

Practitioners Affairs

CWP-108/02/60041

29 July, 2002

Clerk to the Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Sir/Madam,

Re: Companies (Amendment) Bill 2002

I attach a copy of the Law Society's submissions on the Bill for consideration by the appropriate Bills Committee.

Yours sincerely,

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Director of Practitioners Affairs
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Encl.

COMPANIES (AMENDMENT) BILL 2002
COMMENTS BY THE COMPANY AND FINANCIAL LAW COMMITTEE OF THE LAW SOCIETY OF HONG KONG

Section	Amendments	Response
Clause 1	States the title of the Bill and provides for its commencement.	No comment
Clause 2(1)(a)	Amends the definition of <i>annual return</i> by repealing an obsolete reference to section 108.	No comment
Clause 2(1)(b)	Adds the following new definitions:	
	<i>Certificate of solvency</i>	No comment
	<i>Image record and imaging method</i>	No comment
	<i>Manager</i> *This is a recommendation of the Standing Committee in the SCCLR Report.	It is not clear whether ‘under the immediate authority of the board’ includes for example someone who reports directly to the managing director. We recommend that the wording be amended to clarify this.
	<i>Record</i>	No comment
	<i>Shadow director</i> *This amendment is a recommendation of the Standing Committee in the SCCLR Report.	No comment
Clause 2(2)	Amends section 2(2) by substituting the concept of a shadow director with <i>shadow director</i> as a defined term.	No comment
Clause 2(3)	Adds new sections 2(12) and (13) to clarify that references to directors or members shall also mean director or member, respectively.	No comment

Section	Amendments	Response
Clause 3	Repeals section 2A(3) which provides that deviations from specified forms not affecting the substance of such form shall not invalidate it.	No comment
Clause 4(1)	Amends section 4(1) to permit the formation of a company by one person. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clause 4(2)	Adds new section 4(4) which prohibits the incorporation of a company limited by guarantee with a share capital. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clause 5	Amends section 8 to remove the right of dissenting shareholders in a public company to resort to the court to cancel an alteration to the objects clause of the company's memorandum of association. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clause 6	Amends section 18(2) to require a company to file a statement in specified form with the Registrar, instead of a statutory declaration on incorporation.	Agreed
Clause 7	Amends section 22 to require a company that changes its name, to file a notice in the specified form with the Registrar, instead of a copy of the special resolution, and to require the Registrar to issue a certificate of change of name instead of an altered certificate of incorporation.	Agreed
Clause 8	Amends section 22B(3) to reflect the amendment to section 22 (see Clause 7 above), i.e., a copy of the special resolution on a change of name is no	No comment

Section	Amendments	Response
	longer required to be filed; instead only a notice of change of name is now required.	
Clause 9	Amends section 23(1) to clarify the contractual position of a company and its members in relation to each other and to give every member of a company a personal right to sue to enforce the terms of the memorandum and articles of association. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	No comment
Clause 10	Amends section 25A to remove the right of dissenting shareholders in a public company to resort to the court to cancel an alteration to memorandum of association.	Agreed
Clauses 11 and 12	Repeals section 31 which provides for liability where a company carries on business with only one member and the subheading preceding it.	No comment
Clause 13	Amends section 45 to shorten the period for filing a return of allotments from 8 weeks to 1 month and to simplify the filing requirements, in particular, in relation to the allotment of shares otherwise than for cash and where such a contract has not been reduced in writing, and to remove the need to state the shareholder's occupation.	Agreed
Clauses 14 to 17 and 19 to 23	Amend sections 47E, 47F, 47G, 48, 49J, 49K, 49L, 49M and 49Q respectively (relaxation of financial assistance rules) to replace the references in those sections to a statutory declaration by references to a statement in the specified form.	The consequences of making a false statement are not set out. We suggest that this is specifically addressed.
Clause 18	Amends section 49BA(10)(b) by substituting the concept of shadow director with the defined term.	No comment

