

Bills Committee on Building Management (Amendment) Bill 2005

The Administration's response to Views of the Professional Bodies in the Building Management Sector

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
(1) Interpretation (clause 3)			
The Law Society of Hong Kong [CB(2)2149/04-05 (01)]	<u>Definition of "building"</u> (a) It has now become more common for deed of mutual covenants (DMCs) to provide for the common parts of an estate to be held by a manager on trust for all co-owners, but the definition in the Building Management Ordinance (BMO) does not seem to have catered for this situation.	(a) The definition of "building" should be amended by inserting after c(ii) - "(iii) is owned or held by the manager for the common use, enjoyment and benefit of the owners and occupiers of the flats in that building." (b) Consequential amendments should be made to the definition by deleting "or" after subsection c(i) and inserting "or" after subsection c(ii).	We consider that the existing definition of "building" in section 2 has already served the present purpose of the BMO. The common parts of a building [undivided shares of which are usually assigned to the manager as trustees for all owners (but not owned by the manager)] have already been covered in paragraph c(ii) of the definition. Under paragraph c(ii), "building" means "any other land (if any) which in relation to the appointment of an MC or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit (whether exclusively or otherwise) of the owners and occupiers of the flats in that building".
	<u>Definition of "convenor"</u> (b) To achieve consistency in drafting, the word "convenor" should be	(c) The proposed definition of "convenor" should be extended by inserting after	The proposed definition of "convenor" in section 2 is intended to be used only in relation to an owners' meeting convened under sections 3, 3A, 4 or 40C for the purpose of appointment

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>adopted in Schedule 8 of BMO to replace "the person or persons convening the meeting of the owners' committee".</p>	<p>(d) -</p> <p>"(e) in relation to a meeting of owners convened under paragraph 8 of Schedule 8, means the person appointed under paragraph 8(b)."</p> <p>(d) Consequential amendments should be made to the proposed definition of "convenor" by deleting "or" after subsection (c); and inserting "or" after subsection (d).</p>	<p>of an MC. It is not intended to apply to meetings referred to in Schedule 8. We consider that the proposed elaboration of the definition of "convenor" in section 2(1) by adding references to Schedule 8 is not necessary.</p>
	<p><u>Definition of "member"</u></p>	<p>(e) The proposed definition of "member" should take into account the Tenant's Representative who is appointed under section 15(1) of BMO.</p>	<p>Paragraph 1(d) of Schedule 2 provides that an MC shall include the tenants' representative. Paragraph 2(2) (and the new 5(2A)) of Schedule 2 already provides that the tenants' representative shall be deemed to be appointed by the owners as a member of the MC (or the new MC). The provisions clearly show that the tenants' representative is a member of the MC. The reference to a person "appointed as a member" of an MC in the definition of "member" in section 2 includes a person who is deemed to be so appointed.</p>
<p>The Hong Kong Institute of Architects</p>		<p>(f) The scope of the bill should cover public housing.</p>	<p>The BMO aims to facilitate the incorporation of owners of flats in buildings or groups of buildings to provide for their management and for matters incidental thereto or connected therewith. "Building" is defined in section 2 of the BMO. Any building which falls within the definition will be covered. As public housing estates are solely owned by the Housing Authority with no element of common ownership, it is unlikely</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
			<p>that they fall under the definition of "building". However, for those estates under the Tenants Purchase Scheme (TPS) and the Buy or Rent Option Scheme (BRO) of the Housing Authority where a DMC has been drawn up to set out the common ownership among owners, they should fall under the definition of "building". In practice, many of these estates have already formed an OC under the BMO.</p>
<p>(2) Appointment of a management committee (MC) (clauses 4 to 7, 19 and 36)</p>			
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]</p>	<p>(a) It supports the proposal of making it mandatory for the appointment of an MC to follow the procedures set out in BMO, rather than DMC.</p> <p>(b) There would be a growing important role of the vice-chairman of an MC in an owners corporation (OC) acting during the absence of the chairman of the MC in conducting business and activities relating to tendering exercise.</p>	<p>(a) The appointment of a vice-chairman should be retained.</p>	<p>The Bill proposes to allow owners to decide whether a vice-chairman should be appointed, regardless of whether the post is specified in the DMC.</p>
<p>The Hong Kong Housing Society [CB(2)2102/04-05 (02)]</p>	<p>(c) According to some court cases (<i>The Incorporated Owners of Tsuen Wan Garden v Prime Light Ltd</i> as an example), the</p>		<p>Given the practical problem of appointment to MCs under a "majority" voting system, we propose that the "first past the post" voting system should be adopted in the appointment of MC members – in other words, those who receive the highest number of votes will be appointed and there is no need to</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>appointment of individual MC members requires to be supported by over 50% of the votes of the owners. The proposed amended section 3(2) which clarifies that a resolution for the appointment of an MC must be passed by a majority of the votes of the owners and supported by the owners of not less than 30% of the shares in aggregate would prolong the voting process.</p> <p>(d) The Bill contains no provision to govern the ways of voting and it may lead to lawsuits.</p>		<p>obtain a 50% majority support at the owners' meeting. For details, please refer to LC Paper No. CB(2)2617/04-05(04) – <i>Interpretation of the Term "Majority"</i>.</p>
<p>The Law Society of Hong Kong [CB(2)2149/04-05 (01)]</p>	<p>Percentage of owners to convene meetings and quorum requirements</p> <p>(e) It was held in <i>U Wai Investment Co. Ltd & Anor v. Au Kok Tai & ors</i> [1997] 4 HKC 2000 that the requirement for the chairman of an MC under paragraph 1(2) of Schedule 3 to convene a general meeting of OC at the request of not less than "5% of the owners" means</p>	<p>(b) For the sake of clarifying that the majority of the owners means the majority of owners at a meeting, and not the majority of all the owners in a building, paragraph 3(3) of Schedule 3 should be amended to read -</p> <p>"Subject to section 10(1),</p>	<p>The interpretation of "5%" in paragraph 1(2) of Schedule 3 is in accordance with the court's ruling in LDBM 80/1997. This has been clearly elucidated in Schedule 11 to the BMO.</p> <p>In addition to having all resolutions passed by the majority of shares at an owners' meeting, it is also our policy intent that the meetings should be attended by a representative number of owners of the building. In other words, in addition to a requirement of a resolution, there should also be a quorum requirement for owners' meetings under the BMO.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>5% of the owners by reference to "the number of owners" and not "owners' shares". However, similar requirement in respect of the percentage of owners under the existing and proposed amended sections 3, 3A and 4 for an owners' meeting to be convened for the appointment of an MC is worked out by reference to shares of owners, not number of owners. Different treatment in various provisions in the same Ordinance will not only confuse the public, but also operate as a trap for the unwary.</p> <p>(f) It fails to appreciate the rationale behind for adopting 10%/20% of owners (by reference to the "number of owners" rather than "owners' shares") for determining the quorum of the meeting for the purpose of sections 3, 3A, 4, 40C, paragraphs 5(1)(a) & 5(1)(b) of Schedule 3 and paragraph 11 of Schedule 8. This requirement may create a strange result that</p>	<p>all matters arising at a meeting of the corporation at which a quorum is present shall be decided by majority of the votes of the owners voting either personally or by proxy <u>at such a meeting.</u>"</p> <p>(c) Similar amendments should be made to sections 3(2)(a), 3A(3), 4(4), 40C(3) and paragraph 2(1) of Schedule 2.</p> <p>(d) Paragraph 8(b) of Schedule 8 relating to the convening of a meeting of the owners should be amended along the line of the proposed amended section 3(1)(c) for the sake of consistency.</p>	<p>Paragraph 3(3) of Schedule 3 already refers to all matters arising at a meeting. We consider the proposed addition of the words "at such a meeting" redundant. The same applies to the amended sections 3(2)(a), 3A(3), 4(4), 40C(3) and paragraph 2(1) of Schedule 2.</p> <p>Clause 65(a) of the Bill has already proposed to amend paragraph 8(b) of Schedule 8 along the line of the amended section 3(1)(c).</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>owners holding the majority of undivided shares who have successfully procured a meeting to be convened can find that no resolution can be passed because of their failure to meet the quorum requirement of 10% owners (by reference to number of owners).</p> <p>(g) Proposed amended section 3(1)(c) seeks to clarify that a meeting of the owners to appoint an MC may be convened by "an owner appointed to convene such a meeting by the owners of not less than 5% of the shares in aggregate", rather than "the owners of not less than 5% of the shares".</p>		
