

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

**Follow-up actions arising from the discussion
at the meetings on 27 and 20 February, and 23 January 2003**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meetings on 27 and 20 February, and 23 January 2003.

(A) 27 February 2003

(a) Exercise of property rights under the security document in relation to a security provided by a company in contravention of the new section 157H

2. Members asked about the exercise of property rights under the security document in relation to a security provided by a company in contravention of the new section 157H. New section 157I(2) provides that subject to subsection (3), a guarantee entered into or any security provided by a company in contravention of section 157H(1), (2) or (4) shall be unenforceable against the company. Where a company has executed a legal charge of a real property in favour of a bank to secure a loan advanced from the bank to a borrower, if the borrower fails to repay, the bank is entitled to foreclose the property i.e. to extinguish the company's right to redeem the property so that the bank becomes the owner of the property both at law and in equity. However, an order of the court for foreclosure is essential and the company, who has a right to redeem the property must be made parties to the action (Megarry & Wade, *The Law of Real Property*, 6th ed., paragraphs 19-049 to 19-052). Where the charge is unenforceable against the company by reason of the new section 157I(2), it is unlikely that the court will assist the bank by allowing it to foreclose.

3. The bank also has a right to sell the property. In general, the power of sale is exercisable without any order of the court. However, before entering into a contract of sale, the bank first needs to obtain and execute an order for possession if it is not already in possession of the property (Megarry & Wade, *The Law of Real Property*, 6th ed., paragraph 19-060). Since the charge is unenforceable against the company, it is doubtful whether the court will grant the order in favour of the bank if the company contests the application. Other

remedies available to the bank are taking possession of the property and the appointment of a receiver. If a company opposes such steps on the ground that the charge is unenforceable against it, we cannot see, based on the above rationale, how the bank can enforce its rights as a legal chargee.

4. New section 157I(3)(b) provides that subsection (2) shall not affect an interest in any property that has been passed by the company to any person by way of security provided in connection with any transaction or arrangement. By executing a legal charge in favour of the bank, the company purports to transfer the legal estate in the property to the bank. This is the interest in the property that has been passed under the charge and such interest will not be affected by the unenforceability of the charge. Hence, the bank is a secured creditor of the company. The company (and in the event of liquidation, the liquidator) cannot sell the property without first obtaining a release of the charge, which will only be made upon repayment of all outstanding amounts due to the bank.

(b) Reference to a person who is not a director of a company under the new section 157I(3)(a)

5. New section 157I(3)(a) provides that subsection (2) shall not apply to a guarantee entered into or any security provided by the company in connection with a loan etc to a person who is not a director of the company or of its holding company if it is shown that, at the time the guarantee was entered into or the security provided, the person to whom the guarantee was given or the security provided, did not know the relevant circumstances i.e. the guarantee or security shall be enforceable against the company under such circumstances. We need to keep the reference to “a person who is not a director of the company or of its holding company” in this section because where the guarantee or security is in connection with a loan etc to a director of the company or of its holding company, it is our policy that the guarantee or security shall be unenforceable against the company, regardless of whether the person to whom the guarantee was entered into or the security provided knew the relevant circumstances at the time of the transaction. Moreover, it should be noted that a loan prohibited under new section 157H includes, among other parties, one made to another company in which a director holds a controlling interest.

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

6. We are re-considering the matter in the light of Members' concern. A copy of our letter to the Law Society of Hong Kong has been sent to the Clerk to the Bills Committee for distribution to Members and the draft Committee Stage Amendments (CSAs) in respect of the two-month period in the new section 153A(4) have been included in the first batch of the draft CSAs.

(d) Hong Kong Association of Banks' further comments on clauses 26(2) and 33

7. As explained at the meeting held on 27.2.2003, we would take into account the comments of the Hong Kong Association of Banks in the drafting of the draft CSAs. The draft CSAs relating to clause 26(2) have been included in the first batch of the draft CSAs.

(B) 20 February 2003

(a) Prescribed amount under the new section 178(4)

8. In response to the Bills Committee's suggestion, we propose to amend the new section 178(4) to provide that the Financial Secretary may, by regulation, prescribe an amount other than (instead of greater than) \$10,000. If the debt owed by a company is equal to or exceeds this amount, a petition may be made to the court for a winding-up order against the company.

(b) Release of a registered charge under the new section 85

9. The requested information and the draft specified form (which would be further amended in the light of the relevant CSAs to the new section 85) in respect of the release of a registered charge under the new section 85 are at Annexes A and B respectively.

