

立法會

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Committee on Members' Interests Paper for the eighth meeting on 16 March 2012

The five principles of how directorships should be regarded for the purpose of Rule 83A of the Rules of Procedure

Purpose

This paper invites the Committee on Members' Interests ("CMI") to consider whether the five principles of how directorships should be regarded for the purpose of complying with Rule 83A of the Rules of Procedure ("RoP") determined by members earlier should be re-visited.

Background

2. Rule 83A of RoP provides that: "In the Council or in any committee or subcommittee, a Member shall not move any motion or amendment relating to a matter in which he has a pecuniary interest, whether direct or indirect, or speak on any such matter, except where he discloses the nature of that interest".

3. Earlier on, in the course of considering a complaint against certain Members for failing to disclose the nature of their pecuniary interests in a project before they spoke at several meetings of a subcommittee by virtue of their being non-executive directors ("NED") of the companies involved in the project, CMI deliberated and agreed on five principles of how it would regard directorships for the purpose of complying with Rule 83A. The five principles are set out in CMI's report on the complaint to the Council and a motion¹ was moved by the Chairman of CMI to enable Members to express their views on the five principles and other issues in relation to the procedural rules on pecuniary interests at the Council meeting of 13 July 2011. The motion was negatived after debate.

¹ The motion was entitled "Issues in relation to procedural rules on pecuniary interests". The wording of the motion was: "That this Council takes note of the issues in relation to the procedural rules on pecuniary interests that are set out in the Report of the Committee on Members' Interests on its consideration of a complaint against Ir Dr Hon Raymond HO, Hon Jeffrey LAM and Hon Abraham SHEK".

4. In the light of the views expressed by some Members at the motion debate, members raised at the last CMI meeting whether the five principles should be re-visited.

Five principles

5. The five principles of how directorships should be regarded for the purpose of complying with Rule 83A are:

- (a) a company is regarded as having a direct pecuniary interest in a project if the company has bid for a contract or has been awarded a contract under the project;
- (b) if a company is regarded as having a direct pecuniary interest in a project by virtue of (a) above, a Member who is a director of the company is regarded as having an indirect pecuniary interest in the project;
- (c) there is no distinction between executive directors ("ED"), NEDs and independent non-executive directors ("INEDs") as far as disclosure of pecuniary interest under Rule 83A of RoP is concerned;
- (d) a Member is expected to take reasonable steps to find out, for the purpose of making the required disclosures under Rule 83A of RoP, whether the company of which he is a director has a pecuniary interest in the matter under consideration by a committee; and
- (e) generally speaking, if a subsidiary of a company ("parent company") has bid for a contract or has been awarded a contract under a project, then, the parent company is regarded as having an indirect pecuniary interest in the project and on this basis, a Member who is a director of that parent company is regarded as having an indirect pecuniary interest in the project.

Members' views expressed at the debate on the motion on "Issues in relation to procedural rules on pecuniary interests"

6. An extract on the relevant parts of the report is at the **Appendix** for members' easy reference.

7. While there were Members who spoke in support of the five principles at the debate, some Members expressed concerns and reservations on these

principles. Their main concerns and reservations are summarized as follows:

- (a) although INEDs have the same fiduciary duty as EDs, INEDs do not have the authority and control over the companies as EDs do. INEDs only participate in the company's board meetings to give advice on corporate governance and are not involved in the day-to-day operation of the company. It is therefore unreasonable and impracticable to expect Members who are INEDs of companies to take steps to find out whether the companies have bid for or have been awarded any contract under a project being considered by the Council or its committee, in order to determine whether they have to make the required disclosure under Rule 83A;
- (b) as there is no definition of what constitutes "reasonable steps to take", Members may easily be accused of breaching Rule 83A. To avoid being caught by Rule 83A, Members who are INEDs of companies may be forced to declare any interests they may have before they speak at meetings, and this will not only use up the meeting time but will also undermine the purpose of disclosure of interest which is to enable other people to judge if a Member's views on the relevant matter before the Council or committee have been influenced by his interest;
- (c) requiring a Member who is an INED/NED of a company to find out whether the subsidiaries of the company have bid for or have been awarded a contract under the project being considered by the Council or any committee of the Council is unreasonable and impracticable. Further, INEDs do not have the capacity or duty to keep abreast of the business activities of the subsidiaries of their companies, not to mention that some companies have many subsidiaries and their subsidiaries have their own subsidiaries which may also have their own boards of directors. Also, under the existing company registration system in Hong Kong, parent company and its subsidiary are separate entities with their own sphere of control and responsibility; and
- (d) it is necessary to make clear the question of remoteness, i.e. to what extent that the pecuniary interest of a subsidiary which has bid for or has been awarded a contract under a project being considered by the Council or its committee will be caught by Rule 83A and hence the Member who is an INED of the parent company of that subsidiary should disclose his indirect pecuniary interest derived from that subsidiary.

