Bills Committee on Companies (Amendment) Bill 2004

Summary of amendments to individual clauses of the Bill proposed by the Bills Committee, Administration or organizations

(Position as at 21 April 2005)

Abbreviations:

Hong Kong Institute of Certified Public Accountants (HKICPA)

The Association of Chartered Certified Accountants (Hong Kong) (ACCA)

W H Lam & Company (Lam & Co)

The Company & Financial Law Committee, Law Society of Hong Kong (Law Soc)

The Hong Kong Mortgage Corporation Limited (HKMCL)

The Hong Kong Capital Markets Association (HKCMA)

The Association of International Accountants (Hong Kong Branch) (AIA(HK))

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Clause 2 (proposed section 2B of the Companies Ordinance (CO))	Law Soc notes that under the proposed new section 2B(4) of the CO, the Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend subsection (3). Any changes to the meaning of "subsidiary" could have significant consequences and should require legislative oversight, and should not be left to the Administration. (LC Paper No. CB(1)465/04-05(01))	The "notice published in the Gazette" referred to in the proposed section 2B(4), for the purpose of any proposed amendments to section 2B(3) by the Secretary for Financial Services and the Treasury, is subsidiary legislation, hence subject to the legislative scrutiny (including vetting by the Legislative Council). (LC Paper No. CB(1)681/04-05(02))
Clause 3 (section 123 of CO)	Members are concerned that there is overlap between the existing subsection (1) and the proposed subsection (4), and between the existing subsection (3) and the proposed subsection (4) of section 123. It is suggested that the Administration should consider deleting subsection (3). (LC Paper No. CB(1)1207/04-05(03))	To a certain extent, subsection (1) overlaps with subsection (4) since both require the accounts to give a true and fair view. However, this does not automatically render the proposed subsection (4) unnecessary. What subsection (4) seeks to achieve is to give a specific example of what is meant by the duty to give a true and fair view, as required under subsection (1), and how the "true and fair view override" rule applies. It is not rare in the CO where a provision imposes a general duty, followed by imposition of specific duties. Indeed, the proposed subsections (4) and (4A) have shown clearly that subsection (1) is overriding. In response to Members' concerns, we would consider proposing a Committee Stage amendment (CSA) to expressly provide that the proposed subsection (4) should not affect the

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		generality of the existing subsection (1). The proposed subsection (4) already provides expressly that it does not affect the generality of subsection (3). There is thus no question of subsection (4) affecting the application and interpretation of subsection (3). We agree that, to a certain extent, subsection (3) may become redundant with the addition of the proposed subsection (4). However, the repeal of subsection (3) will open up other questions in relation to the existing operation of this subsection. As subsection (3) refers to Part III of the Tenth Schedule (concerning the accounting requirements for banking and insurance companies) and any other requirements of the CO, the repeal of subsection (3) will have implications far beyond the purpose of the Bill. In this light, we would maintain the status quo, i.e. retaining subsection (3), and consider proposing a CSA to remove the words "in the following provision of this section or" in subsection (3). We would separately invite the Standing Committee on Company Law Reform and

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		the Joint Government/HKICPA Working Group, which is tasked to review the accounting and auditing provisions of the CO, to examine the wider implications for the operation of subsection (3). (LC Paper No. CB(1)1207/04-05(04))
Clauses 3 and 5 (sections 123 and 126 of CO)	Linklaters supports the introduction of the "true and fair view override" provisions. However, in the absence of more specific guidance, the discretion for directors to apply the provisions may create problems or uncertainties on how such discretion should be exercised. It would be helpful if HKICPA could provide practical guidelines on the application of the provisions before the implementation of the Bill. (LC Paper No. CB(1)465/04-05(01))	We envisage that the "true and fair view override" provisions will be used only in an exceptionally rare occasion to cater for the unforeseen circumstances of a company. If necessary, HKICPA will promulgate guidelines and interpretations as to the application to the "true and fair view override" provisions, taking into account the experience in the application of the provisions and the development of International Financial Reporting Standards (IFRS). (LC Paper No. CB(1)681/04-05(02))
	HKMCL notes that the "true and fair view override" provisions in the Bill are derived from sections 226A and 227A of the UK Companies Act 1985. In the UK, there is authority which suggests that the effect of the provisions is limited only to matters of disclosure and does not enable a company to depart from other provisions of the Act (e.g. definitions) even though section 227A also has language	The gist of the proposed "true and fair view override" provisions is to ensure that accounts would always present a "true and fair view". Our intention is that only the Tenth Schedule and other requirements of the CO

