

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

**Follow-up actions arising from the discussion
at the meeting on 15 October 2002**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 15 October 2002.

Threshold for shareholders' proposals

2. Section 115A of the Companies Ordinance provides that on request by shareholders of not less than 5% of the voting rights or not less than 100 shareholders holding shares on which there has been paid up an average sum of not less than \$2,000 per person, the company must circulate the requisitionists' proposal to shareholders entitled to notice of general meetings. Whilst recognising that the existing regime is sound, the Standing Committee on Company Law Reform (SCCLR) considers that the threshold in respect of shareholders is high and recommends a reduction to 2.5% of the voting rights or 50 shareholders, which is consistent with its earlier recommendation to reduce the threshold for requisitioning meetings from 10% to 5% (such recommendation already implemented under the Companies (Amendment) Ordinance 2000).

3. In its deliberations, the SCCLR has had regard to the issue of costs incurred in circulating shareholders' proposals and noted that the requisitionists have to bear the costs, but as the materials are sent to the shareholders together with the company's annual reports, such costs are reduced. We do not have information on the costs in past cases, but attach a note at Annex A on possible costs to be incurred by a listed company in circulating a notice of resolution or statement before an annual general meeting.

Review of the Companies Ordinance

4. A note on the implementation of the recommendations from the review of the Companies Ordinance is attached at Annex B for Members' reference.

**Right to resort to court under
section 8 of the Ordinance**

5. After conducting research on the Hong Kong Law Reports and Digest (from 1905 up to now), Registrar of Companies cannot locate any case involving an application made to the court under section 8 of the Ordinance.

Financial Services Branch
Financial Services and the Treasury Bureau
October 2002

**Possible costs to be incurred by a listed company
in circulating a notice of resolution or statement
before an annual general meeting**

<u>Items</u> ¹	<u>Estimated cost</u> ²
Printing of notice and statement	HK\$5,000 per 1000 copies
Translation	HK\$700 per page
Postage within HK	HK\$2.50 – HK\$3 per copy

¹ The list of cost items is by no means exhaustive.

² The number of shareholders of a listed company varies. It can be less than 10 or more than 450,000.

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**Implementation of the Recommendations
arising from the Review of Companies Ordinance**

The 62 recommendations arising from the Review of the Companies Ordinance are grouped under four Phases. 40 of these recommendations relate to legislative amendments, while 22 recommendations state that certain subjects should be further studied or reviewed. The details of the 62 items are set out in the following table.

2. Of the 40 proposals relating to legislative changes –
 - ☒ 18 (items 1-17 under Phase I and item 17 under Phase IV) have already been included in the Companies (Amendment) Bill 2002;
 - ☒ 3 (items 2, 3 and 4 under Phase III) are intended to be included in the Companies (Amendment) Bill 2003;
 - ☒ 6 items require further study because they carry extensive legal implications (item 1 under Phase III); or that members of the public have indicated objection to the proposal (item 19 under Phase II); or have been subsumed under Phase II of SCCLR's Corporate Governance Review (CGR) (items 5 and 11 under Phase II); or require further analysis before drafting instructions could be prepared (items 14 and 17 under Phase II). The draft legislation would be prepared once the further studies have been completed.
 - ☒ 13 items involve restructuring of the Companies Ordinance (items 1 to 11, 16 and 18 under Phase IV). This restructuring seeks to improve the overall organization of the Ordinance as well as rewriting it in plain language. At this stage, we do not have a definite implementation timetable for these relatively less urgent

items.

3. Of the 22 items for further study or research –

- ☒ 8 have been subsumed under SCCLR's CGR Phase II (items 1 to 4, 6, 8 12 and 13 under Phase II). The Review is now at an advanced stage and we expect SCCLR to firm up its recommendations in the near future.
- ☒ The study on 4 items (items 9 and 10 under Phase II) has been completed. We intend to include 2 legislative changes in the Companies (Amendment) Bill 2003; SCCLR has decided not to proceed with 2 other items (items 16 and 18 under Phase II).
- ☒ The review on 6 items (items 7 and 15 in Phase II, 5-8 in Phase III) is in progress, and we hope to complete it in 2003. The review on 2 other items (items 14 and 15 in Phase IV) will commence at a later date.
- ☒ 2 other items (items 12 and 13 under Phase IV) will be taken forward in the context of the major restructuring of the Companies Ordinance.

