

## Bills Committee on Companies Bill

### Comparison Table for Part 5 – Transactions in relation to Share Capital

#### PURPOSE

To facilitate clause-by-clause examination of Part 5 (Transactions in relation to Share Capital) of the Companies Bill (CB), this paper provides a comparison table, at Annex, on the provisions in Part 5 and the relevant provisions in the Companies Ordinance (Cap 32) or the company laws of comparable jurisdictions, where applicable. Transitional and saving arrangements for Part 5 are set out in sections 43 to 48 of Schedule 10 to the CB.

#### PART 5 OF THE CB

2. The major proposals and policy issues concerning Part 5 are set out in Annex B to LegCo Paper CB(1)2066/10-11(01), which was considered by Members at the meetings on 19 May and 3 June 2011. Our responses to issues raised by Members relating to Part 5 at the meeting on 19 May and other meetings are as follows:-

Meeting Date	Issued raised by Members	Administration's response (LegCo Paper No.)
19 May	(a) Reasons for not including a balance sheet test in the uniform solvency test under Part 5; (b) Reasons for requiring a 12-month period of solvency for the uniform solvency test; and (c) Reasons for not requiring a solvency statement to be	CB(1)2439/10-11(04)

<b>Meeting Date</b>	<b>Issued raised by Members</b>	<b>Administration's response (LegCo Paper No.)</b>
	accompanied by an auditor's report under the uniform solvency test for the types of transactions under Part 5.	
17 June	Reasons why an auditor's report is required for buy-backs out of capital but not reduction of capital by a private company under the court-free procedures in the United Kingdom (UK).	CB(1)2636/10-11(02)
8 July	The difference between the buy-back out of capital provisions in the CB and the UK Companies Act 2006 regarding the treatment of "revaluation reserve".	CB(1)2756/10-11(02)

### **ADVICE SOUGHT**

3. Members are invited to note the contents of this paper and provide their views.

**Financial Services and the Treasury Bureau  
Companies Registry  
11 October 2011**

**Comparison Table for Part 5**

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (CO) of the clause concerned in the Companies Bill (CB), where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wording may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows:-

CO: Companies Ordinance (Cap 32)

NZCA: New Zealand Companies Act 1993

SCA: Singapore Companies Act

UKCA 2006: United Kingdom Companies Act 2006

UKC(RSC) Order 2008: United Kingdom Companies (Reduction of Share Capital) Order 2008

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
<b>Division 1: Preliminary</b>				
198	Interpretation	CO ss.2(1), 49E(1), 49S(1) and 71A(3)(a)	Sets out the meaning of a number of terms and expressions used in the CO provisions relating to buy-backs.	Existing law.
<b>Division 2: Solvency Test</b>				

Clause	Contents	Derivation	Position in CO	Position in CB
199	Application of Division		<p>(i) Under Part II of the CO, a solvency test is provided for in respect of:-</p> <p>(a) buy-backs of its own shares out of capital by a private company; and</p> <p>(b) financial assistance by an unlisted company for the purpose of an acquisition of shares in the company or its holding company.</p> <p>(ii) Both solvency tests are based on cash flow alone, but there are minor differences between them.</p>	New provision to apply a uniform solvency test to a reduction of capital, share redemption or buy-back out of capital and the giving of financial assistance (referred hereunder as “the three types of transactions”).
200	Solvency test	CO s.47F(1)(d)	<p>The directors making the solvency statement must have formed the opinion, as regards the company's initial situation immediately following the date of the proposed financial assistance, that there will be no ground for it to be found to be unable to pay its debts; and that:-</p> <p>(i) if it is intended to commence the winding up of the company within 12 months of that date, the company will</p>	The uniform solvency test is derived from the test under the CO (s.47F(1)(d)) for giving of financial assistance by an unlisted company.

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>be able to pay its debts in full within 12 months of the commencement of the winding up; or</p> <p>(ii) in any other case, the company will be able to pay its debts as they fall due during the year immediately following that date.</p>	
201	Solvency statement	CO s.47F(1) and (2)	<p>(i) The solvency statement is contained in a specified form to be signed by the directors.</p> <p>(ii) In forming their opinion of solvency, the directors shall take into account the same liabilities (including contingent and prospective liabilities) as would be relevant under s.177<sup>1</sup> to the question whether the company is unable to pay its debts. However, s.177 does not provide guidance on what types of liabilities should be included.</p>	<p>(i) The requirements on directors for making of the statement are based on existing law, but are modified to make the requirements applicable to the three types of transactions.</p> <p>(ii) It is clarified that the directors should consider “all the liabilities (including contingent and prospective liabilities)” of the company instead of the “liabilities relevant under s.177”.</p> <p>(iii) It also provides that the solvency statement in support of the giving of financial assistance need not be in specified form.</p>

<sup>1</sup> CO s.177: “Circumstances in which company may be wound up by court”.

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
202	Offences regarding solvency statement	CO s.47F(5)	A director of a company who makes a statement under s. 47E(6) (which includes a solvency statement) without having reasonable grounds for the opinion commits an offence.	(i) Existing law extended to apply to all of the three types of transactions.  (ii) The maximum fine level is raised from Level 5 to Level 6 if prosecuted summarily.  (iii) The offence may now be triable on indictment. The maximum penalty will be a fine of \$150,000 and imprisonment for two years.
203	Power to modify solvency test by regulation	CO s.49Q(1)(d) and (4)	The Chief Executive in Council may modify the solvency test by regulations.	Existing law, but is extended to apply to all of the three types of transactions.
<b>Division 3: Reduction of Share Capital</b>				
<b>Subdivision 1: General Provisions</b>				
204	Application of Division	CO s.58(1A)	Except as provided in the CO, no company limited by shares or limited by guarantee and having a share capital <sup>2</sup> shall reduce its share	Existing law.