	<p><u>Election of MC members</u></p> <p>(h) The meaning of "majority" of votes of owners was held by the Court of Appeal in <i>The Incorporated Owners of Tsuen Wan Garden v. Prime Light Ltd</i> CACV 1/04 [14/3/05] to mean a majority of over 50% of the votes cast. Whilst the case relates to a voting</p>	<p>(e) Consideration should be given to amend -</p> <p>(i) the proposed paragraph 2(1) of Schedule 2;</p> <p>(ii) the proposed amended section 3(2)(a);</p> <p>(iii) the existing section</p>	<p>Given the practical problem of appointment to MCs under a "majority" voting system, we propose that the "first past the post" voting system should be adopted in the appointment of MC members – in other words, those who receive the highest number of votes will be appointed and there is no need to obtain a 50% majority support. For details, please refer to LC Paper No. CB(2)2617/04-05(04) – <i>Interpretation of the Term "Majority"</i>.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>exercise under paragraph 3(3) of Schedule 3, the same principle should likewise apply to other resolutions requiring the majority of the votes of the owners.</p> <p>(i) In a meeting for the appointment of MC members, where there are several candidates contesting for a post (e.g. chairman), it is likely that no candidate will receive more than 50% of the votes. Indeed, there can be situations where no single member of MC receives over 50% of the votes. That is why in various election legislation (e.g. section 51(2) of the Legislative Council Ordinance; section 41(2) of the District Council Ordinance, and the Village Representative Election Ordinance), the expression "simple or relative majority" is adopted to indicate the winning majority of less than 50%.</p>	<p>3A(3);</p> <p>(iv) the existing section 4(4); and</p> <p>(v) the proposed amended section 40C(3) to adopt a "simple or relative majority" of votes for passage of the relevant resolutions.</p>	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
(3) Protection for MC members (clause 15)			
The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]	(a) It supports the proposal that MC members of an OC acting in good faith shall not be held personally liable for any act done or default made by or on behalf of the OC.	(a) The proposed exemption of liability should be cautioned against MC members who are acting <i>ultra virus</i> or with willful negligence.	Noted. Under the proposal, if an MC member is sued in his personal capacity, he may rely on the proposed new section 29A to defend against the claim only if his act was done in good faith (and in a reasonable manner, as discussed at the Bills Committee) on behalf of the OC for discharging statutory duties under the BMO.
Chartered Institute of Housing Asian Pacific Branch [CB(2)2139/04-05 (02)] The Hong Kong Housing Society [CB(2)2102/04-05 (02)] The Housing Managers Registration Board [CB(2)2102/04-05 (03)]	(b) Giving a blanket exemption of liabilities to MC members may encourage them to make unreasonable decisions against professional advice, causing losses to owners.	(b) MC members should be encouraged to make collective decisions which are neither tortious nor <i>ultra vires</i> in order to be exempted from liabilities. (c) The proposed exemption must be carefully defined against any abuses. (d) Government should issue guidelines to OCs and MC members in respect of fulfillment of various legal obligations relating to building maintenance and management. (e) At least one registered housing manager should be appointed for a large estate and OC of a single-block	Noted. Under the proposal, if an MC member is sued in his personal capacity, he may rely on the proposed new section 29A to defend against the claim only if his act was done in good faith (and in a reasonable manner, as discussed at the Bills Committee) on behalf of the OC for discharging statutory duties under the BMO. HAD has all along issued guidelines to OCs and MCs on the various legal requirements under the BMO. Upon enactment of the Bill, HAD will launch a publicity programme on the revised statutory requirements. Guidelines (including a layman's guide on the BMO) will be updated as appropriate.

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
		building should appoint a registered housing manager as its adviser.	
The Hong Kong Institute of Surveyors [CB(2)2102/04-05 (01) and CB(2)2169/04-05 (01)] The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05 (02)]	(c) "Acting in good faith" is a rather broad term and not self-explanatory in nature. The proposed exemption does not support good and responsible management philosophy. (d) MC members are in a similar position to the board of directors of a company and have clear duties to all the owners. They should be liable and accountable for the decisions they make as they have taken up the posts freely.	(f) The following solutions are suggested – (i) taking out a Directors and Officers Liability insurance coverage, similar to Professional Indemnity insurance; (ii) employing a professional manager; (iii) providing proper training for MC members; and (iv) advising all owners of the consequences and liabilities arising from the setting up of an OC.	Please refer to LC Paper No. CB(2)1885/04-05(02) – <i>Proposed New Section 29A – Protection of Members of Management Committee</i> for an elaboration of the term “good faith”. As discussed at the Bills Committee, we will require MC members to be acting in a reasonable manner (in addition to acting in good faith) in order to be able to invoke the indemnity provision. We understand some MCs have procured liability insurance cover similar to the professional indemnity insurance for their members. We consider that this should be a matter for the MC and OC to decide. If owners want to obtain such information, they could approach our Building Management Resource Centres. HAD has all along been providing training for MC members on all aspects relating to building management. The 18 District Offices have focused on providing training to new MC members while the four Building Management Resource Centres have focused on organizing more advanced courses for experienced MC members. Experience sharing sessions are also arranged from time to time for the MC members to share among themselves their experience in the work of OC.
The Law Society of Hong Kong [CB(2)2149/04-05 (01)]	(e) It welcomes the proposed new section 29A, but considers that the new section shall be supplemented by amendments to other sections.	(g) The Administration should clarify the policy intention behind section 45(4)(c) and review whether the provision which may enable legal proceedings to be conveniently commenced in	Having regard to the fact that an MC is not a legal entity having the right to sue, we propose to delete section 45(4)(c). While MCs will no longer be competent in commencing proceedings at the Lands Tribunal under section 45, this will not be prejudicial to the MC as the OC or individual members of the MC (either as “owner” under section 45(4)(a) or as “tenants’ representative” under section 45(4)(i)) may still sue

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>(f) Section 45(4)(c) specifically names the MC as a competent person to commence those legal proceedings specified in Schedule 10. In <i>The Incorporated Owners of Kwai Wan Industrial Building v. Kwai Fung Industrial Ltd</i> LDBM 208/2002 (17/2/05) and <i>4th MC of the Incorporated Owners of Hanley Villas v. 2nd MC of the Incorporated Owners of Hanley Villas & anor</i> LDBM 73/04 (03/08/2004), the Lands Tribunal, however, held that although section 45 provides that the MC shall be competent to commence legal proceedings, MC is not a legal entity but a group of natural persons, who are the office bearers of an OC.</p>	<p>the name of the MC is appropriate.</p>	<p>in its/their own capacity. Subject to the views of the Bills Committee, we will introduce Committee Stage Amendments as appropriate.</p>
	<p>(g) It was held in the case of <i>Wong Wai Chun v. Shing Sau Wan</i> CACV 174/04 [28/1/05] that in any litigation where an OC was an interested and necessary party in the sense that the</p>	<p>(h) A subsection (2A) should be inserted after the existing section 45(2) to reflect the necessity of the Joinder.</p>	<p>It is for the plaintiff to decide which party he wants to sue in a litigation. Furthermore, Order 15 rule 6(2)(b) of the Rules of the High Court (Cap.4A) has already provided that the court may either on its own motion or on application order any person (including any person who ought to have been joined as a party) to be added as a party. Pursuant to section 10 of the Lands Tribunal Ordinance (Cap.17), the Lands Tribunal can,</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>Lands Tribunal was asked to make orders that would affect the OC, OC should be made a party.</p>		<p>where appropriate, adopt the procedures of the High Court, including the above rule. It is thus not necessary to add a subsection as proposed.</p>
<p>(4) Qualifications of MC Members (clause 23)</p>			
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]</p>	<p>(a) It worries about the proposal of lifting the ban in BMO such that a person who has been sentenced to imprisonment, whether suspended or not, for three months or more without the option of a fine will not be disqualified from being a member of an MC after five years, given that many suspected corruption cases are related to the building management sector and OCs in particular.</p>	<p>(a) The current ban stipulated in BMO should be retained.</p>	<p>The proposed amendment is to make the requirements under the BMO in line with those under the Legislative Council Ordinance (Cap.542) and the District Councils Ordinance (Cap.547).</p>
<p>The Hong Kong Institute of Surveyors [CB(2)2102/04-05 (01) and CB(2)2169/04-05 (01)] The Real Estate Developers</p>		<p>(b) Any self declarations must include adequate disclosures to avoid any conflicts of interest.</p> <p>(c) Voting for owners who have not paid management fees should be blocked. Any owners not paying management fees should be</p>	<p>Our proposal is to introduce a self-declaration system such that each individual MC member has to make a statutory declaration that he complies with the qualifications required as an MC member. In practice, those who are not qualified to be an MC member should not be making any declaration at all and thus there should be no need for any disclosures to accompany the statutory declaration filed by qualified MC members. It must be noted that any person who submits a false declaration under the new section 7(3)(e) commits an offence under section 36 of the BMO.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
Association of Hong Kong [CB(2)2149/04-05 (02)]		barred from voting.	An owner of an undivided share in land on which there is a building is an owner of the building, whether he needs to pay management fees or not, and whether he pays management fees or not. It is the ownership of the undivided shares which grants him the voting rights, rather than the payment of the management fees associated with those shares. We consider it inappropriate to make such restrictions in the BMO.