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	that overrides other provisions of the Act. Therefore, if such interpretation is adopted in Hong Kong, then if accounting standards change in a manner which conflict with parts of CO other than the Tenth Schedule and other matters of disclosure, the "true and fair view override" provisions will not enable a company to disregard the requirements of CO and follow accounting standards. To address the above concern, HKMCL proposes that amendments be made to expressly extend the overriding effect of the "true and fair view override" provisions to cover other sections in CO, such as the definition section. HKMCL points out that there will be practical difficulties in using the "true and fair view override" provisions as - (a) Company directors will not make a decision to use the provisions lightly because they are obliged to present accounts in the format specified by CO and would face heavy criminal liability for non-compliance; and (b) Even if company directors consider it necessary to use the provisions, it is questionable whether the company's auditor could be persuaded to endorse such departure from the requirements of CO. (LC Paper No. CB(1)465/04-05(01))	as to the matters to be included in company's accounts are subject to this "true and fair view override". To further extend the scope of the "true and fair view override" to any other sections in the CO will unnecessarily allow a much larger room for discretion beyond which is strictly required in relation to form and content of the accounts (i.e. Tenth Schedule) and other CO requirements as to the matters to be included in a company's accounts or group accounts. In this light, we consider that the current proposal, which is modelled on the UK Companies Act 1985, has provided an appropriate ring-fence for the "true and fair view override" provisions. Moreover, we will like to point out that that, as far as we are aware, no problem has arisen from the operation of the relevant provisions in the UK. The general requirement to present accounts giving a true and fair view has always been the objective of financial reporting, notwithstanding that the existing CO does not expressly require companies to disclose additional information or depart from the requirements of CO to give a "true and fair view". Section 123(3) of the existing CO

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		states that "(s)ave as expressly provided in the following provisions of this section or in Part III of the Tenth Schedule, the requirements of subsection (2) and the said Schedule shall be without prejudice either to the general requirements of subsection (1) or to any other requirements of this Ordinance". Thus, where compliance with the Tenth Schedule does not give a true and fair view of the company's state of affairs, the company accounts should, say, disclose additional information as may be necessary to fulfill the "true and fair view" requirement in section 123(1). We consider that the proposed express "true and fair view override" provisions will enhance the transparency of financial reporting hence providing further guidance to company directors in order to discharge their duties of preparing accounts that give a true and fair view. We have to stress that the "true and fair view override" provisions are not simply about "departure", but also "disclosure". When the provisions are used, additional information as may be necessary to give the true and fair view, and reasons for and

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		particulars and effects of such departure have to be disclosed to facilitate users of the accounts to assess the implications therefor. HKMCL has rightly pointed out that this provision is not intended to be used easily in practice but only in very exceptional and unforeseen circumstances with strong justification. This position is similar to that under the UK Companies Act 1985. As accounts are also subject to audits by auditors who have a statutory duty to state whether in the auditors' opinion the accounts has been properly prepared and whether in their opinion a true and fair view is given, this will provide sufficient and necessary "check and balance" to avoid abuses. (LC Paper No. CB(1)465/04-05(03))
Clause 4 (section 124 of CO)	Lam & Co points out that the two conditions for exclusion of a subsidiary from the group accounts set out in the proposed new subsections (2A)(a) and (b) of section 124 are different from those provided in Hong Kong Accounting Standards (HKAS) 27. (LC Paper No. CB(1)465/04-05(01))	The proposed section 124(2A)(a) is modelled on the existing section 229(3)(a) of the UK Companies Act 1985. However, we note that the International Accounting Standards Board (IASB) had decided to remove this condition from the latest IAS 27 "Consolidated and Separate Financial Statements" which was promulgated in

