

Legislative Council
Bills Committee on Companies (Amendment) Bill 2010 and
Business Registration (Amendment) Bill 2010

Follow-up to issues raised at the first meeting on 23 February 2010

Administration's response

A. Overview of Company Name Registration

Present Position

The Companies Ordinance (Cap.32) ("CO") imposes certain restrictions on the registration of company names. A company name is not registrable if –

- (a) it is the same as another name appearing in the index of company names kept by the Companies Registry ("CR");
- (b) it is the same as that of a body corporate incorporated or established under an Ordinance;
- (c) in the opinion of the Chief Executive¹, its use would constitute a criminal offence²; or
- (d) in the opinion of the Chief Executive¹, it is offensive or otherwise contrary to the public interest.

2. In addition, certain names require the prior approval of the Registrar of Companies ("Registrar") under the delegated authority of the Chief Executive. These are names -

- (a) which would be likely to give the impression that the company is connected in any way with the Central People's Government or

¹ The authority has been delegated to the Registrar of Companies.

² The improper use of certain words and expressions in company names may be a criminal offence under some other legislation. For example, under the Banking Ordinance (Cap 155), it is an offence to use "Bank" (銀行) in a company name without the consent of the Hong Kong Monetary Authority.

the Hong Kong Government or any department of either government; or

(b) which contain specified words or expressions as contained in the Companies (Specification of Names) Order (“Names Order”).

3. After a name has been registered, the Registrar has power under the CO to direct the company to change its name if -

(a) the company name is found to be “the same as” or “too like” another name³ within 12 months after registration;

(b) the Registrar notices, within five years after the registration of the company name, that misleading information has been given for the purpose of the company’s registration by a particular name or that undertakings or assurances for that purpose have not been fulfilled; or

(c) the company name gives so misleading an indication as to the nature of the company’s activities as to be likely to cause harm to the public.

Problems under the current regime

4. Currently, it normally takes four working days for a company limited by shares to be incorporated in Hong Kong. Much of the processing time is spent on the scrutiny of company names both through system and manual checking.

5. Besides the relatively long processing time for company incorporation as compared with other jurisdictions like Singapore and the United Kingdom, we have received complaints from owners of trade marks and trade names about the problem of “shadow companies”⁴. At present, an owner of a trade mark or trade name may, in a legal action for trade mark infringement or passing off against a shadow company, obtain

³ This refers to names appearing or should have appeared in the index of company names, or the name of a body corporate incorporated or established under any Ordinance at the time of the registration.

⁴ “Shadow companies” refer to those companies incorporated in Hong Kong with names which are very similar to existing and established trademarks or trade names of other companies and which often pose themselves as representatives of the owners of such trademarks or trade names to produce counterfeit products in Mainland China bearing such trademarks or trade names.

a court order to direct the latter to change its name. However, the Registrar has no authority under the current law to change the company's name pursuant to the court order even if the court order is presented to the CR. The Registrar also has no power under the CO to deal with registered company names allegedly infringing paragraphs 1 (c) and (d) above.

Proposals under the Companies (Amendment) Bill 2010

6. We propose to introduce changes to the company name registration system with a view to expediting the company name approval process. Under the electronic company incorporation process, a company name will be approved for registration instantaneously, except where –

- (a) the name is the same as another name on the register;
- (b) the name is the same as that of a body corporate incorporated or established under an Ordinance;
- (c) the name contains words that may make it not registrable under paragraph 1 (c) or (d) above, e.g. “Bank”(銀行);
- (d) the name contains words that are likely to give an impression of government connection, e.g. “Department” (部門), “Government” (政府);
- (e) the name contains words or expressions as specified in the Names Order; and
- (f) the name is the same as a name for which a direction has been issued under sections 22 or 22A on or after the commencement of the Companies (Amendment) Ordinance 2010.

7. The revised procedures will significantly shorten the normal processing time for electronic company incorporation from four working days to one day. Those company names that are not accepted electronically under paragraphs 6 (a) to (f) will either be rejected or further scrutinised manually to see if they are registrable.

8. In case an objectionable company name has been registered under the new electronic incorporation process, the Registrar will be empowered to direct a company to change its name within a specified period. We also propose to empower the Registrar to act pursuant to a court order to direct a shadow company to change its name. If a company fails to comply with the direction to change its name, the Registrar is empowered to substitute the company's name with its registration number.

B. Response to Specific Questions

9. Our response to the specific questions raised by Members is as follows –

Company name registration

(1) Company name guidelines

The CR has published guidelines to explain the requirements for the registration of a company name. The “Company Names Guidelines 2007” are at Annex A.

(2) Company name registration under existing and proposed legislation

Local companies

The company name registration regime under the existing and proposed legislation are explained in paragraphs 1 to 8 above and are summarised in the flowcharts at Annex B.

Non-Hong Kong companies

As for non-Hong Kong companies, if their corporate names are “the same as” or “too like” a name appearing in the index of company names, or if the names give so misleading an

indication of the nature of its activities in Hong Kong as to be likely to cause harm to the public, the Registrar may serve a notice to the company within six months of its registration. The company on which such notice has been served must not carry on business in Hong Kong under its corporate name at any time after the expiration of two months from the service of the notice.

The company may then either cause its corporate name to be changed in the place of incorporation and notify the Registrar of the change of name or specify another name approved by the Registrar under which it proposes to carry on business in Hong Kong. There is no change to the name registration system for non-Hong Kong companies under the proposed legislation.

(3) Effectiveness of the proposed amendments in enhancing enforcement against shadow companies

(a) Compliance requirements on a company to change name

In respect of a court order to change name

Currently under the CO, a change of the name of a company can only be effected by way of a special resolution passed by the shareholders of the company. Without such a resolution the CR cannot effect the change of name, even if a court order is presented.

In order to obtain orders which can be enforced, there were precedents in the past where owners of trade marks/trade names (“owners”) joined the shareholders of shadow companies as co-defendants to the actions. Owners can then seek an order requiring the defendants to change the name of the shadow company. In the expectation that the defendants would not be cooperative, owners can also obtain orders granting powers to their solicitors to sign special resolutions on behalf of the shareholders of the defendant company in the event that the defendant company fails to comply with the orders to change

the name of the defendant company within the prescribed period of time.