Phase I

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
1	One member companies.	Included in the Companies (Amendment) Bill 2002
2	One director companies.	Ditto.
3	Incorporation of a company limited by guarantee with share capital be prohibited in the future.	Ditto.
4	Regulation 82 of Table A be amended along the lines of the U.K. Table A.	Ditto.
5	Removal of directors by ordinary resolution notwithstanding any provision in the company's constitution.	Ditto.
6	Subject to contrary provision in the articles, a director be vicariously liable for the acts and omissions of his alternate.	Ditto.
7	The statutory provisions be extended to cover in generic terms the provision of financial assistance to directors.	Ditto.
8	A statutory definition of shadow directors be provided.	Ditto.
9	A shadow director be defined to include someone who can influence less than the whole board of directors.	Ditto.
10	The definition of manager be clarified to indicate a rank immediately below and reporting to the board.	Ditto.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
11	The Ordinance should confirm that indemnities may be given to directors for liability incurred by them to others in the course of performing their duties and that the permissible scope of such indemnities should be studied further.	Ditto.
12	Companies be permitted to insure directors and officers except in certain specified circumstances.	Ditto.
13	The threshold for shareholders' proposals be reduced to 2½% of voting rights or 50 shareholders.	Ditto.
14	A strict time limit (10 business days) be stipulated for completion of transfers of shares of public companies.	Ditto.
15	Giving every shareholder a personal right to sue to enforce the terms of the Memorandum and Articles of Association.	Ditto.
16	The right to resort to the court under section 8 (Statutory procedure for amending the objects clauses of a company's memorandum) be repealed as regards public companies.	Ditto.
17	Court approval for reduction of capital should not be required for the redesignation of par-value to a lower amount provided that the company has only one class of shares; the issued shares are fully paid-up; the reduction is distributed equally to all shares; and the reduction is credited to the share premium account.	Ditto.

Phase II

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
1	Further study be made of the appropriate board structure for public companies as part of the programme to improve corporate governance.	The further study has been subsumed under Phase II of SCCLR's CGR.
2	The question of appointment of directors be reviewed .	Phase I of CGR, but SCCLR reviewing this in Phase II of CGR.
3	The question of a statutory statement of directors' duties and whether directors be able to rely in good faith on reports prepared by officers and professional advisers be kept under review in the light of international developments.	The non-statutory code to be circulated for comments in Phase II of SCCLR's CGR.
4	The question of self-dealing be further studied .	The further study has been subsumed under Phase II of SCCLR's CGR.
5	The dispersed notice provisions be consolidated into one general criterion: the notice must provide a full explanation (including conflict of interests) of a proposed transaction to enable shareholders to form a judgement.	Being considered in Phase II of CGR.
6	Provisions for a proxy system be further studied .	Ditto.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
7	The impact on the right of shareholders to vote when shares are registered in the name of Central Clearing and Settlements System (CCASS) be further studied after the completion of the market restructuring.	Being pursued.
8	The following principles be studied further : transactions in which controlling shareholders have an interest different from that of other shareholders is proposed to be subject to approval by shareholders, with the controlling shareholder abstaining from voting; adequate exceptions is proposed to be made available to accommodate immaterial transactions and bona fide transactions in the ordinary course of business on arm's-length terms; compliance with rules stipulated by securities regulators is proposed to be deemed to be compliance with the law; it is proposed that private companies may include exemptions in their articles.	Phase I of CGR, but SCCLR reviewing this in Phase II of CGR.
9	The issue of access to corporate records be further studied.	To be included in the Companies (Amendment) Bill 2003 which is intended to be introduced into the Legislative Council in May 2003.
10	A statutory right of derivative action to be considered.	Ditto.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
11	Section 155A be repealed and its contents moved to Table A with the following amendments: the requirement for approval should be triggered by dispositions of the same percentage of net assets of the company; the provision should apply to all companies, provided that transactions between parents and wholly-owned subsidiaries and between wholly-owned subsidiaries of the same holding company shall be exempt.	The further study has been subsumed under Phase II of SCCLR's CGR.
12	The question of class rights and variation be further studied .	Ditto.
13	The suitability of judicial control, multiplicity of provisions and class votes be further studied .	Ditto.
14	Section 141D of the Ordinance be amended to refer to a 'true and fair' view.	To be considered by the Government/HKSA Joint Working Group.
15	A study be undertaken as to whether, and if so to what extent, section 141D (regarding simplified accounts for private companies) should be modified and extended.	Ditto.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
16	Further study and consultation be conducted on exempting private companies from publication of financial statements.	Considered in Phase I of CGR. Will not proceed as majority of respondents did not favour private companies filing audited accounts with the Companies Registry.
17	The Tenth Schedule be updated, and the HKSA's offer of assistance in this respect be accepted.	Being taken forward by the Government/HKSA Joint Working Group. The Working Group is of the view that the Tenth Schedule should be repealed.
18	The concept of a register of directors interests be studied further .	SCCLR reviewed this in Phase I of CGR and agreed that this proposal should not be pursued.
19	Directors' minimum qualifications including requirement that all directors must be natural persons i.e. abolition of corporate directors.	Being reviewed.

