[162B.01] History

Section 162B was added in 2003.

[162B.02] Overview

This provision concerns a company which has only one member who is also a director and which enters into a contract with that member. If the contract is not in the company's ordinary course of business, the company must ensure that the terms of the contract, unless they are stated in writing, are set out in a written memorandum within seven days of the contract being made. Such memoranda must be kept at the same place where the books containing minutes of the meetings of directors are kept: s 162B(1) and (2). Failure to comply with this provision does not, however, affect the validity of any contract: s 162B(5).

Where the sole member of a company is a shadow director, that member must be treated as a director of the company but a body corporate is not to be treated as a shadow director of any of its subsidiaries by reason only that the directors (or a majority of the subsidiary) are accustomed to act with his directions or instructions: s 162B(6).

[162B.03] Default

If a company fails to comply with this provision, the company and every officer who is in default is liable to a fine: s 162B(3).

163. Approval of company requisite for payment by it to director or past director for loss of office etc.

It shall not be lawful for a company to make to any director or past director of the company any payment by way of compensation for loss of office, or as consideration for or in connexion with his retirement from office, without particulars with respect to the proposed payment (including the amount thereof) being disclosed to the members of the company and the proposal being approved by the company.

(Replaced 6 of 1984 s 120)

[cf. 1948 c 38 s 191 U.K.]

[163.01] History

This section may be compared with s 191 of the Companies Act 1949 (UK). Cf s 312 of the Companies Act 1985 (UK). It was enacted in 1984.

[163.02] Overview

Section 163 declares unlawful the making of any payment to a director or past director of the company where such a payment is made as compensation for loss of office or as consideration for retirement from office, without prior approval by the company based upon full disclosure to the members: see *W Haking Enterprises Ltd v Wong Wan Chiu & Ors* [2004] HKCU 159, (2004) DCCJ 6048 of 2002. Reference should also be made to related provisions in ss 163A, 163B, 163C and 163D. In this context, the term 'payments' is defined broadly in s 163D(3), but it does not include a bona fide payment by way of damages for breach of contract or by way of pension for past services. See generally *W Haking Enterprises Ltd v Wong Wan Chiu* [2004] HKEC 174, DCCJ 6048/2002 and the decisions considered therein.

163A. Approval of company requisite for any payment, in connexion with transfer of its property, to director or past director for loss of office etc.

(1) It is hereby declared that it is not lawful in connexion with the transfer of the

whole or any part of the undertaking or property of a company for any payment to be made to any director or past director of the company by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, without particulars with respect to the proposed payment (including the amount thereof) being disclosed to the members of the company and the proposal being approved by the company.

(2) Where a payment which is hereby declared to be illegal is made to a director or past director of the company, the amount received shall be deemed to have been received by him in trust for the company.

(Added 6 of 1984 s 120)

[cf. 1948 c 38 s 192 U.K.]

[163A.01] History

This section may be compared with s 192 of the Companies Act 1948 (UK), cf s 313 Companies Act 1985, (UK). It was enacted in 1984.

[163A.02] Overview

Where the company seeks to transfer the whole or a substantial part of the undertaking or property of a company, s 163A(1) declares that it is unlawful for a payment to be made by the company to any director or past director of the company to compensate the director for loss of office, or by way of consideration for that director's retirement from office, without first obtaining the informed consent of the members of the company. However, such a payment may be made if it is approved by the company on the basis of full disclosure being made to the members of the details of the payment: s 163A(1). In the event of a payment being made to a director in contravention of this provision, s 163A(2) provides that the payment which has been received by the director or past director will be held by that person in trust for the company: see s 163D. In this context, the term'payments' is defined broadly in s 163D(3), but it does not include a bona fide payment by way of damages for breach of contract or by way of pension for past services.

The statutory requirement in s 163A may be compared with the duty of a director as a fiduciary to account where a director receives unauthorized profits or benefits through their position as a director: see for example, *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134; and the Privy Council decision in *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, (1978) CLC ¶ 40-389 at 29,779; also see Tomasic and Bottomley *Corporations Law in Australia 1995, Federation Press, Sydney, Ch 14)*. It should also be noted that the provisions of s 163A do not exclude the operation of any rule of law which requires disclosure to be made in regard to any payments to directors which are covered in s 163A: s 163D(5).

163B. Duty of director or past director to disclose payment for loss of office, etc., made in connexion with transfer of shares in company

(1) Where, in connexion with the transfer to any persons of all or any of the shares in a company, being a transfer resulting from-

(a) an offer made to the general body of shareholders;

(b) an offer made by or on behalf of some other undertaking with a view to the company becoming its subsidiary or a subsidiary of its parent undertaking;

(Replaced 12 of 2005 s 12)

(c) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise or control the exercise of not less than one-third of the voting power at any general meeting of the company; or

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(d) any other offer which is conditional on acceptance to a given extent,

a payment is to be made to a director or past director of the company by way of compensation for loss of office, or as consideration for or in connexion with his retirement from office, it shall be the duty of that director or past director to take all reasonable steps to secure that particulars with respect to the proposed payment (including the amount thereof) shall be included in or sent with any notice of the offer made for their shares which is given to any shareholders.

(2) If-

(a) any such director or past director fails to take reasonable steps as aforesaid; or

(b) any person who has been properly required by any such director or past director to include the said particulars in or send them with any such notice as aforesaid fails so to do,

he shall be liable to a fine.

(Amended 7 of 1990 s 2)

(3) If-

(a) the requirements of subsection (1) are not complied with in relation to any such payment as is therein mentioned; or

(b) the making of the proposed payment is not, before the transfer of any shares in pursuance of the offer, approved by a meeting summoned for the purpose of the holders of the shares to which the offer relates and of other holders of shares of the same class as any of the said shares,

any sum received by the director or past director on account of the payment shall be deemed to have been received by him in trust for any persons who have sold their shares as a result of the offer made, and the expenses incurred by him in distributing that sum amongst those persons shall be borne by him and retained out of that sum.