<sup>2</sup> There are only a few companies limited by guarantee and having a share capital that have been grandfathered under the Companies (Amendment) Ordinance 2004. Such companies can no longer be formed after 13 February 2004.

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
			capital.	
205	Permitted reductions of share capital	CO s.58(1) and (1D) c.f. UKCA 2006 s.641(2) to (4) and (6)	(i) Subject to confirmation by the Court, a company may, if so authorized by its articles, by special resolution reduce its share capital in any way.  (ii) A company must not buy back its own shares if, as a result of the buy-back, there would no longer be any member of the company holding shares other than redeemable shares. Any such buy-back shall be void.	(i) Existing law plus new provision to allow a non-Court reduction of share capital supported by a solvency statement.  (ii) The reduction need not be authorized by the articles but the articles may prohibit or restrict a company's power to reduce its share capital.
206	Procedure for a company to reduce its share capital	CO s.58(1) c.f. UKCA 2006 s.641(1)	Subject to confirmation by the Court, a company may by special resolution reduce its share capital.	Existing law plus new provision to allow a non-Court reduction of share capital supported by a solvency statement.
207	Offence if share capital is reduced in contravention of Division	CO s.58(1A) and (1B)	Except as provided in the CO no company limited by shares or limited by guarantee and having a share capital shall reduce its share capital. A breach of this restriction is an offence.	(i) Existing law except that the maximum fine level is changed from \$125,000 to \$150,000 on summary conviction.  (ii) With the introduction of the procedure for non-Court reduction of capital supported by a solvency statement, a new provision

Clause	Contents	Derivation	Position in CO	Position in CB
				is added to clarify that a reduction of share capital by a company is not to be regarded as contravening the prohibition on unlawful reductions in cl.207 only because one or more directors of the company commit an offence under cl.202 in making a solvency statement for the purposes of the reduction of share capital.
208	Liability of members following reduction of share capital	CO s.62 (except the proviso to s.62(1), which is now set out in CB cl.227)	After a reduction, the members cease to be liable for calls or other contributions as regards the amount by which the nominal amount of their shares has been reduced. This does not affect the rights of the contributories among themselves.	Existing law.
209	Reserves arising from reductions of share capital	c.f. UKC(RSC) Order 2008, Art. 3(2) to (4)	No corresponding provision under the CO.	New provision to make the law clear that a reserve arising from a reduction of share capital by any lawful means is a realized profit available for distribution.

Clause	Contents	Derivation	Position in CO	Position in CB
<b>Subdivision 2: Reduction of Share Capital by Special Resolution Supported by Solvency Statement</b>				
210	Special resolution for reduction of share capital		The CO (ss.58 to 63) allows a reduction of share capital if there is approval by a special resolution and if the reduction is approved by the Court.	<p>(i) In the CB (cls.210 to 220), we introduce, as an alternative procedure, a general court-free procedure based on the solvency test.</p> <p>(ii) Cl.210 is a new provision based on similar provisions in the CO (ss.49K(2) and 61(2)) for a private company to buy back its shares out of capital under CO ss.49K to 49O. The reduction of capital should be approved by a special resolution and is effective when the required documents are registered with the Companies Registry (CR). This follows the CO requirement relating to reduction of capital confirmed by the Court under s.61(2).</p>
211	Solvency statement for reduction of share capital		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (ss.49K(3) and (7)(b) and 49L(1) and (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>(ii) All directors of a company must make a solvency statement to support a reduction of capital. The special resolution in support of the reduction shall be passed within 15 days of the solvency statement (c.f. within the next week in the similar CO provision). Unlike the CO provisions allowing a private company to redeem or buy back its shares out of capital, there is no requirement to have an auditor's report. The reason for not requiring an auditor's report is set out in our response in the LegCo Paper CB(1)2636/10-11(02).</p>
212	Special resolution: exercise of voting rights		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (ss.49K(7)(a) and 49L(2) to (3)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) The voting restrictions in CO s.49L(2) and (3) are re-enacted in cl.212(2) and (3), which provide that the vote in respect of the shares to which the resolution relate should not be counted. However,</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				because a reduction of capital can apply equally to all issued shares, a provision is added so that the voting restrictions do not apply in that scenario.
213	Public notice of reduction of share capital		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49M(1) to (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that the company must publish notices with relevant information in the Gazette and newspapers and must register the solvency statement with the CR.</p> <p>(iii) Two new offences are added, namely, one for failing to publish the notice in the Gazette and newspapers, and one for failing to register the solvency statement with the CR.</p>
214	Inspection of special resolution and solvency		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49M(5) to (7)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
	statement			<p>(ii) It provides that:-</p> <p>(a) the special resolution and the solvency statement must be kept at the registered office or at a prescribed place for 5 weeks; and</p> <p>(b) the company must permit a member or creditor to inspect these documents.</p> <p>Failing to do either (a) or (b) is an offence.</p> <p>(iii) The maximum fine level for refusing to allow an inspection is raised from Level 4 to Level 5 compared with similar CO offence provisions.</p>
215	Application to Court by members or creditors		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49N (except s.49N(3)(b)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that any creditor or non-approving member of the company may, within 5 weeks after the special resolution is passed, apply to the Court for</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>cancellation of the resolution. The applicant must serve the application on the company. The company must give notice of such application to the CR within seven days after itself having been served with the same (c.f. “forthwith” in the similar CO provision); failing to do so shall be an offence.</p>
216	Power of Court to adjourn proceedings		No corresponding provision under the CO.	<p>(i) New provision based on a similar provision in the CO (s.49O(1)) for a private company to buy back its shares out of capital under CO ss.49K to 49O CO.</p> <p>(ii) It provides that the Court may adjourn the proceedings, give directions and make orders at its discretion.</p>
217	Power of Court to confirm or cancel special resolution		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49O(2) to (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that the Court must either confirm or cancel the special resolution. The Court may also make ancillary orders</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				to protect the interests of members or creditors, e.g. to order the company to buy back the shares of a member.
218	Company to deliver copy of order of Court to Registrar		No corresponding provision under the CO.	<ul style="list-style-type: none"> <li>(i) New provision based on similar provisions in the CO (s.49N(3)(b) and (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</li> <li>(ii) It provides that the company must register the Court order with the CR within the prescribed time. Failing to do so shall be an offence.</li> <li>(iii) The time to register the order with the CR is changed from 15 days to 14 days compared with similar CO provisions.</li> </ul>
219	Registration of return if no application to Court		No corresponding provision under the CO.	<ul style="list-style-type: none"> <li>(i) New provision based on CO s.61(1). It provides that the company must deliver after the 5-week period (but no later than 7 weeks) to the CR a return in specified form if there is no Court application.</li> <li>(ii) The reduction is effective when the return is registered with the CR (cl.210(2)).</li> </ul>

