

Bills Committee on Companies Bill

Part 1, Part 3 and Part 17 of the Companies Bill

PURPOSE

This paper outlines the major proposals and policy issues in Part 1 (Preliminary), Part 3 (Company Formation and Related Matters, and Re-registration of Company) and Part 17 (Companies not Formed, but Registrable, under this Ordinance) of the Companies Bill. It also provides a comparison table on the provisions in each Part and a summary of the public views on key policy issues received during earlier public consultation and our responses.

DETAILS

2. Details for each Part are contained in the Annexes -

Annex A - Part 1 (Preliminary)

Annex B - Part 3 (Company Formation and Related Matters, and Re-registration of Company)

Annex C - Part 17 (Companies not Formed, but Registrable, under this Ordinance)

ADVICE SOUGHT

3. Members are invited to note the contents of the paper and provide their views.

**Financial Services and the Treasury Bureau
Companies Registry
21 March 2011**

Bills Committee on Companies Bill

Part 1 – Preliminary

INTRODUCTION

This paper outlines the major elements of Part 1(Preliminary) of the Companies Bill (“CB”), which is an introductory part that sets out the title of the new Ordinance, its commencement date, the interpretation and definitions of various terms and expressions that are used throughout the Bill, including “responsible person”, “subsidiaries”, “parent companies”, “parent undertaking” and “subsidiary undertaking”, and the types of companies that can be formed under the new Ordinance.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 1 contains initiatives that aim at improving regulation and modernising the law, namely –

- (a) Replacing the formulation of “officer who is in default” with “responsible person” to strengthen the enforcement regime (paragraphs 4 to 7 below); and
- (b) Streamlining the types of companies that can be formed (paragraphs 8 to 13 below).

3. More details of the above proposals are set out in paragraphs 4 to 13 below. Apart from the above proposals, Part 1 also provides for the application of the new Ordinance to existing companies and other types of companies (paragraph 14 below).

Replacing the formulation of “officer who is in default” with “responsible person” to strengthen the enforcement regime (clause 3)

4. A number of offence provisions under the Companies Ordinance (“CO”) (and the CB) punish not only a company but also officers of the company who are in default. The formulation of “officer who is in default” in the CO is defined as meaning an officer or shadow director of a company who “knowingly and wilfully authorises or permits the default, refusal or contravention”. However, the “knowingly and wilfully” threshold renders prosecution against officers difficult.

5. In the Bill, we have adopted a new formulation of “responsible person”, modelled on the UK Companies Act (“UKCA”) 2006, to replace “an officer who is in default”, with the aim to enhance enforcement by extending the scope to cover reckless acts/ omissions or negligent omissions of officers.

6. **Clause 3(2)** defines a “responsible person” of a company or non-Hong Kong company as an officer or shadow director of the company or non-Hong Kong company who “authorizes or permits, participates in, or fails to take all reasonable steps to prevent the contravention or failure”¹.

7. **Clause 3(3)** extends the scope of a “responsible person” to cover an officer or shadow director of a body corporate that is an officer or shadow director of a company or non-Hong Kong company. As a result, an officer or shadow director of the body corporate who caused the default will also be liable as a “responsible person” of the company.

Streamlining the types of companies that can be formed (clauses 6 – 11)

8. At present, eight different types of companies can, in theory, be formed under the CO according to their capacity to raise funds from outside sources, the ability of members to freely transfer their shares and

¹ C.f. section 1121(3) of the UKCA 2006 which defines that “an officer is “in default”...if he authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention”.

the methods by which the liability of members is determined. They are –

- (a) private companies limited by shares;
- (b) non-private companies limited by shares;
- (c) private companies limited by guarantee without share capital;
- (d) non-private companies limited by guarantee without share capital;
- (e) private unlimited companies with a share capital;
- (f) non-private unlimited companies with a share capital;
- (g) private unlimited companies without share capital; and
- (h) non-private unlimited companies without share capital.

9. To streamline the types of companies that can be formed, the following changes are made –

- (a) unlimited companies without share capital (whether private or non-private, i.e. (g) and (h) in paragraph 8 above) are obsolete and should be abolished because it is very unlikely that such type of companies will be formed in the future and there is currently no such company on the Companies Registry (“CR”’s register;
- (b) companies limited by guarantee without share capital (whether private or non-private, i.e. (c) and (d) in paragraph 8 above) should become a separate category of companies. They are generally treated in a manner similar to public companies with appropriate modifications. For example, like public companies, all guarantee companies will be required to file audited accounts; and

(c) non-private companies are expressly referred to as “public companies” which are defined to mean companies other than private companies or guarantee companies.

10. As a result, the types of companies that may be formed under the new Ordinance are reduced to five. Clauses 6 to 11 provide for the definitions whereas clause 61 in Part 3 sets out the types of companies permissible under the new Ordinance, namely –

- (a) private companies limited by shares;
- (b) public companies limited by shares;
- (c) private unlimited companies with a share capital;
- (d) public unlimited companies with a share capital; and
- (e) companies limited by guarantee without a share capital.

11. **Clauses 6 and 9** provide that a limited company is a company limited by shares or by guarantee, and an unlimited company is a company with no limit on the liability of its members. **Clause 7** provides that a company is a company limited by shares if the liability of its members is limited by the company’s articles to any amount unpaid on the shares held by the members.

12. **Clauses 10 and 11** provide for the definitions of private and public companies. The required characteristics of a private company are the same as those currently provided under section 29 of the CO (i.e. a company is a private company if its articles restrict members’ rights to transfer shares, limit the number of members to 50, and prohibit any invitation to the public to subscribe for any shares or debentures. A company is a public company if it is not a private company or a company limited by guarantee.

13. **Clause 8(1)** provides that a company is a company limited by guarantee if it does not have a share capital and if the liability of its members is limited by the company's articles to the amount that the members undertake to contribute to the assets of the company in the event of its being wound up. **Clause 8(2)** makes it clear that a company limited by guarantee and having a share capital formed under the CO before 13 February 2004 (i.e. the date when such type of company was abolished under s.4(4) of the CO), will be regarded as a guarantee company under the new Ordinance although it has a share capital.

Application of the new Ordinance to existing companies and other types of companies

14. **Clauses 16 and 17** provide that the new Ordinance applies to an existing company (i.e. a company formed and registered under a former CO) and an unlimited company registered as a limited company pursuant to the CO or s.58 of the CO 1911. The new Ordinance also applies to companies registered but not formed under a former CO (**Clause 18**).

15. A comparison table on relevant provisions in the existing CO and Part 1 of CB is at the **Appendix**.

PUBLIC CONSULTATION

16. We have consulted the public on the draft Bill in two phases of public consultation held from December 2009 to March 2010 and May to August 2010 respectively. Part 1 was covered in both phases of consultation.² The comments and the Administration's response are set out in Appendix III to the consultation conclusions of the two phases of consultation of the draft CB issued on 27 August 2010 and 25 October 2010 respectively.³

² In the second phase consultation, some definitions were added to draft Part 1 while some others were revised.

