# 立法會 Legislative Council

LC Paper No. CB(1)2658/11-12 (These minutes have been seen by the Administration)

Ref: CB1/BC/12/09

# **Bills Committee on Competition Bill**

Minutes of the 38<sup>th</sup> meeting held on Tuesday, 8 May 2012, at 4:30 pm in Conference Room 3 of the Legislative Council Complex

**Members present**: Hon Andrew LEUNG Kwan-yuen, GBS, JP (Chairman)

Hon Ronny TONG Ka-wah, SC (Deputy Chairman)

Hon Albert HO Chun-yan

Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP

Hon LEE Cheuk-yan

Hon Fred LI Wah-ming, SBS, JP

Hon James TO Kun-sun

Hon CHAN Kam-lam, SBS, JP

Dr Hon Philip WONG Yu-hong, GBS

Hon Miriam LAU Kin-yee, GBS, JP

Hon Emily LAU Wai-hing, JP

Hon Abraham SHEK Lai-him, SBS, JP

Hon Audrey EU Yuet-mee, SC, JP

Hon Vincent FANG Kang, SBS, JP

Hon Jeffrey LAM Kin-fung, GBS, JP

Hon CHIM Pui-chung

Hon Starry LEE Wai-king, JP

Dr Hon LAM Tai-fai, BBS, JP

Hon CHAN Kin-por, JP

Dr Hon LEUNG Ka-lau

Hon WONG Kwok-kin, BBS

Hon Mrs Regina IP LAU Suk-yee, GBS, JP

Hon Paul TSE Wai-chun, JP

Hon Alan LEONG Kah-kit, SC

Hon LEUNG Kwok-hung

Hon Tanya CHAN

Hon WONG Yuk-man

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**Members absent**: Dr Hon Margaret NG

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Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP

Hon WONG Ting-kwong, BBS, JP

Prof Hon Patrick LAU Sau-shing, SBS, JP

Hon Cyd HO Sau-lan Hon CHAN Hak-kan

Hon Paul CHAN Mo-po, MH, JP

Public Officers attending

Agenda item II

Ms Linda LAI Wai-ming, JP

Deputy Secretary for Commerce and Economic

Development (Commerce and Industry)

Mr Raymond WU Wai-man

Principal Assistant Secretary for Commerce and Economic Development (Commerce & Industry)

Mr Michael LAM Siu-chung Senior Assistant Law Draftsman

Department of Justice

Ms Phyllis POON Hon-ying Senior Government Counsel

Department of Justice

Ms Jenny FUNG Mei-fung

Senior Assistant Law Officer (Civil Law) (Acting)

Department of Justice

Mr David Alan GROVER Senior Government Counsel

Department of Justice

**Clerk in attendance:** Mr Derek LO

Chief Council Secretary (1)6

**Staff in attendance:** Mr Timothy TSO

Assistant Legal Adviser 2

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# Ms Sarah YUEN Senior Council Secretary (1)6

# **Action**

# I Confirmation of minutes

(LC Paper No. CB(1)1726/11-12 —Minutes of meeting held on 20 December 2011)

The minutes of the meeting held on 20 December 2011 were confirmed.

# II Meeting with the Administration

with the Administration	
(LC Paper No. CB(1)1770/11-12(01)	—List of follow-up actions arising from the discussion at the meeting on 24 April 2012
LC Paper No. CB(1)1770/11-12(02)	—Administration's responses to follow-up questions arising from previous meetings
LC Paper No. CB(1)1770/11-12(03)	<ul><li>—Administration's paper on proposed further Committee</li><li>Stage amendments</li></ul>
LC Paper No. CB(1)1770/11-12(04)	<del>-</del>
LC Paper No. CB(1)1770/11-12(05)	—Draft Committee Stage amendments proposed by Hon Ronny TONG Ka-wah
LC Paper No. CB(1)1806/11-12(01)	Administration's response to the Committee Stage Amendments proposed by Hon Albert Ho and Hon Ronny Tong
LC Paper No. CB(1)1806/11-12(02)	The full set of Common Stage Amendments to be proposed by the Administration
LC Paper No. CB(1)1573/11-12(03)	—Draft Committee Stage amendments proposed by the Administration
LC Paper No. CB(3)885/09-10	—The Bill
LC Paper No. CB(1)1357/11-12(01)	<ul><li>Marked-up copy of the Bill prepared by the Legal Service Division)</li></ul>

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2. <u>The Bills Committee</u> deliberated (Index of proceedings attached at **Appendix**).

