

**Disclosure of pecuniary interest under Rule 83A and
Restriction against voting in case of direct pecuniary interest
under Rule 84 of the Rules of Procedure**

This paper provides information on issues relating to the disclosure of pecuniary interest by members under Rule 83A of the Rules of Procedure ("RoP") and restriction against voting under Rule 84 of RoP when a member has a direct pecuniary interest in a proposal being considered at a meeting of the Finance Committee ("FC").

Disclosure of pecuniary interest by members under Rule 83A of RoP

2. Paragraph 40 of the FC Procedure provides that Rule 83A and Rule 84 of RoP shall apply to the proceedings of FC. Rule 83A of RoP provides that "[i]n 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".

Restrictions against voting in case of a member having direct pecuniary interest under Rule 84 of RoP

3. Except for Rule 84(1A) and (3A) which apply to the Council or committee of the whole Council, Rule 84 of RoP applies to FC proceedings. RoP 84(1) provides that a Member shall not vote upon any question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof ("common pecuniary interests") or his vote is given on a matter of Government policy. Rule 84(4) of RoP provides that any Member may move without notice a motion to disallow the vote of a Member on the ground of his direct pecuniary interest in a question immediately before the result of the voting is declared. Under Rule 84(6), if the motion to disallow a vote is agreed to, the result will be altered accordingly. The procedure for moving a motion for the disallowance of vote on grounds of direct pecuniary interest is set out in Rule 84(5) and 84(6) of RoP and further supplemented by House Rule 3 and Appendix II of the House Rules.

4. Whilst no motion under Rule 84(4) to disallow the vote of a Member has been moved at the Council or FC meetings, the Council had dealt with a motion on withdrawal under Rule 84(3A) at the Council meeting of 12 November 2008. During that meeting, a Member moved without notice, under Rule 84(3A) of RoP, a motion for the withdrawal of another Member on the ground of his failure to withdraw as required by Rule 84(1A) of RoP¹. Several Members spoke on the motion. In the end, the mover of the motion said that as those Members who had spoken did not consider that the Member concerned had a direct pecuniary interest, he would like to withdraw the motion. As there was no dissenting voice, the motion was withdrawn by leave of the Council.

Direct or indirect pecuniary interest

5. RoP does not provide specifically the circumstances under which a Member does or does not have a pecuniary interest in a matter that is put before the Council or a committee, be it direct or indirect. It is for individual Members to judge whether they have a direct or indirect pecuniary interest in the matter under consideration at the relevant meeting of the Council or its committees. The basic principle as having been adopted by the Committee on Members' Interests ("CMI") of the previous Legislative Council ("LegCo") in determining whether a pecuniary interest should be disclosed under Rule 83A of RoP is whether the interest might reasonably be thought by others to influence the Member's actions or speech in the matter being considered². It has been the view of CMI 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", 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 Member³.

6. The requirement for disclosure of pecuniary interest by Members under Rule 83A is distinct from the requirement for registration of

¹ Rule 84(1A) of RoP provides that "In the Council or a committee of the whole Council, a Member shall withdraw when a vote is taken on a question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy".

² Paragraph 4, LC Paper No. CMI/17/09-10 for the meeting of Committee on Members' Interests held on 16 December 2009.

³ Paragraph 3.4, 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 tabled at the Council meeting of 22 June 2011.

interests by Members under Rule 83 of RoP. As provided in paragraph III(3) of the Guidelines on Registration of Interests issued to Members, "[t]he registering of interests is additional to, and in no way a replacement of, the requirement on Members to disclose pecuniary interest under Rule 83A". Hence, an interest registered still requires to be disclosed if it falls within Rule 83A.

7. Paragraph 41 of FC Procedure provides that there are situations in which the usual rules regarding pecuniary interests do not apply, such as when an item proposes changes to Members' salaries and allowances as Members of the Council. In these cases, there is no need for members to declare their individual interests. The Chairman shall declare that all members have the same pecuniary interest in the question and the Clerk records the statement. Members may then speak and vote.

Interest in common with a sector of the population of Hong Kong

8. CMI of the Second LegCo had considered the interpretation of the phrase "a sector of the population" in Rule 84(1) of RoP and came to the view that it is technically impossible to give a clear and clean definition, and individual Members should decide whether their pecuniary interests are common to a sector of the population in the context of their own circumstances⁴.

