

Bills Committee on Building Management (Amendment) Bill 2005

**Summary of views of the professional bodies in the building management sector
prepared by the Legislative Council Secretariat
(as at 9 September 2005)**

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
(1) Interpretation (clause 3)		
The Law Society of Hong Kong [CB(2)2149/04-05(01)]	<p><u>Definition of "building"</u></p> <p>(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.</p> <p><u>Definition of "convenor"</u></p> <p>(b) To achieve consistency in drafting, the word "convenor" should be adopted in</p>	<p>(a) The definition of "building" should be amended by inserting after c(ii) -</p> <p>"(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."</p> <p>(b) Consequential amendments should be made to the definition by deleting "or" after subsection c(i) and inserting "or" after subsection c(ii).</p> <p>(c) The proposed definition of "convenor" should be extended by inserting after (d) -</p>

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	<p>Schedule 8 of BMO to replace "the person or persons convening the meeting of the owners' committee".</p> <p><u>Definition of "member"</u></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>(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>The Hong Kong Institute of Architects</p>		<p>(f) The scope of the bill should cover public housing.</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</p>	<p>(a) The appointment of a vice-chairman should be retained.</p>

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	<p>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>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 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>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</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</p>

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	<p>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 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 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</p>	<p>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), 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>

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	<p>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 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.</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 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>

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	<p>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>(3) Protection for MC members (clause 15)</p>		
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05 (01)]</p>	<p>(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.</p>	<p>(a) The proposed exemption of liability should be cautioned against MC members who are acting <i>ultra virus</i> or with willful negligence.</p>
<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 Housing Managers Registration Board [CB(2)2102/04-05(03)]</p>	<p>(b) Giving a blanket exemption of liabilities to MC members may encourage them to make unreasonable decisions against professional advice, causing losses to owners.</p>	<p>(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.</p> <p>(c) The proposed exemption must be carefully defined against any abuses.</p> <p>(d) Government should issue guidelines to OCs and MC members in respect of</p>

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		<p>fulfillment of various legal obligations relating to building maintenance and management.</p> <p>(e) At least one registered housing manager should be appointed for a large estate and OC of a single-block building should appoint a registered housing manager as its adviser.</p>
<p>The Hong Kong Institute of Surveyors [CB(2)2102/04-05(01) and CB(2)2169/04-05 (01)]</p> <p>The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05(02)]</p>	<p>(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.</p> <p>(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.</p>	<p>(f) The following solutions are suggested –</p> <p>(i) taking out a Directors and Officers Liability insurance coverage, similar to Professional Indemnity insurance;</p> <p>(ii) employing a professional manager;</p> <p>(iii) providing proper training for MC members; and</p> <p>(iv) advising all owners of the consequences and liabilities arising from the setting up of an OC.</p>
<p>The Law Society of Hong Kong [CB(2)2149/04-05(01)]</p>	<p>(e) It welcomes the proposed new section 29A, but considers that the new section shall be supplemented by amendments to other sections.</p> <p>(f) Section 45(4)(c) specifically names the MC as a competent person to commence those legal proceedings specified in</p>	<p>(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 the name of the MC is appropriate.</p>

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	<p>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>(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 Lands Tribunal was asked to make orders that would affect the OC, OC should be made a party.</p>	<p>(h) A subsection (2A) should be inserted after the existing section 45(2) to reflect the necessity of the Joinder.</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</p>	<p>(a) The current ban stipulated in BMO should be retained.</p>

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	<p>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>The Hong Kong Institute of Surveyors [CB(2)2102/04-05(01) and CB(2)2169/04-05 (01)]</p> <p>The Real Estate Developers Association of Hong Kong [CB(2)2149/04-05(02)]</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 barred from voting.</p>
<p>The Law Society of Hong Kong [CB(2)2149/04-05(01)]</p>	<p>(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.</p>	<p>(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.</p> <p>(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</p>

