

## **Business Registration (Amendment) Bill 1998**

### **Reply to the concerns raised by the Bills Committee at its meeting held on 24 November 98**

- (a) Since the enactment of the Business Registration Ordinance (the Ordinance) in 1959, the Commissioner of Inland Revenue (Commissioner) has all along not been required under section 6(4)(a) to register any unlawful business/branch. The proposed section 6(4B) ensures the integrity of section 6(4)(a) by providing a remedy to the Commissioner under the situation where an unlawful business/branch is inadvertently registered, i.e. the Commissioner can remove its name from the Business Register and publish a notice of removal in the Gazette. The power given to the Commissioner under the proposed section 6(4B) will only be exercised under the situation set out in paragraph (a) of section 6(4), i.e. a business/branch is unlawful when it applies for business registration. This proposed amendment is purely technical and involves no new policy or change of policy.
  
- (b) So far, the Inland Revenue Department has not come across any business/branch which should not have been registered by virtue of section 6(4)(a) but has been inadvertently registered. Following the enactment of section 6(4B), the Commissioner will not exercise his power under the section to remove an unlawful business/branch from the Business Register except under the situation set out in section 6(4)(a).
  
- (c) The word “unlawful” is not defined in the Ordinance. “Unlawful” in its ordinary meaning can be used in two senses. First, it refers to an act or thing to which the law will not give effect, either on the ground of immorality or being contrary to public policy (e.g. contracts in restraint of trade). Secondly, it simply means contrary to law, whether statute law or common law.

Hence, whether a business/branch is unlawful is a question of law and should be decided by the court (for cases involving crimes) or other competent authorities. The proposed section 6(4B) will not give the Commissioner the power to make a judgement on this question. It merely provides a remedy to the Commissioner when “it appears to” the Commissioner that a registered business/branch should not have been registered because it was unlawful at the time of registration, i.e. to remove the registration from the Business Register.

In the laws of Hong Kong, there are already certain provisions concerning whether a business should be considered as unlawful. For example, under section 143(1)(c)(i) of the Companies Ordinance (Cap. 32), the Financial Secretary can appoint inspectors to investigate the affairs of a company if

there are circumstances suggesting that the business of the company is being conducted for an unlawful purpose. The inspectors will then submit a report to the Financial Secretary under section 146(1) in which they will form an opinion as to whether such business is in fact unlawful. Depending on the findings, the Financial Secretary may present a petition to the court to wind up the company. A similar example is found in section 95 of the Trustee Ordinance (Cap. 29) under which the Financial Secretary may appoint an inspector to investigate the affairs and management of a trust company if there are circumstances suggesting that the business of the trust company has been or is being conducted for an unlawful purpose or that it was formed for any unlawful purpose. The inspector shall make a report of his investigation to the Financial Secretary [section 95(3)] based on which the court may order the winding up of the company [section 96]. (Extracts of the relevant sections of the two Ordinances are at the Annex.)

## Annex

Under the two scenarios, once the company's unlawful status is established under the respective Ordinances and if the unlawfulness existed at the time when the company was accepted for business registration, the Commissioner will invoke the proposed section 6(4B) to remove the business registration concerned.

- (d) The Commissioner in practice will not determine whether or not a business/branch is unlawful. As explained in paragraph (c) above, the proposed section 6(4B) will only be invoked by the Commissioner to de-register a business/branch which is found to be unlawful. Considering that whether a business/branch is unlawful is decided by the court or a competent authority, the court or the authority should give the person carrying on such business/branch the opportunity to show cause or to make representation before it makes a decision on whether the business/branch is unlawful. In other words, since the business/branch owner should be well aware that investigation into the affairs of his business/branch has been made and of the decision in respect of the investigation, a prior notice of the Commissioner's de-registration action should not be necessary.

Notwithstanding the above, as a good administrative practice, the Commissioner is prepared to send a notice to the business/branch owner, say two weeks, before he removes the registration from the register, at the last known business or other correspondence address of the business. The notice would inform the person concerned the Commissioner's intended action and his right under the proposed section 6(4C) to appeal to court if aggrieved by the decision. With this arrangement, there is no need to send a further notice to the business/branch owner after the publication of the removal in the Gazette.

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## 93. Borrowing

(1) For the purpose of attaining the objects of the company as set out in section 81 (or such of them as the company may have adopted), and for no other purpose, a trust company may from time to time borrow money provided that the aggregate of the sums of money borrowed shall at no time exceed the amount of the company's capital for the time being paid up.