The Law Society of Hong Kong [CB(2)2149/04-05 (01)]	(b) Paragraphs 4(1) and 4(2) of Schedule 2 do not provide for the retirement or disqualification of the secretary and treasurer of an MC who are not members of the MC.	(d) Similar qualification requirements as those imposed under paragraph 4(1) and 4(2) of Schedule 2 should apply to non-member secretary and treasurer of an MC, save that those of paragraph 4(2)(d)(da) and (e) of Schedule 2 may need necessary modifications. (e) Section 14(2) should be amended to include "any office bearer or" immediately before "any member" so that an OC may at any time by resolution remove non-member office-bearers. Similar amendments to the proposed new paragraph 4(3) of Schedule 2 and the proposed amended section 7(3)(e) should also be considered.	The new paragraph 2(3) of Schedule 2 stipulates clearly that the secretary and treasurer (who is not an MC member) will not by virtue of his appointment as the secretary or treasurer become an MC member. The requirements under the revised paragraphs 4(1) and 4(2) of Schedule 2 apply to MC members only, and therefore should not apply to them. In practice, the secretary and treasurer, if they are not members of the MC, may be employees of the manager or outside professionals. Their terms of appointment should be governed by contracts between them and the OC. We do not think it is necessary to impose further qualifications on them, if they are not MC members. As to retirement, the revised paragraph 5(1) of Schedule 2 stipulates clearly that the secretary and treasurer, even if they are not MC members, have to retire at the second annual general meeting of the OC and thereafter at every alternate annual general meeting. We have proposed in the Bill to delete the term "holders of office" as it has no other use in the BMO other than qualifying who should be eligible for allowances. We do not see the need to introduce another term "office bearer" in the BMO to cater for secretaries and treasurers who are non-MC members. As explained above, their terms of appointment should be governed by contracts between them and the OC.

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
		<p>(f) The proposed amended paragraph 4(1)(a) of Schedule 2 should be amended by substituting the word "that" for "the" immediately after "Bankruptcy Ordinance (Cap.6) with".</p>	<p>We do not consider that the proposed change from "the person's creditors" in the new paragraph 4(1)(a) of Schedule 2 to "that person's creditors" has any significant difference. Instead of making the proposed change, we propose to change "the person's creditors" to "his creditors" to tally with the use of "he" in the earlier part of the provision. We will introduce Committee Stage Amendments as appropriate.</p>
<p>(5) Appointment of proxy by owners (clauses 4-6, 19, 22, 24 and 29)</p>			
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]</p>	<p>(a) It supports the relevant proposals.</p>	<p>(a) The deadline for submission of proxy before an owners' meeting should be set in proportional to the size of the estate in order to allow adequate time for verification.</p> <p>(b) Standard requirements for proxy including the following, instead of a standard format, should be stipulated in BMO –</p> <p>(i) the date, time, venue, and resolution arranged to be voted at an annual general meeting (AGM) or an extraordinary general meeting (EGM) of an</p>	<p>We are open to suggestions on the statutory format of the proxy instrument. For the latest position, please refer to paragraphs 9 – 15 of LC Paper No. CB(2)2617/04-05(03) - <i>Matters Arising from Meeting on 12 July 2005 "Appointment of Proxy"</i>.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
		<p>OC;</p> <p>(ii) the date and time of the proxy certified by the manager or OC;</p> <p>(iii) the premises and the owners' undivided share stated in DMC;</p> <p>(iv) name(s) of owner(s) and the signature or joint signatures if it is jointly owned, or name of the owner and company chop and authorised signature of a person at directorate level if it is a corporate;</p> <p>(v) the authorised person's name and number of his Hong Kong Identify Card;</p> <p>(vi) the clear authorisation to attend and to vote, or to attend only at the meeting;</p> <p>(vii) the clear authorization to vote for a particular resolution, or all resolutions on the agenda; and</p> <p>(viii) the name and contact telephone number in case of queries</p>	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
		arising from the appointment of proxy, etc.	
The Law Society of Hong Kong [CB(2)2149/04-05 (01)]	<p><u>Deadline for submission of proxy</u></p> <p>(b) Since May 1993, the deadline of 48 hours before the owners' meeting for submission of proxy has been reduced to 24 hours, but the chairman of the meeting has the discretion to relax the time limit. It should be borne in mind that members of MC are a group of volunteers and laymen with little legal knowledge and that BMO already posts many traps for the unwary. The proposal of imposing an absolute deadline of 24 hours will take away the discretion of the chairman and runs counter to the legislative intent of encouraging owners' participation in the management of their buildings.</p>		<p>Our proposal to make the 24-hour deadline an absolute one is to allow the MC sufficient time to check the proxy instruments lodged and to verify the accuracy with both the owners and the proxy in case of doubt. We have not extended it further to a 48-hour deadline because –</p> <p>(a) setting a 48-hour deadline may cause it difficult, in some cases, for the convenor of the owners' meeting or the MC chairman (as the case may be) to secure sufficient quorum for the meeting; and</p> <p>(b) the Multi-storey Buildings (Owners Corporation) Ordinance enacted in 1970 actually provided for a 48-hour deadline for the submission of proxy, but that was amended to 24 hours in the 1993 legislative amendment exercise because the 48-hour requirement was considered too stringent.</p>
	<p><u>Sealing requirement</u></p> <p>(c) There are several</p>	<p>(c) If the legislative intention is</p>	<p>The requirement under the BMO is not exactly the same as</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>conflicting authorities on the necessity of applying a seal by a corporate owner to a proxy form, see, for example -</p> <p>(i) <u>U Wai Investment Co. Ltd & Anor v. Au Kok Tai & ors</u> [1997] 4 HKC 2000;</p> <p>(ii) <u>Triumphal Fountain Ltd & Anor. v. Chan Chi Lun & Anor</u> LDBM 309/2001 (19/10/01);</p> <p>(iii) <u>嘉居樂物業管理有限公司 v. 家安花園業主立案法團</u> LDBM188/2004 (21/10/2004); and</p> <p>(iv) <u>Rightop Investment Ltd & anor v. Yu Tsui Sheung & anor</u> HCA 2691/01 (10/3/05).</p> <p>(d) It welcomes the proposed amendment to clarify that application of the company seal by a corporate owner onto the proxy form is not strictly necessary. Drafting of the proposed amendment, however, needs improvement to</p>	<p>as stated by His Honour Deputy Judge Mak in the <u>Triumphal</u> case, namely, that "the purpose of using any common seal is to serve as evidence of authenticity", the Administration should make reference to section 36 of the Companies Ordinance and amend the relevant proposed provisions as follows -</p> <p>"the proxy shall if the owner is a body corporate, be signed by a director, secretary, or other authorized officer of that body corporate, and need not be under its common seal."</p>	<p>that in the Companies Ordinance (Cap. 32). We consider the existing proposal clear and simple enough to achieve the policy intent and for owners to understand. The instrument of proxy given by an owner which is a body corporate must be sealed with the seal or stamped with the stamp of the body corporate and signed by a person authorized by the body corporate for that purpose.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	enhance clarity of the legislative intent.		