(C) 23 January 2003

(a) Definition of “credit transaction” under the new section 157H(7)

10. In response to the Bills Committee’s suggestion, we propose to amend the Bill to exclude from the “credit transaction” a transaction under which the creditor (i.e. the company) leases or hires land or goods to the borrower in return for periodical payments where the terms of the transaction are not more favourable than those terms that it is reasonably expected to be offered at the market.

(b) Transaction limit of \$500,000 under the new section 157HA(8)

11. In response to the Bills Committee’s suggestion, we propose to amend the Bill to increase the limit from \$500,000 to \$750,000 to take into account inflation¹ since 1984.

Financial Services Branch
Financial Services and the Treasury Bureau
March 2003

¹ The Composite Consumer Price Index (CCPI) has increased by about 38% in the period between 1984 and 2002, assuming a 3% decline in 2002.

**Release of a registered charge
under the new and existing section 85**

		Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under Existing Section 85	Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under New Section 85
1.	Form of Memorandum of Satisfaction	<p>There is no “set” form of “Memorandum of Satisfaction” at present. This takes the form of a notice (commonly known as the Memorandum of Satisfaction) which is given to the Companies Registry (CR) together with such evidence as may be required concerning satisfaction or release of property from charge.</p> <p>The form of the Memorandum of Satisfaction is commonly prepared by the mortgagee (occasionally by the mortgagor) and is available for public search after microfilming.</p>	<p>The Memorandum of Satisfaction will be replaced by the specified form (new Form M2). A copy of the draft form, which would be further amended in the light of the Committee Stage Amendments to clause 33, is at <u>Annex B</u>.</p> <p>Specified form will be imaged upon presentation and the whole of the form will be available for public search.</p>
2.	I. Evidence of Discharge Required to be Lodged	<p>If lodged by mortgagor-</p> <p>The instrument of release (or a certified copy) must be presented to the CR for inspection.</p> <p>Instrument of release is not microfilmed upon presentation and so not available for public search.</p> <p>If lodged by the mortgagee- The CR will accept the Memorandum of Satisfaction</p>	<p>If lodged by mortgagor-</p> <p>The instrument of release (or a certified copy) must be presented to the CR for inspection.</p> <p>Instrument of release will not be imaged upon presentation and so not available for public search.</p> <p>If lodged by the mortgagee- The CR will accept the specified form signed by the</p>

		Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under Existing Section 85	Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under New Section 85
		signed by the mortgagee, normally without further evidence.	mortgagee, normally without further evidence.
	II. Evidence Required in Cases of Discharge of Charges over Land	<p>Evidence produced by mortgagee-</p> <p>The instrument of release must be produced together with the signed Memorandum of Satisfaction.</p> <p>In cases where physical evidence is not available due to the nature of the charge e.g. Letters of hypothecation, a charge over deposits or charge over securities, the CR will rely on the Memorandum of Satisfaction executed by the chargee confirming the release.</p> <p>Evidence produced by mortgagor-</p> <p>The mortgagor must produce the instrument of release together with the signed Memorandum of Satisfaction.</p> <p>In the absence of evidence of release of the property of the charge, registration of the release will be refused.</p>	<p>Evidence produced by mortgagee-</p> <p>Mortgagee need only submit specified form which will contain a Certificate of Discharge certifying that the facts given in the form are correct, duly signed by or on behalf of the mortgagee.</p> <p>In cases where physical evidence is not available due to the nature of the charge e.g. Letters of hypothecation, a charge over deposits or charge over securities, the CR will rely on the Memorandum of Satisfaction executed by the chargee confirming the release.</p> <p>Evidence produced by mortgagor-</p> <p>The mortgagor must lodge the specified form together with evidence of release of the property from the charge.</p> <p>In the absence of evidence of release of the property of the charge, registration of the release will be refused.</p>

		Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under Existing Section 85	Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under New Section 85
3.	Documents and Entries Appearing on the Register	<p>The microfilmed Memorandum of Satisfaction is available for public search together with the entries made in the paper register. The Memorandum is required to show the following information –</p> <ul style="list-style-type: none"> ⒸName of chargor and chargee ⒸDescription of the charge ⒸDescription of the property included in the Memorandum of Satisfaction. ⒸWording to indicate whether Memorandum of Satisfaction is in respect of the whole or part of the debt for which the charge was given. ⒸWording to indicate whether part of the property or undertaking charged has been released from the charge or ceased to form part of the company's property or undertaking. <p>(There is presently no set form of or precise wording required in a Memorandum of Satisfaction which may contain a lengthy description of the property which is the subject of the charge. This may be difficult for the public to read and to identify the nature of the property being released and the extent of the release of the</p>	<p>The specified form, in place of the existing Memorandum of Satisfaction, will be imaged and available for public search together with the entries made in the computerized register. The wording regarding the extent or nature of the discharge will be more clearly classified and available for search. The party lodging the form will be required to indicate which of the following types of discharge is applicable –</p> <ul style="list-style-type: none"> ⒸThe debt for which the charge was given has been paid or satisfied in whole. ⒸThe debt for which the charge was given has been paid or satisfied in part to the extent of a stated monetary amount. ⒸThe whole property or undertaking charge has been released from the charge. ⒸPart of the property or undertaking charge has been released from the charge. ⒸThe whole property or undertaking charge has ceased to form part of the company's property or undertaking. ⒸPart of the property or undertaking charge has ceased to form part of the company's property or undertaking.

		Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under Existing Section 85	Documentation and Evidence of Satisfaction and Release of Property from a Charge Required under New Section 85
		charge (whole or part).	In the case of land, a description of the property or undertaking which is the subject of the discharge will also be required. (The intention is to make more information regarding the nature and extent of discharge available for public search which will be given in a clearer format which should be quicker to read and understand.)
4.	Evidence re Change in Identity of Mortgagee	Evidence of change is required by the CR but the change of identity of a mortgagee is often not mentioned in the notice (i.e. the Memorandum of Satisfaction). Evidence will invariably be produced in the form of a copy of the assignment of the charge between mortgagees.	The specified form contains a new field in which the presenter will be required to state the date of change of the mortgagee or chargee. When the form is presented, evidence of the change of identity will not be required because the CR will rely on the certificate in the form signed by the mortgagee.
5.	Endorsement of "Satisfaction Entered" on the Instrument of Charge	In cases where the whole of the debt for which a charge was given has been paid or satisfied, the CR will, upon payment of an additional fee, endorse the words "Satisfaction Entered" and the date of satisfaction on the original instrument which has to be resubmitted to the CR.	In cases where the whole of the debt for which a charge was given has been paid or satisfied, the CR will, upon payment of an additional fee, endorse the words "Satisfaction Entered" and the date of satisfaction on the original instrument which has to be resubmitted to the CR.



Memorandum of Satisfaction or
Release of Property from Charge

Companies Regis

(85)
(Companies Ordinance s.85)

M2

Form

Important Notes

Please read the accompanying notes before completing this form.
Please print in black ink.

Company Number

1 Company Name

2 Particulars of Mortgagee or Chargee

Name

(No

Date of Change of Mortgagee or Chargee

<input type="text"/>	<input type="text"/>	<input type="text"/>
DD	MM	YYYY

3 Particulars of the Discharge

A

Description of the Instrument Creating or Evidencing the Charge

Date of Creation of the Charge

B

<input type="text"/>	<input type="text"/>	<input type="text"/>
DD	MM	YYYY

Date of Discharge of the Charge

C

<input type="text"/>	<input type="text"/>	<input type="text"/>
DD	MM	YYYY

(Note 3)

Presentor's Reference

Name:

Code:

Address:

Tel:

Fax:

E-mail Address:

Reference:

Specification No. / (/)
/ (/)

For Official Use

CR Barcode

3

Particulars of the Discharge (cont'd)

D

Type of Discharge *J Please tick the relevant box*

I

The debt for which the charge was given has been paid or satisfied in whole.

II

The debt for which the charge was given has been paid or satisfied in part to the extent of :

Currency

Amount

--	--

III

The whole property or undertaking charged has been released from the charge.

IV

Part of the property or undertaking charged has been released from the charge.

V

The whole property or undertaking charged has ceased to form part of the company's property or undertaking.

VI

Part of the property or undertaking charged has ceased to form part of the company's property or undertaking.

(Note 9)

E

D

Description of the Property or Undertaking Related to Item D above

(**A** Use Continuation Sheet A if space is insufficient)

a Landed Property

1 1st Property

(*Please state the address of the property*)

2 2nd Property

(*Please state the address of the property*)

b

Other types of property

(*Please insert details as appropriate*)

A

This Notification includes _____ Continuation Sheet(s) **A**.

