

**立法會**  
**Legislative Council**

LC Paper No. CB(1)2014/04-05  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/5/04

**Bills Committee on Banking (Amendment) Bill 2005**

**Meeting on**  
**Thursday, 19 May 2005, at 8:30 am**  
**in Conference Room A of the Legislative Council Building**

**Members present** : Hon Jeffrey LAM Kin-fung, SBS, JP (Chairman)  
Hon CHAN Kam-lam, JP  
Hon SIN Chung-kai, JP  
Hon Andrew LEUNG Kwan-yuen, SBS, JP  
Hon Ronny TONG Ka-wah, SC

**Members absent** : Hon Bernard CHAN, JP (Deputy Chairman)  
Dr Hon David LI Kwok-po, GBS, JP

**Public Officers** : Mr William RYBACK  
**Attending** Deputy Chief Executive  
Hong Kong Monetary Authority

Mr Simon TOPPING  
Executive Director (Banking Policy)  
Hong Kong Monetary Authority

Mrs Clarie LO  
Deputy Secretary for Financial Services and the Treasury  
(Financial Services)

Mrs Millie NG  
Principal Assistant Secretary for Financial Services and the  
Treasury (Financial Services)

Mr Jonothan ABBOTT  
Senior Assistant Law Draftsman  
Department of Justice

Mr Sunny CHAN  
Senior Government Counsel  
Department of Justice

**Clerk in attendance** : Mr Andy LAU  
Chief Council Secretary (1)2

**Staff in attendance** : Mr KAU Kin-wah  
Assistant Legal Adviser 6

Ms Anita SIT  
Senior Council Secretary (1)9

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**I Confirmation of minutes and matters arising**  
(LC Paper No. CB(1)1508/04-05 - Minutes of meeting held on 27 April 2005)

The minutes of the meeting held on 27 April 2005 were confirmed.

**II Meeting with the Administration**  
(LC Paper No. CB(1)1545/04-05(01) - List of issues requiring follow-up actions by the Administration (position as at 17 May 2005) prepared by the Secretariat  
LC Paper No. CB(1)1545/04-05(02) - Information paper on "Proposal of Establishing a New Appeals Mechanism under the Bill" provided by the Administration  
LC Paper No. CB(1)1545/04-05(03) - Information paper on "Proposed Amendments Relating to Liability of Managers of Authorized Institutions" provided by the Administration)  
— the Bill;  
— Marked-up copy of the Bill (LC Paper No. CB(1)1373/04-05(01)).

2. The Bills Committee deliberated (index of proceedings attached at **Annex A**).

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Proposal of establishing a new appeals mechanism under the Bill

3. Regarding members' suggestion made at the last meeting that a new appeals mechanism should be established to handle the appeals pertinent to the exercise of powers conferred on the Monetary Authority (MA) by the proposed amendments under the Bill, the Bills Committee noted the Administration's position that in view of the technical nature of appeals under the rules to be prescribed under proposed section 98A, the Administration was prepared to pursue the proposal of establishing a tribunal that would review certain decisions of MA under the Capital Rules (the tribunal proposal).

4. The Hong Kong Monetary Authority (HKMA) advised that in its preliminary consultation with the banking industry on the tribunal proposal, certain issues had been raised including whether the hearings of the tribunal should be held in public or in camera, whether the tribunal's determinations could override the directions of MA, who should bear the costs for the operation of the tribunal, etc. HKMA found that it might need more time to examine relevant legal issues and to conduct a full consultation with the industry on the tribunal proposal. Whilst HKMA would proceed earnestly with the tribunal proposal, it might not be able to complete the work on the tribunal proposal within the present time frame of the Bill (i.e. within the current legislative session).

5. With regard to the time frame of the Bill, HKMA explained that major international banking groups were expected to implement Basel II globally with effect from 1 January 2007, in accordance with the timetable set by the Basel Committee on Banking Supervision (BCBS). Those banks with a presence in Hong Kong would naturally expect to be able to use the Basel II approaches in their operations in Hong Kong. It was therefore important that Hong Kong implement Basel II at the same time as the BCBS members. It was also important to allow some time for banks to get themselves prepared, such as making necessary changes to their systems, for implementation of Basel II. To this end, it was preferable to have the Capital Rules in place in the first half of 2006. The Capital Rules, as proposed in the Bill, would be subsidiary legislation subject to negative vetting of the Legislative Council, and HKMA would consult the banking industry in the course of drafting the Capital Rules. The enactment of the Bill would provide certainty on the legal framework for adopting the revised capital standards based on which the Capital Rules were to be drafted. If the Bill could not be enacted within the current legislative session, the work on the Capital Rules would be deferred correspondingly.