Section	Amendments	Response
Clause 24	Amends section 54(1) to provide for the use of a specified form when notifying the Registrar on a consolidation of the share capital of conversion of shares into stock.	No comment
Clause 25(1) and (2)	Amends section 55 to require a company to give notice of an increase in share capital within 15 days after the increase takes effect.	There may be circumstances where someone searching the public register would want to know the passing of a resolution to increase capital, even if the increase will or may take place at a later date. We therefore suggest that notification is still required within 15 days of passing the resolution and, where appropriate, again on the resolution lapsing or becoming unconditional.
Clause 25(3)	Amends section 55(2) to remove the requirement for a printed copy of the resolution to be filed with the Registrar.	No comment
Clause 26(1)	Technical correction to section 58(1C) by repealing the unnecessary reference to subsection (1D) in that section.	No comment.
Clause 26(2)	Amends section 58 to provide that court approval is not required where the reduction consists of a re-designation of the par-value to a lower amount, subject to certain specified conditions. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clauses 27 and 28(1)	Amend sections 59 and 61(1) to reflect the amendment to section 58 above (see Clause 26(2) above).	No comment
Clause 28(2)	Amends section 61(4) to provide for the Registrar to issue a certificate with his printed signature.	No comment.
Clause 29	Adds section 61A to the Ordinance which sets out the procedures for a reduction of capital under section 58 where court approval is not required.	No comment

Section	Amendments	Response
Clause 30	Make consequential amendments to section 63A(6) in connection with the new section 114AA which provides for one member to constitute quorum for a meeting of a company with only one member.	No comment
Clause 31	Amends section 70 to change the time-limit for the completion of a transfer of shares by a public company from 2 months to 10 business days. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clause 32	Amends section 83(2) to make clear that a certificate of registration of a charge may bear a printed signature of the Registrar and to remove the requirement that the certificate state the amount secured by the charge.	In relation to the removal of the need for the Registrar to sign each certificate by hand, refer to our comments in respect of Clause 28(2) above. In relation to the removal of the requirement for the certificate to state the amount secured, it can actually be useful (especially to creditors) if the amount charged is stated on the certificate. We query the rationale for this amendment.
Clause 33	Amends section 85 to: (i) streamline the procedure with respect to entries of satisfaction and release of property from charge; and (ii) widen the scope of the section to cover releases of the whole of a charge and cases where the whole of the property charged has ceased to form part of the company's property or undertaking.	We agree to the changes. We suggest that the opportunity is taken to clarify the position of a creditor if the company wrongly files a memorandum of satisfaction.
Clause 34	Makes a consequential amendment to section 86(1) in connection with the amendment made to section 85.	No comment
Clause 35	Amend section 87 to include a requirement for receivers, managers and liquidators to provide their identity card or passport numbers and to notify	No comment

Section	Amendments	Response
	the Registrar of any change in the particulars filed with the Registrar.	
Clause 36	Amends section 92(2) to provide for the use of a specified form when notifying the Registrar of the situation of the registered office and any change thereof.	No comment
Clause 37	Deletes the requirement in section 95(1)(a) for a company to enter the details of the occupations or descriptions of members of the company in the company's register of members.	No comment
Clause 38	<p>Adds new section 95A requiring companies in which the number of members of such company:</p> <p>(i) falls to one; or</p> <p>(ii) increases from one to two or more members,</p> <p>to record that fact in the company's register.</p>	We do not see the need for this. What are to be the consequences of failure to do this?
Clause 39	Amends section 103(1) to delete the requirement that a company file a statutory declaration when applying for a licence to keep a branch register of members and to provide for the application to be filed with the Registrar.	No comment
Clause 40	Amends section 109(5) by substituting the concept of shadow director with the new defined term.	No comment
Clause 41	Amends section 114A(1) by adding reference to the new section 114AA.	No comment
Clause 42	Adds new section 114AA which provides that one member constitutes a quorum for a meeting of a company having only one member.	No comment
Clause 43	Amends section 115A(2) to reduce the	Agreed

