

Submission No. 179

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Mrs Regina Ip
Secretary for Security
Security Bureau
6/F, Main and East Wings
Central Government Offices
Hong Kong

Dear Madam,

National Security (Legislative Provisions) Bill

I am writing to draw to your attention a number of serious flaws in the proposed amendments to be introduced to the above Bill. For the avoidance of doubt, my objection is to the entire Bill but my particular concern is that the proposed application of the proscription mechanism to organisations which have hitherto been completely outside the provisions of the Societies Ordinance is ill-conceived, done without any proper regard for the particular statutory regimes which govern those organisations and, most alarmingly, without any consideration for the rights of innocent third parties who may have had dealings with an organisation (such as supplying goods or services to it) which is then dissolved or whose registration is cancelled.

Since these amendments have been introduced at the very last minute by the Government, it is simply impossible for detailed consideration to be given to the implications of these amendments in the time available. I have endeavoured nonetheless to set out in the attached note some of the fundamental problems with the proposals

which I have already discerned. I should point out that I specialise in Company Law and insolvency. I was, for ten years, a member of the Insolvency Sub-Committee of the Law Reform Commission of Hong Kong and am a member of the Standing Committee on Company Law Reform which has not been consulted on any of these proposals.

Finally, may I enquire to what provision the 1st sentence in paragraph 6 of Paper No. 73 dealing with Assets of a Proscribed Organisation refers? Neither the Schedule to the existing Bill nor the proposed Schedule 2 in the proposed amendments contains an amendment to the Companies Ordinance. I am sure that if this is a mistake, you would wish to draw this to the attention of the Legislative Council Committee considering the Bill.

Yours sincerely,



Winston Poon, QC

WP/dc

Encl.

cc. Mrs Sharon Tong, Clerk to Bills Committee on National Security (Legislative Provisions) Bill

**Note on paragraphs 1 and 2 of Schedule 2 to the
National Security (Legislative Provisions) Bill**

Paragraphs 1 and 2 of Schedule 2 to the National Security (Legislative Provisions) Bill provide for the dissolution respectively of registered and unregistered companies under the Companies Ordinance which are proscribed under section 8A of the main Ordinance. Paragraphs 2 and 3 (under the section entitled "Current position under the Bill") of Paper No. 73 concerning the "Assets of a Proscribed Organisation" in support of the Bill declare that "the Bill does not contain any express provision dealing with the assets of the proscribed organisation" as "the existing law is able to deal adequately with the winding up of a proscribed organisation and distribution of its assets."

Registered Companies

Paragraph 1(1) of Schedule 2 to the Bill states that the name of a company shall be struck off by the Registrar of Companies if it is proscribed under section 8A of the main Ordinance. Sub-paragraph (2) of paragraph 1 stipulates that on the publication in the Gazette of the notice of the striking off, the proscribed company shall be dissolved. Sub-paragraph (3) empowers the Registrar to apply to the Court to wind up the struck off company and sections 360D to 360M of the Companies Ordinance shall

then apply as if it is a company struck off the register under section 360C of the same Ordinance.

Part V of the Companies Ordinance comprising sections 169 to 296 contains provisions for the winding up of registered companies, whether by order of the Court or voluntarily. Section 360D of the Companies Ordinance identifies the provisions in Part V which shall not apply to the winding up of a company struck off the register and section 360G sets out the sections in the same Part of the Ordinance applicable to the winding up of this type of companies.

By section 360E(1) of the Ordinance, on the dissolution of a company which has been struck off the register, "all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (...) shall vest in the Official Receiver." The next sub-section provides for the priority of payments on the winding up; creditors of the company are entitled to share in its assets after the payments of certain fees, costs and expenses and any surplus will be distributed to its members. The rationale for vesting in the Official Receiver "all property and rights" of the struck off company is that upon its dissolution, the company, being a legal entity, no longer exists at law and there must be someone to assume control of those assets and rights pending their distribution or exercise in the course of winding up its affairs.

It should be noted, however, that there is no mention in section 360D to 360M of vesting the liabilities of the struck off company in the Official Receiver. Whilst section 360I of the Companies Ordinance enables proceedings pending against a dissolved company to be continued against the Official Receiver, it is cold comfort to those creditors who has not yet taken or able to take action against the company or towards whom liabilities incurred by the company have not yet accrued or crystallised.

If a creditor is entitled to make a claim against the dissolved company, he will have no recourse since section 290 of the Companies Ordinance enabling the Court to declare the dissolution of a company to have been void so as to enable the commencement of proceedings against it has been expressly removed from the scheme by section 360D. As the Official Receiver does not assume the liabilities of the dissolved company, section 360K(5), which empowers an aggrieved person to apply to the Court to reverse or modify the act or decision of the Official Receiver, will not come to his aid either.