The CR has been accepting these special resolutions as having the same legal effect as a special resolution by the shareholders of the shadow company. However, the judicial process is often time consuming and costly, given that shareholders of shadow companies often reside outside Hong Kong.

In respect of a Registrar's direction to change name

The Registrar is currently not empowered to change a company's name pursuant to a court order. Nevertheless, the Registrar may direct a company to change its name if it is "too like" the name of another company already on the register within 12 months of the date of registration of the name. If a company fails to comply with the Registrar's direction to change its name, the company and any officers in default will be liable to prosecution (see sanctions under (b) below). However, the Registrar has no power to effect a change of company name on his/her own accord under the current CO.

As noted in paragraph 8 above, we propose in the Companies (Amendment) Bill 2010 that if a company fails to comply with the direction to change its name in the future, the Registrar will be empowered to substitute the company's name with its registration number. We believe that this will effectively tackle the problem of non-compliance of directions to change name. It will also reduce the time and costs for owners to enforce court orders through the judicial process.

(b) Sanctions for failing to change company name as directed by the Registrar

If a company fails to comply with the Registrar's direction to change name, the company and every officer in default will be liable to prosecution and subject to a maximum penalty of \$100,000 and a daily default fine of \$700. Depending on the

nature of the name, an officer in default is also liable to imprisonment of up to six months. In cases where the Registrar has reasonable cause to believe that the company is not carrying on business or in operation, the company may be struck off the register in accordance with section 291 of the CO. Administratively, if a company fails to comply with the direction to change name within the specified period, its name will be included in a list of companies in default posted on the CR's website.

(c) Cooperation arrangements with other jurisdictions

There is constant liaison and dialogue between the CR and the relevant authorities in the Mainland. In the past years, CR officers have visited the State and Beijing Administration for Industry and Commerce, the Guangdong Provincial and Guangzhou Administration for Industry and Commerce and the Shenzhen Administration for Industry and Commerce. The CR has also received delegations from the Administration for Industry and Commerce of various cities of the Mainland.

The CR will issue confirmation letters, where necessary, to the Mainland authorities clarifying that company registration and trade mark registration are two distinct types of registration in Hong Kong and that the registration of company name does not constitute a defence to any legal action for trade mark infringement and/or passing off in Hong Kong. In addition, a warning statement has been inserted in the Certificates of Incorporation stating that the registration of a company name does not confer trade mark and/or other intellectual property rights over the name.

We have also met officials from Japan, the US and the EU explaining about our existing and proposed measures to tackle shadow companies.

(d) Views gathered during public consultation

In 2008, we consulted the public on, among other things, the proposal to empower the Registrar to act on a court order directing a defendant company to change its infringing name, and substitute its infringing name with its registration number if the company fails to comply with the direction to change its name. An overwhelming majority of the respondents supported the proposal and considered the proposal useful to tackle the problem of shadow companies. The respondents' views and our response are summarised in the Consultation Conclusions published in December 2008. A relevant extract is at Annex C.

Apart from the public consultation in 2008, the CR has also consulted the Liaison Committee with Intellectual Property Practitioners⁵ on the amendments proposed to be made under the Companies (Amendment) Bill 2010 in relation to measures to tackle shadow companies. The Committee members endorsed the proposed amendments and considered that the replacement of a company name with its registration number would be effective in resolving the problem.

(4) Alerting banks to directions to change names

Currently, if a company is subject to a change of name direction issued by the Registrar, a note would appear in the company particulars in the register, which is available for public inspection. After the enactment and commencement of the Companies (Amendment) Bill 2010, where the Registrar has replaced a company's name with its registration number, the new name will appear on the register instantly. A notice will also be published in the Gazette.

⁵ The Committee was formed in 2007 by the CR to explore with intellectual property practitioners ways and means of tackling the problem of shadow companies.

Multiple statutory derivative actions

- (5) Our response regarding multiple derivative actions is at Annex D.

**Financial Services Branch
Financial Services and the Treasury Bureau
March 2010**



Company Names Guidelines

2007

Companies Registry
www.cr.gov.hk

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(A) Introduction

1. To incorporate a local limited company, one of the first steps is to choose a company name. An existing company may also change its name by passing a special resolution. Since 1991, the name reservation system has been abolished and no provisional approval of company name will be given by the Registrar of Companies (“the Registrar”). It is therefore important that, when choosing a company name, promoters should satisfy themselves that the intended company name meets the requirements for the registration of a company name. Choosing an unregistrable company name may render the application being rejected and a new application would be required. It should also be noted that if a company name is “too like” the name of an existing company, it may result in the company being directed by the Registrar to change its name. “Company Names Guidelines 1998” are replaced by these guidelines.

2. These Guidelines explain the requirements for the registration of a company name. These Guidelines should be used as a guide only and should be read with the relevant provisions in the Companies Ordinance (Chapter 32 of the Laws of Hong Kong) which is available at www.legislation.gov.hk.

(B) General Requirements of a Company Name

3. A company may be registered with an English name, a Chinese name, or an English name and a Chinese name. A company name with a combination of English words/letters and Chinese characters are not allowed.

4. An English company name must end with the word “Limited” and a Chinese company name must end with the characters “有限公司”.

5. A Chinese company name should contain traditional Chinese characters (繁體字) that can be found in the Kang Xi Dictionary (康熙字典) or Ci Hai Dictionary (辭海) AND also in the ISO 10646 international coding standard.

[See section 5(1) of the Companies Ordinance]

(C) Circumstances in which a Company Name will NOT be registered

6. Generally speaking, a company name will not be registered if:-

- (a) it is the same as a name appearing in the Registrar’s index of company names;
- (b) it is the same as that of a body corporate incorporated or established under an Ordinance;
- (c) in the opinion of the Chief Executive, its use would constitute a criminal offence; or
- (d) in the opinion of the Chief Executive, it is offensive or otherwise contrary to the public interest.