Section	Amendments	Response
	<p>threshold for shareholders' proposals to 2½% of voting rights or 50 members.</p> <p><i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i></p>	
Clause 44	Adds new section 116BC which provides that, a sole member of a company who makes any decision which is akin to a decision agreed to by a company in a general meeting, shall provide the company with a written record of that decision.	No comment
Clause 45	Amends section 117(4)(a) to exclude from the application of that section special resolutions effecting a change of company name.	No comment
Clauses 46 and 47	Amend sections 128 and 129 respectively (statements in companies accounts of subsidiaries and associated companies) to clarify the reporting requirements, to provide for the use of specified forms, to remove archaic terminology and to widen the scope of the offence provisions to cover a failure to comply with section 128(5A) or 129(5A).	No comment
Clause 48	Makes a consequential amendment to section 129A(1) in connection with the amendments made to sections 128 and 129.	No comment
Clause 49	Amends section 129B(1) to provide for the signing of a company's balance sheet by one director in the case of a sole-director company.	No comment
Clause 50	Corrects a cross-reference in section 140A(3)(b), (4) and (6)(b).	No comment.

Section	Amendments	Response
Clause 51	Makes consequential amendments to section 145B(b) in connection with the amendment made to section 161B.	No comment
Clause 52	Amends section 151 to provide for the use of a specified form when notifying the Registrar upon appointment of an inspector by the Financial Secretary to investigate the affairs of a company.	No comment
Clause 53	Amends section 153 (which requires every company to have at least two directors) to apply only to public companies. It also adds new section 153A, which permits a private company to have only one director and deems certain persons to be a director in cases where a company has not filed a return under section 158.	Agreed
Clause 54	<p>Adds section 153B, which makes clear that an alternate director is the agent of the director who appointed him and provides that a director shall be vicariously liable for torts committed by his alternate</p> <p><i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i></p>	Agreed
Clause 55	Adds section 153C, which provides that a written record of a decision of a sole director of a private company shall be sufficient evidence of that decision.	Agreed
Clause 56	Amends section 154 to prohibit a sole director of a private company and certain bodies corporate from being the secretary of the company.	Agreed

Section	Amendments	Response
Clause 57(1) and (2)	<p>Amends section 157B(1) and (2) to provide that a director may be removed by an ordinary resolution instead of a special resolution, notwithstanding any provision in the company's constitution.</p> <p><i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i></p>	Agreed
Clause 57(3)	<p>Makes a technical change to the terminology used in section 157B(5) from "term of office" to "period of office".</p>	No comment
Clauses 58 and 59	<p>Amends section 157H to extend the prohibition against a company making a loan to a director, or providing a guarantee or security for such a loan, to cover more modern forms of credit. The section is now split into two sections, one covering the prohibition and one covering the relevant exceptions to the prohibition.</p> <p>Amends section 157I so that it is consistent with the amended section 157H and the new section 157HA.</p> <p><i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i></p>	Agreed
Clause 60	<p>Amends section 157J such that the provisions are consistent with the amended section 157H and the new section 157HA.</p>	No comment
Clause 61(1)(a)	<p>Amends section 158(5) to provide for the use of a specified form to notify the Registrar of a director's consent to act on appointment.</p>	No comment
Clauses 61(1)(b) and (2)	<p>Make consequential amendments to sections 158(5) and 158(6)(a) in connection with the amendment made to section 153.</p>	No comment