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		<p>paragraph 4(3) of Schedule 2 and the proposed amended section 7(3)(e) should also be considered.</p> <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>(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> <ul style="list-style-type: none"> (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 OC; (ii) the date and time of the proxy

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		<p>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 arising from the appointment of proxy, etc.</p>
<p>The Law Society of Hong Kong [CB(2)2149/04-05(01)]</p>	<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</p>	

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	<p>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><u>Sealing requirement</u></p> <p>(c) There are several conflicting authorities on the necessity of applying a seal by a corporate owner to a proxy form, see, for example -</p> <p>(i) <u><i>U Wai Investment Co. Ltd & Anor v. Au Kok Tai & ors</i></u> [1997] 4 HKC 2000;</p> <p>(ii) <u><i>Triumphal Fountain Ltd & Anor. v. Chan Chi Lun & Anor</i></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><i>Rightop Investment Ltd & anor v. Yu Tsui Sheung & anor</i></u> HCA 2691/01 (10/3/05).</p> <p>(d) It welcomes the proposed amendment to</p>	<p>(c) If the legislative intention is as stated by His Honour Deputy Judge Mak in the <u><i>Triumphal</i></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>

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	<p>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 enhance clarity of the legislative intent.</p> <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>(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>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 34C, these sections as well as Schedules 7 and 8 only apply to "a</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 proposed amendments should have the effect of -</p>

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	<p>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>(i) requiring a Sub-DMC manager to comply with the provisions of Schedules 7 and 8 and Part VIA, in general; and</p> <p>(ii) allowing owners to terminate the employment of Sub-DMC manager under paragraph 7 of Schedule 7, in particular.</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>(7) Procurement by OCs and managers (clauses 13 and 28)</p>		
<p>The Hong Kong Institute of Housing [CB(2)2139/04-05(01)]</p> <p>The Hong Kong Institute of Real Estate Administration</p>	<p>(a) The mandatory requirement of procuring goods or services with a value exceeding \$200,000 or 20% of the annual budget through tendering has the following demerits -</p> <p>(i) it deprives the freedom of the majority residents in choosing to renew existing service contracts which have been performed</p>	<p>(a) The definition of procurement of services requires clarification, e.g. relating to employment of security guards.</p>

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	<p>satisfactorily;</p> <p>(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</p> <p>(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, 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>	

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<p>Chartered Institute of Housing Asian Pacific Branch [CB(2)2139/04-05 (02)]</p> <p>The Hong Kong Institute of Surveyors [CB(2)2102/04-05(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>(c) The proposed procurement procedures have not taken care of day-to-day management needs and would encourage frequent change of service contractors.</p> <p>(d) The proposed procurement procedures ignore the 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>(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>(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>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>

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<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>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>The Law Society of Hong Kong [CB(2)2149/04-05(01)]</p>	<p><u>Code of Practice on Procurement of Supplies, Goods and Supplies</u></p> <p>(j) The proposal of deleting the relevant provisions from the 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</i></p>	<p>(g) The Administration should perhaps make clear which requirements in the Procurement Code will be deleted under the present proposal.</p>

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	<p><u>Management Committee of the Incorporated Owners of Grenville House</u> 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><u>Compliance with the procurement requirements</u></p> <p>(k) Detailed requirements of the tender process are laid down in the Procurement 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>	<p>(h) The extent of obligation of OC/MC to invite tender should be clarified and in particular, consideration should be given to -</p> <p>(i) amending paragraph 4 of the Procurement Code to the effect that, "The minimum of <u>tenderers from a relevant class of suppliers (be defined as the supplier who normally provides goods or service of such class)</u> to be <u>approached</u> shall be as follows -</p> <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

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	<p>(i) the OC/MC invites suppliers to provide quotation by way of tender;</p> <p>(ii) the tenders submitted by the suppliers will be placed in a tender box;</p> <p>(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 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>- 5 in the case ofexceeding a value of HK\$100,000.00."</p> <p>(ii) clarifying whether a "no offer" tender could be counted as a tender; and</p> <p>(iii) clarifying in section 20A(3) that an OC in 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>