³ Available at http://www.fsb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccfp_conclusion_e.pdf and http://www.fsb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccsp_conclusion_e.pdf.

17. The major comments we received on Part 1 and our response are summarised below –

Major Comments	Administration's Response
<i>Formulation of “responsible person”</i>	
<p>Some respondents expressed concerns on the prosecution threshold. For example,</p> <ul style="list-style-type: none">• while considering it a positive development to strengthen Hong Kong’s compliance standards, the Law Society of Hong Kong was concerned that the officers of SMEs without professional training might have difficulty in compliance; and• the Hong Kong Institute of Directors supported lowering the threshold from “knowingly and wilfully” for the current formulation of “officer who is in default” while considered that it should still require a level of guilty mind beyond mere negligence.	<ul style="list-style-type: none">• The new definition of “responsible person” aims to enhance enforcement by extending the scope to cover reckless acts or omissions. We do not intend to impose strict liability on officers. Mental element (<i>mens rea</i>) is required for the prosecution to secure a conviction of a “responsible person” as defined in the Bill.• The word “permits” incorporates a mental element requirement which can only be satisfied by proof of actual⁴ knowledge, wilful blindness⁵ or recklessness⁵, but not negligence.• Officers who are truly innocent would be beyond reach of the definition of “responsible person”.

Financial Services and the Treasury Bureau

Companies Registry

21 March 2011

⁴ “Wilful blindness” requires proof that there was actual suspicion on the part of the officer but he chose to shut his eyes to the obvious.

⁵ “Recklessness” requires proof that the officer acted recklessly in respect of circumstances if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk.

Appendix to Annex A

Comparison Table for Part 1

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (“CO”) of the clause concerned in the CB, where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wordings may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows –

CO: Companies Ordinance (Cap. 32)

UKCA 2006: United Kingdom Companies Act 2006

Clause	Contents	Derivation	Notes
Division 1: Short title and commencement			
Division 2: Interpretation of this Ordinance: General			
2(1)	Interpretation - <i>accounting transaction</i> - <i>articles</i>	CO s. 344A(9)(b) CO s.2(1)	Existing law. Existing law with modification so that a condition of an existing company’s memorandum of association is regarded as a provision of the articles (see clause 93).

Clause	Contents	Derivation	Notes
	<ul style="list-style-type: none"> - <i>associated company</i> - <i>body corporate</i> - <i>certified public accountant (practising)</i> - <i>commencement date</i> - <i>Companies Register</i> - <i>company</i> - <i>company secretary</i> - <i>contributory</i> - <i>Court (note: this term is not defined in Chinese as it is not necessary to do so)</i> 	<p>CO s.165(5), s.168BA</p> <p>CO s.2(3)</p> <p>Professional Accountants Ordinance (Cap 50) s.2(1)</p> <p></p> <p>c.f. UKCA 2006 s.1080(2)</p> <p>CO s.2(1)</p> <p></p> <p>CO s.171</p> <p>CO s.2(1) definition of court</p>	<p>Existing law except that <i>related company</i> is used in s.165(5) and s.168BA.</p> <p>Existing law.</p> <p>New definition.</p> <p>New definition.</p> <p>New definition.</p> <p>Existing law.</p> <p>The term is used to replace <i>secretary</i> in CO.</p> <p>Existing law except that the latter part of s.171 is removed as it is in relation to Phase II of CO Rewrite.</p> <p>Existing law.</p>

Clause	Contents	Derivation	Notes
	<ul style="list-style-type: none"> - <i>court</i> - <i>debenture</i> - <i>director</i> - <i>document</i> - <i>electronic record</i> - <i>existing company</i> - <i>financial year</i> - <i>former Companies Ordinance</i> 	<p>CO s.2(1)</p> <p>CO s.2(1), Cap 553 s.2(1)</p> <p>CO s.2(1)</p> <p>c.f. UKCA 2006 s.390</p>	<p>New definition.</p> <p>Existing law with modification so that <i>debenture</i> includes “other debt securities” rather than “other securities” as currently defined in the CO. This is to align with the definition of “debenture” in the Securities and Future Ordinance (Cap.571).</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law expanded to cover companies formed and registered under CO.</p> <p>The definition replaces the definition in s.2(1) of the CO and provides for the determination of a company’s financial year.</p> <p>New definition.</p>

Clause	Contents	Derivation	Notes
	<ul style="list-style-type: none"> - <i>founder member</i> - <i>group of companies</i> - <i>identity card</i> - <i>Index of Company Names</i> - <i>information system</i> - <i>listed company</i> - <i>listing rules</i> - <i>manager</i> - <i>member</i> - <i>non-Hong Kong company</i> - <i>officer</i> - <i>Official Receiver</i> - <i>ordinary resolution</i> 	<p>CO s.2(1)</p> <p>CO s.2(1)</p> <p>Cap 177 s.1A(1)</p> <p></p> <p>CO s.168BAA (1), Cap 553 s.2(1)</p> <p>CO s.2(1)</p> <p></p> <p>CO s.2(1)</p> <p>CO s.28</p> <p>CO s.332</p> <p>CO s.2(1)</p> <p>CO s.2(1)</p> <p>c.f. UKCA 2006 s.282</p>	<p>Existing law plus new provision regarding new companies.</p> <p>Existing law.</p> <p>New definition.</p> <p>New definition.</p> <p>Existing law.</p> <p>Existing law.</p> <p>New definition.</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law.</p> <p>New definition.</p>

Clause	Contents	Derivation	Notes
	<ul style="list-style-type: none"> - <i>predecessor Ordinance</i> - <i>recognized exchange company</i> - <i>recognized stock market</i> - <i>redeemable shares</i> - <i>registered non-Hong Kong company</i> - <i>Registrar</i> - <i>reserve director</i> - <i>Secretary</i> - <i>shadow director</i> - <i>share</i> - <i>share warrant</i> - <i>special notice</i> 	<p>CO s.2(1)</p> <p>CO s.2(1)</p> <p>CO s.49(1)</p> <p>New definition for companies registered under Part 16.</p> <p>CO s.2(1)</p> <p>CO s.2(1)</p> <p>New definition.</p> <p>CO s.2(1) & (2)</p> <p>CO s.2(1)</p> <p>CO s.2(1) and s.73</p> <p>CO s.116C, c.f. UKCA 2006 s.312</p>	<p>New definition to refer to the CO.</p> <p>Existing law.</p> <p>Existing law with modification - the 21 days period is changed to 14 days.</p>

Clause	Contents	Derivation	Notes
	<ul style="list-style-type: none"> - <i>special resolution</i> - <i>specified form</i> - <i>undertaking</i> - <i>unlisted company</i> - <i>written resolution</i> 	<p>CO s.116, c.f. UKCA 2006 s.283</p> <p>CO s.2(1) & (9)</p> <p>CO 23rd Schedule section 1(1)</p> <p>CO s.2(1)</p> <p>CO s.116B(1) c.f. UKCA 2006 s.296</p>	<p>Existing law with modification - see clause 554.</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law.</p> <p>Existing law with modification – see clause 546.</p>
2(2)	Reference to this Ordinance etc.		New provision.
2(3)	Meaning of manager, receiver	CO s.302A	Existing law.
2(4)	Document in hard copy or electronic form	CO s.168BAA(3),	Existing law.
2(5)	Sending of document etc.	CO s.168BAA(2)	Existing law.
2(6)	Note	Cap 341 s.2(5) and Cap 542 s.3(4)	New provision.