Clause	Contents	Derivation	Position in CO	Position in CB
220	Registration of return if application to Court		No corresponding provision under the CO.	<p>(i) New provision based on CO s.61(1) and (2). It provides that if there is Court application, the company must deliver to the CR a return in specified form within 14 days after the Court makes the order confirming the special resolution or the proceedings are ended without determination by the Court.</p> <p>(ii) The reduction is effective when the return is registered with the CR (cl.210(2)).</p>
<b>Subdivision 3: Reduction of Share Capital Confirmed by Court</b>				
221	Special resolution and application to Court for confirmation of reduction of share capital	CO s.59(1) to (3) (except s.59(2)(a) to (c): see cl.222)	<p>(i) Where a company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.</p> <p>(ii) A Court approved reduction of capital that involves the repayment of capital or the diminution of unpaid liability on shares requires the consent of creditors unless the Court directs otherwise.</p>	Existing law.

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
222	Creditors entitled to object to reduction of share capital	CO s.59(2)(a) to (c)	<p>(i) The procedures for creditors' consent involve the Court settling a list of creditors, followed by payment of their claims, or obtaining their consent to the reduction.</p> <p>(ii) The Court may dispense with the consent of a creditor on the company securing payment of the debt.</p>	Existing law.
223	Offence in connection with creditors list	CO s.63 c.f. UKCA 2006 s.647	An officer who wilfully conceals the name of a creditor entitled to object or misrepresent the nature or amount of the creditors' debts commits an offence.	Existing law, except that:-  (i) the <i>mens rea</i> of the offences is changed from "wilfully" to "intentionally" or "recklessly"; and  (ii) the maximum fine level is raised from Level 5 to Level 6 on summary conviction.
224	Order of Court confirming reduction of share capital	CO s.60	The Court, if satisfied, that the necessary consents from creditors are obtained, may make an order confirming the reduction.	Existing law.
225	Registration of order,	CO s.61(1)	(i) The company must deliver to the CR a copy of the Court order and minute	Existing law plus a new requirement to register within 14 days a specified form containing a

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
	minute and return	to (3)	<p>within 14 days after the Court makes the order.</p> <p>(ii) The reduction is effective when the required documents are registered with the CR. A notice of registration must also be published in the manner as directed by the Court.</p>	“statement of capital” together with the Court order and minute.
226	Certification of registration	CO s.61(4)	The CR shall issue a certificate on the registration of the order and minute, and the certificate shall be conclusive evidence that all the requirements of the CO have been complied with.	Existing law.
227	Liability to creditors omitted from list of creditors	CO s.62(1) proviso and s.62(2)	If after a reduction of capital is confirmed by the Court, the company is unable to pay the debt or claim of a creditor who by reason of his ignorance of the reduction was not included in the list of creditors, the members of the company as at the date of the reduction would be liable for the amount which they would have been liable to contribute if the company commenced winding up on the day before the said date.	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
<b>Division 4: Share Redemptions and Buy-backs</b>				
<b>Subdivision 1: Preliminary</b>				
228	Application of Division	CO ss.49(1), and 49B(1) and (2)	A company limited by shares or limited by guarantee and having a share capital may issue redeemable shares, redeem or buy back their own shares in accordance with the CO.	Existing law.
<b>Subdivision 2: Redeemable Shares</b>				
229	Issue of redeemable shares	CO s.49(1) and (2) c.f. UKCA 2006 s.684 (2)	A company may, if authorized to do so by its articles, issue redeemable shares.	Existing law except that it is no longer a requirement that the articles must authorize the issue of redeemable shares before the company can issue such shares, but the articles may prohibit or restrict the issue of such shares.
230	Terms, conditions and manner of redemption	c.f. UKCA 2006 s.685	CO s.49A(3) provides that the redemption of shares may be effected on such terms and in such manner as may be provided by the company's articles.	New provision to replace CO s.49A(3) by providing that the terms and manner of redemption may be determined by the directors if they are authorized to do so by the company's articles or resolution of the shareholders.
<b>Subdivision 3: Share Buy-backs</b>				

Clause	Contents	Derivation	Position in CO	Position in CB
231	General power of company to buy back its own shares	CO s.49B(1), (2) and (6) c.f. UKCA 2006 s.690(1)(b)	A company may, if authorized to do so by its articles, buy back its own shares.	Existing law except that it is no longer a requirement that the articles must authorize a buy-back before the company can buy back shares, but the articles may prohibit or restrict buy backs.
232	Retention and inspection of share buy-back contracts	CO s.49G(4), (5) and (7) to (9)	<p>(i) A company is required to keep a copy of any approved buy-back contracts or memoranda of their terms (except buy back contracts pursuant to general offers or market purchases for shares in listed companies) at its registered office for ten years.</p> <p>(ii) These contracts must be open to inspection by members of the company and, in the case of listed companies, also any other person.</p>	Existing law except that the maximum fine level is raised from Level 4 to Level 5 for failing to keep the contracts or make the contracts open for inspection as required.

