

**Bills Committee on
Companies (Amendment) Bill 2002**

**Follow-up actions arising from the discussion
at the meeting on 9 January 2003**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 9 January 2003.

(a) Definition of “shadow director”

2. We are not aware of any cases where the current definition of “shadow director” is “insufficient”. As explained at the meeting on 9 January 2003, the legislative proposal relating to the definition of “shadow director” is based on a recommendation of the Standing Committee on Company Law Reform. The rationale for the concept of “shadow director” is to prevent the evasion of liabilities by persons who control the company but choose to remain in the shadow. If the majority of the directors of the company act in accordance with the directions or instructions of a person, the company will implement such directions or instructions. Hence, there seems to be little logic¹ in allowing the person to be excluded from the definition of “shadow director” merely because a single or a minority of the directors are not accustomed to act in accordance with his directions or instructions when the majority are so accustomed. In this regard, Members may wish to note that in the New Zealand Companies Act, the definition of “director” was extended in 1993 to include, for the purpose of certain provisions relating to directors’ duties, a person in accordance with whose directions or instructions a director may be required or is accustomed to act.

3. We have reviewed the proposed definition of “shadow director”, having regard to the practices in other common law jurisdictions (i.e. the UK, Australia, Malaysia and Singapore). These jurisdictions define the concept of “shadow director” along the same lines except that the Australian Corporations Act 2001 provides that the concept of “shadow director” does not apply merely because the directors act on advice given by a person in the proper performance of functions attaching to the person’s professional capacity or the person’s business relationship with the directors or the

¹ Markovic M, “The Law of Shadow Directorships” (1996) 6 Australian Journal of Corporation Law.

company or body. We are not inclined to follow the Australian approach by introducing the concept of “business relationship” which does not appear to be clearly defined. Our existing approach of referring to “professional capacity” only is in line with the approaches adopted in the UK, Malaysia and Singapore.

(b) Review of the UK company law

4. We are awaiting the responses from our UK counterparts on the issue of the applicability of the existing provisions relating to quasi-loans etc in the UK Companies Act to private companies and will revert to the Bills Committee after receiving the responses.

(c) Extension of the definition of “credit transaction” to cover tenancy agreements

5. In the light of the Bills Committee’s concerns about the scope of the definition of “credit transaction”, we are considering the wording of the definition vis-à-vis tenancy agreements. As regards part (b) of the Chinese version of the definition of “credit transaction”, we consider that the term “出租” should be wide enough to cover the phrase “hire or lease”.

(d) Transaction limit of \$500,000

6. In the UK Companies Act, a money-lending company² may make a loan or quasi-loan to any person notwithstanding any general prohibitions regarding loans etc to directors etc. However, the aggregate of the value of transactions or arrangements in the nature of loans, quasi-loans or credit transactions with a director or connected person etc shall not exceed £100,000 if the company (unless it is a banking company) is a relevant company³. We are reviewing the transaction limit of \$500,000 in the new section 157HA(8) and will revert to the Bills Committee as soon as possible.

² A money-lending company is defined in section 338 of the UK Companies Act to mean a company whose ordinary business includes the making of loans or quasi-loans, or the giving of guarantees in connection with loans or quasi-loans.

³ A relevant company is defined in section 331 of the UK Companies Act to mean (a) a public company; (b) a subsidiary of a public company; (c) a subsidiary of a company which has as another subsidiary a public company; or (d) has a subsidiary which is a public company.

(e) Enforcement of section 98(3)

7. Under the existing section 107, a company is required to file with the Companies Registry (CR) an annual return which includes, among other things, particulars of its members. Such a return will then be made available for public inspection. In the event that there is any change in a company's membership in between the filing periods, any member of the public should be able to find out the change by inspecting the company's register of members or obtaining a copy thereof under the existing section 98. In the past decade, the CR has received nine complaints regarding breaches of the existing section 98(3) (relating to refusal of inspection of a company's register of members etc). In seven of these cases, the aggrieved parties have been able to inspect the registers of members after the CR's correspondence with the concerned companies. For the remaining two cases, the CR has issued a summons in one case but has not been able to follow up further in another case due to lack of evidence. A search of precedent cases has revealed 3 cases in which orders have been made under the existing section 98(4) since 1989 compelling an immediate inspection of the register and index of members, or directing that copies thereof shall be sent to the persons requiring them.

8. The CR is now working on its Integrated Companies Registry Information System, the first phase of which would start to operate in end-2003. By then, members of the public can search for information in the CR's register (including particulars of a company's members as reported in its annual returns) through the Internet. However, there is no plan to require companies to file with CR information about the changes in their membership in between the filing periods as such a requirement would increase the compliance burden on companies and, in particular, private companies. Furthermore, as revealed by the complaint and enforcement statistics in paragraph 7 above, there does not appear to be a major problem for a member of the public to find out the changes in a company's membership from its register of members. Hence, we are not inclined to require companies to file a notice with the CR whenever there is a change in its membership.

(f) Appointment of a person to act in place of the sole director (who is also the sole member) of a company

9. Section 201F of the Australian Corporations Act 2001 provides, inter alia, that, if a person who is the only director and the only shareholder of a proprietary company dies and a personal representative is appointed to

administer the person's estate or property, the personal representative may appoint a person as the director of the company. This section does not, however, seem to address the Bills Committee's concerns about the lack of a mechanism to deal with issues arising from the death of the sole director pending the grant of representation. On the suggestion to make it a statutory requirement for the sole member (who is also the sole director) of a company to appoint a person to act as the director upon the member's death, we consider that it is difficult to justify the need for making the appointment a mandatory requirement, having regard to the fact that there is, at present, no statutory provision requiring a person to make a will. As regards the ways such an appointment is made, we are still drawing up the relevant details and will revert to the Bills Committee once they are available.

(g) "as far as he is reasonably able to do so" in the new section 161B(9)

10. We are considering the matters and will revert to the Bills Committee as soon as possible.

(h) New section 165(3)

11. We are awaiting the comments from the Hong Kong Society of Accountants on the new section 165(3) and will revert to the Bills Committee after receiving the comments.

Financial Services Branch
Financial Services and the Treasury Bureau
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