Bills Committee on
Companies (Amendment) Bill 2002

Summary of concerns
(as at 6 November 2002)

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Reducing threshold for shareholders' proposals	Mr David Webb (CB (1)2604/01-02)	Support the 2.5% threshold but not the details of the 50-holder threshold as it may not be fair to shareholders of companies with low par value relative to market value or net assets per share. Consideration should be given to requiring requisitionists to make a specific deposit to defray costs, at a fixed amount per registered shareholder. The deposit will be refunded if the proposed resolution receives the support of more than 5% by value of shares voted in general meeting.	This legislative proposal is based on the Standing Committee on Company Law Reform (SCCLR)'s recommendation that the threshold for circulating shareholders' proposals should be reduced from 5% to 2.5% of the voting rights or from 100 shareholders (holding shares on which there has been paid up an average sum of not less than $2,000 per person) to 50 shareholders. The existing reference to the paid-up sum is relatively simple and easy to understand. We do not consider it necessary to introduce the concept of net assets, which appear to change in value from time to time. On the proposal to add a deposit requirement to the Companies Ordinance, we are concerned that this would effectively mean that all shareholders of a company (instead of the requisitionists)

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			would need to meet the expenses of circulating the requisitionists' proposals. While our policy intent is to reduce the threshold for circulating the proposals, we do not consider it appropriate to relieve the requistionists of the responsibility for bearing the expenses in question.
Removing directors by ordinary resolution	Mr David Webb	Support the proposal. Not agree to paragraph 7(c) of the Legal Service Division Report (LS 50/01-02) which states that the proposal may affect the readiness of directors to make hard decisions which are unpalatable to investors. Emphasize that decisions which are "unpalatable" to a majority of shareholders are generally decisions which are not in their best interest.	Noted.
	Chinese General Chamber of Commerce (CGCC) (CB(1) 2610/01-02(01))	There may be circumstances where directors of a company have to appoint/remove directors by special resolution which conflicts with the proposed ordinary resolution. Which resolution should then prevail.	This legislative proposal, if enacted, would prevail, i.e. a director of a company can be removed by an ordinary resolution instead of a special resolution.
Providing a statutory definition of "Shadow Director"	CGCC	Should specify the extent to and the details of which the threshold for "shadow director" is lowered.	The original definition of "shadow director" (in section 168C) refers to a person in accordance with whose directions or instructions the directors of a company

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			are accustomed to act. The proposed definition refers to a person in accordance with whose directions or instructions the directors or majority of the directors of the company are accustomed to act.
Extending the statutory provisions to cover in generic terms provision of financial assistance to directors	CGCC	The proposal may affect the financial flexibility of some companies, particularly those small and medium enterprises (SME) which usually operate on a tight capital.	This legislative proposal should not affect the financial flexibility of a company as the proposed prohibition applies to loans made to a director by the company but not vice-versa. Moreover, certain exceptions are already provided for in the new section 157HA e.g. the proposed prohibition does not prohibit a private company (other than one that is a member of a group of companies of which a company is a listed company in Hong Kong) from making a loan to its directors that has been approved by the company at a general meeting.
Permitting the formation of a company by one person	Hong Kong General Chamber of Commerce (HKGCC) (CB(1) 2592/01-02) Democratic Alliance for Betterment of Hong Kong (DABHK) (CB(1) 219/02-03(01))	Need to address problems arising from the death of the sole shareholder and director. Need to address the situations where the sole shareholder and director has died, is subject of bankruptcy petition or mentally incapable.	The possible problems arising from the death of the sole member and director of a one-member company are no different from those for a company with two or more members. Section 72 of the Ordinance provides that the production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate of a deceased person having been granted to some person

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			shall be accepted by the company, notwithstanding anything in its articles, as sufficient evidence of the grant. This section applies to the scenario of one-member company. We do not consider appropriate to further legislate in respect of such a scenario, which may impact on the established framework for the administration of a deceased's estate (as stipulated in the Probate and Administration Ordinance). Moreover, the existing approach under the Ordinance is consistent with those adopted in UK and Australia. Similarly, there is an established framework for dealing with the situation where the sole member and director of a one-member company is adjudged bankrupt or mentally incapable. In the case of bankruptcy, the trustee will take over a bankrupt's property including his interests in a company and may apply to court to order the calling of a meeting to appoint a director for the company. Under the Mental Health Ordinance, the court is given wide powers in relation to control, management and disposal of the property of a mentally incapacitated person. Hence, we do not consider it

