Companies (Amendment) Bill 1999

Thank you for the opportunity to comment further on the Bill. As certain points were not raised or discussed at the Bills Committee meeting of 20 April, we have taken the opportunity to comment on the Administration response tabled thereat and otherwise clarify our position.

Although the Institute supports the Bill in general, and in particular the introduction of the additional avenue to deregistration without the expense of liquidation, concerns remain regarding the scope of the proposed deregistration provisions.

Our contention is that the IRD clearance requirement for deregistration[1] should be deleted from the proposed deregistration provisions.

Summary of case put to Bills Committee

The following arguments were presented to the Bills Committee at the meeting of 20 April 1999 in the alternative:

1. **That the requirement that IRD clearance be obtained *need not* be included in the proposed provisions, as the safeguards otherwise proposed[2] are sufficient to provide for relevant interests, eg:**

   a) the proposed IRD requirement is only evidence of no outstanding liabilities, ie. evidence which may be required by Registrar under proposed section s291AA(5);

   b) the Registrar may require that applicants for deregistration under the proposed provisions must be accompanied by tax and other relevant clearances as deemed necessary under proposed section s291AA(5); and, in any case

   c) the required Gazette notice period of 3-months will give the IRD ample time to object to deregistrations to protect their interests, ie. based on the presumption that most applications for clearance can be processed within one month.

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[1] Proposed section 291AA(3)(b).

[2] See Safeguards Proposed specified in submission of 16 April, ie:

a) Scope limited to defunct private companies (s291AA(2))
   - all members agree to deregistration;
   - no commencement of business/operation, or cessation for more than 3-months;
   - no outstanding liabilities

b) Registrar *may* ask for further information (s291AA(5))

c) Gazetting of Notice (s291AA(7-8))

d) Discretionary power, ie. Registrar *may* strike (s291AA(9))

e) Liability survives dissolution (s291AA(12))

f) Criminal penalties may be imposed for false/misleading Information (s291AA(14))

g) Exclusion of companies, ie. scope may be further limited (s291AA(16))

h) Reinstatement of Deregistered Company via action of Registrar by publication or otherwise by court order following application (s291AB)

i) Records Required to be Kept after dissolution (s292(3))

2. **That the IRD clearance requirement *should not* be included in the Companies Ordinance in any case, given that:**

   a) amendments to the Companies Ordinance for the purpose of protecting the public [tax] revenue in this respect would appear to be inappropriate;

   b) legislation should not codify practice, or practice standards, unless there is a clear and sufficient need[3] or advantage – as such matters are better left to the professions and professional bodies such as the HKICS; and

   c) requirements promulgated by the Companies Registry in the form of rules or guidance notes, would be as effective, and perhaps more efficient, as such requirements -

      - would have statutory authority under the proposed provision (s291AA(5)); and
      - could be adjusted responsively and efficiently as there would be no need of amending legislation, eg.

        it may be that in practice, the clearance requirement may not be necessary for companies that have never commenced operations, in which case the rules might be adjusted to distinguish these companies from those that have commenced but ceased business operations, or companies which have been employed for specific transaction purposes.

The foregoing arguments were put forward in our written submission and presentation to the Bills Committee notwithstanding:

a) that IRD clearance may be acquired relatively quickly and inexpensively;

b) that obtaining IRD clearance may in fact be considered generally accepted as good or best practice;

c) that the number of companies 'abusing' the current deregistration provisions, ie. s291 and s290A, may in fact be significant in terms of number and dollar value; and

d) that the objections to deregistration under section 291, received by the Registrar from the IRD, although only 8.3% of total applications, may amount to a significant portion of the public revenue.

Summary of response from Administration

The focus of the Administration's response at the Bills Committee meeting of 20 April 1999, and the submission tabled thereat, was on the time required to process applications for clearance and the need to protect the public revenue.

[3] See note 6.

