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Report of the Bills Committee on
Building Management (Amendment) Bill 2005

Purpose

This paper reports on the deliberations of the Bills Committee on Building Management (Amendment) Bill 2005.

Background

2. After the enactment of the Building Management (Amendment) Ordinance 2000 (Ord. No. 69 of 2000), the Panel on Home Affairs set up a subcommittee to discuss with the Administration the review of the Building Management Ordinance (the BMO) (Cap. 344). The Subcommittee discussed the inadequacies of the provisions and operation of the BMO, and made a number of recommendations on how the BMO could be further refined. Following discussions with the Subcommittee, the Administration issued a paper on the proposed amendments to the BMO for public consultation in 2003. The Administration reported the results of the public consultation exercise to the Panel on Home Affairs in November 2003, and briefed the Panel on the preliminary proposals to be included in the Building Management (Amendment) Bill 2005. The Subcommittee held further discussions on these proposals and made a number of suggestions for the Administration to consider in finalising its proposals to amend the BMO.

Objectives of the Bill

3. According to the Administration, the aims of the proposals in the Bill are to rationalise the appointment procedures of a management committee (MC), assist owners' corporations (OCs) in performing their duties and exercising their powers, and safeguard the interests of property owners.

The Bills Committee

4. At the House Committee meeting on 29 April 2005, members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

5. Under the chairmanship of Hon James TO, the Bills Committee has held 51 meetings with the Administration. The Bills Committee has received views from the public and professional bodies in the building management sectors at two of these meetings. A list of the organisations and individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

6. The deliberations of the Bills Committee are set out in this report under the following subjects -

(l)	Mandatory requirement on OCs to procure third party risks insurance	170 - 200
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Appointment of an MC and its members and holders of office

Proposals in the Bill

7. According to section 3 of the BMO, an MC may be appointed at a duly convened meeting of the owners in accordance with the DMC; or if there is no DMC or the DMC contains no provision for the appointment of an MC, by a resolution of the owners of not less than 30% of the shares. According to the Administration, the reference to a DMC in section 3 of the BMO has raised doubts over whether the provisions in the DMC or those in the BMO should prevail. In the case of *Siu Siu Hing v Land Registrar* (HCAL 77/2000), the court held that unless the DMC of a building specifically referred to the appointment of an MC under section 3 of the BMO, the MC referred to in the DMC was not the same as the one provided for in the BMO.

8. In order to dispel any doubts, the Bill seeks to -

(a) stipulate clearly in the BMO that for an MC to be formed under the BMO, the owners have to follow the procedures set out in the BMO, instead of the DMCs;

(b) repeal all references to the DMC in Schedule 2 to the BMO (relating to the composition and procedure of an MC) so that the operation of an MC will follow the requirements under the BMO instead of the DMCs; and

(c) include a savings provision in the BMO so that MCs which have been formed in accordance with the provisions in their respective DMCs will remain valid upon the enactment of the proposed amendment and these MCs will have to follow the requirements set out in the revised Schedule 2 after the expiry of a period of four years from the commencement of the Amendment Ordinance (upon enactment of the Bill).

9. The Bill also includes legislative amendments to the appointment procedures of an MC to the following effects -

(a) owners of not less than 5% of the shares shall nominate and appoint one owner to convene and preside at the meeting convened for the appointment of an MC;

(b) members of an MC shall be appointed by a resolution passed by a majority of votes of owners cast in respect of undivided shares at which the first MC has been successfully appointed;

(c) the same mechanism of passing a resolution by a majority at the annual general meeting shall apply to the appointment or re-appointment of members of the subsequent MCs;

(d) there will be a quorum requirement of 10% of owners throughout the meetings convened for the purpose of appointment of an MC;

(e) owners will be allowed to decide, at meetings convened for the appointment of an MC or subsequent annual general meetings, whether a vice-chairman of the MC should be appointed, regardless of whether the office of vice-chairman is specified in the DMC;

(f) the secretary and treasurer who are not members of an MC will not, by virtue of their appointment, become members of the committee; and the secretary and treasurer should retire together with other members of the MC at the alternate annual general meetings, regardless of whether they are members of the MC or not; and

(g) each member of an MC will be eligible for allowances provided that the payment has been approved by owners at an

annual general meeting and the level of allowances does not exceed the maximum amount specified in Schedule 4 to the BMO.

The "majority" voting system

10. The Administration has explained to the Bills Committee that there are practical difficulties in applying the "majority" voting system for the appointment of an MC under paragraph 2 of Schedule 2 to the BMO or for the re-appointment of another MC when the previous one retires under paragraph 5 of Schedule 2. As an MC usually has some 11 to 16 members except for old tenement buildings, there will be a need for many rounds of voting in order to determine who has received the majority of votes from the meeting and get appointed.

11. The Administration has also added that, while the usual reference to "majority" infers a winning majority of more than 50%, there are exceptions in the Laws of Hong Kong, particularly those ordinances which are election-related. Section 51 of the Legislative Council Ordinance (Cap. 542) provides for a winning majority of less than 50% (referred to as the "first past the post" voting system). Similar provisions appear in section 41 of the District Councils Ordinance (Cap. 547), section 29 of the Schedule to the Chief Executive Election Ordinance (Cap. 569) and section 31 of the Village Representative Election Ordinance (Cap. 576). The legislative intent in such legislation is that the winning majority at a poll can be less than 50%, and special emphasis is expressly made in the relevant provisions.

12. Given the practical problem of appointment to MCs under a "majority" voting system, the Administration has proposed that the simple or relative majority system (otherwise known as the "first past the post" voting system) should be adopted in the appointment of individual members of an MC made under section 14, paragraphs 2(1), 5(2), 6 and 6A of Schedule 2. In other words, those who receive the greatest number of votes will be deemed to be appointed as MC members and there is no need to obtain an over 50% majority support. The Administration will move Committee Stage Amendments (CSAs) to that effect.

13. The Administration has further proposed that a resolution regarding the appointments would be passed if the appointments are made in accordance with the "first past the post" voting system, in order to facilitate the appointment procedures at the owners' meeting. To ensure that all members of an MC are appointed only from among the owners (except the tenants' representative appointed under section 15(1) of the BMO), the Administration will also move CSAs to amend clause 23(d)(i) (i.e. new paragraph 2(1)(b) of Schedule 2) and clause 23(g)(ii) (i.e. new paragraph 5(2)(a) of Schedule 2) in the English text, so that at a meeting of owners, the owners shall appoint, from amongst the owners (instead of "from amongst themselves"), members of the MC.

14. Members have raised queries over situations where nominees for the same office have received the same number of votes or where the number of nominees is the same as the number of members of an MC. They consider that the arrangement under paragraph 3(4) of Schedule 3 which gives a casting vote, in addition to a deliberative vote, to the person presiding over the owners' meeting should not apply to the appointment of members of an MC.

15. The Administration has proposed that, in the appointment of members of an MC in the BMO, if two or more of the most successful nominees have an equal number of votes, the person presiding over the owners' meeting shall determine the result by drawing lots. The candidate on whom the lot falls will be deemed to be appointed. The arrangement is in line with the wording in section 41(3) of the District Councils Ordinance and section 51(6) of the Legislative Council Ordinance. The Administration has also proposed that, if there is only one nominee for the post (i.e. the number of nominees is the same as the number of members of an MC), that nominee will be deemed to be appointed. According to the Administration, this is in line with the arrangement in section 39 of and paragraph 5 of Schedule 5 to the District Councils Ordinance. The Administration will move CSAs accordingly.

16. The Administration has also informed the Bills Committee that following the court judgments of *The Incorporated Owners of Tsuen Wan Garden v Prime Light Limited* which elucidate the application of the term "majority" under the BMO, OCs are concerned about the possible impact on their daily operations. According to the Administration, there are views that the Chinese translation for the term "majority" in the BMO, i.e. "多數" is inaccurate. The Court of Appeal, however, has stated in that case that "majority" and "多數" should be given their ordinary meanings, namely more than 50%. The Chinese words "以多數票" cannot be regarded as inaccurate translation for the English word "majority". However, after having discussed with the Department of Justice, and noting that the term "過半數" has been used as the Chinese translation of the term "majority" (instead of "多數") in a number of legislation, particularly those enacted or amended more recently, the Administration will move CSAs to amend the Chinese translation of the term "majority" in the BMO as "過半數".

Appointment procedures of an MC

17. Members have expressed reservations about the proposal of imposing mandatory requirements on owners to follow the procedures set out in the BMO, instead of the DMC, for the appointment of an MC. They have pointed out that some DMCs may provide for the composition of an MC. For developments consisting of a few blocks for example, the DMC may provide for a certain number of representative(s) to be elected from each block. For composite developments, the DMC may provide for the ratio of representatives

from the residential, commercial and industrial portions. These provisions of DMCs are reasonable and will enhance the representativeness of an MC. These members consider that owners (both for existing OCs and to-be-formed OCs) should be allowed to follow flexibly these well-established appointment procedures. They are also concerned that confusion will be caused to the day-to-day work and the re-appointment of the existing MCs which have been formed in accordance with the provisions in their respective DMCs if the mandatory appointment procedures are imposed.

18. Members have suggested that a detailed mechanism should be provided in the BMO to require owners to opt into the statutory framework of appointment procedures by way of passing a resolution at an owners' meeting for the formation of MCs, so that existing MCs which have been formed in accordance with the provisions in their respective DMCs will be allowed to maintain their status quo if they wish to do so. They stress that the statutory appointment procedures should not apply across the board and the Administration should review its proposal.

19. The Administration has responded that there is no provision in the BMO governing the composition of an MC. In other words, provided that the members of an MC and the post-holders are appointed from amongst the owners at an owners' meeting, they would have fulfilled the requirements under paragraphs 2(1) and 5(2) of Schedule 2. The Administration's views are that, provided that the appointment of members of an MC is endorsed at a general meeting of owners, such appointments are valid. Owners may choose to use whatever ways to allocate the posts in their MC (they could choose to adopt the allocation stipulated in the DMC but they are not bound to do so) as long as the final appointment of each member is approved at the owners' meeting.

20. The Administration has also accepted members' suggestion that an OC may decide to follow the requirements under the amended Schedule 2 at any general meeting of owners (instead of just the annual general meeting). The Administration will move a CSA to amend Clause 36(3)(a) accordingly.

21. According to section 34D, "owners' committee" in respect of a building means - (a) where an MC has been appointed, the MC; or (b) where no such MC has been appointed, the committee of owners (howsoever named) formed under and in accordance with the DMC in respect of the building. Section 34K further provides that where an MC in respect of a building has been appointed, the members of the MC for the time being shall be deemed, for the purposes of the DMC, to be the owners' committee.

22. The Administration has explained that, when sections 34D and 34K are read together, it might be interpreted that an owners' committee formed under DMC will have the same powers of an MC. In *Kwan & Pun Company Ltd and Chai Lai Yee & Ors* (LDBM 542/2001 and CACV 234/2002), the judge had applied the provisions in Schedule 8 to an owners' meeting convened

for the purpose of appointing an MC, and this is not in line with the Administration's policy intent.

23. To avoid any doubt as to whether an owners' committee formed under DMC would have the same power of an MC, the Administration will move a CSA to amend the definition of "owners' committee" in section 34D as "the committee of owners formed under and in accordance with the DMC in respect of the building".

Resolutions to be passed at the owners' meeting for the appointment of an MC

24. Some members have pointed out that the existing section 5(4) of the BMO stipulates that a notice of meeting convened under sections 3, 3A, 4 and 40C shall specify (a) the date, time and place of such meeting and (b) the resolutions which are to be proposed and, in particular, the resolution for the appointment of an MC. They consider that the words "in particular" raise doubts as to whether resolutions other than the appointment of an MC could be moved at these owners' meetings where an OC has not yet been formed.

25. The Administration will move CSAs to amend relevant provisions to the effect that the notice of meeting shall specify the resolutions that are related only to the appointment of an MC under sections 3, 3A, 4 and 40C respectively and the incorporation of owners. The Administration has explained that the amendments would allow the owners to pass resolutions regarding the appointment of an MC as well as such related matters as the size and composition of the MC and the name and registered address of the OC.

Convenor for the owners' meeting for the appointment of an MC

26. The legal adviser to the Bills Committee has pointed out that there is no express provision stipulating that the convenor shall continue to chair the meeting convened under sections 3, 3A, 4 and 40C for the appointment of individual members of the MC under paragraph 2 of Schedule 2 after an MC has been appointed. To clarify the matter, the Administration will move CSAs to amend the new paragraph 2(4) of Schedule 2 (clause 23(d)(ii)) by making the new section 3(7), 3A(3E), 4(9) and 40C(8) (i.e. the convenor shall preside at a meeting of owners) applicable for the purpose of appointing MC members at a meeting of owners convened under sections 3, 3A, 4 and 40C respectively. At the suggestion of the legal adviser, the Administration will also move CSAs to amend the new section 3(3)(a), (b) and (c) in clause 4, the new section 3A(3A) in clause 5 and the new section 4(5) in clause 6 by changing "any person" to "the person" and adding the words "(if any)" at the end.

27. In response to members' enquiry about the procedure for the appointment of the convenor by the owners of not less than 5% of the shares, the Administration has explained that there is no rigid rule to regulate how the decision of appointing a convenor should be made. At members' suggestion,

the Administration has undertaken to ask the Land Registrar (LR) to prepare a sample form to facilitate the appointment of the convenor by owners. Members have also requested the Administration to liaise with LR to put in place a mechanism whereby information on the total number of persons who are owners could be made readily available to owners or managers in order to facilitate the calculation of the quorum at meetings of owners convened under the BMO.

Abstention votes and invalid votes

28. The Administration has explained to the Bills Committee that existing provisions in the BMO are ambiguous as to how abstention votes and invalid votes should be counted. Abstention votes include blank votes as well as those who are present at an owners' meeting but do not vote. The Administration has proposed to set out clearly in the BMO that abstention votes and invalid votes should not be counted on the following considerations -

(a) it is clear from the Black's Law Dictionary (8th edition) that "simple majority vote" means "a majority of the members who vote, a quorum being present, disregarding absent members, members who are present but do not vote, blank votes, and abstentions";

(b) if abstention votes were counted, there will be practical difficulties in deciding whether those who are only present at the commencement of the meeting or only when the votes are cast should form the denominator;

(c) as some owners may join or leave the meeting before a particular resolution is put to vote, it would be extremely difficult to obtain the requisite majority if the denominator is based on the number of shares of owners present at the commencement of the meeting;

(d) while it seems more reasonable to count the number of shares of owners present at the meeting when the resolution is put to vote, it would add a huge administrative burden to an MC (especially for large estates with thousands of owners) if it has to count the number of shares of owners present every time a resolution is put to vote;

(e) it would be difficult for an OC to pass any resolution at a general meeting if abstention votes were to be counted as all matters arising at a meeting of an OC would have to be passed by more than 50% of the votes of the owners voting either personally or by proxy;

(f) if it is set out in the BMO that abstention votes should not be counted, it will provide a strong urge for owners to indicate clearly their views on the resolution instead of abstaining from voting or submitting a blank vote; and

(g) if abstention votes were counted, it will have to be decided whether these should be regarded as voting "for" or "against" a particular resolution. While it seems logical not to regard them as supporting votes, neither should the owners concerned be regarded as opposing the proposal.

The Administration will move a CSA to add a new section on references to majority of votes in Part I of the BMO.