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			necessary to further legislate for these scenarios.
Authorization of electronic forms of publicity	HKGCC	To consider amending the relevant provisions, including section 74A, to enable the Registrar to approve web-sites as an alternative to newspapers.	The proposal entails a number of issues such as the public's access to information, who should be responsible for establishing the proposed website and the mechanics of doing so. It is more appropriate to deal with this proposal outside the Bill.
Specified forms	Society of Chinese Accountants & Auditors (SCAA) (CB(1) 2658/01-02)	Not able to comment on the impact of the proposed specified forms unless given the chance to review these forms.	The specified forms would be designed so as to contain the information specified in the corresponding provisions of the Ordinance. The draft forms were circulated earlier this year to the Companies Registry (CR)'s major customers and various professional bodies and their suggestions have been incorporated into the forms, where appropriate. As regards the existing specified form for the annual return (AR1), the Notes for Completion of the form contain a direction that the address to be given by the directors should be the usual residential address. The new specified form contains the same note and an additional direction that the residential addresses of directors have to be given.
Statutory	SCAA	The proposed replacement of statutory	We do not consider that the proposal would

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declaration		declaration by written statement may give the public a wrong impression that there is a relaxation on the accuracy of information lodged with the Company Registry. Given that accuracy of information is of prime importance to certain sections in the Companies Ordinance, it is necessary for the Administration to assess the social impact of such changes. Meanwhile, the public should be made aware of the consequences of making a false statement.	give the public the impression that there is a relaxation in the accuracy of information required to be filed under the Ordinance. Any person making a false statement in such a written statement may be prosecuted under section 349 of the Ordinance and, on conviction, subject to a maximum penalty of $100,000 and maximum imprisonment of 6 months.
Clause 2 Definition of "manager"	Law Society of Hong Kong (LS) (CB(1) 2340/01-02(02)) SCAA	Need to amend the wording to clarify whether "under the immediate authority of the board" includes for example someone who reports directly to the managing director. The definition is too general. Many employees of (SMEs), particularly those with single director, may become	The definition of the term "manager"[1] in clause 2(1)(b) aims to implement the SCCLR's recommendation that the term should mean the rank of executives immediately below and reporting to the board of directors of a company (and not executives at any rank in the company). The definition does not include a person who reports directly to the managing

[1] The term "manager", in relation to a company, means a person occupying a position under the immediate authority of the board of directors but does not include –

(a) a receiver or manager of the property of the company; or
(b) a special manager of the estate or business of the company appointed under section 216.

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		officers as the director concerned normally oversees most of the day-to-day operation of these organizations.	director.
Definition of "shadow director"	Lingnan University (LU) (CB(1) 2610/01-02(02))	There may be circumstances that a person occupying a position under the immediate authority of the board of directors may not be called a "manager".	The definition of "manager" is wide enough to include a person who may not be called a "manager" so long as he occupies a position under the immediate authority of the board of directors.
	Securities and Future Commission (SFC) (CB(1) 2622/01-02(05))	Consideration should be given to expressly excluding bank representatives, who make recommendations for improvement of the way the companies should run their business, from the definition.	We do not consider it necessary to expressly exclude from the definition of "shadow director" bank representatives who make recommendations for improvement of the way the companies should run their business. The proposed definition of the term and the new section 2(2) should have the effect of excluding such bank representatives as they do not give the directors directions or instructions and they act in a professional capacity.
	W H Lam & Company (WHL) (CB(1) 42/02-03(01))	Need to have a clear definition for the term "professional capacity".	In this legislative proposal, we consider it sufficient to rely on the literal meaning of the term "professional capacity". It is worth noting that this term exists in the definition for "shadow director" under section 168C of the Ordinance and other ordinances e.g. Banking Ordinance without a specific definition.

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Definition of "secretary"	DABHK	Need to include a definition for "secretary" to avoid confusion.	Section 158 of the Ordinance requires a company to file with the CR the particulars of a person who serves as a secretary of the company. It is not necessary to define the term in section 2 of the Ordinance.
Clause 4	WHL	The proposed section 4(1) may run the risk of creating more unnecessary work for the Registrar and other relevant authorities in the event that the only director and shareholder of a company cannot be contacted.	In accordance with section 158 of the Ordinance, a company has to notify R of C of the particulars (including the usual residential address) of its director(s) and secretary, and any subsequent changes to the particulars within 14 days after their appointment or the change. This requirement applies to a company, irrespective of whether it has one member or more. Hence, R of C should not have any major difficulty corresponding with the director(s) of a one-member company.
Clause 5	LU	No need to provide for dissenting shareholders to apply to the court to cancel the alteration when the resolution has been passed by the majority. In appropriate circumstances, the dissenting shareholders may invoke section 168A.	This legislative proposal is based on the SCCLR's recommendation that the right of shareholders to apply to the court to annul alterations to the objects clause in a public company's constitution should be repealed having regard to the fact that such dissenting shareholders can always sell their shares in the company. The same factor does not however apply to private companies. Hence, the SCCLR has not recommended repealing the right of the

