



**COMPANIES (AMENDMENT) BILL 2002
SUBMISSION BY BAKER & MCKENZIE**

Clause	Submission
2(1)(b) and 2(2)	<p><i>Interpretation</i></p> <p>We note that under the newly enacted Securities and Futures Ordinance, the definition of a “shadow director” does not refer to “a majority of the directors” and refers to being “accustomed or obliged to act”. We believe that this term should be consistently defined in both Ordinances.</p>
2(3)	<p><i>Interpretation</i></p> <p>We suggest adding “, as if such references were references to such one subscriber, member or shareholder, as the case may be” after “as the case may be” in section 2(12).</p> <p>We suggest adding “as if such references were references to such one director” after “only one director” in section 2(13).</p>
5(1)	<p><i>Mode in which and extent to which objects may be altered</i></p> <p>We suggest adding “under this section” before “may be made”.</p>
5(5)	<p><i>Mode in which and extent to which objects may be altered</i></p> <p>We suggest adding “under this section” after “(whether a private company or not)”.</p>
10(1)	<p><i>Power to alter conditions in memorandum which could have been contained in articles</i></p> <p>We suggest adding “under this section” before “may be made”.</p>
15	<p><i>Directors’ statement under section 47E</i></p> <p>We suggest adding a new sub-Clause:</p> <p>“The heading for section 47F is repealed and substituted by “Directors’ statement under section 47E”.”</p>



Clause	Submission
<p style="text-align: center;">29</p>	<p><i>Registration of special resolution, minute and statement where court confirmation is not required</i></p> <p>Since the special resolution is already required to be registered under section 117, it is not necessary to provide for its registration under section 61A(1).</p> <p>Assuming that the “minute” refers to the minutes of the general meeting at which the special resolution was passed and given that the information prescribed under section 61A(1)(a) may all be required to be included in the special resolution, in this context, is any additional purpose served by requiring separate registration of the minute?</p> <p>We suggest that section 61A(1)(b) be amended as follows:</p> <p style="padding-left: 40px;">“(b) a statement in the specified form signed by an officer of the company, certifying the company’s satisfaction of the conditions set out under section 58(3)(a) to (d),”</p>
<p style="text-align: center;">30</p>	<p><i>Variation of rights attached to special classes of shares</i></p> <p>While section 114AA (<i>Quorum where company has only one member</i>) should apply to meetings held under section 63A (<i>Variation of rights attached to special classes of shares</i>), section 114AA should not be modified or be subject to the provisions under section 63A(6)(a) and (b).</p>
<p style="text-align: center;">33</p>	<p><i>Entries of satisfaction and release of property from charge</i></p> <p>We propose inserting “payment,” before “satisfaction” in section 85(3)(b), to mirror the wording in section 85(1).</p> <p>We propose substituting “officer” with “ secretary or authorized representative” in section 85(3)(c)(i) so that those persons who are authorized to sign the specified form M1 under section 80 (to register charges) are also authorized to sign the specified form under section 85(3).</p> <p>We propose deleting “mortgagee or” in section 85(3)(c)(ii). There is no reference to mortgage in section 85. Section 85 refers to a charge only.</p>



Clause	Submission
42	<p><i>Quorum where company has only one member</i></p> <p>Please consider if it is really necessary or appropriate to allow for a sole member to be present <u>by proxy</u> to form a quorum at a meeting.</p>
44	<p><i>Written record where company has only one member</i></p> <p>It is unclear as to what the distinction is between a written resolution by a sole member under section 116B and a written record under section 116BC.</p> <p>If it is the intention of the Bill to allow decisions which have no reporting requirements to be recorded by way of written records but to require those requiring filings with the Registrar to be passed by way of written resolutions, section 116BC needs to be amended to specify the requirements more clearly.</p> <p>Furthermore, if “written record” also covers matters requiring filings with the Registrar, the 30-day period should be shortened to, say, 10 days to enable the company to attend to the filings within the statutory time limits.</p> <p>Section 116BC should also provide for an obligation by the company to keep the written records in a book (similar to the provision under section 116B(7)) and for section 120 (<i>Inspection of minute books</i>) to similarly apply to written records.</p>
54	<p><i>Directors vicariously liable for acts of alternates, etc.</i></p> <p>We suggest that a provision for the appointment of alternate directors be included in Table A.</p>
55	<p><i>Written record of decision of sole director of private company</i></p> <p>It is unclear as to what the distinction is between a sole director’s resolution and a written record.</p> <p>Section 153C should also provide for an obligation by the company to keep the written records in a book (similar to the provision under section 119(1)).</p>