Phase III

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
1	No-par value shares to be permitted for all companies on an optional basis.	An optional no-par value regime carries extensive legal implications. Further Study of the ramifications will soon commence.
2	Section 341 (Interpretation of Part XI – Companies incorporated outside Hong Kong) be redrafted.	To be included in Companies (Amendment) Bill 2003 (target date: May 2003).
3	The filing requirements for registration as a foreign company should be simplified.	Ditto.
4	The filing requirements applicable to foreign companies under the new Ordinance should be co-ordinated with those of the Business Registration Ordinance.	Ditto.
5	The offences and punishment provisions in the Ordinance be further studied .	The Companies Registry (CR) is undertaking a review with the aim of submitting proposals to the SCCLR in 2002/03.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
6	The investigation provisions in the Ordinance be further studied .	CR and Department of Justice have undertaken a review with the aim of formulating proposals for legislative changes.
7	The study of the issue of the status of shares as negotiable instruments be deferred until the completion of the securities and futures market reforms.	Being reviewed.
8	The issue of scripless securities to be studied after the completion of the securities and futures market reforms.	Ditto.

Phase IV

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
1	The new Ordinance should cover solvent liquidations and dissolutions but insolvent liquidations and dissolutions should be left to a comprehensive Insolvency Ordinance.	To be taken forward in the overall restructuring and rewriting of the Ordinance. No implementation time table at this stage.
2	The provisions in the Ordinance applicable to listed companies be applicable to Public Companies.	Ditto.
3	Removal of Prospectus provisions from the Ordinance.	Ditto.
4	Review of the “Charges” provisions under Part III with a view to introducing a separate, comprehensive regime governing security interests in personal property.	Ditto.
5	The Ordinance to be written in plain language so as to be accessible to users like business people, lawyers and accountants etc.	Ditto.
6	Public Companies to be defined to mean companies limited by shares that are not private companies.	Ditto.
7	Companies limited by guarantee be referred to as ‘Guarantee Companies’.	Ditto.
8	Memorandum and Articles of Association be retitled the constitution.	Ditto.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
9	The drafting of the provisions regarding financial assistance to directors be simplified.	Ditto.
10	A separate part of the Ordinance be dedicated to matters dealing with shareholders' rights and remedies.	Ditto.
11	Improve the overall organization of provisions regarding the fundamental changes of a company, such as changing the scope of the business or restructuring the share capital, to make the legislation more user-friendly.	Ditto.
12	Reform of section 47A (financial assistance by a company for acquisition of its own shares) be further studied .	Ditto.
13	Further study be made of restraints on issuance of shares for consideration in kind.	Ditto.
14	The application of section 79C (regarding restrictions on the distribution of a company's assets) to private companies should be further studied .	Will be reviewed by the Government/ HKSA Joint Working Group.
15	The issue of liability of controllers of companies for employees' wages be referred to the Administration for further consideration .	Will be reviewed.
16	The provisions of Parts VII and XIII regarding the administration of the Ordinance be consolidated and updated.	To be taken forward in the overall restructuring and rewriting of the Ordinance.

<u>Item</u>	<u>Subject</u>	<u>Latest Position</u>
17	Enabling provisions be inserted in Table A to permit electronic communications.	Included in the Companies (Amendment) Bill 2002.
18	Provisions be made for the concept of 'record dates' for the payment of dividends, issue of notices of meetings and voting purposes.	To be taken forward in the overall restructuring and rewriting of the Ordinance.