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	Hong Kong Bar Association (BA) (CB(1) 135/02-03)	Question the rationale for repealing section 8 on the ground that such a provision may permit a minority to impede fundamental business decisions. It is pointed out that such rationale can in principle be applied to many other provisions of the Companies Ordinance with regard to public companies. Besides, the power conferred by section 8 may not be able to impede business decisions because although dissenting shareholders can apply to court for an order of annulment, the court can properly come to view that the application is made in good faith and make such an order as it thinks fit.	shareholders of private companies. In any event, section 168A of the Ordinance can only be invoked if the interest of a shareholder is unfairly prejudiced. Given that the doctrine of ultra vires[2] has been abolished and the memorandum of association of a company is not immutable, the SCCLR considers that it may not be necessary to retain the existing provision to allow the shareholders to apply to the court to annul alterations to the objects clause of a company. Moreover, there are other provisions in the law to deal with transactions tainted with improprieties or self-dealing. In the absence of improprieties, the shareholders of a public company can always sell their stake in the company. Hence, the SCCLR recommends that the right to resort to the court under section 8 of the Ordinance be repealed as regards public companies.
Clause 7	Hong Kong Society of Accountants (HKSA) (CB(1) 42/02-03(03))	Suggest to further amend section 22 to extend the period within which the Registrar may direct a company to change its name from 12 months to five	The existing 12-month period is sufficiently long for the affected companies to notify R of C of the existence of a company which bears a name which is the

[2] Under the doctrine of ultra vires, a contract entered into by a company which is not authorized by its objects is regarded as ultra vires (without authority) and unenforceable.

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		years to prevent possible abuses.	same as or too like a name in the CR's index of company names. Hence, we do not consider it necessary to further extend the period.
Clause 9	LU	The amendment has not added anything new to the existing law since there are many cases which have already clarified the meaning of section 23(1).	This amendment aims to implement the SCCLR's recommendation that it should be made clear in the law that every shareholder has a personal right to sue to enforce the terms of the memorandum and articles of association of the company.
	Federation of Hong Kong Industries (FHKI) (CB(1)2645/01-02)	It is inappropriate to apply new section 23 to cover the situation whereby shareholders, particularly those minority shareholders, in private companies who fail to spell out their rights in joint agreements as this may distort the neutrally applied terms between the shareholders.	This legislative proposal relates to the memorandum and articles of association of the company only and should not affect the joint agreements mentioned.
	Institute of Professional Development (IPD)	While welcoming the introduction of the provision which will bring a degree of clarity in respect of the right of shareholders to take direct legal action to enforce the company memorandum and articles, proposed section 23 as drafted is too broad which may give rise to circumstances where enforcement by a minority shareholder is not in the	This legislative proposal is based on the SCCLR's recommendation that the ordinance should be amended to give every shareholder of a company a right to enforce the terms of memorandum and articles of association of the company. In the interest of shareholder protection, we do not consider it appropriate to restrict the ambit of the proposal as suggested .

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		interests of the company. To this end, there is a need to qualify shareholders' statutory right to enforce the provision. Consideration could be given to making the right of action subject to the reasonability of the behaviour of the shareholder in light of the alternative courses of action available. However, any statutory provision giving the court the right to deny the right of action on the basis of an alternative course of action must be carefully drafted so that it does not amount to a statutory injunction against proposed section 23. Perhaps the court should be bound to exercise its discretion in light of all the relevant circumstances.	
	BA	Query the need to spell out the right of members and company to enforce the terms of the memorandum and articles of association as this has been already provided in the existing section 23 of the Companies Ordinance.	While section 23 of the Ordinance provides that the terms of the memorandum and articles of association of a company are binding on its shareholders, this section does not clearly spell out the right of the shareholders to enforce these terms. The new section 23 will make it clearer that the shareholders are given such a right especially to take proceedings to remedy procedural irregularities.
Clause 10	LU	No need to provide for dissenting	Comments in relation to clause 5 above are

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		shareholders to apply to the court to cancel the alteration when the resolution has been passed by the majority. In appropriate circumstances, the dissenting shareholders may invoke section 168A.	relevant.
Clauses 14 to 17 and 19 to 23	LS Hong Kong Institute of Company Secretaries (HKICS) (CB(1) 2622/01-02(04)) SFC HKGCC	Need to specifically address the consequences of making a false statement. There is no provision dealing with the consequences of making a false statement. The consequences of making a false statement are not set out in the Bill. Disappointed that only minor amendments are proposed in relation to share repurchases. A more comprehensive review should be conducted with a view to simplifying the relevant provisions.	These clauses aim to amend certain provisions in the Ordinance to replace the filing requirement of a statutory declaration or affidavit by the filing of a written statement. Any person making a false statement in such a written statement may be prosecuted under section 349 of the Ordinance and, on conviction, subject to a maximum penalty of $100,000 and maximum imprisonment of 6 months. The proposals put forward by the HKGCC are likely to have implications for shareholders' and creditors' interests. As they touch on an area outside the scope of the Bill, it is more appropriate to deal with the issues raised by the HKGCC outside the Bill.
Clause 25	LS	Suggest to amend sub-clauses (1) and (2) such that notification is still required within 15 days of passing the resolution	To streamline the procedure and simplify the filing requirement, we consider it appropriate to dispense with the existing