	<p><u>Keeping of proxy forms</u></p> <p>(e) As the validity of a resolution would depend on the validity of the votes and the proxy, it may be worth considering inserting additional provision in BMO to provide for the safe keeping of the proxy forms for a period of time.</p>	<p>(d) Provision should be proposed to require keeping of the proxy forms for a period of time after the holding of the owners' meeting.</p>	<p>This has already been a practice for most OCs, especially in case of disputes over the voting results. We do not see the need for the time being to make this a statutory requirement as this will impose additional administrative burden for the OCs.</p>
<p>(6) Termination of the appointment of manager (clauses 16 and 28)</p>			
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]</p>	<p>(a) It supports the principle of paying due respect to commercial contract under the rule of law.</p>		<p>Noted. Having regard to the views of the Bills Committee, we propose that the termination mechanism for managers under Schedule 7 shall apply to the first manager (i.e. the manager specified under the DMC) and subsequent contract managers whose contract with the OC does not specify a termination mechanism at all. For details, please refer to paragraph 2 of LC Paper No. CB(2)2192/04-05(01) – <i>Matters Arising from Meeting on 14 June 2005</i>.</p>
<p>The Law Society of Hong Kong [CB(2)2149/04-05 (01)]</p>	<p>(b) It was held in <i>Rightop Investment Ltd & anor v. Yu Tsui Sheung & anor</i> HCA 2691/01 (10/3/05) that as both sections 34E and 34F fall within Part VIA of BMO, by virtue of section</p>	<p>(a) The Administration should give consideration to amending Part VIA of BMO so that sections 34E and 34F as well as Schedules 7 and 8 will apply to the case of Sub-DMCs. The</p>	<p>We do not consider it appropriate to amend the BMO to the effect that all sub-DMCs should be subject to Schedules 7 and 8. By nature, sub-DMCs are only applicable to part of a building, e.g. the commercial portion or one or a few floors. Some terms in the BMO, like “common parts” which are supposed to mean those areas jointly owned by all the owners of the building, may not be applicable to sub-DMC (as the</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>34C, these sections as well as Schedules 7 and 8 only apply to "a building" in respect of which a DMC is in force". A sub-DMC regulating only the commercial area of a building, which represents only a discrete area of a building, does not fall within any limb of the definition of "building" in section 2 of the Ordinance. It follows that these sections as well as Schedules 7 and 8 do not apply to such a sub-DMC.</p>	<p>proposed amendments should have the effect of -</p> <ul style="list-style-type: none"> (i) requiring a Sub-DMC manager to comply with the provisions of Schedules 7 and 8 and Part VIA, in general; and (ii) allowing owners to terminate the employment of Sub-DMC manager under paragraph 7 of Schedule 7, in particular. 	<p>so-called "common parts" covered by the sub-DMC are only jointly owned by those owners who are subject to the sub-DMC, instead of all owners in the building).</p> <p>HCA 2691/2001 quoted by the Law Society is not related to an OC at all – it only involves a group of commercial owners of the whole building. While Schedule 7 contains mandatory terms which are impliedly incorporated into all the DMCs, owners still need to incorporate first in order that they can terminate the appointment of a DMC manager under the statutory mechanism. Any decision of the OC will bind all owners, and not only the commercial owners – who are all subject to the main DMC. If owners are not satisfied with the assignment of duties to any sub-manager (e.g. for the commercial portion) by the main manager, they could always exercise their rights and terminate the contract of the main manager under the main DMC using the statutory mechanism in the BMO.</p>
<p>Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]</p>	<p>(c) It re-affirms that the termination of the appointment of the DMC manager should be conducted by a resolution of owners of not less than 50% of the shares as defined under sub-paragraph 5A of Schedule 7.</p>		<p>Noted.</p>
<p>(7) Procurement by OCs and managers (clauses 13 and 28)</p>			
<p>The Hong Kong</p>	<p>(a) The mandatory requirement</p>	<p>(a) The definition of</p>	<p>We consider that for renewal of contracts where the majority of</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
<p>Institute of Housing [CB(2)2139/04-05 (01)]</p> <p>The Hong Kong Institute of Real Estate Administration</p>	<p>of procuring goods or services with a value exceeding \$200,000 or 20% of the annual budget through tendering has the following demerits -</p> <ul style="list-style-type: none"> (i) it deprives the freedom of the majority residents in choosing to renew existing service contracts which have been performed satisfactorily; (ii) it is operationally impracticable for a large estate as it is very easy to exceed the limit and it is difficult to obtain comparables in supplier-driven contract, e.g. lift maintenance; and (iii) it is operationally impracticable for individual small OCs of single-block residential buildings as they may be forced to procure the employment of security guards through tendering. 	<p>procurement of services requires clarification, e.g. relating to employment of security guards.</p>	<p>the owners would like to retain the existing service, it is acceptable that the tendering requirement could be waived. We have proposed to further revise the procurement requirements to the effect that for renewal of contracts which exceeds the sum of \$200,000 or a sum which is equivalent to 20% of the annual budget of the OC, whichever is the lesser, the MC may put the procurement proposal to an owners' meeting for approval without going through the process of tendering. For details, please refer to paragraphs 9 –12 of LC Paper No. CB(2)2617/04-05(05) – <i>Procurement by OCs and Managers</i>.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>resulting in an increase in management expenses.</p>		
<p>The Housing Managers Registration Board [CB(2)2102/04-05 (03)]</p>	<p>(b) A majority of the provisions in BMO have been drawn up without due regard to the number of units in a building or estate and the complexity of a development project. Such a broad-brush approach creates many implementation difficulties. The across-the-board application of the proposed threshold in respect of the procurement procedures create practical difficulties to large estates as the value of many of their service contracts would exceed \$200,000.</p>		<p>We have considered the option of having a tiered structure for the procurement requirement. However, the number of units in buildings of Hong Kong varies greatly (from some 10 units to thousands of units) and it is basically impractical to have a demarcation that will satisfy everyone. To make a tiered system work, a number of tiers would be required to cater for the many different types of buildings. This would bring obvious inconvenience in implementation and render the mechanism unworkable and ineffective. In fact, it is another form of tiered structure by applying a threshold based on the percentage of annual budget and doing away with a fixed amount. We consider the revised proposal will be able to cater for the needs of buildings of different sizes.</p>
<p>Chartered Institute of Housing Asian Pacific Branch [CB(2)2139/04-05 (02)] The Hong Kong Institute of Surveyors [CB(2)2102/04-05</p>	<p>(c) The proposed procurement procedures have not taken care of day-to-day management needs and would encourage frequent change of service contractors. (d) The proposed procurement procedures ignore the</p>	<p>(b) Consideration must be given to the proprietary nature of certain supplies and services, such as the maintenance of lifts and escalators which requires the supply of original spare parts, and qualified and registered contractors.</p>	<p>We have further refined the proposal in the Bill as follows –</p> <p>(a) Any procurement of supplies, goods and services which exceeds the sum of \$200,000 (<i>\$100,000 in the existing BMO</i>) or a sum which is equivalent to 20% (<i>same as in the existing BMO</i>) of the annual budget of the OC, whichever is the lesser, shall be done by invitation to tender.</p> <p>(b) Any procurement of supplies, goods and services which</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
<p>(01) and CB(2)2169/04-05 (01)]</p> <p>The Hong Kong Housing Society [CB(2)2102/04-05 (02)]</p> <p>The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05 (02)]</p>	<p>difficulties in obtaining a quorum to convene an owners' meeting and to pass a resolution for the selection of tenders.</p> <p>(e) The current requirement under section 21 of BMO for approval at general meetings for any budget increase greater than 50% is adequate.</p>	<p>(c) The bodies are in favour of retaining the existing Code of Practice on the procurement of supplies, goods and services issued by the Secretary for Home Affairs under BMO (Procurement code).</p>	<p>exceeds the sum of 20% of the annual budget of an OC shall be accepted or rejected by a resolution passed at a general meeting of the OC.</p> <p>For details, please refer to paragraphs 4 – 8 of LC Paper No. CB(2)2617/04-05(05) – <i>Procurement by OCs and Managers</i>.</p>
<p>The Hong Kong Institute of Architects</p>	<p>(f) Procurement requirements should be stipulated in clearer forms and employment of professional building maintenance contractors should be encouraged.</p>	<p>(d) Splitting up a procurement into items with a value below \$200,000 should be expressly prohibited.</p> <p>(e) Guidelines should be issued to prohibit property management companies to employ contractors from the same company.</p>	<p>In addition to revising the thresholds for procurement, we have also rectified the anomaly about the legal effect of the procurement provisions in the BMO. Upon enactment of the Bill, all procurements meeting the thresholds will have to go through tendering and/or the owners' meeting. Owners will have the chance to accept or if they are not satisfied with the arrangement or the tenders submitted, reject the proposal. For splitting of procurement into items below the threshold, owners may request the MC chairman to convene an extraordinary general meeting to discuss the matter.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
