

Bills Committee on Companies Bill

Follow-up actions for the meeting held on 11 November 2011 relating to Part 7

Purpose

This paper sets out the Administration's response to the issues raised by Members at the Bills Committee meeting on 11 November 2011 relating to Part 7 ("Debentures") (clauses 303 to 330 and sections 51 to 62 of Schedule 10) of the Companies Bill (CB).

Administration's response

Clause 304 – Register of debenture holders

2. Members were concerned that there may be privacy issues in allowing the register of debenture holders to be open for public inspection and that debenture holders may not wish to have their particulars disclosed. The company may therefore have difficulty in entering such particulars in the register of debenture holders as required by the law.

3. The requirements to enter a debenture holder's name and address and keep a register of debenture holders for public inspection are existing law under the CO¹ which help to protect the interest of debenture holders as a whole. In the absence of an up-to-date record of the names and addresses of the holders of debentures forming part of a series, it would be difficult if not impossible for them to organise action in defence of their common interests where they may be required to contact each other.

4. It is also beneficial for an individual debenture holder to provide his correspondence address to the company so that the company can contact him when necessary, for example, where a liquidator is to be, or has been appointed.

¹ Section 74A(1)(a) of the CO for entering the debenture holder's name and address; and section 75 of the CO for inspection by the public. Similar requirements also apply to register of members under the CO (section 95(1)(a) of the CO for entering a member's name and address; and section 98 of the CO for inspection by the public).

5. In fulfilling the requirement to provide “name and address”, the debenture holder is not required to provide a residential address, and may provide a correspondence address at which he can be contacted by the company or the other debenture holders. We do not consider there to be any privacy issues in allowing the register to be open for inspection. Similar requirements to enter the name and address of a debenture holder in the register of debenture holders for public inspection can also be found in Australia².

Clause 306 – Right to inspect and request copy

6. Members enquired whether or not there was a right for the Court to order immediate inspection in the event of non-compliance with a request for inspection under clause 306(1), similar to the rights provided in respect of obtaining copies of certain documents under sub-clauses (2), (3), (4) and (7)³.

7. Sections 75(4) and 75(5) of the CO provide that if inspection is refused, or a copy is refused, the Court may by order compel an immediate inspection of the register or direct that the copies required be sent to the person requiring them.

8. We do not propose to change the current law. The power of the Court to order an inspection will be re-enacted in the regulations governing companies’ records and fees to be made under clause 648 of the CB. The regulations relating to inspection to be made under clause 648 will detail, for example, the notice period required for inspection, and the times when the register will be open, etc. It is considered more appropriate for these detailed provisions relating to the request for inspection to be contained in regulations. The regulations will also cover inspection of other registers and company records.

² Sections 171(1)(a) and 173(1) of the Australia Corporations Act.

³ Sub-clauses (2), (3), (4) and (7), when read together, provide that a person may apply to the Court for an order to compel a company to provide to him a copy of certain document, e.g. the register of debenture holders. Sub-clauses (2), (3), (4) and (7) apply to the situation where a person is requesting a copy of documents from the company, but not inspection of the documents.

9. Members expressed concern on the meaning of the word “abused” in sub-clause (8)⁴ and asked whether or not this sub-clause was necessary given that sub-clause (7)⁵ has already provided the Court with a wide discretion to make an order. We agree with the observation and will introduce a Committee Stage Amendment (CSA) to remove sub-clause (8).

Clause 310 – Keeping of branch register

10. Clause 310(6) creates an offence if a company contravenes sub-clause (3)⁶. Members were concerned that sub-clause (3) does not set out a clear timeframe for compliance and is therefore uncertain.

11. We note the concern. The intention is to ensure that any entry made in the branch register must be included in the duplicate register kept at the registered office, so that the duplicate register has an updated database. We will introduce a CSA to provide a timeframe for compliance, which we propose to be two weeks after the entry is made in the branch register.

Clause 318 – Registration of transfer or refusal of registration

12. Members noted that if a company refuses to register a transfer of shares, the transferee or transferor has a statutory right to request the company to provide reasons for refusal (clause 146(3)). Members considered that the transferee or transferor of debentures should also have such a right.

13. Generally speaking, the entitlement to the rights attached to a share is conditioned upon registration as a shareholder of the company in the register of members. Under the CO, although the right of the

⁴ Sub-clause (8) of clause 306 stipulates that the Court “must not make an order under subsection (7) if it is satisfied that the rights given by subsection (2) or (3) (as the case may be) are being abused”.

⁵ Sub-clause (7) of clause 306 stipulates that if “a company contravenes subsection (4), the Court may by order direct that the copy be provided to the person requesting it”.