Clause	Contents	Derivation	Notes
3	Responsible person	CO s.351(2) c.f. UKCA 2006 s.1121(3), s.1122(2) and s.1123(1)	Existing law with the following new elements – (a) to remove “knowingly and willfully”; (b) to include “participates in” and “failure to take all reasonable steps to prevent”; (c) to include officer and shadow director of corporate officer; and (d) to extend the application of the definition to non-Hong Kong company.
4	Certified translation	Cap 32B paragraph 6	Existing law plus new power for the Secretary to amend the list of specified persons.
5	Dormant company	CO s.344A, s.360(5) and 16 th Schedule	Existing law with transitional provision. Section 344A(6) of the CO is moved to clause 438(2). Section 344A(9)(b) is moved to clause 2(1).

Clause	Contents	Derivation	Notes
Division 3: Interpretation of this Ordinance: Types of Companies			
Subdivision 1: Limited Company and Unlimited Company			
6	Limited company	CO s.4(2)(a) & (b)	Existing law.
7	Company limited by shares	CO s.4(2)(a)	Existing law.
8	Company limited by guarantee	CO s.4(2)(b) and (4)	Existing law It should be noted that companies limited by guarantee now form a category separate from private or public companies.
9	Unlimited company	CO s.4(2)(c)	Existing law.
Subdivision 2: Private Company and Public Company			
10	Private company	CO s.29	Existing law plus clarification that a company limited by guarantee is not a private company.
11	Public company		New definition.
Division 4: Interpretation of this Ordinance: Holding Company and Subsidiary, and Parent Undertaking and Subsidiary Undertaking			
12	Holding company	CO s.2(4) & (5)	Existing law.

Clause	Contents	Derivation	Notes
13	Provisions supplementary to section 12	CO s.2(6)	Existing law.
14	Subsidiary	CO s.2(7)	Existing law.
15 and Schedule 1	Parent undertaking, parent company and subsidiary undertaking	CO s.2B(1) & 23 rd Schedule	Existing law.
Division 5: Application of this Ordinance			
16	Application to existing company	CO s.307	Existing law.
17	Application to unlimited company registered in pursuance of former Companies Ordinance as limited company	CO s.309	Existing law with modification to include the CO.
18	Application to company registered, but not formed, under former Companies Ordinance	CO s.308	Existing law with modification to include the CO.

Clause	Contents	Derivation	Notes
Schedule 1 : Parent Undertakings and Subsidiary Undertakings			
1	Interpretation - <i>shares</i>	CO 23 rd Schedule s.1(1)	Existing law.
2	Parent undertaking	CO 23 rd Schedule ss.2(1) & (2), 3 to 5	Existing law.
3	Provisions supplementary to section 2 of this Schedule	CO 23 rd Schedule ss.6 to 9	Existing law.
4	Parent company	CO 23 rd Schedule s.1(1)	Existing law.
5	Subsidiary undertaking	CO 23 rd Schedule s.2(3)	Existing law.

Bills Committee on Companies Bill

Part 3 – Company Formation and Related Matters, and Re-registration of Company

INTRODUCTION

Part 3 (Company Formation and Related Matters, and Re-registration of Company) of the Companies Bill (“CB”) contains provisions relating to company formation and registration, re-registration of unlimited companies as companies limited by shares and related matters.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 3 contains initiatives that aim at facilitating business operation and modernising the law, namely –

- (a) Abolishing the Memorandum of Association (“MA”) (paragraphs 5 to 9 below);
- (b) Reforming company re-registration provisions (paragraphs 10 to 12 below);
- (c) Providing statutory protection for persons dealing with a company (paragraphs 13 and 14 below);
- (d) Making the keeping and use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad (paragraphs 15 and 16 below); and
- (e) Widening the scope of documents an attorney can execute on behalf of the company locally or outside Hong Kong (paragraph 17 below).

3. The details of the major proposals in Part 3 are set out in paragraphs 5 to 17 below.

4. Apart from the above major proposals, Part 3 also provides for a company to appeal to the Administrative Appeals Board instead of to the court against a direction issued by the Registrar of Companies (“the Registrar”) concerning the company’s name (paragraph 18 to 19 below) as suggested by Members of the Bills Committee on the Companies (Amendment) Bill 2010. In addition, it sets out the types of companies that may be formed. It also incorporates changes introduced recently through the Companies (Amendment) Ordinance 2010, which provided for an improved company name registration system following the implementation of the new electronic company registration and filing of document services.

Abolishing the MA (clauses 63 to 65, 70 to 80 and 93)

5. Currently, the constitutional documents of a company formed in Hong Kong are the MA and the articles of association (“AA”). The MA used to contain the objects clause of the company. However the objects clause of a company is now less significant given the abolition of the doctrine of ultra vires in relation to corporate capacity in 1997 and all companies now have the capacity and rights of a natural person. As all the information provided on incorporation apart from the objects clause and the authorised capital¹ (which will be removed following the migration to no par) is contained in the AA and the incorporation form, the need to retain the MA as a separate constitutional document has diminished. In some common law jurisdictions such as Australia and New Zealand, companies have only a single constitutional document. We therefore propose to abolish the requirement for an MA.

6. **Clause 62** states that person(s) may form a company by, amongst other things, delivering to the Registrar for registration an incorporation form in specified form and a copy of the company’s AA. **Clauses 63 to 65 and 70 to 80** set out the requirements of the incorporation form and the AA respectively. Subject to the amendments

¹ Authorised capital is the maximum amount, usually specified in monetary terms, that a company is permitted by its constitutional document to raise by issuing shares. Shares can but need not be issued up to the authorised level.

in the CB, these will include all the information currently contained in the MA. **Clause 73** empowers the Financial Secretary (“FS”) to prescribe different model AA for different types of companies. These model AA replace Table A and the other tables in the First Schedule of the current CO for companies incorporated after the commencement of the CB.