<p>The Hong Kong Association of Property management Companies Limited [CB(2)2102/04-05 (04)]</p> <p>The Hong Kong Institute of Real Estate Administration</p> <p>The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05 (02)]</p>	<p>(g) While the proposed procurement procedures would safeguard the interests of owners, it would reduce operational flexibility of an OC.</p> <p>(h) An across-the-board application of the threshold would not be appropriate for certain service contracts which required continuity e.g. lift maintenance, employment of lawyer and gardening.</p>	<p>(f) An OC should be allowed to formulate, at their own discretion, their own list of urgent matters or such other matters which are considered by the OC to have great impact on the operation of their properties that need not go through the required procurement procedures. The list has to be passed by a resolution of a majority of votes of owners cast in respect of undivided shares at a general meeting.</p>	<p>We have re-considered the matter. We foresee grave difficulties for the OCs and building managers to draw up such a list of urgent items for pre-approval at an owners' meeting. We therefore propose to delete from the Bill the provisions relating to urgent items. This means that all procurement (howsoever urgent) will need to go through the statutory steps (i.e. tendering and owners' meeting) if the thresholds have been reached. Our experience is that emergency works of a building will unlikely cost over \$200,000 or 20% of the annual budget of an OC (which are the thresholds proposed in the Bill). For details, please refer to paragraphs 13 – 15 of LC Paper No. CB(2)2617/04-05(05) – <i>Procurement by OCs and Managers</i>.</p>
<p>The Hong Kong Institute of Surveyors [CB(2)2102/04-05 (01) and CB(2)2169/04-05 (01)]</p>	<p>(i) The proposal of allowing OCs to formulate a list of urgent matters that need not go through the required procurement procedures may likely cause disputes as it is difficult to define the list in the first place.</p>		<p>As above.</p>
<p>The Law Society of Hong Kong [CB(2)2149/04-05 (01)]</p>	<p>Code of Practice on Procurement of Supplies, Goods and Supplies</p> <p>(j) The proposal of deleting the relevant provisions from the</p>	<p>(g) The Administration should perhaps make clear which</p>	<p>We propose for the time being to delete paragraph 1 (which is the same as the existing section 20A(2) of the BMO) from the</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>Procurement Code to make clear the policy intent that any procurement with a value exceeding the thresholds prescribed in BMO has to be done by way of tender is a good response to the comments made by Her Honourable Yuen JA in <i>Wong Tak Keung, Stanley v. The Management Committee of the Incorporated Owners of Grenville House</i> CACV 244/03 (17/12/03). The case [an interlocutory appeal decision] held that whilst most parts of the Procurement Code may be directory, paragraphs 1 and 9 which have been incorporated into the Ordinance (under sections 20A(2) and 20A(4)) acquire the force of law as primary legislation. As such, these parts are mandatory rather than merely directory.</p>	<p>requirements in the Procurement Code will be deleted under the present proposal.</p>	<p>Code of Practice on Procurement. We will further review the Code of Practice upon enactment of the Bill. Law Society's comments will be taken into consideration when we review the Code of Practice.</p>
	<p>Compliance with the procurement requirements</p> <p>(k) Detailed requirements of the tender process are laid down in the Procurement</p>	<p>(h) The extent of obligation of OC/MC to invite tender should be clarified and in</p>	<p>As above.</p> <p>We have reservation on the proposal to amend section 20A(3)</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>Code. According to paragraph 4 of the Procurement Code -</p> <p>The minimum of tenders to be <i>sought</i> shall be as follows –</p> <ul style="list-style-type: none"> - "3 in the case.... exceeding a value of \$10,000 but not exceeding a value of \$100,000; and - 5 in the case of exceeding a value of HK\$100,000". <p>(l) The Procurement Code further laid down the procedure to be followed in the tendering exercise -</p> <ul style="list-style-type: none"> (i) the OC/MC invites suppliers to provide quotation by way of tender; (ii) the tenders submitted by the suppliers will be placed in a tender box; (iii) at the designated time and place and in front of the designated persons, the tender box will be opened and the tenders will be 	<p>particular, consideration should be given to -</p> <ul style="list-style-type: none"> (i) amending paragraph 4 of the Procurement Code to the effect that, "<u>The minimum of tenderers from a relevant class of suppliers (be defined as the supplier who normally provides goods or service of such class) to be approached shall be as follows -</u> <ul style="list-style-type: none"> - "3 in the case.... exceeding a value of \$10,000.00 but not exceeding a value of \$100,000; and - 5 in the case ofexceeding a value of HK\$100,000.00 ." (ii) clarifying whether a "no offer" tender could be counted as a tender; and (iii) clarifying in section 20A(3) that an OC in 	<p>as it will give a wrong impression to owners that the tendering requirement is not important.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>collected from the tender box; and</p> <p>(iv) all tenders will then be opened in front of the designated persons.</p> <p>(m) It is unclear what the word "sought" means in the context of the Procurement Code. The problem is that it will be difficult in reality for OC/MC to make sure that a sufficient number of suppliers will submit tenders in a particular tendering exercise. If the word "sought" means "attempted to find", an OC/MC should have discharged its duty by having "invited" five suppliers to submit tenders in a particular tendering exercise. However, if it should mean "to actually obtain", OC/MC would have to show that it has chosen a supplier out of a list of five or more suppliers who have submitted tenders in a particular tendering exercise.</p>	<p>a general meeting may by majority accept any tender obtained in a tendering exercise notwithstanding that the number of tenders provided in the Procurement Code.</p>	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>(n) It is also unclear if a "no offer" tender from a supplier will be counted as a tender, assuming that in some cases the supplier may give a "no offer" tender.</p> <p>(o) The court had regarded the Procurement Code to be "merely directory and not mandatory". However, a question remains as to how OC/MC could have said to have discharged its obligations under section 20A(2) of BMO. In the event that there have been invitations to tender but there is no tender submitted or only one or two tenders received in a particular tendering exercise, it is unclear whether OC/MC will be obliged to conduct a fresh tendering exercise again.</p>		
	<p>Exemption from the required procurement procedures</p> <p>(p) As whether any matter should be treated as "urgent" should very much depend more on the</p>	<p>(i) The owners should be given the right to exempt any matters from the tender requirement by way of</p>	<p>As to the list of urgent items, please refer to our response above to the submission from HKAPMC, HKIREA and REDA.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>circumstances of the case rather than the nature of the matter, providing a general list of urgent matters that will be exempted from the tendering requirement may not work to the best interests of the owners.</p>	<p>passing a resolution in general meetings, with perhaps, limitation on the maximum term and value of the contract to be entered into by OC/MC in urgent situations.</p>	
<p>(8) Accounts of corporation (clause 14)</p>			
<p>Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]</p>		<p>(a) MC should, upon receiving the audited financial statements incorporating the income and expenditure account, the balance sheet and the auditors' report, and the management letter issued by the auditors, if any, distribute the documents to the owners, together with the notice and agenda of the annual general meeting.</p> <p>(b) Full disclosure and approval from OC are required for any management services rendered by the management company, which may involve a third party service provider with possible mark-up charges on</p>	<p>Section 27(1) of the BMO provides that an MC shall lay before the OC at the annual general meeting the income and expenditure account and a balance sheet. Section 27(2) provides that the MC shall permit, amongst others, the owners, to inspect the books of account. Schedule 6 also requires the treasurer to prepare a summary of the income and expenditure of the OC within one month after each consecutive period of three months and display a copy in a prominent place in the building. Interested owners could also request the OC to supply him with copies of these documents under Schedule 6. We consider that the existing provisions regarding disclosures are already sufficient and there is no need to require the MC to distribute these documents to the owners when they issue the notice and agenda of the general meeting.</p> <p>We have proposed to revise the statutory procurement requirements by OCs and managers. As the engagement of management services generally exceeds the procurement threshold, such procurement of service will have to go through the tendering procedures and owners' meeting.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
		expenses or services.	