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	ACCA points out that the condition for exclusion set out in the proposed new subsection (2A)(a) of section 124 has been removed from the International Accounting Standards (IASs). It considers that the scope of the proposed new subsection (2A)(b) is less clear then that under IASs. (LC Paper No. CB(1)465/04-05(01))	December 2003, as the Board considered that such circumstances might not preclude control over a subsidiary. In the light of the latest development, we would consider proposing a CSA to withdraw this proposed provision from the Bill. (LC Paper No. CB(1)453/04-05(14)) The proposed section 124(2A)(b) is modelled on the previous section 229(3)(c) of the UK Companies Act 1985, which has recently been amended by the Companies Act 1985 (International Accounting Standards and Other Accounting Amendments) Regulations 2004 in November 2004. We would review this provision and consider proposing a CSA if necessary, in the light of the latest legislative change in the UK. (LC Paper No. CB(1)453/04-05(14)) We agree to review clause 4 of the Bill (containing the proposed sections 124(2A)(a) and 124(2A)(b)), alongside the existing section 124(2) of CO, in the light of the latest changes in IAS and latest legislative changes in the UK Companies Act 1985 regarding conditions for exclusion of subsidiaries from consolidation. The
	Law Soc considers that the condition for exclusion of a subsidiary from the group accounts set out in the proposed new subsection (2A)(a) of section 124 fails to identify who the decision-maker should be if such circumstances arise. The directors are given the right to form an opinion in relation to the exclusions listed in section 124(2). It would be clearer for the operation of section 124(2A)(a) if a similar right could be given to the directors. (LC Paper No. CB(1)465/04-05(01))	

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		Administration will propose CSAs for the Bills Committee's consideration. (LC Paper No. CB(1)668/04-05(03))
Clause 7 (section 128 of CO)	Law Soc notes that under the proposed amended section 128(1)(b), particulars to be shown in the group accounts in respect of a subsidiary include the country in which it is incorporated or established. There may not be a readily identifiable jurisdiction in which an undertaking is considered to have been established. It would be more meaningful to require the disclosure of the country in which the undertaking carries on business. (LC Paper No. CB(1)465/04-05(01))	With respect to the proposed amendment to section 128(1)(b), we note Law Soc's suggestion that there may be difficulties to identify the place where the incorporated undertaking is established and that it is more meaningful to require the disclosure of the place in which the undertaking carries on business. In this regard, we will consider proposing a CSA to require, by modelling on paragraphs 1(3) and 15(3) of Schedule 5 to the UK Companies Act 1985, the disclosure of the "address of its principal place of business", instead of the "country in which it is established", if the subsidiary is unincorporated. (LC Paper No. CB(1)681/04-05(02))
	Law Soc notes that under section 128(1)(c) and (d), information about the nature and quantity of shares held in the subsidiary is required to be disclosed. The term "shares" is given an extended meaning in section 1(1) of the proposed 23rd Schedule to catch unincorporated bodies. Even if the extended definition of "shares" is applied to section 128(1)(c) and (d), it is still not clear on the extent and nature of information that is required to be disclosed in respect of an	In relation to sections 128(c) and (d) of CO, the reference to "shares" shall, pursuant to the proposed section 2B of the Ordinance, be construed in accordance with the proposed 23rd Schedule. The definition of "shares" in section 1 to the 23rd Schedule, modelled on section 259(2) of the UK Companies Act 1985, has provided

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	unincorporated body in terms of ownership. (LC Paper No. CB(1)465/04-05(01))	guidance on how the term "shares" should be interpreted in relation to an undertaking with a share capital, with capital in the form other than share capital, or without any capital. We also note that the same disclosure requirement as applied to both an incorporated and unincorporated body is stipulated in paragraphs 2 and 16 of Schedule 5 to the UK Act 1985. (LC Paper No. CB(1)681/04-05(02))
	The Legal Adviser to the Bills Committee suggests amendments to the Chinese text of the proposed subsection (2)(a) of section 128. (LC Paper No. CB(1)162/04-05(02))	The Chinese text of the proposed subsection follows the precedent of the existing subsection. We will review the Chinese text. (LC Paper No. CB(1)453/04-05(17))
Clause 13 (section 360(5) of CO)	Law Soc notes that under the proposed amended section 360(5) of CO, the Financial Secretary may, by order published in the Gazette, amend the 23rd Schedule. The Schedule is a substantive part of CO and is of no less importance than the main body of the Ordinance. Any change to the Schedule should require legislative oversight. (LC Paper No. CB(1)465/04-05(01))	The "order published in the Gazette" referred to in section 360(5), for the purpose of any proposed amendments to 23rd Schedule by the Financial Secretary, is subsidiary legislation, hence subject to the legislative scrutiny (including vetting by the Legislative Council). (LC Paper No. CB(1)681/04-05(02))