Section	Amendments	Response
Clause 61(3)	Amends section 158(10)(a) by substituting the concept of shadow director with the new defined term.	No comment
Clause 62	Repeals an obsolete provision in section 158C(1)(a).	No comment.
Clause 63	Amends the reporting requirements under section 161B so that it is consistent with the changes made to section 157H and the new section 157HA.	No comment
Clause 64	Amend sections 161BA(1) and (2) to correct a cross-reference in section 161B.	No comment
Clause 65	Adds new section 162B which requires a company that has only one member, and that member is also the director of such company, to record in a written memorandum the terms of any oral contract that the company enters into with that member.	Agreed
Clause 66	Amends section 165 to clarify the scope of indemnities for directors and to permit companies to purchase liability insurance for officers and auditors in certain specified circumstances. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clause 67	Amends section 168C to reflect the new definition of shadow director	No comment
Clause 68	Makes a technical correction to the Chinese text of section 168H(1) so that it is consistent with the English interpretation.	No comment
Clause 69	Amends section 177 to provide for the winding up of a company that has no members and makes consequential amendments in connection with the amendment made to section 8.	No comment

Section	Amendments	Response
Clause 70	<p>Amends section 178 to permit the increase in the minimum amount of debt below which a petition for winding-up cannot be presented from \$5,000 to \$10,000 or such greater amount as may be prescribed by the Financial Secretary.</p> <p><i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i></p>	Agreed
Clause 71	<p>Makes a consequential amendment to section 179(1) to provide for the possibility of one-member companies.</p>	No comment
Clause 72	<p>Amends section 195(a) to provide for the use of a specified form when notifying the Registrar on appointment of the provisional liquidator.</p>	No comment
Clause 73	<p>Makes a consequential amendment to section 199(6)(a) in connection with the amendment made to section 168C by substituting the concept of shadow director with the new defined term.</p>	No comment
Clause 74	<p>Amends section 226A to allow a liquidator to issue a certificate under that section and to provide for the use of a specified form.</p>	No comment
Clauses 75, 77, 82 and 83	<p>Make consequential amendments to sections 228(1)(d), 230, 264A(2)(b) and 264B(2)(b) respectively in connection with the amendments made to section 228A.</p>	No comment
Clause 76	<p>Amends section 228A:</p> <p>(a) to require the directors of a company to file a winding-up statement in the specified form, instead of a statutory declaration;</p> <p>(b) to require a provisional liquidator to give notice of his appointment or of his ceasing to</p>	<p>The consequences of making a false statement are not set out. We suggest that this is specifically addressed.</p>

Section	Amendments	Response
	<p>act to the Registrar in the specified form;</p> <p>(d) to provide for the case of a private company having only one director; and</p> <p>(d) to make other technical changes.</p>	
Clause 78	Makes a consequential amendment to the subheading before section 233 in connection with the amendments made to that section.	No comment
Clauses 79(1) to (5)	Amends section 233 to replace the requirement for a statutory declaration with a requirement for a certificate of solvency in the specified form.	The consequences of making a false statement are not set out. We suggest that this is specifically addressed.
Clause 79(6)	Adds new section 233(6) to provide for the case of a private company having only one director.	No comment
Clause 79(7)	Adds new section 233(7) to deal with transitional matters.	No comment
Clause 80	Makes a consequential amendment to section 237A(1).	No comment
Clause 81	Amends section 253 to include a requirement for receivers, managers and liquidators to provide their identity card or passport numbers and to notify the Registrar of any change in the particulars filed with the Registrar.	No comment
Clause 84	Amends section 271(3) by substituting the concept of shadow director with the new defined term.	No comment
Clause 85	Makes a consequential amendment to section 300A(1) in connection with the amendments made to section 300B.	No comment
Clause 86	Amends section 300B (statement of affairs submitted to the receiver) to replace the requirement for an affidavit with a requirement for a statement in writing.	The consequences of making a false statement are not set out. We suggest that this is specifically addressed.