Allowance for members of an MC

29. The Administration has informed the Bills Committee that, in the case of *Wong Wai Chun and Shing Sau Wan* (CACV 173/2004), the OC concerned passed resolutions at a general meeting to grant allowances to the chairman and treasurer of the OC, the amount of which were above the maximum amounts specified in Schedule 4 to the BMO. As the action of the OC concerned was clearly not in line with the policy intent, the Administration will move a CSA to amend section 18(2)(aa) by specifying that the sum of the allowances granted to members of the MC in aggregate as may be approved by the corporation by resolution passed at a general meeting shall, under no circumstances, exceed the maximum amounts specified in Schedule 4.

30. Some members including Hon James TO, Hon Emily LAU and Hon Albert CHAN have expressed concern that allowing all members of an MC to be eligible for the allowances to be approved by a resolution of a corporation could incur a very large sum of expenses to owners and might give rise to abuse. They have suggested that, in order to recognise the statutory duties of the chairman, vice-chairman, secretary and treasurer of an MC, it should be expressly stated that only these four office-holders should be eligible for the allowances. The Administration has accepted the suggestion and will move CSAs to amend section 18(2)(aa) and the heading of Schedule 4 to the BMO.

Avoidance of formation of more than one OC

31. Hon James TO has expressed concern as to whether there are sufficient safeguards under the BMO to avoid the formation of more than one OC in a building. He suggests that it should be expressly stipulated in the BMO that LR could not issue more than one certificate of registration for an OC in respect of one building. To address his concern, the Administration will move a CSA to include an express provision in Part III of the BMO that LR shall not issue a certificate of registration to more than one OC for a building in respect of which a DMC is in force.

32. Section 10(1)(b) of the BMO provides that a corporation may, by a resolution passed by a majority of not less than 75% of the votes of the owners, change the name of the corporation. Having regard to Members' comments on the drafting of this section, the Administration will move a CSA to repeal the phrase "a majority of" from the provision as 75% of the votes has already guaranteed a majority of the votes.

Publication of the notice of owners' meeting in a newspaper

33. Under existing section 5, a notice of the meeting convened under section 3, 3A, 4 or 40C for the appointment of an MC is required to be published in a newspaper, from amongst a list of newspapers specified by SHA. Members consider the requirement unnecessary as it is of little practical use and the notice of meeting would be displayed in a prominent place in the building. They have suggested to the Administration to waive the requirement so as to ease the financial burden on owners concerned for convening the owners' meeting. The Administration is in agreement and will move CSAs to amend the new sections 3(6), 3A(3D), 4(8) as well as 40C(7) of the BMO accordingly.

Public Register

34. Section 12 of the BMO stipulates that LR shall maintain a register of corporations. Pursuant to existing sections 12(2)(d) and 12(2)(e), the register includes information on "the name and address of the chairman, vice-chairman (if any), secretary and treasurer of the MC" and "the name and address of any administrator". The Administration has accepted Hon James TO's suggestion to extend the scope of the register to cover all members of an MC and will move CSAs to such effect.

35. The Administration has also informed the Bills Committee that the Office of the Privacy Commissioner for Personal Data (PCO) considers that such information may constitute "personal data" as defined in the Personal Data (Privacy) Ordinance (Cap. 486). PCO has therefore recommended that the Administration should state the purpose of maintaining the register of corporation in the BMO and specify the permissible secondary uses of such information. In view of PCO's recommendation, the Administration will move a CSA to amend section 12(1) by -

(a) stipulating that LR shall maintain a register of corporations which shall be made available for public inspection for the purpose of enabling any member of the public to ascertain the items of information stated under section 12(2); and

(b) specifying that the application of such information should be restricted to matters related to building management.

Personal liabilities of members of an MC for the decision of an OC

36. Under the BMO, once an OC is formed, the liability of the owners in relation to the common parts of the building will be enforceable against the OC to the exclusion of the owners. The Administration has proposed to add a new section 29A to the BMO to the effect 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.

37. Members in general recognise the need to give statutory protection to owners, who have joined an MC to serve their fellow co-owners, from being claimed for personal liability in the course of exercising statutory power or discharging statutory duty on behalf of the OC under the BMO. They consider that the proposed express provision in the BMO that members of an MC acting in good faith shall not be held personally liable for any act done or default made by or on behalf of the OC can provide a statutory basis for a member of an MC to apply for striking out the legal proceedings, if he is being sued on account of the OC's collective decisions solely on the ground that he is a member of the MC.

38. Some members, however, have expressed concern that as the meaning of the term "in good faith" is not clear, a member of an MC may make use of the proposed express provision to avoid taking responsibility for carrying out malpractices on the defence that "they have acted in good faith". They have pointed out that members of an MC might also make a very unreasonable decision which they faithfully believe is a correct one and such a decision can turn out to be detrimental to the interest of owners. These members have suggested that members of an MC should be required to act in good faith as well as in a reasonable manner in order to invoke the protection under the proposed new section 29A.

39. The Administration has explained to the Bills Committee that the term "in good faith" is ubiquitous in legislation and has not posed any legal difficulties in its application to factual situations. In addition, the proposed express provision cannot afford protection to a member of an MC if he has failed to discharge his statutory duties imposed on him under the BMO. However, if members of an MC have made a decision which they honestly believe is in the interest of the OC, they are acting in good faith and are not personally liable for any personal claim. The Administration, however, has no objection from a policy perspective to require members of an MC to act in a reasonable manner for the purpose of the proposed new section 29A and will move a CSA accordingly. Members note that unless express provisions are made under the BMO to provide for the factors which the court will have to take into account in deciding whether a member of an MC has acted in a reasonable manner for the said purpose, the court will apply the test of reasonableness on the basis of the particular circumstances of each case.

Appointment of proxy

Proposals in the Bill

40. The Bill seeks to set out clearly the requirements for appointment of proxy (including the absolute deadline for submission of proxy 24 hours before the owners' meeting, and the procedures for appointment of proxy if the owner is a body corporate) and to include a standard format of proxy instrument in the BMO.

Format of proxy instrument

41. Members have expressed diverse views on the format of proxy instrument. While some members consider that owners should be allowed to indicate voting instructions on the proxy instrument and alter the statutory format, some other members are concerned that it will make the proxy instrument too complicated and such flexibility may lead to more disputes.

42. After careful consideration of the pros and cons of giving the discretion to owners, a majority of members have agreed that owners should not be allowed to give instructions to the proxy and should only be allowed to use the statutory format on the following grounds -

(a) the statutory format as specified in the Bill is relatively simple and easy to understand and would facilitate the use of proxy instruments by owners and OCs;

(b) allowing too much flexibility to owners to alter the statutory format of the proxy instruments would lead to disputes over the validity of proxy instruments and operational problems in the holding of owners' meetings;

(c) in appointing a person to be his proxy, the owner supposedly should have a certain degree of trust in the person who can vote on his behalf; and

(d) owners would be discouraged from appointing proxies if a proxy instrument is made too complicated, e.g. if various resolutions on the agenda are included.

43. Hon WONG Kwok-hing, however, remains of the view that owners should be allowed to give instructions to the proxy and to alter the statutory format because it would protect owners' right to choose over matters of building management and maintenance and would meet the operational needs of OCs.

44. At members' suggestion, the Administration will move technical amendments to the statutory proxy form in Schedule 1A for the purpose of facilitating the filling of the proxy instruments by owners.

Cross-checking of proxy voting

45. Members are of the view that mandatory measures should be introduced for the prevention of abuse of proxy instruments. They have considered the merits of various measures, including the existing guidelines drawn up by the Home Affairs Department (HAD) in consultation with the Department of Justice (D of J), for reference by OC and owners to facilitate the appointment of proxy by owners as well as the inclusion of additional information (such as the first four digits of Hong Kong Identity Card numbers, dates and times of signing the proxy instruments and names and signatures of witnesses) on the statutory proxy instrument for cross-checking purpose.

46. At members' suggestion, the Administration has agreed to move CSAs to include the following additional requirements in Schedule 3 to the BMO for owners' meetings to facilitate the cross-checking of proxy instruments -

(a) the secretary of an MC should be required to acknowledge receipt of all proxy instruments submitted by leaving a receipt slip (which should be signed by the secretary) at the flat of the owner or depositing the slip into the letter box of the owner before the owners' meeting; and

(b) the secretary of the MC should be required to post, throughout the owners' meeting, information in respect of those flats where a proxy instrument has been submitted (without details about the proxy) in a prominent place of the venue of the owners' meeting for inspection by owners.

47. The Administration has explained that the secretary of the MC might be subject to civil liability if he fails to perform these responsibilities. If an owner appoints more than one proxy to attend the owners' meeting, the proxy who is last appointed by the owner should be valid. Clarification could be sought from the owner if it is not clear which of the proxies is last appointed.

48. The Administration will also move CSAs to the effect that the new requirements regarding cross-checking of proxy should apply to owners' meetings convened for the purpose of the appointment of an MC under sections 3, 3A, 4 and 40C of the BMO and also to a special meeting of the corporation convened under the new paragraph 6A of Schedule 2 for the sole purpose of filling the vacancies when the number of vacancies in an MC is more than 50% of the number of MC members. In the case under section 3, 3A, 4 or 40C, the convenor will be responsible for acknowledging receipt of all proxy

instruments submitted and posting out the proxy information throughout the owners' meeting. For the case under the new paragraph 6A of Schedule 2, the chairman (if one of the vacancies occurs in the office of the secretary) or the member appointed from amongst the remaining members of the MC to convene the meeting (if the vacancies occur in the office of the chairman and the secretary of the MC) will be tasked with such responsibilities.

49. To ensure that the secretary or the convenor would have sufficient time to check the proxy instruments, verify the accuracy with both the owners concerned and the proxy in case of doubt, issue the receipts to owners and compile the relevant information for posting out at the owners' meeting, the Administration has further proposed to increase the time limit for lodging the proxy instruments from 24 hours (as originally proposed) to 48 hours before the owners' meeting in order to facilitate the implementation of the proposed requirements. The Administration will move CSAs accordingly.

50. The Administration has also explained to the Bills Committee that the new section 3(10)(e)(iii) requires, where a proxy form is lodged with the convenor, the convenor to display information on the owner's address in a prominent place at the venue of the meeting. The information to be displayed should be "the owner's flat". The Administration will introduce CSAs to amend the new sections 3(10)(e)(iii), 3A(3H)(e)(iii), 4(12)(e)(iii) and 40C(11)(e)(iii) and the new paragraph 4(5)(a)(ii) of Schedule 3 accordingly.

51. Some members including Hon James TO and Hon WONG Kwok-hing consider that all the new requirements for OCs on appointment of proxy should be extended to all meetings of owners, particularly those of large estates which are supported by property managers, on the grounds that such requirements would be useful in preventing the abuse of proxy instruments and the administrative work required could be shouldered by the property managers.

52. The Administration has agreed to introduce CSAs to amend Clause 22 and Schedule 8 to the BMO to the effect that instruments of proxy for all meetings of owners convened under Schedule 8 would be required to adopt the statutory proxy format under the new Schedule 1A to the BMO. The Administration, however, has reservations about the suggestion of extending all other new requirements for OCs on appointment of proxy to all meetings of owners where an OC has not been formed. The Administration is concerned that it would place a lot of responsibilities onto the convenors of owners' meetings as well as the members of owners' committees which are not supported by property managers.

53. At members' suggestion, the Administration has undertaken to consider the feasibility of extending these new requirements to meetings of owners in the light of the implementation experience of OCs in meeting these requirements and report developments to the Panel on Home Affairs.

54. Members have also expressed concern over the validity of proxies deposited prior to an adjourned meeting of the corporation. They consider that it should be specified in the proposed proxy instruments that proxies deposited prior to the adjourned meeting would remain valid unless new proxies from the same owner has been received.

55. The Administration has agreed to move CSAs to make specific provisions in the BMO to the effect that the proxy instruments deposited for the original owners' meetings (submitted in accordance with the statutory format) could be used at adjourned meetings, unless revoked, replaced by a new proxy instrument submitted by the owner, or specifically instructed by the owner to the contrary in accordance with the statutory format.

Power to determine the validity of a proxy instrument

56. Members note that the BMO is silent on who should have the power to determine the validity of a proxy instrument. The Administration has proposed that the chairman of an MC and the person presiding at the meeting in the case of a meeting convened for the purpose of appointing an MC should be given the power to determine the validity of questionable proxy instruments.

57. Some members including Hon James TO and Hon Miriam LAU have expressed concern about the Administration's proposal mainly on the ground that the power might be subject to abuse. Members, however, understand that it is difficult to devise another practicable alternative. They consider that the Administration should give due regard to the need for operational efficiency as well as checks and balances in working out the arrangements. They have also requested the Administration to specify clearly as to who should be given the power to determine the validity of questionable proxy instruments in the absence of the chairman of an MC, or in the case of his office being vacant.

58. The Administration has proposed that the chairman of an MC, and if he is absent, the person presiding over the owners' meeting in accordance with paragraph 3(1) of Schedule 3 to the BMO, should be given the power to determine the validity of the questionable proxy instruments in accordance with the stipulated requirements. For meetings convened for the purpose of appointing an MC under sections 3, 3A, 4 and 40C, the Administration has proposed that the convenor should be given such powers. For the special meeting of the corporation convened for the sole purpose of filling the vacancies when the number of members has dropped below the statutory requirement of 50%, the Administration has proposed that the chairman or, if one of the vacancies occurs in the office of the chairman of the MC, the member appointed from amongst the remaining members of the MC to convene the meeting would be tasked with such responsibilities. The Administration will move CSAs accordingly.

59. Some members have expressed concern about the liability of the convenor in checking these proxy instruments and whether a protection clause could be included in the BMO. Hon Albert HO and Hon Audrey EU have suggested that the convenor should be given statutory protection under the proposed new section 29A in the course of performing his duty to determine the validity of proxy instruments.

60. The Administration has confirmed that, if the convenor has no reason to believe that the proxy instrument is not in order (e.g. no enquiries received on its validity, no suspicious element on the proxy instrument, etc), or has no reason to suspect that there is a motive for forgery, it is acceptable for him, as a reasonable man, to consider that the proxy instrument is valid. The Administration is of the view that it is not appropriate to include a protection clause (similar to the new section 29A) for the convenor in checking the proxy instrument because the proposed clause will create a procedural bar on an individual's right to institute legal proceedings before a court in civil matters and impose a restriction on the court's jurisdictions and powers.

61. Hon James TO has expressed concern that the court in the case of *Yeung Chung Lau and Incorporated Owners of Century Industrial Centre and Ors* (DCCJ381/2006) applied a very restrictive interpretation of section 14(1) of the BMO[1] in determining whether it could be decided by resolution at an owners' meeting to financially support the chairman of an MC in a lawsuit against him. He considers that the chairman of an MC should be entitled to such financial support when legal proceedings are instituted against him in connection with his decision made regarding the validity of a proxy instrument. However, it is not clear that such a situation will be covered by section 14(1). He has requested the Administration to keep in view the result of the relevant appeal and consider whether any amendments to the BMO would be warranted.

Keeping of proxy instruments

62. Members are of the view that, as many disputes over the holding of an owners' meeting are related to the validity of proxy instruments, an OC should be required to keep the proxy instruments for a certain period of time after the holding of the owners' meeting. They consider that, as the relevant proxy instruments can be used as evidence for the purpose of legal proceedings, it will have deterrent effect against making forgery appointment of proxy. The Administration will move CSAs to stipulate in the BMO that an MC should keep the proxy instruments received for an owners' meeting for a period of 12 months after the holding of the relevant owners' meeting.