Executive and non-executive directorships

9. Before considering the question as to whether the holding of a non-executive directorship should be regarded as a pecuniary interest required to be disclosed and/or should affect a Member's eligibility to vote, members may note that CMI of the Fourth LegCo had, 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 of the companies involved in the project, deliberated and agreed on five principles of how it would regard directorships for the purpose of complying with Rule 83A⁵. The five principles (**Appendix I**) are set out

⁴ LC Paper No. CMI/52/00-01 circulated to Members vide LC Paper No. CMI/53/00-01 on 6 June 2001.

⁵ Paragraph 3.14, 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 tabled at the Council meeting of 22 June 2011.

in CMI's report on the complaint to the Council and a motion was moved by the Chairman of CMI at the Council meeting of 13 July 2011 by which the Council was invited to take note of the issues (including the five principles) in relation to the procedural rules on pecuniary interests as set out in the CMI's report. 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 in **Appendix II**. The motion was negatived by the Council after debate.

10. Regarding the question of whether the holding of a non-executive directorship should be regarded as a pecuniary interest for the purposes of Rule 83A and Rule 84 of RoP, members may wish to note that there is no distinction between executive and non-executive directorship under the above Rules. Rule 83A is concerned with whether a Member has a direct or indirect pecuniary interest in a matter being considered by the Council or its committees. Rule 84, on the other hand, is concerned with whether a Member has a direct pecuniary interest in a question being put to vote. Such an approach of drawing no distinction between the types of directorship that a Member may be holding in a company is consistent with the registration of interest requirement imposed by Rule 83(5)(a) of RoP, under which any directorship which is remunerated has to be registered.

11. Whether a Member should disclose his non-executive directorship as a pecuniary interest at a meeting of the Council or its committees depends on what the matter being considered by the meeting is. Based on paragraph 5 above, it is the responsibility of individual Members to judge whether they have a direct or indirect pecuniary interest in the matter under consideration at the relevant meeting by virtue of their non-executive directorships. The fact that a Member has registered the interest of a remunerated directorship does not obviate his obligation to disclose at the relevant meeting a pecuniary interest arising from such directorship.

12. Similarly, whether a Member's non-executive directorship would affect a Member's eligibility to vote at a meeting of the Council or its committees depends on what the question being put to vote at the meeting is. It is the responsibility of individual Members to judge whether they have a direct pecuniary interest in that question having regard to their circumstances.

13. As the Council has not provided further guidance for Members to judge if they have a direct or indirect pecuniary interest in a matter before the Council or its committees by virtue of being directors or non-executive directors of companies, members should have regard to the basic principle underlying the requirement of disclosure⁶ and may make reference to some statutory definitions found in some common law jurisdictions outside Hong Kong which have in place a declaration of interest scheme similar to that in Hong Kong. The one that may be relevant to the situation of directors of a company provides to the effect that a member of the council has an indirect pecuniary interest in any matter in which the council is concerned if the member is a director of a company that has a direct pecuniary interest in the matter⁷. In considering the complaint against certain Members for failing to disclose the nature of their pecuniary interests referred to in paragraph 9 above, CMI of the Fourth LegCo had considered the circumstances under which a Member who is a non-executive director would be required to make disclosure of pecuniary interests under Rule 83A of RoP by virtue of his non-executive directorship. CMI of the Fourth LegCo considered that as non-executive directors have the same fiduciary duties and duty of care and skill as executive directors in a company, a Member who is a non-executive director should be knowledgeable about the nature of business of the company. Under the circumstances, if the company of which a Member is a non-executive director has a direct pecuniary interest in a matter before a committee, the then CMI considered that the Member should have an indirect pecuniary interest in the matter⁸.

14. Members who would like to seek advice on whether they should declare a particular interest or vote on a proposal at a FC meeting may approach the Clerk to FC who would consult the Legal Adviser on the legal issues involved, if necessary.

Timing of disclosure of pecuniary interest

15. Under Rule 83A of RoP, disclosure by a Member of the nature of his direct or indirect pecuniary interest in a matter before a committee is a condition to the Member's speaking on the matter. Based on the

⁶ See paragraphs 5, 6 and 11 above.

⁷ LC Paper No. CMI/17/09-10.

⁸ Paragraph 3.9, 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 tabled at the Council meeting of 22 June 2011.

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, it has been the view of CMI of the previous term of LegCo that a Member should disclose his pecuniary interest at the beginning of his speech on the matter⁹.

