

**Bills Committee on
Companies (Amendment) Bill 2003**

**Follow-up actions arising from the discussion
at the meeting on 6 May 2004**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 6 May 2004.

**Continuing obligation in respect of authorized representative –
Return to be delivered to Registrar where documents, etc. altered**

(a) to clarify the policy intent of the provisions under sections 333A, 333B and 335 and to review the proposed amendments in respect of the registration and notification requirements and to discuss with the Hong Kong Society of Accountants the proposed amendments

2. The intention of the Sub-Committee appointed by the SCCLR was to streamline the existing provisions with regard to the appointment of authorized representatives (AR) and the notification requirements and, in particular, to provide the AR with the ability to terminate his appointment since this power is currently only available to the company itself under the existing provisions of the Companies Ordinance (CO). The continuing obligation to maintain an AR in the existing section 333A(1) is a provision unique to Hong Kong.

3. The principal policy intention is to require a non-Hong Kong company to maintain at all times an AR to accept service of process and notices on its behalf and for the name of that AR to remain on the record for a certain period (presently 3 years, to be reduced to 1 year according to the present proposals) after the non-Hong Kong company has ceased to have a place of business in Hong Kong.

4. It is considered that this objective may be achieved by amending the relevant provisions in the Bill along the lines of the corresponding provisions in the Australian Corporations Act 2001 (SS. 601CF, 601CG and 601CH) which are more straightforward and do not impose a continuing obligation to maintain an AR (local agent in Australia). The essential aspects of the Australian provisions are as follows:

- An obligation to appoint a person as a local agent;
- A provision restricting registration of the foreign company under Division 2 without at least one local agent having been appointed by the company;
- An obligation to appoint a new local agent within 21 days of a person formerly registered as a local agent ceasing to act as such so long as the foreign company continues to have a place of business;
- A person appointed as a local agent shall be the local agent of the foreign company until either:
 - (a) the local agent ceases to be a local agent after having served notice of termination or
 - (b) dies or ceases to exist.
- A local agent may be removed by either the foreign company or the local agent lodging a written notice stating that the person's appointment as a local agent has terminated or will terminate on a specified date.
- Where such a notice has been lodged, the local agent will cease to be the local agent at the end of either :
 - (a) 21 days from the date of lodgment or
 - (b) the date specified in the notice whichever is the later.

5. A copy of the relevant Australian provisions (sections 601CF, 601CG and 601CH) are attached at **Annex A**.

6. We propose to remove section 333A in the Bill and include an obligation for non-Hong Kong companies to appoint a new AR along the lines of the Australian provisions. However, in relation to the obligation to appoint a new AR within a certain period of time after a previous AR ceases to act, Australia and UK allow 21 days, New Zealand allows 20 days and Singapore allows one month. We will consider adopting a period of one month as in the case of Singapore.

7. We have discussed the proposal to amend the Bill along the lines of the Australian provisions with the Hong Kong Society of Accountants (HKSA) which has indicated its agreement in principle, subject to sight of the proposed form of wording. A copy of the HKSA's letter dated 11 May 2004 is attached at **Annex B**.

Notice of commencement of liquidation and of appointment of liquidator

(b) to review the 14-day notice requirement under proposed section 337A with particular regard to members' concern that service of the petition for winding-up to the non-Hong Kong company concerned may not enable it to comply with the 14-day notice requirement. In this connection, the Administration is requested -

(i) to check the respective arrangements adopted in Hong Kong and other major jurisdictions for serving the petition for winding-up on the company concerned; and

Hong Kong

8. So far as the service of a winding up petition commenced under Part V of the CO is concerned, Rule 25 of the Companies (Winding-Up) Rules provides as follows -

"Every petition shall, unless presented by the company, be served upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer, or servant of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any), appointed for the purpose of winding up the affairs of the company. (See Forms 5 & 6)"

9. Although Rule 25 does not specifically require service of the petition on the company within a specified time, the petition is usually served on the company very shortly after it has been issued so as to bring it to the attention of the company as soon as possible. As the date of presentation of the petition, which determines the date of commencement of the winding up is significant in relation to the legality of future actions taken by the company, it is in the interests of the petitioner to serve the petition as soon as possible. Further, Rule No. 24 of Companies (Winding-Up) Rules requires a petition to be gazetted at least 7 days before the petition is heard.

Australia

10. Section 465A provides as follows:

"Notice of Application.

465A. A person who applies under section 459P, 462 or 464 for a company to be wound up must:

- (a) lodge notice in the prescribed form that the application has been made; and
- (b) within 14 days after the application is made, serve a copy of it on the company; and
- (c) advertise the application as prescribed by the rules."