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Clause 18 (proposed 23rd Schedule to CO)	Section 1 of the proposed 23rd Schedule The Legal Adviser to the Bills Committee notes that section 1 of the proposed 23rd Schedule limits the scope of interpretation for the terms "parent company", "parent undertaking", "shares" and "undertaking" to "for the purposes of the provisions specified under section 2B(3) of this Ordinance and this Schedule". However, "shares" and "undertaking" are further defined to be "construed for the purposes of the provisions specified under section 2B(3) of this Ordinance" only. (LC Paper No. CB(1)162/04-05(02))	The policy intention is that the interpretation of the terms "shares" and "undertakings" should not only cover those provisions specified under the proposed section 2B(3) of the Ordinance but also the proposed 23rd Schedule to the Ordinance. We will consider further the need for a CSA to delete the rider qualifying the scope of application in relation to these two terms. (LC Paper No. CB(1)453/04-05(17))
	Section 1 of the proposed 23rd Schedule Members consider it unclear from the present drafting of the provision whether the proposed definition of "undertaking" is intended to cover "an individual". (LC Paper No. CB(1)825/04-05(01))	The definition of "undertaking" is not intended to cover "an individual". To put the provision beyond doubt, we intend to propose a CSA to change the term "unincorporated body" in the definition to "unincorporated association", and qualify the scope of the definition by amending the word "includes" to "means". (LC Paper No. CB(1)825/04-05(02))
	Section 1 of the proposed 23rd Schedule AIA(HK) considers it unnecessary to introduce a definition for the term "undertaking" in section 1 of the proposed 23rd Schedule. The proposed definition includes a body corporate, a partnership, and an unincorporated body carrying on a trade or business. These are not separate and distinct legal entities. If a company becomes a member or a partner	Section 2(4) of CO excludes a partnership or an unincorporated body from becoming a "subsidiary" of a company, even though the company may have control of the majority of the voting power or the composition of the board of directors of the partnership or unincorporated body. Our proposed

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	in such undertakings in its own name, the undertakings are legally part of the company. If a company is involved in such undertakings through a nominee, the legal status is the same unless the beneficial interest of the company is deliberately concealed with fraudulent intentions. The proposed amendment remains ineffective if an undisclosed nominee or trustee is imposed between the company and the undertaking, similar to undisclosed nominee or trustee of shares in another company. (LC Paper No. CB(1)465/04-05(01))	amendment in the Bill will extend the scope of the "subsidiary" to a partnership or an unincorporated body such that the accounts of the partnership or unincorporated body will be consolidated in the group accounts, when control is evident in the investment or interest of a company in a partnership or an unincorporated body. This proposal is drawn up with reference to section 259(1) of the UK Act. IAS 27 also defines a subsidiary as "an entity, including an unincorporated entity such as a partnership that is controlled by another entity". (LC Paper No. CB(1)465/04-05(02))
	<u>Section 2 of the proposed 23rd Schedule</u> ACCA considers that there are inconsistencies in the wording regarding the determination of the existence of a parent/subsidiary relationship between section 2 of the proposed 23rd Schedule and IAS 27, as follows: (a) In determining whether control by a parent undertaking exists, IAS 27 refers to the power of governing the financial and operating policies of an entity; and (b) Under section 2(1)(c) of the proposed 23rd Schedule, the scope of such power is extended to having a "dominant influence over the subsidiary undertaking".	We have made reference to the UK Companies Act 1985 in preparing the legislative provisions. The expression "the right to exercise dominant influence" in section 2(1)(c) of the proposed 23rd Schedule is defined in section 5(a) under the same proposed Schedule as "a right to give directions with respect to the operating and financial policies of" the subsidiary undertaking. This is modelled on paragraph 4(1) of Schedule 10A to the UK Companies Act 1985. We consider that the current drafting is sufficient in reflecting our intention to align the definition of