**Subdivision 4: Share Buy-backs: Listed Companies**

Clause	Contents	Derivation	Position in CO	Position in CB
233	Share buy-back under general offer	CO s.49BA(1) (a), (2)(a), (3)(a) and (7) to (10)	<p>(i) A listed company may buy back its own shares under a general offer<sup>3</sup>.</p> <p>(ii) (i) above must be authorized by the company in general meeting. An ordinary resolution is generally sufficient authorization but a special resolution is required where a shareholder seeking control of the company intends to take advantage of the compulsory acquisition powers under CO s.168B and Schedule 13.</p> <p>(iii) There are notice and information requirements to ensure there is sufficient disclosure of the proposed buy-back to the members.</p>	Existing law.
234	Share buy-back on recognized stock market or approved stock	CO s.49BA(1) (b), (2)(b), (3)(b) and (4)	<p>(i) A listed company may buy back its own shares on the stock exchange (i.e. a market purchase).</p> <p>(ii) A market purchase must also be sanctioned by the company in general meeting. The authorization will be</p>	Existing law.

<sup>3</sup> A general offer is an offer to all members of a company or to all members holding shares of a particular class on terms which are the same for all those shareholders.

Clause	Contents	Derivation	Position in CO	Position in CB
	exchange		<p>valid until the company's next annual general meeting, when it may be extended until the date of the following annual general meeting.</p> <p>(iii) There are notice and information requirements to ensure sufficient disclosure of the proposed buy-back to the members.</p>	
235	Share buy-back otherwise than under section 233 or 234	CO ss.49BA(1) (c), (5) and (6), 49D(4) and 49E(1) and (2)	<p>(i) A listed company may also buy back its shares otherwise than via a general offer or a market purchase. This type of buy-back must be authorized by a special resolution in general meeting. The special resolution will not be effective if any member holding shares to which the resolution relates exercises the voting rights carried by those shares to vote on the resolution and the resolution would not have been passed if he had not done so.</p> <p>(ii) There are notice and information requirements to ensure sufficient</p>	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
			disclosure of the proposed buy-back to the members.	
236	Exemption	CO s.49BA(11) and (12)	<p>(i) The Securities and Futures Commission (SFC) may exempt a listed company from any of the requirements of s.49BA subject to such conditions it thinks fit.</p> <p>(ii) The SFC may also vary, suspend or withdraw an exemption if any conditions imposed are not complied with or on such other ground as it thinks fit.</p>	Existing law.
237	No assignment of right to buy back own shares	CO s.49F(1)	The rights of a listed company under a contract to buy back its own shares authorized under the corresponding CO provisions are not capable of being assigned.	Existing law.
238	Release of right to buy back own shares	CO s.49F(3)	(i) An agreement by a listed company to release its rights under a contract authorizing a buy-back under a general offer or a buy-back which is neither a general offer nor a market purchase is void unless the release agreement is	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>approved in advance by a special resolution before the agreement is entered into.</p> <p>(ii) The notice and information requirements and voting restrictions described in the above items under this Subdivision will apply to any such resolution.</p>	
<b>Subdivision 5: Share Buy-backs: Unlisted Companies</b>				
239	Share buy-back under contract	CO s.49D(1) to (3), and 49E(1) and (3)	An unlisted company may only buy back its own shares under a contract approved in advance. The terms of the proposed contract must be authorized by special resolution of the company before it is entered into and the authority may be varied, revoked or renewed by special resolution of the company.	Existing law.
240	Resolution authorizing contract: disclosure of	CO s.49D(5) and (7) (c) (ii)	(i) A copy of the contract or (if it is not in writing) a memorandum of its terms must be available for inspection by members both at the company's	Existing law except that it is clarified that a failure to send the contract or memorandum of terms together with the written resolution to the members will render the authorization

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
	contract details	c.f. UKCA 2006 s.696	<p>registered office for at least 15 days prior to the meeting to consider the special resolution and at the meeting itself; failing to do so will render the resolution ineffective.</p> <p>(ii) If approval is by a written resolution, the company must send the contract or memorandum of terms together with the written resolution to the members.</p>	ineffective. The current law is silent on this point.
241	Resolution authorizing contract: exercise of voting rights	CO s.49D(4) and (7) (c) (i)	The special resolution will not be effective if any member holding shares to which the resolution relates exercises the voting rights carried by those shares to vote on the resolution and the resolution would not have been passed if he had not done so.	Existing law.
242	Variation of authorized contract	CO s.49D(3) and (6)	An unlisted company may agree to a variation of an existing approved contract but only if the variation is authorized by a special resolution of the company before it is agreed to and the authority may be varied, revoked or renewed by special resolution of the company.	Existing law.