	(a) It has been brought to the Institute's attention that some OCs do not keep sufficient transaction records.	(c) As this is a requirement under section 27 of BMO, a penalty clause should be introduced for the failure to comply with this requirement.	The penalty clause under section 27(3) is related to section 27(1).
	(b) In most cases, the auditor's appointment for OC is made by owners holding a larger percentage of the total number of shares.	(d) The auditor's appointment should be decided by OC's AGM at the fee to be directed by MC.	Section 27(1A) provides that accounts of an OC (which contains 50 or more flats) shall be audited by an accountant retained by the OC as may be approved by the OC by a resolution passed at a general meeting.
(9) Meeting and procedure of corporation (clause 24)			
Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]		(a) Distribution of votes at owners' meeting should be proportional to the amount of management fee payable.	Section 39 of the BMO provides that an owner's share shall be determined in the manner provided in the DMC, or in the absence of a DMC, in the proportion which his undivided share in the building bears to the total number of shares into which the building is divided. Paragraph 3(3) of Schedule 3 provides that all matters arising at a meeting of the OC shall be decided by a majority of votes of the owners. The proposal to re-distribute the votes in proportion to the management fee payable by owners will amount to amendment to the DMC. The proposal might also affect the property rights enjoyed by some owners of the shares (especially if the votes re-distributed to them are fewer than their original number).
	(a) It is noted that only individual owners who attend an owners' meeting,	(b) Abuse of using proxy should be prevented.	We have proposed a number of amendments which are related to the appointment of proxy. These include setting the absolute deadline for submission of proxy at 24 hours before

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>may accept or solicit proxies. It is not uncommon that estate managers use the proxy system to collect votes for those candidates of their choice or to vote in their favour.</p>		<p>the owners' meeting, clarifying the procedures for appointment of proxy if the owner is a body corporate and also inclusion of a standard format of proxy instrument in the BMO.</p>
	<p>(b) Some DMCs contain provisions that the first owner and the developer are not required to pay any management fee deposit and other deposits.</p>	<p>(c) Any owners including the first owner and the developer should have an equal obligation to contribute such deposits as well as the subsequent owners.</p>	<p>The arrangement for management fee deposits is usually stipulated in the DMC of the building. DMC is a deed and a private contract signed between the developer, the manager and the first purchaser of the building. It is not appropriate for the Government, who is not a party to the deed, to attempt to override those provisions set out in the DMC which are regarded by any one single party to be unfair to him without strong justifications.</p>
	<p>(c) Some owners holding a certain percentage of the total number of shares are not required to contribute their share of the management fees under the provisions of some DMCs, for example, car park owners.</p>	<p>(d) All owners, irrespective of the number of shares they hold, should have an equal obligation to contribute their share of the management fees.</p> <p>(e) As regards paragraph (4) of Schedule 3, prior to the proceeding of the general meeting convened by the owners for the purpose of appointing a MC, an auditor should be present to validate the proxy forms before the proceedings of owners' meetings with the purpose of avoiding disputes of</p>	<p>The share of management expenses is usually stipulated in the DMC of the building. DMC is a deed and a private contract signed between the developer, the manager and the first purchaser of the building. It is not appropriate for the Government, who is not a party to the deed, to attempt to override those provisions set out in the DMC which are regarded by any one single party to be unfair to him without strong justifications.</p> <p>It is not a statutory requirement for the proxy instruments to be validated by a professional. Neither do we think there is the need to stipulate it as a statutory requirement under the BMO as this will create financial burden for the OC. If an OC wishes to appoint a professional (lawyer or accountant) to assist in verifying the proxy instruments received, they may seek assistance/advice from our Building Management Resource Centres.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
		voting among owners.	
(10) Financial arrangements for OCs and managers (clause 28)			
The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]	(a) It supports the proposed requirement for the manager to open and maintain one or more segregated trust/client accounts for holding money received in respect of the management of the building with OC as the client.		Noted.
The Hong Kong Housing Society [CB(2)2102/04-05 (02)]	(b) It supports the proposal but there must be a check and balance between an OC and the manager to avoid any misappropriation of fund.		Noted.
The Law Society of Hong Kong [CB(2)2149/04-05 (01)]	(c) No adverse comments.		Noted.

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
(11) Procurement of third party risks insurance (clause 33 and the proposed Building Management (Third Party Risks Insurance) Regulation)			
The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)] Chartered Institute of Housing Asian Pacific Branch [CB(2)2139/04-05 (02)] The Hong Kong Institute of Surveyors [CB(2)2169/04-05 (01)] The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05 (02)]	(a) It supports the mandatory requirement for OCs to procure third party risks insurance. (b) The minimum insured amount of \$10 million per event in the proposed Building Management (Third Party Risks Insurance) Regulation is inadequate.	(a) An independent valuation mechanism should be set up to review the insured amount annually. (b) The minimum insured amount should be adjusted in line with compensation awards in recent cases and market practice.	The current proposal for a \$10 million coverage was made by the HK Federation of Insurers. We have an open mind on this matter and welcome the views of the industry.
The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]	(c) The new requirement for OCs to give notice to the Land Registrar the name of the insurance company from which an OC has		This is for the benefit of both the owners and the third party victims so that there is a reliable source for them to find out whether the OC has procured the third party risks insurance.

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>effected such policy and the period of the policy will create unnecessary paperwork for law-abiding OCs every year.</p>		
<p>The Hong Kong Institute of Surveyors [CB(2)2169/04-05 (01)]</p>	<p>(d) Consideration should be given to buildings where unauthorized building works are present.</p>	<p>(c) A bulk insurance policy initiative should be introduced to help needy owners.</p>	<p>Management of buildings is the responsibility of the owners. We are aware that some buildings may have difficulties to get insurance coverage due to the existence of unauthorized building works. The solution, however, is not for the Government to arrange a bulk insurance policy for them – this will mean passing on their responsibilities to the Government and is not the proper way of using public funds. Owners should step up the management and maintenance of their buildings and to remove the unauthorized works as soon as possible.</p>
<p>The Hong Kong Federation of Insurers [CB(2)2139/04-05 (03)]</p>	<p>(e) According to the proposed Regulation, the insured party will be OC and the owners of the building as a whole and the term "assured" means the assured corporation and the assured owners. However, no provision has been made to address the various issues arising from cross liability and severability of interest between those parties.</p> <p>(f) The proposed Regulation contains no provision in the apportionment of policy</p>	<p>(d) It is more appropriate to include an Asbestos Exclusion in proposed section 3(2) of the proposed Regulation given that Asbestos-Related injuries/disease has been taken care of by the Pneumoconiosis (Compensation) Ordinance and is also excluded from the Employees' Compensation insurance; and without such exclusions, the providers for this insurance may be limited in the market or confined to a few major</p>	<p>The aim of section 28(1) of the BMO and the Regulation is to protect the third party victims. As to matters relating to the cross liability and severability of interest between the assured corporation and the assured owners, and the apportionment of policy limit between the OC and the owners, we consider that they should be provided in the insurance policy, if the OC and the owners think fit. The Regulation should not be the vehicle for dealing with the liability and interest between the different assured parties.</p> <p>Having consulted the Director of Environmental Protection, and the Commissioner for Labour, we have reservation on including an Asbestos Exclusion clause in the Regulation. This is because the Pneumoconiosis (Compensation) Ordinance only compensates persons suffering from pneumoconiosis but not all asbestos-related injuries/disease. The proposed exclusion clause would render some third parties uninsured.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	limit between OC and owners of building.	insurers who have the ability to retain the risk even without reinsurance protection.	
Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]	(g) Arising from the Albert House case, there is a need to mitigate the damages to the owners resulted from similar failures of the performance of the property management company in cases such as the illegal building structure or cash embezzlement of OC's funds under the care of the property management company, etc.	(e) An additional requirement should be set out to arrange for the procurement of the professional indemnity and fidelity insurance policy on performance failure.	We understand some MCs have procured liability insurance similar to the professional indemnity insurance for their members. We consider that this should be a matter for the MC and OC to decide. If owners want to obtain such information, they could approach our Building Management Resource Centres. We will focus on the new requirement for OCs to procure third party risks insurance for the common parts of the building in this legislative amendment exercise.
