

Part 11
Fair Dealing by Directors
Division 1
Preliminary

484. Interpretation

(1) In this Division—

child (子女) includes a step-child, an illegitimate child and a child adopted in any manner recognized by the law of Hong Kong;

cohabitation relationship (同居關係) means a relationship between 2 persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship;

director (董事) includes a shadow director.

(2) In this Division, a reference to a minor child is a reference to a child who is under 18 years of age.

History

This section is derived from s 157H(9), (10) of the former Companies Ordinance (Cap 32).

Overview

This section sets out some definitions for the purpose of Part 11, which largely deals with various types of company transactions in which directors may have a conflict of interest. The main provisions in Part 11 deal with:

- loans, quasi-loans and credit transactions (Div 2);
- payments for loss of office (Div 3);
- long term service contracts (Div 4);
- material interests in transactions etc (Div 5).

Cohabitation relationship

The definition of cohabitation relationship is derived from the definition of that term in s 2(1) of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189).

Director

The extension of the definition of director to include shadow directors means that shadow directors are subject to the restrictions in Part 11 which apply to directors. For the meaning of 'shadow director', see s 2(1).¹

The prohibition on loans, quasi-loans and credit transactions in the predecessor s 157H of the former Companies Ordinance (Cap 32) also

¹ And see also *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180; *Secretary of State for Trade and Industry v Laing* [1996] 2 BCLC 324; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 87 ACSR 260 (FCA).

applied to shadow directors; but the predecessor provisions on material interests of directors (former s 162) and payments for loss of office (former s 163C) did not. In Divisions 2, 3, and 4, a narrower definition of 'shadow director' applies: see ss 491(2), 516(5) and 530(2) respectively.

485. Circumstances constituting contravention

In this Part, a reference to circumstances constituting a contravention includes, in the case of a transaction or arrangement that, but for any fact or circumstances, would not be prohibited because of Subdivision 3 of Division 2, the fact or circumstances.

History

This section is derived from s 157I(6) of the former Companies Ordinance (Cap 32).

Overview

Section 513 contains provisions referring to the circumstances constituting contravention. Under s 513(4), certain persons who were not aware of the circumstances constituting a contravention of provisions in Division 2 are exempted from liability which would otherwise be imposed on them.

Subdivision 3 of Division 2 sets out a list of exceptions to the prohibitions on loans, quasi-loans and credit transactions.

486. Connected entity

- (1) In this Part, a reference to an entity connected with a director or former director of a company is a reference to—
- (a) a member of the director's or former director's family;
 - (b) a person who is in a cohabitation relationship with the director or former director;
 - (c) a minor child of a person falling within paragraph (b) who—
 - (i) is not a child of the director or former director; and
 - (ii) lives with the director or former director;
 - (d) a body corporate with which the director or former director is associated;
 - (e) a person acting in the capacity as trustee of a specified trust, other than a trust for the purpose of an employee share scheme or a pension scheme; or
 - (f) a person acting in the capacity as partner of—
 - (i) the director or former director;
 - (ii) the spouse of the director or former director;
 - (iii) a minor child of the director or former director; or
 - (iv) another person who, by virtue of paragraph (e), is an entity connected with the director or former director.
- (2) For the purposes of subsection (1)(e), a trust is a specified trust—

- (a) if the beneficiaries of the trust include—
 - (i) the director or former director;
 - (ii) the spouse of the director or former director; or
 - (iii) a minor child of the director or former director; or
- (b) if—
 - (i) the terms of the trust give a power to the trustees that may be exercised for the benefit of—
 - (A) the director or former director;
 - (B) the spouse of the director or former director; or
 - (C) a minor child of the director or former director; and
 - (ii) the director or former director knows that the director or former director, or the spouse or child, is an object of the power.
- (3) In this section—

employee share scheme (僱員參股計劃) means a scheme for encouraging or facilitating the holding of shares in a company by or for the benefit of—

 - (a) persons employed or formerly employed in good faith by that company or another company in the same group of companies; or
 - (b) the spouses, widows, widowers or minor children of persons referred to in paragraph (a);

partner (合夥人), in relation to another person, means a person who is a partner of that other person in a partnership within the meaning of the Partnership Ordinance (Cap. 38).