Clause	Submission
<p>56 and 112</p>	<p><i>Secretary - Punishment of offences under this Ordinance</i></p> <p>Please consider if penalties should be imposed on the company and its officers in default for failing to have a company secretary.</p>
<p>58</p>	<p><i>Prohibition of loans, etc., to directors and other persons</i></p> <p>If section 157H(4) is intended to prohibit, for example, back-to-back loan arrangements, it is doubtful if a typical back-to-back loan arrangement would be prohibited under that section unless there was a “benefit” to the conduit lender. Given that section 157H(1) already prohibits the making of a prohibited loan, etc. “directly or indirectly”, we query whether the proposed section 157H(4) adds any significant value.</p> <p>We propose adding “and section 157HA, 157I and 157J” after “In this section” in section 157H(7).</p> <p>We suggest adding a “,” before “in the case” and also after “Unified Exchange” in section 157HA(2).</p> <p>We suggest that section 157HA(8)(iii) be amended as follows, for consistency of wording:</p> <p style="padding-left: 40px;">“(iii) the amount representing the maximum liability of the company at that time under all guarantees entered into by the company, and in respect of all security provided by the company, in connection with any loans or quasi-loans made by any person to, or any credit transactions entered into by any person as creditor for, the director or other company concerned by virtue of subsection (6) (excluding guarantees and security constituting the transaction in question).”</p>
<p>60</p>	<p><i>Criminal penalties for contravention of section 157H</i></p> <p>The definition of a “director” under section 157J(4) may be deleted if our proposed amendment to section 157H(7) under Clause 58 above is made.</p>



Clause	Submission
<p>66</p>	<p><i>Provisions as to liability of officers and auditors</i></p> <p>We suggest that the wording under section 165(4) be amended to clarify that the exemption applies in respect of anything done (or omitted to be done) by the relevant person prior to the coming into effect of the proposed amendments under the Bill.</p>
<p>79</p>	<p><i>Certificate of solvency in case of proposal to wind up voluntarily</i></p> <p>We suggest adding a new sub-Clause:</p> <p style="padding-left: 40px;">“The heading for section 233 is repealed and substituted by “Certificate of solvency in case of proposal to wind up voluntarily”.”</p> <p>We suggest adding “by so” before “recording and signing” in section 233(6).</p> <p>We suggest substituting “it” with “such declaration” in section 233(7)(b).</p>
<p>88, 89 and 102 to 108</p>	<p><i>Electronic documents, records, information and transmissions</i></p> <p>We assume that the proposed amendments under the Bill are intended to fit with the regime established by the Electronic Transactions Ordinance (the “ETO”).</p> <p>However, to the extent that certain types of transactions are excluded from the operation of the ETO, it is unclear how such transactions should be dealt with under the Bill. For example, it is not clear whether any of the documents excluded from the operation of the key provisions of the ETO, such as a floating charge which includes an interest in land as part of the security, will be capable of electronic filing under the Bill and if so, what the legal effect of the filing will be.</p>
<p>93</p>	<p><i>Authentication of statements of existing companies</i></p> <p>In the context of a sole director, please consider if it is appropriate to require that the statement be verified by 2 or more directors or other principal officers.</p>



Clause	Submission
108(c)	<p data-bbox="454 369 829 403"><i>First Schedule amended</i></p> <p data-bbox="454 443 1348 622">Please consider if it is intended that all communications (other than appointment of proxy) between the company (on the one hand) and its directors or members (on the other hand) may be given in electronic form. If so, the wording should be amended accordingly to state this clearly.</p> <p data-bbox="454 663 1332 801">Furthermore, if appointment of a proxy cannot be provided by electronic means, we propose that the same applies to the appointment of a corporate representative and possibly of an alternate director.</p>