### Committee Stage amendments proposed by members

- 3. Mr Albert HO briefed members on the rationale (as detailed in LC paper No. CB(1)1770/11-12(04)) behind the draft Committee Stage amendments (CSAs) proposed by him to provide for the addition of a sunset clause, so that clauses 3, 4 and 5 on exemption of statutory bodies from the enacted Ordinance would cease to have effect three years after the coming into operation of these clauses.
- 4. Mr Ronny TONG briefed members on the draft CSAs proposed by him to provide for the deletion of the definition of "statutory body" in clause 2 and the deletion of clauses 3, 4 and 5 (LC paper No. CB(1)1770/11-12(05)). He explained that it was against the rule of law and hence unreasonable and unacceptable to grant broad exemption of all statutory bodies but five from the regulation of the enacted Ordinance, instead of leaving the flexibility to the Competition Commission (the Commission) and/or the Legislative Council (LegCo) to grant exemption on the merits of individual statutory bodies.
- 5. Mr Jeffrey LAM, however, indicated support for granting exemption to statutory bodies, such as the Trade Development Council (TDC) in recognition of the useful services it could provide to the commercial sector, and drew members' attention to the fact that some undertakings which opposed to the exemption of TDC were indeed TDC's competitors who would benefit greatly if TDC would not Ms Miriam LAU opined that to address relevant concerns, the be exempted. Administration should undertake to conduct a comprehensive review of the exemption of statutory bodies from the enacted Ordinance after a specified period of time, say, three or five years. This could ensure that the exemption arrangements would be reasonable in serving their purposes, and could facilitate the deletion/addition of any statutory bodies from/to the exemption list as To facilitate members' consideration of whether to support the above CSAs proposed by Hon Albert HO and Hon Ronny TONG, she urged the Administration to respond to her proposal early.
- 6. <u>Mrs Regina IP</u> added that she would introduce CSAs to provide that exemption would be granted to those statutory bodies which did not engage in any economic activities, and to ensure that not only TDC but also the Hong Kong Productivity Council, which had been competing with the private sector in providing consultancy services, would not be exempted.
- 7. <u>Mrs Regina IP</u> also indicated intention to move CSAs to amend clause 1 on short title and commencement to ensure that the enacted Ordinance would come

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into operation only after the guidelines had been issued by the Commission and approved by LegCo by way of a resolution, so as to address small and medium enterprises' concerns about the absence of clear definitions of "market" and "a substantial degree of market power".

### Committee Stage amendments proposed by the Administration

8. <u>The Administration</u> took members through the proposed further CSAs to the Bill (LC Paper No. CB(1)1770/11-12(03)). <u>The Chairman</u> requested Assistant Legal Adviser 2 to go through all proposed further CSAs, including those proposed at this meeting, to ensure that the English text and the Chinese text would be consistent.

### Follow-up actions required of the Administration

9. <u>The Bills Committee</u> requested the Administration to take the following actions –

### Committee Stage amendments

(a) provide a full set of the CSAs which the Administration would introduce to the Bill, including those proposed at this meeting;

### Exemption arrangements

(b) respond to Ms Miriam LAU's proposal to make an undertaking to conduct a comprehensive review of the exemption of statutory bodies from the enacted Ordinance after a specified period of time, so as to ensure that the exemption arrangements would be reasonable and could serve their purposes, and to facilitate the deletion/addition of any statutory bodies from/to the exemption list as appropriate;

#### Conduct rules

- (c) respond to Mr Jeffrey LAM's proposal to apply the criteria presently adopted in the merger rule to the conduct rules as well, and make the following amendments to the relevant provisions
  - (i) amend clause 6(1) to apply the criterion of "that have, or are likely to have, the effect of substantially lessening competition in Hong Kong" adopted in the merger rule to determine whether any agreements, concerted practices or decisions should be prohibited under the first conduct rule;