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[1] Section 14(1) provides that "subject to this Ordinance, at a meeting of a corporation any resolution may be passed with respect to the control, management and administration of the common parts or the renovation, improvement or decoration of those parts and any such resolution shall be binding on the management committee and all the owners."

Proxy counted as quorum

63. The Administration has informed the Bills Committee that paragraph 5(2) of Schedule 3 to the BMO states that a proxy appointed to give the vote of an owner at a meeting of the corporation shall, for the purposes of establishing a quorum, be treated as being an owner present at that meeting. The proxy, however, should be treated as being an owner present at the meeting, not only for the purpose of establishing a quorum. His vote will be counted as well. Hence, the Administration has proposed to delete the reference to "for the purposes of establishing a quorum" and expand the scope to "for the purposes of the owners' meeting concerned". The Administration will move CSAs to propose corresponding amendments to sections 3, 3A, 4, 40C, Schedule 3 and Schedule 8.

Appointment of a proxy by a body corporate

64. Having regard to members' comments, the Administration has agreed to move CSAs to amend the new sections 3(10)(a)(ii), 3A(3H)(a)(ii), 4(12)(a)(ii), 40C(11)(a)(ii) and paragraph 4(2)(b) of Schedule 3 to the effect that, if the owner is a body corporate, the proxy instrument shall, notwithstanding anything to the contrary in its constitution, be impressed with the seal or chop of the body corporate and signed by a person authorised by the body corporate in that behalf.

65. At members' suggestion, the Administration has agreed to issue detailed administrative guidelines and instructions, following passage of the Bill, to OCs and property owners on how to follow the new requirements on appointment of proxy, including but not limited to, how to verify the proxy instruments, how to treat the invalid proxies (e.g. more than one proxy instrument received from one owner), a sample of the statutory proxy instrument, the standard format for the posting of proxy information and other good practices relating to the appointment of proxy.

Composition and procedure of an MC

Notice of meeting

66. Members have expressed diverse views on whether owners should be allowed to attend meetings of an MC. While some members consider that owners should be allowed to attend as observers, other members are concerned that, if meetings of an MC are made open to all owners, it might be very difficult for the MC to conduct its meetings smoothly. The Administration is of the view that it should best be decided by the MCs themselves.

67. Some members including Hon James TO and Hon Emily LAU have suggested that MCs should be required under the BMO to display in a

prominent place in the building the agendas of their meetings within a specified period of time before the meetings are held so that owners could express their views on the subject matters to be discussed.

68. After consideration, the Administration has agreed to take on members' suggestion and will move CSAs to paragraph 8(2) of Schedule 2 to the effect that MCs would be required to post the notices of its meetings (which would specify the resolutions to be proposed) in a prominent place in the building. The Administration will move a further CSA to delete paragraph 8(3) of Schedule 2 so that the requirement of giving notice of an MC meeting to each MC member at least 7 days before the meeting as specified in paragraph 2 could no longer be waived, even if the MC had decided on the dates and times of such meetings for the whole year by resolution in accordance with paragraph 8(3).

69. The Administration has also informed the Bills Committee that it will introduce CSAs to amend paragraph 8(2) and (2A) of Schedule 2 to ensure that the notice of meeting of an MC has to be issued to all members of the MC, as well as the treasurer who is not a member of the MC.

Terms of an MC

70. The amended paragraph 3 of Schedule 2 to the BMO provides that the members of an MC appointed under new paragraph 2(1)(b) shall hold office until the members of a new MC are appointed under the amended paragraph 5(2)(a) of Schedule 2. Members are of the view that it should be stipulated in the legislation that incumbent members should only be allowed to hold office for a maximum period of time, of say, 30 to 40 months, even if no new MC has been appointed under the amended paragraph 5(2)(a).

71. The Administration has strong reservations on the suggestion on the following grounds -

(a) if an MC automatically dissolves or ceases to have the power to represent the OC, or that members of an MC are compelled to retire before new members of an incoming MC are appointed to take their place, the building would lapse into a state of anarchy;

(b) if an express provision to such effect is included in the BMO, the management vacuum of a building will happen not only when an MC delays in the convening of the general meeting. In some cases, the general meeting of owners is unable to successfully appoint a new MC to replace the old one (e.g. lack of quorum for a meeting, nobody willing to take up the posts in the new MC, etc);

(c) the suggestion which has significant implication on the operation of MCs has not been put to public consultation; and

(d) the owners have certain remedies under the BMO to deal with the situation e.g. owners can seek an order from the court for the appointment of an administrator under section 31 of the BMO.

72. Some members including Hon Emily LAU and Hon WONG Kwok-hing do not accept the Administration's explanation. They maintain their view that all MCs should convene an annual general meeting to conduct the appointment exercise in a timely manner, failing which the MC should become invalid. These members are concerned that allowing MCs to operate without going through any appointment process will create a loop-hole which is subject to abuse. Some other members including Hon James TO and Hon Mrs Selina CHOW, however, have expressed appreciation of the Administration's concern, given that channels are available under the BMO for owners to call an urgent owners' meeting or seek an order from the court for the appointment of an administrator to replace the existing MC.

Resignation from an MC

73. Paragraph 4(2)(d) of Schedule 2 to the BMO stipulates that a member of an MC shall cease to be a member if he resigns from his office, by notice in writing delivered to the secretary of the MC. The Administration has pointed out that a problem might arise if the secretary of the MC has already retired and there is not yet a replacement or if it is the secretary who wants to resign. The Administration will therefore move a CSA to amend paragraph 4(2)(d) of Schedule 2 such that when the secretary post is vacant, the resignation notice can be delivered to the chairman of the MC.

74. The Administration has further pointed out that paragraph 5A of Schedule 2 provides that a member of an MC who ceases to be a member shall, within 14 days of his ceasing to be a member, hand over to the secretary, or if the secretary is not readily available, any other member of the MC any books or records of account, papers, documents, etc. However, it is difficult to define what is meant by "not readily available" and to identify which members of the MC should be responsible for the task. The Administration will, therefore, move a CSA to amend paragraph 5A of Schedule 2 such that when the secretary post is vacant, the retiring member should hand over to the chairman of the MC the assets and documents of the OC.

Change in the size of an MC

75. The Administration has informed the Bills Committee that it is clear in the BMO that a resolution could be passed at a meeting of a corporation convened under paragraph 5(2) of Schedule 2 where all members retire (i.e. the

alternate annual general meeting) to change the size of an MC. However, the position is unclear if the resolution is passed at the annual general meeting convened under paragraph 1(1)(b) of Schedule 3 or at the extraordinary general meeting convened under paragraphs 1(1)(c) and 1(2) of Schedule 3.

76. The Administration takes the view that a meeting of a corporation, whether it is an alternate annual general meeting, an annual general meeting or an extraordinary meeting, should be allowed to change the size of the MC through a valid resolution passed at the meeting. The Administration will, therefore, move a CSA to amend paragraph 1(3) of Schedule 2 to the BMO to the effect that all meetings of a corporation (except a general meeting of the corporation convened under paragraph 6A(1) of Schedule 2) can change the size of an MC.

77. At members' suggestion, the Administration will also move CSAs to improve the drafting of paragraph 1 of Schedule 2 regarding the statutory minimum size of an MC and to stipulate in paragraph 2 of Schedule 2 that owners should pass a resolution at an owners' meeting convened under sections 3, 3A, 4 or 40C on the size of an MC before voting on the appointment of members to the MC.

Filling of vacancies of an MC

78. Paragraph 9 of Schedule 2 to the BMO stipulates that the quorum at a meeting of an MC shall be 50% of its members. Members note the judgment in *The Incorporated Owners of Blocks F1 to F7 of Pearl Island Holiday Flat and Wong Chun Yee and Others* (CACV 1911/2001) that the reduction of the size of an MC below the statutory minimum[2] alone would not render an MC invalid, and the MC could fill the vacancies in accordance with paragraph 6 of Schedule 2. However, it is held in *Chan Yip Keung and Leung Shiu Kuen 對 The Incorporated Owners of Belvedere Garden Phase II & Chiang Shu To* (LDBM 54/2002) that once an owners' meeting has decided the number of members to be appointed to an MC, the size will remain until it is resolved at another owners' meeting to change it. It is held further that, in the absence of a quorum, an MC, albeit its continued existence, would not be able to convene any meeting in accordance with paragraph 8 of Schedule 2 to handle the business of the OC. Any resolution passed by such MC would be regarded as invalid.

79. Members are of the view that, in case the size of an MC has dropped below the quorum requirement (i.e. 50%), an easier mechanism should be provided for the OC to fill the casual vacancies in the MC, so that the OC would not need to appoint an administrator under section 30(1) of the BMO or

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[2] *Paragraph 1 of Schedule 2 to BMO provides that an MC shall consist of not less than three persons where the building contains not more than 50 flats; not less than seven persons where the building contains more than 50 flats but not more than 100 flats; or not less than nine persons where the building contains more than 100 flats.*

seek an order from the Lands Tribunal to appoint an administrator under section 31(1) of the BMO. They have pointed out that the management of a building would be seriously affected in case no general meeting of the corporation could be convened under paragraph 1(2) of Schedule 3 when the number of members of an MC has dropped below 50% and the chairman is no longer in post.

80. After consideration of members' views, the Administration has agreed to move CSAs -

(a) to allow a vacancy in an MC to be filled either by the MC or the OC at a general meeting;

(b) to add a new paragraph 6A under Schedule 2 to the BMO to the effect that, where the number of members of an MC drops below 50%, the chairman (if still in post) may convene a general meeting of the corporation for the sole purpose of filling the vacancies in the MC, or the remaining members of the MC (if the chairman is not in post) may appoint from amongst themselves a person to convene a general meeting of the corporation for that sole purpose;

(c) to amend paragraph 6 to the effect that the corporation may, by a resolution passed at a general meeting of the corporation appoint an owner to fill the vacancy in the MC (including the chairman, vice-chairman, secretary, treasurer or other members) and the terms of such appointment would end at the next alternate annual general meeting convened under paragraph 5(1) of Schedule 2 when all members shall retire;

(d) to add new paragraphs 6(3)(b), 6(4)(b) and 6(5)(b) of Schedule 2 to stipulate clearly that the appointment made by the MC should last till the next general meeting of the corporation only; and

(e) to specify that the term "member" in section 2 of the BMO should cover those members appointed to fill the vacancies under paragraph 6 and the new paragraph 6A of Schedule 2.

Validity of adjourned meetings

81. Some members have expressed concern that there are many disputes over the validity of an adjourned meeting when the original meeting has to be adjourned to another date due to an absence of quorum.

82. The Administration has informed the Bills Committee that, in accordance with law books, an adjournment of a meeting, if bona fide, is only a continuation of the meeting and the notice that was given for the first meeting holds good for and includes all the other meetings following upon it. If however, the meeting is adjourned without a date for the adjourned meeting having been fixed, a fresh notice must be given[3]. There is, however, no provision for adjournment of owners' meeting under the BMO. In practice, no matter it is a meeting of owners convened for the purpose of appointment of an MC (i.e. before the owners have been incorporated) or a general meeting of owners convened after the owners have been incorporated, the District Office staff attending the meeting will normally recommend to the convenor/chairman and the owners to arrange afresh another owners' meeting in order to avoid any legal dispute in future. This is especially the case when there is insufficient quorum at the owners' meeting as the remaining handful of owners may not be able to pass on the message about the details of the adjourned meeting to other absentee owners. This means that a fresh notice for the re-convened meeting will have to be issued to owners in accordance with section 5 (for meetings convened for the purpose of appointment of an MC) of or Schedule 3 (for OC meetings) to the BMO.

83. The Administration has further explained that, as there is a common law power for the adjournment of meetings, this should be applicable to owners' meetings convened under the BMO as well. The Administration will move CSAs to make specific provisions in the BMO to the effect that all adjourned meetings should comply with the requirements set out in Schedule 3 to the BMO (for general meetings of owners) or sections 3, 3A, 4 or 40C (for meetings convened for the purpose of appointment of an MC). In particular, the requirement of issuance of notice at least 14 days before the meeting should also apply to all adjourned meetings.

Disqualification as a member of an MC

84. The BMO stipulates that no person shall be appointed as a member of an MC if the person has been declared bankrupt, has entered into composition with his creditors, has at any time been sentenced to imprisonment for three months or more. However, no time limit has been set and it is unclear whether suspended sentence should be regarded as "sentenced to imprisonment".

85. To ensure clarity and to bring the qualifications requirements in line with the relevant provisions under the Legislative Council Ordinance and the District Councils Ordinance, the Bill seeks to amend the BMO to the effect that -

[3] Paragraphs 5-15 and 6-16 of "Shackleton on The Law and Practice of Meetings", Sweet and Maxwell, 9th edition.

(a) 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;

(b) anyone who has been discharged from bankruptcy by paying the creditors in full will not be barred from being a member of an MC; and

(c) anyone who has either obtained a discharge in bankruptcy or has entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap. 6) with the creditors, in either case without paying the creditors in full, will be eligible for MC membership after five years.

86. Clauses 9 and 23 of the Bill also introduce a self-declaration system to section 7 of and Schedule 2 to the BMO whereby all members appointed to an MC have to lodge with LR a declaration that they are not disqualified under the amended paragraph 4(1) of Schedule 2.

87. Some members have requested the Administration to consider the situation where a person appointed as an MC member refuses to make declaration. They also have doubts as to whether an authorised representative of a body corporate under paragraph 11 of Schedule 2 is subject to the self-declaration requirement.

88. The Administration has proposed to include a new sub-paragraph (3A) under paragraph 4 of Schedule 2 to stipulate that a member of an MC shall cease to be a member of the committee if he does not comply with the self-declaration requirement.

89. Members have expressed concern that there may not be sufficient time for the member to fill in the declaration form. Having considered members' concern, the Administration has agreed to allow at most 21 days for an individual member of an MC to submit the declaration form to the secretary under paragraph 4(3) of Schedule 2. Section 7(1) of the BMO requires an MC to apply to LR for the registration of the OC within 28 days of the appointment. This means that the secretary will be given, in the most extreme situation where all members submit the declaration on the 21st day, seven days to make the application to LR. For subsequent appointments to the MC and where the member's situation has changed which necessitates the submission of a new declaration form, the 21-day requirement will still apply. The secretary in such cases will be given a longer time (28 days from the date of his receipt of the forms) to lodge the declaration forms with LR. The Administration will introduce CSAs to amend paragraphs 4(4) and 4(5) of Schedule 2 to such effect.

90. As the cessation of membership as a result of the failure to comply with paragraph 4(3) of Schedule 2 is permanent and irreversible, Hon Mrs Selina CHOW considers it too drastic for a person elected to be a member of an MC to have to get a fresh appointment in accordance with the requirements in Schedule 2 to the BMO even if that person has just missed the deadline by a few hours. The Administration, however, maintains that the proposed new paragraph 4(3A) of Schedule 2 should be retained. The Administration undertook to provide the necessary assistance to MC members to facilitate their compliance with the new requirements.

91. The Administration will move CSAs to make further technical amendments to clause 23(f)(i) (paragraph 4(1)(a) and (b) of Schedule 2) to the effect that -

(a) any person who has, within the previous five years, been convicted of an offence in Hong Kong or any other place for which he has been sentenced to imprisonment, whether suspended or not, for a term exceeding three months without the option of a fine shall not be eligible for appointment as a member of an MC; and

(b) "the person's creditors" is changed to "his creditors" to tally with the use of "he" in the earlier part of the provision.