(2) Moneys borrowed by a trust company shall not be secured, by debenture or otherwise, on its capital or general undertaking, but may be secured on any of the company's property (not being property held by it on any trust), other than the securities deposited by it with the Director of Accounting Services under the provisions of this Part. (Amended 9 of 1950 Schedule; L.N. 16 of 1977)

94. (Repealed 84 of 1970 s. 2)

## 95. Investigation by inspector

(1) The Financial Secretary may at any time appoint an inspector to investigate the affairs and management of any trust company if it appears to the Financial Secretary that there are circumstances suggesting—

- (a) that the trust company has committed a breach of trust;
- (b) that the business of the trust company has been or is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose;
- (c) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members;
- (d) that its members have not been given all the information with respect to its affairs that they might reasonably expect;
- (e) that it is insolvent; or
- (f) that it has failed to comply with any of the requirements of this Part. (Replaced 9 of 1993 s. 5)

(1A) The Financial Secretary may give directions as to the manner in which and the extent to which an investigation under subsection (1) shall be conducted. (Added 9 of 1993 s. 5)

(2) It shall be the duty of all officers and servants of the company to produce for examination by the inspector all books, accounts, vouchers and other documents in their custody or control in relation to matters under investigation, and to answer truly all inquiries addressed to them by the inspector respecting any matter affecting the affairs of the company.

## 93. 借款

(1) 為達致第 81 條所列的公司宗旨(或為達致公司所採納的其中任何宗旨), 而非為其他目的, 信託公司可不時借入款項, 但借款總額在任何時間均不得超過信託公司在當其時的已繳足股款的資本。

(2) 信託公司借入的款項, 不得藉債權證或其他方式而以公司的資本或整體業務作為抵押, 但可以公司的財產(不包括公司以信託方式持有的財產)作為抵押, 但根據本節條文存放於庫務署署長的抵押除外。(由 1950 年第 9 號附表修訂; 由 1977 年第 16 號法律公告修訂)

94. (由 1970 年第 84 號第 2 條廢除)

## 95. 視察員進行的調查

(1) 財政司如覺得有某些情況顯示以下各項, 可隨時委任視察員調查任何信託公司的事務及其管理——

- (a) 該公司違反信託;
- (b) 該公司曾經或正在意圖欺詐其債權人或其他人的債權人而經營業務, 曾經或正在為欺詐或非法目的而經營業務, 曾經或正在以欺壓其任何部分成員的方式經營業務, 或該公司是為欺詐或非法目的而組成;
- (c) 與該公司的組成有關或與其事務的管理有關的人, 在該項組成或管理方面, 曾犯欺詐、行為失當或對公司或其成員行為不檢;
- (d) 該公司的成員並不獲給予彼等合理地期望得到的公司事務資料;
- (e) 該公司無力償債; 或
- (f) 該公司沒有遵守本節的任何規定。(由 1993 年第 9 號第 5 條代替)

(1A) 財政司可就根據第(1)款進行的調查的方式及範圍給予指示。(由 1993 年第 9 號第 5 條增補)

(2) 該公司的所有高級人員及受僱人, 均有責任向有關視察員出示由他們保管或控制並與受調查的事宜有關的所有簿冊、帳目、憑單及其他文件, 並從實回答視察員就影響該公司事務的事宜向他們提出的詢問。

(3) The inspector shall make a report of his investigation to the Financial Secretary.

(4) All expenses of and incidental to any such investigation shall be paid by the company, if the Financial Secretary so directs.

(Amended 9 of 1993 s. 5)

#### 96. Special provision as to winding up a trust company

(1) The court may order the winding up of a trust company in accordance with the Companies Ordinance (Cap. 32), and the provisions of that Ordinance shall apply accordingly subject however to the modification that the company may also be ordered to be wound up on application made by the Attorney General if—

- (a) the company has made default in complying with a requirement of this Part and such default has continued for a period of 2 months after notice of default has been served upon the company; or
- (b) from the consideration of the report of an inspector appointed under section 95 it appears that the company has committed a breach of trust.

(2) Upon the winding up of a trust company every person who has been a director of the company at any time within the period of 2 years immediately preceding the commencement of the winding up shall be liable for the balance unpaid on every share which he may have transferred during such 2 years.