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
243	Resolution authorizing variation: disclosure of details of variation	CO s.49D(5), (6) and (7) (c) (ii) c.f. UKCA 2006 s.699	The disclosure requirements are the same as those set out in the item for cl.240 save that a copy of the original contract or a memorandum of its terms, together with any variations previously made, shall also be available for inspection or sent to the members.	Existing law, except that:- (i) the relevant provisions are now contained in an independent section; and (ii) it is clarified that a failure to send the original contract, variation contract or memorandum of terms together with the written resolution to the members will render the special resolution ineffective. The current law is silent on this point.
244	Resolution authorizing variation: exercise of voting rights	CO s.49D(4), (6) and (7) (c) (i)	The voting restrictions are the same as those set out in the item for cl.241.	Existing law except that the relevant provisions are now contained in an independent section.
245	No assignment of right to buy back own shares	CO s.49F(1)	The rights of an unlisted company under a contract to buy back its own shares approved under the corresponding CO provisions are not capable of being assigned.	Existing law.
246	Release of right to buy	CO ss.49D(3)	An agreement by an unlisted company to release its rights under an approved contract	Existing law.

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
	back own shares	and 49F(2)	is void unless its terms of the release agreement are approved in advance by a special resolution of the company before the agreement is entered into. The approval may be varied, revoked or renewed by special resolution of the company.	
247	Resolution authorizing release: disclosure of details of release	CO ss.49D(5), (7)(c)(ii) and (8) and 49F(2) c.f. UKCA 2006 ss.699 and 700(5)	The disclosure requirements are the same as those set out in the item for cl.240 save that a copy of the original contract or a memorandum of its terms, together with any variations previously made, shall also be available for inspection or sent to the members.	Existing law, except that:- (i) the relevant provisions are now contained in an independent section; and (ii) it is clarified that a failure to send the original contract, release agreement or memorandum of terms together with the written resolution to the members will render the special resolution ineffective. The current law is silent on this point.
248	Resolution authorizing release: exercise of voting rights	CO ss.49D(4), (7)(c)(i) and (8) and 49F(2)	The voting restrictions are the same as those set out in the item for cl.241.	Existing law except that the relevant provisions are now contained in an independent section.
249	Variation of	CO	An unlisted company may agree to a	Existing law.

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
	release of right to buy back own shares	ss.49D(3) and (6) and 49F(2)	variation of an approved release agreement but only if the variation is authorized by a special resolution of the company before it is agreed to and the authority may be varied, revoked or renewed by special resolution of the company.	
250	Resolution authorizing variation of release: disclosure of details of variation	CO ss.49D(5), (6), (7)(c)(ii) and (8) and 49F(2)  c.f. UKCA 2006 s.699	The disclosure requirements are the same as those set out in the item for cl.240 save that a copy of the original release agreement or memorandum of its terms, together with any variations previously made, shall also be available for inspection or sent to the members.	Existing law, except that:-  (i) the relevant provisions are now contained in an independent section;  (ii) it is clarified that a failure to send the original release agreement, variation contract or memorandum of terms together with the written resolution to the members will render the special resolution ineffective. The current law is silent on this point.
251	Resolution authorizing variation of release: exercise of	CO ss.49D(4), (6), (7)(c)(i) and (8) and	The voting restrictions are the same as those set out in the item for cl.241.	Existing law except that the relevant provisions are now contained in an independent section.

Clause	Contents	Derivation	Position in CO	Position in CB
	voting rights	49F(2)		
<b>Subdivision 6: Payment for Share Redemptions and Buy-backs</b>				
252	Payment for redemption or buy-back	CO ss.49(3), 49A(1)(a), 49B(3) and 49C	<p>(i) Shares may only be redeemed or bought back out of the distributable profits of the company or out of the proceeds of a fresh share issue. Associated payments (e.g. a payment for acquiring a right to buy back the company's own shares or for varying the terms of a buy-back contract) must be made out of distributable profits.</p> <p>(ii) The CO permits a private company to make a payment in respect of a redemption or buy-back of its own shares otherwise than out of distributable profits or the proceeds of a fresh issue of shares. However, certain conditions must be met.</p>	Existing law plus new provisions to allow all companies to redeem, buy back their own shares or make associated payments out of capital, except in the case of an on-market buy-back by a listed company.
253	Special resolution for payment out		No corresponding provision under the CO.	(i) New provision based on similar provisions in the CO (ss.49K(2) and 49L(1)) for a private company to buy back its shares out

Clause	Contents	Derivation	Position in CO	Position in CB
	of capital			<p>of capital under CO ss.49K to 49O.</p> <p>(ii) The payment out of capital should be approved by special resolution and must be made no earlier than 5 weeks and no later than 7 weeks after the date of special resolution.</p>
254	Solvency statement for payment out of capital		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (ss.49K(3), 49K(7)(b) and 49L(1) and (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) All directors of a company must make a solvency statement to support the payment out of capital. The special resolution in support of the payment out of capital shall be passed within 15 days of the solvency statement (c.f. within the next week in the similar CO provisions). Unlike the CO provisions allowing a private company to redeem or buy back its shares out of capital, there is no requirement to have an auditor's report. The reason for not</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				requiring an auditor's report is set out in our response in the LegCo Paper CB(1)2636/10-11(02).
255	Special resolution: exercise of voting rights		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (ss.49K(7)(a) and 49L(2) to (3)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) The voting restrictions in CO s.49L(2) and (3) are reproduced in cl.255(2) and (3). They provide that the vote in respect of the shares to which the resolution relates should not be counted. However, because under a general offer, the buy-back can apply equally to all issued shares, a provision is added so that the voting restrictions do not apply in that scenario.</p>
256	Public notice of payment out of capital		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49M(1) to (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				(ii) It provides that the company must publish notices with relevant information in the Gazette and newspapers and must register the solvency statement with the CR. Two new offences are added, namely, one for failing to publish the notice in the Gazette and newspapers and one for failing to register the solvency statement with the CR.
257	Inspection of special resolution and solvency statement		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49M(5) to (7)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that:-</p> <p>(a) the special resolution and the solvency statement must be kept at the registered office or at a prescribed place for 5 weeks; and</p> <p>(b) the company must permit a member or creditor to inspect these documents.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>Failing to do either (a) or (b) is an offence.</p> <p>(iii) The maximum fine level for refusing to allow an inspection is raised from Level 4 to Level 5 compared with similar offence CO provisions.</p>
258	Application to Court by members or creditors		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49N (except s.49N(3)(b)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that any creditor or non-approving member of the company may, within 5 weeks after the special resolution is passed, apply to the Court for cancellation of the resolution. The applicant must serve the application on the company. The company must give notice of such application to the CR within 7 days after itself having been served with the same (c.f. “forthwith” in the similar CO provision). Failing to do so is an offence.</p>