7. As a result of the migration to no par, the authorised share capital requirement will be removed but **clause 80(3)** provides that a company having a share capital may state in its AA the maximum number of shares that it may issue.

8. **Clauses 83, 91 and 92** require companies to notify the Registrar of any alterations to the AA, including alterations by an order of the court or other Ordinance(s). **Clause 84** allows a company to alter its objects under its AA and **clause 86(1)** gives members of private companies the right to apply to the court in certain circumstances to object to the resolutions for altering the provisions of the company’s AA with respect to its objects. **Clause 85** provides for the alteration of the CO section 25A type conditions in an existing private company’s AA and **clause 86(3)** preserves the right of members of an existing private company to object to the resolutions for altering such conditions.

9. **Clause 93** provides that conditions (i.e. provisions) of the MA of an existing company (i.e. a company formed and registered under a former CO), such as object clauses (if any) and members’ liability, will be deemed to be regarded as provisions of the company’s AA.

Reforming company re-registration provisions (clauses 89 to 90, 125 to 127)

10. Part 3 simplifies the current provisions concerning re-registration of unlimited companies as limited companies under section 19 of the CO, as well as the provisions on private companies changing to public companies under section 30 of the CO. The current requirements under the CO are outdated and unnecessarily detailed.

11. **Clause 89** provides for alteration of the AA which changes the status of a private company. The existing requirement to file a

prospectus or a statement in lieu of prospectus (i.e. the Second Schedule) under section 30 of the CO, which is unduly onerous and serves no useful purpose², has been removed. However, the company must deliver to the Registrar within 14 days an annual financial statement for the financial year immediately preceding the financial year in which the alteration of the AA is made. **Clause 90** further provides for alteration of the AA which changes the status of a public company to that of a private company.

12. **Clause 125** provides for the matters in section 19(1) of the CO with the modification that an unlimited company may only re-register as a company limited by shares under the new CO. There must be a statement on the share capital structure, which after re-registration must conform to the requirements in the CB. **Clause 126** deals with how the application for re-registration should be made, and **clause 127** provides for a fresh certificate of incorporation to be issued by the Registrar to the company after the re-registration.

Providing statutory protection for persons dealing with a company (clauses 111 to 114)

13. **Clause 111** provides that a company's exercise of powers will be limited by its AA after the elimination of the MA. To supplement the provision, we have made reference to sections 40 and 42 of the United Kingdom Companies Act 2006 (“UKCA 2006”) and added **clauses 112 to 114** to provide statutory protection for persons dealing with a company in addition to the common law indoor management rule³. **Clause 112** provides that in favour of a person dealing with a company in good faith, the power of the directors to bind the company will be deemed to be free of any limitation under the AA, any resolutions of the company or any agreement between the members of the company.

² It serves no useful purpose for companies merely re-registering as public companies without going forward to raise funds. In any event, prospectuses would be required in the case of public companies going to raise funds.

³ Also known as the “rule in *Turquand’s case*”, i.e. the rule that a third party dealing in good faith with a company is not bound to inquire whether acts of internal management have been regular and is entitled to presume that acts within the company’s constitution and powers have been properly and duly performed, see *Royal British Bank v Turquand* (1856) 119 ER 886.

14. **Clauses 113 and 114** provide that the protection afforded to a person by **clause 112** will not apply where the party to a transaction with a company is an “insider” (for example, a director of the company or of a holding company of the company; or an entity connected with such a director); or where the company in question is an exempted company⁴, unless the person is unaware, at the time that the act is done, that the company is an exempted company or unless the exempted company has received full consideration in respect of the act done, and the person is unaware that the act in question is not permitted by any relevant document of the exempted company or is beyond the powers of the directors.

Making the keeping and use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad (clauses 119, 120 and 122)

15. Currently, section 93(1)(b) of the CO stipulates that every company shall have a common seal with the company name engraved in legible characters. To facilitate business, it is necessary to simplify the mode of execution of documents by making the keeping and the use of a common seal optional. In this respect, both the UK and Australia have given companies the choice of not keeping or using a common seal to execute documents and deeds⁵. **Clause 119** states that a company may have a common seal. This gives flexibility to companies and does not prejudice those companies which may still wish to keep and use their common seals. In connection with the change, **clause 122** sets out the requirements for execution of documents by a company. In particular, **clause 122(2)** allows a company to execute a document by having the document signed by a director (in the case of a single-director company) or by two authorised signatories (in the case of a company having two or more directors). **Clause 122(4)** also provides that a document signed in accordance with **clause 122(2)** and expressed to be executed by the company has effect as if the document had been executed under the company’s common seal.

⁴ An exempted company refers to a company permitted to be registered by a name without “Limited” as the last word of the name, see clause 98 of the CB. It is essentially the same as a “section 21 company” under the current CO.

⁵ Please see s.45 of UKCA 2006 and s.123 of Australian Corporations Act 2001.

16. Further, for a company to have an official seal for use outside Hong Kong, presently there must be authorisation by the AA and the company must have objects which require or comprise the transactions of business outside Hong Kong. Taking into consideration overseas experience⁶, the current restrictive requirements can be removed. **Clause 120** states that a company may have an official seal for use outside Hong Kong.

Widening the scope of documents an attorney can execute on behalf of the company locally or outside Hong Kong (clause 124)

17. Currently under the CO, an attorney can only bind a company in respect of deeds executed by him on its behalf outside Hong Kong. This is unduly restrictive taking in to account the increasing volume of local and overseas business activities. **Clause 124** widens the scope by stating that a company may authorise any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere. This clause is in line with section 47 of UKCA 2006.

Allowing a company to appeal to the Administrative Appeals Board instead of to the court (clause 104)

18. Currently, where the Registrar is satisfied that the name of a company gives so misleading an indication of the nature of its activities as to be likely to do harm to the public, or that the name constitute a criminal offence, or that it is offensive or otherwise contrary to the public interest, the Registrar may direct the company to change its name under section 22A of the CO. The company may apply to the court to set the direction aside.

19. At the meeting of the Bills Committee on the Company (Amendment) Bill 2010, Members suggested that a company should be allowed to appeal to the Administrative Appeals Board, instead of to the court, against a change-of-name direction/ notice issued by the Registrar in view of the cost and time involved in court proceedings. We agree with the suggestion. For local companies, the relevant changes have been incorporated in **clause 104**.

⁶ There are no such requirements in other common law jurisdictions such as the UK.

20. A comparison table on relevant provisions in Part 3 is contained in **Appendix**. Transitional and saving arrangements for Part 3 are set out in sections 3 to 13 of Schedule 10.