#### 97. Personal liability of officers of a trust company

Where a trust company holds the office of executor, administrator or trustee, every person employed by the company to discharge any of the duties of such office shall, in respect of the duties entrusted to him, be personally responsible to the court and be subject to the process of the court, as though he had been personally appointed to such office.

#### 98. Offences

(1) Any director, officer or servant of a trust company who wilfully and with intent to defraud neglects to make any entry in the books of the company which it is his duty to make shall be guilty of an offence triable upon indictment.

(2) Any director, officer or servant of a trust company, who wilfully and with intent to defraud makes or abets the making of any false entry in the books of the company, or subscribes or exhibits any false document with intent to deceive any person appointed under this Part to investigate the affairs and management of the company shall be guilty of an offence triable upon indictment.

(3) 視察員須就其所作調查向財政司提交報告。

(4) 如財政司作出指示，上述調查及其附帶引起的一切開支須由該公司支付。

(由 1993 年第 9 號第 5 條修訂)

#### 96. 與信託公司清盤有關的特別條文

(1) 法院可命令任何信託公司按照《公司條例》(第 32 章)的規定清盤，而該條例的條文須據此適用，但須經一項修改，即如有以下情況，則在律政司作出申請時該公司亦可被命令清盤——

- (a) 該公司沒有遵守本部的規定而構成失責，而該失責在該公司獲送達關於該失責的通知後 2 個月仍然持續；或
- (b) 在考慮根據第 95 條委任的視察員所作的報告後，令人覺得該公司違反信託。

(2) 任何信託公司一經清盤，在緊接清盤的生效日期前 2 年內的任何時間曾出任該公司董事的每個人，須對其在該 2 年內轉讓的每項股份的未付款餘額負法律責任。

#### 97. 信託公司高級人員的個人法律責任

凡任何信託公司擔任遺囑執行人、遺產管理人或受託人職位，則受僱於該公司以履行該職位的職責的每個人，須就其獲託付的職責而向法院負上個人責任，並須受法院的法律程序規限，猶如他是個人被委任擔任該職位一樣。

#### 98. 罪行

(1) 信託公司的任何董事、高級人員或受僱人，如故意及意圖欺詐而忽略在公司的簿冊內記入其職責上須予記入的記項，即屬犯罪，可循公訴程序予以審訊。

(2) 信託公司的任何董事、高級人員或受僱人，如故意及意圖欺詐而在公司的簿冊內記入或教唆他人記入虛假記項，或簽署或展示任何虛假文件而意圖欺騙根據本部獲委任以調查公司事務及其管理的人，即屬犯罪，可循公訴程序予以審訊。

## Inspection

## 審查

## 142. Investigation of the affairs of a company on application of members

(1) The Financial Secretary may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Financial Secretary may direct—

- (a) in the case of a company having a share capital, on the application either of not less than 100 members or of members holding not less than one-tenth of the shares issued;
- (b) in the case of a company not having a share capital, on the application of not less than one-tenth in number of the persons on the company's register of members.

(2) The application shall be supported by such evidence as the Financial Secretary may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the Financial Secretary may, before appointing an inspector, require the applicants to give security in such amount as he may require for payment of the costs of the investigation. (*Amended 6 of 1984 s. 97*)

(Replaced 4 of 1963 s. 8)  
(cf. 1948 c. 38 s. 164 U.K.)

## 143. Investigation of the affairs of a company in other cases

(1) Without prejudice to his powers under section 142, the Financial Secretary—

- (a) shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Financial Secretary may direct, if the court by order declares that its affairs ought to be investigated by an inspector appointed by the Financial Secretary; and
- (b) may do so if the company by special resolution declares that its affairs ought to be investigated by an inspector appointed by the Financial Secretary and the company gives security in such amount as the Financial Secretary may require; and (*Amended 6 of 1984 s. 98*)
- (c) may also do so if it appears to the Financial Secretary that there are circumstances suggesting—
- (i) that the business of the company has been or is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent

## 142. 應成員的申請而調查公司事務

(1) 如有下述情況，財政司可委任一名或多於一名合資格的審查員，按財政司指示的方式，調查某間公司的事務並就有關調查作出報告——

- (a) 如屬有股本公司，有不少於100名成員或持有不少於十分之一已發行股份的成員提出申請；
- (b) 如屬無股本公司，有為數不少於十分之一名列該公司成員登記冊的人提出申請。

(2) 有關申請須以財政司所規定的證據作支持，以證明申請人有好的理由要求進行該項調查，而財政司在委任審查員前，可規定申請人須提供一項繳付調查費用的保證，款額為財政司所規定者。 (*由1984年第6號第97條修訂*)

(由1963年第4號第8條代替)  
(比照1948 c. 38 s. 164 U.K.)

