's response to members' concern about the rationale for providing the court with power to award damages and interests on such damages as set out in the Administration's paper	
012715 - 014040	Chairman ALA7 Administration Mr Albert HO	Reason for using the wordings "whether or not with a view to bringing to an end the matters complained of" on relief provided under <b>proposed sections 168A(2A) and 168A(2C)</b>	Administration to take follow-up action set out in paragraphs 3(b) and 3(c) of the minutes

Time marker	Speaker	Subject(s)	Action required
014041 - 015534	Chairman Administration ALA7 Mr Henry WU Mr Albert HO	<p>Administration's response to members' concern on whether an action brought by a past member under the <b>proposed section 168A(2B)</b> should be subject to a limitation period.</p> <p>The Administration advised that there was no statutory limitation period for the proposed section 168A(2B) or the existing section 168A, but there was a precedent case showing that the court would take the time element into account when deciding whether a conduct had prejudiced a shareholder unfairly.</p> <p>The Bills Committee agreed to revisit the issue at a later meeting with further information provided by the Administration.</p>	Administration to take follow-up action set out in paragraphs 3(d) and 3(e) of the minutes
015535 - 020307	Chairman ALA7 Administration	<p><u>Clause 6 - Injunctions</u></p> <p>ALA7 advised that the proposed amendments were mirrored from relevant provisions adopted in Australia except <b>proposed section 350B(1)(g)</b>.</p> <p>The Bills Committee accepted the policy intent of the proposed amendments.</p>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
020308 - 020822	Chairman Administration Dr Eric LI	<p>The Bills Committee would scrutinize the proposed Committee Stage amendments (CSAs) relating to inspection order in Schedule 4 of the Bill at the next meeting.</p> <p>The Administration agreed to prepare for reducing the scope of the proposed amendments in Schedule 3 relating to oversea companies and incorporation procedures, in view of time constraints for scrutiny of the entire Bill.</p> <p>The Chairman requested and the Administration agreed to consult the persons/organizations which had provided substantive views on the Bill on the relevant draft CSAs.</p>	