6. Mr SIN Chung-kai reiterated his view that the existing appeals mechanism whereby appeals against MA's decisions were to be made to the Chief Executive in Council was not a practicable one, and he believed this was the main reason that the appeals mechanism had not been used by authorized institutions (AIs) in the past 10 years or so. He considered that the proposed tribunal to review certain decisions of MA made under the Capital Rules should be in place before or at the same time as the implementation of Basel II in Hong Kong. He therefore suggested that if the tribunal proposal could not be taken on board in the context of the current Bill, the Administration should introduce the relevant legislative proposal together with the

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subsidiary legislation to provide for the commencement of operation of the provisions pertinent to Basel II.

7. Mr Ronny TONG opined that as the present proposal was simply to establish an independent tribunal to replace the Chief Executive in Council as the body to handle appeals, and members did not propose vigorous changes to the procedures and practices of the existing appeals mechanism, it might not be difficult to resolve the issues raised on the new appeals mechanism as mentioned by HKMA. Mr TONG also questioned the need to rush through the current Bill given that Basel II would not be implemented until January 2007. On HKMA's concern that the certainty about the legal framework provided for in the Bill was a pre-requisite for the drafting of the Capital Rules, he considered that as soon as the Bills Committee had come to a view that it was in principle supportive of the proposed provisions empowering MA to make Capital Rules and the rules regarding the disclosure of information by AIs, HKMA could proceed with the rules drafting work without awaiting the enactment of the Bill.

8. HKMA clarified that it was still HKMA's intention to complete the consultation on the tribunal proposal and put up the relevant draft Committee Stage Amendments (CSAs) to the Bills Committee for consideration. However, it had to draw members' attention to the fact that certain issues had been raised by the banking industry and thus HKMA might need more time to complete a full consultation with the industry and to examine the relevant legal issues. Since it was important for the Bill to be enacted as soon as possible to provide the necessary framework for the rules drafting work, HKMA would like to seek members' agreement that if necessary, the tribunal proposal be incorporated into the next Banking (Amendment) Bill, which might be introduced into the Legislative Council in one to two years' time, and thus it might still be possible to put in place the tribunal before or at the same time as the implementation of Basel II in January 2007.

9. Mr CHAN Kam-lam considered that the tribunal proposal could be dealt with separately from the Bill. As the new appeals mechanism might have wide and long term implications on the industry, it was necessary to thoroughly examine the relevant issues and to conduct a thorough consultation with the industry on the proposal.

10. The Chairman concluded that the Bills Committee was supportive of the proposal in principle and the Administration and HKMA should put up the details of the proposal to the Legislative Council as soon as possible.

### Clause 2 – Section substituted

*Proposed section 60A – Disclosure to the general public of information relating to financial affairs*

11. Referring to proposed section 60A(4), Mr Ronny TONG questioned the appropriateness of the provision as based on the current drafting, even for a minor technical breach by an AI of any requirement applicable to it contained in rules made under proposed section 60A(1), every director, every chief executive and every manager of the AI would commit an offence and would thus be subject to criminal prosecution.

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In reply to his enquiry about the actions MA would probably take in the case of a breach of the rules made under proposed section 60A(1), HKMA advised that in the BO, apart from criminal prosecution, there were a full range of alternative actions that MA could take in respect of a contravention of a provision of BO on the part of an AI. As the primary regulatory objective of MA was to ensure stability of the banking system, MA's primary concern was to address the relevant problem arisen in the first place. To this end, MA would probably use moral suasion in the first instance and this could be reinforced by exercising the power under section 52 of the BO. Proposed section 60A(4) imposed a strict liability on certain personnel of AIs and there were other similar provisions existed in the BO. Depending on the circumstances of the case, criminal prosecution against the personnel of the AI concerned might not be initiated, but this was a matter for the Department of Justice, not the HKMA.

12. Taking note of HKMA's advice that there were a range of alternative actions that MA might take in respect of a breach of a provision in the BO, Mr Ronny TONG considered that the current drafting of proposed section 60A(4) might not be appropriate and it might be preferable or necessary to qualify the proposed provision to reflect the actual regulatory practice of MA. To assist members to further deliberate the matter, ALA6 was requested to provide a paper on what MA might, apart from criminal prosecution, do in respect of non-compliance with the provisions of the BO.