New Zealand

11. Rule 700L of the High Court Rules provides as follows:

"Every statement of claim filed pursuant to Rule 700C shall, unless the plaintiff is the defendant company, be served, together with the verifying affidavit and notice of proceeding, upon the defendant company."

12. By section 700L(3), it is provided that service of the statement of claim shall be effected not less than 21 days before the date of hearing appointed or fixed under Rule 700F.

13. Pursuant to Rule 700C(1), every application to the court to put a company into liquidation under section 211(2)(c) of the Companies Act 1955 or section 241(2)(c) of the Companies Act 1993, as the case may be, shall be made by statement of claim in Form 64A in accordance with the Companies Winding up Rules.

Singapore

14. The position regarding service of a compulsory winding up petition in Singapore is couched in virtually identical terms to Rule 50 of the Companies (Winding up) Rules (Cap 32H) and thus does not specifically require service of the petition on the company within a specified time. Similarly, by Rule 24, each petition is required to be advertised in the Gazette at least 7 days before the hearing.

(ii) to compare the notification requirement under proposed section 337A with those adopted in other major jurisdictions

15. The notification requirement in respect of commencement of liquidations in other jurisdictions is as follows:

UK

16. There is no similar provision in the UK Companies Act 1985 for overseas companies which have established a place of business in the UK.

Australia

17. Section 601CL(14)(a) of the Australian Corporations Law provides as follows -

"Cessation of business etc

601CL (1) ...

601CL (14) [Appointment of liquidator] Where a registered foreign company commences to be wound up, or is dissolved or deregistered, in its place of origin:

- (a) each person who, on the day when the winding up proceedings began, was a local agent of the foreign company shall, within the period of 1 month after that day or within that period as extended by the Commission in special circumstances, lodge or cause to be lodged notice of that fact and, when a liquidator is appointed,

- notice of the appointment; and
 - (b) the Court shall, on application by the person who is the liquidator for the foreign company's place of origin, or by the Commission, appoint a liquidator of the foreign company.
- 601CL (15)... "

New Zealand

18. No similar provision exists in the New Zealand Companies Act 1993.

Singapore

19. Section 377(2) of the Singapore Companies Act provides as follows -

"377. Cesser of business in Singapore

- (1) ...
- (2) If a foreign company goes into liquidation or is dissolved in its place of incorporation or origin -
 - (a) each person who immediately prior to the commencement of the liquidation proceedings was an agent shall, within one month after the commencement of the liquidation or the dissolution or within such further time as the Registrar in special circumstances allows, lodge or cause to be lodged with the Registrar notice of that fact and, when a liquidator is appointed, notice of such appointment; and
 - (b) the liquidator shall, until a liquidator for Singapore is duly appointed by the Court, have the powers and functions of a liquidator for Singapore.
- (3) ... "

20. To address Members' concerns that a non Hong Kong company may not have sufficient time to file notice of the commencement of proceedings with the CR pursuant to the proposed section 337A (i.e., within

14 days of the commencement of proceedings), we may consider either lengthening the period to one month from the date of commencement, as in the case of the Australian and Singaporean provisions or simply reinstating the existing provision in section 337A of the CO.

Notification requirement on non-Hong Kong companies regarding the appointment of receivers or managers

(c) to clarify whether oversea companies are currently required to notify the Companies Registrar of the appointment of receivers or managers for the winding of the non-Hong Kong companies, and if so, to advise the relevant provisions and requirements

21. Notification of the appointment of receivers and managers in respect of non-Hong Kong companies is already required under section 87(1) of the CO since, by virtue of section 91(1), the provisions of Part III of the CO are extended to charges on property in Hong Kong which are created or acquired by non-Hong Kong companies which have a place of business in Hong Kong.

**Certified copies of documents required to be delivered under Part XI
Translations**

(d) With reference to the powers conferred on justices of the peace (JPs) under the Justices of the Peace Ordinance (Cap. 510), to check whether JPs are authorized to certify copies of documents and translations of documents under sections 3 and 6 of the Companies (Forms) Regulations

22. Section 5(1) of the Justices of the Peace Ordinance (Cap 510) provides as follows -

"(1) The functions of a justice of the peace shall be-

(a) to visit any custodial institution or detained person;

(b) to take and receive declarations and to perform any other functions under the Oaths and Declarations Ordinance (Cap 11); and

(c) in the case of a justice of the peace appointed under section 3(1)(b), to serve as a member of any advisory panel.