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		and, where appropriate, again on the resolution lapsing or becoming unconditional since there may be circumstances where someone searching the public register will want to know the passing of a resolution to increase capital, even if the increase will or may take place at a later date.	requirement for filing a resolution that authorizes an increase in the share capital of a company. Instead, the company would be required to file a notice with the Registrar of Companies (R of C) of the increase within 15 days after the increase takes effect. These legislative changes are in line with the existing filing arrangements for matters relating to share capital such as consolidation of shares, conversion of shares into stock. It is also worth noting that if the resolution in question is passed by way of a special resolution[3], section 117 of the Ordinance still requires the special resolution to be filed.
Clause 26	Hong Kong Association of Banks (HKAB) (CB(1) 2547/01-02(01))	There should be an additional condition such that court confirmation of a reduction of share capital is not required if no cash is paid out of the company. Otherwise, a court confirmation is required to protect creditors.	Under the Ordinance, the court's approval is required for a reduction in a company's share capital. The SCCLR considers that such approval is not necessary where there is no distribution out of the company and shareholders are treated equally and fairly. Accordingly, the SCCLR recommends that no court approval is required for a reduction in a company' share capital arising from a redesignation of par value to a lower amount provided that –
	DABHK	There should be an additional condition that the reduction of share capital shall not directly or indirectly cause outflow	

[3] Where a company's articles of association do not provide for the increase of capital by an ordinary resolution, a special resolution is required to be passed for the increase.

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		of capital from the company.	(a) the company has only one class of shares; (b) all issued shares are fully paid-up; (c) the reduction is distributed equally to all shares; and (d) the reduction is credited to the share premium account. Given that the reduction is credited to the share premium account, there would not be any distribution out of the company since the share premium account is deemed to be the share capital of a company under section 48B. It is worth noting that court approval (as in the case of a reduction in the share capital) is required in respect of any distribution from the share premium account. Hence, we do not consider it necessary to add the condition "no cash is paid out of the company" in the clause.
	Mr Winston POON, SC (CB(1)94/02-03)	The clause as drafted seems to permit the reduction of the capital of a company for any purpose, including the elimination of losses, without the sanction of the Court provided that the	We are reviewing the wording of the clause in the light of Mr Poon's comments.

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		four conditions set out in the provision are satisfied. This has failed to reflect the intention of the recommendation of the Standing Committee on Company Law Reform to ensure that the capital of a company is maintained for the protection of its creditors.	
Clause 31	WHL	The time limit of 10 business days for the completion of a transfer of shares by a public company is too tight. Suggest to extend the time limit to 15 business days or one month.	This legislative proposal is based on the SCCLR's recommendation that a strict time limit (i.e. 10 business days) should be stipulated for the completion of transfer of shares of public companies. The recommendation is made, having regard to the existing requirement of the Stock Exchange of Hong Kong that registration of transfer of shares be completed within 10 business days. Hence, we do not consider it necessary to change the time-limit to 15 business days.
Clause 32	LS HKICS	Need to clarify the rationale for removing the requirement for the certificate to state the amount secured, which is a useful information, particularly to creditors. Query why the requirement for the certificate of registration to state the	We have proposed to dispense with the requirement for a certificate of registration of a charge to state the amount secured, having regard to the experience of the CR. R of C has advised us that 95% of the current charges are "all monies" charges, where the amount cannot be accurately stated. He is often presented with such

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		amount secured should be removed.	verbose and legalistic descriptions of the amounts secured that it is very difficult for him to interpret them and state the essence in the certificates of registration. We do not consider that the requirement to state the amount secured by the charge in the charge certificate serves any real purpose. Interested parties can obtain more comprehensive information by searching the related documents, which are available at the CR for public inspection.
Clause 33	LS HKAB DABHK	Need to clarify the position of a creditor if the company wrongfully files a memorandum of satisfaction. The amendment may give rise to the possibility of a release being entered based on a certificate of the company when in fact the property covered by the charge has not actually been released by the mortgagee or chargee. A certificate of the mortgagee or chargee should be required prior to release. A certificate of the mortgagee or chargee should be required prior to release of property from charge.	The policy intent is that if a specified form in respect of the release of the registered charge is submitted to R of C by a person other than the mortgagee or chargee, it has to be accompanied by a certified copy of the document evidencing the release of the registered charge. Such document will either be sealed or signed by an authorized signatory on behalf of the chargee or mortgagee confirming his agreement to the release of the charge. We are reviewing the wording of clause 33 to see if this policy intent should be made more explicit.