<b>Clause</b>	<b>Contents</b>	<b>Derivation</b>	<b>Position in CO</b>	<b>Position in CB</b>
259	Power of Court to adjourn proceedings		No corresponding provision under the CO.	<p>(i) New provision based on a similar provision in the CO (s.49O(1)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that the Court may adjourn the proceedings, give directions and make orders at its discretion.</p>
260	Power of Court to confirm or cancel special resolution		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49O(2) to (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p> <p>(ii) It provides that the Court must either confirm or cancel the special resolution. The Court may also make ancillary orders to protect the interests of members or creditors e.g. to order the company to buy back the shares of a member.</p>
261	Company to deliver copy of order of Court to		No corresponding provision under the CO.	<p>(i) New provision based on similar provisions in the CO (s.49N(3)(b) and (4)) for a private company to buy back its shares out of capital under CO ss.49K to 49O.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
	Registrar			(ii) It provides that the company must register the Court order with the CR within the prescribed time. Failing to do so is an offence. The time to register the order with the CR is changed from 15 days to 14 days compared with similar CO provisions.
<b>Subdivision 7: General Provisions</b>				
262	General prohibition on acquisition of own shares	CO s.58(1A), (1B), (1C) and (1D)	<p>(i) Except as provided in the CO, no company shall buy back or subscribe for its own shares.</p> <p>(ii) Subject to s.168A<sup>4</sup>, if a company buys back its own shares under ss.49 to 49S, no such purchase shall be void by reason only of a failure to comply with any of those provisions. However, a buy-back is void if, as a result of the buy-back, there would no longer be any member of the company holding shares other than redeemable shares.</p>	Existing law, except that the level of fine is changed from \$125,000 to \$150,000 on summary conviction.

<sup>4</sup> CO s.168A: “Alternative remedy to winding up in case of unfair prejudice”.

Clause	Contents	Derivation	Position in CO	Position in CB
263	No redemption or buy-back of unpaid or partly-paid shares	CO ss.49(3) and 49B(3)	A company must not redeem or buy back its own shares unless they are fully paid.	Existing law.
264	Effect of redemption or buy-back	CO ss.49A(4) and 49B(3)  c.f. SCA s.76G	Shares redeemed or bought back are to be regarded as cancelled on redemption or buy-back.	<p>(i) Existing law, plus new provision to deal with the effect on the share capital if the redemption or buy-back is financed out of capital.</p> <p>(ii) On redemption or buy-back of its own shares, a company must:-</p> <ul style="list-style-type: none"> <li>(a) reduce the amount of its share capital if the shares were redeemed or bought back out of capital;</li> <li>(b) reduce the amount of its profits if the shares were redeemed or bought back out of profits; or</li> <li>(c) reduce the amount of its share capital and profits proportionately if the shares were redeemed or bought back</li> </ul>

Clause	Contents	Derivation	Position in CO	Position in CB
				out of both capital and profits, by the total amount of the price paid by the company for the shares.
265	Fresh issue of shares before redemption or buy-back	CO s.49A(5) , (6) and 49B(3)	<p>(i) If a company is about to redeem or buy back its own shares, the company may issue replacement shares for those shares.</p> <p>(ii) If the shares are redeemed or bought back within one month after new shares are issued, no capital duty is payable on the issue of the new shares.</p>	Existing law.
266	Return of share redemption or buy-back	CO ss.49G(1) to (3) and (6) and 54(1)	(i) The CO requires that a company which has brought back its own shares deliver to the CR a return within 14 days giving details of the shares and the date on which they were delivered to the company. In the case of a listed company, the aggregate amount paid for the shares together with the maximum and minimum price paid for each class of shares also has to be notified.	Existing law, plus:- <p>(i) new provision to require the filing of the return (c.f. notice of alteration of share capital under the CO) in case of a redemption of shares;</p> <p>(ii) new provisions to include a “statement of capital”;</p> <p>(iii) new provisions to require the disclosure of more particulars if the redemption or</p>