PUBLIC CONSULTATION

21. We have consulted the public on the draft CB in two phases of public consultation held from December 2009 to March 2010 and May to August 2010 respectively. Part 3 was covered by the second phase consultation. The comments and the Administration's response are set out in Appendix III to the consultation conclusions of the second phase consultation of the draft CB issued on 25 October 2010.⁷

22. The major comments received on Part 3 and our response are summarised below –

Major Comments	Administration's Response
<i>Allowing non-Hong Kong companies to re-domicile to Hong Kong</i>	
The Government should consider allowing non-Hong Kong companies to re-domicile to Hong Kong, which will make Hong Kong a more competitive jurisdiction and reduce cost for maintaining corporate structure.	The Standing Committee on Company Law Reform reviewed the issue in 2000 and concluded that there was no need to change the law to allow the "import" of companies. There was no support for such a proposal in the public consultation conducted in 1997-98. ⁸ There is no strong demand for introduction of corporate migration provisions in our recent public consultation. We will keep in view market development.

⁷ Available at http://www.fsb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccsp_conclusion_e.pdf.

⁸ See *The Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance* (2000), paragraphs 11.34 to 11.40 (available at <http://www.cr.gov.hk>)

Major Comments	Administration's Response
<p><i>Change of Company's Status</i></p> <p>It is important that an application for re-registration is filed with the Companies Registry indicating the company's changed status.</p>	<p>A new requirement has been introduced so that a private company changing to a public company has to deliver a notice of change of company's status in specified form to the Registrar for registration (clause 89 of CB). A parallel mechanism has also been introduced to deal with the situation that a public company changes its status to a private company (clause 90 of CB).</p>
<p><i>Company must not be registered by certain names</i></p> <p>The restriction on company name should be expanded to cover company names that are “too-like” the name of a company for which a direction to change its name has been given by the Registrar. A name shall be deemed “too-like” another name if it contains the same or substantially the same distinctive element as a well-known trademark or the name of another party.</p>	<p>We do not propose that the Registrar considers before registration whether a company name is similar to a name for which a direction of changing name has been given. Such an arrangement would lead to a huge surge in workload which would in turn cause inevitable delay in the company registration process. We also consider it unfair to grant any company a monopoly over the use of any distinctive words/expressions in its name. The Administration has responded to a similar comment on the Companies (Amendment) Bill 2010 in the Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill</p>

Major Comments	Administration's Response
	2010, see LC Paper No. CB(1)1680/09-10(01).
<p>There should be a “well-known mark” list or a “watch list” on which trademark owners can apply to have their trademarks recorded. A company applying to register a name including a trademark on such a list could be asked by the Companies Registry for confirmation or evidence that it is connected with the trademark owner. In addition, an opposition procedure can be established for trademark owners to object to a name, before a company is registered.</p>	<p>Our company registration system and trademark registration system are distinct and separate. It would be inequitable to grant trademark owners a monopoly over company names covering all kinds of business activities.</p>
<p>The Government should reconsider introduction of a company names adjudication system similar to that in the UK.</p>	<p>We would keep in view the effectiveness of the new measures to tackle “shadow companies”⁹ and draw reference from the UK as appropriate.</p>

**Financial Services and the Treasury Bureau
Companies Registry
21 March 2011**

⁹ These are measures introduced by the Companies (Amendment) Ordinance 2010 and are incorporated in the CB. “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 pose themselves as representatives of the owners of such trademarks or trade names to produce counterfeit products in the Mainland bearing such trademarks or trade names. Measures introduced under the Companies (Amendment) Ordinance 2010 which came into force in December 2010 include, among others, empowering the Registrar to act pursuant to court orders to direct a “shadow company” to change its name. The Registrar may substitute the company’s name with its registration number if it fails to comply with the Registrar’s direction to change name.

Appendix to Annex B

Comparison Table for Part 3

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (“CO”) of the clause concerned in the CB, where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wordings may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows –

ACA: Australia Corporations Act 2001

CO: Companies Ordinance (Cap. 32)

SCA: Singapore Companies Act

UKCA 2006: United Kingdom Companies Act 2006

Clause	Contents	Derivation	Notes
Division 1: Company Formation			
Subdivision 1: General Requirements for Formation			
61	Types of companies	CO s.4(2), (4) & s.29	Existing law except that: (i) under CO, 8 different types of companies can be formed. Under the Bill there are 5 (see the note on Part 1 at Annex A); (ii) private companies limited by guarantee without share capital and non-private

Clause	Contents	Derivation	Notes
			<p>companies limited by guarantee without share capital under the CO will be merged into one category of “companies limited by guarantee without share capital”;</p> <p>(iii) “private unlimited companies without share capital” and “non-private unlimited companies without share capital” under the CO are removed as it is unlikely that such types of companies will be formed in the future and there is currently no such company on the register; and</p> <p>(iv) non-private companies are renamed “public companies” and are defined in cl.11.</p>
62	Formation of company	CO s.4(1), 12(1)(c) CO s.14A(1) & 15(1) CO s.304 & 360(3A) & Eighth Schedule	Existing law except that: <p>(i) with the abolition of the MA, it is no longer a requirement to sign and deliver to the Registrar a MA for registration; and</p> <p>(ii) Fees will be prescribed by regulations to be made</p>

Clause	Contents	Derivation	Notes
			<p>under cl.897. Under the CO, the fees are paid pursuant to s.304 and Eighth Schedule. S.360(3A) stipulates that the FS may amend the table of fees in the Eighth Schedule by order published in the Gazette.</p>
63	Content of incorporation form	CO s.14A(2) CO s.14A(2)(a), (b), (c), (d) & (f) CO s.14A (2)(g) CO s.14A (2)(h), (k), (l); and CO s.18	<p>The content of the form is moved to Schedule 2. The existing law is modified as follows:</p> <p>(i) Cl.63(1)(a) is based on existing law, this should be read with s.1 of Schedule 2;</p> <p>(ii) Cl.63(1)(b) relates to each founder member of the company. This should be read with s.2 of Schedule 2. The existing requirement in CO s.14A(2)(g) to set out “the number of shares that each founder member is to take” is moved to the Statement of Capital and Initial Shareholdings stipulated in cl. 63(2) and s.8 of Schedule 2);</p> <p>(iii) Cl.63(1)(c) relates to each person who is to be a director of the company on the company’s formation. This</p>

Clause	Contents	Derivation	Notes
		CO s.14A (2)(i)	<p>should be read with s.3 of Schedule 2 (which is the existing law plus new provisions in s.3(1)(a)(iii) & 3(2) of Schedule 2 on “correspondence address” to enable a director to withhold his/her usual residential address from public inspection, see also clauses 48 to 54 and 632 to 638); and s.4 of Schedule 2 on statement relating to directors’ “consent to act” ;</p> <p>(iv) Cl.63(1)(d) relates to each person who is to be the company secretary, or one of the joint company secretaries, of the company on its formation. This should be read with s.5 of Schedule 2 (which is the existing law in CO s.14A(2)(i) except that the requirement for a company secretary to provide his “usual residential address” is replaced by a “correspondence address” to take account of the proposed abolition of the requirement for company secretaries to file their residential addresses);</p>