Section	Amendments	Response
Clause 87	Repeals section 303A which relates to the taking of affidavits.	No comment
Clause 88	Amends section 305 to take account of documents that are filed or stored with the Registrar in electronic form. The new section 305(1)(b)(ii) is added as a consequence of the amendments made to section 22(7).	No comment
Clause 89	Adds new section 305A which provides that documents required to be signed by the Registrar may instead be authenticated in a manner determined by the Registrar.	No comment
Clause 90	Makes a consequential amendment to section 310(1) in connection with the amendment made to section 4(1).	No comment
Clauses 91 and 92	Amend sections 312(a) and 313(a) respectively to remove the requirement to provide details of members' occupations in relation to registration under Part IX.	No comment
Clause 93	Amends section 314 to correct a spelling error and to replace the requirement for a statutory declaration with a requirement for a statement in writing in respect of the details to be delivered to the Registrar for registration under Part IX.	No comment
Clause 94	Amends section 318 to allow a registration certificate under Part IX to be issued by the Registrar to bear a printed signature instead of his signature under hand.	No comment
Clause 95	Amends section 323 to remove the right of dissenting shareholders of a public company to resort to the court to cancel an alteration to the conditions of the company's memorandum of association.	Agreed
Clause 96	Amends section 327 to permit the increase in the minimum amount of	Agreed

Section	Amendments	Response
	debt below which petition for winding up cannot be presented from \$5,000 to \$10,000 or such greater amount as may be prescribed by the Financial Secretary.	
Clause 97	Amends section 333(3) to allow a registration certificate under Part XI to be issued by the Registrar to bear a printed signature instead of his signature under hand.	No comment
Clause 98	Amends section 333B(1) (termination of authorized representative) to replace the requirement for a statutory declaration by a requirement for a statement in writing in respect of the details to be delivered to the Registrar for registration under Part XI.	No comment
Clause 99	Repeals an obsolete provision in section 333C(1)(a).	No comment
Clause 100	Amends section 341 by substituting the concept of shadow director with the new defined term.	No comment
Clause 101	Amends section 344A (dormant companies) to remove the requirement for a statutory declaration and to simplify the procedure for a company to become dormant.	No comment
Clauses 102, 103 and 105	Amend sections 346, 347 and 348B(b) respectively to facilitate the delivery, processing and storage of information in electronic form.	No comment
Clause 104	Amends section 348 to take account of documents that are in electronic form and to allow the Registrar to refuse to register or accept for registration forms that deviate from the forms specified by the Registrar under section 2A.	No comment
Clause 106	Amends section 348D to take account of documents and records that are in electronic form.	No comment

Section	Amendments	Response
Clause 107	Amends section 351(2) by replacing the concept of shadow director with the new defined term.	No comment
Clause 108(a), (b) and (e)	Amends certain cross-references in the First Schedule.	No comment
Clause 108(c)	Amends regulation 1 of Part I of Table A in the First Schedule to take account of electronic communications and to remove obsolete provisions.	Agreed
Clause 108(d)	Amends regulation 82 of Part I of Table A to remove the directorial autonomy rule. <i>*This amendment is a recommendation of the Standing Committee in the SCCLR Report.</i>	Agreed
Clause 109	Amends certain cross-references in the Eighth Schedule and makes consequential amendments to that Schedule in connection with the amendments made to sections 22 and 85.	No comment
Clause 110	Amends certain cross-references in the Tenth Schedule.	No comment
Clause 111	Amends certain cross-references in the Eleventh Schedule.	No comment
Clause 112	Makes consequential amendments to the Twelfth Schedule.	No comment
Clause 113	Makes a consequential amendment to rule 5(1)(a) and (b) of Order 102 of the Rules of the High Court (Cap. 4 sub. leg.) and repeals rules 2(3) and 6(3), which are obsolete.	No comment
Clause 114	Repeals the Companies (Requirements for Documents) Regulation (Cap. 32 sub. leg.), which is obsolete.	No comment
Clause 115	Repeals the Companies Ordinance (Fee for Taking Affidavit, Affirmation or Declaration) Notice (Cap. 32 sub. leg.) as a consequence of the repeal of	No comment

Section	Amendments	Response
	section 303A (Clause 87).	
Clauses 116 to 124	Make consequential amendments to other enactments.	No comment

Company and Financial Law Committee
The Law Society of Hong Kong
26 June 2002

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