(4) Subject to section 163D(4), where the shareholders referred to in subsection (3)(b) are not all the members of the company and no provision is made by the articles for summoning or regulating such a meeting as is mentioned in that paragraph, the provisions of this Ordinance and of the company's articles relating to general meetings of the company shall, for that purpose, apply to the meeting either without modification or with such modifications as the court on the application of any person concerned may direct for the purpose of adapting them to the circumstances of the meeting.

(5) If at a meeting summoned for the purpose of approving any payment as required by subsection (3)(b) a quorum is not present and, after the meeting has been adjourned to a later date, a quorum is again not present, the payment shall be deemed for the purposes of that subsection to have been approved.

(Added 6 of 1984 s 120)

[cf. 1948 c 38 s 193 U.K.]

[163B.01] History

This section may be compared with s 193 of the Companies Act 1949 (UK). It was enacted in 1984. Subsection (1)(b) was amended by the Companies (Amendment) Ordinance 2005 s 12 to adopt the revised terminology applying to groups of companies. It substitutes 'undertaking' for 'body corporate' and 'parent undertaking' for 'holding company': see s 2B.

[163B.02] Overview

Section 163B(1) imposes a duty upon a director or a past director of the company to take all reasonable steps to ensure that particulars of any proposed payment, in respect of compensation for loss of office or as consideration for retirement from office, are provided to the members, in circumstances where the payment is made in connection with the transfer of all or any shares in the company. Such a duty arises under s 163B(1) in four specific circumstances:

(1) where an offer is made to the general body of shareholders for the transfer of the shares;

(2) where an offer is made by or on behalf of some other undertaking with a view to the company becoming its subsidiary or a subsidiary of its holding company;

(3) where an offer is made by or on behalf of an individual with a view to his obtaining the right to exercise or control the exercise of not less than one-third of the voting power at a general meeting of the company; or

(4) where any other offer is made which is to a certain extent conditional on acceptance.

In this context, the term 'payment' is defined broadly in s 163D(3), but it does not include a bona fide payment by way of damages for breach of contract or by way of pension for past services.

[163B.03] Effects of non-compliance with s 163B(1)

Where a director fails to comply with the duty which is imposed upon them by s 163B(1), that director will be liable summarily to a level 5 fine where it is proved that the director failed to take reasonable steps in complying with this duty: s 163B(2)(a). The same sanction applies to any person who has been properly required by a director to provide such particulars or to send such particulars to the members: s 163B(2)(b). Where there has been non-compliance with the requirements of s 163B(1), or where the making of the proposed payment is not approved by a meeting of members, any sums received by the director or past director in this context are deemed by s 163B(3) to be held in trust for the persons who have sold their shares as a result of the offer which has been made. Furthermore, any expenses which are incurred by the director or past director in distributing this sum to those persons, is to be borne by the director or past director: s 163B(3).

[163B.04] Meeting procedures under s 163B(3)(b)

The procedures to be followed in relation to such a meeting of shareholders held under s 163B(3)(b) are provided for in ss 163B(4) and (5); these are subject to the operation of s 163D(4).

[163B.05] Other remedies

It should also be noted that the provisions of s 163AB do not exclude the operation of any rule of law which requires disclosure to be made in regard to any such payments to directors which are covered in s 163B: s 163D(5).

163C. Approval of company requisite for payment of damages or pension to director or past director in certain cases

(1) It shall not be lawful for a company to make to any director or past director of the company any payment by way of damages or pension referred to in section 163D(3)(b) if the company makes or has made to that director any payment to which section 163, 163A or 163B applies, without particulars with respect to the proposed payment of damages or pension (including the amount thereof) being disclosed to the members of the company and the proposal being approved by the company; and for the purposes of this section 'pension' (退休金) has the same meaning as it has for the purposes of section 163D(3)(b).

(2) Where a payment which is hereby declared to be illegal is made to a director or past director of the company, the amount received shall be deemed to have been received by him in trust for the company.

(Added 6 of 1984 s 120)

[163C.01] History

This provision was enacted in 1984.

[163C.02] Overview

Where a company has made a payment to a director or a past director which is covered by section

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163, 163A or 163B, that company is precluded by s 163C(1) from making any further payments to that director by way of damages or pension (as defined in s 163D(3)(b)) without the details of such a further payment being disclosed to its shareholders and approved by the company. In the event of such a payment being made, it will be considered illegal and the amount received will be deemed to have been received by the director in trust for the company. It should also be noted that the provisions of s 163C do not exclude the operation of any rule of law which requires disclosure to be made in regard to any such payments to directors which are covered in s 163C: s 163D(5).

163D. Provisions supplementary to sections 163, 163A, 163B and 163C

(1) Where in proceedings for the recovery of any payment as having, by virtue of subsections (1) and (2) of section 163A or subsections (1) and (3) of section 163B, been received by any person in trust, it is shown that-

(a) the payment was made in pursuance of any arrangement entered into as part of the agreement for the transfer in question or within 1 year before or 2 years after that agreement or the offer leading thereto; and

(b) the company or any person to whom the transfer was made was privy to that arrangement,

the payment shall be deemed, except in so far as the contrary is shown, to be one to which the subsections apply.

(2) If in connexion with any such transfer as is mentioned in section 163A or 163B-

(a) the price to be paid to a director of the company whose office is to be abolished or who is to retire from office for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of the like shares; or

(b) any valuable consideration is given to any such director,

the excess or the money value of the consideration, as the case may be, shall, for the purposes of that section, be deemed to have been a payment made to him by way of compensation for loss of office or as consideration for or in connexion with his retirement from office.

(3) References in sections 163, 163A and 163B to payments to any director of a company by way of compensation for loss of office, or as consideration for or in connexion with his retirement from office-

(a) include any such payments to him in respect of the loss of or retirement from his office as director of the company or in respect of the loss or retirement, while a director of the company or on or in connexion with his ceasing to be a director of the company, of or from-

(i) any other office in connexion with the management of the company's affairs; or

(ii) any office as director or otherwise in connexion with the management of the affairs of any subsidiary of the company; but

(b) do not include any bona fide payment by way of damages for breach of contract or by way of pension in respect of past services; and for the purposes of this paragraph 'pension' (退休金) includes any superannuation allowance, superannuation gratuity or similar payment.