92. Members have expressed concern that the operation of a newly-appointed MC would be adversely affected if some of its members have been found unqualified for being appointed. They have requested the Administration to publicise widely the new grounds for disqualification, such as setting them out in the forms for nomination of MC members.

Meetings and procedure of a corporation

Owners' rights to request the chairman of an MC to convene a general meeting of the corporation

93. Paragraph 1(2) of Schedule 3 to the BMO provides that the chairman of an MC shall convene a general meeting of the OC at the request of not less than 5% of the owners for the purpose specified by such owners within 14 days of receiving such request.

94. Some members have expressed concern over a situation where the chairman of an MC refuses to convene an owners' meeting in accordance with paragraph 1(2) of Schedule 3 to the BMO. They point out that some chairmen would issue a notice of meeting within the statutory time limit but schedule the general meeting to be held months later. These members have suggested that the owners concerned should be allowed to apply to SHA for an order that the manager concerned must convene an owners' meeting within a reasonable period of time.

95. Some other members including Hon WONG Kwok-hing and Hon LI Kwok-ying, however, have expressed the view that the practical need for the chairman/an MC to prepare for the meeting should also be considered. They are also concerned that the developer or one single owner who possesses more than 5% of the shares in some cases could abuse their right by making frequent requests for convening an owners' meeting, thereby creating nuisance to the owners.

96. Hon Albert HO and Hon Albert CHAN have suggested that a non-judicial mechanism to determine whether the owners have reasonable grounds in making such request should be put in place, and the determination made would serve to give protection to the chairman of MC in case he is sued by civil proceedings on the ground of his refusal to convene the owners' meeting. They further consider that the District Officers should be responsible for making the determination. Hon James TO has suggested that the chairman of MC could take the case to the court for a determination. If the court considers that the conduct of the owners concerned amounts to an abuse of proceedings, it could order that the chairman of MC does not need to convene the owners' meeting. In order not to deter owners from exercising their rights under the said provision, the owners making the request should not be ordered to pay for the litigation costs unless these owners have abused the proceedings in a very extreme manner. He has requested the Administration to consider the suggestions and explore possible ways to avoid abuse of owners in exercising their rights under paragraph 1(2) of the Schedule 3.

97. The Administration has taken the view that it is not appropriate for District Officers to interfere into building management matters as to whether the owners have grounds to request an owners' meeting to be held. In addition, the minority owners should not be deprived of the right to request the holding of an owners' meeting. The Administration is also concerned that the MC chairman might abuse the judicial proceedings to delay the holding of the owners' meeting.

98. After consideration of members' views, the Administration has proposed to include another time limit for the actual holding of the general meeting. The Administration will move CSAs -

(a) to amend paragraph 1(2) of Schedule 3 to provide that the chairman of an MC shall convene a general meeting of the corporation at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request, and hold the general meeting within 45 days of receiving such request; and

(b) to amend paragraph 8(1)(b) of Schedule 2 such that the secretary shall convene an MC meeting within 14 days of

receiving the request of any two members and the MC meeting should be held within 21 days on receipt of such request.

99. Members also note that the Administration will move CSAs to repeal paragraph 9 of Schedule 3 on the counting of the percentage of owners as the requirements have already been set out in section 5B of and Schedule 11 to the BMO.

Appropriateness of the chairman of an MC to preside over owners' meeting in case of possible conflict of interests

100. Paragraph 3(1) of Schedule 3 to the BMO provides that the chairman of an MC shall preside at a meeting of the corporation. Paragraph 3(2) further provides that if the chairman of the MC is absent, the vice-chairman of the MC (if any) shall preside at a meeting in his place or, failing him, the owners at a meeting shall appoint an owner as chairman for that meeting. There is no statutory provision stating the circumstances under which the chairman of an MC should refrain from presiding over the owners' meeting.

101. Some members have expressed concern that it might not be appropriate for the chairman of an MC to continue to preside over the owners' meeting for the relevant discussion if he has conflict of interests in a certain item on the agenda for that meeting, particularly when the matter to be discussed is related to the dissolution of the MC, appointment of an administrator, or the removal of the chairman from office.

102. The Administration has explained that there is no relevant case law or statutory provision on whether a chairman of an MC should vacate the chair if he is facing a resolution to remove him from office at a meeting of the OC. The Administration has made reference to the Companies Ordinance (Cap. 32) which also contains no express provisions which state the circumstances under which the chairman of the board of directors should refrain from presiding over the shareholders' meeting. The Administration considers that it is up to the chairman to exercise his good sense of fairness and impartiality in deciding whether he should continue to preside over the discussion. In the event that the chairman vacates the chair from an owners' meeting or if the owners so wish, the matter as to who is going to chair the meeting should be determined by the corporation in accordance with paragraph 7 of Schedule 3.

103. While some members in general remain of the view that it is inappropriate for the chairman of an MC to preside at a meeting of the corporation if he has an apparent conflict of interests over a matter to be discussed, they appreciate that there are many practical issues to be addressed if the chairman of the MC is not allowed to preside over the discussion of that matter at the meeting. Members agree not to pursue the issue in the current legislative exercise.

Voting rights of non-paying owners

104. The Law Society of Hong Kong has suggested to the Bills Committee that owners who default on payment of management fees should be disallowed to attend or vote at any owners' meetings. Some members including Hon James TO and Hon Miriam LAU have expressed support for the suggestion. They have suggested that non-paying owners should be disallowed to vote at any meetings of OCs or of owners, by incorporating appropriate provisions in the BMO, or by passing a resolution at an owners' meeting to such effect. Hon CHOY So-yuk considers that a credit period should be allowed, and non-paying owners' right of voting for appointment of members of MC should not be affected. Hon Jasper TSANG has, however, expressed reservations about the suggestion as it might infringe property rights of the owners concerned.

105. The Administration does not think that the Law Society of Hong Kong's decision should be adopted mainly because -

(a) there are already existing provisions in the BMO and the Guidelines for DMC issued by the Legal Advisory and Conveyancing Office of the Lands Department (LACO) that facilitate the collection of payment from owners; and

(b) it is the D of J's advice that the suggestion is not in line with the spirit of section 34J(2) of the BMO and will also raise an issue of property right protection under Articles 6 and 105 of the Basic Law.

106. While members have in general raised no objection to the Administration's decision of not adopting the Law Society of Hong Kong's suggestion, Hon James TO and Hon Miriam LAU consider that the Administration should explore introducing amendments to the BMO in future review to provide for an easier mechanism for an OC to sell the interest of the owners concerned in the land in order to facilitate recovery of management fees.

107. Hon James TO has further expressed the view that, as a major owner could make use of his dominant position in the appointment of an MC to default on payment of management fees, a mechanism should be provided under the BMO whereby small owners could apply to the court to disallow a defaulting owner who is the major owner from attending or voting at a particular meeting of the corporation on the basis of some objective criteria such as length of period in default on payment of management fees and reasonableness for making the application.

Termination of the appointment of manager

Termination of the appointment of the DMC manager by an OC

108. Schedule 7 to the BMO provides for, amongst other things, a mechanism for the termination of the appointment of manager under DMC (DMC manager) under which a resolution of owners of not less than 50% of the shares is required. According to the Administration, in the case of any manager appointed subsequently by an OC under a management contract (contract manager), the relevant management contract normally provides for a specified period of management. However, there are cases where the contract manager refuses to leave service even after the specified contractual period has expired on the ground that the appointment can only be terminated by the mechanism under paragraph 7 of Schedule 7.

109. The Bill seeks to specify that the termination mechanism under the BMO shall only be applicable to the termination of the appointment of the DMC manager. For any manager appointed subsequently by an OC (including the DMC manager who is re-appointed by the OC), any termination of the manager's appointment shall be executed in accordance with the provisions of the management contract.

110. Hon Albert HO has expressed concern that a real estate developer, after selling the first unit of a property development project, might quickly set up an OC or an owners' committee which immediately signs a contract for a long service period (say, 20 years) with a manager with whom the developer has close relations. He has suggested to the Administration to consider applying the termination mechanism under paragraph 7 of Schedule 7 to all managers.

111. The Administration has explained that the proposal in the Bill is to tackle the problem of many pre-1987 DMCs which do not provide for a termination mechanism at all. For most of the management contracts entered into by OCs with a new manager, the contracts usually specify clearly the contract period of the appointment and termination clause. If the termination mechanism under paragraph 7 of Schedule 7 is made applicable to contract managers as well, OCs would not benefit from having a termination clause favourable to them when negotiating the management contract with prospective managers.

112. After consideration of members' concern and suggestions, the Administration has agreed to move CSAs to the Bill to the effect that the mechanism for termination of the appointment of managers under paragraph 7 of Schedule 7 to the BMO shall apply only to the first manager (i.e. the DMC manager) as well as managers subsequently appointed by an OC if the management contract does not provide for a termination mechanism at all. If the management contract has already provided for a termination mechanism

(regardless of the terms/requirements), the termination mechanism specified in the contract should be followed.

113. The Administration will correspondingly introduce CSAs to delete clause 17(b) of the Bill to retain the wording in the existing section 34J(4)(b) of the BMO, viz. "the termination of a manager's appointment in accordance with Schedule 7", as the mechanism is applicable to both DMC managers and contract managers (contract of which does not contain a termination clause).

Existing requirement for termination of the appointment of the DMC manager

114. The proposal to relax the existing requirement (50% of the shares of owners) for termination of the appointment of the DMC manager was included in the consultation paper on the proposed amendments to the BMO. According to the Administration, as strong objections have been received from the industry, professional organisations and some property owners, the proposal has been excluded from the Bill.

115. Some members including Hon James TO, Hon Albert HO and Hon Albert CHAN are of the view that the existing threshold is too harsh and should be lowered. They have made the following suggestions -

(a) the threshold should be revised as 50% of the owners present at a meeting of OC;

(b) the threshold should be lowered to 30% of shares of owners as section 3 of the BMO only requires a resolution of owners of not less than 30% of the shares for the formation of OC and it is logical for owners to terminate the appointment of the manager on the basis of the same threshold; or

(c) the voting rights of owners for the termination of the appointment of the manager should be determined on the basis of management shares instead of undivided shares.

Members belonging to the Liberal Party, however, consider that the present threshold is acceptable.

116. The Administration maintains its position that the existing termination mechanism should not be changed, on the grounds that -

(a) the provision in paragraph 7(5A) of Schedule 7 which specifies that only owners of shares who pay or are liable to pay management expenses shall be entitled to vote in the resolution of termination of DMC manager has already balanced the interests of the general owners and those of the developers and DMC managers; and

(b) there are many OCs which have successfully terminated the appointment of their managers under the existing mechanism.

117. The Administration has further explained that an owner of an undivided share in land on which there is a building is an owner of the building, irrespective of his number of management shares. It is the ownership of the undivided shares which grants him the voting rights, rather than the ownership of management shares. Management shares are devised to calculate the shares of owners of each individual unit that has to contribute towards the total management expenses of a building. Factors such as the frequency of the use of common facilities and common parts may be crucial in determining the ratio of management shares in the DMC. Management shares fail to reflect the share of other liabilities which the owners of a building have to bear, e.g. liability in the case of winding up of the OC. As such, it is not appropriate to use management shares as the basis for determining the ratio according to which the owners' voting rights are to be fixed.

Sub-Deeds of Mutual Covenant

118. Some members have expressed concern over the applicability of Schedule 7 and Schedule 8 to the BMO to sub-DMCs. They are particularly concerned that owners may not be able to make use of the mechanism for OCs to terminate the appointment of the DMC manager under Schedule 7 to terminate the appointment of a manager who is appointed under the sub-DMC.

119. The Administration has advised that although the Guidelines for DMC issued by LACO do not mandate the appointment of a manager under the principal DMC, it is extremely unusual for the developer of phased developments not to do so (i.e. no appointment of manager made under the DMC, but under different sub-DMCs). LACO will request an explanation for such exceptional arrangement. LACO is unaware of any cases where the principal DMC has not appointed a manager and the appointment is only made in the sub-DMCs. According to LACO, as the principal DMC should have set out the relevant rights and responsibilities of the manager as well as the termination mechanism, most sub-DMCs are silent on these matters.

120. Hon James TO has, however, pointed out that some developers would divide the commercial part of a building into individual units for sale and the relevant sub-DMC does not have to be submitted to LACO for approval since these commercial units of the building are not uncompleted flats. He has requested the Administration to, in the future review of the BMO, study the problems encountered by owners of these units in terminating the appointment of the manager who is responsible for the management of these small units.

Handing over of business from the outgoing manager

121. Whilst members generally agree that the outgoing manager should be allowed two months to prepare the income and expenditure account and balance sheet, they consider that the manager should be required to hand over to the owners' committee (if any) or the new manager "supplies, facilities and equipment" such as keys, safes, floor plans, etc, immediately after his appointment ends. Some members have suggested that, in order to better protect owners' interest, the period within which the manager has to deliver to the owners' committee or the manager appointed in his place the items specified under paragraph 8(b) of Schedule 7 should be shortened, and the words "equipment and items" should be added to paragraph 8(b) of Schedule 7.

122. Having considered the views of members and professional organisations involved in property management, the Administration has agreed to move CSAs to amend paragraph 8 to the effect that only those books or records of account, papers, documents and other records which have to be used for the purpose of preparing the financial statements as required under the new paragraph 8(2)(a) of Schedule 7 should be delivered to the new manager or the owners' committee within two months of the termination of the appointment of the old manager, and the outgoing manager should deliver other properties or records as soon as practicable after the end of his appointment and in any event no later than 14 days under the new paragraph 8(1) of Schedule 7.

123. Most members in general consider that the relevant proposed revised CSAs have addressed their concerns as far as is possible, given that paragraph 8(1) would have the effect of imposing a legal obligation on the outgoing manager to deliver other properties or records as soon as practicable. Hon Audrey EU has expressed the view that there is no point in specifying the requirement that the outgoing manager has to deliver such properties "immediately" because, in practical circumstances, disputes over the delivery of such properties are very often triggered by disputes over the termination of the appointment of the manager, which might have to be resolved by the court and, in that case, the relevant hearing would probably take one to two weeks.

124. Hon WONG Kwok-hing, however, expressed dissatisfaction with the Administration's refusal to move amendments to paragraph 8 of Schedule 7 to stipulate that the outgoing manager would be obliged to deliver properties relating to the management of public utilities installation in the building immediately upon the termination of the contract of the manager. He would move a CSA to the effect that the outgoing manager would deliver other properties or records as soon as practicable after the end of his appointment but no later than two days under paragraph 8(1) of Schedule 7.

Procurement of supplies, goods and services by OCs and managers

Proposals in the Bill

125. The BMO currently provides that any procurement which exceeds or is likely to exceed $100,000, or a sum which is equivalent to 20% of the annual budget of an OC, whichever is the lesser, shall be procured by invitation to tender. The Bill has introduced the following new requirements on procurement -

(a) any procurement of goods or services with a value exceeding $200,000 or 20% of the annual budget of an OC (whichever is the lesser) shall be done through tendering, and that any tender of a value exceeding 20% of the annual budget of an OC shall be accepted or rejected upon the passage of a resolution of the owners at a general meeting;

(b) managers, as well as OCs, need to comply with the same procurement requirements and go through the tendering procedures and passage of resolution at an owners' meeting if the procurement meets the stipulated threshold; and

(c) OCs will be allowed to formulate their own list of urgent matters that need not go through the required procurement procedures under the BMO but 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.

