

2527 3909
2528 3345
C2/1/55(02) Pt.13

21 October 2002

Miss Monna Lai
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Miss Lai,

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

I refer to your letter of 9 October 2002 on the above subject.

Our comments on your observations on the Companies (Amendment) Bill 2002 are as follows -

Clauses 14 to 17 and 19 to 23

To enable the Companies Registry to move towards full electronic filing, we have proposed these clauses in the Bill to replace the requirements of filing statutory declarations or affidavits with filing statements. Any person making a false statement will be subject to the offence provision in section 349 of the Companies Ordinance (i.e. a maximum penalty of a 6-month imprisonment and a fine of \$100,000). Our policy intent is that the offence provision in relation to making a false statement under these clauses should be the same as that relating to making a false statement under other provisions of the Ordinance.

Clause 33

As explained in our comments on the submission from the Hong Kong Association of Banks, we are reviewing the wording of this clause to see if our policy intent should be made more explicit.

Clause 38

- (a) The public can easily ascertain the number of members of a company upon inspection of the company's register of members.
- (b) When the number of members of a company falls to one or increases from one to two, a statement of this event should be entered into the company's register of members upon its occurrence.

Clause 58*New section 157H(1)(c)ii*

The phrase "such a director" in this section refers to a director of a company or of its holding company.

New section 157H(2) and (4)

The term "must" is used in many other provisions of the Ordinance to impose an obligation e.g. sections 5, 38, 113 and 291AA.

New section 157H (4)

We consider it sufficient to rely on the literal meaning of the term "benefit" so as to cover all possible scenarios. It is worth noting that this term is used in the UK Companies Act 1985 and a similar term is also used in other ordinances e.g. Drug Trafficking (Recovery of Proceeds) Ordinance, Post Office Ordinance.

*New section 157H (7)**(a) Definition of "credit transaction"*

This definition is drafted on the basis of the UK Companies Act 1985, which is couched in such terms to cover all possible scenarios where "financial assistance to directors" is involved. For example, leasing/selling goods/land to a director with (periodic) payments could involve "financial assistance to directors" if the payments are set at a level not available in the commercial markets. The provision of financial assistance to a director of a company in the form of a credit transaction as well

as a loan, a quasi loan under the new section 157 will be subject to the exceptions under the new section 157HA.

(b) Definition of “director”

We are reviewing the definition to see whether a body corporate which is a shadow director should be excluded as in the UK Companies Act 1985.

(c) Definition of “quasi loan”

(i) & (ii)

This definition is based on a similar definition in the UK Companies Act 1985. While the phrase “agree to pay” applies to sub-clause (a)(i) of the definition, the phrase “pay otherwise than an agreement” applies to sub-clause (a)(ii) of the same definition.

(iii)

We consider that the proposed use of the phrase “another party for another” in paragraph (b) of the definition of “quasi loan” is inconsistent with the use of the term “another” in paragraph (a) of the same definition.

New section 157HA

If the phrase “in the case of” is deleted, paragraph (b) will read “..... (other than a private company that is a member of a group of companies of which a company ~~in the case of~~ shares are listed on the Unified Exchange is a member).....”. We consider that the revised wording is not as clear as the original wording.

Clause 65

We are reviewing the definition to see whether a body corporate which is a shadow director should be excluded as in the UK Companies Act 1985.

Clause 66

The SCCLR has studied relevant laws in other common law jurisdictions e.g. Australia, the UK and recommended that section 165 of the Ordinance should state explicitly that provisions in a company’s articles or a contract granting exemptions or

indemnities by a company to its officers or auditors against liability for negligence, default, breach of duty or breach of trust to the company or a related company are void. However, a company may, inter alia, indemnify its officers or auditors in defending any proceedings in which judgement is given in their favour or in which they are acquitted. The term “liability” in subsection (2) refers to the costs and expenses incurred in defending an officer or auditor in criminal or civil proceedings in which judgement is given in his favour or in which he is acquitted or in connection with any application under section 358 of the Ordinance in which relief is granted to him by the court.

Yours sincerely,

(Esmond Lee)
for Secretary for Financial Services
and the Treasury

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(4) in C2/1/55(02) Pt.15

11 November 2002

Miss Monna Lai
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Hong Kong

Dear Monna,

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

I refer to your two letters of 1 November on the above subject.