(4) The following provisions shall apply in relation to any meeting of a company and any meeting referred to in section 163B(3)(b) summoned for the purpose of approving any payment as required by section 163, 163A, 163B or 163C-

(a) the notice convening the meeting shall give full particulars with respect to such payment, including the amount thereof;

(b) the approval of the company for any such payment shall be given by ordinary resolution;

(c) any director to whom it is proposed to make any such payment, and any person who holds any shares in the company in trust for him, shall not

be entitled to vote on any resolution to approve such payment or any other payment in respect of which approval is required by section 163, 163A, 163B or 163C, nor shall the director or such person, if any, be counted in determining whether a quorum is present at the meeting.

(5) Nothing in sections 163A, 163B and 163C shall be taken to prejudice the operation of any rule of law requiring disclosure to be made with respect to any such payments as are therein mentioned or with respect to any other like payments made or to be made to the directors of a company.

(6) References in this section to a director include references to a past director.

(Added 6 of 1984 s 120)

[cf. 1948 c 38 s 194 U.K.]

[163D.01] History

This section may be compared with s 194 of the Companies Act 1948 (UK). It was enacted in 1984.

[163D.02] Overview

Section 163D supplements earlier provisions of the Ordinance which are found in ss 163, 163A, 163B and 163C. The section provides that in regard to any proceedings for the recovery of a payment which is deemed by ss 163A(1) and (2) and ss 164B(1) and (3) to be held in trust by the person to whom it was made, the payment will be deemed to be subject to s 163D if the following conditions are met: (i) the payment was made pursuant to an arrangement which had been entered into as part of the agreement for the transfer or within one year before or two years after that agreement or the offer which led to it; and (ii) the company or any person to whom the transfer was made was privy to the arrangement: s 163D(1). In this context, the term 'payments' is defined broadly in s 163D(3), but it does not include a bona fide payment by way of damages for breach of contract or by way of pension for past services.

In relation to a transfer which is referred to in ss 163A or 163B, if the share price which is to be paid to a director of the company who is to retire or whose office is to be abolished is in excess of the price which could at that time have been obtained by other shareholders holding similar shares, the excess value will be deemed to be a payment made by way of compensation for loss of office or as consideration for or in connection with the director's retirement from office: s 163D(2). The same deeming provision will apply in relation to any valuable consideration which is given to any such director, where the money value of the consideration provided will be deemed to be a payment made in connection with the director's retirement from office: s 163D(2).

[163D.03] Other machinery provisions

Section 163D defines the concept of a payment for the purposes of ss 163, 163A and 163B; it also defines a 'pension' as including any superannuation allowance, superannuation gratuity or similar payment.

In regard to meetings which are required under ss 163, 163A,163B or 163C to approve the making of a payment to a director, the procedural requirements for such a meeting are set out in s 163D(4). Furthermore, the provisions of ss 163A, 163B or 163C are not intended to exclude the operation of any rule of law which requires disclosure to be made in regard to any such payments to directors which are covered in these sections. Finally, it should be noted that references in s 163D to a director are deemed to include a reference to a past director: s 163D(6).

164. Provisions as to assignment of office by directors

(1) If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or managing agent of the company to assign his office as such to another

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person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company.

(Amended 6 of 1984 s 121)

(2) It shall be the duty of a company which is the managing agent of another company to notify forthwith to that other company-

(a) any change in the control of such first-mentioned company;

(b) any material change in the composition of the board of directors of such first-mentioned company.

(Added 6 of 1984 s 121)

(3) Notwithstanding anything in any agreement providing for the appointment of a company as the managing agent of another company, where that other company is notified under subsection (2)(a) that a change in the control of such first-mentioned company has occurred and, at the same time or thereafter, is notified under subsection (2)(b) that a material change in the composition of the board of directors of such first-mentioned company has also occurred, such agreement may be terminated by that other company at any time within 1 month after being so notified under subsection (2)(b).

(Added 6 of 1984 s 121)

(4) For the purposes of this section 'material change' (重大改變), in relation to the composition of the board of directors of a company, means any change whereby more than half of the number of directors of the company cease to be directors.

(Added 6 of 1984 s 121)

[cf. 1929 c 23 s 151 U.K.]

[164.01] History

This section may be compared with s 151 of the Companies Act 1929 (UK) and was amended in 1984.

[164.02] Overview

Where the articles of a company or any other agreement between the company and another person provides for the assignment of the office of director by a director or the managing agent of the company, such a provision will be ineffective until it is approved by a special resolution of the company: s 164(1). Section 116 sets out the rules which need to be complied with in relation to such a special resolution.

[164.03] Duty of managing agent in relation to various changes

Section 164(2) imposes a duty upon a company which is the managing agent of another company to notify that other company forthwith where any change occurs in the control of the first-mentioned company, as well as where there is any 'material change' (as defined in s 164(4)) which occurs in such first mentioned company to the composition of the board of the first-mentioned company. Any such changes may lead to the termination in the appointment of the company as managing agent of the other company, notwithstanding any provisions of the management agreement to the contrary: s 164(3).

Avoidance of Provisions in Articles or Contracts relieving Officers from Liability

165. Provisions as to liability of officers and auditors

(1) Any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any officer of the company or any person employed by the company as auditor from, or indemnifying him against, any liability to the company or a related company that by virtue of any rule of

law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company or related company shall, subject to subsections (2) to (4), be void.

(2) A company may indemnify any officer of the company, or any person employed by the company as auditor, against any liability incurred by him-

(a) in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted; or

(b) in connection with any application under section 358 in which relief is granted to him by the court.

(3) A company may purchase and maintain for any officer of the company, or any person employed by the company as auditor-

(a) insurance against any liability to the company, a related company or any other party in respect of any negligence, default, breach of duty or breach of trust (save for fraud) of which he may be guilty in relation to the company or a related company; and

(b) insurance against any liability incurred by him in defending any proceedings, whether civil or criminal, taken against him for any negligence, default, breach of duty or breach of trust (including fraud) of which he may be guilty in relation to the company or a related company.

(4) Nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision as is mentioned in subsection (1) was in force.

(5) In this section, 'related company' (有關連的公司), in relation to a company, means any company that is the company's subsidiary or holding company or a subsidiary of that company's holding company.