Members' suggestions made at the motion debate

8. At the motion debate, a number of suggestions were put forward by Members as follows:

- (a) the scope of "pecuniary interests" that a Member is required to disclose for the purpose of Rule 83A of RoP by virtue of his being an INED/NED or an ED of a company should be clearly defined;
- (b) the "reasonable steps" that a Member should take to find out, for the purpose of making the required disclosures under Rule 83A of RoP, whether the company of which he is a director has a pecuniary interest in the matter under consideration by the Council or its committee should be clearly defined;
- (c) the meaning of "matter" in Rule 83A of RoP should be made clearer;
- (d) the arrangements for Members' disclosure of interests at meetings should be enhanced by, say, printing the relevant interests of Members on the agenda of Council and committee meetings, so as to obviate the need for Members to disclose their interests before they speak at these meetings; and
- (e) a lesser former of punishment should be provided in Rule 85 of RoP for breaches which are minor and/or inadvertent.

Advice sought

9. Members are invited to consider whether the five principles of how directorships should be regarded for the purpose of complying with Rule 83A of RoP should be re-visited, and whether, and if so, how the suggestions set out in paragraph 8 should be followed up.

Council Business Division 3
Legislative Council Secretariat
14 March 2012

Extract from "Report of the Committee on Members' Interests on its consideration of a complaint against Ir Dr Hon Raymond HO, Hon Jeffrey LAM and Hon Abraham SHEK"

CHAPTER 3

Issues considered in relation to procedural rules on pecuniary interests

3.1 As the complaint raises, for the first time, the issue of whether a Member's position as an NED of a company may give rise to a situation under which the Member is considered to have a pecuniary interest by virtue of that position under Rule 83A of RoP, and having regard to some of the points made by Ir Dr Hon Raymond HO, Hon Jeffrey LAM and Hon Abraham SHEK in their respective response, CMI has examined the following issues in its preliminary consideration of the complaint against the three Members:

- (a) the information provided to Members prior to December 2009 on disclosure of interests, including direct and indirect pecuniary interests;
- (b) the meaning of direct and indirect pecuniary interests under Rule 83A of RoP;
- (c) the role of an INED in a company and the circumstances under which a Member who is an INED of a company would be required to make disclosure of pecuniary interests under Rule 83A of RoP; and
- (d) how Rule 83A of RoP is interpreted and applied when speaking at meetings, including at which point in time should a pecuniary interest be disclosed and whether the same pecuniary interest should be disclosed each time when the Member speaks.

Information on disclosure of pecuniary interest available to Members of Fourth LegCo

3.2 CMI notes that the following documents were made available to all Members of the Fourth LegCo after they had assumed office:

- (a) the Guidelines on Registration of Interests, together with the Registration Form on Members' Interests to be completed and returned to the Clerk before the first meeting of the new term, were issued to all Members on 11 September 2008. In paragraph III (3) of the Guidelines, it is stipulated that the registration of interests is additional to, and in no way a replacement of, the requirement on Members to disclose pecuniary interests under Rule 83A of RoP;
- (b) one set of RoP was issued to all Members on 19 September 2008;
- (c) a circular (LC Paper No. CB(3) 69/08-09) on "Disclosure of Pecuniary Interest by Members" (**Appendix VIII**) was issued on 20 October 2008 in response to enquires from some Members regarding Members' participation in the debate and voting on the motion on "Assisting the victims of the Lehman Brothers Incident". The circular further explained the requirements under Rules 83A and 84(1) of RoP;
- (d) the subject of "Disclosure of Pecuniary Interests under Rule 83A of the Rules of Procedure" was discussed at the CMI meeting on 16 December 2009, on the eve of the consideration of the funding proposal of the XRL Project at the FC meeting on 18 December 2009. A paper (LC Paper No. CMI/17/09-10) (**Appendix IX**) which provided information on matters relating to compliance with Rule 83A of RoP, including the meaning of direct and indirect pecuniary interests and the interests involved in non-executive directorships, was issued on 15 December 2009. As the meeting of CMI was open to the public, the discussion paper and the minutes of the meeting were uploaded onto LegCo's website and are accessible by all Members; and
- (e) a circular on "Procedural Implications of Pecuniary Interests on Speaking and Voting on a Matter before the [Finance] Committee" (LC Paper No. FC 27/09-10) (**Appendix X**) was issued by the Clerk to FC to all Members on 17 December 2009. The circular explained

some practical issues relating to the compliance of Rule 83A of RoP, such as timing for making the declaration, disallowance of vote on grounds of direct pecuniary interest, non-executive directorships, chairing of meetings by Members who may have a pecuniary interest, etc.