The Administration has further proposed that the new procurement requirements shall take effect on a day to be published in the Gazette and estimates that 12 months after commencement of the Bill would be sufficient.

126. The statutory procurement requirements are also set out in the Code of Practice on Procurement of Supplies, Goods and Services issued by SHA under the BMO. While the statutory procurement requirements impose a legal obligation on OCs, compliance with the Code of Practice is not mandatory under the law. According to the Administration, the co-existence of the same provisions in both the BMO and the Code of Practice often gives rise to dispute as to whether it is legally necessary to comply with the stipulated procurement requirements. It is, therefore, proposed in the Bill that the relevant provisions be deleted from the Code of Practice to make it clear that any procurement with a value exceeding the thresholds prescribed in the BMO has to be done in accordance with the legislation.

Continuous engagement of the incumbent contractor/supplier for supplies, goods and services

127. The Administration has informed the Bills Committee that it is acceptable from the policy point of view that the tendering requirement could be waived for continuous engagement of the incumbent contractor/supplier for supplies, goods and services if the majority of owners would like to retain the existing service.

128. Some members including Hon Mrs Selina CHOW, Hon Miriam LAU, Hon Abraham SHEK and Hon WONG Kwok-hing have expressed support for the Administration's proposal of giving flexibility to owners to retain the existing service without the need to go through the tendering requirement. They consider that the ultimate decision would rest with owners at an owners' meeting, instead of an MC only.

129. Some other members including Hon Albert HO, Hon James TO and Hon LEUNG Kwok-hung have reservations over the proposal on the following grounds -

(a) the threshold for imposing the statutory procurement requirements involves a large sum of money, and it would be proper for procurement proposals of such a large sum to go through tendering;

(b) the tendering process would enable owners to obtain the best quotations and the most up-to-date market information; and

(c) the tendering process could give owners a right to choose on the basis of the performance of the existing contractor and other tender returns.

Hon James TO considers that, if tendering requirements could be waived for continuous engagement of the incumbent contractor/supplier, owners should be requested to make a conscious decision by passing a resolution at a general meeting of the corporation to waive the tendering requirements and to award the contract to the incumbent contractor/supplier.

130. While Hon Audrey EU does not object to the Administration's proposal, she considers that the scope of its application should be specified in the legislation.

131. After consideration of members' views, the Administration will move CSAs to revise the procurement requirements to the effect that -

(a) for contracts of the same type engaging the same contractor/supplier which exceed the sum of $200,000 or a

sum which is equivalent to 20% of the annual budget of an OC, whichever is the lesser, an MC or a manager may seek approval from a general meeting of the OC, or a meeting of owners, where applicable, to waive the tendering requirement and to endorse the procurement proposal by majority of owners at the meeting; and

(b) in addition to deciding whether tendering should be conducted/waived, owners should decide at that meeting the terms and conditions of the new procurement contract.

132. To ensure that owners will be properly consulted where no OC has been formed in the building, the Administration will move further CSAs to stipulate in new paragraph 5(2) of Schedule 7 to the BMO that if there is an OC, the tender whose value exceeds the statutory threshold has to be endorsed (or rejected) by a resolution of the owners at a general meeting. If there is no OC, the tender has to be endorsed (or rejected) by a meeting of the owners convened in accordance with the DMC.

133. After consideration of the Administration's finalised proposal, Hon Albert HO and Hon James TO have indicated that, while they appreciate the merits of the proposal, they still have some reservations about the proposed retention of the new section 20A(2A) which would allow an OC to decide at a general meeting of owners not to procure any supplies, goods or services by invitation to tender.

List of urgent items

134. The Administration has proposed to delete from the Bill clause 13(a)(iii) (amending section 20A(2)) relating to urgent items on the following grounds -

(a) there are grave difficulties for OCs and managers to draw up such a list of urgent items for pre-approval at a general meeting of the corporation;

(b) the proposed mechanism might create a high risk of abuse and disputes among owners as the term "urgent" is subject to interpretation; and

(c) emergency works of a building will unlikely cost over $200,000 or 20% of the annual budget of an OC (i.e. the proposed thresholds for the statutory procurement requirements).

135. Some members including Hon James TO, Hon Mrs Selina CHOW and Hon WONG Kwok-hing have expressed reservations over the proposed deletion on the following grounds -

(a) while there might be practical difficulties in drawing up a comprehensive list of urgent items, an OC, in consultation with appropriate professionals if necessary, could draw up a list containing only the minimum content of description of each urgent item for endorsement at a general meeting of the corporation;

(b) the Bill should provide for a mechanism for owners to draw up such a list of urgent items if they choose to do so;

(c) the mechanism is necessary for owners or an MC to take prompt action to deal with emergency situation because emergency work for a large housing estate might very often cost over $200,000 and emergency work for a single-block building would likely cost over 20% of the annual budget of an OC; and

(d) it might be more cost effective for owners to commission a contractor to undertake overall remedial work which would cost over $200,000, instead of carrying out remedial work on a temporary basis.

136. After consideration of the practical difficulties in implementing the proposal, a majority of members raise no objection to the Administration's decision to withdraw the proposal for providing for a list of urgent items. Hon WONG Kwok-hing, however, objects to the decision because he considers that it will deprive owners of the discretion to draw up a list of urgent items for the better management of their properties.

137. Hon Albert HO has suggested that, in order to avoid any delay in carrying out emergency works and to cater for an urgent need to convene a meeting of an MC, paragraph 8 of Schedule 2 to the BMO should be amended to the effect that if 75% of members of an MC are satisfied that there is an urgent need for convening a meeting of the MC, a shorter period of notice can be allowed.

138. The Administration does not support the suggestion. According to the Administration, the associations of OCs in general consider that they have not encountered any particular difficulties under the current seven-day requirement for convening a meeting of an MC and they see no need to shorten the notice period.

Procurement of legal service

139. Members have expressed diverse views over whether the procurement of legal service should be subject to the statutory procurement requirements. Some members including Hon Albert HO, Hon Mrs Selina CHOW, Hon CHOY So-yuk, Hon LI Kwok-ying and Hon Alan LEONG are of the view that, given the unique nature of legal service, it is neither feasible nor appropriate to put its procurement to tender. They consider that owners could endorse the appointment of a lawyer at a general meeting of an OC without the need to go through the tendering requirement if owners have been provided with quotations and are satisfied with the quality of service to be provided by the selected lawyer. Other members including Hon James TO, Hon Albert CHAN, Hon WONG Kwok-hing and Hon LEUNG Kwok-hung, however, take the view that the tendering requirement should be applied to the procurement of all professional service including the appointment of lawyers.

140. The Administration has informed the Bills Committee that it has consulted a number of legal professionals about the market practice. While it is not common for legal service to be selected through open/public tender, many legal professionals have advised that quotations in the form of hourly/daily rate (subject to a maximum cap) or a lump sum fee could be provided to an OC to facilitate its consideration of the appointment. The Administration, therefore, maintains its position that the procurement of legal service should, as for the procurement of all other services, also be subject to the statutory procurement requirements.

141. Some members are of the view that owners have every right to know about and have a say in any litigation involved by their OC. Owners' views, therefore, should be sought whenever an OC is engaged in lawsuits, including the appointment of lawyer by an OC. They have suggested that it should be stipulated in the BMO that OCs or managers cannot engage in lawsuits unless such a decision has been endorsed at a general meeting of an OC by resolution.

142. Some other members, however, consider that an OC may inevitably need to initiate litigation (or be sued) in performing its statutory duties, such as suing owners for outstanding management fees, applying for court orders compelling owners to remove unauthorised building works (UBWs), etc. There might be practical difficulties for an MC if the BMO requires the convening of a general meeting for every single legal action to be initiated by the OC or whenever the OC is sued. They are of the view that the MC should be given the discretion to procure legal service without the need to seek owners' endorsement by a resolution passed at a general meeting, if the initial cost required is not expected to exceed the statutory threshold. These members suggests that an express provision should be added to the BMO to require an OC to notify owners of any appointment of lawyers so that owners would be given the opportunity to revoke the decision if necessary. They have requested the Administration to consider the detail of the information about which owners should be notified.

143. After consideration of members' views and suggestions, the Administration has agreed to move CSAs to add a new provision in the BMO (i.e. new section 26A) such that an MC should have the duty to inform the owners whenever the OC is sued or the OC decides to sue. The Administration has further proposed that, in cases where the OC is sued, the MC shall notify the owners by posting a notice about the details of the case in a prominent place in the building within seven days of receipt of the court documents by which the legal proceedings are commenced for not less than seven consecutive days. In cases where the OC decides to sue, the MC has to post the notice within seven days of issuing any court documents commencing the legal proceedings and the notice should remain posted for not less than seven consecutive days.

144. Hon James TO has expressed the view that it might be too cumbersome for an MC to notify the owners of all legal proceedings. He has suggested to the Administration to consider whether legal proceedings brought up in the Small Claims Tribunal should be excluded from the new section 26A. Hon Miriam LAU, however, considers that it would be very difficult to set an appropriate threshold as the $50,000 limit of a small claim might be regarded as a huge sum of money.

145. The Administration takes the view that all legal proceedings, with no exception, should be brought to the owners' notice. The Administration has undertaken to issue administrative guidelines after the passage of the Bill to set out the types of details of the cases which should be included in the notice to owners, such as the name and capacity of the plaintiff/defendant, the legal representatives of the other parties (if any), the case number of the legal action, etc.

Consequence of non-compliance with the statutory procurement requirement

146. Members have expressed divergent views over the consequences of non-compliance with the statutory procurement requirements, especially in relation to the validity of a contract for the procurement of any supplies, goods or services. Some members including Hon CHOY So-yuk and Hon WONG Kwok-hing are of the view that, in order to protect the interests of owners, a procurement contract should be rendered void in case of non-compliance, but could be ratified by a resolution passed at an owners' meeting. They consider that, as the proposed statutory requirement is very clear, contractors and suppliers should be able to protect their interests by ensuring due compliance with the requirement before provision of any supplies, goods or services.

147. Some other members including Hon James TO, Hon Emily LAU, Hon Albert CHAN and Hon Audrey EU, however, take the view that such contracts for the procurement of any supplies, goods or services shall only be voidable at the option of owners, say, by the majority votes of the owners at a

general meeting convened under the BMO or a certain percentage of the shares of owners.

148. While members in general agree that the court may make such orders and give such directions in respect of the rights and obligations of the contractual parties where proceedings are taken for the enforcement of any procurement contract to which section 20A(2) and (2B) applies, they consider that owners should be given the opportunity to decide whether to honour the contract or not before the judicial mechanism is triggered.

149. After consideration of members' views, the Administration has agreed to move CSAs to provide for the following arrangements and procedures for OCs and owners to deal with contracts that are procured without following the amended section 20A(2) and the new section 20A(2B) -

(a) subject to (b) and (c) below, a contract for the procurement of any supplies, goods or services shall not be rendered void by reason only of non-compliance with section 20A(2) and (2B);

(b) a contract for the procurement of any supplies, goods or services may be avoided by a resolution passed by the majority votes of the owners at a general meeting of the corporation convened under Schedule 3 to the BMO by reason only of non-compliance with section 20A(2) and (2B);

(c) where proceedings are taken for the enforcement of any procurement contract to which section 20A(2) and (2B) applies, the court may make such orders and give such directions in respect of the rights and obligations of the contractual parties, including whether the procurement contract is void or voidable, as the court may deem fit having regard to all the circumstances of the case and in particular (but not limited to) a number of factors listed under the new section 20A(7);

(d) where the court makes an order that the procurement contract is voidable at the option of the OC, the court should also make an order that a general meeting of the corporation be convened and held in such manner as the court thinks fit, so as to determine whether the contract is to be avoided; and

(e) a contract for the procurement of any supplies, goods or services shall not be void by reason only of non-compliance with section 20A(1).

150. The Administration has also explained that both sections 20A(1) and (3) refer to the need to comply with the Code of Practice on the Procurement of

Supplies, Goods and Services. The Administration will therefore move a CSA to repeal section 20A(3) which is redundant.

151. Members have expressed concern that OCs might split huge-sum contracts into mini-contracts so as to avoid the need to comply with the statutory procurement requirements. Hon Audrey EU has suggested that it should be stipulated in the BMO that any procurement of supplies, goods and services of the same nature undertaken within the same period of time but is covered by different contracts should be deemed as one single procurement contract; or any procurement contract which is artificially split for the sole purpose of avoiding the need to comply with the statutory procurement requirements will be rendered void at the option of the owners, and it would be up to the court to determine whether the contract has been artificially split.

152. The Administration is concerned that inclusion of an express provision that all related contracts must be regarded as a single procurement might reduce the flexibility of some corporations and would likely result in more disputes among owners as to whether two or more procurement contracts are related or not. The Administration has agreed to stipulate the principle against splitting of contracts in the Code of Practice on procurement of supplies, goods and services issued by SHA.

153. At members' suggestion, the Administration has agreed to move CSAs to list the following factors under the new section 20A(7) -

(a) whether the procurement contract has been split for the sole purpose of avoiding the requirements in section 20A(2) or (2B); and

(b) whether the supplier has benefited from the contract.

154. Hon Albert CHAN has further suggested that criminal sanction should be imposed for non-compliance with the statutory procurement requirements. Hon Alan LEONG has suggested that the consequence of non-compliance could be stipulated by codifying the civil liability involved in the BMO. Other members, however, consider that while imposition of a punitive clause would achieve more effective deterrent effect, it would not be appropriate to pursue the issue in the current legislative exercise as it was not included in the paper on the proposed amendments to the BMO issued for public consultation in 2003. Members have requested the Administration to review the need for the proposed punitive clause after implementation of the proposed provisions relating to procurement procedures. Members also take the view that, for the sake of ensuring enforceability of the statutory procurement requirements, it should be clearly stipulated in the BMO that any MC member or manager who has signed a procurement contract on behalf of OC without proper authorisation may be held personally liable for any consequences arising from the non-compliance.

155. In the light of members' concern, the Administration has agreed to move a CSA to add a new section 20A(9) that, for the avoidance of doubt, any person who enters into a procurement contract on behalf of the corporation in breach of section 20A(2) or (2B) of the BMO may be held personally liable for any claims arising from the contract unless the new section 29A applies.

Application of the principle of "majority rules"

156. Members in general agree that whilst the "first past the post" voting system should be adopted in the appointment mechanism of an MC, the application of the principle of "majority rules" should be retained in the selection of tenders by an OC under the BMO. The Administration is of the view that no specific method of voting should be stipulated in the BMO and owners should be given the flexibility to decide how the majority requirement is fulfilled.

Provision of assistance to OCs for compliance with the procurement requirements

157. Members are of the view that HAD should take active measures to facilitate OCs in complying with the procurement requirements such as –

(a) setting clear guidelines in the Code of Practice on procurement of supplies, goods and service issued by SHA on the tendering arrangements in respect of procurement of professional service and the arrangements for the implementation of the "majority rules" principle in the selection of tenders, in particular, the format of quotations and the number of quotations required to be obtained for the procurement of legal service;

(b) prescribing relevant procurement forms in the Code of Practice;

(c) setting up tendering webpage at relevant websites (e.g. those of District Offices) to provide matching service; and

(d) liaising with the Law Society of Hong Kong for a more effective distribution of information to owners about tender invitation to law firms.

158. At members' request, the Administration has undertaken to devise a comprehensive plan (including the provision of adequate manpower resources for carrying out extensive publicity programmes) on the new procurement requirements and issue a layman's guide after the passage of the Bill. Members have agreed to refer the issue to the Panel on Home Affairs for follow-up.