[See section 20(1) of the Companies Ordinance]

7. In determining whether a company name is “the same as” another, the following shall be disregarded:

- the definite article, where it is the first word of the name
(e.g. The ABC Limited = ABC Limited)
- the ending words or expressions “company”, “and company”, “company limited”, “and company limited”, “limited”, “unlimited”, “public limited company”, their abbreviations, and the ending characters “公司”, “有限公司”, “無限公司” and “公眾有限公司”
(e.g. ABC Company Limited = ABC Limited = ABC Co., Limited; 甲乙丙有限公司 = 甲乙丙公眾有限公司)
- type and case of letters, accents, spaces between letters and punctuation marks
(e.g. A-B-C Limited = a b c Limited)

The following words and their abbreviations will also be taken as the same:

- “and” = “&”
- “Hong Kong” = “Hongkong” = “HK”
- “Far East” and “FE”

8. In determining whether a Chinese company name is the same as another, the Registrar has specified a list of interchangeable Chinese characters at **Appendix A** which are regarded as the same. The list of Chinese characters is not exhaustive and the Registrar may amend it from time to time.

[See section 20(3) of the Companies Ordinance]

(D) Company Name which will require approval before registration

9. The Chief Executive’s approval is required for a company name –

- (a) which, in the opinion of the Chief Executive, would be likely to give the impression that the company is connected in any way with the Central People’s Government or the Government of the Hong Kong Special Administrative Region or any department of either government. Such names will be allowed only where it is considered there is a genuine connection with the Central People’s Government or the Government of the Hong Kong Special Administrative Region. The use of words such as “Department”(部門), “Government”(政府), “Commission”(公署), “Bureau”(局), “Federation”(聯邦), “Council”(議會), “Authority”(委員會), would in certain circumstances imply such a connection and will not normally be approved;
- (b) which contains any of the words or expressions listed in **Appendix B**.

The power of approval has been delegated to the Registrar. Applicants should seek the advice of the Companies Registry about this type of name and apply in writing for the consent to use these names before the documents applying for incorporation or change of name are submitted. Applications should be sent to the New Companies Section of the Companies Registry on the 14th Floor, Queensway Government Offices, 66 Queensway, Hong Kong.

[See sections 20(2) and 22B of the Companies Ordinance]

(E) Company Names with words and expressions which are covered by other legislation

10. In some cases, the use of certain words and expressions in company names is covered by other legislation. Their improper use will be a criminal offence. The followings are some examples:

- Under the Banking Ordinance (Chapter 155), it is an offence to use “Bank” (銀行) in a company name without the consent of the Hong Kong Monetary Authority.
- Under the Securities and Futures Ordinance (Chapter 571), no person other than the Exchange Company (交易所) as therein defined shall use the title “Stock Exchange” (證券交易所) or “Unified Exchange” (聯合交易所) or other variations. Contravention of this section will constitute a criminal offence.
- It will also be an offence for a company other than a corporate practice as defined in the Professional Accountants Ordinance (Chapter 50) to use in its name the description “certified public accountant” or “public accountant” or the initials “C.P.A.” or “P.A.” or the characters “執業會計師”, “核數師” or “審計師”.

11. Applicants should ensure that the use of these words or expressions in the company name will not contravene the related legislation. It is advisable that applicants should seek advice from the relevant body on the use of the words or expressions in the company name.

(F) Company which wishes to omit the word “LIMITED” from its Company Name

12. A company which wishes to apply for a licence under Section 21 of the Companies Ordinance to omit the word “Limited” and/or the characters “有限公司” from its name (either on incorporation or change of name by special resolution) may obtain a Memorandum on the procedure for applying for a Licence under Section 21 for further details. The Memorandum can be viewed or downloaded from the Companies Registry’s website (www.cr.gov.hk) under the item “Memorandum Notes / Guidelines” in the “Publications and Press Releases” section. It is also available at the enquiry counter of the New Companies Section of the Companies Registry on the 14th Floor, Queensway Government Offices, 66 Queensway, Hong Kong.

[See section 21 of the Companies Ordinance]

(G) Directions to change a Company Name

13. The Registrar has power to direct a company to change its name under the following provisions of the Companies Ordinance:

Section 22(2)

Where –

- (a) the company name is “the same as” or, in the opinion of the Registrar, “too like” a name appearing in the Registrar’s index of company names at the time of registration;
- (b) the company name is “the same as” or, in the opinion of the Registrar, “too like” a name which should have appeared in that index at that time; or
- (c) the company name is “the same as” or, in the opinion of the Registrar, “too like” the name of a body corporate incorporated or established under any Ordinance at the time of the registration.

The criteria which the Registrar will apply in forming an opinion on whether a name is “too like” are set out in **Appendix C**.

Section 22(4)

If the Registrar has been given misleading information for the purpose of a company’s registration by a particular name or has been given undertakings or assurances for that purpose but the same have not been fulfilled.

Section 22A

If the company name gives so misleading an indication as to the nature of the company’s activities as to be likely to cause harm to the public.

14. In examining an intended name before incorporation / registration or change of name, the aspect of “too like” will NOT form part of the Registrar’s consideration. It is therefore important that, before applying for incorporation / registration or changing the name of a company, applicants should consider carefully whether the intended name could lead to a complaint from another company for being “too like” an existing company name, and the possibility that it may be subject to a change of name direction by the Registrar after incorporation / registration or change of name.

15. Company names which are “too like” will normally be brought to the Registrar’s attention by objections being lodged by a person who feels that the name is “too like” that of a previously registered company.

16. Any objection to company names should be submitted to the Registrar, giving reasons in full and including any available evidence of confusion which is claimed to have arisen. Objections lodged should be headed “Names Complaints” and sent to the New Companies Section of the Companies Registry on the 14th Floor, Queensway Government Offices, 66 Queensway, Hong Kong. Objections to company names should be made to the Registrar in good time (preferably not later than one month before the expiry of the statutory periods

hereinafter mentioned) so as to enable him to make enquiries and serve notices that may be required before the expiry of the statutory periods, which is 12 months from the date of registration of the company name under Section 22(2) and 5 years from the date of registration of the company name under Section 22(4).