Meaning of direct and indirect pecuniary interests

3.3 Under Rule 83A of RoP, to the extent that it is relevant to the complaint, a Member shall not speak on a matter in which he has a pecuniary interest, whether direct or indirect, except where he discloses the nature of that interest. CMI notes that there is no provision in the RoP which provides the circumstances which constitute "direct pecuniary interest" and "indirect pecuniary interest" in the context of Rule 83A of RoP.

3.4 CMI takes the view that for a pecuniary interest to be direct, it should be immediate and not merely of a remote or general character. As regards "indirect pecuniary interest", CMI is of the view that it is an interest not immediate and personal to a Member, but does have a certain relationship with the Member which would make a reasonable person to consider that such interest might have certain influence on the action or speech of the Member.

Role of INEDs

3.5 CMI notes that there is no distinction between executive and non-executive directors in law. CMI also notes that all the directors of a company owe a fiduciary duty to their company. This means that they must at all times act honestly and diligently, showing the company their highest loyalty, acting in good faith and in the company's best interests. Although an INED has no executive or management responsibility in the company on whose board he sits, the duty of INEDs to act bona fide in the interests of the company as a whole is identical to that of their executive colleagues.

3.6 The Code on Corporate Governance Practices, contained in the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited, also states that every director is required to keep abreast of his responsibilities as a director of a listed company and of the conduct, business activities and development of that issuer. Given the essential unitary nature of the board, NEDs have the same fiduciary duties and duties of care and skill as executive directors.

Circumstances under which a Member who is an INED would be required to make disclosure of pecuniary interests under Rule 83A of RoP by virtue of being an INED

3.7 CMI had taken almost a year from January 2010 to December 2010 in 13 meetings to study the circumstances under which a Member who is an INED would be required to make disclosure under Rule 83A of RoP by virtue of being an INED.

3.8 CMI notes that the disclosure of the nature of the direct or indirect pecuniary interest in the matter before a committee is a condition to a Member's speaking on the matter. Based on the principle that it is a Member's responsibility to disclose his pecuniary interest in a matter being considered to enable other people to judge if his views on the matter have been influenced by his interest, a Member should disclose his pecuniary interest at the beginning of his speech on the matter.

3.9 CMI considers that as NEDs have the same fiduciary duties and duties of care and skill as executive directors in a company, a Member who is an INED of a company should be knowledgeable about the nature of business of the company. Under the circumstances, if the company of which a Member is an INED has a direct pecuniary interest in a matter before a committee, CMI considers that the Member should have an indirect pecuniary interest in the matter. It follows that the Member should, for the purpose of making the required disclosures under Rule 83A of RoP, take reasonable steps to find out whether the company of which he is an INED has a pecuniary interest in the matter under consideration by a committee of the Council. CMI notes that Members would disclose their pecuniary interests in a project being considered by FC if they consider that any company related to them had submitted or might submit a bid or bids for contract(s) under the project. On the other hand, where initiatives have not yet evolved into financial proposals and are being considered at Panel meetings, it is much less likely that Members would disclose their pecuniary interests.

3.10 CMI considers that as a general rule, where a subsidiary of a company has bid for a contract or has been awarded a contract under a project, the parent company is regarded as having an indirect interest in a project. It follows that a Member who is a director of that parent company is regarded as having an indirect pecuniary interest in the project. However, CMI is aware that the circumstances of each individual case could vary and sometimes the indirect pecuniary interest could be too remote to be caught by Rule 83A of RoP.

3.11 CMI has also deliberated at which juncture in a tender exercise that a company should be regarded as having a pecuniary interest. While members generally agree that it is fair to require a Member who is an INED of a company which has actually put in a bid in a tender exercise for a project to declare his indirect pecuniary interest derived from his company's bidding the project, some members consider that the Member has the obligation to declare his interest as soon as the company has indicated interest in the project even though it has not yet submitted any formal bid or an "expression of interest" in response to a formal invitation. These members consider that as the purpose of disclosure of interests by Members is to uphold the credibility of LegCo, the issue should also be examined from the perspective of public perception. Generally speaking, the public may not be able to draw a distinction between a Member whose company has submitted a bid for contracts under a project and another Member whose company is considering submitting a bid, as both Members' actions, speeches or votes on the project being considered may reasonably be thought by others to be subject to the influence of their involvement in the respective companies. It is therefore a Member's responsibility to disclose his pecuniary interest in a matter being considered to enable other people to judge if his views on the matter have been influenced by his interest. Hence, a Member should disclose his pecuniary interest at the beginning of his speech on the matter.

3.12 The majority of members consider that a company should not be regarded as having a pecuniary interest in a project if it is merely contemplating the making of a bid for a contract under the project since no potential detriment or advantage to the company has arisen yet. These members consider that the making of bids for contracts under a project by a company is a concrete action which can be easily identified. They consider that as a company might be interested in various business opportunities, to regard a company which is contemplating the making of bids for contracts under a project as having a pecuniary interest in the project might have wide ramifications on Members' observing the requirement to disclose their pecuniary interest under Rule 83A of RoP.