## 143. 在其他情況下調查公司事務

(1) 在不損害財政司根據第142條所具權力的情況下——

- (a) 如法院藉命令宣布某公司的事務應由財政司委任的審查員調查，則財政司須委任一名或多於一名合資格的審查員，按財政司指示的方式，調查該公司的事務並就有關調查作出報告；及
- (b) 如某公司藉特別決議宣布該公司的事務應由財政司委任的審查員調查，該公司並且提供財政司所規定款額的保證，則財政司可照上述方式行事；及 (*由1984年第6號第98條修訂*)
- (c) 如財政司覺得有情況顯示下述事態，亦可照上述方式行事——
- (i) 有人曾意圖或正意圖藉經營該公司的業務而詐騙其債權人或任何其他人的債權人，或為其他欺詐或非法目的而經營該公司的業務，或以欺壓該公司的任何部分成員的方式經營該公司的業務，或該公司

or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or (Amended 78 of 1972 s. 16)

- (ii) that persons concerned with its formation or the management of its affairs have in connexion therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or
- (iii) that its members have not been given all the information with respect to its affairs that they might reasonably expect. (Added 4 of 1963 s. 8. Amended 6 of 1984 s. 98)

(2) The power of the Financial Secretary under subsection (1)(c) shall be exercisable with respect to a body corporate notwithstanding that it is in course of being voluntarily wound up. (Added 6 of 1984 s. 98)

[cf. 1948 c. 38 s. 165 U.K.]

#### 144. Power of an inspector to investigate affairs of related company

If an inspector appointed under section 142 or 143 to investigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate also the affairs of any other body corporate that is or has at any relevant time been—

- (a) a subsidiary or a holding company of the company,  
 (b) a subsidiary of its holding company,  
 (c) a holding company of its subsidiary, or  
 (d) substantially under the control of the same person as the first-mentioned company,

he shall have power so to do, and shall report on the affairs of the other body corporate so far as he thinks the results of his investigation thereof are relevant to the investigation of the affairs of the first-mentioned company.

(Added 4 of 1963 s. 8)

[cf. 1948 c. 38 s. 166 U.K.]

#### 145. Production of documents, and evidence, on investigation

(1) It shall be the duty of all officers and agents of the company and of all officers and agents of any other body corporate whose affairs are investigated by virtue of section 144 to produce to the inspector all books and documents of or relating to the company or, as the case may be, the other body corporate that are in their custody or power, to attend before the inspector when required so to do and otherwise to give to the inspector all assistance in connexion with the investigation that they are reasonably able to give. (Amended 6 of 1984 s. 99)

乃為任何欺詐或非法目的而組成；或 (由1972年第78號第16條修訂)

- (ii) 關涉該公司的組成或該公司事務的管理的人，對該公司或其成員在在這方面犯了欺詐行為、失當行為或其他不當行為的罪行；或
- (iii) 該公司的成員未獲提供其合理地預期獲得的一切有關該公司事務的資料。 (由1963年第4號第8條增補。由1984年第6號第98條修訂)

(2) 財政司根據第(1)(c)款所具的權力，可對任何法人團體行使，不論該法人團體是否正在進行自動清盤。 (由1984年第6號第98條增補)

(比照1948 c. 38 s. 165 U.K.)

#### 144. 審查員調查有關連公司的事務的權力

根據第142或143條獲委任調查某公司的事務的審查員，如認為就其調查工作而有需要調查任何其他法人團體的事務，而該其他法人團體現在是或於任何有關時間曾經是——

- (a) 該公司的附屬公司或控股公司，  
 (b) 該公司的控股公司的附屬公司，  
 (c) 該公司的附屬公司的控股公司，或  
 (d) 實質上與該首述的公司由同一人控制，

則該審查員即有權如此行事，而且只要其認為他對該其他法人團體事務所作調查的結果，是與他對該首述的公司的事務所作的調查有關連，則須就該其他法人團體的事務作出報告。

(由1963年第4號第8條增補)

(比照1948 c. 38 s. 166 U.K.)