- (2) A justice of the peace appointed or nominated under any Ordinance to perform functions under subsection (1)(a) or (c) shall exercise such powers and perform such other functions as may be conferred or imposed on him by such Ordinance.
- (3) A justice of the peace shall perform such other functions as may be imposed on him from time to time by the Chief Executive. "

23. Apart from section 5(1), there is no other provision in Cap. 510 that deals with the functions of a JP. As certification of documents and of the competency of the translators of such documents is not incidental to any of the functions expressly given to a JP under section 5(1), it is considered that such certification is not within the functions given to a JP under Cap. 510. Further, there is no current provision in any ordinances of Hong Kong which authorises JPs to certify documents and the competency of translators of such documents to be delivered under the corresponding ordinances. Therefore, we prefer to keep the proposed amendments as in the Bill.

Financial Services Branch
Financial Services and the Treasury Bureau
May 2004

Australian Corporations Law

Appointment of local agent

601CF(1) [Power of appointment] A foreign company may at any time appoint a person as a local agent.

601CF(2) [Required for registration] The Commission shall not register a foreign company under this Division unless the foreign company has at least one local agent in relation to whom the foreign company has complied with section 601CG.

601CF(3) [Company to appoint new agent] Where:

- (a) because a person ceased on a particular day to be a local agent of the foreign company, a registered foreign company has no local agent; and
- (b) the foreign company carries on business, or has a place of business, in Australia;

the foreign company shall, within 21 days after that day, appoint a person as a local agent.

Local agent: how appointed

601CG(1) [Memorandum of appointment or power of attorney duly executed] A foreign company that lodges a memorandum of appointment, or a power of attorney, that is duly executed by or on behalf of the foreign company and states the name and address of a person who is:

- (a) a natural person or a company;
- (b) resident in Australia; and
- (c) authorised to accept on the foreign company's behalf service of process and notices;

shall be taken to appoint that person as a local agent.

601CG(2) [Copy of document authorizing execution] Where a memorandum of appointment, or a power of attorney, lodged under subsection (1) is executed on the foreign company's behalf, the foreign company shall, unless it has already done so, lodge a copy, verified in writing in the prescribed form to be a true copy, of the document authorizing the execution.

601CG(3) [Copy to be deemed original] A copy lodged under subsection (2) shall be deemed for all purposes to be the original of the document.

601CG(4) [Written statement by local agent] A foreign company that

appoints a local agent shall lodge a written statement that is in the prescribed form and is made by the local agent.

601CG(5) [Cessation of appointment] A person whom a foreign company appoints as a local agent is a local agent of the foreign company until the person:

- (a) ceases by virtue of section 601CH to be such a local agent; or
- (b) dies or ceases to exist.

Local agent: how removed

601CH(1) [Notice of termination] Where a person is a local agent of a foreign company, the foreign company or the person may lodge a written notice stating that the person's appointment as a local agent has terminated, or will terminate, on a specified day.

601CH(2) [Date of cessation] Where a notice is lodged under subsection (1), the person ceases to be a local agent of the foreign company at the end of:

- (a) the period of 21 days beginning on the day of lodgment; or
- (b) the day specified in the notice;

whichever is the later.

HONG KONG SOCIETY OF ACCOUNTANTS

(Incorporated by the Professional Accountants Ordinance, Cap. 501)

Annex B香
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計**BY FAX AND BY POST**
(2869 1007)Your Ref.: (1) in CR/HQ/8/1/59 XI
Our Ref: C/EPLM, M27410

11 May 2004

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Ms. Dorothy Silkstone,
Companies Registry,
14th Floor, Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear Ms. Silkstone,

Companies (Amendment) Bill 2003

Thank you for your letter attaching an extract of the Australian Corporations Law dealing with the equivalent in Australia of authorised representatives (ARs).

It would appear that something along the lines of the Australian provisions could, in principle, resolve the concern expressed by the Society in our letter of 3 May 2004 to the Financial Services Branch, regarding a possible inconsistency between the continuing obligation under section 333A of the Companies Ordinance and the requirements of section 335(1).

As we discussed, there would need to be some adaptation of the Australian provisions as they focus upon the date of appointment of a new AR to replace an AR who ceases to act as such, whereas the corresponding Companies Ordinance provisions are linked to the date at which notifications of the details of a new AR are provided to the Companies Registry.

Yours sincerely,

PETER TISMAN
TECHNICAL DIRECTOR
(BUSINESS MEMBERS & SPECIALIST PRACTICES)

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