

External Circular No 2/2014, 6 January 2014, which lists the new Guidelines issued.

## 25. Registrar may authenticate document etc.

- (1) If a document is required by this Ordinance to be signed by the Registrar or to bear the Registrar's printed signature, the Registrar may authenticate it in any manner that the Registrar thinks fit.
- (2) If anything is authorized to be certified by the Registrar under this Ordinance or any other Ordinance, the Registrar may certify it in any manner that the Registrar thinks fit.

### [25.01] History

Subsection (1) of this section is derived from s 305(3B) of the former Companies Ordinance (Cap 32). Subsection (2) is derived from s 305A of the former Companies Ordinance (Cap 32).

### [25.02] Overview

For examples of documents required to be signed by the Registrar, see:

- s 71(2) (certificate of incorporation);
- s 777(4)(a) (certificate of registration of non-Hong Kong company).

For other examples of certificates, see:

- s 107(3)(b) (certificate of change of name);
- s 132 (fresh certificate on re-registration of unlimited company as limited by shares);
- ss 779(1)(b), 782(5)(b) (fresh certificate of registration containing new corporate name).

See s 61 Registrar's power to issue certificates.

## 26. Fees payable to Registrar

- (1) The Financial Secretary may make regulations to require payment to the Registrar of fees in respect of—
  - (a) the performance of any of the Registrar's functions; or
  - (b) the provision by the Registrar of services or facilities for purposes incidental to, or otherwise connected

with, the performance of any of the Registrar's functions.

- (2) The regulations may—
  - (a) provide for the amount of the fees to be fixed by or determined under the regulations;
  - (b) provide for different fees to be payable in respect of the same matter in different circumstances; and
  - (c) specify when and how fees are to be paid.
- (3) The Registrar—
  - (a) may, subject to the approval of the Financial Secretary, determine what fees are chargeable in respect of the performance of functions or the provision of services or facilities—
    - (i) for which fees are not provided for by the regulations; or
    - (ii) in circumstances other than those for which fees are provided by the regulations; and
  - (b) may charge such fees.
- (4) Fees received by the Registrar must be paid into the general revenue, unless the fees are required by section 5 of the Trading Funds Ordinance (Cap. 430) to be paid into the Companies Registry Trading Fund.

### [26.01] History

This section is derived from s 304(1), (2) and (4) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 1063;
2. Australia: Corporations (Fees) Act 2001;
3. Singapore: Companies Act (Chapter 50), s 8.

### [26.02] Overview

The Companies (Fees) Regulation (Cap 622K) was made by the Financial Secretary pursuant to ss 26(1) and 909.



## Companies Register

**27. Registrar must keep records of companies**

- (1) The Registrar must keep records of—
  - (a) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part;
  - (b) the information contained in every certificate that is issued by the Registrar under this Ordinance; and
  - (c) the information contained in every prospectus registered by the Registrar under section 38D or 342C of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).
- (2) The Registrar must continue to keep the records that were, immediately before the commencement date of this section, kept for the purpose of a register of companies under the predecessor Ordinance.
- (3) For the purposes of subsections (1) and (2), the Registrar must record the specified address as the correspondence address of a director, reserve director or company secretary of the following company—
  - (a) an existing company;
  - (b) a company falling within paragraph (a) of the definition of *company* in section 20(1) that is registered under section 777(1) by virtue of section 132 of Schedule 11; or
  - (c) a company falling within paragraph (b) of the definition of *company* in section 20(1).
- (4) After the specified address is recorded under subsection (3) as the correspondence address of a director, reserve director or company secretary of a company, the Registrar must update the entry of such correspondence address with—
  - (a) the latest address of the company's registered office contained in a notice of change of address of the company's registered office—
    - (i) that is sent under section 92(3) of the predecessor Ordinance or section 658(3); and
    - (ii) that is registered by the Registrar under this Part; or
  - (b) the latest address of the company's principal place of business in Hong Kong contained in a return in

respect of the change of address of the company's principal place of business in Hong Kong—

- (i) that is delivered under section 335(1)(d) of the predecessor Ordinance or section 791(1); and
  - (ii) that is registered by the Registrar under this Part.
- (5) Subsection (4) does not apply if, in relation to the director, reserve director or company secretary of a company—
    - (a) a notice or return is delivered under section 645(4), 652(2) or 791(1) in respect of a change of the person's correspondence address; and
    - (b) the notice or return is registered by the Registrar under this Part.
  - (6) For the purposes of subsection (3), an address is the specified address in relation to a director, reserve director or company secretary of a company if—
    - (a) immediately before the commencement date of this section, the address was shown on the register of companies under the predecessor Ordinance as the address of the company's registered office or principal place of business in Hong Kong;
    - (b) the address is contained, as the address of the company's registered office, in an incorporation form—
      - (i) delivered before the commencement date of Division 1 of Part 3 to the Registrar for registration under section 15(1) of the predecessor Ordinance; and
      - (ii) registered on or after that commencement date under section 16(1) of the predecessor Ordinance; or
    - (c) the address is contained, as the address of the company's principal place of business in Hong Kong, in an application for registration delivered before the commencement date of Division 2 of Part 16 to the Registrar under section 333 of the predecessor Ordinance and the registration takes place under section 777(1).



