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Mrs Sharon Tong
Clerk to Bills Committee on
National Security (Legislative
Provisions) Bill
Legislative Council
Hong Kong

Dear Mrs Tong,

National Security (Legislative Provisions) Bill: proscribed organisations

I must express my great dismay at the proposed amendment to Schedule 2 to the above Bill as set out on page 8 of Paper No. 105 dated 25 June 2003.

The newly introduced section 4 in the Schedule, which attempts to preserve the liabilities of "every director, officer and member of the [proscribed] organization" after its dissolution, is not, and cannot be, directed at any of my previous criticisms of sections 1 and 2 of Schedule 2. It merely adds complexity to a Bill which has already consisted of some very convoluted drafting.

It is the *most* elementary principle of company law that on incorporation (which also applies to unregistered foreign corporations within the

meaning of section 326 of the Companies Ordinance), a company becomes a legal entity separate and distinct from its members:

> "… once the company is legally incorporated it must be treated like any other independent person with its rights and *liabilities appropriate to itself*, and that the motives of those who took part in the promotion of the company are *absolutely irrelevant* in discussing what those rights and liabilities are." (my emphasis) (per Lord Halsbury LC, Salomon v A. Salomon & Co Ltd. [1897] AC 22 at 30)

Thus since the Salomon case, the complete separation of the company and its members has never been doubted in any Commonwealth or North American jurisdiction. If a company is separated from its members, it is all the more the case that it is separated from its directors or other officers since directors and officers *per se* merely work for the company and have no interest in it at all.

If section 4 in Schedule 2 is intended to fix the liabilities of a proscribed company on its members, directors or other officers, adopting the words of Lord Templeman sitting in the House of Lords in Williams & Humbert v W H Trade Marks [1986] 1 AC 368,

> "This heretical submission flies in the face of the principle established in *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 and re-affirmed in *E. B. M. Co. Ltd. v. Dominion Bank* [1937] 3 ALL E.R. 555, 564-565 where Lord Russell of Killowen said that it was:
>
> > "of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and *liabilities* on the one hand and the individual shareholders and their actions, assets, rights and *liabilities* on the other hand."" (my emphasis)(at 429)

There can be no simpler explanation for the basic principle that shareholders do not assume the liabilities of their company than that by Lord Herschell in the Salomon case:

> "In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs." (at 43)

In the circumstances, section 4 of Schedule 2 is not designed to address any of the defects in sections 1 and 2 at all; otherwise the provision undermines the whole foundation of company law and defeats the very object of incorporation. If this is the case, the "liability, … of every director, officer and member" can only mean their *personal* liabilities and not those of the company. Since there is no provision in the Bill to "dissolve" or extinguish or alter their personal status at law, section 4 to me is wholly superfluous and may well serve to confuse in the context of the Bill. As long as these individuals exist (even when fined or imprisoned), any claimant may mount a claim against them for liabilities incurred personally under the law as now existing in Hong Kong. Even the estate of a deceased person is liable for civil wrongs committed or damages incurred by him whilst he was alive!

If the Administration remains adamant in striking off or dissolving a registered or unregistered company first but is nevertheless serious in preventing innocent third parties from adversely affected by sections 1 and 2 of Schedule 2 to the Bill, short of vesting the liabilities of a dissolved company in the officer taking charge of its winding up section 290 of the Companies Ordinance, which enables claims to be made against a dissolved company, must be available to any creditor or member of the dissolved company, whether registered or unregistered under the Ordinance. A disadvantage of invoking section 290 is that it is a time consuming and costly procedure.

Personally speaking, a much more satisfactory regime for dealing with the assets and liabilities of a proscribed company would be for it to be wound up first with the Official Receiver immediately taking control of all its affairs (in which case all the powers of its officers cease at once as a matter of law) and continuing to wind up the company in accordance with Part V of the Ordinance *irrespective of whether the company is registered or unregistered*. Unless the Government is distrustful of its own official i.e. the Official Receiver, there should be no fear of any conduct of unlawful activities by the proscribed company.

In the eyes of the public, winding up of a company for all intent and purposes is the beginning of its “death” process and its existence, as envisaged by the Companies Ordinance, is solely for the orderly running down of its affairs for the benefits of its creditors and, if there are surplus assets, its members also.

In concluding this letter I must, once again, draw your attention to the fact that my views expressed above are confined solely to sections 1 and 2 of Schedule 2 to the Bill and in no way bears upon any of the organizations in section 3 such as partnerships or trade unions.

Yours sincerely,

Winston Poon, QC

cc. Mrs Regina Ip, Secretary for Security