Our comments on your observations on the Companies (Amendment) Bill 2002 are as follows -

Clause 38

- (a) The existing legislative provisions in the Companies Ordinance relating to the register of members do not prescribe the manner in which the members' particulars should be organized. We consider it useful to require a one-member company to enter into its register of members a statement in respect of its number of members falling to one or increasing from one to two or more so that the public can easily find out the occurrence of such event in the register.

- (b) Our policy intent is to require that when the number of members falls to one or increases from one to two or more, a one-member company should enter the statement in the company's register on the very day on which such event occurs. In this regard, it is worth noting that a shareholder of a company has to be registered before he can become a member of the company. The transfer of shares from one shareholder to the remaining shareholder of a company does not automatically result in the reduction of members from two to one unless the name of transferee is entered in the register of members. Hence, this clause only requires the statement to be entered at the time the transferee's name is entered in the register.

Clause 58

General observations on new sections 157H, 157HA, 157HI and 157J

Prohibited transactions

Permissible transactions

Criminal sanction

The SCCLR considers that the existing provisions of the Ordinance (i.e. sections 157H, 157I and 157J) are fundamentally sound but the term "loan" in relation to provision of financial assistance by a company to its directors is inadequate to cover modern forms of credit. Our policy intent is to widen the scope of the term "loan", on the basis of the relevant provisions in the UK Companies Act 1985, while preserving the existing regime on prohibition of financial assistance to directors of a company. Hence, the new sections 157H, 157HA, 157I and 157J need not follow the relevant provisions in the Act clause-by-clause.

Civil consequences of contravention

New section 157I(4)

- (a) "A director of a company that has entered into a contravening transaction" refers to a director who has entered into a transaction or arrangement in contravention of new section 157H(1), (2) or (4). There is no specific requirement in respect of whether such director is a party to the transaction or

has authorized or permitted the transaction. “Any other director under this subsection” refers to any director (other than the first-mentioned director in the new section 157I(4)) who is liable under this section. This caters for the scenario in which a company has more than one director and two or more of them are liable under this section. It is worth noting that this section is based on the existing section 157I(4) of the Ordinance.

New section 157I(5)

- (b) In view of the wording in this section, the title or interest in the goods or land which are/is the subject of credit transaction (and such transaction is in contravention of the new section 157H(1), (2) or (4)) will not be affected. It is worth noting that this section is based on the existing section 157I(5) of the Ordinance.
- (c) Notwithstanding the new section 157I(5), the guarantee or security in contravention of the new sections 157H(1), (2) or (4) will be unenforceable against the company subject to the new section 157I(3).

New section 157I(3)(b)

- (d) This section is not subject to the condition that the person in favour of whom the guarantee or security is provided for did not know the relevant circumstances at the time when the guarantee was entered into or the security provided. It is worth noting that this section is based on the existing section 157I(3)(b) of the Ordinance.

New section 157H(7)

- (e) It is our policy intent that the conditional sales agreement does not cover the usual agreement for sale and purchase of property currently used in Hong Kong. As explained in our comments on the submission from the Hong Kong Association of Banks, we are considering whether the term “conditional sales agreement” should be defined in the Bill for the sake of clarity.

New section 157HA(7)

- (f) It is a reinstatement of the threshold in respect of financial assistance to directors of a company in section 157H(8) of the Ordinance.

New section 157H(4)(b)

We consider that the scope of this section is no different from that under the relevant provision in the UK Companies Act 1985. The terms “that other person”, “in pursuance of the arrangement” and “any benefit” have been covered by the terms “the other person”, “by or under which” and “a benefit”.

New section 157H(1)(c)ii

The phrase “such a director” in this section refers to a director of a company or of its holding company. The same wording is also used in the section 157H(2)(b) of the Ordinance.

New section 157H(2) and (4)

In the light of your advice, we are reviewing whether the term “must” should be replaced by “shall”.

New section 165

Our policy intent is that this section should state explicitly that provisions in a company’s articles or a contract granting exemptions or indemnities by a company to its officers or auditors against liability for negligence, default, breach of duty or breach of trust to the company or a related company (but not others) are void. Exemptions or indemnities against other types of liability will be subject to the common law.

Yours sincerely,

(Esmond Lee)
for Secretary for Financial Services
and the Treasury