Clause	Contents	Derivation	Notes
		CO s.14A (2)(m)& (n) CO s.14A (2)(j) CO s.14A (2)(e) c.f. ACA s.117(2)(k)	(v) Cl.63(1)(e) relates to statements made in relation to the company's articles. This should be read with s.7 of Schedule 2, which is based on existing law except that the references to MA is deleted; (vi) Cl.63(1)(f) is based on existing law; and (vii) Cl.63(2) relates to statement of capital and initial shareholdings. This should be read with s.8 of Schedule 2. These new provisions are to be added to ensure that the public register contains a company's statement of capital which will be updated whenever there is a change to its capital structure. This is aligned with similar provisions in cl.80 below and in cl 196.
64	Signing of incorporation form	CO s.14A(3)	Existing law.
65	Statement of compliance to be contained in incorporation	CO s.18(2) & 18(3)(a) & (b)	Existing law.

Clause	Contents	Derivation	Notes
	form		
Subdivision 2: Incorporation of Company			
66	Issue of certificate of incorporation on registration	CO s.16(1)	<p>Existing law except that:</p> <ul style="list-style-type: none"> (i) any proposed company need not deliver the MA to the Registry for registration; (ii) specification as to how the certificate of incorporation should be signed by the Registrar is removed; and (iii) the certificate of incorporation will state whether the company is limited or unlimited.
67	Conclusiveness of certificate of incorporation	CO s.18(1)	Existing law.
68	Effect of incorporation	CO s.16(2)	<p>Existing law except that:</p> <ul style="list-style-type: none"> (i) after incorporation, the company shall be a body corporate by the name contained in the certificate of incorporation instead of in “the memorandum”; and (ii) the reference to having a

Clause	Contents	Derivation	Notes
			“common seal” is removed.
69	Delivery of director’s written consent	CO s.18A	Existing law modified with the maximum fine and daily default fine increased from level 3 to level 4 and \$300 to \$700 respectively.

Division 2: Company Articles

Subdivision 1: General

70	Articles prescribing regulations for company	CO s.9 c.f. UKCA 2006 s.18(1)	Existing law, but all companies must register articles containing basic information about the company (in place of the memorandum). Regulations which apply by default in the absence of modification or exclusion in the registered articles are now contained in the Model Articles instead of Table A (clauses 74 and 75 below).
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71	Language of articles	CO s.12(1)(a)	Existing law.
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72	Form of articles	CO s.12(1)(b)	Existing law.
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Subdivision 2: Model Articles

73	Financial Secretary may prescribe model articles	c.f. UKCA 2006 s.19(1) & (4)	New provision empowering the FS to prescribe model articles by notice published in the Gazette.
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Clause	Contents	Derivation	Notes
74	Adoption of model articles	CO s.11(1)	Existing law.
75	Application of model articles to limited company	CO s.11(2) c. f. UKCA 2006 s. 20	Existing law modified to refer to model articles instead of Table A.
Subdivision 3: Content and Effect of Articles			
76	Company name	CO s.5(1)	Existing law except that the name is set out in the articles instead of the memorandum.
77	Company's objects	CO s.5(1A) & (1B)	Existing law except that the objects (if any) are set out in the articles instead of the memorandum.
78	Members' liabilities	CO s.5(2) c.f. SCA s.22(1)(f)	Existing law except that: (i) the statement of limited liability is set out in the articles instead of the memorandum; and (ii) a new provision is added to provide that the AA of an unlimited company must state that the liability of the members is unlimited.

Clause	Contents	Derivation	Notes
79(1)	Liabilities or contributions of members of limited company	CO s.4(2)(a)	Existing law except that the statement in the MA on the liability of members of a company limited by shares is stated in the AA.
79(2)		CO s.5(3)	Existing law except that the statement of the undertaking of members to contribute in companies limited by guarantee is stated in the articles instead of the memorandum;
80	Capital and initial shareholdings	CO s.5(4)(a) c.f. UKCA2006 s.9(4) & 10 and Companies (Shares and Share Capital) Order 2009 of the UK, Art.2(3)	CO requires the MA to state the amount of share capital with which the company proposes to register (i.e. authorised share capital); and the division of that capital into shares of a fixed amount (i.e. par value). These matters no longer need to be stated in the constitution due to the abolition of par value and authorised capital. The statement of capital under cl.80 and s.8 of Schedule 2 requires other details of the share capital to be stated.
81	Effect of articles	CO s.23	Existing law except that reference to "the memorandum" is deleted.

Clause	Contents	Derivation	Notes
Subdivision 4: Alteration of Articles			
82	Company may alter articles	CO s.7, 13(1), (1A), 25 & 25A(2)	Existing law except the restriction on alterations to MA is now a restriction on amendment to AA as regards increase of liability to contribute to the share capital of the company.
83	Alteration by special resolution or ordinary resolution	CO s.13(1), (2), (3) & (4)	<p>Existing law plus:</p> <ul style="list-style-type: none"> (i) a new provision is introduced to enable members to vary the maximum number of shares a company may issue, for companies which state such a maximum number in their articles. (Under the CO, the authorised share capital places a limitation on the maximum amount of share capital which a company may issue. It can be altered under CO s.53(1)(a) &(2) by ordinary resolution); (ii) the company must deliver to the Registrar for registration a notice of the alteration of a company's AA in the specified form; and (iii) the time to register a notice and a certified copy of the

Clause	Contents	Derivation	Notes
			AA as altered with the Companies Registry (CR) is changed from 15 days to 14 days to align with similar requirements in this and other Parts.
84	Alteration of company's objects	CO s.8(1), (5), (7), (7A) & (8)	<p>Existing law except that:</p> <ul style="list-style-type: none"> (i) the alteration is made in the articles instead of the memorandum; (ii) a specified form is provided for filing of “a notice confirming the alteration of a company’s objects”; and (iii) the time to register the order and the required documents with the CR is changed from 15 days to 14 days to align with similar requirements in this and other Parts.
85	Alteration of certain articles by existing company	CO s.25A(1), (2), (3) <i>[with reference to s.8(7)&(8) of CO]</i> , (3A) & (4)	<p>Existing law except that:</p> <ul style="list-style-type: none"> (i) the provision is only relevant for existing companies which had set out the relevant conditions in its memorandum; and (ii) the time to register the order and the required documents with the CR is changed from