WARNING

Registration of a company name does not mean that the name is protected, neither does it mean that such a name is not liable to challenge by others. If the name is considered to be “too like” the name of another company appearing in the index of company names kept by the Registrar, a change of name direction will be issued against that company. Non-compliance with such a direction may result in the company and/or its officers being prosecuted. The maximum penalty for failure to comply is at present a fine of \$100,000 and imprisonment of 6 months, as well as a daily default fine of \$700 for continued default. Further, if the adopted name infringes the intellectual property rights of a third party, the company may face legal action by that third party. Infringement of the intellectual property rights of others may attract criminal or civil sanctions, either in Hong Kong or elsewhere. The registration of a company name with the Companies Registry is not, in itself, a defence to any subsequent claim for infringement of intellectual property rights. Applicants should, therefore, ensure that they do not adopt a name which conflicts with a registered trademark or is “too like” the name of another company.

(H) Companies incorporated outside Hong Kong and registered under Part XI of the Companies Ordinance

17. Section 337B of the Companies Ordinance contains regulations of the use of corporate name by companies incorporated outside Hong Kong and registered under Part XI of the Companies Ordinance. If the Registrar is satisfied that the corporate name is “the same as” or is “too like” a name appearing in the Registrar’s index of company names, or it gives so misleading an indication of the nature of its activities in Hong Kong as to be likely to cause harm to the public, the Registrar may, within six months of the date on which the company is registered under Part XI or has complied with Section 335 where there has been a change in its corporate name, serve a notice to that effect on the company.

18. The company on which such notice has been served must not at any time after the expiration of two months from the service of that notice carry on business in Hong Kong under its corporate name. The company may either cause its corporate name to be changed in the place of incorporation or specify a name approved by the Financial Secretary of Hong Kong¹ other than its corporate name under which it proposes to carry on business in Hong Kong. For further details, please refer to the Memorandum on the operation of section 337B. The Memorandum can be viewed or downloaded from the Companies Registry’s website (www.cr.gov.hk) under the item “Memorandum Notes / Guidelines” in the “Publications and Press Releases” section. It is also available at the enquiry counter of the New Companies

¹ Upon the commencement of section 28 of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004), the name will be approved by the Registrar of Companies.

Section of the Companies Registry on the 14th Floor, Queensway Government Offices, 66 Queensway, Hong Kong.

19. Please also note the points stated in Section G above. Objections to corporate names should be made to the Registrar in good time (preferably not later than one month before the expiry of the six months period mentioned in paragraph 17 above) so as to enable him to make enquiries and serve notices that may be required before the expiry of the statutory period.

(I) Company Name Search

20. Applicants are advised to conduct a company name search at the Companies Registry's Cyber Search Centre on the Internet (www.icris.cr.gov.hk) to check whether an intended name is the same as a company name already registered. Such service is free of charge. Please use the search mode "Exact Name Search" when conducting the company name search and input the full and exact company name that is intended to be used, including all spaces, punctuation marks, and ending terms like "Company Limited", "Limited", "Company", "有限公司", "公司" etc. However, the registrability of a company name can only be confirmed after the application documents have been processed by the Companies Registry.

21. Applicants are also recommended to conduct a trademark search at the Intellectual Property Department's Online Search System at <http://ipsearch.ipd.gov.hk/> before choosing a company name, so as to avoid the risk of facing legal action for "passing off" or trademark infringement.

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Appendix A

List of interchangeable Chinese characters which are regarded as the same
by the Registrar of Companies :-

1	兩 兩 兩	21	嶮 崙	41	獎 獎	61	窗 窗
2	峯 峰	22	滙 匯	42	奩 奩	62	鎮 鎮
3	真 眞	23	焰 燄 焰	43	麪 麪 麵	63	翱 翱
4	廩 廩	24	羣 群	44	塚 塚	64	廠 廠
5	眾 衆	25	聚 聚	45	窑 窑 窯	65	為 爲
6	賓 賓	26	貓 猫	46	櫃 柜	66	殮 殮
7	妝 粧	27	寶 寶	47	響 响	67	隼 雥
8	迪 廸	28	巖 巖	48	衛 衛	68	瀨 瀨
9	荊 荆	29	廚 厨	49	氈 毡	69	偽 偽
10	峩 峨	30	憇 憇	50	厦 廈	70	免 免
11	畧 略	31	舉 舉	51	臘 腊	71	冲 冲
12	啟 啓	32	鐵 鉄	52	上 上	72	獵 獵
13	捷 捷	33	藥 葯	53	綉 繡	73	珏 珏
14	場 場	34	輝 輝	54	雞 鷄	74	填 填
15	疊 疊	35	嶢 崑	55	籐 藤	75	滇 滇
16	拍 拍	36	穎 穎	56	龐 龐		
17	牀 床	37	潤 潤	57	線 綫		
18	恒 恆	38	霸 霸	58	裡 裏		
19	柏 栢	39	證 証	59	晉 晉		
20	強 强	40	哈 峇	60	獻 獻		

Appendix B

The following words and expressions will require the consent of the Chief Executive before their use will be allowed in a company name :

Building Society
Chamber of Commerce
Cooperative
Kaifong
Mass Transit
Municipal
Savings
Tourist Association
Trust
Trustee
Underground Railway
市政
地下鐵路
地鐵
合作
受託
受託人
建屋合作社
信託
旅遊協會
商會
街坊
總商會
儲蓄

[See Companies (Specification of Names) Order]

Appendix C

Criteria which the Registrar will apply in forming an opinion on whether a name is “too like”

In considering whether names are “too like”, the Registrar of Companies will take account of all factors which may be considered to suggest similarity and lead to confusion between the names of two companies. These will include, for example, the nature of the business concerned, the public awareness of the names concerned, evidence of confusion etc.