History

This section is derived from s 157H(2), (8), (9), (10) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 252;
2. Australia: Corporations Act 2001, s 228;
3. Singapore: Companies Act (Chapter 50), s 163(1), (5).

Overview

A number of the prohibitions or restrictions in Part 11 apply in respect of entities connected with directors:

- (a) the prohibitions on loans, quasi-loans and credit transactions are extended to apply to connected entities of directors in the case of public companies or their subsidiaries (see ss 502, 503);
- (b) the prohibition on payments for loss of office of directors cover payments made to entities connected with the director (s 516(3)); and

- (c) the requirement for directors to disclose material interests extends to disclosure of the interests of connected entities of a director in the case of public companies (s 536(2)).

The provisions in the predecessor s 157H(2), (8), (9) of the former Companies Ordinance (Cap 32) extended the prohibitions on loans to directors to loans given to bodies corporate controlled by a director; and in the case of listed companies (or other companies in a group in which any company is listed), the prohibitions on loans, quasi-loans and credit transactions also extended to certain persons connected with a director. However, the concept of 'connected entity' in s 486 is somewhat wider than the categories of persons caught under the former provisions. For example, s 486 also covers persons in cohabitation relationships with the director, and parents of and adult children of a director.

Definitions

Subsection (3) defines 'employee share scheme' and 'partner'.

The persons who are family members for the purpose of Part 11 are set out in s 487.

For the meaning of 'cohabitation relationship', see s 484(1). For 'child' and 'minor child', see s 484(1) and (2). For 'associated' bodies corporate, see s 488.

487. Family member of director or former director

In this Part, a reference to a member of a director's or former director's family is a reference to—

- (a) the spouse of the director or former director;
- (b) a child of the director or former director; or
- (c) a parent of the director or former director.

History

This section is derived from s 157H(8), (9) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 253;
2. Australia: Corporations Act 2001, s 228(2), (3);
3. Singapore: Companies Act (Chapter 50), s 163(5).

Overview

Members of a director's family, as defined in this section, are entities who are connected with a director for the purpose of Part 11. On the concept of connected entities and the significance of being a connected entity, see s 486.

488. Director or former director associated with body corporate

(1) For the purposes of this Part, a director or former director is associated with a body corporate if—

- (a) the director or former director, or any one or more of the entities specified in subsection (3), or the director or former director together with any one or more of those specified entities, are entitled to exercise, or control the exercise of, more than 30% of the voting power at any general meeting of that body corporate; or
- (b) the directors, or a majority of the directors, of that body corporate are accustomed to act in accordance with the directions or instructions of—
 - (i) the director or former director; or
 - (ii) an entity connected with the director or former director.

(2) In this section, a reference to voting power the exercise of which is controlled by a director or former director, or by an entity specified in subsection (3), includes voting power the exercise of which is controlled by another body corporate if the director or former director, or any one or more of the specified entities, or the director or former director together with any one or more of the specified entities, are entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that other body corporate.

(3) The entity specified for the purposes of subsections (1) and (2) is—

- (a) the spouse of the director or former director;
- (b) a minor child of the director or former director; or
- (c) a person who, by virtue of section 486(1)(e), is an entity connected with the director or former director.

History

This section is derived from s 157H(2) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, ss 254, 255;
2. Australia: Corporations Act 2001, ss 50AA, 228(1);
3. Singapore: Companies Act (Chapter 50), s 163(1), (3).

Overview

Two concepts of bodies corporate related to a director are used in Part 11. One is the concept of a body corporate 'controlled' by a director: see ss 492 and 500. The other is the concept of a body corporate 'associated' with a director, as defined in s 488. A body corporate which is controlled by a director (within the meaning of s 492) would also come within the meaning of a body corporate associated with a director. However, the latter concept is wider, and the fact that a body corporate is associated with a director does not necessarily mean that it is controlled by the director.