The Law Society of Hong Kong [CB(2)2149/04-05 (01)]	<u>Coverage</u> (h) The proposed Regulation as presently drafted will not cover the assured owners, the assured corporations and their employees. In addition, the insurance policy required to be taken out under the proposed Regulation will not cover liabilities arising out of a breach of any duty imposed by law in relation to any building or works carried out in contravention of the	(f) The Administration should make their policy very clear to the owners or OCs so that they will understand the extent of their statutory obligations for the purpose of compliance and the kind of protections afforded by the law. On the basis of clear understanding, owners or OCs could decide on the need to take out separate insurance policy for their own protection and to cover	Section 3(1) of the Regulation requires a policy to insure the assured (i.e. the assured corporation and the assured owners) in respect of any liability that may be incurred by the assured corporation, or the assured owners, in respect of the death of, or the bodily injury to, any person. Such person can be an individual owner, or occupier of the building. Section 2 of the Regulation defines "assured owners" as the owners of the building on behalf of whom the policy is procured – that means the owners of the building for the time being, rather than an individual owner. Section 3(2)(b) of the Regulation is modeled on section 6(1)(b)(i) of Cap.272. If the assured corporation or the assured owners incur any liability in respect of the death or the

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>Buildings Ordinance.</p> <p>(i) It is unclear whether the principal intention of the proposed Regulation is to protect third party victims or lessen the burden of owners in meeting claims for any liability arising out of the common parts of the building. However, as owners and employees are among the groups which are most likely to suffer injury as a result of any problem with the common parts of a building and given that the number of buildings with unauthorized building works is voluminous, it would appear that only minimal protection will be afforded by the Regulation.</p> <p><u>Minimum insured amount</u></p> <p>(j) In the view that the case of <i>Albert House</i> involves a sum exceeding HK\$33,000,000, it has reservation whether the proposed minimum amount of insurance that a policy is required to provide under</p>	<p>their potential liabilities to others. The ambiguities in the proposed Regulation which need to be clarified are set out in the Annex.</p>	<p>bodily injury to an employee of the corporation of owners; and the death or injury arises out of and in the course of the employment, the liability of the assured corporation, or the assured owners, is already required to be insured under the legislation concerning employees' compensation.</p> <p>Section 3(2)(c)(i) and (ii) refers to unlawful building works. Section 3(2) does not require a policy to cover any liability arising out of a breach of certain legal duty (i.e. that relating to unlawful building works). The Regulation defines unlawful building works by reference to the appropriate concepts in the Buildings Ordinance (Cap.123) – thus we adopt, in this context, the meanings of “contravention”, “building works”, “street works” and “building” also from Cap.123.</p> <p>We have reservation on the Law Society's proposal to require an insurance policy to cover the risks of the matters set out in section 6(2) of the Regulation as this will certainly increase the insurance company's financial liabilities and in turn the premium for the policy to be paid by the OC. The proposal of Law Society is also not in line with section 12(1) of Cap.272.</p> <p>Under section 28(1) of the BMO, an OC shall, on behalf of the OC and the owners of a building, procure and keep in force in relation to the common parts of the building and the OC's property, such policy of insurance with an insurance company in respect of third party risks.</p> <p>On whether the insurance company could avoid liability under section 6(3)(a)(ii) of the Regulation where only one owner has breached the user requirement, we consider that even though an individual owner is in breach of the user restriction in the DMC, the insurance company cannot escape liability unless the following conditions are also satisfied –</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>section 4 of the proposed Regulation, i.e. HK\$10 million, is adequate, bearing in mind that the prescribed sum under the Motor Vehicles Insurance (Third Party Risks) Regulation is HK\$100 million.</p>		<p>(a) the policy requires the assured corporation, and the assured owners, to ensure compliance with the DMC in relation to the use of the building; and</p> <p>(b) the death or injury is directly caused by the assured corporation's, or the assured owners', failure to comply with the requirement.</p> <p>For the definition of "relevant instruments" in section 6(3)(iii), please refer to section 2 of the Regulation.</p> <p>As to the suggestion that the restrictions under section 6(1) should be spelt out in more express terms, section 6(1) and (5) are modeled on section 12(1) of Cap.272. Section 6(1) and 6(2) set out the kind of policy that is of no effect. Section 6(3) carves out those situations to which section 6(1) does not apply. If section 6(1) applies, and the insurance company is obliged to make payment despite the presence of a restriction, it may recover the amount of its payment from the assured by section 6(5). We do not think there is problem with the current draft.</p> <p>On the proposed coverage, please refer to our response to the submissions from HKIH, CIH, HKIS and REDA.</p>
	<p><u>Notice of insurance</u></p> <p>(k) It does not see the need to require the office bearers of an MC to make a statutory declaration under section 5(5) of the proposed Regulation in case of loss or destruction of a notice of</p>	<p>(g) Reference should perhaps be made to section 12 of the Motor Vehicles Insurance (Third Party) Risks Regulation requiring an insurance company being satisfied that a certificate of</p>	<p>Section 5(5) of the Regulation is modeled on section 14 of Cap.272. We will take into account the suggestion of the Law Society in making reference to section 12 of Cap.272 (which imposes an obligation on an insurance company, on being satisfied that the certificate is defaced/lost/destroyed, to issue a fresh certificate) when we finalise the Regulation.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	insurance when the insurance company could simply be asked to re-issue the notice or provide a certified or duplicate copy thereof.	insurance has become defaced or has been lost or destroyed to issue a fresh certificate.	
(12) Mandatory terms in deeds of mutual covenant (clause 52)			
Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]	(a) Some old DMCs are unfair to the individual owners but these old DMCs are still applying to new properties by developers.	(a) The revised guidelines for deeds of mutual covenant (LACO Circular Memo No. 41 of 29.6.99) should apply to all DMCs irrespective of the dates of the DMC and should have overriding effect.	The Guidelines for DMC issued by Lands Department are applicable only to DMCs signed after the date of the publication of the Guidelines. DMC is a deed and a private contract signed between the developer, the manager and the first purchaser of the building. It is not appropriate for the Government, who is not a party to the deed, to attempt to override all provisions set out in the DMC by imposing the Guidelines for DMC into all DMCs.
(13) Delegation of Powers and Duties by Secretary of Home Affairs			
The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]	(a) It supports the relevant proposal.		Noted.
(14) Setting up a Building Management Tribunal			
The Housing Managers Registration Board		(a) The Government should as soon as possible set up a Building Management	The Housing, Planning and Lands Bureau is currently consulting the public on the proposal for the setting up of a Building Affairs Tribunal (BAT) in the context of the second

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
[CB(2)2102/04-05 (03)]		Tribunal in which professionals would be responsible for mediating and adjudicating building management disputes.	round of consultation on Building Management and Maintenance. The proposal involves a number of complex policy and legal issues, including the legal status and institutional arrangement of the BAT, its interface with the existing Lands Tribunal which deals with building management disputes; the BAT's jurisdiction over unauthorized building works vis-à-vis that of the Building Authority under the Buildings Ordinance; and the resource implications arising from the setting up of the BAT. For details, please see LC Paper No. CB(2)2017/04-05(01) – <i>Alternative Dispute Resolution for Building Management Disputes</i> .
Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]	(a) A Tribunal should be established to settle disputes arising from building management on the grounds that - (i) it should protect small property owners from the risk of paying unproportionately high legal costs in the event of losing lawsuits against OC. As such, owners could pursue their rights effectively. (ii) it is not appropriate to appoint Hong Kong Mediation Council or Hong Kong Mediation Centre to render the mediation service and	(b) The Government should make reference to the existing mechanism of labour disputes or the Board of Review process set up under the Inland Revenue Ordinance in setting up a Building Management Tribunal with the following features – (c) It should be established within the Home Affairs Department (HAD) which is the administrator of BMO. (d) The Panel of the Tribunal should consist of a number of Presidents, Deputy Presidents and Members who render voluntary	See above.