16. For FC proceedings, since the consideration of an agenda item as defined in paragraph 22 of the FC Procedure involves members expressing views or asking questions of the Administration on that agenda item, it has been the practice of FC for members to disclose their pecuniary interest at the beginning of their speech or question on a proposal being considered by the Committee.

17. The Chairman will, at the start of each meeting, remind members that if they have any direct or indirect pecuniary interest in any matter being dealt with at the meeting, they should disclose the nature of such interest before they speak on the matter in accordance with Rule 83A of RoP.

Chairing of meetings

18. At present, there is no rule in RoP which prohibits the chairman of a committee from presiding at a meeting on grounds that he has a pecuniary interest or role conflict in the matter under consideration by the meeting. There is also no provision on this matter in the procedures of FC or its subcommittees. The practice on this matter also varies. There have been cases where Members had on their own volition chosen not to chair a meeting when they felt that there was a conflict in role or interests in the matter being considered by the meeting, or when they considered that they might be perceived in that way by others.

19. For instance, when the Public Works Subcommittee was discussing three funding proposals related to the Hong Kong section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link project at the meeting on 2 December 2009, a member expressed concern that the Chairman might have conflict of interest in chairing the meeting to consider the funding proposals on the ground that the Chairman was an independent non-executive director of a construction company which had announced earlier its intention to bid for the contracts of the proposed railway works. The Chairman suspended the meeting to seek views from

⁹ Paragraph 3.8, *ibid.*

the Legal Adviser. He subsequently decided not to chair the meeting which was then presided by the Deputy Chairman during the discussion of these proposals.

20. Another instance where a Member's suitability for chairmanship of a committee was challenged on the ground of conflict of interest took place at the election of the Chairman of a Subcommittee¹⁰ formed to study subsidiary legislation related to the regulatory control of toys on 28 February 2014. In that case, member A queried that there would be conflict of interest for member B to be the Chairman since the latter was engaged in the toy manufacturing business. Members deliberated and member A stated his objection for electing member B to be the Chairman. As there was no other nomination, member B was elected the Chairman of the Subcommittee.

21. It is provided under paragraph 13 of the FC Procedure, paragraph 12 of the Public Works Subcommittee Procedure, and paragraph 11 of the Establishment Subcommittee Procedure that if the respective Chairman decides that he is unable to act for a particular item, or if so decided by the Committee (or the Subcommittee), the Deputy Chairman shall chair the meeting for that particular item. If both of them decide that they are unable to act, or if so decided by the Committee (or the Subcommittee), the members present shall elect one from among themselves to chair the meeting for that item.

Latest development

22. At the CMI meeting on 29 April 2014, members deliberated on the compliance issues in relation to the disclosure of pecuniary interests under Rule 83A of RoP¹¹. CMI agreed to seek Members' views in the near future on whether Rule 83A of RoP should be amended as follows:

- (a) to exclude common pecuniary interests from the requirement on disclosure of pecuniary interests by Members in the Council or any committee or subcommittee; and

¹⁰ Subcommittee on Toys and Children's Products Safety (Additional Safety Standards or Requirements) Regulation, Toys and Children's Products Safety Regulation (Repeal) Regulation and Toys and Children's Products Safety (Amendment) Ordinance 2013 (Commencement) Notice.

¹¹ Refer to LC paper No. CMI/30/13-14.

- (b) to expressly provide that members of a committee/subcommittee on legislative proposals are required to disclose pecuniary interests when they first speak on a matter in the committee/subcommittee and repeated disclosures of the same interests at subsequent meetings are not necessary.

Council Business Division 1
Legislative Council Secretariat
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Appendix I

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

The five principles of how directorships should be regarded for the purpose of complying with Rule 83A of the Rules of Procedure ("RoP") as 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 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, 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.

Appendix II

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

The main concerns and reservations of Members of the Fourth LegCo on the five principles of how directorships should be regarded for the purpose of complying with Rule 83A of the Rules of Procedure ("RoP") are summarized as follows¹²:

- (a) although independent non-executive directors ("INEDs") have the same fiduciary duty as executive directors ("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 committees, 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 its committees have been influenced by his interest;
- (c) requiring a Member who is an INED/non-executive director 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

¹² See LC Paper No. CMI/28/11-12.

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 responsibilities; 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 committees 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.