#### 145. 被調查時出示文件及證據

(1) 任何公司的所有高級人員及代理人，及其他法人團體(如其事務憑藉第144條而被調查)的所有高級人員及代理人，均有責任向審查員出示該公司或該法人團體(視屬何情況而定)的所有在他們保管或權力管轄下的簿冊及文件，或所有與該公司或該法人團體(視屬何情況而定)有關，並且在他們保管或權力管轄下的簿冊及文件；他們亦有責任在被要求時到該審查員面前，以及有責任向該審查員提供其合理地能夠提供的一切與該項調查有關的協助。 (由1984年第6號第99條修訂)

the inspector may require the director to produce to him all documents in the director's possession, or under his control, relating to that account.

(Added 10 of 1987 s. 6)

#### 146. Inspector's report

(1) The inspector may, and, if so directed by the Financial Secretary, shall, make interim reports to the Financial Secretary, and on the conclusion of the investigation shall make a final report to the Financial Secretary.

(2) Any such report shall be written or printed, as the Financial Secretary directs.

(3) The Financial Secretary—

(a) shall—

(i) forward a copy of any report made by the inspector to the company at its registered office;

(ii) if he thinks fit, furnish a copy thereof, on request and on payment of the fee appointed under section 305 for a certified copy of a document where the copy has been prepared in the office of the Registrar, to any person who is a member of the company or of any other body corporate dealt with in the report by virtue of section 144 or whose interests as a creditor of the company or of any such other body corporate appear to the Financial Secretary to be affected; (Amended 6 of 1984 s. 101)

(iii) where the inspector is appointed under section 142, furnish, at the request of the applicants for the investigation, a copy to them; and (Amended 6 of 1984 s. 101)

(iv) where the inspector is appointed under section 143 in pursuance of an order of the court, file a copy in the court; (Added 6 of 1984 s. 101)

(b) may cause the report or any part thereof to be printed and published; (Replaced 6 of 1984 s. 101)

(c) may, or if such report or any part thereof is printed and published shall, cause a copy to be delivered to the Registrar. (Replaced 6 of 1984 s. 101)

(4) The inspector may at any time in the course of his investigation, without the necessity of making an interim report, inform the Financial Secretary of matters coming to his knowledge as a result of the investigation tending to show that an offence has been committed or that civil proceedings ought in the public interest to be brought by any body corporate. (Added 6 of 1984 s. 101. Amended 10 of 1987 s. 7)

[cf. 1948 c. 38 s. 168 U.K.]

則該審查員可要求該董事向他出示在該董事管有或控制下一切與該帳戶有關的文件。

(由 1987 年第 10 號第 6 條增補)

#### 146. 審查員報告

(1) 審查員可以，而在財政司有所指示下則須，向財政司作出中期報告；審查員並須於調查完結後向財政司作出最後報告。

(2) 任何上述報告均須按財政司指示予以書寫或印製。

(3) 財政司——

(a) (i) 須將審查員作出的報告一份遞送予公司的註冊辦事處；

(ii) 如認為合適，可於有關人士提出請求及繳付根據第 305 條就一份文件在處長的辦事處擬備核證副本所指定的費用後，向公司的任何成員、或報告內憑藉第 144 條而處理的其他法人團體的任何成員、或財政司覺得權益受到影響的公司的任何債權人或該其他法人團體的任何債權人，提供該份報告；(由 1984 年第 6 號第 101 條修訂)

(iii) (凡審查員根據第 142 條被委任)須就申請進行有關調查的人的請求，向他們提供該份報告；及 (由 1984 年第 6 號第 101 條修訂)

(iv) (凡審查員依據法院一項命令而根據第 143 條被委任)須將該份報告送交法院存檔；(由 1984 年第 6 號第 101 條增補)

(b) 可安排將該報告或其任何部分印製與發表；(由 1984 年第 6 號第 101 條代替)

(c) 可安排將該報告一份交付處長；如該報告或其任何部分予以印製與發表，則須安排將該報告一份交付處長。(由 1984 年第 6 號第 101 條代替)

(4) 審查員可在進行有關調查期間，無需作出中期報告而隨時將在調查中獲悉任何會顯示某罪行已經發生的事項，或會顯示任何法人團體應基於公眾利益而進行民事法律程序的事項，通告財政司。(由 1984 年第 6 號第 101 條增補。由 1987 年第 10 號第 7 條修訂)

[比照 1948 c. 38 s. 168 U.K.]