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	(LC Paper No. CB(1)465/04-05(01))	"subsidiary" in CO more closely with IAS 27. (LC Paper No. CB(1)453/04-05(14))
	<u>Sections 2(1)(c) and 5 of the proposed 23rd Schedule</u> Linkelaters notes that under sections 2(1)(c) and 5 of the proposed 23rd Schedule, parent/subsidiary relationship is determined through the rights to exercise a "dominant influence" over another undertaking by virtue of the provisions contained in the undertaking's constitutional documents or a "control contract". There are two points of concern: (a) It is important to clarify whether more than one entity can exercise "dominant influence" over another undertaking in the Hong Kong context, e.g. through joint control; (b) Control contracts do not appear to be common in Hong Kong. They are more relevant to European companies (e.g. Germany companies) where entering into control contracts with subsidiaries is prevalent. It seems that the meaning of "control contract" under the Hong Kong provisions needs to be specifically considered. (LC Paper No. CB(1)465/04-05(01))	Only one undertaking can have dominant influence or control over another undertaking under IAS / HKAS 27. It is a question of fact to determine which undertaking ultimately has a dominant influence over another. If two undertakings concurrently but independently exert influence or control over another undertaking but each fails to demonstrate that it is a parent undertaking under the test for the "parent-subsidiary" relationship under the CO or IAS / HKAS 27, the two undertakings will be regarded as having a joint control over what the financial reporting standards call the "jointly controlled entity" (i.e. not "subsidiary"). An undertaking having a joint control together with others over a "jointly controlled entity" does not need to prepare group accounts, as the undertaking cannot satisfy any of the tests (including the "dominant influence" test) which determines "parent-subsidiary" relationship under the CO and IAS / HKAS 27.

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		In determining whether or not an undertaking is a subsidiary undertaking in relation to another undertaking under the existing provisions of CO and the proposed 23rd Schedule, the subsidiary undertaking's place of incorporation, formation or registration is not relevant. Even though "control contracts" may not appear to be very common in Hong Kong, it can still be relevant in certain cases to identify the source document providing for the right to exercise a dominant influence over the subsidiary undertaking. We consider that sections 2(1)(c)(ii) and 5(b) of the proposed 23rd Schedule, modelled on section 258(2)(c) of the UK Companies Act 1985 and section 4(2) of Schedule 10A to the same Act, adequately reflect our policy intent. (LC Paper No. CB(1)681/04-05(02))
	Section 5(b)(ii) of the proposed 23rd Schedule Law Soc notes that "control contract" is defined in section 5(b)(ii) of the proposed 23rd Schedule as "a contract in writing conferring a right which is permitted by the law under which that undertaking is established". There are two points of concern:	The definition of "control contract" in section 5(b) of the proposed 23rd Schedule is modelled on section 4(2) of Schedule 10A to the UK Act. Although it is possible that an unincorporated body or a partnership may not be invariably established in the place where it operates, it should be noted

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	(a) There may not be a readily identifiable jurisdiction in which the undertaking is considered to have been established. Take partnership as an example, it is formed by contract and does not require registration to come into existence. A partnership may have a presence in one or more jurisdictions in which it carries on business, but it cannot be said that in every case the partnership is established in the jurisdiction where it operates; and (b) The law under which the undertaking is established may be silent on whether a control contract is permissible. On the other hand, the law does not prohibit the entering into of such contracts. The use of the word "recognized" could perhaps clarify the intention of the provision. (LC Paper No. CB(1)465/04-05(01))	that section 5(b)(ii) refers to the "the law under which that undertaking is established" but not "the law of the place where that undertaking is established". Therefore, the crux of the issue is how we ascertain the governing law of the constitutional document in relation to the establishment of the undertaking (for example, a partnership agreement). Usually, such a document will contain a governing law clause. If so, "the law under which that undertaking is established" will be the governing law as expressly provided in the document. If there is no express governing law clause, there will be legal rules governing the law that should apply. For example, in the case of a partnership, where the partners are all domiciled in Hong Kong, it is likely that the partnership agreement will be governed by the laws of Hong Kong. Where the partners are domiciled in different jurisdictions, there are rules in private international law to determine the governing law of the partnership agreement. The Law Society suggests using the word "recognized", instead of "permitted", in the phrase "(a contract in writing conferring a right which is) permitted by the law under