Although we are convinced the IRD will be able to meet performance pledges regarding processing, and fully appreciate the obligation to protect the public revenue, it is respectfully submitted:

1. **with regard to processing time, that this is something of a moot point, as our case is based on need, not speed; and**

2. **with regard to protection of the public [tax] revenue, that the neither the Companies Ordinance nor the proposed deregistration provisions should be employed for this purpose, as, inter alia, protection can be assured without specific legislation.**

Processing Time

It is respectfully submitted that the efficiency and cost of processing clearance applications is not a sufficient basis for rejection or inclusion of the provision in the Bill.

If in fact, as indicated at the Bills Committee meeting, the IRD will be able to process 75% of the applications within 4-weeks and the remainder within 6-weeks, then the proposed 3-month notice period within which the IRD may notify the Registrar of Companies of its objection, will clearly be sufficient to protect IRD interests and the public revenue.

Therefore, there would appear to be no need for the proposed amendment to include the requirement.[4]

Revenue Protection

Although the Institute fully appreciates the obligation of the IRD to guard against tax evasion and protect the public revenue, it is respectfully submitted that proposed section 291AA(3)(b) is not an appropriate means.

The pervasive use of revenue protection grounds by the Administration, to substantiate nearly all points raised in response to the Institute's submission of 16 April 1999, gives the impression that the Companies Ordinance and the proposed provisions are to be employed for a collateral purpose for which the Companies Ordinance was not intended.

As indicated in our initial submission and the Explanatory Memorandum to the Bill, the purpose of the provisions in question are to 'introduce a new procedure for deregistering solvent, defunct private companies', and not 'to provide a fast, inexpensive and simple alternative to member's voluntary winding up',[5] as the Administration submission specifies, or to protect the public revenue, as the Administration response implies. To proposed that the requirements be more demanding that even those which currently apply to liquidation in this respect,[6] would seem inappropriate.

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[4] This point was made at the meeting of the Bills Committee on 20 April 1999 but not considered.
[5] Winding up alternatives are being considered by the LRC.
[6] Evidence of the lack of need is implicit in its absence from relevant existing provisions for:

a) liquidation and dissolution, *which do not require* that liquidators obtain IRD tax clearance prior to winding-up the affairs of a company, and
b) dissolution without going through the process of liquidation, *which do not require* IRD tax clearance to be obtained, ie:
   - Discretion of the Registrar (s291 and s290A)
   - Court Order where Registrar feels liquidation inappropriate (s291A)
   - Court order pursuant to statutory scheme of reconstruction or merger (s167)
   - Government Order where company engaged in undesirable activities' (s360C)

With regard to the Administration assertion that a 'specific' statutory requirement in the Companies Ordinance would be the most 'effective and efficient' means of revenue protection regarding deregistration, one wonders whether a sledgehammer is being proposed to crack a walnut. As indicated above, the most effective and efficient means in this respect would appear to be the promulgation of rules/guidelines by the Registrar under his statutory authority (s291AA(5)).

Concluding Remarks

As we do not feel the need for the proposed IRD requirement has been justified, we would restate the concluding remarks from our submission of 16 April, ie. but for points regarding processing time and compliance costs, which are conceded.

1. Proposed provisions are not being put forward as alternatives to liquidation which ends in dissolution, but as alternatives to provisions for deregistration, ie. dissolution without liquidation, therefore the requirement would appear to be unnecessary, and perhaps unduly bureaucratic.

2. Safeguards proposed in Bill are broad in scope and sufficient to address relevant interests of affected persons, regulators, the business environment and the public, the most significant being:

   a) the power of the Registrar of Companies regarding the determination of the information required of applicants – which would allow for the production of tax and other clearances as necessary; and

   b) the 3-month period within which the IRD might object to deregistration applications, which may be exercised whether or not tax clearance is required by the Registrar.

3. Given the limited access to the proposed route to dissolution, the safeguards otherwise proposed and likely benefits, the rationale for the IRD clearance requirement seems insufficiently great to justify its inclusion in the Bill.