

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

**Follow-up actions arising from the discussion
at the meeting on 22 October 2002**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 22 October 2002.

Expenses incurred by a requisitioner

2. Under section 113 of the Companies Ordinance, the directors of a company, on the requisition of members holding not less than 5% of the voting rights or paid-up capital of the company, are required to proceed to convene an extraordinary general meeting within 21 days from the deposit of the requisition and the costs incurred in convening the meeting will fall on the company. If the directors fail to do so, the requisitionists may convene the meeting and the expenses¹ incurred, if reasonable, will be reimbursed by the company.

3. Under section 115A of the Ordinance, a company, on the requisition of members holding not less than 5% of the voting rights or of not less than 100 members holding shares on which there has been paid up an average sum of not less than \$2,000 per person, is required to circulate to members of the company notice of any resolution intended to be moved at the next annual general meeting (convened under section 111 of the Ordinance) and any statement regarding the matter referred to in the proposed resolution or the business to be dealt with at that meeting. The expenses² incurred for circulating the notice or statement will be borne by the requisitionists and those incurred for convening the meeting will fall on the company.

¹ The expenses vary from case to case but usually include items such as printing of notice, translation, postage, hire of venue etc.

² For more information about the expenses, please see Annex A to the paper on “Follow-up actions arising from the discussion at the meeting on 15 October 2002”.

Removal of a director by an ordinary resolution

4. Under the new section 157B(1), a director may be removed by an ordinary resolution. This section applies to a company³ incorporated under the Ordinance. In the case of a statutory body or a public company (being a company incorporated under the Ordinance), the removal of its directors is subject to the relevant statute, if any, and, in the absence of such statute, the new section 157B(1). For example, section 8 of the Mass Transit Railway Ordinance provides that the Chief Executive may appoint not more than 3 persons to be additional directors of the MTR Corporation Limited and such directors may not be removed from office except by the Chief Executive. Similarly, section 20(1) of the Exchange and Clearing Houses (Merger) Ordinance provides that the Financial Secretary may appoint certain number of persons to be directors of the Hong Kong Exchanges and Clearing Limited, the holding company of the Stock Exchange of Hong Kong Limited, and the power to remove such directors rests with the Financial Secretary. Hence, the new section 157B(1) does not apply to the removal of directors in both cases. As regards the Stock Exchange of Hong Kong Limited, there is no statute governing the removal of its directors and hence the removal will be subject to the new section 157B(1).

Shadow directors

(i) Scope

5. Under section 2(1) of the Ordinance, a “director” means any person occupying the position of director by whatever name called. A shadow director is defined under the new section 2(1) to mean a person in accordance with whose directions or instructions the directors or majority of directors of a company are accustomed to act. The new section 2(2) further provides that a person shall not be regarded as a shadow director of a company by reason only that the directors or majority of the directors of a company act on advice given by him in a professional capacity. Hence, we do not consider that a consultant or an adviser who gives advice to a company in a professional capacity should be regarded as a shadow director of the company.

³ Under section 2(1) of the Ordinance, the term “company” means a company formed and registered under the Ordinance or an existing company (which is a company formed and registered under the Companies Ordinance 1865 or the Companies Ordinance 1911).

6. When a company fails to repay its secured debts, a receiver or manager may be appointed by the secured creditor to manage the company's property (which is subject to a charge) with a view to realizing it for repayment of the debts. Such receiver or manager should not be regarded as a shadow director of the company as he gives instructions in his professional capacity. If the subject of a charge is a company's cash deposit, the withdrawal of which requires a secured creditor's consent, the creditor should not be regarded as a shadow director of the company as the consent does not amount to instructions or directions on the day-to-day management of the company.

(ii) Obligation and liability

7. A number of obligations are imposed on a shadow director of a company either by including the term "shadow director" or expanding the term "director" or "officer" to cover "shadow director" in the relevant provisions of the Ordinance, a list of which is at Annex for Members' reference. The liability of a shadow director of a listed public company (being one incorporated under the Ordinance) under the Ordinance is no different from that of a shadow director of a company other than a listed public company. For example, a shadow director of a company is held liable to a fine or penalty to which an officer of the company in default is liable under the Ordinance if the shadow director knowingly and wilfully authorizes or permits the default. As regards past court cases where negligence or fraud was involved, no record has been kept with reference to the offender's occupation or position in a company.