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>Failing to do so is an offence.</p> <p>(ii) If a company redeems any redeemable preference shares, it shall give a notice of alteration of share capital to the CR within 1 month under CO s.54.</p>	<p>buy-back is financed out of capital; and</p> <p>(iv) prosecution on indictment is removed, and the maximum fine level for summary conviction is raised from Level 4 to Level 6.</p>
267	Effect of company's failure to redeem or buy back	CO s.49P(1) to (3)	A company is not liable in damages in respect of any failure on its part to redeem or buy back any of the shares.	Existing law.
268	Effect on a winding up of company's failure to redeem or buy back	CO s.49P(4) to (7)	<p>(i) If the redemption or buy-back was to occur before the commencement of a company's winding up, the terms of the redemption or buy-back may be enforced in the winding up. However, this right is qualified, and will be lost if, between the date of redemption or buy-back and the commencement of the winding up, the company could not have fulfilled its obligations out of distributable profits.</p> <p>(ii) In any event, the amount claimed is</p>	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
			deferred to all the creditors' claims and any preferential claims of the preference shareholders ranking ahead of the claimant.	
269	Power to modify by regulation	CO ss.49Q(1) (a) to (c) and 49Q(4)	The Chief Executive in Council may make regulations to modify the authorizations required for a buy-back and for a release agreement and the information to be included in a return to report a buy-back / redemption of shares.	Existing law.
<b>Division 5: Financial Assistance for Acquisition of Own Shares</b>				
<b>Subdivision 1: Preliminary</b>				
270	Interpretation	CO ss.47B(1) and (3), and 47D(2)(a) and (b)	(i) Sets out a number of definitions, which include "financial assistance" <sup>5</sup> and "net assets". (ii) Under s.47B(2), "net assets" is given "the same meaning as in section 157HA(15)". S.157HA(15) includes a	Existing law except that the definitions of "net assets" and "liabilities" are standardised according to the definitions under CO s.47D(2). The Tenth Schedule to the CO is repealed.

<sup>5</sup> "Financial assistance" means financial assistance given in a variety of forms e.g. by way of gift, guarantee, security, indemnity, loan or any other financial assistance given by a company which reduces the net assets of the company to a material extent.

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>definition of “liabilities”, which makes reference to the Tenth Schedule to the CO.</p> <p>(iii) There is another set of definitions of “net assets” and “liabilities” under s.47D(2).</p> <p>(iv) The two sets of definitions are in substance the same.</p>	
<b>Subdivision 2: General Prohibition on Financial Assistance for Acquisition of Own Shares</b>				
271	Prohibition on financial assistance for acquisition of shares or for reducing or discharging liability for acquisition	CO s.47A	A Hong Kong company (and its Hong Kong subsidiaries) is prohibited from giving financial assistance to another person for the purpose of acquiring shares in the company.	Existing law, except that:- <p>(i) cl.271 expressly sets out the exception applicable in the scenario of acquisition of the shares in a holding company incorporated outside Hong Kong; and</p> <p>(ii) the maximum level of fine is changed from \$125,000 to \$150,000 on summary conviction.</p>
272	Consequences of failing to comply with		No corresponding provision under the CO.	New provision. Under existing case law, the transaction providing for unlawful financial assistance is void. This position is altered

Clause	Contents	Derivation	Position in CO	Position in CB
	Division			under cl.272 such that transactions are not invalidated merely because of contravention of Division 5.
<b>Subdivision 3: Exceptions from Prohibition</b>				
273	General exceptions	CO s.47C(3)	<p>General exceptions to the financial assistance prohibition include, e.g.:-</p> <ul style="list-style-type: none"> <li>(i) a dividend paid to shareholders or a distribution made in the course of the company's winding up;</li> <li>(ii) an allotment of bonus shares;</li> <li>(iii) a reduction of capital; and</li> <li>(iv) a redemption or buy-back of own shares, etc.</li> </ul>	Existing law.
274	Principal purpose exception	CO s.47C(1) and (2)	<p>A company is not prohibited from giving financial assistance if:-</p> <ul style="list-style-type: none"> <li>(i) the company's principal purpose in giving the assistance is not to give it for the purpose of the acquisition of shares in it or its holding company, or</li> </ul>	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>(ii) the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company</p> <p>provided that:-</p> <p>(iii) the assistance is given in good faith in the interests of the company.</p>	
275	Exception for money lending businesses	CO s.47C(4)(a)	A company is not prohibited from giving financial assistance by the lending of money in the ordinary course of business of the company if the lending of money is part of the company's ordinary business.	Existing law.
276	Exception for employee share schemes	CO s.47C(4)(b) c.f. UKCA 2006 ss.682(2) (b) and (c) and (5), and 1166	The prohibition on financial assistance does not apply to employee share schemes. However, the financial assistance is restricted to the provision of money for the purchase or subscription of fully paid shares.	<p>Existing law modified to:-</p> <p>(i) cover all types of employee share schemes (c.f. just those involving provision of money for the purchase or subscription of fully paid shares under the CO);</p> <p>(ii) clarify that the exception applies to former employees;</p> <p>(iii) cover the holding or acquisition of beneficial ownership of the shares of the</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>company or its holding company by spouses, widows, widowers, or minor children of the employees or former employees; and</p> <p>(iv) a requirement is added that the assistance shall be given in good faith in the interest of the company for the purposes of an employee share scheme or the giving of the assistance is for the purposes of enabling or facilitating transactions to acquire the beneficial ownership of shares for the employees.</p>
277	Exception for loans to employees	CO s.47C(4) (c), (5) and (6)	The prohibition on financial assistance does not apply to the making by a company of loans to persons (other than directors) with a view to enabling those persons to acquire fully paid shares in the company or its holding company to be held by them by way of beneficial ownership.	Existing law.
278	Special restriction for listed	CO s.47D(1)	A listed company may not take advantage of the exceptions under s.47C(4)(a) to (c) unless it has net assets which are not thereby	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	companies		reduced or, if they are, the assistance is provided out of distributable profits.	
<b>Subdivision 4: Authorization for Giving Financial Assistance</b>				
279	Financial assistance not exceeding 5% of shareholders funds	c.f. NZCA ss.76(1)(c), 76(2) and (3), 77(1) and (2), and 80	CO s.47A imposes a broad prohibition on a Hong Kong company (and its subsidiaries) giving financial assistance to a party for the purpose of acquiring shares in the company. Certain exceptions are set out in s.47C. Unlisted companies are provided with an additional exception premised upon passing a solvency test and subject to a special resolution of the shareholders (s. 47E).	<p>(i) The main change from the CO is to allow all types of companies (listed or unlisted) to provide financial assistance, subject to satisfaction of the solvency test and one of the three procedures set out in cls.279 to 285.</p> <p>(ii) Cl.279 (based on the NZCA) is a new provision for the first of three general exceptions, which provides that:-</p> <p>(a) a company may give financial assistance if the assistance, and all other financial assistance previously given and not repaid does not exceed 5% of the shareholders' funds;</p> <p>(b) the giving of the assistance must be supported by a solvency statement and a resolution of the directors in</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>favour of giving the assistance;</p> <p>(c) the assistance must be given not more than 12 months after the solvency statement is made; and</p> <p>(d) within 15 days after giving the assistance, the company must notify its members of the details of the assistance.</p> <p>(iii) As proposed by the Hong Kong Association of Banks at the Bills Committee meeting with deputations on 9 April 2011, we agree that the wording “...aggregate amount received by the company in respect of the issue of shares and the reserves of the company...” in cl.279(1)(c) can be further simplified and may cause confusion as to whether shares issued for a consideration other than cash or other forms of capital injection will be included. We will substitute the phrase with “paid up share capital and reserves”<sup>6</sup>.</p>