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	<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><u>Exemption from the required procurement procedures</u></p> <p>(p) As whether any matter should be treated as "urgent" should very much depend more on the 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>(i) The owners should be given the right to exempt any matters from the tender requirement by way of 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>

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(8) Accounts of corporation (clause 14)		
<p>Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05(01)]</p>	<p>(a) It has been brought to the Institute's attention that some OCs do not keep sufficient transaction records.</p> <p>(b) In most cases, the auditor's appointment for OC is made by owners holding a larger percentage of the total number of shares.</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 expenses or services.</p> <p>(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.</p> <p>(d) The auditor's appointment should be decided by OC's AGM at the fee to be directed by MC.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
(9) Meeting and procedure of corporation (clause 24)		
Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05(01)]	<p>(a) It is noted that only individual owners who attend an owners' meeting, 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>(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) 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>(a) Distribution of votes at owners' meeting should be proportional to the amount of management fee payable.</p> <p>(b) Abuse of using proxy should be prevented.</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>(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</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
		the proceedings of owners' meetings with the purpose of avoiding disputes of 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.	
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.	
The Law Society of Hong Kong [CB(2)2149/04-05(01)]	(c) No adverse comments.	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
(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 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 effected such policy and the period of the policy will create unnecessary paperwork for law-abiding OCs every year.	

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
The Hong Kong Institute of Surveyors [CB(2)2169/04-05 (01)]	(d) Consideration should be given to buildings where unauthorized building works are present.	(c) A bulk insurance policy initiative should be introduced to help needy owners.
The Hong Kong Federation of Insurers [CB(2)2139/04-05(03)]	(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. (f) The proposed Regulation contains no provision in the apportionment of policy limit between OC and owners of building.	(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 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.
The Law Society of Hong Kong [CB(2)2149/04-05(01)]	<u>Coverage</u> (h) The proposed Regulation as presently	(f) The Administration should make their

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
	<p>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 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</p>	<p>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 their potential liabilities to others. The ambiguities in the proposed Regulation which need to be clarified are set out in the Annex.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
	<p>minimum amount of insurance that a policy is required to provide under 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><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 insurance when the insurance company could simply be asked to re-issue the notice or provide a certified or duplicate copy thereof.</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 insurance has become defaced or has been lost or destroyed to issue a fresh certificate.</p>
<p>(12) Mandatory terms in deeds of mutual covenant (clause 52)</p>		
<p>Hong Kong Institute of Certified Public Accountants [CB(2)2554/04-05(01)]</p>	<p>(a) Some old DMCs are unfair to the individual owners but these old DMCs are still applying to new properties by developers.</p>	<p>(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.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
(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.	
(14) Setting up a Building Management Tribunal		
The Housing Managers Registration Board [CB(2)2102/04-05(03)]		(a) The Government should as soon as possible set up a Building Management Tribunal in which professionals would be responsible for mediating and adjudicating building management disputes.
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 to make dispute	(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 – (i) It should be established within the Home Affairs Department (HAD) which is the administrator of BMO. (ii) The Panel of the Tribunal should consist of a number of Presidents, Deputy Presidents and Members who

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
	<p>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>render voluntary service, and should be appointed by the Chief Executive of HKSAR.</p> <p>(iii) The President or Deputy President and a certain number of Members will sit on the Board when required.</p> <p>(iv) A party in dispute may register at HAD for referral to the Panel.</p> <p>(v) HAD should convene a Tribunal hearing at its premise.</p> <p>(vi) HAD may charge a fee to the disputed parties to cover administrative cost.</p> <p>(vii) The Panel decision should carry certain legal effect.</p> <p>(viii) 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
(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>
(16) Voting rights of non-paying owners		
<p>The Law Society of Hong Kong [CB(2)2149/04-05(01)]</p>	<p>(a) It was held in the <i>Rightop</i> case HCA 2691/01 (10/3/05) by His Honour 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</p>	<p>(a) A credit period of ONE MONTH should be allowed before an owner should be 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</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
	<p>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>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>(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 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 <u>Re the Incorporated Owners of Foremost Building</u> 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 <u>Foremost</u></p>	<p>(a) If the legislative intention is for the Lands Tribunal and the High Court to have concurrent jurisdiction, section 34A(1)(b) and section 34B should be amended to tally with the situation.</p>