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and

(ii) amend section 1 of Schedule 1 to the Bill to apply to the conduct rules the exclusion criterion of "if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong" (section 8(1) of Schedule 7 to the Bill) presently adopted in the merger rule;

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### **Drafting matters**

#### Clause 106

(d) improve the drafting of the Chinese text of the new clause 106(b) in LC Paper No. CB(1)1770/11-12(03) to obviate the use of brackets, and to more clearly reflect the phrase "any of the causes of action" in the English text of this clause;

#### Clause 117 and other related/similar clauses

(e) amend the phrase "或牽涉入指稱的違反行為守則" in the Chinese text of the proposed CSA to clause 117(1) (and other clauses in similar context) in LC Paper No. CB(1)1770/11-12(03), so as to more accurately reflect its English text "alleged involvement";

# Clause 141(1)(f)

(f) amend the phrase "實則上" in the proposed CSA to clause 141(1)(f) in LC Paper No. CB(1)1770/11-12(03) to "實質上";

## *Clause 153A(2)*

(g) amend the phrase "interlocutory order" in the second line of the English text of the proposed new clause 153A(2) in LC Paper No. CB(1)1770/11-12(03); and

# Section 6(1) of Schedule 1

(h) improve the drafting of the Chinese text of the proposed new section 6(1) of Schedule 1 to the Bill in LC Paper No. CB(1)1770/11-12(03), so as to clarify that the second conduct rule would not apply only to a conduct engaged in by an undertaking the turnover of which did not exceed \$40,000,000 for a certain turnover period, rather than

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any conduct engaged in by the undertaking concerned during any period.

### Legislative timetable and cancellation of meetings

- 10. The Bills Committee completed scrutiny of the Bill. The Bills Committee agreed to the Administration's proposal to resume the Second Reading debate on the Bill at the Council meeting of 30 May 2012, and to report its deliberations to the House Committee at its meeting on 18 May 2012. The Chairman reminded members that the deadline for giving notice of CSAs would be 21 May 2012.
  - 11. As the Bills Committee had completed scrutiny of the Bill, <u>members</u> agreed to cancel meetings earlier scheduled for the following dates
    - (a) 15 May 2012 at 4:30 pm;
    - (b) 22 May 2012 at 4:30 pm;
    - (c) 29 May 2012 at 4:30 pm;
    - (d) 5 June 2012 at 4:30 pm;
    - (e) 12 June 2012 at 4:30 pm; and
    - (f) 19 June 2012 at 4:30 pm.

# III Any other business

12. There being no other business, the meeting ended at 5:50 pm.

Council Business Division 1 <u>Legislative Council Secretariat</u> 28 September 2012

Clerk

# Proceedings of the 38<sup>th</sup> meeting of the Bills Committee on Competition Bill on Tuesday, 8 May 2012, at 4:30 pm in Conference Room 3 of the Legislative Council Complex

Time marker	Speaker	Subject(s)	Action required		
Agenda Ite	Agenda Item I – Confirmation of minutes				
000300 - 000342	Chairman	Confirmation of minutes of meeting on 20 December 2011 (LC Paper No. CB(1)1726/11-12)			
Agenda Ite	m II – Meeting with th	ne Administration			
	/11-12(04)) and draft (	re Stage amendments proposed by Hon Albert HO Committee Stage amendments proposed by Hon Ronny TO			
000343 - 001410	Chairman Mr Albert HO Administration Mr Ronny TONG	Briefing by Mr Albert HO on the rationale (as detailed in LC paper No. CB(1)1770/11-12(04)) behind the draft Committee Stage amendments (CSAs) proposed by him to provide for the addition of a sunset clause so that clauses 3, 4 and 5 on exemption of statutory bodies from the enacted Ordinance would cease to have effect three years after the coming into operation of these clauses.  Briefing by Mr Ronny TONG on the draft CSAs proposed by him (LC paper No. CB(1)1770/11-12(05)) to provide for the deletion of the definition of "statutory body" in clause 2 and the deletion of clauses 3, 4 and 5. He gave reasons for proposing the CSAs as follows —  (a) it was against the rule of law and hence unreasonable and unacceptable to grant broad exemption of all statutory bodies but five from the regulation of the enacted Ordinance, instead of leaving the flexibility to the Competition Commission (the Commission) and/or the Legislative Council (LegCo) to grant exemption on the merits of individual statutory bodies;  (b) the Bill would already empower the Chief Executive in Council (CE in Council) to make orders to exempt agreements or conducts from the conduct rules if the CE in Council was satisfied that there were exceptional and compelling reasons of public policy that the conduct rules ought not to apply; and  (c) the Commission would also be empowered to decide, in response to an application, as to whether or not an agreement or conduct was excluded or exempt from the conduct rules in accordance with certain criteria.  Briefing by the Administration on its responses to the above proposed CSAs, in particular the reasons for not accepting them.  (LC paper No. CB(1)1806/11-12(01) tabled at the meeting)			