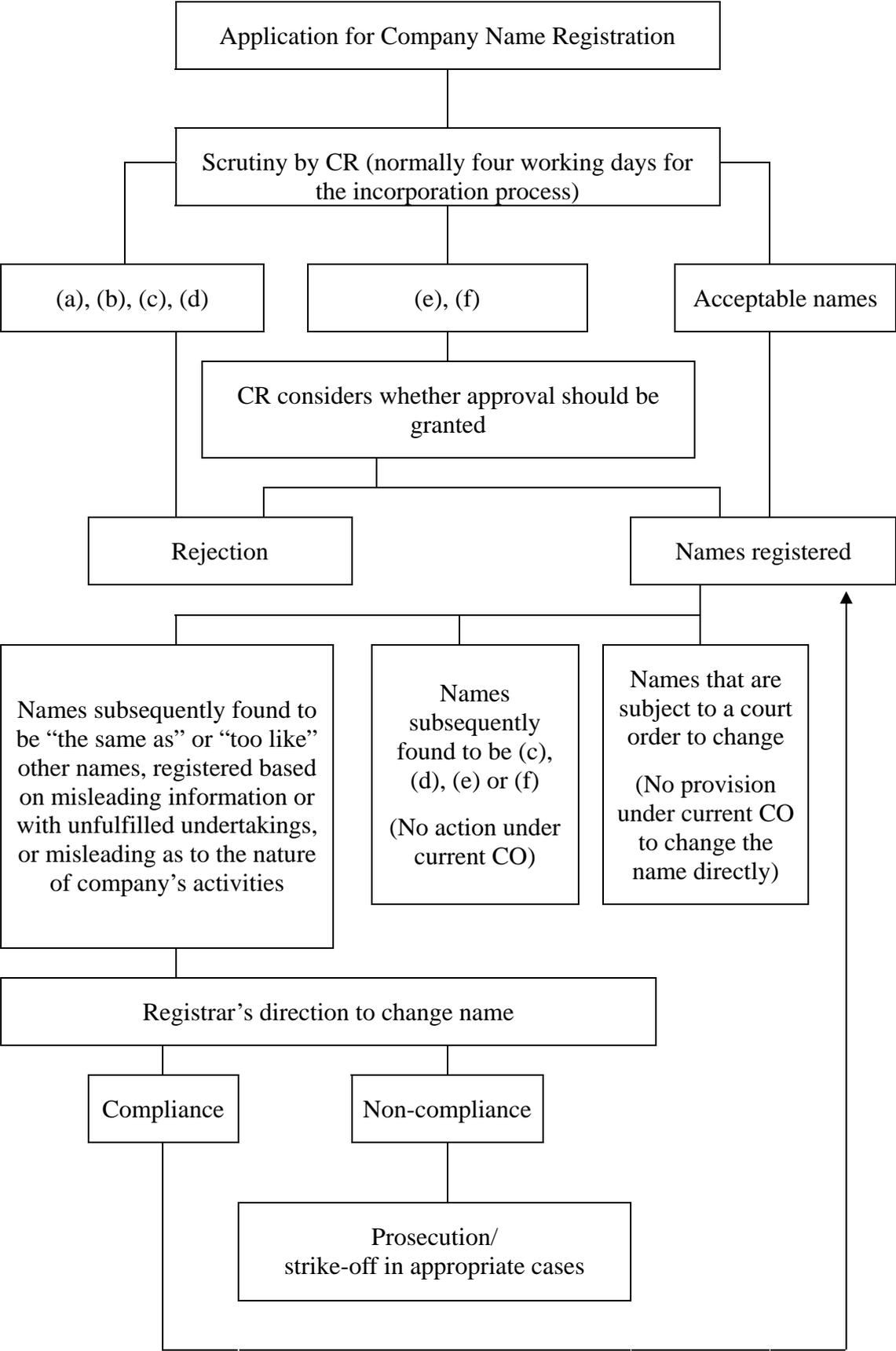
Subject to this requirement, names may be considered to be “too like” in the opinion of the Registrar of Companies if :-

- (a) the names are visually and/or phonetically identical;
- (b) there is only a slight variation in the spelling of the two names and the variation does not make a significant difference between the names, e.g. grammatical variations such as trade/trading, addition of “s” or “es”.
- (c) the names contain a word or words which might be regarded as a distinctive element, unless that element is qualified in such a way as would minimize risk of confusion. A distinctive element will normally be defined as “English made up words”, “non-dictionary English words” or “unusual combinations of two or more letters as a key part”. In some cases, everyday words used in a “distinctive” way may also be considered as distinctive elements. Place names, or everyday descriptive words in general use will not normally be regarded as distinctive. Similar business classifier or descriptive elements, e.g. press/printing, staff agency/employment agency, or the inclusion in one name of only a general or “weak” qualification such as international, holding, group, services etc., would not normally be regarded as a sufficient qualification or distinction.

Examples

1. Names which are the same - KWUN TONG ENGINEERING LIMITED v KWUN TONG ENGINEERING COMPANY LIMITED or 發達(貿易)有限公司 v 發達貿易有限公司.
2. Names which are phonetically identical - LYFECITY LIMITED v LIFECITY LIMITED and AB-CHEM LIMITED v ABKEM LIMITED or 興隆企業有限公司 v 興龍企業有限公司.
3. Names in which the slight variation in spelling does not make a significant difference - CONSOLAIR LIMITED v CONSULAIR LIMITED or 美儂有限公司 v 美濃有限公司.
4. Grammatical variations which do not have significant difference - ADVANCE TRAVEL LIMITED v ADVANCED TRAVEL LIMITED.
5. Names which contain the same distinctive element :-
 - (a) Where the names are sufficiently qualified - FACTROMATIC COMPUTERS LIMITED v FACTROMATIC PLANT HIRE LIMITED.
 - (b) Where the names are not sufficiently qualified - MECHALA LIMITED v MECHALA HOLDING LIMITED or ODDBODS PRESS LIMITED v ODDBODS PRINTING LIMITED or 禾豐印刷有限公司 v 禾豐印務有限公司