(Replaced 28 of 2003 s 73)

[cf. 1929 c 23 s 152 U.K.]

[165.01] History

This section may be compared with s 152 of the Companies Act 1929 (UK) (cf s 310 Companies Act 1985 (UK)). It was amended in 1984 and replaced in 2003.

[165.02] Overview

Before the section appeared in the 1932 Ordinance it was common for articles to relieve directors and other officers and auditors from liability, except for their own dishonesty or wilful neglect or default. The original s 165 changed this position. Section 165 was replaced, in particular with respect to directors' liability insurance, in 2003. Section 165(1) declares void (subject to the exceptions in s 165(2)) any provision in the company's articles or any contract with the company or otherwise for exempting any officer of the company or any person employed by the company as auditor from, or indemnifying him against any liability to the company or a related company which would by virtue of any rule of law otherwise attach to that person in respect of any negligence, default, breach of duty or breach of trust in relation to the company. Sub-s (4) preserved the protection given in existing indemnity provisions when sub-s (1) was first introduced and is unlikely to be relevant today. S 165(1) only affects indemnities given by the company and its related companies, not those given by third parties: see *Burgoine v London Borough of Waltham Forest* [1997] 2 BCLC 612. For 'related company' see subsection (5).

Section 165(2) permits a company to indemnify any officer or its auditor against liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application for relief under s 358 in which relief is granted to him by the court: for such relief see [356.03]

Section 165(3) clarifies the uncertainties of the previous provisions and permits a company to purchase and maintain for an officer or an auditor, insurance against any liability to the company, a related company or any other party in respect of any negligence, default breach of duty (save for fraud) of which he may be guilty in relation to the company or a related company; and

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insurance against any liability incurred by him in defending any proceedings, whether civil or criminal, taken against him for any negligence, default, breach of duty or breach of trust (including fraud) of which he may be guilty in relation to the company or a related company.

Section 165 applies only to Hong Kong incorporated companies (by virtue of the definition of 'company' in s 2): see *Re Moulin Global Eyecare Holdings Ltd v Lee Sin Mei Olivia* [2009] 3 HKLRD 265 (and for the construction of an express indemnity clause). The trial judge's decision as to the incorporation of an indemnity under bye-law 166 being incorporated into the defendant's terms of engagement was reversed on appeal: see [2010] 2 HKLRD 1096, (CA).

[165.03] Reform

The Standing Committee on Company Law Reform Ninth Report, 1992, at pp 46-48 considered the original s 165 and concluded provisions such as s 165 have been interpreted as preventing a company from insuring its directors from the risks of actions being brought against them for negligence, breach of duty or breach of trust. This rule has been reformed in some jurisdictions (see s 199A-C of the Corporations Act 2001 (Aust); Companies and Securities Law Review Committee Company Directors and Officers: Indemnification, Relief and Insurance; Report No 10, CSLRC, Melbourne, 1990; and Companies and Securities Advisory Committee Report on Company Directors and Officers: Indemnification Relief and Insurance, CASAC, Sydney, 1992). The Standing Committee on Company Law Reform in its Ninth Annual Report, 1992, Hong Kong, at pp 46-48 also considered s 165 and concluded that the provision should be amended so as to eliminate doubts which have been expressed about the capacity of companies to provide insurance cover to their officers. Also see the Tenth Annual Report of the Hong Kong Standing Committee on Company Law Reform 1993-94, Hong Kong, at pp 13-14. The 1997 *Consultancy Report of the Review of the Hong Kong Companies Ordinance*, pp 126-127, recommended that companies should be permitted to indemnify directors and officers in specific situations, except where they failed to act honestly and in good faith. The SCCLR in their Report of February 200[illegible] recommended that the Ordinance should confirm that indemnities may be given to directors and the permissible scope of such indemnities (R75). The Companies (Amendment) Ordinance 2003 (28 of 2003) clarified the scope of indemnities for directors and permitted companies to buy liability insurance for officers and auditors in specified circumstances: see Millin[illegible] Youl, 'Protecting Non-Executive Directors from Liability', Hong Kong Lawyer, Feb[illegible] 2003, pp 56-60.

Arrangements and Reconstructions

166. Power to compromise with creditors and members

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) shall have no effect until an office copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3), the company and every officer of the company who is in default shall be liable to a fine for each copy in respect of which default is made.

(Amended 22 of 1950 Schedule; 6 of 1984 s 25; 97 of 1990 s 2)

(5) In this section and in section 166A, the expression 'company' (公司) means any company liable to be wound up under this Ordinance, and the expression 'arrangement' (債務償還安排) includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

(Amended 6 of 1984 s 123)

[cf. 1929 c 23 s 153 U.K.]

[166.01] History

The section is derived from s 153 of the Companies Act 1929 (UK). Subsection (4) and s 200(3) was amended in 1990 when all the penalty provisions were amended and the Twelfth Schedule added. Subsection (5) was amended in 1984 to include the reference to s 166A. For similar provisions, see s 425 of the Companies Act 1985 (UK); s 411 et seq of the Corporations Act 2001 (Aust) and the Companies Act (Cap 50)(Sing), Corporations Regulations, Eighth Schedule, s 210.

For the power of liquidators to compromise: see s 199(e), (f) and see ss 237, 254. For schemes involving a reduction of capital: see s 58. For attempts at a corporate rescue by provisional liquidators: see s 193.

[166.02] Overview

The section provides that a compromise or arrangement effected in the manner set out shall be binding on all creditors or members or classes, as appropriate, notwithstanding the fact that there may be a dissenting minority. Without a statutory provision like this, 100% member/creditor approval is required if a compromise or arrangement is to be effective: see *Re Wah Nam Group Ltd (No 2)* [2003] 1 HKLRD 282, [2002] HKCU 784.

