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(English version only)

From: "David M Webb"
To: <panel_itb@legco.gov.hk>

Date: Wednesday, June 04, 2008 09:32PM
Subject: Submission to Panel on Information Technology and Broadcasting
History:  This message has been forwarded.

Dear Sir/Madam,

I attach an article regarding the recent ruling by the Broadcasting Authority regarding the cross-media ownership restrictions in Schedule 1 of the Broadcasting Ordinance. The ruling exposes a huge loophole in the law.

Please treat this as a submission to the Panel with a request that they review whether the law needs amending as proposed in my article.

This submission is digitally signed and may be published.

Yours faithfully,

David M. Webb
Editor, Webb-site.com
<http://webb-site.com>

Attachments:

Official_ Richard Li doesn't control PCCW.pdf

The Government-appointed Broadcasting Authority says that Richard Li doesn't control PCCW - who knew? This exposes a huge loophole in the law on cross-media ownership, which can be avoided simply by passing your shareholdings into a trust. We call on the Government to either scrap the law, which is outdated in the internet age, or close the loophole by amending it.

Official: Richard Li doesn't control PCCW 2nd June 2008

"I have no intention to reduce my stake in PCCW"
- Richard Li, quoted in SCMP, 30-May-08

What do you mean, *"my stake"*, Richard? The reason we ask is that the Government-appointed [Broadcasting Authority \(BA\)](#) last month [announced](#) the outcome of a review of whether Richard Li Tzar-kai (**Mr Li**), Chairman of PCCW Ltd (**PCCW**, 0008) had infringed the cross-media ownership provisions of Part 2 of Schedule 1 of the [Broadcasting Ordinance](#) by simultaneously holding stakes in both PCCW, which owns [PCCW Media Ltd \(PCCWM\)](#), a pay-TV business, and [Hong Kong Economic Journal Co. \(HKEJ\)](#), publisher of a Chinese newspaper (which still has no online version).

Mr Li is the settlor (the founder) of certain trusts which own 100% of Pacific Century Group Holdings Ltd (**PCGH**), which in turn owns about 75% of Pacific Century Regional Developments Ltd (**PCRD**), listed in Singapore, which in turn holds about 23% of PCCW. PCCWM is an indirect wholly-owned subsidiary of PCCW. So in theory, Mr Li does not own any shares in PCGH and hence none in PCCW. Yet he obviously still thinks of it as *"my stake in PCCW"*.

The BA concluded that Mr Li has not infringed the cross-media restrictions, because he was not a "voting controller", either *de jure* (in law) or *de facto* (in practice), of 15% or more of the voting shares in PCCW Media Ltd (**PCCWM**). Therefore it was not necessary to decide what his status was in relation to HKEJ, since no common ownership occurred.

The BA said that the trustees of the trusts (whoever they are) are *"discretionary professional trustees who have no legal obligation to consult any third party when exercising the rights to vote"* shares of PCGH. That comes as no surprise. Most of the tycoons in Hong Kong have established trust structures which hold the controlling stake in their companies, and in every case the trustees would swear to be independent. But having *"no legal obligation to consult"* the founder is not the same thing as being prohibited from doing so.

The main purposes of such trusts was to avoid estate duty and perhaps to avoid any future legal claims such as divorce, litigation or bankruptcy. Estate duty (Hong Kong's death tax) has now been abolished, partly because all the tycoons would have avoided it anyway through trust structures, so it would only hit the lazy rich or the middle classes who had not established trusts.

For trusts to hold up in court, the trustees must be independent. But the commercial reality is that they will nearly always follow the wishes of the "settlor", the person who

transferred his assets into the trust in the first place. Such wishes include the purchase or sale of assets, the distribution of income or capital, or the voting of shares. If trustees did not follow such wishes then they would rapidly find themselves out of a job. Why do you think it is, year after year, that the trustees always vote the shares of such companies in favour of all the resolutions proposed by the board, which is typically chaired by the tycoon who founded the trust?

Precedent in other regulations and laws

The Listing Rules and the Takeover Code both recognised long ago that trusts are under the effective control of their settlors. The definition of "associates" of an individual under [Listing Rule 1.01](#) (yes, the first rule in the book) includes:

"(iii) the trustees, acting in their capacity as such trustees, of any trust of which he or any of his family interests is a beneficiary or, in the case of a discretionary trust, is (to his knowledge) a discretionary object..."

The [Takeover Code](#) deems that "related trusts" of a director are presumed to be acting in concert with him:

"(2) a company with any directors (together with their close relatives, related trusts and companies controlled by any of the directors, their close relatives or related trusts)..."

and last but not least, interests in shares held by a trust are deemed to be interests of the settlor for the purpose of the disclosure requirements under the [Securities and Futures Ordinance](#):

"322 (4) Where property is held on trust and an interest, or short position, in shares is comprised in that property-

- (a) a beneficiary of the trust...is taken to have such an interest or short position...;
- and
- (b) in the case of a discretionary trust, the founder of the trust is taken to have an interest or short position..."

What the Government should do

The BA's interpretation of the Broadcasting Ordinance, assuming it is legally correct, has exposed a huge loophole in the law. By the BA's argument, no tycoon who has settled his assets into a trust controls the company you thought he controlled. It flies in the face of the *de facto* understanding of who controls these companies. It would, for example, allow Mr Li's father Li Ka-shing to say that, because he does not control Cheung Kong (Holdings) Ltd (a trust does), he is not a voting controller of [Metro Broadcast Corporation Ltd](#), a radio station owned 50:50 by Cheung Kong and Hutchison Whampoa Ltd (which itself is 49% owned by Cheung Kong).

In this day and age, with the wide availability of information on the internet, including international newspapers and streaming TV and radio, it is debatable whether we should

continue with cross-media ownership restrictions between broadcasters and newspapers. Many societies have rolled back such laws, and instead focus on general competition issues under the umbrella of a competition law, such as whether a merger or common control would be likely to damage competition. *Webb-site.com* favours this approach.

But if we are going to continue with this law, then the loophole should be removed by amending the law to include founders or beneficiaries of trusts as being deemed voting controllers of any shares held by that trust. Furthermore, any ambiguity over intermediate companies should be removed. From the bottom-up, if a licensee is a subsidiary of another company, then the 15% test should also apply to the parent company. From the top-down, the law should take the same approach as the SFO does - namely that if you hold one third or more of a company, then you are deemed to control any shares it owns, and so on down the chain, until you get to the stake in the licensee company or its parent, where the 15% test applies.

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