Current Company Name Registration Process

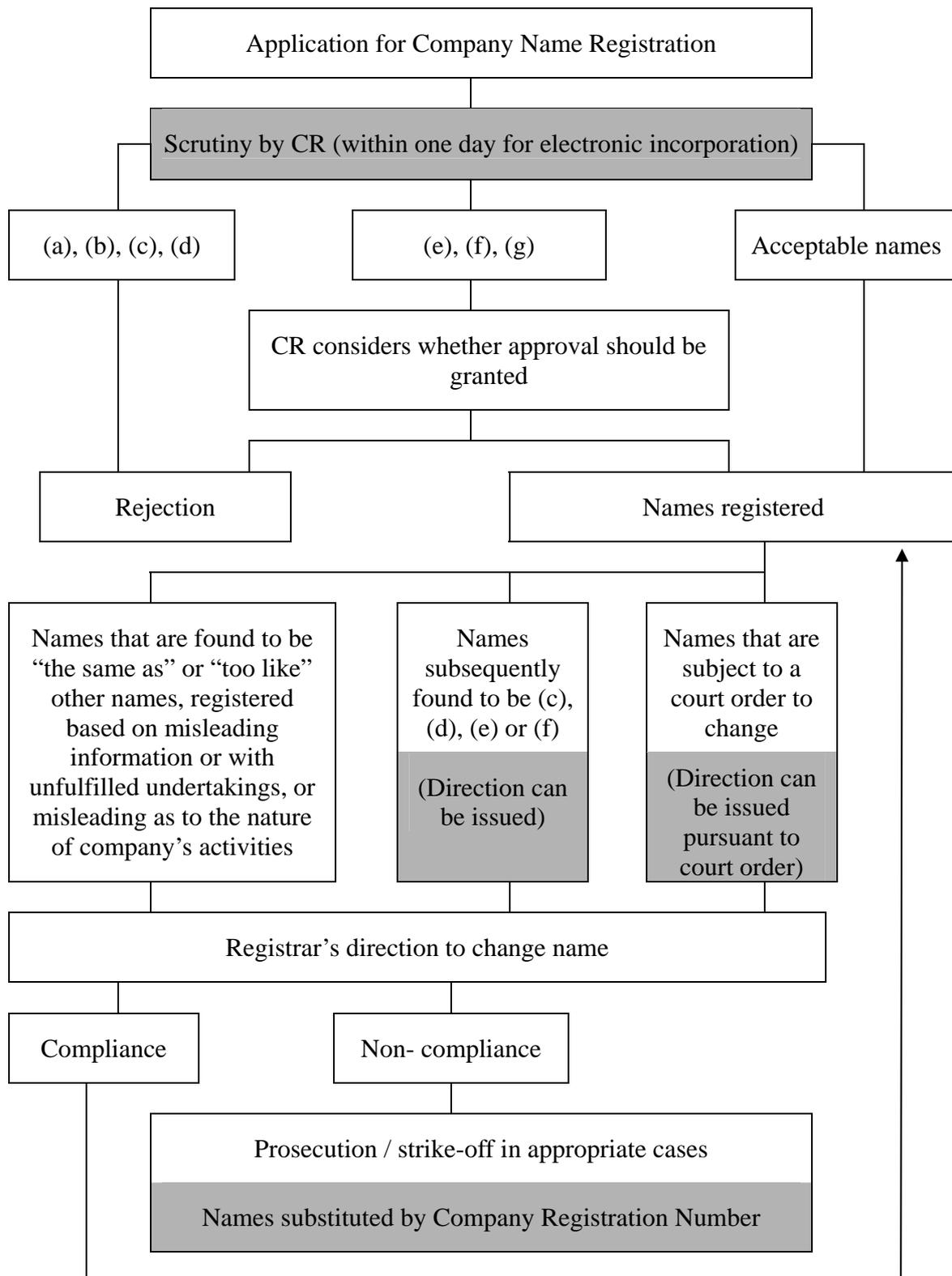


Note:

- (a) names that are identical to existing names;
- (b) names that are the same as a body corporate incorporated/established under an Ordinance;
- (c) names the use of which would constitute a criminal offence;
- (d) names that are offensive/contrary to public interest;
- (e) names that would give the impression of connection with the Central Peoples' Government or Hong Kong Government; and
- (f) names that contain words or expressions specified in the Names Order.

**Proposed Company Name Registration Process
under Companies (Amendment) Bill 2010**

(New arrangements highlighted in shade)



Note:

- (a) names that are identical to the existing names;
- (b) names that are the same as a body corporate incorporated/established under an Ordinance;
- (c) names that would constitute a criminal offence;
- (d) names that are offensive/contrary to public interest;
- (e) names that would give the impression of connection with the Central Peoples' Government or Hong Kong Government;
- (f) names that contain words or expressions specified in the Names Order; and
- (g) names that are the same as those for which directions have been issued under s.22 or s.22A on or after the commencement of the Companies (Amendment) Ordinance 2010.

**Consultation Conclusions
on Company Names, Directors' Duties,
Corporate Directorship and Registration of Charges
Issued in December 2008**

Extract

Company Names

A. "Shadow Companies" (Questions 1 & 3)

5. We proposed to empower the Registrar of Companies ("the Registrar") to act on a court order directing a defendant company to change its infringing name, and substitute its infringing name with its registration number if the company fails to comply with the Registrar's direction to change its name.
6. We also asked for further views on how the company name registration system could be improved for the purpose of tackling the problem of "shadow companies".

Respondents' views

7. An overwhelming majority of the respondents supported the proposal. They generally considered the proposal useful to tackle the problem of "shadow companies"³. Some of them suggested that the specified period within which the defendant company is required to change its name should be made as short as possible in

³ These refer to those companies incorporated in Hong Kong at the Companies Registry with names which are very similar to existing and established trademarks or trade names of other companies and pose themselves as representatives of the owners of such trademarks or trade names when contracting with Mainland manufacturers to produce counterfeit products bearing such trademarks or trade names.

order to minimise the period of misuse of the infringing name by shadow companies.