In an insolvency situation the need for unanimity may cause a perfectly reasonable rehabilitation proposal to be defeated by a single recalcitrant creditor. Section 166 is an improvement on this, but still is not of much use in an insolvency situation, since it lacks a moratorium (stay of proceedings) element. Even though under s 166 a dissenting minority will be bound on the court sanctioning the scheme, until the court makes the order a recalcitrant creditor may petition for winding up. For this reason s 166 was rarely used. It was not used in any of the shipping group cases (*Tung*, *Wah Kwong* and *Fung*) in the mid-1980s during the shipping recession: see the Law Reform Commission of Hong Kong Sub-Committee on Insolvency Report on Corporate Rescue and Insolvent Trading, January 1996, paras 1.8 to 1.12. Section 166 was used in the *Re Bank of Credit and Commerce Hong Kong Ltd* case in relation to depositors who were owed less than $100,000, but that was a special case, in which the government was concerned to uphold the reputation of the Hong Kong banking industry. (For the background to the case see Srivastava (1991) 1 Aust Jo Corp Law 170 and for the administration of the liquidation see the Annual Departmental Reports of the Official Receiver's Office.) See *Re Hong Kong Construction (Holdings) Ltd* [2007] 1 HKLRD 190.

In October 1996, the Law Reform Commission of Hong Kong recommended an additional procedure, called provisional supervision, which would involve a moratorium: see the Companies (Corporate Rescue) Bill 2001. For the failure to introduce provisional supervision see [166.07]. Section 166 application in the insolvency context remain quite common: see eg, *Re Plus Holdings Ltd* [2007] 2 HKLRD 725; *Re Perfect Sense Group Ltd* [2007] 2 HKLRD 734.

In fact s 166 was most often in the late 1980s and 1990s for the purposes of redomiciling Hong Kong companies overseas: see *Re Hongkong and Shanghai Banking Corp Ltd* [1991] 2 HKLR 111, [1991] HKCU 424, a scheme whereby the Hongkong Bank trading company became a wholly owned subsidiary of HKSBC Holdings plc, a public company incorporated in the United Kingdom. This phenomenon began in 1988 as a protection, so it was seen, against the possible

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seizure of assets post-1997. Redomiciles increased dramatically after June 1989. The 1996 Stock Exchange of Hong Kong Fact Book records four changes of domicile to Bermuda. As at year-end 2008 there were 1087 companies listed on the Main Board, many of which were incorporated overseas in Bermuda, BVI, the Cayman Islands, Jersey and Guernsey (see the SEHK Fact Book at www.hkex.com.hk).

In recent times schemes of arrangement have been proposed under s 166 to re-organise groups of companies to create a new holding company (see, for example, *Re Hong Kong Construction (Holdings) Ltd* [2007] I HKLRD 190) and to enable public listed companies in liquidation to sell their listing status: see *Re UDL Holdings Ltd (No 1)* [1999] 2 HKLRD 817, [2000] 4 HKC 778 (CA); *Re Yaohan Hong Kong Corp Ltd (in liq)* [2001] 1 HKLRD 363, [2000] 3 HKC 554, [2000] 4 HKC 488 (CA); *Re Wah Nam Group Ltd (No 2)* [2003] 1 HKLRD 282, [2002] HKCU 754; *Re 3D-Gold Jewellery Holdings Ltd* [2009] HKCU 1001, 9 July 2009, HCMP 1196/2009.

As in other jurisdictions, the section is used for various types of company or group reorganisations: see, eg, *Re China National Aviation Co Ltd* [2007] HKCU 140; *Re Shaw Bros (Hong Kong) Ltd* 17 March 2099, HCMP 67/2009; *Re Shaw Bros (Hong Kong) Ltd* [2009] HKCU 405, 19 March 2009, HCMP 67/2009; *Re Wheelock Properties Ltd* [2010] 4 HKLRD 587. For recent cases concerning the realisation of an insolvent company's listing status as part of a scheme of arrangement, see *Re Yaohan Hong Kong Corp Ltd (in liq)* [2000] 3 HKC 554, [2000] 4 HKC 488, [2001] 1 HKLRD 363, (CA); *Re Rhine Holdings Ltd (in liq)* [2000] 3 HKC 543; *Re Albatronics (Far East) Co Ltd* [2001] 3 HKC 223; *Re Albatronics (Far East) Co Ltd (in liq) (No 2)* [2002] 4 HKC 99, [2002] HKLRD (Yrbk) 180: see *Re Wah Nam Group Ltd (No 2)* [2003] 1 HKLRD 282; *Re I-China Holdings Ltd* [2004] HKLRD (Yrbk) 178; *Re Hong Kong Pharmaceutical Holdings Ltd* [2006] HKLRD (Yrbk) 187, [2004] HKCU 505; *Re Plus Holdings Ltd* [2007] 2 HKLRD 725.

Section 166(2) requires a majority in number (the 'head count') and three fourths in value. The head count requirement was criticised in *Re PCCW Ltd* 6 April 2009, HCMP 2382/2008, varied on appeal22 April 2009, CACV 85/2009 and 26 August 2009 (application for leave to appeal to CFA dismissed), and has been reviewed as part of the Companies Ordinance Rewrite (see Companies Bill 2011 clause 664(2)(c)(ii), which follows the Australian Corporations Act s 411(4) and allows the court in its discretion to override the head count requirement in the case of members' schemes). And note in relation to listed companies, where the scheme falls within the Takeovers Code, r. 2.10(b) of the Code, which requires a 95 per cent majority approval of the scheme. It is worth noting that the original s 166 applied (as did the equivalent provision in the English legislation) only to insolvent companies, where the majority in number representing three-fourths in value test is more understandable in the context of creditors. By the Companies Ordinance 1911 the section was extended (following the English 1908 Act and probably without much thought being given to the matter) to solvent companies. One solution may be to retain the head count for insolvent companies, but delete it for solvent companies.

For other provisions relevant to companies and arrangements in a winding up, see ss 199(1)(e), (f), 227D, 237, 246 and 254.On the overlap between s 166 and s 199 see *Re Moulin Global Eyecare Holdings Ltd* [2007] 4 HKLRD 315.

The section applies to unregistered, including non-Hong Kong, companies: subsection (5) and s 326(2) and s 327; but quaere whether the company must actually be in liquidation: see Graeme Johnston, The Conflict of Laws in Hong Kong, para 8.041.

The pari passu principle of distribution does not apply to a s 166 scheme: *GDH Ltd v Creditor Co Ltd* [2008] 5 HKLRD 895.