Clause	Contents	Derivation	Notes
			15 days to 14 days to align with similar requirements in this and other Parts.
86	Application to Court to cancel alteration	CO s.8(2), (3) & (4)	Existing law except as a result of the abolition of the par value shares, reference to the nominal value of the company's issued share capital is now a reference to the number of issued shares.
87	Certain alterations not binding on members	CO s.25	Existing law except that reference to "the memorandum" is deleted.
88	Company must incorporate alteration into articles	CO s.27	The requirement under the existing law in relation to the memorandum is now applied to the articles.
89	Alteration affecting status of private company	CO s.30(1)&(2), 12 th Schedule	Existing law except that: <ul style="list-style-type: none"> (i) the filing of a prospectus or a statement in lieu of prospectus is substituted by the company's latest annual financial statements; (ii) new provision is added for filing a "notice of change of status from private to public" in the specified forms with the Registrar within 14 days after the date on which the

Clause	Contents	Derivation	Notes
			<p>alteration takes effect;</p> <p>(iii) new offence provision is added for company failing to file the notice mentioned in (ii); and</p> <p>(iv) offence provision is modified such that a company failing to file the annual financial statements will be liable to a further fine of \$1,000 for each day during which the offence continues.</p>
90	Alteration affecting status of public company		New provision explicitly dealing with the conversion of public companies to private companies.
91	Notifying Registrar of alteration by order of Court	c.f. UKCA2006 s.35	New provision.
92	Notifying Registrar of alteration by Ordinance	c.f. UKCA2006 s.34(2), (3)(a) & proviso, (5) &(6)	New provision.
Subdivision 5: Miscellaneous			
93	Conditions of memorandum of association	c.f. UKCA2006 s.28(1)	New provision to cater for the abolition of the memorandum for existing companies.

Clause	Contents	Derivation	Notes
	of existing company to be regarded as provisions of articles		
94	Articles of company limited by guarantee	CO s.24	Existing law except that reference to “the memorandum” is deleted.
Division 3: Company Name			
Subdivision 1: Restriction on Company Name			
95	Company must not be registered by certain names	CO s.20(1), 20(2) & 20(2A)	Existing law except that reference to “the Chief Executive” (CE) is substituted by reference to “the Registrar”. There is no change in actual practice as the CE has delegated his powers under CO s.20(1) and 20(2) to the Registrar of Companies.
96	Financial Secretary may specify word or expression for section 95(2)(b)	CO s.22B(1)(a)	Existing law except that the power is to be exercised by the FS instead of the CE under the CO.

Clause	Contents	Derivation	Notes
Subdivision 2: Limited Company Name with “Limited” as Last Word etc.			
97	Limited company must not be registered without “Limited” as last word of name etc.	CO s.5(1)	Existing law except that reference to “the memorandum” is deleted.
98	Registrar’s licence to dispense with “Limited” etc.	CO s.21(1) & (2)	Existing law.
99	Terms and conditions of licence	CO s.21(3)	Existing law except that reference to “the memorandum” is deleted.
100	Effect of licence	CO s.21(4),(6) & (7)	Existing law except that reference to “the memorandum” is deleted.
101	Revocation of licence	CO s.21(5)	Existing law plus new provisions as follows: <ul style="list-style-type: none"> (i) to set out explicitly the grounds upon which a licence may be revoked by the Registrar; and (ii) the company must pass a special resolution to change name within the period specified in the notice of

Clause	Contents	Derivation	Notes
			revocation.
Subdivision 3: Change of Company Name			
102	Company may change name by special resolution	CO s.22(1), (1A), (1B), (7) & (8)	Existing law except that the time to register the notice with the CR is changed from 15 days to 14 days to align with similar requirements in this and other Parts.
103	Registrar may direct company to change same or similar name etc.	CO s.22(2), (3A), (3B), (4), (5) & (6)	Existing law.
104	Registrar may direct company to change misleading or offensive name etc.	CO s.22A(1), (1A), (2), (3) & (4)	Existing law except that reference to the “court” is substituted by reference to the “Administrative Appeals Board”.
105	Registrar may change company name in case of failure to comply with direction	CO s.22AA	Existing law.

Clause	Contents	Derivation	Notes
Subdivision 4: Supplementary Provision			
106	Determining whether name is same as or similar to another name	CO s.20(3) & 22(3)	Existing law.
Division 4: Membership			
107	Members of company	CO s.28	Existing law.
108	Members of holding company	CO s.28A	Existing law.
109	Notifying Registrar of increase in number of members of company limited by guarantee	CO s.10(3)	<p>Existing law except that:</p> <ul style="list-style-type: none"> (i) reference to “a company not having a share capital” is substituted by reference to “a company limited by guarantee”; (ii) the time to register the notice in the specified form with the CR is changed from 15 days to 14 days to align with similar requirements in this and other Parts; and (iii) a new definition of “registered number” is added.

Clause	Contents	Derivation	Notes
Division 5: Capacity and Powers of Company			
110	Company's capacity etc.	CO s.5A & 17	Existing law except that reference to "the memorandum" is substituted by reference to "the articles".
111	Company's exercise of powers limited by articles	CO s.5B	Existing law except that reference to "the memorandum" is substituted by reference to "the articles".
112	Transaction or act binds company despite limitation in articles etc.	c.f. UKCA2006 s.40 (1), (2), (3), (4) & (5)	New provision.
113	Transaction or act involving directors or their associates is voidable	c.f. UKCA 2006 s. 41	New provision.
114	Section 112 not to apply to certain cases	c.f. UKCA 2006 s.42(1) to (3)	New provision.
115	No constructive notice of matters	CO s.5C	Existing law except that reference to "the memorandum" is deleted.

Clause	Contents	Derivation	Notes
	disclosed in articles etc.		

Division 6: Contracts of Company

116	Contracts made by or on behalf of company	CO s.32	Existing law modified to take into account changes made to the requirement for seal and the execution requirements stated in cl.122(2).
117	Contracts made before company's incorporation	CO s.32A	Existing law.
118	Bills of exchange and promissory notes	CO s.33	Existing law.

Division 7: Execution of Documents

Subdivision 1: Company Seal

119	Company may have common seal etc.	CO s.93(1)(b), (4) & (5)(a) & proviso c.f. UKCA 2006 s.45(1) and ACA s.123	Existing law modified such that the keeping and use of a common seal is optional.
120	Official seal for use abroad	CO s.35 c.f. UKCA 2006 s.49	Existing law modified: (i) to remove the requirement for objects clause or AA of a

Clause	Contents	Derivation	Notes
			<p>company to authorise use of its official seal for the transaction of business outside Hong Kong so that all companies have the right; and</p> <p>(ii) new definition of an “executing agent” is added.</p>
121	Official seal for sealing share certificates etc.	CO s.73A c.f. UKCA 2006 s.50(1) & (2)(a)	Existing law but now applicable only for companies which choose to keep a common seal.
Subdivision 2: Execution Requirements			
122	Execution of documents by company	c.f. UKCA 2006 s.44(1),(2), (3), (4), (5), (6) & (8); ACA s.127(2)(a) & (b)	New provision.
123	Execution of deeds by company	c.f. UKCA 2006 s.46; ACA s.127(3)	New provision.
124	Execution of deeds or other documents by attorney for Company	CO s.34 c.f. UKCA 2006 s.47	Existing law expanded to allow execution of any other documents, not just deeds, and to documents or deeds executed in Hong Kong as well as elsewhere.