Time marker	Speaker	Subject(s)	Action required
		Mr HO opined that if exempted statutory bodies would still be required to adhere to the competition principle underpinning the competition rules in the Bill, they might as well be subject to the rules, instead of being subject to a separate regulatory framework.	
		The Administration gave the following response –	
		<ul> <li>(a) there was a need to exempt statutory bodies to eliminate the uncertainties as to whether certain activities of a statutory body, which might form part of its core statutory functions, might be alleged as anti-competitive, and hence ensure the un-interrupted provision of public service and/or implementation of public policy that the statutory body was tasked to perform. Notwithstanding the above need, the Administration would seek to ensure that statutory bodies would comply with the competition principles of the enacted Ordinance; and enactment of the Bill was necessary to provide a legal framework and basis for the investigation and sanctioning of anti-competitive conduct because the existing approach of discouraging anti-competitive conduct through voluntary compliance with administrative guidelines could not effectively ensure that private undertakings would rectify their anti-competitive behaviour. As for statutory bodies, they were already regulated by the ordinances by or under which they were established or constituted, and they had to operate in accordance with the requirements in the establishing ordinances; and</li> <li>(b) The Administration would ensure that mechanisms be in place for handling statutory bodies should they be found engaged in anti-competitive conduct.</li> </ul>	
001411 – 001929	Chairman Ms Miriam LAU Administration	Ms Miriam LAU referred to the above CSAs proposed by members to remove the exemption mechanism and opined that their purpose could also be achieved if the Administration made an undertaking to conduct a comprehensive review of the exemption arrangements after a specified period of time, say, three or five years, so as to ensure that the exemption arrangements would be reasonable and could serve their purposes, and to facilitate the deletion/addition of any statutory bodies from/to the exemption list as appropriate.	
		The Administration responded that it was an established practice of the Administration to review its policies and laws from time to time. Similarly, the effectiveness of the enacted Ordinance and the exemption arrangements would be reviewed when a sufficient number of cases or any controversial case had arisen to call for a constructive and meaningful review.	

Time marker	Speaker	Subject(s)	Action required
		In response to Ms LAU and the Chairman, the Administration agreed to respond to Ms LAU's proposal above to facilitate members' consideration of whether to support the CSAs proposed by members.	The Administration to take action as requested in paragraph 9(b)
001930 - 002311	Chairman Mrs Regina IP Administration	<ul> <li>(a) amend clause 1 on short title and commencement to ensure that the enacted Ordinance would come into operation only after the guidelines had been issued by the Commission and approved by LegCo by way of a resolution, so as to address small and medium enterprises (SMEs)' concerns about the absence of clear definitions of "market" and "a substantial degree of market power"; and</li> <li>(b) provide that exemption would be granted to those statutory bodies which did not engage in any economic activities, and to ensure that not only TDC but also the Hong Kong Productivity Council, which had been competing with the private sector in providing consultancy services, would not be exempted.</li> <li>The Administration gave the following response –</li> <li>(a) clause 1 would already provide that the enacted Ordinance would come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette. As such, the clause could already allow a phased commencement of different parts of the enacted Ordinance to address the concerns highlighted by Mrs IP above; and</li> <li>(b) the relevant part of the Ordinance concerning the setting-up of the Commission could be commenced first, allowing the Commission to conduct consultation and prepare the guidelines before the conduct rules came into force.</li> </ul>	
002312 - 002512	Chairman Mr Jeffrey LAM	Mr Jeffrey LAM declared that he was a member of certain statutory bodies proposed to be exempted from the regulation of the enacted Ordinance, including TDC. He indicated support for granting exemption to TDC in recognition of its useful services to the commercial sector, and assistance to SMEs in promoting trade opportunities in Hong Kong and overseas. He considered that as some undertakings which opposed to the exemption of TDC were indeed TDC's competitors who would benefit greatly if TDC would not be exempted, members should exercise care to strike a balance between the interests of different parties.	