*(Post-meeting note: English version of the paper on "Powers exercisable by the Monetary Authority in respect of non-compliance with the provisions of the Banking Ordinance on the part of authorized institutions" prepared by Legal Service Division of the Legislative Council Secretariat (LC Paper No. LS70/04-05) was issued on 23 May 2005.)*

### **III Any other business**

#### Date of next two meetings

13. The Bills Committee agreed that in addition to the meeting scheduled for 2 June 2005, at 8:30 am, an additional meeting should be held on 24 May 2005 at 4:30 pm.

14. The Bills Committee noted that the Hong Kong Association of Banks and the Hong Kong Institute of Certified Public Accountants had requested that the deadline for their submission of views be extended to 23 May 2005.

15. There being no other business, the meeting ended at 10:30 am.

**Proceedings of the meeting of Bills Committee on  
Banking (Amendment) Bill 2005  
Thursday, 19 May 2005, at 8:30 am  
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
<i>Agenda Item I – Confirmation of minutes and matters arising</i>			
001232 – 001544	Chairman	Confirmation of minutes of the meeting held on 27 April 2005 (LC Paper No. CB(1)1508/04-05)	
<i>Agenda Item II – Meeting with the Administration</i>			
001545 – 002085	Administration HKMA	<ul style="list-style-type: none"> <li>- Briefing by the Administration on the information papers on “Proposal of Establishing a New Appeals Mechanism under the Bill” (LC Paper No. CB(1)1545/03-04-05(02)) and “Proposed Amendments Relating to Liability of Managers of Authorized Institutions” (LC Paper No. CB(1)1545/04-05(03))</li> <li>- HKMA’s explanation on the need for more time to conduct a full consultation on the tribunal proposal and to consider relevant legal issues</li> </ul>	
002086 – 002485	Mr SIN Chung-kai HKMA	<ul style="list-style-type: none"> <li>- Mr SIN’s enquiry about the timing and the scope of the tribunal proposal should it not be pursued in the context of this Bill and HKMA’s response</li> </ul>	
002486 – 003350	Mr Ronny TONG HKMA	<ul style="list-style-type: none"> <li>- Mr TONG’s view on the suggestion that the tribunal proposal be pursued separately from the Bill</li> <li>- Mr TONG’s enquiry about the timetable for the work including the enactment of the Bill and the relevant rules for implementation of Basel II in January 2007 and HKMA’s advice</li> <li>- Mr TONG’s enquiry about the number of appeal cases under the BO handled by the Chief Executive in Council in the past 10 years and HKMA’s advice that there was none</li> <li>- HKMA’s explanation on the need to enact the Bill as soon as possible, preferably within this legislative session</li> </ul>	

Time marker	Speaker	Subject(s)	Action required
003351 – 004766	Chairman Mr SIN Chung-kai Mr Ronny TONG Mr CHAN Kam-lam HKMA Administration	- Further discussion on whether the tribunal proposal should be dealt with separately from the Bill if the consultation and other relevant work on the proposal could not be completed within the current time frame of the Bill	
004767 – 005141	HKMA Mr SIN Chung-kai Admin	<p><b>Clause-by-Clause examination of the Bill</b></p> <ul style="list-style-type: none"> <li>- Members’ agreement to scrutinize the English version of the Bill first and ALA6 to follow up with the Administration on the drafting aspects of the Chinese version of the Bill</li> </ul> <p><u>Clause 1 – Short title and commencement</u> <i>Subsection (2)</i></p> <ul style="list-style-type: none"> <li>- The Administration’s confirmation that the gazette notice in respect of the day on which the future Amendment Ordinance shall come into operation would be subsidiary legislation subject to negative vetting of the Legislative Council</li> <li>- The Administration’s advice that the provisions in the future Amendment Ordinance might not come into operation in one-go but in phases taking into account relevant factors including the timetable set by the Basel Committee on Banking Supervision for implementation of the various elements of Basel II.</li> </ul>	
005142 – 005968	HKMA ALA6 Administration Mr SIN Chung-kai Chairman	<p><u>Clause 2 – Section substituted</u></p> <ul style="list-style-type: none"> <li>- ALA6’s advice that proposed sections 60A and 98A were general empowering provisions in that the rules to be made under these sections would not be confined to matters pertinent to the implementation of Basel II.</li> <li>- Interpretation of “manager” in the BO</li> </ul>	
005969 – 011359	Admin HKMA Mr CHAN Kam-lam Mr Ronny TONG Mr SIN Chung-kai ALA6	<p><u>Clause 3 – Capital adequacy ratio</u> <u>Clause 4 – Section added</u></p> <ul style="list-style-type: none"> <li>- In reply to Mr SIN’s enquiry regarding proposed section 98A(3), HKMA’s advice that the intention was to establish an internal procedure for handling requests for review of MA’s decisions. Before invoking the formal appeal procedure, an aggrieved person might apply to the Monetary</li> </ul>	