⁶ Sub-clause (3) of clause 310 requires a company that keeps a branch register to (a) “transmit to its registered office a copy of every entry made in the branch register as soon as possible after it is made” and (b) “cause to be kept at the place where the company’s principal register is kept a duplicate of the branch register entered up from time to time.”

transferee to apply to the court to have a transfer of shares registered is provided under section 69(1B), the burden of proving that directors have wrongfully disapproved a transfer would be difficult as directors are not required to provide grounds for their refusal. Hence, there is a new requirement under clause 146(3) to require a company to give reason upon request to address this problem.

14. Unlike “shares”, in the case of debentures, ownership generally does not depend upon registration and so the debt constituted or evidenced by the debenture is transferred in a manner similar to other choses in action. For a legal transfer, this will be governed by section 9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23), subject to any restrictions in the terms of the trust deed or agreement⁷.

15. In the light of the different legal effects between registration of shares and registration of debentures, it would be a disproportionate burden to require companies to give reasons upon request for refusal to register transfer of debentures.

16. In view of the above, and given that no apparent difficulty has been encountered regarding the registration of transfer of debentures under the current CO, there is no compelling reason to introduce a new requirement for the company to give reasons for a refusal to register a transfer of debentures upon request.

Clause 328 – Court may order meeting of debenture holders

17. Clause 328 provides that debenture holders may apply to the Court to convene a meeting to give directions to the trustee. This right may be excluded or varied by the terms of the debenture or trust deed. Members enquired whether this exclusion was based upon any overseas legislation.

⁷ In summary, section 9 of Cap 23 provides that any absolute assignment of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law to pass and transfer the legal right to such debt or chose in action from the date of such notice.

18. Clause 328 replaces and improves section 75A of the CO⁸ to provide that the Court may order a meeting of debenture holders. The clause provides for the right for debenture holders holding at least 10% of the value of the debentures in total to apply to the Court to order a meeting for giving directions to the trustee. This is subject to any provisions in the debentures, or the trust deeds or other documents securing the issue of the debentures that exclude such right or require a higher percentage of debenture-holdings. This clause applies to debentures forming part of a series issued by the company and ranking *pari passu* (i.e. of the same rank) with other debentures of that series, and debenture stock.

19. Clause 328 is based partly on provisions in the Australia Corporations Act (ACA). The Australian provisions provide that holders of 10% or more of the nominal value of the issued debentures may require, the trustee may call or the Court may order a meeting of the debenture holders⁹. In the UK, meetings of debenture holders are governed by the terms of the covering trust deed and there is no statutory right to apply to court for a meeting to be held. Singapore has no general provisions on meetings.

20. We believe that this proposal strikes a reasonable balance between, on one hand, the right of the company to contract freely with the debenture holders on the terms upon which the debentures forming part of a series are issued; and on the other hand, enhancing protection for debenture holders.

⁸ Section 75A of the CO provides that where the debentures or the trust deed or other document securing the debentures or stock provide for the holding of meetings of holders of debentures or stock, then subject to such provisions, such meetings shall be convened subject to the relevant provisions in the CO (sections 113, 114B, 114C, 114D(2) and 114E of the CO). In practice, however, section 75A is unlikely to be invoked, because if the debenture documents do not provide for meetings, the CO provisions would be of no assistance. Where the debenture documents do so provide, these documents (if professionally prepared) are likely to have their own provisions which will negate the application of the CO provisions.

⁹ Sections 283EA, 283EB and 283EC of the ACA. Requisition by debenture holders may be made to consider financial statements laid before last Annual General Meeting, or to give trustee directions in exercising powers. Trustee may call meeting in the event borrower or guarantor fails to remedy any breach when required by trustee. Court may order meeting to give directions to trustee. Please see paragraph 18 of Annex B to the LegCo Paper CB(1)2175/10-11(01).

Clause 330 – Immunity of trustees for debenture holders

21. Members queried why the trustee should not be liable for negligent acts or omissions if he acts in accordance with the directions given in a meeting of debenture holders.

22. Clause 330 is a new provision based on a similar provision in the ACA (section 283DC). Clause 330 complements clause 328, which is also a new provision. Clause 328 provides a right for debenture holders in some circumstances to apply to the Court to order a meeting for giving directions to the trustee. Clause 330 clarifies that the trustee is not liable for anything done by it in accordance with a direction given by a meeting of debenture holders held under clause 328.

23. Having considered Members' views, we agree that trustees acting in accordance with directions given by debenture holders in meetings called under clause 328 should be treated in the same manner as those in meetings called in accordance with the provisions of the trust deed or debenture. Accordingly, we will introduce CSA to delete clause 330.

**Financial Services and the Treasury Bureau
Companies Registry
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