Specification No. / (/)
/ (/)

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4

Certificate of Discharge

Certification by Mortgagee or Chargee

I hereby certify that the facts given in this form are correct.

Signed :

Name :

Date :

_____ DD / MM / YYYY

(Note 4)

(_____ *)

Mortgagee Chargee

(Director Secretary Authorized Representative *)

OR

Certification by Company

This Part should be completed by the Company only if the above Certification has not been signed by the Mortgagee or Chargee.

3

I hereby certify that the facts given in this form are correct. A certified copy of the following document evidencing the discharge of the charge described in Section 3 is submitted.

Description of Document

Date

(No _____

--	--	--

DD MM YYYY

(registered.)

The above-mentioned copy will be returned to the presenter after this form has been

Signed :

Name :

Date :

_____ DD / MM / YYYY

(Note 4)

(_____ *)

Company

(Director Secretary Authorized Representative *)

*

Delete whichever does not apply

Company Number

3D

2(3E)

Description of the Property or Undertaking Related to Section 3D (Section 3E)

(32)
85

∞ M2

1. ()

2. M1 — 3A

3.

4. —

5.

6.

7.

(2)

8.

3D

(3E)

9.

3D I II

3D III,IV,V VI

**MEMORANDUM OF SATISFACTION
OR RELEASE OF PROPERTY FROM CHARGE
Required by Companies Ordinance (Cap. 32)
Section 85**

Notes for Completion of Form M2

Introduction

1. Either a Mortgagee or Chargee or a Company (i.e. the mortgagor or chargor of a charge) may notify the Registrar of Companies of the discharge of a registered charge of the Company. This form should be used for the notification.
2. Please fill in all particulars and complete all items consistently in either Chinese or English **AND** in the same language used in the 'Mortgage or Charge Details' Form M1 registered in respect of the charge stated in Section 3A of this form. In the case of Chinese, traditional Chinese characters should be used. Please note that handwritten forms will be rejected by the Companies Registry.
3. Please complete the Presentor's Reference. Unless the presentor needs to raise a specific issue for the attention of the Companies Registry, no covering letter is required.

Signature

4. This form can either be signed by the Mortgagee or Chargee **OR** the Director, Secretary or Authorized Representative of the Company. If the Mortgagee or Chargee is a body corporate, this form must be signed by a Director, Secretary or an Authorized Representative. If the Mortgagee or Chargee is an individual, this form must be signed by the Mortgagee or Chargee personally or by his or her Authorized Representative. A form which is not properly signed will be rejected by the Companies Registry.

Evidence

5. If this form is signed by the Director, Secretary or Authorized Representative of the Company, please fill in the particulars of the document evidencing the discharge in the box provided and submit a certified copy of that document together with this form. The document can be certified by the Company, Mortgagee or Chargee, or the solicitors on behalf of either of them. If this form is signed by the Mortgagee or Chargee, documentary evidence relating to the discharge is not required.

Fee

6. This form must be submitted with the correct registration fee. A form which is not submitted with the correct fee will be rejected by the Companies Registry. Please refer to the information pamphlet on 'Price Guide to Main Services' for the correct fee payable.
7. If this form is delivered by post, please send a crossed cheque in Hong Kong Dollars payable to 'Companies Registry'. Please do not send cash.

Particulars of Mortgagee or Chargee (Section 2)

8. If there has been a change of Mortgagee or Chargee, please fill in the date on which the current Mortgagee or Chargee became entitled to the charge in the box provided.

Description of the Property or Undertaking Related to Section 3D (Section 3E)

9. If the type of discharge falls within Items I or II of Section 3D, please briefly describe the charged property or undertaking in the boxes provided. If the type of discharge falls within Items III, IV, V

or VI of Section 3D, please describe the property or undertaking which has been released from the charge or has ceased to form part of the company's property or undertaking.

1.

?

(a)

(b)

(c)

(d)

2.

Personal Information Collection Statement

Purpose of Collection

1. Personal data provided pursuant to any requirement in the Companies Ordinance ("the Ordinance") will be used by the Companies Registry for one or more of the following purposes:-
 - (a) to administer the Ordinance;
 - (b) to enforce relevant provisions of the Ordinance;
 - (c) to make information contained in personal data provided in a specified form available for public inspection; and
 - (d) to provide copies of any documents containing such personal data to any person subject to payment of a fee.

Classes of Transferees

2. The personal data collected by means of the Companies Registry's Specified Forms will be disclosed in the Companies Registry's public registers for public inspection.