(iii) Index of directors under section 158

8. Under section 158(1) of the Ordinance, a company is required to keep a register of its directors (including shadow directors) and secretaries. Failure to comply with this requirement may be prosecuted under section 158(8) of the Ordinance and, if convicted, the company and its officers will be subject to a maximum penalty of \$10,000 and a maximum daily default fine of \$300.

(iv) New section 161B

9. Under the new section 161B(9), an auditor of a company is required to include in his report a statement giving the particulars of loans to the company's directors as far as he is reasonably able to do so if the requirements under the new section 161B are not complied with. This section is modelled on the existing section 161B(6) of the Ordinance. An auditor of a company is not expected to include the particulars of loans

to shadow directors in his report if he is not reasonably able to do so.

Prosecution statistics

10. While no statistics have been kept on the number of prosecution taken under the Crimes Ordinance for making a false declaration under the Companies Ordinance, the statistics kept by the Companies Registry (CR) show that no prosecution has been taken under section 349 of the Companies Ordinance in respect of making a false statement.

Section 349 of the Companies Ordinance

11. Under section 349 of the Ordinance, any person in any return, report, certificate, balance sheet or other document required by or for the purposes of any of the provisions of the Ordinance wilfully makes a statement false in any material particular, knowing it to be false, may be prosecuted and, if convicted, subject to a maximum penalty of \$100,000 and maximum imprisonment of 6 months. Since its enactment in 1984, there has been no change in the scope of this section nor has the Bill proposed any such change.

12. The purpose of section 349 is to provide a deterrent against making a false statement, thereby encouraging a culture of compliance with the filing requirements under the Ordinance. The offence in question is more in the nature of an offence of dishonesty rather than a regulatory offence. It is worth noting that separate offences relating to making a written statement are provided for in certain provisions of the Ordinance where the circumstances justify. For example, section 49K(6) of the Ordinance provides that a director, who makes a statutory declaration (to be replaced by a written statement) relating to the redemption of shares under section 49K of the Ordinance without having reasonable grounds for the opinion expressed in the declaration is subject to a maximum penalty of \$1,250,000 and maximum imprisonment of 2 years (on indictment) or a maximum penalty of \$50,000 and maximum imprisonment of 6 months (on summary prosecution). The punishment for the separate offences would remain intact in the Ordinance after replacing the filing requirements of a statutory declaration with a written statement as proposed in the Bill.

13. Having regard to the purpose of section 349 of the Ordinance and the separate offences in relation to making a statutory declaration (to be replaced by a written statement) in the Ordinance where the relevant circumstances justify, we consider that the existing level of punishment under this section (i.e. a maximum penalty of \$100,000 and maximum

imprisonment of 6 months) is adequate.

14. As regards the enforcement of section 349 as well as other provisions in the Ordinance, the CR, having regard to the availability of resources, will continue its existing approach of acting on complaints received from the public.

Financial Services Branch
Financial Services and the Treasury Bureau
November 2002

**A list of provisions in the Companies Ordinance
which applies to a shadow director**

<u>Provision</u>	<u>Subject</u>
Section 2	Definition of a shadow director
Section 49BA	Requirements for listed company to purchase its own shares
Section 109	General provisions as to annual returns
Section 158	Register of directors and secretaries
Section 168C	Interpretation for the purposes of Part IVA (Disqualification)
Section 168G	Disqualification for fraud etc., in winding up
Section 168H	Duty of court to disqualify unfit directors of insolvent companies
Section 168 I	Applications to court under section 168H
Section 168J	Disqualification after investigation of a company
Section 168K	Matters for determining unfitness of directors
Section 199	Powers of liquidators
Section 271	Offences by companies in liquidations
Section 341	Interpretation of Part XI (relating to the registration of oversea companies)

Section 344A

Dormant Companies

Section 351

Provision for punishment and offence

