

Practitioners Affairs

CWP-108/04/82396
CB1/BC/3/04

3 December 2004

Ms. Connie Szeto
for Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central, Hong Kong

Dear Ms. Szeto,

**Re: Bills Committee on Companies (Amendment) Bill 2004
Invitation for submissions**

I refer to your letter dated 10 November 2004.

I attach the Law Society's submissions on the Amendment Bill for distribution to the Bills Committee.

The Law Society will not be sending any representatives to the Bills Committee meeting scheduled to take place on 16 December 2004.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

Encl.

cc Company & Financial Law Committee



Comments on Companies (Amendment) Bill 2004

1. Power of Secretary for Financial Services and the Treasury to amend Section 2B(3)

The principle object of the Bill is said to be the extension of the meaning of “subsidiary” to include unincorporated business entity for financial reporting purposes only. The definition of “subsidiary” for other purposes is to remain intact. The new Section 2B(3) enumerates the specific sections of the Companies Ordinance that would adopt the extended definition of “subsidiary” and these affected sections are in the main concerned with financial reporting matters.

Under Section 2B(4) the Secretary for Financial Services and the Treasury is given the power to amend Section 2B(3) by gazette notice. Adoption of the extended meaning of “subsidiary” for other areas of our companies’ law could have significant consequences. Clearly any such change should require legislative oversight and should not be left to the Administration.

Comments on the Proposed 23rd Schedule

2. Meaning of Section 3(3)

The objective or intended effect of Section 3(3) is not at all apparent.

3. Definition of “control contract”

Section 5(b)(ii) defines “control contract” as a contract in writing conferring a right which is permitted by the law under which that undertaking is established. We note the following in relation to this proposed definition:

- (i) There may not be a readily identifiable jurisdiction in which the undertaking is considered to have been established - Take partnership as an example: It is formed by contract and does not require registration to come into existence. A partnership may very well have a presence in one or more jurisdiction in which it carries on business. But it cannot be said that in every case the partnership is established in the jurisdiction where it operates.
- (ii) The law under which the undertaking is established may be silent on whether a control contract is permissible; on the other hand, the law does not prohibit the entering into of such contracts. The use of the word “recognized” could perhaps clarify the intention of the provision in the 23rd Schedule.

4. Circumstances under which subsidiary may be excluded from group accounts

The new Section 124(2A) adds 2 circumstances under which a subsidiary may be excluded from group accounts.

The first is severe long-term restrictions substantially hindering the exercise of the rights of the holding company over the assets or management of the subsidiary – see limb (a) Section 124(2A). It fails to identify who the decision maker should be if such circumstance arise. The directors are given the right to form an opinion in relation to the exclusions listed in Section 124(2). It would be clearer for the operation of Section 124(2A)(a) to give a similar right to the directors.

5. Information to be shown in the group accounts

Under the amended Section 128(1), particulars to be shown in the group accounts in respect of a subsidiary include the country in which it is incorporated or established. Again there may not be a readily identifiable jurisdiction in which an undertaking is considered to have been established. It would be more meaningful to require the disclosure of the country in which the undertaking carries on business.

Section 128(1)(c) and (d) requires information respecting the nature and quantity of shares held in the subsidiary to be disclosed. The term “share” is given an extended meaning in Section 1(1) of the new 23rd Schedule to catch unincorporated bodies. Even if the extended definition of “share” is applied to Section 128(1)(c) and (d), it is still not clear on the extent and nature of information that is required to be disclosed in respect of an unincorporated body in terms of ownership.

6. Power of Financial Secretary to amend the 23rd Schedule

Under the amended Section 360(5), the Financial Secretary will be empowered to amend the 23rd Schedule. The Schedule basically defines how wide the net is cast on unincorporated bodies for financial reporting purposes. It is a substantive part of the Companies Ordinance and is of no less importance than the main body of the Ordinance. Again, any change to the 23rd Schedule should require legislative oversight.

**The Law Society of Hong Kong
Company & Financial Law Committee
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