

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

**Follow-up actions arising from the discussion
at the meetings on 11 and 18 November 2002**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meetings on 11 and 18 November 2002.

(A) Meeting on 11 November 2002

(a) Review of the scope of “Manager”

2. During the review of the Companies Ordinance, the Standing Committee on Company Law Reform (SCCLR) considered that the term “manager” in the Ordinance did not carry any substantive meaning, which could mean any rank of executives. It recommended that the term should mean a rank of executives immediately below and reporting to the board. Hence, we propose to add a definition of “manager” in the new section 2(1) to implement this recommendation. In the light of Members’ concerns about the scope of the definition, we are considering the wording of the definition as to how it could better implement the recommendation.

(b) Review the need for new section 83(2)

3. Section 80(1) of the Ordinance provides that unless a charge on a company’s property is registered with the Companies Registry (CR) within 5 weeks after it is created, it shall be void against the liquidator and any creditor of the company. Section 83(1) further provides that the Registrar of Companies (R of C) shall keep a register of charges with respect to each company, which shall include, among other things, the amounts secured by the charges. When a charge is registered with the CR, R of C shall give a certificate under section 83(2) of the Ordinance. The certificate is conclusive evidence that the requirements as to the registration of charge have been complied with. In effect, the certificate serves to protect the security interest of the chargee in the charge from the invalidation effect of section 80(1) of the Ordinance. Hence, we consider

it necessary to retain the new section 83(2).

(c) Re-examine the justifications for new section 95A

4. The new section 95A is based on a similar provision in the UK Companies Act, which requires 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. In the light of Members' concerns, we are considering whether this new section is required. On the suggestion that companies should be required to file with R of C the concerned statement when there is a transfer of shares, we wish to point out that the register of members kept by a company is required under section 98 of the Ordinance to be made available for public inspection upon payment of a fee, presently \$1 or less as the company may prescribe. There does not appear to be a strong reason for R of C to keep the concerned statement for the purpose of making it available for public inspection.

(d) Review the drafting of new section 153(A)(3)

5. We do not envisage that it would be difficult for a company or its officers to put the number of directors back from zero to one within two months' time under the new section 153(A)(3) given that the appointment of a company's director can be made by a resolution passed at a general meeting or a resolution in writing signed by members of the company. A similar requirement of maintaining the number of directors at not less than two is found in section 153 of the Ordinance. In case of the death of a company's sole member who is also the sole director, there are means to deal with issues relevant to the company pending the grant of probate (see paragraph 7 below).

(e) Death of the sole member and director

6. In the case of the death of the sole member of a company who is also the sole director, the company, having a separate legal status, will continue to exist. The staff of the company may continue to discharge their duties to the company by doing such acts and things which they have been authorized to do.

7. On the suggestion that a separate mechanism should be provided for in the Ordinance to deal with issues arising from the death of a company's sole member (who is also the sole director) pending the grant of a probate¹, we consider it not desirable to do so as this would affect the established framework in respect of the administration of probate and might prejudice the interests of concerned parties in the deceased's property. There are already means to deal with the issues in question. For example, a person can be appointed² in advance by the company, who, upon the death of the sole member and director, would be empowered to carry out functions of a director for such period and subject to such terms as may be stated in the appointment. This alternative has its own merits in that the scope of the power vested in that person could vary, depending on the wishes of the sole member and director and the relevant circumstances of the company. Alternatively, a provision can be added into the company's articles to provide that in the event of the death of the sole member and director of the company, an outsider e.g. the surviving spouse shall be entitled to appoint a person to act as the director of the company for such period and on such terms as the articles may provide or as the outsider considers appropriate. It is worth noting that other common law jurisdictions like the UK and Australia do not provide for a separate mechanism in their company legislation. In the light of Members' concerns, the CR would raise the issues arising from the death of a company's sole member (who is also the sole director) pending the grant of a probate with its Customer Liaison Group.

(B) Meeting on 18 November 2002

Shadow Directors

(a) "Directors"

8. 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. Reading the terms "directors" and "majority of directors" together, we consider that it is clear that the term "directors" refers to "a board of directors". It is worth noting that the SCCLR took the same view³ in its

¹ It normally takes about 6 months' time to obtain a probate from the court.

² Such appointment does not affect the transmission of shares of the sole member.

³ See paragraphs 6.114 and 6.115 of the Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance.

review of the Companies Ordinance.

(b) “Accustomed to Act”

9. The expression “accustomed to act” was considered in *Re Unisoft Group Ltd (No. 3) [1994] 1 BCLC 609*. In that case, Judge Harman stated that the expression refers to acts not on one individual occasion but over a period of time and as a regular course of conduct.

(c) Governance

10. A table comparing the governance of shadow directors in Hong Kong with that in the UK, Australia, Singapore and Malaysia is at the Annex.

