

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

**Summary of concerns  
(as at 2 October 2002)**

<u>Subject/Clause</u>	<u>Organization/individual</u>	<u>Concern/View</u>
Reducing threshold for shareholders' proposals	Mr David Webb (CB (1)2604/01-02)	Support the 2.5% threshold but have reservation on the detail of the 50-holder threshold as it may not be fair to shareholders of companies with low par value relative to market value or net assets per share. Consideration should be given to requiring requisitionists to make a specific deposit to defray costs, at a fixed amount per registered shareholder. The deposit will be refunded if the proposed resolution receives the support of more than 5% by value of shares voted in general meeting.
Removing directors by ordinary resolution	Mr David Webb  Chinese General Chamber of Commerce (CGCC) (CB(1) 2610/01-02(01))	Support the proposal. Not agree to paragraph 7(a) of the Legal Service Division Report (LS 50/01-02) which states that the proposal may affect the readiness of directors to make hard decisions which are unpalatable to investors. Emphasize that decisions which are "unpalatable" to a majority of shareholders are generally decision which are not in their best interest.  There may be circumstances where directors of a company have to appoint/remove directors by special resolution which conflicts with the proposed ordinary resolution. Which resolution should then prevail.
Providing a statutory definition of "Shadow Director"	CGCC	Should specify the extent to and the details of which the threshold for "shadow director" is lowered.

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Extending the statutory provisions to cover in generic terms provision of financial assistance to directors	CGCC	The proposal may affect the financial flexibility of some companies, particularly those small and medium enterprises which usually operate on a tight capital.
Permitting the formation of a company by one person	Hong Kong General Chamber of Commerce (HKGCC) (CB(1) 2592/01-02)	Need to address problems arising from the death of the sole shareholder and director.
Authorization of electronic forms of publicity	HKGCC	To consider amending the relevant provisions, including section 74A, to enable the Registrar to approve web-sites as an alternative to newspapers.
Clause 2  Definition of “manager”	Law Society of Hong Kong (LS) (CB(1) 2340/01-02(02))  Lingnan University (LU) (CB(1) 2610/01-02(02))	Need to amend the wording to clarify whether “under the immediate authority of the board” includes for example someone who reports directly to the managing director.  There may be circumstances that a person occupying a position under the immediate authority of the board of directors may not be called a “manager”.
Definition of “shadow director”	Securities and Future Commission (SFC) (CB(1) 2622/01-02(05))	Consideration should be given to expressly excluding bank representatives, who make recommendations for improvement of the way the companies should run their business, from the definition.

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Clause 5	LU	No need to provide for dissenting shareholders to apply to the court to cancel the alteration when the resolution has been passed by the majority. In appropriate circumstances, the dissenting shareholders may invoke section 168A.
Clause 9	LU	The amendment has not added anything new to the existing law since there are many cases which have already clarified the meaning of section 23(1).
Clause 10	LU	No need to provide for dissenting shareholders to apply to the court to cancel the alteration when the resolution has been passed by the majority. In appropriate circumstances, the dissenting shareholders may invoke section 168A.
Clauses 14 to 17 and 19 to 23	LS  HKGCC  Hong Kong Institute of Company Secretaries (HKICS) (CB(1) 2622/01-02(04))  SFC	Need to specifically address the consequences of making a false statement.  Disappointed that only minor amendments are proposed in relation to share repurchases. A more comprehensive review should be conducted with a view to simplifying the relevant provisions.  There is no provision dealing with the consequences of making a false statement.  The consequences of making a false statement are not set out in the Bill.

<u>Subject/Clause</u>	<u>Organization/individual</u>	<u>Concern/View</u>
Clause 25	LS	Suggest to amend sub-clauses (1) and (2) such that notification is still required within 15 days of passing the resolution and, where appropriate, again on the resolution lapsing or becoming unconditional since there may be circumstances where someone searching the public register will want to know the passing of a resolution to increase capital, even if the increase will or may take place at a later date.
Clause 26	Hong Kong Association of Banks (HKAB) (CB(1) 2547/01-02(01))	There should be an additional condition such that court confirmation of a reduction of share capital is not required if no cash is paid out of the company. Otherwise, a court confirmation is required to protect creditors.
Clause 32	LS  HKICS	Need to clarify the rationale for removing the requirement for the certificate to state the amount secured, which is a useful information, particularly to creditors.  Query why the requirement for the certificate of registration to state the amount secured should be removed.
Clause 33	LS  HKAB	Need to clarify the position of a creditor if the company wrongfully files a memorandum of satisfaction.  The amendment may give rise to the possibility of a release being entered based on a certificate of the company when in fact the property covered by the charge has not actually been released by the mortgagee or chargee. A certificate of the mortgagee or chargee should be required prior to release.