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Clause 34	DABHK	Instead of applying to court for extension of time for registration and rectification of register of charges, consideration should be given to allowing applications to be filed with the Registrar of Companies.	As the extension of time for registration, and rectification of the register of charges may prejudice the position of a company's creditors, shareholders and those who have business transactions with the company, we consider it more appropriate for the court to continue to deal with the concerned applications.
Clause 38	LS Mr David Webb Stephenson Harwood & Lo (SH&L) (CB(1) 2622/01-02(01))	Question the need for new section 95A and the consequences in the event of non-compliance. Fail to see the relevance of recording the number of shareholders. The requirement under new section 95A may not be necessary as any transfer or repurchase should have been recorded in the register of members. One can	If the number of members of a company falls to one or increases from one to two or more, the company has to enter a statement in respect of such event into the company's register of members upon its occurrence, which is made available for public inspection. Hence, this arrangement can enhance the transparency of a company having one member in the interest of the public and, in particular, those who have business transactions with the company. Any company making default in complying with the above requirement may be prosecuted and, on conviction, subject to a maximum penalty of $25,000 and maximum daily default fine of $700. The existing legislative provisions relating to the transfer of shares do not require a one-member company to enter into its register of members a statement in respect

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		check the number of members in a company by looking at the register.	of its number of members falling to one or increasing from one to two or more, upon the occurrence of such event. As explained above, the proposed arrangement can enhance the transparency of the company.
Clause 42	HKAB	It is not possible to have a meeting of one person. Suggest to amend the clause to the effect that a written resolution or record of a decision be treated for all purposes of the Companies Ordinance and any Articles of Association as being equivalent to a resolution passed at a duly convened and quorate meeting.	Clause 42 provides that one member constitutes a quorum for a meeting of a company having only one member. Clauses 44 and 55 recognize respectively the decisions made at a meeting where a company has one member or director. It is also worth noting that clause 2(3) provides that any provision in the Ordinance should apply with necessary modifications to cater for the situation where a company has only one member or director. Hence, we do not see a need to further amend the Ordinance as suggested.
	Mr David Webb	Fail to see the need to provide for a quorum for a meeting of a company having only one member since meetings, by definition, require at least two participants. In this connection, a written resolution of that member will have the same effect as a meeting of shareholders.	This legislative proposal aims to cater for the scenario in which the sole member of a company wishes to invite the secretary, directors, to attend a general meeting or a general meeting is needed to be held to decide on matters like removal of a director or an auditor.

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	DABHK	Suggest to amend the clause as it is not possible to have a meeting of one person.	
Clause 43	DABHK	Consideration should be given to reviewing proposed section 115A(2)(b) on the requirement for requisitionists to hold paid up shares of not less than $2,000 per person	The existing reference to the paid-up sum is relatively simple and easy to understand. We do not consider it necessary to introduce the concept of net assets, which appears to change in value from time to time.
Clause 44	HKAB	Refer to comments in respect of Clause 42	Comments in relation to clause 42 above are relevant.
	DABHK	Refer to comments in respect of Clause 42.	
	SH&L	A delay of 30 days in filing the written resolution is too long and will be subject to abuse. Suggest to require filing to be done as soon as possible. In line with new section 153C relating to proofs of decisions of single director, consideration should be given to providing that such filing will be sufficient proof of the actions taken by the relevant member.	This legislative proposal is adopted from the UK Companies Act 1985 (section 382B). We need a specific timeframe for the filing. The proposed 30 days is meant to give sufficient time for the filing to be done. We are reviewing the need to amend the clause along the lines of the new section 153C.
Clause 53	SCAA	It is expected that many SMEs will have only one director after the	In accordance with the new section 153A(4), where the number of directors of

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		enactment of the Bill. As the single director will have total control of the company and the chance of the number of directors being reduced to zero is greatly increased, the remaining officers of the company viz the Secretary or the Manager will have practical difficulties, if not impossible, to put the board back from zero to one. Therefore, it is not fair nor appropriate to hold these officers liable under proposed section 153A(3).	a private company is reduced to zero by reason of the office of any director being vacated, the company or any officer shall not be liable for any default under the new section 153A(3) for a period of two months beginning on the day on which the office is vacated. A general meeting can be convened during this period to appoint a new director. Such arrangement would be analogous to the present situation where the number of directors of a company falls to below 2.
Clause 54	LU	Need to clarify the definition of "alternate director". If the articles of a company provide for the appointment of an alternate director and the board of directors approves the appointment, there is no reason why an alternate director so appointed shall be deemed to be the agent of the director who appoints him, rendering the director concerned liable for any tort committed by the alternate director.	In this legislative proposal, it is sufficient to rely on the literal meaning of the term "alternate director". As the alternate director is appointed by the director and not the board of directors, the director should be vicariously responsible for the acts or omissions of his alternate (except in relation to an offence). It is worth noting that this deeming provision is subject to the contrary provisions in the articles of the company.
	SH&L	Whether the ambit of section 153B should be restricted such that a director will not be liable for the acts of his alternates if he has taken reasonable care to appoint a competent person to	We agree with the SCCLR's view that a director should be vicariously responsible for his alternate unless there are contrary provisions in the articles of the company. Hence, we do not consider it appropriate to