Financial arrangements for OCs and managers

Proposals in the Bill

159. Schedule 7 to the BMO provides, amongst other things, that the manager shall open and maintain an interest-bearing account and shall use that account exclusively in respect of the management of the building. To strengthen the requirements on setting up of accounts for OCs by managers, the Bill proposes to stipulate in the BMO that the manager shall open and maintain one or more segregated trust/client accounts for holding money received in respect of the management of the building with the OC as a client.

160. The Bill also includes the following legislative amendments relating to the financial arrangements of an OC and the manager to safeguard the interest of property owners -

(a) an MC shall be responsible for preparing a set of financial statements to give a true and fair view of the state of affairs of the OC, and the accountant (i.e. a certified public accountant (practising) within the meaning of the Professional Accountants Ordinance (Cap. 50)) shall in his/her audit report give opinion on whether such financial statements are properly drawn up so as to give a true and fair view of the state of affairs of the OC;

(b) an OC shall supply copies of its financial statements, as well as the accountant's audit report, to the owners upon request and payment of a reasonable copying charge; and

(c) the manager shall, within one month after each consecutive period of three months, prepare a summary of income and expenditure and a balance sheet in respect of that period and shall display a copy of it in a prominent place in the building.

Preparation of financial statements

161. The Administration has informed the Bills Committee that it is the policy intent that, for OCs with more than 50 flats, the financial statements that would be laid before the corporation at the annual general meeting should have been audited by an accountant in accordance with section 27(1A). The Administration will move CSAs to the effect that "financial statements" in section 27(1AA) will include -

(a) an income and expenditure account which gives a true and fair view of the financial transactions of the corporation for the period to which it relates;

(b) a balance sheet which gives a true and fair view of the financial position of the corporation as at the date to which the income and expenditure account is made up; and

(c) where section 27(1A) applies, the financial statements referred to in (a) and (b) above have to be audited by an accountant and the accountant's report, together with the financial statements, shall be laid before the annual general meeting of the corporation.

162. Some members consider that, in order to ensure compliance with the statutory requirements and to achieve deterrent effect, a penalty clause should be introduced for the new requirement under the proposed amendments to paragraphs 3 and 4 in Schedule 7 to the BMO.

163. The Administration has pointed out that Schedule 7 contains provisions which shall be impliedly incorporated into any DMC. Failure to comply with the requirements in Schedule 7 is a breach of contract for which the owners may seek civil remedy through legal actions.

164. Hon CHOY So-yuk and Hon WONG Kwok-hing are of the view that it is unsatisfactory that, where a manager has failed to comply with the requirements related to opening and maintaining bank account, maintaining a special fund and entering into contracts as specified in paragraphs 3, 4 and 5 of Schedule 7 respectively, the owners could only resort to civil proceedings to claim damages against any financial loss. They consider that the Administration should explore, in the course of its feasibility study of setting up a regulatory framework for property management companies, introducing punitive measures for dealing with such non-compliances. Hon James TO has suggested that OCs/owners should be advised in the relevant guidelines that compliance with the relevant requirements should be included as fundamental conditions in the appointment contracts of managers.

Display of documents

165. According to paragraph 10(4B) of Schedule 2 and paragraph 6(3) of Schedule 3 to the BMO, the minutes of an MC meeting and those of a general meeting of an OC shall, within 28 days of the respective dates of the meetings, be displayed by the secretary in a prominent place in the building. According to paragraph 2 of Schedule 6, the MC treasurer shall prepare a quarterly summary of the income and expenditure of the OC and display a copy of it in a prominent place in the building within one month after each consecutive period of three months. Paragraph 1(2) of Schedule 7 to the BMO provides for the display of a draft budget in a prominent place in the building if there is no owners' committee.

166. Members note that these provisions do not specify how long these documents need to be displayed. They have suggested that a duration period should be set in the BMO for the relevant financial statements to be displayed in the building. The Administration will move CSAs to specify a time period of not less than seven consecutive days for the display of these documents.

Inspection of documents

167. Some members have expressed concern over the situation where owners could not inspect bills, invoices, receipts, etc., referred to under paragraph 1 of Schedule 6. They have suggested that a provision should be made in the BMO to allow owners to inspect bills, invoices, receipts, etc. Some other members, however, consider that the requirement of having an accountant to audit the financial statements of the OC is sufficient. To allow owners to inspect bills, invoices, receipts, etc. might add a huge administrative burden on the OC.

168. Having considered members' diverse views on the matter, the Administration will move CSAs -

(a) to include a new provision in the BMO that an MC shall permit any person (not necessarily an owner), who is supported by not less than 5% of the owners, to inspect all documents referred to under paragraph 1 of Schedule 6 at any reasonable time;

(b) to make corresponding amendment to Schedule 11 so as to explain the calculation of the 5% of the owners; and

(c) to enable any individual owner (if they could not obtain the support of 5% of the owners) to apply for a court order to inspect these documents.

169. The Administration has also explained that paragraph 2(6) of Schedule 7 provides that, if there is a corporation and the corporation decides that any income and expenditure account and balance sheet of the manager should be audited by an accountant, the manager shall arrange for such an audit to be carried out. There is, however, no requirement for the manager to release the audited accounts. The Administration will move CSAs to amend paragraph 2(6) such that the manager shall allow any owners to inspect all the audited accounts at any reasonable time and obtain copies of the accounts on payment of a reasonable copying charge.

Mandatory requirement on OCs to procure third party risks insurance

Proposals in the Bill

170. The Building Management (Amendment) Ordinance 2000 introduced a new section in the BMO (i.e. section 28) which provides that all OCs shall procure and keep in force in relation to the common parts of the building a policy of third party risks insurance. To implement the new section which has yet to come into operation, the Administration needs to draw up the Building Management (Third Party Risks Insurance) Regulation to set out the detailed requirements. According to the Administration, during the drafting of the Regulation, it is found that the following legislative amendments will need to be made to the principal legislation -

(a) the addition of a new subsection to expressly authorise an OC to take out insurance as the agent for and on behalf of the owners of the building from time to time;

(b) the deletion of "occupiers" from section 28 of the BMO because "occupiers", unlike owners, do not have an "insurable" interest in the common parts or the property of the OC;

(c) the deletion of "all parts thereof" from section 28 of the BMO because the inclusion of such words in effect means that apart from the common parts, all of the individual units in a building would require to be insured against third party risks by the OC;

(d) the empowerment of the Chief Executive in Council under the BMO to make regulations concerning avoidance of agreements as to the liability of OCs or owners towards third parties; and

(e) a new requirement for OCs to give notice to LR the name of the insurance company from which an OC has effected such policy and the period of the policy.

The Administration has also proposed that the new requirement on mandatory third party risks insurance shall take effect on a day to be published in the Gazette and believes that 12 months after the Regulation has been made would suffice.

Liability of occupiers

171. While members are supportive of the imposition of mandatory requirement on all OCs to procure and keep in force in relation to the common parts of the building a policy of third party risks insurance, some members have raised queries over the rationale for the proposed deletion of the word "occupiers" from section 28(1) of the BMO.

172. The Administration has explained that there must be an "insurable interest" in the thing or person being insured in order for a risk to be insurable. "Occupier" is defined under section 2 of the BMO as a tenant, sub-tenant or other person in lawful occupation of a flat, but does not include an owner of that flat. The responsibility to properly manage and maintain the common parts of a building rests with the owners, and not the occupiers. Hence, the BMO should only require an OC (which represents all owners of a building, but not the interests of the occupiers who reside or stay in the building) to procure third party risks insurance for common parts of the building.

173. Some members including Hon James TO, Hon Miriam LAU, Hon Audrey EU and Hon LI Kwok-ying are of the view that, in order to offer better protection for third parties, the scope of the third party risks insurance to be procured by an OC should cover liabilities arising from all accidents that occurred in the common parts of a building. Hence, there might be a need to require the OC to procure an insurance policy on behalf of the occupiers as well. They are concerned that the occupiers may be held liable for the death or injury of a third party that occurred in the building, but they may not have the financial capability to settle the judgment compensation to the injured third party. These members consider that such a policy is also desirable for the sake of protection of all owners of the building, as the OC concerned may be held liable jointly and severally for the death or injury of a third party that occurred in the building even though the court has ruled that the death or injury is largely the responsibility of the occupier. They have also pointed out that an OC might in the end be liable for the whole judgment compensation since the other party might go bankrupt. These members have suggested that an OC should be required to act as an agent and procure collectively third party risks insurance to cover the occupiers' liabilities in addition to liabilities incurred by the OC. They consider that individual owners would have the benefit of obtaining a cheaper premium if the OC can negotiate with the insurance company on their behalf.

174. The Administration, however, maintains its position that the scope of mandatory third party risks insurance for OCs under the BMO should not include any liabilities that are beyond the control of an OC and not related to the common parts of a building. The Administration has given the following explanations for its position -

(a) if an OC is made liable for any damage or personal injury caused by the occupier's negligence, it would mean that the occupier does not need to pay any care to the use of the common parts of the building and the OC might need to help the occupier to pay his share of the damages even if it is above the insurance amount procured by the OC;

(b) imposition of a mandatory requirement on an OC to procure insurance to cover the liabilities of individual occupiers will lead to another question as to whether the OC should be responsible for all the liabilities of the occupiers as well as other persons (e.g. individual owners, a manager or a contractor) in the building concerned under all circumstances (irrespective of whether the OC has procured the third party risks insurance);

(c) it will be unfair to require an OC to settle the damages if it is held by the court that an owner or an occupier should be held responsible for the accident;

(d) if it is held by the court that an OC, an owner and an occupier are jointly and severally liable to a third party's injury in tort, the injured third party may opt to enforce his award of judgment compensation against any of the three parties depending on their financial capability. Each of the parties will be liable to the injured third party for the whole damage in the first place, but may recover contribution from the other parties under section 3(1) of the Civil Liability (Contribution) Ordinance (Cap. 377)[4]; and

(e) if the occupier goes bankrupt, a remaining party will likely go to the court to seek an order for the purpose of getting the share from the other party (other than the occupier) and the issue of contribution will be determined by the court. If the court held that the OC has to share the responsibility for paying the extra damage, the insurance company of the OC will have to pay the OC's share of the damages up to the policy amount. In other words, the liability of the OC will be covered by the insurance policy.

175. The Administration has also expressed concern that the proposal would impose a huge responsibility on OCs and might discourage owners from forming OCs.

176. The Bills Committee has discussed the relevant issues with representatives of the Hong Kong Federation of Insurers . Members note the Federation's view that, if there is such a demand in the market, insurance companies could provide cover to individual owners and occupiers under the third party risks insurance policy procured by an OC as an agent acting for these owners and occupiers. However, it will be very difficult to make risk assessment particularly for those buildings which consist of both residential

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[4] *Section 3(1) of the Civil Liability (Contribution) Ordinance provides that any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*

and commercial parts involving different types of occupiers. The premium is also expected to be high. Hon Bernard CHAN, a non-Bills Committee member, has pointed out that an insurance policy for individual households is a common product in the market but a collective insurance policy for all households in a building would be rather complex. He is concerned whether owners are willing to shoulder the financial burden concerned. Hon Albert HO has also expressed concern that OCs might have reservations against the suggestion.

177. Hon Jasper TSANG has expressed doubt about the need to impose a mandatory requirement on all owners to procure the insurance policy as suggested. He also considers that, while procurement of third party risks insurance to cover liability of occupiers in relation to the common parts of the building by an OC can be regarded as a sharing of risks among owners, individual owners might have different considerations in assessing their possible liabilities involved on the basis of the nature of their properties (i.e. residential or commercial), the nature of the business, or the number of people in their households, etc.

178. Given the diverse views expressed by members, the Bills Committee has decided not to pursue the issue further. Hon James TO has suggested that frontline staff of HAD should advise owners and individual occupiers to consider procuring third party risks insurance collectively.

179. The Administration has also informed the Bills Committee that, given that an OC represents all owners and the liabilities of owners in relation to common parts are enforceable against the OC to the exclusion of the owners and "occupiers" will be deleted from sections 28(1) and (3), there is no need to specify in the relevant proposed provisions that the OC shall procure the insurance policy on behalf of the OC and the owners. It is also unnecessary to retain section 28(1A) which provides that an OC shall enter into a policy of insurance as agent for the owners of a building. The Administration will, therefore, introduce CSAs -

(a) to delete sub-section (1A) and amend sub-sections (1) and (3) accordingly; and

(b) to make corresponding amendment to section 41(ca) which is the empowering provision for the making of regulations by the Chief Executive in Council.

Scope of the mandatory requirements

180. Some members consider that the obligations to procure insurance should not be imposed on OCs only and the scope should be extended to managers and owners' committees.

181. The Administration has advised the Bills Committee that it is the Government's policy intention that all buildings in the long run should be covered by third party risks insurance for the protection of owners and third parties. The need to procure insurance is specified in the Guidelines for DMC issued by LACO and most managers have already procured third party risk insurance for the buildings they manage. The Regulation is made as a piece of subsidiary legislation under the BMO which is applicable to OCs only. The Administration has further explained that there are grave difficulties to require managers to procure insurance in the manner required under the Regulation by way of including a provision in Schedule 7 to the BMO as suggested by members.

182. The Administration has further explained that as an owners' committee is not a legal person, it cannot procure third party risks insurance on behalf of owners. Hon Albert HO and Hon James TO has suggested that the Administration should explore, in collaboration with the insurance industry, the feasibility of procurement of third party risks insurance by owners of buildings (especially those old tenement buildings) which have not formed OCs nor engaged the service of property managers.

183. The Administration has undertaken to study the issue after the commencement of the Building Management (Third Party Risks Insurance) Regulation. The Administration has also pointed out that section 42 of the BMO stipulates that the Chief Executive may, by order published in the Gazette, amend Schedule 7 to the BMO. If it is considered feasible to introduce the requirements of procurement of insurance on managers under Schedule 7, it could be implemented through a relatively quicker legislative exercise.

184. Members have enquired about the need for section 28(3) of the BMO which provides that a corporation may insure and keep insured with an insurance company the common parts of the building and the property of the corporation to the reinstatement value thereof against fire and other risks, given that procurement of insurance against fire and other risks is not a mandatory requirement and similar provision has been incorporated in section 18(2)(d). At members' suggestion, the Administration has agreed to move CSAs -

(a) to amend section 28(6A) of the the BMO so that the requirement to give notice to LR applies only to third party risks insurance policy procured by an OC under section 28(1) of the BMO but not the insurance on fire and other risks under section 28(3);

(b) to make corresponding amendment to the new section 12(2)(da); and

(c) to amend the heading of the new section 28 to show that it covers matters relating to insurance, and not only obligations.

Avoidance of agreements as to the liability of OCs or owners towards third parties

185. Members note that the new section 41(ca)(xi) provides that the Chief Executive in Council may make regulations concerning avoidance of agreements as to the liability of OCs or owners towards third parties made or reached after 31 March 2005. Members have queried the need for such a provision which seeks to have retrospective effect and intervene in agreements or understandings reached between private parties.

186. The Administration has explained that the empowering provision is aimed to protect the rights of third parties. If the date of 31 March 2005 is not stipulated in the proposed provision, it will only apply to arrangements, agreements or understandings made after the commencement of the Regulation. The purpose of imposing the mandatory requirement will be defeated if an OC can evade liability by making such an arrangement, agreement or understanding before commencement of the legislation. However, given members' concern over the retrospective implication of the provision, the Administration has agreed to move CSAs to delete the stipulated date in the provision.