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Clause 38	LS  Mr David Webb  Stephenson Harwood & Lo (SH&L) (CB(1) 2622/01-02(01))	Question the need for new section 95A and the consequences in the event of non-compliance.  Fail to see the relevance of recording the number of shareholders.  The requirement under new section 95A may not be necessary as any transfer or repurchase should have been recorded in the register of members. One can check the number of members in a company by looking at the register.
Clause 42	HKAB          Mr David Webb	It is not possible to have a meeting of one person. Suggest to amend the clause to the effect that a written resolution or record of a decision be treated for all purposes of the Companies Ordinance and any Articles of Association as being equivalent to a resolution passed at a duly convened and quorate meeting.  Fail to see the need to provide for a quorum for a meeting of a company having only one member since meetings, by definition, require at least two participants. In this connection, a written resolution of that member will have the same effect as a meeting of shareholders.
Clause 44	HKAB   SH&L	Refer to comments in respect of Clause 42  A delay of 30 days in filing the written resolution is too long and will be subject to abuse. Suggest to require filing to be done as soon as possible. In line with new section 153C relating to proofs of decisions of single director, consideration should be given to providing that such filing will be sufficient proof of the actions taken by the relevant member.

<u>Subject/Clause</u>	<u>Organization/individual</u>	<u>Concern/View</u>
Clause 54	LU  SH&L  SFC	<p>Need to clarify the definition of “alternate director”. If the articles of a company provide for the appointment of an alternate director and the board of directors approves the appointment, there is no reason why an alternate director so appointed shall be deemed to be the agent of the director who appoints him, rendering the director concerned liable for any tort committed by the alternate director.</p> <p>Whether the ambit of section 153B should be restricted such that a director will not be liable for the acts of his alternates if he has taken reasonable care to appoint a competent person to act as the alternate and the alternate’s actions which give rise to the liability have been taken independently of the director appointing him.</p> <p>The proposed provision seems to defeat the policy objective of improving the standard of corporate governance by holding directors responsible for the acts and omissions of their alternates.</p>
Clause 55	HKAB	Refer to comments in respect of Clause 42
Clause 56	Mr David Webb	Fail to see the sole director of a company should be prohibited from acting as Secretary of the company. The proposed provision imposes an unnecessary burden on the sole owner and director of a very small business who must find a third party to act as Secretary, which will inevitably incur expenses.
Clause 57	LU	Instead of calling for a special notice, consideration should be given to specifying a longer notification period if the 14-day notice period is deemed insufficient.



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Clause 65	HKAB	Question why the requirement for a company which has only one shareholder and enters into a contract with that shareholder, who is also a director, to set out the contract concerned in a written memorandum which is kept with the company's books does not apply to contracts entered into in the ordinary course of business.
Clause 66	HKAB  LU	It is questionable whether it is correct that the company should be entitled to purchase directors' and officers' liability insurance for the benefit of auditors and covering costs of defending proceedings in respect of fraud.  Need to clarify the position where a company purchases insurance against any liability to the company on behalf of its officers.
Clause 76	LS  HKICS  SFC	Need to set out the consequences of making a false statement.  There is no provision dealing with the consequences of making a false statement.  The consequences of making a false statement are not set out in the Bill.
Clauses 79(1) to (5)	LS  HKICS  SFC	Need to set out the consequences of making a false statement.  There is no provision dealing with the consequences of making a false statement.  The consequences of making a false statement are not set out in the Bill.



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Clause 86	LS  HKICS  SFC	Need to set out the consequences of making a false statement.  There is no provision dealing with the consequences of making a false statement.  The consequences of making a false statement are not set out in the Bill.
Others	Baker & McKenzie (CB(1) 2622/01-02(02))  Consumer Council (CB(1) 2622/01-02(03))	Comments mainly on drafting aspect which shall be considered during the clause-by-clause examination of the Bill.  Consideration should be given to including in the Bill a provision to abolish private company corporate directors. This will assist in identifying the actual persons responsible for the actions of companies.