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		act as the alternate and the alternate's actions which give rise to the liability have been taken independently of the director appointing him.	restrict the ambit of section 153B as suggested.
	SFC	The proposed provision seems to defeat the policy objective of improving the standard of corporate governance by holding directors responsible for the acts and omissions of their alternates.	This legislative proposal is based on the SCCLR's recommendation. As a matter of principle, the SCCLR considers that a director should be vicariously responsible for his alternate. However, given the practical difficulties pointed out by practitioners and businessmen, the SCCLR agrees that it is more desirable to make it a default rule that a director should be responsible for the acts and omissions of his alternate, unless there are contrary provisions in the articles of the company.
	HKSA	Query the all-embracing nature of the proposed provision since there may be situations in which a company director in practice has no control over the appointment and actions of the person who is his alternate. It is therefore inequitable to make the director vicariously liable for torts committed by his alternate. Besides, the term "alternate director" is not defined under the Ordinance.	Insofar as the alternate director is appointed by the director, we agree with the SCCLR's view that the director should be vicariously responsible for the acts or omissions of his alternate (except in relation to an offence). As explained above, we do not consider it necessary to define the term "alternate director".

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	BA	The proposed section 153B does not bear out paragraph 8 of the LegCo Brief that the director should be vicariously responsible for the acts and omissions of his alternate except in relation to an offence. Besides, if the object of proposed section 153B is to improve corporate governance, it should be limited to torts against the company. However, the proposed section as drafted does not confine itself to torts committed by the alternate director against the company. On the other hand, it does not apply to other wrong-doings such as misfeasance and breach of fiduciary duties.	It is our policy intent to provide that a director of a company who appoints an alternate director shall be vicariously liable for any tort committed by his alternate director while acting in the capacity of an alternate director but not the criminal liability arising from such tortious act or omission. The new sections 153B(2) and 153B(1)(b) aim to give effect to this policy intent. In the interest of better corporate governance, we consider it inappropriate to confine the scope of the "tort" in section 153B(1)(b) to that against the company. Under the common law, the director of a company (being a principal) is not responsible for wrongdoings such as misfeasance, breach of fiduciary duties of his alternate director (agent). Our policy intent is not to go beyond the common law.
Clause 55	HKAB DABHK	Refer to comments in respect of Clause 42. Refer to comments in respect of Clause 42.	Comments in relation to clause 42 above are relevant.
Clause 56	Mr David Webb	Fail to see the sole director of a	This legislative proposal is adopted from

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		company should be prohibited from acting as Secretary of the company. The proposed provision imposes an unnecessary burden on the sole owner and director of a very small business who must find a third party to act as Secretary, which will inevitably incur expenses.	section 283 of the UK Companies Act 1985. It goes some way to alleviating the problems arising from the death of the sole director/member who has not made a will regarding the administration of the company affairs.
	DABHK	The proposed prohibition for the sole director to act as secretary of the company may incur additional cost which in turn may reduce the competitiveness of the company.	
Clause 57	LU	Instead of calling for a special notice, consideration should be given to specifying a longer notification period if the 14-day notice period is deemed insufficient.	The requirement for giving a special notice in respect of a resolution to remove a director is the same as that for the removal of an auditor under the Ordinance.
	HKSA	To enhance the effectiveness and flexibility of the proposed provision, consideration should be given to allowing the requirement regarding special notice to be waived with the unanimous consent of the members of the company.	Under the existing provisions of the Ordinance, a company may by special resolution remove a director and the notice of such resolution has to be given to the shareholders at least 21 days before the meeting at which the resolution is moved. On the basis of the SCCLR's recommendation, we propose to replace the special resolution requirement with

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			ordinary resolution requirement. In this context, we have also adopted a similar approach as with the removal of an auditor and a special notice of the intended resolution to remove a director is required to be given to the members at least 21 days before the meeting at which the resolution is moved. This notice requirement is the same as that for a special resolution.
Clause 58	HKAB	The phrase "take part" under new section 157H(4) is not clear and can catch a transaction which does not involve any giving of credit to the director concerned. Need to amend the proposed section such that a company is prohibited from taking part in an arrangement if it involves some form of the giving of credit to the director concerned. Need to review the definition of "credit transaction" under new section 157H(7). The way it is drafted can cover transactions which do not necessarily involve any credit, such as ordinary contracts for sale of land and	The SCCLR considers that the term "loan" in relation to provision of financial assistance by a company to its directors is inadequate to cover modern forms of credit. It notes that the UK has amended its laws and extended the prohibition to credit transactions and quasi-loans and recommends that the Ordinance should be extended to cover in generic terms the provision of financial assistance. Against the above background, this clause is drafted, on the basis on the relevant provisions in the UK legislation. As regards the concern over the terms "credit transaction" and "take part in an arrangement", we intend to couch the clause in such terms to cover all possible scenarios where "financial assistance to directors" is involved. For example,