8. As for further views sought on tackling “shadow companies”, some respondents suggested that the Government should reconsider the feasibility of introducing a company names adjudication system adopted in the United Kingdom (“UK”), or a system similar to the domain name dispute resolution system in Hong Kong operated by the Hong Kong International Arbitration Centre. They believed that such proceedings would be less lengthy and costly than court proceedings.
9. In addition, a few respondents suggested further measures to tackle the problem of “shadow companies” as follows:
 - (a) the Registrar should refuse the registration of company names which are likely to infringe the intellectual property rights of others;
 - (b) the Registrar should strike off from the register a company which did not comply with a direction to change name issued by the Registrar. It was considered that if a company had its name changed to its registration number, it would most likely that such company, with a numbered name, would become inactive, and eventually, the Registrar would take steps to strike off such a company in the future for lack of activities;
 - (c) some respondents were of the view that the Companies Registry (“CR”) should make more use of provisions under sections 22(2)⁴ and 22A⁵ of the current CO to tackle the problem of shadow companies as they considered that the CR had adopted a too narrow interpretation of such provisions and restricted their application in tackling the problem.

⁴ Section 22(2) of the CO provides that the Registrar may direct a company to change its name within such period as he may specify if, among other things, it is too like a name appearing in the Registrar's index of company names.

⁵ Section 22A of the CO provides that the Registrar may direct a company to change its name, if in his opinion the name gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public.

Some also suggested that the Companies Names Guideline of the CR should be expanded to give a more detailed interpretation of the meaning of “the same” in determining an infringing name;

- (d) information on those companies which have been directed by the Registrar to change or whose names have been substituted with a registration number by the Registrar should be publicised. Some respondents considered it important for such information to be made readily available to the public because default companies could still carry on counterfeit activities by abusing the Certificate of Incorporation originally issued by the Registrar to the infringing companies; and
- (e) the current limitation period of 12 months within which the Registrar may direct a company to change its name is too short, some respondents proposed that the time period be extended to say, 18 months.

Our response

- 10. We welcome the overwhelming support of the proposal from the respondents and will introduce the necessary legislative amendments as soon as possible.
- 11. In respect of the other suggestions set out in paragraphs 8 and 9 above, our responses are as follows:
 - (a) As the UK’s new company names adjudication system had just commenced operation in October 2008, it would be prudent to keep its implementation under review and make reference to any experience gained from the UK when considering the way forward of the proposal;
 - (b) Hong Kong’s domain name dispute resolution system is based on a mandatory arbitration proceeding specified in the Registration Agreement between the administrator of domain

names (namely, Hong Kong Domain Name Registration Company Limited) and the applicant. As the arbitration system is based on a contract between private parties, the procedure can be more flexible and less formal in nature⁶. However, as company name disputes involve the exercise of statutory regulatory power by a government department, due process must be ensured. Informal and flexible proceedings would be inappropriate;

- (c) we remain of the view that the Registrar should not refuse the registration of a company name simply because the name is likely to infringe the intellectual property rights of another party. As explained in paragraph 2.5 of the Consultation Paper, our company registration system and trademark registration system are distinct and separate. It is inequitable to grant trademark owners a monopoly over company names covering all kinds of business activities. Moreover, it is impracticable for the Registrar to check each and every proposed company name against all registered trademarks and to judge whether a name is likely to infringe the intellectual property rights of others;
- (d) it would be inappropriate to strike a company off the register simply because it fails to comply with a direction to change name⁷. As a company will be dissolved upon being struck off the register, it may adversely affect the interests of third parties, such as creditors, and may create uncertainties over the liabilities and obligations of the company and its officers;
- (e) the CR reviews, from time to time, its guidelines on company names, including those on interpretation of names being “too like”, to facilitate enforcement against shadow companies. It will exercise judgment to assess whether the company names in question would create confusion as to identity. As regards section 22A of the CO, we are of the view that it

⁶ For example, the parties do not need to attend a tribunal physically and the arbitration proceedings can be conducted through facsimile, postal or courier services and the Internet.

⁷ We intend to maintain the current policy that the Registrar will only strike a company off the register if it appears to him that the company is defunct

should only be used in the event that what the company actually does is different from what its name implies it does (if the name implies anything) and that difference is likely to cause harm to the public. The provision cannot be used to tackle the problem of “shadow companies”;

- (f) the information of the companies which have failed to comply with the Registrar’s directions to change name is being published at the CR’s website⁸. The CR will keep updating the information. Moreover, the CR has since January 2008 included a warning statement in all Certificates of Incorporation and Certificates of Change of Names that company name registration does not confer any intellectual property rights on the use of a company name; and
- (g) There appears to be no strong case for extending the limitation period within which the Registrar could direct a company to change its names. Under the present provision, CR has already advised members of the public to lodge their complaints in good time before the expiry of the 12 months’ period. In practice, CR would entertain any complaints received two weeks before the expiry of the 12 months’ period.

Full consultation conclusions and compendium of responses are available at the website of the Financial Services and the Treasury Bureau (http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/consult-conclusion.htm).

⁸ http://www.cr.gov.hk/en/statistics/docs/stat_name.pdf

Multiple Derivative Actions

Introduction

This paper provides the Administration's response to the issues raised by Members of the Bills Committee on the proposed amendments relating to statutory derivative actions (SDA) in Part 4 of the Companies (Amendment) Bill 2010 at the Bills Committee meeting held on 23 February 2010. We provide information on the justifications for extending SDA to a member of a related company, in particular to a member of a subsidiary company of a specified corporation and the relevant arrangements in other common law jurisdictions.

A. Justification for extending SDA to a member of a related company, in particular to a member of a subsidiary company of a specified corporation

The SDA Provision

2. The Companies Ordinance (CO) was amended in 2004 by the Companies (Amendment) Ordinance 2004 to provide a new SDA procedure. The relevant provisions are contained in Part IVAA which came into operation on 15 July 2005.

3. The SDA provisions allow a member of a Hong Kong or non-Hong Kong company (specified corporation) to bring an action on behalf of the specified corporation in respect of "misfeasance" committed against the specified corporation. "Misfeasance" is defined as "fraud, negligence, default in compliance with any enactment or rule of law, or breach of duty" in section 168BB(2) of the CO.

4. Unlike some of the overseas jurisdictions¹, only members of a specified corporation have the standing under section 168BC(1) of the CO to seek leave to commence a SDA or to intervene in proceedings. This is commonly known as a "simple" derivative action.

¹ For example, Australia, New Zealand, Singapore and Canada. Please see paras 11 to 16.