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>to make dispute settlement as they are not statutory bodies.</p> <p>(iii) it would be time-consuming and costly to handle the arbitration of building management disputes by the Lands Tribunal.</p>	<p>service, and should be appointed by the Chief Executive of HKSAR.</p> <p>(e) The President or Deputy President and a certain number of Members will sit on the Board when required.</p> <p>(f) A party in dispute may register at HAD for referral to the Panel.</p> <p>(g) HAD should convene a Tribunal hearing at its premise.</p> <p>(h) HAD may charge a fee to the disputed parties to cover administrative cost.</p> <p>(i) The Panel decision should carry certain legal effect.</p> <p>(j) Appeal to the Lands Tribunal or High Court should be available but the non-appealing party should not bear any legal costs.</p>	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
(15) Licensing of property management companies and practitioners			
<p>Chartered Institute of Housing Asian Pacific Branch [CB(2)2139/04-05 (02)]</p> <p>The Hong Kong Housing Society [CB(2)2102/04-05 (02)]</p> <p>The Hong Kong Association of Property Management Companies Limited</p> <p>Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05 (01)]</p>		<p>(a) It is imperative to have a licensing system to regulate the conduct and behaviour of practicing property managers and management companies.</p>	<p>In order to have a more informed deliberation on the matter, we will launch a two-phase study on the feasibility of introducing a regulatory scheme for the property management industry. The first phase of the study will focus on the present situation of the local property management industry, as well as the existing regulatory regime implemented by overseas authorities. We hope to complete the first phase of the study in mid-2006. We will, base on the result of this study, conduct a second phase of the study, objective of which will be to assess the need for a regulatory scheme, and if confirmative, the most appropriate one for the property management industry in Hong Kong.</p>
(16) Voting rights of non-paying owners			
<p>The Law Society of Hong Kong [CB(2)2149/04-05</p>	<p>(a) It was held in the <i>Rightop</i> case HCA 2691/01 (10/3/05) by His Honour</p>	<p>(a) A credit period of ONE MONTH should be allowed before an owner should be</p>	<p>An owner of an undivided share in land on which there is a building is an owner of the building, whether he needs to pay management fees or not, and whether he pays management</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
<p>(01)]</p>	<p>Judge Reyes that notwithstanding the provisions of a Sub-DMC disentitling delinquent owners to vote, the owners in general meeting can decide to hear a non-paying member and to accept his vote. Although the case was decided in the context of the provisions of a Sub-DMC outside the parameters of Schedules 3, 7 and 8, the same principle applies, and His Honour Judge Reyes comments in his judgment that -</p> <p>"it is usual for commercial people to enjoy a credit period of about a month or so from invoicing before an account is treated as overdue."</p>	<p>defined as a non-paying owners for the purpose of disallowing him to attend or vote at any meetings of OC or of owners.</p> <p>(b) It is proposed that appropriate amendments should be made to section 19(2) and paragraph 7(5A) of Schedule 7 of BMO for the purpose of determining the meaning of "failure by an owner to pay".</p>	<p>fees or not. It is the ownership of the undivided shares which grants him the voting rights, rather than the payment of the management fees associated with those shares.</p>
<p>(17) Jurisdiction of Lands Tribunal</p>			
<p>The Law Society of Hong Kong [CB(2)2149/04-05 (01)]</p>	<p>(a) It seems clear now after the decision of <u>Wong Hing Cheong & anor v. Wah E. Investment Ltd & anor</u> CACV 908/01 (2574/02) that the Lands Tribunal does not have exclusive</p>	<p>(a) If the legislative intention is for the Lands Tribunal and the High Court to have concurrent jurisdiction, section 34A(1)(a) and section 34B should be amended to tally with the</p>	<p>It is not the policy intent that the Lands Tribunal should have exclusive jurisdiction on matters set out in section 45 of the BMO. Neither does the Lands Tribunal Ordinance (Cap.17) have provision to such effect. In the light of the rulings in such cases as <i>Wong Hing Cheong</i> and <i>Foremost Building</i>, it is clear that the High Court and the Lands Tribunal have concurrent jurisdiction. We consider there is no need to</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>jurisdiction arising out of matters set out in section 45 of BMO.</p> <p>(b) Even in the case of winding up of an OC, it was held in <i>Re the Incorporated Owners of Foremost Building</i> HCCW 47/04 (28/10/04) that the High Court does have jurisdiction to wind up OC. However, the definition of "commencement of winding up" under section 34B of the Ordinance is at odds with the ruling in the <i>Foremost Building</i> case, because it is defined as "the time of the presentation of the petition to the tribunal for the winding up of the corporation". Section 34A(1)(a) of the Ordinance also provides that "a winding up order in respect of a corporation is made by the tribunal".</p>	<p>situation.</p>	<p>expressly provide in the BMO for the jurisdiction of the High Court in relation to BMO matters.</p>
<p>(18) Failure/Delay of the MC chairman to convene meetings of an OC – Schedule 3</p>			
<p>The Law Society of Hong Kong [CB(2)2149/04-05]</p>	<p>(a) Paragraphs 1(2) and 2(1) of Schedule 3 only specify that the chairman of OC has</p>	<p>(a) Schedule 3 to BMO should incorporate a clause giving owners holding a minimum</p>	<p>We have reservation to allow owners holding a certain percentage of shares (other than the MC) to convene an owners' meeting. It begs the questions of whether resolutions</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
<p>(01)]</p>	<p>to convene a general meeting within 14 days of receiving such notice. Paragraph 1(2) does not specify the period within which the general meeting has to be held.</p> <p>(b) It would seem that members of OC could not convene a general meeting themselves if the chairman refuses to convene the meeting, or has fixed the date for holding the general meeting at a time long after their request is made. What they could do is to apply to the High Court or the Lands Tribunal (under section 45 and paragraph 1 of Schedule 10 of BMO) to compel the chairman to act according to the provisions of the Ordinance or apply to the Lands Tribunal to dissolve MC and appoint an administrator under section 31(1).</p> <p>(c) There is no penalty or fine imposed by the Ordinance on the chairman and/or members of MC in case of default in this respect. By</p>	<p>percentage of shares a right to convene a general meeting of the OC. Alternatively, it is proposed -</p> <p>(i) adding a new paragraph 1(2A) to Schedule 3 as follows -</p> <p>"If the chairman of the management committee shall not within [21] days convene a general meeting which shall be held on a day of not more than [28 or 60] days after the date on which the said owners' notice of request of general meeting is given, the owners may apply for an order from the Court or the Lands Tribunal to convene a general meeting."</p> <p>(ii) in such event, a new section similar to that of section 40C (1) of the Ordinance should be inserted so as to</p>	<p>passed in this meeting should be valid or have binding effect on all owners. This is especially the case if the resolutions passed concern the validity of the incumbent MC and the appointment of some MC members. That said, we have proposed to stipulate in this paragraph the time limit for actually holding the owners' meeting. For details, please refer to Bills Committee paper – <i>Owners' Rights to Request the Chairman of an Owners' Corporation to Convene an Owners' Meeting</i>.</p> <p>According to LDBM 323/2002, the responsibility to convene an owners' meeting under paragraph 1(2) of Schedule 3 rests with the MC chairman and not MC. It is thus his own legal responsibility to carry out such a duty. If the MC chairman refuses to convene an owners' meeting on the request of 5% owners under Schedule 3 to the BMO, the owners could either pass a no-confidence vote on the chairman at an owners' meeting or that they could re-elect another person to become the MC chairman at the alternate annual general meeting of the OC where all MC members have to retire. The owners could also seek an order from the Lands Tribunal for the MC chairman to convene an owners' meeting.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	<p>way of contrast, section 111 of the Companies Ordinance concerns calling of an AGM of a limited company and in case of default, members of the company can apply to the court for an order calling for an AGM, and that the company and every officer of the company shall be liable to a fine and daily default fine.</p> <p>(d) Section 113 of the Companies Ordinance concerns calling of an EGM on members' requisition and provides that -</p> <p>(i) the board of the directors of the company shall forthwith proceed to convene an EGM; and</p> <p>(ii) if the board of directors shall not within 21 days call for an EGM which shall be held on a day of not more than 28 days after the date on which the said members' notice of</p>	<p>give power to the Court and the Lands Tribunal to convene a general meeting.</p>	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions	Administration's Response
	requisition of meeting is given, the members who requisitioned the EGM may themselves convene a meeting which shall be held within 3 months and the expenses incurred is to be deducted ultimately from the directors' fee or remunerations.		

Home Affairs Department
October 2005