Draft Building Management (Third Party Risks Insurance) Regulation (Draft Regulation)

187. The Bills Committee has discussed various issues relating to the Draft Regulation. These include the statutory minimum amount of insurance coverage, protection for OCs, insurance coverage of UBWs and the proposed asbestos exclusion clause.

188. Members have expressed diverse views on the statutory minimum amount of insurance coverage. While some members consider that the proposed amount of $10 million is too low to offer adequate protection for owners, some other members are concerned that increasing the minimum amount will lead to a higher level of premium. Members have suggested to the Administration to consider setting up a tiered structure on the basis of the numbers of flats in respect of the minimum insured amount.

189. The Administration has informed the Bills Committee that the current proposal for a $10 million coverage is made by the Hong Kong Federation of Insurers. As advised by the Federation in June 2006, an average of 6 500 public liability claims were received by its member companies between 2002 and 2004, and no single claim exceeding $10 million was reported.

190. The Administration also considers it impractical to devise a tiered structure for the insurance requirement on the grounds that the number of units of buildings in Hong Kong varies greatly and a number of tiers would be required to cater for the many different types of buildings. The Administration is also concerned that it will bring obvious inconvenience in implementation and render the mechanism unworkable and ineffective.

191. Members note that the new section 28 as currently drafted will enable the Administration to introduce a tiered structure for the insurance requirement if deemed necessary in the future. Members agree that the desirability of such a tiered structure should be considered during the scrutiny of the draft Regulation.

192. Members note that an insurance company may introduce restrictions in the insurance policy by OCs by reference to matters such as the number of claims that may be made during a certain period, the age of the building, the condition or maintenance of the building, and the use of the building, etc. Any such restrictions will be of no effect if the OC has exercised reasonable diligence in managing the building and kept the building in good condition. Members have raised queries over the interpretation of the phrase "having exercised reasonable diligence". They are concerned that an insurance company may reject the claims by third parties on the ground that the OC concerned has failed to exercise reasonable diligence in that respect.

193. The Administration has advised that reference may be made to an English court case relating to liability insurance, i.e. *Fraser v B.N. Furman (Productions) Ltd and Others* [1967] All ER 57. For there to be a breach of the requirement to take reasonable precaution, the insured must have recognised the danger, and deliberately courted it, by taking measures that the insured knew to be inadequate to avert it. The insured's conduct or omission must have been reckless. At members' request, the Administration has agreed to revise the phrase "ensure compliance with the deed of mutual covenant" as "exercise reasonable diligence to ensure compliance with DMC concerned" in section 6(3)(a)(ii) of the Regulation.

194. Members have also expressed diverse views on whether the policy on third party risks insurance should cover UBWs attached to or hung on the common parts of a building. Some members including Hon James TO, Hon Albert HO, Mrs Selina CHOW, Hon Miriam LAU, and Hon Emily LAU are of the view that these UBWs should be covered under the mandatory insurance policies of OCs on the grounds that it could better protect third parties and the increase in premium may encourage owners concerned in considering demolition of their UBWs. Hon CHOY So-yuk and Hon WONG Kwok-hing, however, take a different view. They consider it unfair to impose a mandatory requirement on OCs to procure insurance for UBWs in order to protect the owners who build the UBWs which are used by the owners concerned only.

195. The Administration is strongly of the view that OCs should not be required to procure a third party risks insurance policy which covers liabilities relating to UBWs mainly on the following reasons -

(a) it would imply that the Government condones the existence of UBWs;

(b) it would indirectly encourage the continual existence of UBWs as they are "protected" under the insurance policies; and

(c) the higher insurance premium will mean cross-subsidy of the poor risks by good risks, which is unfair to those properly maintained buildings and those owners who have no UBWs attached to their units.

196. The Administration has also advised that although the UBWs concerned are attached to or hung on the common parts of buildings in a number of cases, it was held by the court in some cases that the OC of the building should not be held responsible for the claim because the individual owner and/or occupier concerned has the exclusive right to use the UBWs which caused the accident and the UBW although attached to the common part is not a common part of the building.

197. The Administration has further pointed out that the Draft Regulation made under section 41(ca) may set out the liabilities required, and not required, to be covered under those policies for the purpose of the new section 28. The issue of whether liabilities relating to UBWs should be covered in the third party risks insurance policies for OCs should be dealt with in the Regulation, and not the principal legislation.

198. Some members including Hon Emily LAU and Hon James TO have expressed disagreement with the arguments put forward by the Administration for not including UBWs within the coverage of the Regulation. The Bills Committee, however, has not come to any unanimous view on the issue.

199. Some members consider that it is unlikely that claims against an OC in relation to death or bodily injury in the common parts of a building will be associated with asbestos. At members' suggestion, the Administration has agreed to include an asbestos exclusion clause in the future Regulation.

200. Hon LEE Kwok-ying, however, has expressed concern whether employees' compensation insurance would cover claims against an OC in relation to death or injury associated with asbestos in the common parts of a building caused to an employee (e.g., a repairman) who is hired by the OC in the course of his performance of regular maintenance work for the building. The Administration has advised the Bills Committee that a common disease induced by asbestos is pneumoconiosis and, under the Pneumoconiosis

Compensation Ordinance (Cap. 360), a person suffering from pneumoconiosis would be able to claim compensation from the Pneumoconiosis Compensation Fund. As for other cases, employees' compensation insurance would cover employees' claims against death or injury associated with asbestos.

Delegation of powers and duties by SHA

201. The Bill seeks to amend Specification of Public Office (Cap. 1 sub. leg. C) to enable SHA to delegate to other public officers his powers and duties under the BMO, in order to facilitate the delegation process.

202. Some members including Hon James TO and Hon Audrey EU have raised queries over the need to give such a broad scope of delegation of powers and duties by SHA as some of the powers should be exercised by SHA personally, e.g. power of appointment of building management agent under section 40B.

203. Having regard to members' concern, the Administration has agreed to drop the proposal from the Bill and will move CSAs to delete Part 4 of the Bill accordingly.

Communication among owners

204. Some members have raised concern over the incidents in some buildings where the manager or the incumbent MC has imposed measures to prohibit communication among owners on matters relating to the management of the building, such as the incorporation of owners or election to MC. They are of the view that the Administration should consider imposing a statutory obligation on a manager and/or the incumbent MC to allow communication among owners on matters relating to the management of their building, such as by distribution of leaflets into letter boxes or posting of notices at the common parts of the building. Hon James TO has suggested that the manager and/or the incumbent MC should be required to notify owners, by way of a standard circular, of any leaflet/letter provided by an owner whose name should be specified, and let the owners decide whether they wish to receive a copy of that leaflet/letter.

205. Some other members, however, take the view that the fundamental principle is that a manager and/or the incumbent MC should ensure equal and fair treatment of information received from different sources and allow owners to have the right to choose whether they wish to receive the information. It is only necessary to stipulate such a general principle in the BMO, instead of specifying details of the actual arrangements in the legislation. They have further pointed out that imposition of such a statutory obligation would lead to the question of how the content of the communication to be allowed should be defined.

206. Hon James TO has suggested that the manager should allow all channels of communication unless any channel is prohibited specifically by a resolution passed at a general meeting of owners. Hon Albert CHAN has suggested that the manager should be required not to unreasonably prohibit or restrict the communication among owners on any business relating to the management of the building, and to ensure equal rights of owners and an OC/owners' committee in communicating with other owners on such business. The Administration has reservations about the suggestions on the ground that they would undermine the manager's right and duty to properly manage the common parts of the building.

207. The Administration has proposed to include a new paragraph 9 under Schedule 7 to require the manager to consult the corporation, or if there is no corporation, the owners' committee on the channels of communication among owners on any business relating to the management of the building. The Administration has explained that the proposal is to ensure that the manager will properly consult owners on such matters.

208. Hon James TO and Hon Albert CHAN, however, have expressed concern that the decision would have the adverse effect that the manager could no longer exercise any discretion and would be bound to adopt the decision made by the owners' committee which may not be in the best interests of all the owners. Hon Emily LAU is dissatisfied that the proposed new paragraph 9 could not resolve the problem of some owners being deprived of the opportunity to receive information from external parties (e.g., elected members of their district) due to unfair restrictions imposed by their respective managers or OCs. She considers that the scope of the proposed new paragraph is too narrow as it only covers "business relating to the management of the building". Hon WONG Kwok-hing has, however, expressed the view that individual owners should have the right to decide what information they do want to receive and to prohibit any such information from being put into their letterboxes by giving instructions to their managers.

209. After consideration of members' views, the Administration has agreed to move CSAs to the effect that the manger shall consult the corporation at a general meeting of the corporation and adopt the approach decided by the corporation on the channels of communication among owners on any business relating to the management of the building.

Borrowing powers of OCs

210. Members note that the proposal of empowering OCs to borrow on behalf of those defaulting owners from the Government to carry out statutory works was included in the consultation paper on the proposed amendments to the BMO issued in 2003. According to the Administration, although the principle of the proposal was generally supported during the public

consultation exercise, there were concerns about the potential danger of abuse by OCs and the Government might be subject to huge risk of non-repayment from defaulting owners. In addition, the Administration has come across various problems and difficulties in pursuing the proposal. These difficulties arise mainly from devising the procedures for OCs to exercise the borrowing power, an appeal mechanism for the owners concerned, and the mechanism for placing a charging order on the properties of the owners concerned as security for the Government loan. As a result, the proposal has been excluded from the Bill.

211. However, the Administration has informed the Bills Committee that, when the Fire Safety (Buildings) Ordinance (FS(B)O) was enacted in 2002, it was agreed that the provisions in FS(B)O should not come into operation until after the BMO has been amended as regards the borrowing power of OCs. As such, the exclusion of the proposal from the Bill would have implications on the commencement of FS(B)O. In consultation with bureaux/departments concerned, the Administration has worked out a proposal of empowering OCs to borrow from the Government on behalf of the defaulting owners to carry out statutory repair works.

212. The Administration has proposed to add a new section to the BMO to empower an OC to borrow money from the Government on behalf of those owners who have failed or refused to pay their share for the purpose of complying with statutory directions, notices or orders relating to the demolition, alteration, repair or improvement works of the building managed by the OC concerned; and to include a new Schedule setting out the conditions and procedures for OCs acting on behalf of the defaulting owners to borrow from the Government, and to execute and register a charge against the defaulting owners' interest in the property in LR.

213. Members in general appreciate the merits of the proposal which could facilitate OCs to undertake timely implementation of the works required under statutory directions, notices or orders relating to the demolition, alteration, repair or improvement works of their buildings in the event that some irresponsible owners have refused to pay their respective shares of the costs of the works. Given that the proposal is not included in the Bill, members requested the Administration to consult the professional bodies in the building management sector on the proposal. The Bills Committee also wrote to organisations and individuals which/who have made submissions to invite their views on the proposal.

214. The Administration has subsequently informed the Bills Committee that while professional bodies have no strong objections to the proposal, they have raised various concerns about the implementation of the proposed scheme. On the other hand, a number of associations of OCs have expressed strong reservations against the proposal. Most organisations and individuals which/who have responded to the Bills Committee's invitation for views have in general expressed objections to the proposal.

215. The Administration has explained to the Bills Committee that whilst the proposed borrowing power scheme is workable, it might not be very useful to OCs given the complexity of the scheme. Moreover, in addition to the Building Safety Loan Scheme administered by the Buildings Department (BD), both the Hong Kong Housing Society and the Urban Renewal Authority have introduced a series of loan and grant schemes in recent years to assist eligible OCs and property owners in carrying out repair works.

216. The Bills Committee has discussed with representatives of the Security Bureau, Fire Services Department (FSD) and BD the measures to be adopted by FSD in facilitating the commencement of the FS(B)O in order to assess the implications of not implementing the proposed borrowing power scheme. Members note that these facilitation measures include a phased implementation timetable based on the age of buildings, a flexible approach in enforcing the requirements based on the physical structure of the building, and the various financial and technical assistance schemes available for owners in carrying out the required works. After consideration, members raise no objection to the Administration's decision of not including the proposed borrowing power scheme in the Bill.

217. The Administration has subsequently consulted the Panel on Security on its decision to withdraw the proposed borrowing power scheme from the Bill and its plan to commence the Fire Safety (Buildings) Ordinance (Cap. 572) on 1 July 2007. The Panel on Security has raised no objection to the Administration's plan.

Formation of OCs in house developments

218. Members in general are of the view that a mechanism should be set up, by introducing provisions under the BMO or under a new piece of legislation, to enable owners of a house development to form a body or to confer certain powers on these owners, for the management of the common parts/facilities of the house development. They stress that it is unfair to deprive owners in house developments, e.g. Hong Lok Yuen, of the right to form OCs to manage their properties.

219. The Administration has explained to the Bills Committee that the aim of the BMO is to facilitate the management of multi-storey buildings by providing for a mechanism for owners, who own undivided shares, to form an OC. This could be reflected in the definition of the term "owner" in section 2 of the BMO. The legal difficulty for the incorporation of owners in house developments under the BMO stems from the fact that DMC of house developments usually do not allocate any undivided share to the owners. Owners of house developments are sole owners of the respective subsections but not co-owners of the whole development. The Administration has also informed the Bills Committee that, as advised by D of J, the shares to be

allocated on any other basis (be it by the number of divided shares of each owner, or by the gross floor area of each owner's house, or by the management fees paid by each owner) would not be considered undivided shares and such allocation of shares would not enable owners of house developments to come within the definition of "owner" under the BMO.

220. The Bills Committee has considered a set of amendments to the BMO put forward by Hon Ronny TONG, a non-Bills Committee member, including the amendments to the definition of "owners" and to the determination of owner's shares so as to provide an alternative basis, other than undivided share, for the incorporation of the owners of house developments.

221. The Administration has pointed out that, while the common parts of a multi-storey building are usually co-owned by the owners of the flats of the building, the so-called "common parts" of house developments remain to be private properties of the developer. It follows that even if owners of individual houses in house developments incorporate themselves into an OC, the OC will not be able to carry out a fundamental duty of an OC which is to manage and maintain the common parts (within the meaning of the BMO) as it might amount to interference of property rights of the developer.

222. The Administration has also expressed doubts that, given the fact that the size of the subsections (or houses) of house developments varies to a great extent and a house development might contain individual houses and multi-storey buildings, unless it is provided for in the DMC, it would be extremely difficult, as proposed by Hon Ronny TONG, for owners to agree among themselves a basis (whether it is based on the number of subsections they own, the size of their subsections, or headcount, etc) for determination of their shares.

223. Members in general recognise that it might not be feasible for owners of house developments to form an OC under the BMO. They are, however, of the view that the Administration should consider setting up a mechanism, by introducing provisions under the BMO or under a new piece of legislation, to enable owners of a house development to form a committee so that they can have a greater say in the management of the common parts/facilities of the house development, even though the proposed committee might not necessarily possess the same powers and functions as those of an OC formed under the BMO.

224. The Administration has pointed out that under the existing legal framework, setting up of the above proposed non-statutory committee would not enable the owners concerned to have any management control of the common parts/facilities of the house developments. If the Administration tries to confer powers on such committees to enable them to play a role in the management by introducing legislative amendments, this would amount to infringement of private property right and compensation would have to be paid

to the developers concerned. Moreover, given the complexity of the proposal, much more time would be needed for extensive consultation and discussion.