The defect of section 360E(1) in this respect should be contrasted with section 198 in Part V of the Companies Ordinance which provides that on the vesting of the property of a company which has been wound up in its liquidator, the liquidator may, upon providing indemnity satisfactory to the Court, "bring or defend in his official name any act or other legal proceeding which relates to that property...", thus implicitly acknowledging that the liquidator may be sued by persons having an interest in that

property. To cure this defect, section 290 of the Ordinance as removed by section 360D may have to apply to the winding up of a registered company which has been dissolved.

Unregistered Companies

Paragraph 2(1) of Schedule 2 to the Bill provides, again, for the dissolution of an unregistered company within the meaning of section 326(1) of the Companies Ordinance which is proscribed under section 8A of the main Ordinance. Sub-paragraph (2) declares that, upon the application to the Court by the Registrar, an unregistered company so dissolved "shall be wound up and Part X of the Companies Ordinance (Cap 32) shall apply to such company."

Part X of the Companies Ordinance for the winding up of unregistered companies consists of sections 326 to 331A. Section 331 states that the various provisions in Part X pertaining to the winding up of unregistered companies "shall be in addition to and not in restriction of any provisions hereinbefore in this Ordinance contained with respect to winding up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Ordinance..." Thus section 331 incorporates, for the purpose of winding up unregistered companies, all the provisions in Part V of the Companies

Ordinance for the winding up of registered companies insofar as such provisions relate to companies wound up by the Court. Comparing this statutory scheme for the winding up of unregistered companies with that for the winding up of registered companies struck off from the register, there appears to be unequal treatments.

First, as examples of the unfairness, one may note that section 290 for the declaration of a dissolution having been void and section 291(7) relating to the restoration of the name of a dissolved company to the register, both of which sections are expressly exempted from the regime for the winding up of dissolved registered companies by section 360D, may be invoked, however unlikely, in the case of a dissolved unregistered company as these provisions fall within Part V of the Ordinance.

Secondly, whilst section 360G pertaining to the winding up of registered companies identifies the applicable provisions within Part V, section 331 for the winding up of unregistered companies adopts in a wholesale manner all the sections in Part V provided that they relate to companies wound up by the Court. I must nevertheless qualify myself on this point as due to the pressure of time, I have not been able to compare the provisions identified in section 360G with those sections in Part V befitting winding up by the Court.

Furthermore, as evidenced by sections 226A and 227 relating to the dissolution of companies wound up by the Court, the process

embodied in Part V envisages the dissolution of a company only after the completion of the winding up but not vice versa. Paragraph 2 of Schedule 2 to the Bill, however, provides for the winding up after the dissolution of the unregistered company. In my opinion, the reversal is fatal.

In the case of a registered company wound up by the Court, a liquidator does not assume the rights and liabilities of the company unless it applies to the Court under section 198 of the Ordinance to have a particular piece of asset of the company vested in him, which is seldom done. As the liquidated company has not yet been dissolved, at law it remains in existence and the liquidator, in accordance with section 199(1)(a), may sue or defend proceedings in its name without assuming personal liabilities. Through the combined effect of paragraph 2(2) of Schedule 2 to the Bill and section 331 of the Companies Ordinance, the adoption of Part V for the winding up of a dissolved unregistered company is unworkable as there is no provision for the vesting of its assets and rights, let alone liabilities, in anyone so as to facilitate the recovery of its assets or to enable claims to be made against it for the benefit of its creditors or members. Again, due to the urgency of the matter, I have not considered the other aspects of this highly unsatisfactory process, which may well bring to light many other deficiencies.

Other Organisations

It is provided in paragraph 3(1) of Schedule 2 to the Bill that the registration of an organisation under any other ordinance which is proscribed shall be cancelled and, upon the publication in the Gazette of a notice of the cancellation, shall be dissolved pursuant to that other ordinance and the provisions, if any, for the dissolution or the winding up of that organisation shall apply accordingly. In the absence of such provisions, sub-paragraph (2) of paragraph 1 states that the dissolved organisation, on an application of the appropriate authority to the Court, shall be wound up and Part X of the Companies Ordinance shall apply as if it were an unregistered company within the meaning of section 326(1).

Insofar as winding up under Part X of the Companies Ordinance is concerned, my advice above in respect of the winding up of unregistered company likewise applies to an organisation under paragraph 3 of Schedule 2 the governing ordinance of which does not provide for its dissolution and winding up.

In the case of organisations in respect of which there are other ordinances governing their dissolution and winding up, it is imperative to scrutinise the relevant provisions in each of those ordinances, particularly to consider whether the dissolution of an organisation before its winding up creates problems as in the

**case of unregistered companies under the Companies Ordinance
which is proscribed under the main Ordinance.**

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WINSTON POON, QC

12/6/03