Clause	Contents	Derivation	Notes
Division 8: Re-registration of Unlimited Company as Company Limited by Shares			
125	Unlimited company may apply for re-registration as company limited by shares	CO s.19(1),(2)(a) & (b)(ii) c.f. UKCA 2006 s.105(3)	Existing law modified such that: (i) an unlimited company may not be re-registered as a company limited by guarantee, only as a company limited by shares; (ii) reference to “the memorandum” is deleted; and (iii) the statement of capital of a company after re-registration must conform to the requirements stated in s.8 of Schedule 2. These new provisions are to be added to align with similar provision in cl.196 of the Bill.
126	Application for re-registration	CO s.19(1) & (3)	Existing law except that the reference to the MA is replaced by AA.
127	Issue of fresh certificate of incorporation	CO s.19(4)&(5) c.f. UKCA 2006 s.107(4)(a)	Existing law modified to take account of the fact that: (i) re-registration can only be as a company limited by shares; and (ii) reference to the

Clause	Contents	Derivation	Notes
			“memorandum” is deleted.
128	Winding up of company re-registered as company limited by shares	CO s.19(6)	Existing law.
Schedule 2: Content of Incorporation Form			
1-8	Content of Incorporation Form	CO s.14A(2)	Please see clause 63 above.
Schedule 10: Transitional and Saving Provisions			
3-12	Transitional and Saving Arrangements for Part 3	N/A	New provisions.

Bills Committee on Companies Bill

Part 17 - Companies not Formed, but Registrable, under this Ordinance

INTRODUCTION

Part 17 (Companies not Formed, but Registrable, under this Ordinance) of the Companies Bill (“CB”) contains provisions relating to companies not formed under the new Ordinance or a former Companies Ordinance (“CO”) but eligible to be registered under the new Ordinance.

PROPOSALS

2. There is no significant change to the CO introduced under Part 17. Part 17 mainly restates, with some modifications, current Part IX of the CO¹, which provides for the registration of companies which are/have been formed in pursuance of any Ordinance other than the CO or a former CO. We have re-arranged the sequence of the provisions in Part IX of the CO in a more logical and user-friendly order. We have also taken the opportunity to remove the archaic provisions on “joint stock company” under sections 310 to 312 of the CO. Further details are set out in paragraphs 3 to 5 below.

Removing archaic provisions on “joint stock company”

3. At present, under section 310 of the CO, a joint stock company with limited liability, formed pursuant to any Ordinance (other than the CO or any of its predecessors), or letters patent, or being otherwise duly constituted according to law, and consisting of one or more members, may register under the CO as a company limited by shares. Section 311 sets out the definition² of a joint stock company while section 312 sets out the requirements for registration by such a company.

¹ Except sections 324 and 325 which will remain in the Companies (Winding Up and Miscellaneous Provisions) Ordinance as they are closely related to the winding-up provisions.

² A joint stock company is defined in section 311 of the CO as “a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons”.

4. Sections 310 to 312 of the CO originated from the United Kingdom (“UK”) Companies (Consolidation) Act 1908, which allowed joint stock companies formed under the earlier UK Joint Stock Companies Acts of 1844 and 1856 to register as a company under the subsequent UK Companies Acts. The UK Joint Stock Companies Acts did not apply in Hong Kong, and there was no equivalent legislation in Hong Kong. As far as we can ascertain, currently there is no incorporated joint stock company in Hong Kong. The chance of unincorporated joint stock companies being in existence is very remote. If there had been any such companies in existence which wished to register under the CO, they would have done so by now.

5. On the basis of the above, and for the sake of simplicity, we consider it justified to have the set of complicated rules on registration of joint stock companies repealed. If, despite the remote possibility, there were still in existence any unincorporated joint stock companies, they could simply dissolve the company and incorporate as a new one if they wish to become a company under the new Ordinance.

6. A comparison table on relevant provisions in Part 17 of the CB is contained in the **Appendix**. Transitional and saving arrangements for Part 17 are set out in section 133 of Schedule 10.

PUBLIC CONSULTATION

7. We have consulted the public on the draft CB in two phases of public consultation held between December 2009 to March 2010 and May to August 2010 respectively. Part 17 was covered by the first phase consultation and we have received no comment on it.

**Financial Services and the Treasury Bureau
Companies Registry
21 March 2011**

Appendix to Annex C

Comparison Table for Part 17

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (“CO”) of the clause concerned in the CB, where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wordings may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows –

CO: Companies Ordinance (Cap. 32)

Clause	Contents	Derivation	Notes
Division 1: Preliminary			
794	Interpretation	CO s.310(1), 322(2) and 323(4)	Existing law with the following modifications: (i) s.310(1)(a) is removed as the sub-clause is considered unnecessary; and (ii) references to “joint stock company” are removed.
Division 2: Registration of Eligible Companies			
795	Registrar may register eligible company	CO s.310(1) and s.313	Existing law.

Clause	Contents	Derivation	Notes
796	General restrictions on Registrar's power to register	CO s.310(1)(b) & (c), s312(c)(iii) and s.317	Existing law.
797	Registrar must not register without members' assent	CO s.310(1)(e) & (f) and 310(2)	Existing law.
798	Registrar must not register without resolution declaring amount of guarantee	CO s.310(1)(g)	Existing law.
799	Eligible company must pay registration fee	CO s.318	CO s.316 is not followed as the exemption from payment of fee cannot be justified.
800	Registrar must issue certificate of registration	CO s.318	Existing law.
Division 3: Consequences of Registration			
801	Application of Division	CO s.322(1)	Existing law.

Clause	Contents	Derivation	Notes
802	Status, property, rights and liabilities of eligible company	CO s.318 and s.320	Existing law except that s.319 is not adopted as there is no need to provide for vesting of property.
803	Continuation of existing proceedings	CO s.321	Existing law.
804	Continuation of existing constitutional document	CO s.322(2)	Existing law.
805	Eligible company may substitute articles for non-statutory constitutional document	CO s.323	Existing law with revisions on the basis of clauses 84 and 86 (the corresponding provisions of s.8 of CO).
806	This Ordinance applies to eligible company	CO s.322(3)	Existing law.
807	Exceptions to section 806(1)	CO s.322(3)(a), (c), (f) & (g)	Existing law.

Clause	Contents	Derivation	Notes
808	Eligible company's power to alter constitution	CO s.322(6)	Existing law.
Schedule 10: Transitional and Savings Provisions			
133	Transitional and Saving Arrangements for Part 17	N/A	New provision.