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		tenancy agreements of property. The former are conditional while rent for the latter is usually payable monthly and in advance, thus do not involve the extension of any credit.	leasing goods or land to a director with periodic payments could involve "financial assistance to directors" if the payments are set at a level not available in the commercial markets. On the term "conditional sales agreement", we are considering whether it should be defined in the Bill for the sake of clarity.
		New section 157HA does not seem to adequately provide in all cases an exception to the provision of new section 157H(2) or (4).	Both new sections 157H(2) and (4) prohibit a company from taking certain actions which would amount to a contravention of the new section 157H(1) in relation to the prohibition of financial assistance to directors. Such prohibition is however subject to certain exceptions in the new section 157HA. Reading sections 157H(2) and (4) together with section 157HA, it is clear that the exceptions in new section 157HA apply equally to new sections 157H(2) and (4).
	SFC	New section 157H(1)(d) does not extend to loans made to a company in which directors of the holding company (of the company making the loan etc) have a controlling interest.	The term "indirectly" in section 157H(1) should be wide enough to cover the loans in question.
	FHKI	The requirement for private companies to first obtain the approval of	We consider that the proposed prohibition would not impair the efficient functioning

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		shareholders before they can make loans to their directors is likely to impair the efficient functioning of companies, particularly those family-owned SMEs. It is therefore recommended that private companies with shareholders' fund below a threshold be exempted from the requirement.	of companies as it only applies to loans made to a director by a company but not vice-versa, and the requirement to obtain shareholders' approval already exists in the Ordinance.
	HKSA	Need to clarify whether there is any empirical evidence as to what will constitute a reasonable threshold. If there is a need to specify a ceiling, consideration should be given to devising a formula that will have regard to the size of transactions which are usual for a particular company. Otherwise, the proposed provision may have the effect of preventing companies from entering into a normal arm's length transaction with its directors.	The ceiling of $500,000 in respect of the financial assistance given to a director of a company, the ordinary business of which includes provision of such financial assistance, is a reinstatement of a similar requirement in the existing section 157H of the Ordinance.
	DABHK	Need to amend new section 157H(7) to prohibit directors of two companies acting as guarantor for each other. Directors of a company should not transfer their loans to the company through transaction.	The new section 157H(4) aims to cover the back-to-back transactions and the term "indirectly" in the new section 157H(1) should be wide enough to cover the loans transferred by a director to his company.

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Clause 63	HKAB	Refer to comments on "credit transaction" under section 157H of Clause 58.	Comments in relation to clause 58 above are relevant.
	SFC	It is not clear as to who will be deemed to be a person "connected with a director of the company" under new sections 161(B)(1)(b), 3(a) and 12(a)	We are reviewing the need to define the phrase "connected with a director of the company" in the new section.
	WHL	Need to clearly define the phrase "a person connected with a director of the company" under section 161B(12)(a) to avoid possible confusion.	
	HKSA	The proposed disclosure requirements can be unduly onerous and in practice overload financial statements with details that will not be useful to most users. Suggest to adopt the disclosure requirements similar to those in the Hong Kong Statement of Standard Accounting Practice on Related Party Disclosure (SSAP 2.120).	The proposed disclosure requirements are a reinstatement of similar requirements in the existing section 161B of the Ordinance. Hence, we do not consider it appropriate to amend this clause as suggested.
Clause 65	HKAB	Question why the requirement for a company which has only one shareholder and enters into a contract with that shareholder, who is also a director, to set out the contract concerned in a written memorandum	It is worth noting that the Ordinance does not impose a general obligation on a company to keep records of the contracts between the company and its members. The purpose of this clause is to enhance the transparency of a company with one