Part 19
Investigations and Enquiries
Division 1
Preliminary

838. Interpretation

(1) In this Part—

agent (代理人), in relation to a company, includes—

- (a) a banker or solicitor of the company; and
- (b) a person, whether an officer of the company or not, who is engaged as an auditor of the company;

authorized institution (認可機構) has the meaning given by section 2(1) of the Banking Ordinance (Cap 155);

books (簿冊) includes accounts and accounting information, however compiled or stored, and whether or not recorded in a legible form;

delegate (獲轉售人)—

- (a) in relation to an inspector, means a person to whom the inspector has delegated any power under section 850(1);
- (b) in relation to the Financial Secretary, means a person to whom the Financial Secretary has delegated any power under section 870;
- (c) in relation to the Registrar, means a public officer to whom the Registrar has delegated any power under section 874;

document (文件) means—

- (a) any register, books or tape recording;
- (b) any input or output, in whatever form, into or from an information system; and
- (c) any other document or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means);

information (資料) includes—

- (a) data, text, images, sound codes, computer programmes, software and databases; and
- (b) any combination of the things mentioned in paragraph (a);

inspector (審查員) means—

- (a) a person appointed under section 840 or 841 to investigate a company's affairs; or
- (b) a person appointed under section 853 to continue an investigation;

officer (高級人員), in relation to a body corporate, means a director, manager or company secretary of, or any other person involved in the management of, the body corporate;

record (紀錄) means any record of information (however compiled or stored) and includes—

- (a) any books, deed, contract, agreement, voucher and receipt;
- (b) any document or other material used with or produced by an information system;
- (c) any information that is recorded otherwise than in a legible form but is capable of being reproduced in a legible form;

- (d) any document, disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of other equipment) of being reproduced; and
- (e) any film (including a microfilm), disc, tape or other device in which visual images are embodied so as to be capable (with or without the aid of other equipment) of being reproduced.
- (2) For the purposes of this Part, a body corporate is an associated body corporate of a company if—
- (a) the body corporate and the company are members of the same group of companies; or
- (b) the body corporate and the company are substantially controlled by the same person.

History

This section is a new provision. See also the former Companies Ordinance (Cap 32), s 145(5); Securities and Futures Ordinance (Cap 571), Part I Schedule 1; and Financial Reporting Council Ordinance (Cap 588), s 2(1).

Overview

Part 19 mainly reorganises the provisions in the former Companies Ordinance (Cap 32) in relation to the appointment of an inspector by the Financial Secretary to investigate the affairs of a company, and the power of the Financial Secretary (or someone authorised by him) to enquire into a company's affairs. These powers have been little-used in practice. The relevant sections in the former Companies Ordinance (Cap 32) were ss 142 to 152F. In the new Companies Ordinance, these provisions purport to provide for 'reserve' or 'last resort' powers as a supplement to the powers of other regulatory bodies.

'Officer'

Under s 2(1) of this Ordinance, 'officer' in relation to a body corporate, includes a director, manager or company secretary of the body corporate. In this provision, officer even covers 'any other person involved in the management of, the body corporate', this may arguably be wide enough to cover shadow directors. De facto directors are caught by reason of the definition of 'director' in s 2(1).

'Records' and 'document' and 'books'

The word 'records' is defined to mean any record of information (however compiled or stored) and includes:

- (a) any books, deed, contract, agreement, voucher and receipt;
- (b) any document or other material used with or produced by an information system;
- (c) any information that is recorded otherwise than in a legible form but is capable of being reproduced in a legible form;

- (d) any document, disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of other equipment) of being reproduced; and
- (e) any film (including a microfilm), disc, tape or other device in which visual images are embodied so as to be capable (with or without the aid of other equipment) of being reproduced.

By definition, records include documents, such as registers, books or tape recordings, forms of input or output into or from an information system, and those produced by whatever means (whether mechanically, electronically, magnetically, optically, manually or by any other means).

Also by definition, records covers books which in turn include accounts and accounting information however compiled or stored, and whether or not recorded in legible form.

'Body corporate'

References in the Companies Ordinance to a body corporate include a company incorporated outside Hong Kong but does not include a corporation sole: see s 2(1).

'Group of companies'

Under s 2(1) of this Ordinance, 'group of companies' means any two or more bodies corporate one of which is the holding company of the other or others.