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		which that undertaking is established" in section 5(b)(ii) of the proposed 23rd Schedule. We consider that the original wording "permitted" has sufficiently reflected our intent, i.e. that which is not prohibited by law is permitted. If it is considered that the clarity of the current drafting should be enhanced, substituting the word "recognized" will not help clarify the uncertainty, if any. Therefore, we are of the view that there is no need to change the original wording which is modelled on the UK Act. (LC Paper No. CB(1)681/04-05(02))
	Section 2(3) of the proposed 23rd Schedule Members request the Administration to clarify the policy intent of section 2(3) and consider the need to improve the drafting to reflect the policy intent. (LC Paper No. CB(1)825/04-05(01))	We intend to propose a CSA to recast the drafting of section 2(3) as follows: "An undertaking shall be treated as the parent undertaking of another undertaking if a subsidiary undertaking of the first-mentioned undertaking is, or is to be treated as, the parent undertaking of that other undertaking; and references to a subsidiary undertaking of the first-mentioned undertaking shall be construed accordingly." (LC Paper No. CB(1)825/04-05(02))

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	Section 2 of the proposed 23rd Schedule The Legal Adviser to the Bills Committee points out that while the term "voting rights" held by a parent undertaking in a subsidiary undertaking which is not a body corporate is defined in section 3(1) of the 23rd Schedule, "voting power" held by a parent undertaking in a subsidiary undertaking which is a body corporate is not defined. She suggests that the meaning of "voting power" referred to in section 2(4) of the Ordinance be defined. (LC Paper No. CB(1)162/04-05(02))	The term "voting power" is referred to in the existing section 2(4) of CO. While the Ordinance does not have an express definition for the term, its meaning is widely understood and we are not aware of any problems arising from its interpretation. Moreover, section 2(6) provides for the circumstances in which the power in question should or should not be treated as exercisable by the parent company in question. As such, we see no apparent need to add in the Ordinance a definition for this term. (LC Paper No. CB(1)453/04-05(17))
	Section 3(3) of the proposed 23rd Schedule Members consider the provision unclear and seek clarification from the Administration on the purposes and operation of the provision. (LC Paper No. CB(1)825/04-05(01), CB(1)1077/04-05(01) and CB(1)1207/04-05(03)) Law Soc considers that the objective or intended effect of section 3(3) is not at all apparent. (LC Paper No. CB(1)465/04-05(01))	Section 3(3) was modelled on paragraph 10 of Schedule 10A to the UK Companies Act 1985. The hitherto intention was to cater for a situation where a subsidiary undertaking, vis-à-vis other right holders, acquired voting rights in itself. We believed then that this meant the case when the subsidiary undertaking held certain voting rights in the parent undertaking, hence indirectly holding voting rights in itself. After further research, it looks that paragraph 10 of Schedule 10A to the UK

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		Act should be read as applying to voting rights in an undertaking held by the same undertaking itself. We have been advised that the relevant UK provision is not taken to apply to a cross-shareholding scenario between parent and subsidiary undertakings, but shall apply to such a company with the result that rights held by the company itself shall be reduced for the purpose of determining the "parent and subsidiary" relationship. In Hong Kong, a company cannot be a member of itself except where statute otherwise provided. Even sections 49A and 49B of the CO permitted a company to redeem or purchase its own shares, such shares have to be cancelled on redemption or purchase. Consequently, voting rights in respect of theses shares would be extinguished. We are not aware of any real life situation where a subsidiary undertaking which is not a body corporate holds voting rights in the same undertaking itself. Moreover, the existing tests of determining parent and subsidiary relationship of two companies under section 2(4) to (7) of the CO do not contain a reduction rule of voting rights equivalent to section 3(3) of the