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		which is kept with the company's books does not apply to contracts entered into in the ordinary course of business.	member who is also a director of the company by requiring that proper records be kept for contracts (excluding those entered into in the ordinary course of the company's business) between the member and company. We do not consider that the clause should go further than that; otherwise, an onerous burden will be unnecessarily imposed on such company, thereby discouraging the use of this incorporation vehicle.
	HKSA	Need to clarify the purpose of introducing new section 162B for companies with one member.	
Clause 66	HKAB	It is questionable whether it is correct that the company should be entitled to purchase directors' and officers' liability insurance for the benefit of auditors and covering costs of defending proceedings in respect of fraud.	The clause is based on the recommendation of the SCCLR. It does not seek to impose an obligation on a company to purchase insurance for its auditor and simply gives the company an option to do so under certain circumstances. Hence, we do not see the need to exclude the "auditors" from the clause.
	LU	Need to clarify the position where a company purchases insurance against any liability to the company on behalf of its officers.	We note that the submission supports this legislative proposal which aims to clarify the position regarding a company's purchase of insurance for its officers.
	HKSA	Need to clarify the purpose of new section 165(3)(b).	This legislative proposal is based on the SCCLR's recommendation that a company may, if it so wishes, obtain insurance for directors and officers to cover their
	Ms Amy Yung	The protection under which a company	

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	Islands District Council Member	should be allowed to obtain insurance for directors and officers to cover their liabilities to the company and other expenses incurred in defending any proceedings taken against them for negligence, default, breach of duty and trust (including fraud) is too wide for the directors who have fiduciary responsibility towards the company and the shareholders.	liabilities to the company and other parties except for fraud, and the insurance cover could include the legal expenses incurred in defending any proceedings taken against them for negligence, default, breach of duty and breach of trust (including fraud) (as provided in the new section 165(3)(b)).
	DABHK	To avoid possible abuse, any decision to purchase insurance under proposed section 165(3)(b) should be made by a special resolution.	Under the new section 165, a company may obtain insurance for directors and officers to cover their legal expenses incurred in defending any proceedings taken against them for fraud but not the liabilities in respect of fraud. Given such scope of the insurance cover, we do not consider it necessary to impose the proposed special resolution requirement. This approach is consistent with that in the UK.
Clause 70	DABHK	Consideration should be given to raising the "specified sum" from $10,000 to $50,000.	This legislative proposal aims to bring the minimum amount of petitioning debt in line with that of the current bankruptcy law. It is worth noting that there is no linkage between this amount and the maximum amount of claim that can be

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			handled by the Small Claims Tribunal.
Clause 76	LS HKICS SFC	Need to set out the consequences of making a false statement. There is no provision dealing with the consequences of making a false statement. The consequences of making a false statement are not set out in the Bill.	Comments in relation to Clauses 14 to 17 and 19 to 23 above are relevant.
Clauses 79(1) to (5)	LS HKICS SFC	Need to set out the consequences of making a false statement. There is no provision dealing with the consequences of making a false statement. The consequences of making a false statement are not set out in the Bill.	Comments in relation to Clauses 14 to 17 and 19 to 23 above are relevant.
Clause 86	LS HKICS SFC	Need to set out the consequences of making a false statement. There is no provision dealing with the consequences of making a false statement. The consequences of making a false	Comments in relation to Clauses 14 to 17 and 19 to 23 above are relevant.

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		statement are not set out in the Bill.	
Clause 108	HKSA	Need to clearly define the phrase "electronic means" by reference to examples of more common modes of communication.	In this legislative proposal, we consider it sufficient to rely on the literal meaning of the term "electronic means". It is worth noting that this term exists in a number of ordinances without a specific definition e.g. Banking Ordinance.
Others	Baker & McKenzie (CB(1) 2622/01-02(02))	Comments mainly on drafting aspect which shall be considered during the clause-by-clause examination of the Bill.	We are considering these comments and will revert to the Bills Committee before the clause-by-clause examination of the Bill.
	Consumer Council (CB(1) 2622/01-02(03))	Consideration should be given to including in the Bill a provision to abolish private company corporate directors. This will assist in identifying the actual persons responsible for the actions of companies.	In drafting the Bill in relation to the abolition of corporate directors, we have become aware of the view that this legislative proposal would result in adverse implications for business, in particular the ability of secretarial firms to form companies quickly and companies solely concerned with asset management. However, on the other hand, there is no true accountability or transparency in a company which has corporate directors. In view of these considerations, we have initiated another round of consultation with the concerned parties on the matter and are examining the submissions received with a view to deciding how best to take the
	DABHK	To avoid evasion of personal liability, section 154A should be amended to abolish private company corporate directors.	

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			matter forward.
	FHKI	Express concern that the proliferation of new regulations on business will not only incur additional compliance cost on companies, particularly those SMEs, but also erode their competitiveness in the world market. Caution that an overly regulated business environment will defeat the entrepreneurial spirit and deter overseas investors from setting up companies in Hong Kong.	It is one of our guiding principle not to impose an unnecessary burden on the companies when drawing up any legislative amendments to the Ordinance.
	DABHK	Consideration should be given to amending section 157C to impose an age limit on directors of a company unless otherwise provided under the articles of association; such an appointment is made by resolution; or the company is a private company.	The proposal appears to be too restrictive. A person above the age limit (70 years old as proposed by DABHK) may perform very well as a director.

Financial Services Branch
Financial Services and Treasury Bureau
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