Division 2

Investigation of Company's Affairs by Inspectors

Subdivision 1

Preliminary

839. Interpretation

In this Division—

company (公司)—

(a) in section 840, includes a registered non-Hong Kong company;

(b) in section 841, includes a non-Hong Kong company;

final report (最終報告) means the final report mentioned in section 856;

interim report (中期報告) means the interim report mentioned in section 855;

investigation (調查) means an investigation into a company's affairs under section 840 or 841.

History

This section is a new provision.

Overview

Division 2 reorganises and reformulates the provisions of ss 142–152 of the former Companies Ordinance (Cap 32) regarding inspections where investigations are conducted by inspectors.

The inspection power is not often exercised. In the past, inspectors have been appointed to investigate listed companies or their related companies including the Allied Group and, with the most recent appointment made in 1999 to investigate into the collapse of the Peregrine group of companies.¹

The former Companies Ordinance (Cap 32) included s 146A which extended the Financial Secretary's power of investigation to certain bodies incorporated outside Hong Kong to which the former Companies Ordinance (Cap 32) applied.

For the purpose of investigation under Division 2, the subject, i.e. 'company' includes a registered non-Hong Kong company covered by a s 840 investigation (by an inspector appointed by application by the company or by its members) and a non-Hong Kong company covered under s 841 investigation (by inspector appointed upon court's or Financial Secretary's initiative).

Obviously, companies incorporated outside Hong Kong and which have a place of business in Hong Kong but have not been registered pursuant to the Companies Ordinance as non-Hong Kong companies would not be subject to investigation under s 840 (and presumably, applications could be pursued in the relevant jurisdictions where the companies have been incorporated). Section 841 shall apply to investigations by inspectors in respect of those companies incorporated outside Hong Kong and which have a place of business in Hong Kong whether or not they have been registered as such under the new Companies Ordinance.

¹ See further Stefan HC Lo and Charles Z Qu, *Law of Companies in Hong Kong* at paragraph 1.195; and Report on *Peregrine Fixed Income Ltd (in liq)* and *Peregrine Investments Holdings Ltd (in liq)* (12 February 2000). See also Paul Kwan, *Hong Kong Corporate Law* at VI [6552].

Subdivision 2**Appointment by Financial Secretary of Inspectors to Investigate Company's Affairs**

- 840. Appointment of inspector on application by company or members**
- (1) The Financial Secretary may, on application by a company, appoint a person to investigate the company's affairs if the company has by special resolution declared that the company's affairs ought to be so investigated.
 - (2) The Financial Secretary may also appoint a person to investigate a company's affairs—
 - (a) for a company having a share capital, on application by—
 - (i) at least 100 members; or
 - (ii) members holding at least 10% of the shares issued; or
 - (b) for a company not having a share capital, on application by at least 10% in number of the persons on the company's register of members.
 - (3) An application for the purposes of subsection (1) or (2) must be supported by the evidence required by the Financial Secretary to show that the applicant has good reason for requesting the investigation.
 - (4) The Financial Secretary must not appoint a person under subsection (1) or (2) to investigate a company's affairs unless the Financial Secretary is satisfied that it is in the public interest to do so.
 - (5) The Financial Secretary may, before making an appointment under subsection (1) or (2), require an applicant for an appointment under subsection (1) or (2) to give security for the payment of the expenses of the investigation, in an amount specified by the Financial Secretary.

History

This section is derived from ss 142 and 143(1)(b) of the former Companies Ordinance (Cap 32).

For equivalent provisions on investigation/inspection:

1. UK: Companies Act 1985, ss 431ff;
2. Australia: Australian Securities and Investments Commission Act 2001, ss 13ff;
3. Singapore: Companies Act (Chapter 50), ss 230ff.

Overview

The powers given to the Financial Secretary to appoint inspectors to investigate the affairs of the company under the Companies Ordinance have several purposes. For example, an investigation may be used to assist members where the management has failed to disclose information about the company. Alternatively, where the management is the majority shareholder and is abusing that position, an investigation may be regarded as a means of protecting minority shareholders.