Organisation (LC Paper No. of submission)	Concerns and views	Proposed amendments/suggestions
	<p><u>Building</u> case, because it is defined as "the time of the presentation of the petition to the <u>tribunal</u> for the winding up of the corporation". Section 34A(1)(b) of the Ordinance also provides that "a winding up order in respect of a corporation is made by the tribunal".</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(01)]</p>	<p>(a) Paragraphs 1(2) and 2(1) of Schedule 3 only specify that the chairman of OC has 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</p>	<p>(a) Schedule 3 to BMO should incorporate a clause giving owners holding a minimum 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>

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

Council Business Division 2
Legislative Council Secretariat
9 September 2005

Ambiguities in the proposed Building Management (Third Party Risks Insurance) Regulation referred to in the preliminary submission of the Law Society of Hong Kong

Section 3(2)(b)

Section 3(2) of the proposed Regulation lists out the liabilities that the policy is “not” required to cover and subsection (2)(b) refers to liabilities to person employed by “assured owners” or “assured corporations”. Arguably, section 3(2)(b) may not cover manager or persons employed by the manager as the relationship between an OC and a manager may not be one of employment but contractual. It is believed that the policy behind section 3(2)(b) should be clarified and managers and employees of OC should be treated alike. To otherwise discriminate against employees of an OC would only deter owners from forming into OCs and taking up the management of the building, which will defeat the main purpose of BMO.

Section 3(2)(c)

Section 3(2)(c) refers to “any liability arising out of a breach of any duty imposed by law in relation to –

- (a) any building within the meaning of the Buildings Ordinance erected in contravention of that Ordinance; or
- (b) any building works, or street works, carried out in contravention of the Buildings Ordinance.”

It is unclear whether “breach of any duty imposed by law” should be read alone or together with “contravention of the Buildings Ordinance”. It is not necessary for section 3(2)(c)(i) to refer to building as “defined in the Buildings Ordinance” when the term “building” has already been defined under BMO.

Section 6

It is noted that section 6(5) seeks to enable the insurance companies to recover any payment made under the policy from the assured or assured corporations, where the insurance companies have in fact restrict their liabilities in the policy regarding such payment but was nonetheless required to pay up because of section 6(1).

It seems that the proposed subsidiary legislation will on the one hand allow the insurance industry to contractually impose certain restrictions in the policy vis-à-vis the owners and OC but on the other hand render such restrictions to be of no effect so far as the third party victims are concerned. This may be considered fair if in negotiating the terms of the contract of insurance policy, the parties have agreed not to

cover certain risks so that the insurance company will not have taken into account such risks in the calculation of the amount of premium payable.

However, it should be noted that the wider the scope of recovery allowed to an insurance company under section 6(5), the less will be the protection to the owners. It is also concerned that in reality, in the light of sections 6(1) and 6(5), the insurance industry will tend to restrict their liabilities in the policy but nevertheless take into account the risks mentioned in section 6(2) in calculating the premium payment. This will clearly work to the detriment of the owners.

Instead of allowing the insurance company to impose restrictions in the policy which are considered to be unacceptable so far as third party victims are concerned, it will be more appropriate for the proposed Regulation to require the policy to cover the stated risks.

As a matter of drafting, the provision of section 6 is difficult to comprehend. The following should need to be clarified –

- (a) could the insurance company avoid liability under section 6(3)(a)(ii) where only one owner of a building has breached the user requirement?
- (b) what is meant by “relevant documents” in section 6(3)(iii)?
- (c) instead of the various cross references made within section 6, the restrictions under section 6(1) should be spelt out in more express terms so that the owners and OC would know clearly the extent of their liabilities under section 6(5).