Time marker	Speaker	Subject(s)	Action required
		<p>Authority to review a decision made by MA under the Capital Rules. On receipt of such a request, a review committee constituted by officials in HKMA who were not directly involved in making the decision in question would be formed to review the decision. This procedure was in line with the normal approach adopted currently by MA for resolving matters with the banking industry. Hence, proposed section 98A(3) would formalize the existing informal procedure.</p> <ul style="list-style-type: none"> <li>- In reply to Mr TONG's enquiries, HKMA's advice that the existing provisions in BO did not empower MA to disclose information to the general public on whether it was making any investigation in respect of an AI and other details of the investigation. However, if a complaint was made to the MA regarding the merit or otherwise of a decision of MA, MA could disclose the information so long as the information did not include details with reference to particular AI(s).</li> </ul>	
011400 – 013442	Mr Ronny TONG HKMA ALA6 Administration Chairman	<p><u>Clause 2 – Section substituted</u></p> <ul style="list-style-type: none"> <li>- The effect of proposed section 60A(4) and the appropriateness of the current drafting of the provision</li> </ul>	ALA6 to provide a paper on the matter
013443 – 014255	Mr SIN Chung-kai HKMA ALA6 Administration	<p><u>Existing section 98(3)</u></p> <ul style="list-style-type: none"> <li>- In reply to Mr SIN's enquiry, the Administration's confirmation that the proposed amendment to section 98(1) would not in any way change the power of the Financial Secretary under existing section 98(3) to vary the percentage specified in section 98(1) which was 8 per cent at present. The proposed amendment to section 98(1) would only change the way as to how the 8 per cent should be calculated.</li> <li>- Mr SIN's query on the appropriateness of empowering the Financial Secretary to amend a provision in the principal ordinance by means of subsidiary legislation</li> <li>- HKMA's explanation on the historical background for existing section 98(3), the circumstances under which the Financial</li> </ul>	



Time marker	Speaker	Subject(s)	Action required
		<p>Secretary might need to vary the 8 per cent and hence the need to empower the Financial Secretary to amend the 8 per cent by notice in the gazette instead of by a Bill</p> <ul style="list-style-type: none"> <li>- ALA6’s advice that under common law, it was not appropriate to use subsidiary legislation to change the effect of a provision in the principal ordinance. In this case, the change that might be made under section 98(3) was confined to an adjustment to the percentage specified in section 98(1) and such adjustment would be different from a change in the effect of the principal ordinance. There was a provision of similar nature in the Securities and Futures Ordinance (Cap. 571) empowering the Chief Executive to amend a schedule of the Ordinance.</li> </ul>	
014256 – 014519	Admin	<p><u>Clause 5 – Monetary Authority may increase capital adequacy ratio for particular authorized institutions</u></p>	
014520 – 014029	Admin ALA6 HKMA	<p><b>Schedule of the Bill</b> <u>Section 1 – Interpretation</u></p> <ul style="list-style-type: none"> <li>- Regarding proposed definition of “capital adequacy ratio”, ALA6’s comment that it was not clear in the proposed definition as to how the “value” in the phrase “... means the ratio of the institution’s capital base to a value representing ...” would be arrived at and whether it was an abstract figure or a figure denominated in a currency. ALA’s request that the Administration consider refining the proposed definition to ensure clarity</li> <li>- HKMA’s advice that the term “value” was a risk factor in relation to different types of assets on the balance sheet of an AI. The proposed definition of “capital adequacy ratio” was arrived at after a lot of deliberation within HKMA and the Administration. Without a concrete suggestion, it was difficult to make further improvement to the proposed definition. Moreover, MA would make rules to prescribe the manner in which the capital adequacy ratio of AIs shall be calculated.</li> </ul>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
014030 – 014327	Chairman	- Date of next meeting	

Council Business Division 1  
Legislative Council Secretariat  
8 July 2005