For a general overview of s 166 see Stewart Smith, Some Problems in Reorganising Insolvent Companies, Law Lectures for Practitioners 1983, Hong Kong Law Journal Ltd 1983, p 227 et seq.

For proposed reform about corporate rescue, see [166.07]. It is worth mentioning here that, as indicated above, while the main defect of s 166 in an insolvency situation is the lack of a moratorium, it does not need a totally new procedure, such as administration, to be introduced to provide the moratorium. Section 411(16) of the Australian Corporations Act 2001 and s 210(10) of the Singapore Companies Act (Cap 50), in the context of a compromise and arrangement

provision provide for the company, a member or a creditor to apply to the court in a summary way once a compromise or arrangement has been proposed between the company and creditors for a stay of proceedings against the company.

An indirect method of obtaining a moratorium while a scheme is arranged is for the company to let some friendly creditor petition for a winding up, then seek the appointment of a provisional liquidator under s 193 and let the liquidator propose a scheme with the benefit of the stay provision in s 186. For provisional liquidators and corporate rescue see [193.02].

[166.03] Compromise and arrangement

A proposal falling within the section tends to be called a 'scheme', whatever its nature, but there is a clear distinction between a compromise and an arrangement. Under a compromise a creditor agrees to accept a lesser sum than is due, or agrees to accept repayment by instalments over a period instead of in one lump sum immediately due. It can also cover a situation where a claimant agrees to modify undoubted rights. A compromise presupposes some dispute or difficulty in enforcing rights. Usually in a compromise situation the debtor company retains, or resumes, control of its assets and the creditor/claimant recovers less than he might otherwise be entitled to.

An arrangement covers any other type of agreement modifying rights, including situations where the modification is not detrimental to the rights holder: see *Sneath v Valley Gold Ltd* [1893] 1 Ch 477 at 494; *Mercantile Investment and General Trust Co v International Co of Mexico* [1893] 1 Ch 484 at 489 and 491; *Re Guardian Assurance Co* [1917] Ch 431. There does not have to be a dispute and the proposal may relate solely to the company and its shareholders and creditors and involve no other parties. Thus an arrangement includes a reorganisation of share capital: see *Re Hongkong and Shanghai Banking Corp Ltd* [1991] 2 HKLR 111 (see [166.02]). As to the differences between compromise and arrangement: see *Re Wah Nam Group Ltd (No 2)* [2003] 1 HKLRD 282.

Subsection (5) states certain inclusions in the word 'arrangement'. In an insolvency situation, an arrangement may involve assets being taken out of the control of the debtor company and put under the control of a trustee.

A company has an implied power to compromise (see *Re Norwich Provident Insurance Society, Bath's Case* (1878) 8 Ch D 334) and to enter into arrangements. However such powers are usually specifically expressed in the company's objects, though not in the Seventh Schedule.

A power to compromise, however, does not avoid the problem of the recalcitrant member or creditor. Power to bind a dissenting minority is vital and this is the value of s 166, except as mentioned in [166.02] the binding effect is too late, as there is no moratorium.

Save under a scheme sanctioned by the court under s 166, a conveyance or assignment by a company of all its property to trustees for the benefit of its creditors is void: s 266(2). Even if the parties are agreed on a scheme, the court may refuse to sanction it: see eg, *Re Zhu Kuan (Hong Kong) Co Ltd* [2007] 4 HKLRD 1 (where the court held that it had no power to make a 'pooling order', so where two or more related companies are in liquidation, the liquidation in respect of each could proceed as if they were one company). But on the power to pool in the group situation see also *Re Moulin Global Eyecare Holdings Ltd* [2007] 4 HKLRD 315. Note the extended definition of 'company' in s 166(5) and cf s 167.

[166.04] Classes

One of the difficulties in relation to schemes under s 166 is getting approval for the proposal from all classes. If one class rejects the proposal it will be necessary to modify the proposal until at least the requisite majority agreement can be obtained in each class.

It is not essential that arrangement legislation requires class recognition and indeed, in some jurisdictions (eg ss 439A-439C of the Corporations Act 2001 (Aust) and in the reform proposals mentioned in [166.07]) there are no requirements for classes, decisions being taken by the creditors as a whole. While some distinctions, eg as between secured and unsecured creditors, are obvious, other distinctions are less so and in the end in the event of a dispute it is a matter for the court in its discretion to determine whether a particular creditor or group of creditors should be recognised as a class: see *Re Industrial Equity (Pacific) Ltd* [1991] 2 HKLR 614, [1991] 2 HKC

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364; *Re Hellenic and General Trust Ltd* [1975] 3 All ER 382. The responsibility for determining what creditors are to be summoned to vote at any meeting constituting a class rests with the company; see *Re UDL Holdings Ltd (No 1)* [1999] 3 HKC 210. In determining whether a group of creditors or members form a class it is necessary to look at the dissimilarity of rights, not dissimilarity of interests: see *Re Industrial Equity (Pacific) Ltd; Re Bond Corp Holding Ltd* (1991) 5 ACSR 304; *Re BTR plc* [1999] 2 BCLC 675 (CA); *Re UDL Holdings Ltd (No 3)* [2000] 3 HKC 405,, on appeal [2000] 4 HKC 778 (CA)[2001] 3 HKLRD 634 (CFA), reported as *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634; *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 (CA) and *Re Albatronics (Far East) Co Ltd (in liq) (No 2)* [2002] 4 HKC 99; *Re S Megga Telecommunications Ltd* [2003] 2 HKLRD 83; *Re Jinro (HK) International Ltd* [2004] HKLRD (Yrbk) 176; *Re Advanced Wireless Group Ltd* [2007] HKEC 1455, 9 August 2007, HCMP 6583/2007; *Re Perfect Sense Group Ltd* [2007] 2 HKLRD 734; *Re China Netcom Group Corpn (Hong Kong) Ltd* [2008] HKEC 1718, 16 October 2008, HCMP 1452/2008; *Re Sun Motor Industrial Co Ltd* [2008] HKEC 2000, 27 November 2008, HCMP 1486/2008. The size of a shareholding per se is no reason to exclude a member from a class or to compel it to form its own class: see *Re Cable and Wireless HKT Ltd* [2001] 1 HKLRD 7. On the arguments for and against classes see the Law Reform Commission's Report on Corporate Rescue and Insolvent Trading, Government Printer, October 1996, paras 16.1 to 16.19. Under s 166, however, classes are already provided for.