Time marker	Speaker	Subject(s)	Action required
002513 – 002600	Chairman	The Chairman drew members' attention to the following dates –	
		(a) 30 May 2012, which was the proposed date of the Council meeting at which the Second Reading debate on the Bill was to resume;	
		(b) 18 May 2012, which was the date of the House Committee meeting at which the Bills Committee was to provide a written report; and	
		(c) 21 May 2012, which would be the deadline for giving notice of CSAs to the Bill.	
	on the Administration' No. CB(1)1770/11-12(0	s responses to follow-up questions arising from previous meet (2))	tings
002601 - 003355	Chairman Administration	Briefing by the Administration on its responses to follow-up questions arising from previous meetings	
		(LC Paper No. CB(1)1770/11-12(02))	
003356 – 003947	Chairman Mr Jeffrey LAM Administration	Mr Jeffrey LAM indicated agreement with the Administration that the examples in clause 6(2) would not be necessary, and that the original clause 6(2) should be deleted without replacement. He expressed the following views –  (a) clause 6(1) should be amended to apply the criterion of "that have, or are likely to have the effect of	
		substantially lessening competition in Hong Kong" adopted in the merger rule to determine whether any agreements, concerted practices or decisions should be prohibited under the first conduct rule, considering that the de minimis arrangement and the warning notice mechanism would not apply to serious anti-competitive conduct; and	
		(b) section 1 of Schedule 1 to the Bill should be amended to apply to the conduct rules the exclusion criterion of "if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong" (section 8(1) of Schedule 7 to the Bill) presently adopted in the merger rule.	
		The Administration considered it undesirable and hence inappropriate to amend clause 6(1) and section 1 of Schedule 1 to the Bill as proposed above, on the grounds that the merger rule and the conduct rules in fact dealt with different matters. If the conduct rules of the Bill were to be modelled on the merger provisions instead of on the corresponding competition provisions in the United Kingdom (UK) and the European Union (EU), the Competition Tribunal (the Tribunal) might have difficulty	

Time marker	Speaker	Subject(s)	Action require	ed
		in drawing reference from overseas case laws and experience when hearing and adjudicating on competition cases.		
		Mr LAM questioned whether reference should be made to the case law of UK and EU when enforcing the enacted Ordinance, pointing out that Hong Kong was a city much smaller than the above jurisdictions, which were large countries the circumstances of which were very different from those in Hong Kong.		
		The Administration stressed the fact that the enacted Ordinance was a brand new piece of legislation, and hence the need to draw reference from the case law and experience of the above jurisdictions which had proven track records in tackling anti-competitive agreement and conduct. It, however, agreed to consider and respond to Mr LAM's proposals above.	The Administration to take action requested paragraph 9(c)	as in
		's paper on proposed further Committee Stage amendments 3) tabled at the meeting)	<u> </u>	
003948 – 004617	Chairman Administration Assistant Legal Adviser 2 (ALA2) Mr Ronny TONG	Examination of the proposed further CSAs to Parts 2, 3 and 7 of the Bill  Members noted that there were no proposed further CSAs to Parts 1, 4, 5 and 6 of the Bill.		
		In response to ALA2 and Mr Ronny TONG, the Administration agreed to improve the drafting of the Chinese text of the new clause 106(b) to obviate the use of brackets, and to more clearly reflect the phrase "any of the causes of action" in the English text of this clause.	Administration	as in
004618 – 005137	Chairman Administration ALA2	In response to ALA2, the Administration agreed to amend the phrase "或牽涉入指稱的違反行為守則" in the Chinese text of the proposed CSA to clause 117(1) (and other clauses in similar context), so as to more accurately reflect its English text "alleged involvement".	The Administration to take action requested paragraph 9(e)	as in
005138 – 005820	Chairman Mr Albert HO Administration	In response to Mr Albert HO, the Administration explained the proceedings transfer mechanism under clause 115.  Members noted that there were no proposed further CSAs to Parts 8 and 9 of the Bill.		
005821 - 010038	Chairman Administration ALA2	Examination of the proposed further CSAs to Part 10 of the Bill		
	TILITY	In response to ALA2, the Administration agreed to amend the phrase "實則上" in the proposed CSA to clause 141(1)(f) to "實質上".	The Administration to take action requested paragraph 9(f)	as in