3.13 CMI's views on the principles of how it would regard directorships for the purpose of Rule 83A of RoP are set out as follows:

- (a) a company is regarded as having a direct pecuniary interest in a project if the company has bid for a contract or has been awarded a contract under the project;
- (b) if a company is regarded as having a direct pecuniary interest in a project by virtue of (a) above, a Member who is a director of the company is regarded as having an indirect pecuniary interest in the project;
- (c) generally speaking, if a subsidiary of a company ("parent company") has bid for a contract or has been awarded a contract under a project, then, the parent company is regarded as having an indirect pecuniary interest in the project and on this basis, a Member who is a director of that parent company is regarded as having an indirect pecuniary interest in the project;
- (d) there is no distinction between executive directors, non-executive directors and independent non-executive directors as far as disclosure of pecuniary interest under Rule 83A of RoP is concerned; and
- (e) a Member is expected to take reasonable steps to find out, for the purpose of making the required disclosures under Rule 83A of RoP, whether the company of which he is a director has a pecuniary interest in the matter under consideration by a committee.

3.14 After deliberation and having regard to Mr SHEK's and Mr LAM's views on CMI's views on the principles of how directorship is regarded in the context of Rule 83A of RoP, CMI agrees to adjust the order of the views so as to highlight the connection of a Member and the company of which he is a director and his obligation as a director under (a) to (d), and to set out separately in (e) that generally speaking, the Member still has an indirect pecuniary interest if the subsidiary of the company of which he is a director has a direct pecuniary interest. Accordingly, CMI considers that the principles applicable to Rule 83A of RoP are as follows:

- (a) a company is regarded as having a direct pecuniary interest in a project if the company has bid for a contract or has been awarded a contract under the project;
- (b) if a company is regarded as having a direct pecuniary interest in a project by virtue of (a) above, a Member who is a director of the company is regarded as having an indirect pecuniary interest in the project;
- (c) there is no distinction between executive directors, non-executive directors and independent non-executive directors as far as disclosure of pecuniary interest under Rule 83A of RoP is concerned;
- (d) a Member is expected to take reasonable steps to find out, for the purpose of making the required disclosures under Rule 83A of RoP, whether the company of which he is a director has a pecuniary interest in the matter under consideration by a committee; and
- (e) generally speaking, if a subsidiary of a company ("parent company") has bid for a contract or has been awarded a contract under a project, then, the parent company is regarded as having an indirect pecuniary interest in the project and on this basis, a Member who is a director of that parent company is regarded as having an indirect pecuniary interest in the project.

3.15 CMI recognizes that a Member might not have access to the information on the day-to-day operation of a company of which he is an INED, but a Member should be vigilant of the potential pecuniary interest which he might have if the nature of the business of the company falls within the scope of subject matter under consideration by a committee. CMI also considers that it would not cause undue hardship to the Member to find out the nature of business of the subsidiaries of the company of which he is an INED for the purpose of considering if there is any pecuniary interest that he should disclose under Rule 83A of RoP, bearing in mind that to reflect the proper balance struck between public accountability and privacy of the Member, the Member is only required to

disclose the nature of the pecuniary interest. In the light of the above, CMI is of the view that it would not be unreasonable to expect the Member to find out the nature of business of the subsidiaries of the company of which he is an INED, and to decide whether and in what manner he is to find out if he has to disclose any pecuniary interest which derives from the pecuniary interest of the subsidiaries. Hon Paul CHAN and Hon WONG Yung-kan are of the view that a Member should only be expected to find out the primary nature of business of the major subsidiaries of the company of which he is an INED for the purpose of Rule 83A of RoP. These two members consider that to expect a Member to find out the nature of business of each and every subsidiary of the company of which he is an INED is sometimes not reasonably practicable.

3.16 CMI considers that the claim by a Member that he has no knowledge of any pecuniary interest of the company of which he is an INED and that he does not participate in the day-to-day management of the company are not relevant considerations when examining whether a non-disclosure of pecuniary interest constitute a breach of Rule 83A of RoP. The relevant question for determination in accordance with the terms of Rule 83A of RoP is whether the Member has a direct or indirect pecuniary interest in the matter under consideration by the relevant committee and, where such pecuniary interest is derived from the pecuniary interest of a subsidiary company of the company of which the Member is a director, whether or not the interest is too remote for it to be regarded as an indirect pecuniary interest that should be caught by Rule 83A of RoP. The question of remoteness is to be determined by CMI based on all the relevant information that it has gathered, including the information available to the Member at the material time and the explanation provided by the Member concerned.