Financial Services Branch
Financial Services and the Treasury Bureau
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**Governance of Shadow Directions -
Comparing Hong Kong with United Kingdom,
Australia, Malaysia and Singapore**

1. Definition	
Hong Kong	In relation to a company, “shadow director” means a person in accordance with whose directions or instructions the directors of a company are accustomed to act. However, a person is not deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity.
United Kingdom	Ditto.
Australia	Unless the contrary intention is shown, a person who is not validly appointed as a director is a shadow director if the directors of the company or body are accustomed to act in accordance with the person’s instructions or wishes. The definition will not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person’s professional capacity, or the person’s business relationship with the directors or the company or body.
Malaysia	The definition of “director” includes a shadow director as defined in Hong Kong.
Singapore	Ditto.

2. Liabilities or Prohibitions	
Hong Kong	<p>The relevant provisions of the Companies Ordinance are -</p> <ul style="list-style-type: none">• A shadow director shall not be the investment adviser for the purposes of section 49BA.• A shadow director shall be liable for defaults in relation to the requirements of completing and filing annual returns. (section 109)• A shadow director shall be liable for defaults in relation to the requirements of keeping a register of directors and secretaries etc. (section 158)• A shadow director shall be liable for certain offences in relation to his conduct (e.g. conceal any debt due from the company) if the company of which he is a shadow director is wound up. (section 271)• A shadow director shall be liable for any defaults he authorizes or permits in relation to Part XI of the Ordinance by an oversea company. (section 341)• A shadow director shall be liable for any debt or liability of the company arising from a relevant transaction when a company is deemed to be dormant. (section 344A)• A shadow director shall be liable for the default, refusal or contravention (which he knowingly or wilfully authorizes or permits) in any provision of the Ordinance. (section 351(2))• A shadow director can be disqualified as a director under certain circumstances. (Part IVA of the Ordinance)

United Kingdom	<p>The relevant provisions of the Companies act 1985 are – those relating to the register of directors and secretaries and the inclusion of directors’ names in business letters (sections 288(6) and 305(7), substituted by Companies Act 1989, section 145 and Schedule 19, paragraph 4); the duty of directors to have regard to the interests of employees as well as members (section 309(3)); the disclosure of directors’ interests in contracts and transactions with the company (section 317(8)); publicity in respect of directors’ service contracts (section 318(6)); the need for the duration of directors’ contracts of employment and the terms of contracts for the acquisition of substantial amounts of assets by or from them to be approved by a general meeting (sections 319(7) and 320(3)); the prohibition on directors buying options to purchase or sell shares, debentures or other loan securities issued by the company or companies in the same group (section 323(4)); the duty of directors to report the acquisition or disposal of interests in shares, debentures or loan securities of the company or of other companies in the same group and the entry of such interests and disposals of them in a register of directors’ holdings (sections 324(6) and 325(6)); the restrictions imposed on loans and quasi-loans and credit transactions for the benefit of directors and persons connected with them and the reporting of such transactions in the company’s annual accounts (section 330(5)); and those relating to the annual return of the company (section 365(3), substituted by Companies Act 1989, section 139). Relevant provisions of the Insolvency Act 1986 are – those relating to criminal offences committed before a company goes into liquidation (section 206(6)) or during the liquidation (sections 208(3), 210(3) and 211(3)); wrongful trading by a company which goes into liquidation (section 214(7)); and persons connected with a company subject to insolvency proceedings (section 249). The relevant provisions of the Company Directors Disqualification Act 1986 are – disqualification for fraudulent trading (section 4(2)) and the disqualification of unfit directors of insolvent companies (section 6(3)).</p>
Australia	<p>All liabilities and prohibitions in the Australian Corporations Law which apply to directors apply equally to shadow directors except the filing of notice of a change of address under section 205B Corporations Act 2001.</p>
Singapore	<p>All liabilities and prohibitions in the Singapore Companies Act which apply to directors apply equally to shadow directors.</p>

Malaysia	Ditto.
<u>3. Filing Requirements of Particulars of Shadow Directors</u>	
Hong Kong	Particulars of shadow directors are required to be filed with the Registrar of Companies as directors. A company's register of directors is open to inspection by the public.
United Kingdom	Ditto.
Australia	Particulars of shadow directors are required to be filed with the Australian Securities and Investments Commission (ASIC) as directors but companies are not required to keep a register of directors. Any member of the public can access to information in relation to directors kept by the ASIC.
Singapore	Particulars of shadow directors are to be filed with the Registrar of Companies as directors. A company's register of directors is open to inspection by the public.
Malaysia	Ditto.
<u>4. Disclosure Requirements of Loans to Shadow Directors</u>	
Hong Kong	At present, particulars about loans to shadow directors are not required to be disclosed in the accounts of public or private companies. The Bill proposes that particulars about loans, quasi loans etc to shadow directors should be disclosed in the accounts of public and private companies
United Kingdom	Particulars about loans, quasi loans and other transactions to shadow directors are required to be disclosed in the accounts of public and private companies.
Australia	Particulars about financial benefits e.g. loans to shadow directors of public companies are required to be disclosed in the accounts of public and proprietary companies.

Singapore	Particulars about loans to shadow directors are required to be disclosed in the accounts of public and private companies.
Malaysia	Ditto.
5. Enforcement Approach	
Hong Kong	Act on complaints received from the public.
United Kingdom	Ditto.
Australia	Awaiting response from the relevant authority.
Malaysia	Ditto.
Singapore	Ditto.