[166.05] The procedure

The details of the procedure can be found in the standard practice books and see 9 Atkin's Court Forms (1995 issue) p 240 et seq; Palmer's Company Precedents (17th edn) Part III (the latter, which is based on the Companies Act 1948 (UK), is especially valuable in Hong Kong). In brief, the first step is an application to the court to call the relevant meetings, or class meetings, of members or creditors. Application is made by way of originating summons: O 102 r 2(1) of the Rules of the High Court (HK). For forms, see 9 Atkin's Court Forms (1995 issue) p 241 et seq.

Application may be made by the company, a member, a creditor and in a winding up, the liquidator (including provisional liquidators, if given power on their appointment to seek a rescue). For the liquidator's other powers of compromise etc, see ss 199(1)(e), (f), 227D, 257, 246, and 254. An application will usually be made only after negotiations have taken place and it has been confirmed that the requisite majority required at the meetings by subsection (2) is likely to be obtained. Where the application is not made by the company or its liquidator, the applicant must show that the company consents to the proposed arrangement: see *Re Savoy Hotel Ltd* [1981] Ch 351.

The main purpose of this application is to satisfy the court that all necessary or appropriate classes have been recognised. For forms of supporting affidavit, see 9 Atkin's Court Forms (1995 issue) p 261 et seq and for forms of advertisement and notice of meetings, forms of proxy, etc. The order will include the appropriate terms as to notices of meetings, advertising of meetings, etc. Some of these matters are set out in s 166A. For details of notice of meetings and proxies, etc for which a body of practice has developed, reference should be made to the larger practitioners' texts such as *Palmer* or *Buckley*. If the court orders meetings, the meetings will be called and the scheme proposals put to the appropriate meetings. As to how class meetings should be conducted, see *Carruth v Imperial Chemical Industries Ltd* [1937] AC 707 (HL). The approval of a majority in number representing three-quarters in value of the members of the class present and voting in person or by proxy is sufficient for the next stage which is an application to the court to sanction the compromise or arrangement.

That application is made by petition: O 102 r 5(1)(h) of the Rules of the High Court; and see Ord 102 r 7 for case management summons which will not apply to the usual insolvency scheme. For forms of petition and affidavits, see 9 Atkin's Court Forms (1995 issue) p 288 et seq. At this stage, the function of the court is to ensure that the creditors have been given sufficient explanation of the scheme and its effects: see *Re Kansa General International Insurance Co Ltd (in liq)* [1999] 1 HKC 254, [1999] 2 HKLRD 429. Some deficiencies may not be so fundamental as to justify the withholding of the court's sanction: see *Re China Light and Power Co Ltd and CLP Holdings Ltd* [1998] 1 HKC 170, [1998] HKLRD 158(where the scheme did not contain any information about expenses); *Re Sharp Brave Co Ltd (in liq)* [1999] 4 HKC 79 (directions given in respect of

sending out notice not fully complied with); *Re Hong Kong Construction (Holdings) Ltd* [2007] 1 HKLRD 190. The court must also ensure that the provisions of the section have been complied with, eg that the proper majorities have been obtained, that the class at any class meeting was fairly represented by those who attended the meeting and that the statutory majority were acting in good faith and did not coerce the minority in order to promote interests adverse to those of the class as a whole. While the court should be slow to differ from the meeting, the applicants must show that the arrangement is one that an intelligent and honest person, being a member of the class concerned and acting in respect of his or her interest, might reasonably approve: see *Re Darman Long & Co Ltd* [1934] Ch 635; *Re Holders Investment Trust Ltd* [1971] 2 All ER 289; *Re Sharp Brave Co Ltd (in liq)*. In *Re PCCW Ltd* [2009] 3 HKCU 292; CACV 85/2009 (CA) these principles were reiterated in the context of share vote splitting. The Court of First Instance had sanctioned PCCW's privatisation scheme but the Securities and Futures Commission appealed, arguing that the court had been wrong in its approach and should not have sanctioned the scheme. The Court of Appeal declined to sanction the scheme because the court could not be satisfied that the votes were cast properly and fairly reflected the true votes of the shareholders.

An order sanctioning a scheme has no effect until an office copy has been delivered to the Registrar of Companies for registration and a copy of such order must be annexed to every copy of the memorandum: s 166(3). For penalties for default, see s 166(5) and the Twelfth Schedule. Once the order is effective, the arrangement is binding on all creditors or members and the company and, if the company is being wound up, on the liquidator: s 166(2); and see *Re Citic International Financial Holdings Ltd* [2008] HKCU 1724, 6 November 2008, HCMP 1686/2008.

A scheme, once sanctioned, can only be varied substantially by another scheme: *Srimati Premila Devi v People's Bank of Northern India Ltd* [1938] 4 All ER 337 (PC); and see *Re APP (Hong Kong) Ltd* [2005] 1 HKLRD 272, [2005] HKCU 1364; *Re UDL Holdings Ltd & Ors* [2006] 3 HKLRD 84; *Re Kansa General International Insurance Co Ltd* [2007] 1 HKLRD 897.

As to the construction of a scheme: see *Re Kenworth Engineering Ltd* [2005] 2 HKLRD 97, [2005] HKCU 162 (another case in the UDL saga).

On the general discretion of the court see *Re PCCW Ltd* [2009] 3 HKCU 292; CACV 85/2009 (CA); *Re Wheelock Properties Ltd* [2010] 4 HKLRD 587.

[166.06] Effect of non-compliance

If a company fails to deliver a copy of the relevant court order to the Registrar or attach a copy of the order to every copy of its memorandum the company and every officer in default is liable to a level 1 fine for each copy in respect of which default is made. See further Twelfth Schedule.