<sup>6</sup> Also see section 76(9A)(a) of the Singapore Companies Act.

Clause	Contents	Derivation	Position in CO	Position in CB
				(iv) As proposed by the Law Society of Hong Kong at the same meeting, we agree that cl.279(1)(d) <sup>7</sup> can be deleted as sufficient safeguards have already been embodied in cl.279(1)(a), which provides that the financial assistance has to be in the best interest of the company and that the terms of the assistance are fair and reasonable.
280	Financial assistance with approval of all members	c.f. NZCA s.76(1)(a), (2) and (3), and 77(1) and (2)	No corresponding provision under the CO.	<p>New provision (based on the NZCA) for the second of three general exceptions, which provides that:-</p> <ul style="list-style-type: none"> <li>(i) a company may give financial assistance if it is approved by written resolution of all members of the company;</li> <li>(ii) the giving of the assistance must be supported by a solvency statement and a resolution of the directors in favour of giving the assistance; and</li> <li>(iii) the assistance must be given not more than 12 months after the solvency statement is</li> </ul>

<sup>7</sup> Cl.279(1)(d) reads, “*the company receives fair value in connection with the giving of the assistance; and*”.

Clause	Contents	Derivation	Position in CO	Position in CB
				made.
281	Financial assistance by ordinary resolution	c.f. NZCA ss.76(1)(b), (2) and (3), 77(1) and (2), 78(1), (2), (5) and (6), and 79	No corresponding provision under the CO.	<p>New provision (with references drawn from the NZCA) for the third of three general exceptions, which provides that:-</p> <ul style="list-style-type: none"> <li>(i) a company may give financial assistance if it is approved by an ordinary resolution;</li> <li>(ii) the giving of the assistance must be supported by a solvency statement and the board must resolve that giving the assistance is in the interests of the company;</li> <li>(iii) the company must send to each member at least 14 days before the resolution a notice which contains all information necessary for the members to understand the nature of the assistance and the implications of giving it; and</li> <li>(iv) the assistance may only be given not less than 28 days after the resolution is passed and not more than 12 months after the day on which the solvency statement is made.</li> </ul>

Clause	Contents	Derivation	Position in CO	Position in CB
282	Application to Court for restraining order		No corresponding provision under the CO.	<p>(i) New provision based on CO provisions (s.47G(2), (3), (4) and (10)) which apply to financial assistance given by unlisted companies.</p> <p>(ii) It allows dissenting shareholders to restrain the company from giving financial assistance under cl.281. According to the present CB, shareholders holding at least 10% of the total voting rights or members representing at least 10% of the total members of the company may, within a 28-day period, apply to the Court to restrain the giving of the assistance.</p> <p>As proposed by the Association of Chartered Certified Accountants, Hong Kong, at the Bills Committee meeting with deputations on 9 April 2011, we will lower the threshold from 10% to 5% as 10% is considered too high a threshold.</p> <p>(iii) It specifies that the applicant must serve the application on the company. The company must give notice of such</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				application to the CR within seven days after itself having been served with the same; failing to do so shall be an offence.
283	Power of Court to adjourn application		No corresponding provision under the CO.	<p>(i) New provision based on the procedure for objections by dissenting shareholders under CO s.47G(5).</p> <p>(ii) It provides expressly that the Court may adjourn the proceedings, give directions and make orders at its discretion.</p>
284	Power of Court to confirm or restrain giving of financial assistance		No corresponding provision under the CO.	<p>(i) New provision based on the procedure for objections by dissenting shareholders under CO s.47G(5)(a), (6) and (8).</p> <p>(ii) It provides that the Court must either confirm or restrain the giving of the financial assistance, and may also make ancillary orders to protect the interests of members, e.g. to order the company to buy back the shares of a member.</p> <p>(iii) There is now an express power for the Court to extend time limits.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
285	Company to deliver copy of order of Court to Registrar		No corresponding provision under the CO.	<p>(i) New provision based on the procedure for objections by dissenting shareholders under CO s.47G(7) and (10).</p> <p>(ii) It provides that the company must file the Court order with the CR within the prescribed time. Failing to do so is an offence. The time limit to file the order with the CR is changed from 15 days to 14 days compared with similar CO provisions.</p>

**Financial Services and the Treasury Bureau**  
**Companies Registry**  
**11 October 2011**