225. After consideration of the Administration's advice, members have agreed that the Bills Committee would not pursue the issues relating to the formation of an OC in a house development in the current legislative exercise for the reasons that setting up of the proposed non-statutory committee might not be useful to owners of house developments and further discussion of the issue would seriously delay the passage of the Bill. At the request of the Bills Committee, the Administration has undertaken to continue to work on the issue in consultation with relevant parties and revert to the Panel on Home Affairs.

Mechanism to amend provisions of the DMC

226. Members in general are of the view that a mechanism should be put in place under the BMO to rectify DMC provisions which are unfair to owners, such as the unfair allocation of undivided shares and management shares between owners and developers (where developers may have a large number of undivided shares but only need to pay a small amount of management expenses). They consider that there should be a mechanism to re-distribute management fees among owners in accordance with their respective undivided shares.

227. The Administration has explained that any amendment to a DMC will inevitably affect the rights and responsibilities of the contractual parties. For example, the re-distribution of undivided or management shares will likely benefit one group of owners at the expense of another group. This could be regarded as having an impact on the property rights of owners. According to the Administration, while the proposal of re-distributing management fees in accordance with undivided shares will not extinguish all the owners' legal rights in respect of their shares, it is likely to be regarded as an "interference"/"control" of the property which has to satisfy the "fair balance" test (i.e. whether it strikes a fair balance between the demands of the general interest of the community and the requirement of the protection of the owners' right). The proposal may also provoke strong objections on the ground of property right protection under Articles 6 and 105 of the Basic Law.

228. The Administration has advised the Bills Committee that it would not introduce any provision in the BMO to mandate the re-allocation of management fees for existing buildings. However, the Administration appreciates that the provisions in many old DMCs have caused difficulties in the owners' efforts in managing and maintaining their buildings (such as buildings covered by more than one DMC). The Administration has undertaken to continue to work on the issue in consultation with relevant parties and revert to the Panel on Home Affairs.

229. Hon James TO, however, considers that while the principle of respecting private contracts should be upheld, the Administration should continue to explore the introduction of a mechanism under the BMO whereby owners could apply to the court for the re-allocation of management fees which are grossly unfair.

Setting up of a Building Affairs Tribunal

230. Members in general consider there to be a need for setting up a Building Affairs Tribunal. They have suggested that the Administration should consider introducing a mandatory mechanism of mediation for dealing with certain types of building management disputes e.g. disputes involving only individual owners, or involving a small amount of money or of certain nature such as water seepage, nuisance or trespassing cases. Some members have further suggested that the proposed Building Affairs Tribunal should handle libel cases arising from disputes in building management as well.

231. The Administration has informed the Bills Committee that the Housing, Planning and Lands Bureau (HPLB) has consulted the public in the setting up of a Building Affairs Tribunal in the context of the "Public Consultation on Building Management and Maintenance". HAD is discussing with HPLB (in the context of setting up the proposed Tribunal) and the Judiciary on how best to promote mediation among OCs and property owners. The Administration has also passed on the suggestion relating to the purview of the proposed Tribunal to the Housing, Planning and Lands Bureau for consideration.

232. As a related issue, some members are of the view that the Lands Tribunal should have exclusive jurisdiction on building management matters and some fast-track summary proceedings should be put in place in the Lands Tribunal for handling relatively straightforward cases, such as application for an order to compel an OC or a manager to provide copies of records or documents. The Administration has undertaken to consider the issue in collaboration with the Judiciary. Given its complexity and implications on the conduct of legal proceedings, members have agreed not to pursue this issue further in the current legislative exercise.

Regulation of property management companies

233. Some members are of the view that a regulatory scheme should be introduced for the property management industry in order to better protect owners' interests. The Administration has informed the Bills Committee that it is conducting a two-phase study on the feasibility of introducing a regulatory scheme for the property management industry. The focus of the first-phase study is on the present situation of the property management industry in Hong Kong, the overseas practices in regulating property management companies,

and the regulatory regime for other comparable industries/professionals in Hong Kong. Upon the conclusion of the first-phase study around June 2007, the Administration will report the findings to the Panel on Home Affairs.

234. At the Administration's suggestion, members have agreed not to pursue the issue in the current legislative exercise. They have, however, made the following suggestions for the Administration to consider -

(a) different levels of regulation should be imposed under the scheme according to the sizes of property management companies;

(b) the proposed regulatory scheme, if introduced, should be combined with the existing regulatory scheme for the security and guarding services industry in order to avoid requiring the property management companies which provide security as well as property management services to apply for two licences; and

(c) property management companies should be required to procure liability insurance for the protection of owners in case of winding up of these companies.

Commencement of the Bill

235. The Administration has originally proposed that the new procurement requirements shall take effect 12 months after commencement of the Bill so as to allow sufficient time for OCs and managers to acquaint themselves with the new provisions. After reconsideration, the Administration has planned to publish in the Gazette the commencement of all the provisions of the Amendment Ordinance (except those related to the third party risks insurance for OCs) around three months following the passage of the Bill on the grounds that -

(a) owners and managers are already well aware of the new procurement requirements during the consultation period;

(b) the proposed provisions will bring about improvements to the existing mechanism and should therefore come into effect as soon as possible (i.e. on the same day as other provisions) for the benefit of the owners; and

(c) the three-month period should be sufficient for the public to understand the new provisions.

236. Members raise no objection to the Administration's plan.

Implementation of the Amendment Ordinance (upon the enactment of the Bill)

237. There are only nine existing provisions of the BMO which come with a penalty provision, in addition to the new section 28(2) of the BMO (which is yet to commence) which imposes a criminal liability on an OC for non-compliance with the requirement to procure third party risks insurance for the common parts of the building. Members have expressed concern over the enforcement of the proposed new provisions of the BMO in the absence of penalty clauses.

238. The Administration has explained that when frontline staff of District Offices notice of a suspected breach of the legal requirements of the BMO, they would draw the attention of the MC of the OC concerned to the problem. Most of the disputes and complaints over non-compliance with the BMO stem from misunderstanding of the requirements in the law. Following enactment of the Amendment Bill, most of the existing ambiguities in the BMO will be clarified. The management of buildings is the responsibilities of owners themselves, and any dispute among the owners should best be resolved through owners' meetings. Moreover, section 45 of and Schedule 10 to the BMO have empowered any owner to take his case to the Lands Tribunal for an adjudication and to seek civil remedy. There are precedent cases where the chairmen of MCs were ordered by the court to convene an owners' meeting to discuss matters of owners' concern. The breach of such an order of the court could amount to contempt of court, punishment for which could ultimately result in imprisonment.

239. The Administration has informed the Bills Committee that, after enactment of the Bill, a set of questions and answers concerning the appointment of an MC, as well as a sample notice of meeting which would contain detailed guidelines on what should be regarded as a valid proxy instrument would be issued for reference by OCs and owners.

240. The Bills Committee has suggested that the Panel on Home Affairs should arrange to discuss issues relating to the implementation of the Amendment Ordinance. Some members have requested the Administration to provide a set of the publicity booklets with Q&As and the guidelines to the Panel before their issuance.

241. Members are of the view that the BMO is a piece of very complicated legislation, and the provisions are drawn up in a very technical manner. It is, therefore, very difficult for owners to understand the provisions and to follow the statutory requirements in the day-to-day management of their buildings. Members consider that staff of the District Building Management Liaison Team

of each District Office should offer more assistance to owners in managing their properties.

242. The Administration has informed the Bills Committee that, on receipt of an invitation to attend an owners' meeting, the subject Liaison Officer would discuss with the chairman or secretary of the MC to ascertain whether there are potentially controversial items on the agenda. Priority would be given to owners' meetings for the formation of an OC because of the technicalities involved and Liaison Officers would attend these meetings. Where the building concerned is a large development involving hundreds/thousands of owners' attendance at the meeting, the subject Liaison Officer would also attend. In addition to Liaison Officers, Community Organisers are employed by District Offices to carry out various duties relating to building management matters. These Community Organisers would attend training courses covering basic knowledge in the formation of OCs, building management and maintenance and the BMO.

243. Members are of the view that the staff of District Officers should render more support and take a proactive role in advising owners in matters relating to the conduct of owners' meetings such as determining the validity of proxies and the procedures for the appointment of an MC. They also consider that the Administration should deploy adequate manpower resources for building management duties in each district.

Committee Stage amendments

244. Apart from the CSAs stated in the preceding paragraphs, the Administration will move the following technical amendments to the Bill -

(a) to amend the English version of clause 33(e) (which amends the new section 28(6)) by replacing "The treasurer" with "the treasurer"; and

(b) to amend the English version of section 32(2) by replacing "determination" with "termination".

245. The Bills Committee does not object to these CSAs.

Date of resumption of Second Reading Debate

246. Subject to the CSAs to be moved by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill on 25 April 2007.

Follow-up actions by the Administration

247. The Administration has made the following undertakings -

(a) LR would prepare a sample form to facilitate the appointment of convenor by owners for the purpose of convening a meeting for the appointment of an MC (paragraph 27);

(b) the feasibility of extending the new requirements on the appointment of proxy to meetings of owners would be considered in the light of the implementation experience of OCs in meeting these requirements and developments would be reported to the Panel on Home Affairs (paragraph 53);

(c) detailed administrative guidelines and instructions would be issued to OCs and property owners on how to follow the new requirements on appointment of proxy (paragraph 65);

(d) administrative guidelines would be issued to set out the types of details of the legal proceedings which should be included in the notice to owners (paragraph 145);

(e) a comprehensive plan (including the provision of adequate manpower resources for carrying out extensive publicity programmes) would be devised on the new procurement requirements and a layman's guide would be issued after the passage of the Bill (paragraph 158);

(f) the issue of expanding the mandatory requirement to procure third party risks insurance to owners' committees and managers would be studied after the commencement of the Building Management (Third Party Risks Insurance) Regulation (paragraph 183);

(g) the issue relating to the formation of OCs in house developments would be studied in consultation with relevant parties and the outcome would be reported to the Panel on Home Affairs (paragraph 225);

(h) the issue relating to the introduction of a mechanism for amendments of DMC provisions through legislative means for the purpose of facilitating effective building management and maintenance would be followed up in consultation with relevant parties and further developments would be reported to the Panel on Home Affairs (paragraph 228); and

(i) the findings of the first-phase study on the feasibility of introducing a regulatory scheme for the property management industry would be reported to the Panel on Home Affairs (paragraph 233).

Follow-up action by the Panel on Home Affairs

248. The Bills Committee has suggested that the following matters should be followed up by the Panel on Home Affairs -

(a) the comprehensive plan (including the provision of adequate manpower resources for carrying out extensive publicity programmes) to be devised by the Administration on the new procurement requirements (paragraph 158); and

(b) issues relating to the implementation of the Amendment Ordinance including the provision by the Administration of a set of the publicity booklets with Q&As and the guidelines on the new provisions (paragraph 240).

Consultation with the House Committee

249. The Bills Committee consulted the House Committee on 13 April 2007 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting on 25 April 2007.

Council Business Division 2
Legislative Council Secretariat
20 April 2007

Appendix I

Bills Committee on Building Management (Amendment) Bill 2005

Membership list

Chairman	Hon James TO Kun-sun
Members	Hon Albert HO Chun-yan Hon Margaret NG Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP Hon Jasper TSANG Yok-sing, GBS, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk, JP Hon Andrew CHENG Kar-foo Hon Abraham SHEK Lai-him, JP Hon Albert CHAN Wai-yip Hon Audrey EU Yuet-mee, SC, JP Hon WONG Kwok-hing, MH Hon LI Kwok-ying, MH, JP Hon Alan LEONG Kah-kit, SC Hon LEUNG Kwok-hung Prof Hon Patrick LAU Sau-shing, SBS, JP Hon TAM Heung-man (Total : 18 Members)
Clerk	Miss Flora TAI
Legal Adviser	Mr Stephen LAM Ping-man
Date	12 October 2006

Appendix II

Bills Committee on Building Management (Amendment) Bill 2005

List of organisations/individuals which/who have submitted views to the Bills Committee

I. Professional and property management-related bodies

The Hong Kong Association of Property Management Companies Limited

Broadway-Nassau Investments Limited

The Chartered Institute of Housing Asian Pacific Branch

The Hong Kong Federation of Insurers

The Housing Managers Registration Board

Hong Kong Housing Society

The Hong Kong Institute of Architects

Hong Kong Institute of Certified Public Accountants

Hong Kong Institute of Housing

The Hong Kong Institute of Real Estate Administration

The Hong Kong Institute of Surveyors

The Law Society of Hong Kong

The Mass Transit Railway Corporation

Property Management Administrative and Clerical Staff Association

Real Estate Developers Association of Hong Kong

Swire Properties

Taikoo Shing (Management) Limited

The Urban Renewal Authority

II. Owners' corporations/owners' committees and owners' groups

Association Concerning Building Management of Yuen Long District

Association for Owners' Building Management Rights

The Association of Owners of the Gold Mine Building

Association of Owners of the Tai On Building

Cheung Chau Kai-Fong Society

Hong Lok Yuen Association

Mei Foo Sun Chuen Residents Association

Hong Kong Owners Club Ltd.

Residents of Wah Ming Estate

Hong Kong Sandwich Class Housing Association

The Incorporated Owners of Charming Garden

The Incorporated Owners of Hibiscus Park

The Incorporated Owner of Kam Fung Garden

The Incorporated Owners of Mei Foo Sun Chuen-Stage VI

The Incorporation Owners of Tak Tin Estate

Mr CHAN Sai-nam, Chairman, owners' committee

Mr WAN Kam-cheung, member of South Horizons Estate Owners' Committee

一群運通洋樓的苦業主及一群平愛大廈的苦業主

鑽石山鳳鑽邨的一群業主

III. District organisations and District Council/Area Committee members

Sai Kung District Council

Sha Tin District Council

Sham Shui Po District Council

Wan Chai District Council

Yau Tsim Mong District Council

Mr CHAN Moon-tong, Kwun Tong Central Area Committee member

Ms CHAN Wai-ching, Yuen Long District Council member

Mr CHAN Yik-wah, Lam Tin Area Committee member

Mr LAI Man-chi, member of the Tuen Mun South East Area Committee

Mr LAM Ho-yeung, Yau Tsim Mong District Council member

Ms LAU Fuk-yu, Kwun Tong West Area Committee member

Mr LAW Kwong-keung, Sha Tin District Council member

Mr LEUNG Chi-wai, Sha Tin District Council member

Kwai Tsing District Councillor Office of NG Kim Sing

Mr VONG Kin-hung, Lam Tin Area Committee member

Mr WONG Cho-ki, Tuen Mun North West Area Committee member

Ms YEUNG Siu-pik, Southern District Council member

Miss Amy YUNG, Islands District Council member

IV. Political parties/affiliations and others

Democratic Alliance for the Betterment and Progress of Hong Kong

Democratic Party

Federation of Hong Kong & Kowloon Labour Unions

V. Individual members of the public

Mr CHAN Wing-chon

Mrs CHEUNG Lee Yue-kan

Mr Lawrence CHEUNG Yin-fan

Mr CHIU Hon-lai

Ms Grace CHUNG

Mr HAN Bing-kei

Mr Edwin HUI

Ms KOT Mei-ping

Mrs Mary V.T. KUO

Mr LAI Man-chi

Mr LEUNG Chi-keung

Mr C.T.LO

Mr LO Yiu-kwong

Ms SZE-To Kin

Mr WONG Kit

Mr Jack WONG Shing-kwong

Mr WONG Siu-wah

Mr Stephen WONG

Mr YIP Ming