The Waddington Case

5. In *Waddington Ltd. v Chan Chun Hoo*², the Court of Final Appeal (CFA) affirmed the Court of Appeal's decision that an action by a shareholder of a parent company on behalf of a subsidiary or second or lower tier subsidiary is maintainable under the common law. Such action is commonly referred to as a "multiple" derivative action.

6. Lord Millet NPJ said in the *Waddington* case that it is appropriate to allow multiple derivative actions for the following reasons :

- (a) As a question of standing, the shareholder in the holding company has a legitimate interest in the relief claimed on behalf of the subsidiary sufficient to justify him in bringing proceedings to obtain it. The shareholder's interest is sufficient as he suffers a real loss (albeit an indirect loss) as a result of the depletion of the subsidiary's assets.³
- (b) If the shareholder is not given standing to commence the proceedings, then there is no possibility of righting the wrongs committed against the subsidiary. In other words, the same rationale for allowing an ordinary derivative action also applies to multiple derivative actions.⁴

The concerns of the CFA were discussed in the context of shareholders in a holding company taking action on behalf of a subsidiary or sub-subsidiary.

7. Perhaps less common, but there could be situations where similar reasons apply in relation to a shareholder of a subsidiary seeking to bring a derivative action on behalf of the holding company. An example is a holding company whose directors are also the only shareholders of the holding company. If those directors misappropriate assets of the holding company, then there might not be any person who could take action against the directors. A depletion of the holding company's assets does not necessarily impact on the subsidiary in the same way that a depletion of the subsidiary's assets would impact detrimentally on the holding company. However, in some situations the subsidiary may be prejudiced by a depletion of the holding company's assets, e.g. where the subsidiary has provided security for the holding

² FACV No. 15 of 2007. The writ in this action was issued prior to the commencement of the SDA provisions.

³ Paragraph 74 of the judgment.

⁴ Paragraphs 66 and 67 of the judgment.

company's liabilities. If creditors of the holding company pursue the subsidiary, then the subsidiary and its shareholders are prejudiced at the expense of the wrongdoing directors/controllers of the holding company.

8. The reasons for allowing multiple derivative actions, as identified in paragraph 6 above would also apply to justify giving standing to a shareholder of the subsidiary to bring an action on behalf of the holding company in the circumstances outlined in paragraph 7 above. The shareholders suffer a real loss as a result of the depletion of the holding company's assets, and there may otherwise not be any basis for righting the wrongs committed by the directors/controllers of the holding company. A similar analysis could also be made in relation to a situation where a shareholder in a subsidiary wishes to take action on behalf of another subsidiary of the same holding company.

9. The Administration is of the view that there is a strong argument for extending the CFA's reasoning to justify giving standing to members of related companies, since this situation concerns a wrongdoer controlling the corporate group to the detriment of a shareholder in the group.

B. Relevant arrangements in other common law jurisdictions

10. The company law legislation in New Zealand, Australia and Canada provide expressly for multiple derivative actions by allowing a member of a related company to bring derivative actions. It is therefore possible for a member of a subsidiary company to bring a derivative action on behalf of its holding company in these jurisdictions. The Canadian legislation also provides that the court has a discretion to allow any proper person to make the application. The Singaporean legislation is similarly wide in allowing any proper person to apply to the court. In the United Kingdom, only simple derivative action may be taken under the Companies Act 2006.

New Zealand

11. In New Zealand, section 165 of the Companies Act 1993 (NZCA) provides that with the leave of court, a shareholder of a company may bring proceedings in the name and on behalf of the company or any related company or intervene in proceedings to which the company or any related company is a party. A company is related to another company if the other company is its holding company or subsidiary, or there is

another company to which both companies are related. (Section 2(3) of NZCA)

Australia

12. Australia has taken the same approach as New Zealand. Section 236 of the Corporations Act 2001 (ACA) provides that a member or former member of a company, or a related body corporate may with leave of court, bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party. A body corporate is related to another if it is a holding company, a subsidiary or a subsidiary of a holding company of the other body corporate. (Section 50 of ACA)

13. The Corporate Law Economic Reform Program Bill 1998 Explanatory Memorandum notes that members of a related body corporate will also be included as persons with standing as they may be adversely affected by the failure of the company to take action and therefore may have a legitimate interest in applying to commence a derivative action. (para 6.27)

14. In the earlier report of the Companies and Securities Law Review Committee (CSLRC), on which the subsequent legislation was based, it was stated : “Due to the evident variety of group structures and the range of transactions which may take place between the component companies of such groups, the Committee does not see merit in confining the terms of the proposed provision to the taking of action on behalf of any subsidiary company by a person having an interest in the holding company. A party interested in a subsidiary should be able to take action on behalf of that subsidiary’s holding company⁵.”

Canada

15. In Canada, a complainant bringing a derivative action may be a shareholder of the corporation or any of its affiliates and he may sue on behalf of the corporation or any of its subsidiaries (Sections 238 and 239(1) of the Canada Business Corporations Act 1985 (CBCA)). “Affiliate” means an affiliated body corporate and one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate. (Section 2(1) and 2(2) of CBCA). Also, any other person who, in the discretion of the

⁵ CSLRC, Enforcement of the Duties of Directors and Officers of a Company by means of a Statutory Derivative action (Report No. 12, Nov 1990) para 42.

court, is a proper person, may seek to bring a derivative action (Section 238 CBCA).

Singapore

16. The Singaporean Companies Act 1994 (SCA) also has a wide provision on the applicant's standing. Section 216A(2) of SCA provides that a complainant may apply to the Court for leave to bring a derivative action. A complainant means any member of a company or any other person who, in the discretion of the Court, is a proper person to make an application. (Section 216A(1) of SCA)

United Kingdom

17. In the United Kingdom, the Companies Act 2006 (CA 2006) introduces a SDA procedure (Sections 260 – 264 of CA 2006). A derivative claim may be brought, with the permission of the court, only by a member of a company. In other words, only “simple” derivative actions may be taken under CA 2006.

**Financial Services Branch
Financial Services and the Treasury Bureau
March 2010**