[166.07] Reform

In September 1990, the Attorney General and the Chief Justice gave a reference to the Law Reform Commission of Hong Kong to review the law and practice of insolvency in Hong Kong; for full details of the reference see [169.09]. The Official Receiver was anxious to bring forward some amendments to the Bankruptcy Ordinance (Cap 6) to make the bankruptcy law more efficient and cost effective. The sub-committee on insolvency law was established by the Law Reform Commission and it dealt first with bankruptcy law, but early on in its deliberations it became obvious that attention had to be given to company rescue as s 166 did not facilitate this. As soon as it completed its work on bankruptcy the sub-committee turned to the question of company rescue. The position in many other jurisdictions was considered and particular attention was given to the effectiveness of the administration procedure in the United Kingdom under the Insolvency Act 1986 and reform in Australia and Canada. The sub-committee came forward with a procedure it called provisional supervision in its Consultation Paper on Corporate Rescue and Insolvent Trading, Hong Kong, June 1995. The proposals were refined in the light of comments made in the consultation process and the recommendations were contained in the Law Reform Commission Report on Corporate Rescue and Insolvent Trading, Hong Kong, August 1996. The legislative proposals to implement these recommendations formed part of the Companies (Amendment) Bill 2000, but due to time constraints and concerns about payments to employees in the rescue process, the proposals were excised from the Bill and deferred. The Companies (Corporate Rescue) Bill was gazetted in May 2001, but has since lapsed. However, in view of the comments of Rogers V-P in *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192, [2006] 3 HKC 565 (casting doubt on the court giving provisional liquidators appointed under s 193

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power to seek to effect a corporate rescue), the proposals may have to be re-considered (and at first instance, see [2005] 3 HKLRD 16). But such appointments continue to be made: see eg, *Re Plus Holdings Ltd* [2007] 2 HKLRD 725.

Very briefly the recommendations are as follows. In a typical case, when a company is getting into financial difficulty the directors should decide either to wind it up or go into provisional supervision. If they delay, they are likely to be personally liable for insolvent trading, a new procedure intended to avoid the evidential difficulties of s 275. If the directors think there is any chance of saving the company, or bits of it, they should enter into negotiations with the creditors and discuss the matter with the professional person they have in mind as the potential provisional supervisor. If the creditors are willing to consider supervision, then the board will resolve that the company go into provisional supervision. Copies of the resolution, the appointment of the provisional supervisor, and a background affidavit sworn on behalf of the directors will be filed. Filing takes place at the Companies Registry and the High Court Registry. Until a registered insolvency practitioner regime is established (see [169.12]) only practising solicitors and accountants can be provisional supervisors. The purpose of the affidavit is to give the basis for a remedy against the directors if they have resolved to go into provisional supervision for improper or unjustified purposes. The provisional supervision process operates from the time of the last filing. As from that time a broad moratorium (stay of proceedings) applies. The initial period of the moratorium is 30 days. As soon as the process starts the provisional supervisor must determine the assets and liabilities of the company. There are provisions requiring the directors and officers of the company to give aid in this investigation. When the provisional supervisor has sufficient information, he has to decide whether the purposes of a voluntary arrangement can be achieved. Provisional supervision is not a complete process in itself; there is what is called an 'exit' into a voluntary arrangement. The relevant purposes include the avoidance of the winding up of the company and the survival of the whole or part of the undertaking of the company as a going concern. If the provisional supervisor decides that there is no hope for the company he must call a meeting of the creditors and they will resolve to terminate the provisional supervision and wind up the company. If the provisional supervisor considers that the company can be saved he will proceed to prepare an arrangement plan. Since this will usually take more than the 30 days of the moratorium, the provisional supervisor will have to seek an extension of the moratorium. In the usual case this is ordered by the court and it has a discretion as to how long the extension shall be for, save that there is a maximum of six months from the commencement of the provisional supervision. If an extension beyond six months is required, only a majority at a meeting of creditors can sanction the extension.

The powers of the directors are suspended during the provisional supervision and the provisional supervisor has the control and management of the affairs and assets of the company. In appropriate cases, the supervisor would delegate the day-to-day management to existing executives, directors or managers.

When the arrangement plan has been finalised it will be put to a meeting of creditors. It is not proposed that there be different classes. The meeting may have to be adjourned to permit some renegotiation of terms, but ultimately the plan will either be rejected or approved. If rejected, the company will be wound up. If approved, the terms of the arrangement will govern the relationship between the parties. In most cases it is likely that the provisional supervisor will become the trustee of the deed of arrangement agreed to seek to save the company.

For full details of the Law Reform Commission's proposal, reference should be made to the Report on Corporate Rescue and Insolvent Trading: see [169.09].

166A. Information as to compromises with creditors and members

(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 166 there shall-

(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement explaining the effect of the compromise or arrangement proposed can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.

(4) Where a company makes default in complying with any requirement of this section, the company and every officer of the company who is in default shall be liable to a fine, and for the purpose of this subsection any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be liable under this subsection if that person shows that the default was due to the refusal of any other person, being a director or trustee for debenture holders, to supply the necessary particulars as to his interests.

(Amended 7 of 1990 s 2)

(5) It shall be the duty of any director of the company and of any trustee for debenture holders of the company to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and any person who makes default in complying with this subsection shall be liable to a fine.

(Amended 7 of 1990 s 2)

(Added 6 of 1984 s 124)

[cf. 1948 c 38 s 207 U.K.]

[166A.01] History

The section was added in 1984 to give effect to the recommendation of the Companies Law Revision Committee in its Second Report, 1973, para 5.88. The Cohen Committee had pointed out in its report that under such a provision a scheme might be sanctioned without information being given as to the personal interests of the directors or trustees for debenture holders who recommended the scheme (see *Re Dorman Long & Co Ltd* [1934] Ch 635 at 665) and a new section in the terms of this section was added as s 207 of the Companies Act 1948 (UK).

Subsections (4) and (5) were amended in 1990 when the specific penalties were taken to the new Twelfth Schedule.

For equivalent sections see the Companies Act (UK), s 426, the Corporations Law (Aust), s 412 and the Companies Act (Cap 50) (Sing), s 211.

[166A.02] Overview

The section requires notice of a meeting ordered to be summoned under s 166 to contain information about the effect of the arrangement and any material interests of the directors under the arrangement and the effect thereof. For material interests in contracts see s 162.

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