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		proposed 23rd Schedule. Hence, section 3(3) of the proposed 23rd Schedule appeares to have little relevance in Hong Kong. In view of the above considerations, we will consider proposing a CSA to remove section 3(3) from the proposed 23rd Schedule. (LC Paper Nos. CB(1)1077/04-05(02) and CB(1)1207/04-05(04))
	Consequential amendments after the proposed deletion of section 3(3) from the proposed 23rd Schedule The Legal Adviser to the Bills Committee suggests that the Administration should consider the need of introducing any consequential amendments, such as amendment(s) to section 7(b) of the proposed 23rd Schedule. (LC Paper No. CB(1)1353/04-05(01))	The Administration has undertaken to review the need of introducing consequential amendments.
	Section 7 of the proposed 23rd Schedule The Legal Adviser to the Bills Committee notes that section 7 of the 23rd Schedule stipulates that for the purposes of this Schedule, rights shall be treated as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence. The Chinese text of "the rights exercisable with his concurrence" is "有關權利只可與另一人共同行使的情況下行使". The Administration is requested to clarify whether these rights are legal rights jointly exercisable by both parties; if yes, whether the two	Our intention is that the word "concurrence" in section 7(c) of the 23rd Schedule, when taken together with the pronoun "his", shall convey the first meaning (i.e. his agreement). We will review the Chinese text of that provision to reflect the policy intent. (LC Paper No. CB(1)453/04-05(17))

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	parties are the joint legal owners of the shares. (LC Paper No. CB(1)162/04-05(02))	
Clause 20 (Consequential amendments)	<u>The Specification of Public Offices (Cap. 1, sub. leg. C)</u> The Legal Adviser to the Bills Committee points out that "Financial Secretary" is not mentioned in section 126(2) of CO and suggests that the reference to the section be deleted. (LC Paper No. CB(1)162/04-05(02))	We will consider proposing a CSA to this effect. (LC Paper No. CB(1)453/04-05(17))
General issues	<u>Impact of the Bill on the development of the asset-securitization market in Hong Kong</u> HKMCL, HKCMA and a number of industry players have expressed grave concern about the possible negative impact of the Bill on the development of the asset-securitization market in Hong Kong. There are three proposed options: (a) To provide a carve-out for securitization special purpose entitles (SPEs) similar to the concept of the Qualifying SPEs (QSPEs) available under US accounting rules; (b) To allow the UK's "link-presentation" format for company group accounts; and (c) To defer the Bill until IASB has completed the review of "control" model for subsidiaries.	The Bill aims at enhancing the quality of financial reporting of companies which will promote the transparency, integrity and efficiency of the financial market and business environment in Hong Kong. The Bill will not have negative impact on the development of the asset-securitization market in Hong Kong. We consider that any proposed carve-out would lead to an inconsistent approach in preparation of group accounts among companies incorporated in Hong Kong and otherwise. No other jurisdictions following IFRS have adopted a carve-out in relation to the securitization industry. The concept of QSPEs under the US accounting standards has been questioned in

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		the wake of Enron. The "link-presentation" method is a concept unique to the UK. In fact, starting from 2005, all listed companies in the UK are required to abandon this method when preparing their group accounts. IASB recommends against any carve-out. We do not consider it appropriate to withhold the Bill given that the "control-based" definition of "subsidiary" proposed in the Bill has been adopted by IASB since 1990 and were adopted by many jurisdictions following IFRS in their company laws / accounting standards since the last decade. As far as we are aware, this definition of "subsidiary" for the purpose of group accounts has run well in these jurisdictions over these years. According to its most recent deliberation of the matter in November 2004 and quite contrary to HKMC's submission, IASB has repeatedly affirmed the intention that "the consolidation principles it develops will apply to all entities including SPEs". Given that IASB has reaffirmed this approach on many occasions before and most recently, we see it unnecessary to defer the Bill. (LC Paper Nos. CB(1)668/04-05(03),

Clause no./ Section no.	Issues of concern	Administration's responses/ proposed amendments
		CB(1)938/04-05(09) and CB(1)1207/04-05(02))
Other suggestions related to the Bill	AIA(HK) considers that the Administration should review section 266 of CO and section 50 of the Bankruptcy Ordinance, which is also related to the holding company and subsidiary, so as to plug the potential loopholes. (LC Paper No. CB(1)465/04-05(01))	The issue is outside the purpose of this Bill. We will review the matter in future amendment exercises of the concerned Ordinances. (LC Paper No. CB(1)465/04-05(02))

Council Business Division 1
Legislative Council Secretariat
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