Time marker	Speaker	Subject(s)	Action required
010039 – 010412	Chairman Administration ALA2	In response to ALA2, the Administration agreed to amend the phrase "interlocutory order" in the second line of the English text of the proposed new clause 153A(2).	The Administration to take action a requested in paragraph 9(g)
010413 – 010520	Chairman Administration	Examination of the proposed further CSAs to Parts 11 and 12 of the Bill	
010521-011020	Chairman Administration ALA2	Examination of the proposed further CSAs to Schedule 1 to the Bill  ALA2 made the following comments on the proposed new section 6(1) of Schedule 1 to the Bill —  (a) the new section 6(1) alone could not tell how the turnover period should be calculated unless read with the new sections 6(3) and 6(4). Consideration might be given to revising the new section 6(1) with reference to the proposed new section 5(1); and  (b) the phrase "第二行為守則不適用於該業務實體從事的行為" in the Chinese text of the new section 6(1) might give people the wrong impression that the second conduct rule would not apply to any conduct engaged in by the undertaking concerned during any period, instead of a conduct engaged in by an undertaking the turnover of which did not exceed \$40,000,000 for a certain turnover period.  The Administration gave the following response —  (a) did not consider the proposed amendment in (a) above necessary because how the turnover period should be calculated was clear if the new sections 6(1), 6(3) and 6(4) were read together; and  (b) agreed to improve the drafting of the Chinese text of the proposed new section 6(1), so as to clarify that the second conduct rule would only not apply to a conduct engaged in by an undertaking the turnover of which did not exceed \$40,000,000 for a certain turnover period, rather than any conduct engaged in by the undertaking concerned during any period.  Members noted that there were no proposed further CSAs to Schedule 2 to the Bill.	The Administration to take action a requested in paragraph 9(h)
011021 – 011522	Chairman Administration Mr Ronny TONG Clerk	Examination of the proposed further CSAs to Schedules 3, 5, 7 and 8 to the Bill  Members noted that there were no proposed further CSAs to Schedules 4, 6 and 9 to the Bill.	

Time marker	Speaker	Subject(s)	Action required
		The Chairman invited ALA2 to go through all proposed further CSAs, and draw the Administration's attention to any additional further CSAs which he considered necessary to ensure that the English text and the Chinese text would be consistent.	
		In response to Mr Ronny TONG and the Chairman, the Administration agreed to provide a full set of the CSAs which the Administration would introduce to the Bill, including those proposed at this meeting.	
011523 – 011834	Chairman Mr Ronny TONG Ms Emily LAU Clerk Administration	The legislative timetable  Members agreed that the Bills Committee should report its deliberations to the House Committee on 18 May 2012.  The Chairman expressed thanks to the Administration, ALA2 and the Clerk for their hard work in servicing the Bills Committee.  The Administration expressed thanks to the Chairman and	The Clerk to prepare a report of the Bills Committee for submission to the House Committee
		other members of the Bills Committee, ALA2 and the Secretariat for their assistance in ensuring completion of the scrutiny of the Bill within this legislative term.	

Council Business Division 1 Legislative Council Secretariat 28 September 2012