**[27.01] History**

This section is derived from s 348D of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 1080;
2. Australia: Corporations Act 2001, s 1274 and particular other sections, eg s 265(1) (ASIC must keep a register to be known as the Australian Register of Company Charges);
3. Singapore: Companies Act (Chapter 50), s 12.

**[27.02] Overview**

Subsections (3) to (6) of this section have not been commenced in so far as the subsections relate to a director or reserve director. (see Companies Ordinance (Commencement) Notice 2013, LN 163 of 2013, referred towards the end of the Overview to s 1.) They do apply to a company secretary as from 3 March 2014.

For 'specified address', see subsection (6).

For the registration of non-Hong Kong companies, see s 776 and Part 16 generally.

**28. Provisions supplementary to section 27**

- (1) The records kept under section 27 must be such that information relating to a company is associated with the company in a manner determined by the Registrar, so as to enable all the information relating to the company to be retrieved.
- (2) A record of information for the purposes of section 27(1) must be kept in such form as to enable any person to inspect the information contained in the record and to make a copy of the information.
- (3) Subject to subsections (1) and (2), a record of information for the purposes of section 27(1) may be kept in any form that the Registrar thinks fit.
- (4) If the Registrar keeps a record of information in a form that differs from the form in which the document containing the information was delivered to, or generated by, the Registrar, the record is presumed, unless the contrary is proved, to represent the information contained in the document as delivered or generated.
- (5) If the Registrar records the information contained in a document for the purposes of section 27(1), the Registrar is

to be regarded as having discharged any duty imposed by law on the Registrar to keep, file or register the document.

**[28.01] History**

Subsections (3), (4) and (5) of this section are derived from s 348D (1), (3) and (2) of the former Companies Ordinance (Cap 32), respectively. Subsection (1) is derived from the UK Companies Act 2006, s 1080(5); and subsection (2) is derived from the UKCA 2006, s 1080(4).

**[28.02] Overview**

Subsection (2) emphasises the search and copy aspects of the Companies Register. The right of the public to inspect the Companies Register and to request for copies of information on the Register is dealt with in s 45. The right to inspect and to have copies is emphasised more fully in the UK Companies Act 2006, section 1080(4) which refers to the information contained in the documents delivered to the Registrar that may be recorded and kept in any form the Registrar thinks fit, provided it is possible to inspect it and produce a copy of it. Sections 1085 and 1086 then go on to deal with the right to inspect the Register and to require a copy of any material on the register in more detail.

**29. Registrar not required to keep certain documents etc.**

- (1) The Registrar may destroy or dispose of any document delivered to the Registrar for registration under an Ordinance if the information contained in the document has been recorded by the Registrar in any other form for the purposes of section 27(1) or for the purpose of a register of companies under the predecessor Ordinance.
- (2) If a document or certificate has been kept by the Registrar for at least 7 years for the purposes of section 27(1) or for the purpose of a register of companies under the predecessor Ordinance, the Registrar may destroy or dispose of the document or certificate.
- (3) If the Registrar is required by section 48 not to make any information available for public inspection, the Registrar is not required to keep a record of the information for any longer than appears to the Registrar to be reasonably necessary for the purpose for which the information was delivered to the Registrar.



**[29.01] History**

Subsections (1) and (2) of this section are derived from s 348B of the former Companies Ordinance (Cap 32). Subsection (3) is derived from UK Companies Act 2006, s 1087(3).

For equivalent provisions:

1. UK: Companies Act 2006, ss 1083 and 1087(3);
2. Australia: Corporations Act 2001, s 1274(10);
3. Singapore: Companies Act (Chapter 50), s 12(7).

**[29.02] Overview**

This section empowers the Registrar to destroy or dispose of documents in the circumstances mentioned.

**30. Registrar must keep Index of Company Names**

The Registrar must keep an index of the names of every company.

**[30.01] History**

This section is derived from s 22C(1) of the former Companies Ordinance (Cap 32).

For equivalent provisions in UK, see the Companies Act 2006, s 1099.

**[30.02] Overview**

When it is intended to form a company, it is necessary to check the Index of Company Names to ensure that the name of the proposed company is not the same as or too like the name of a company already in the Index (see s 108(1)(a)).

Section 1100 of the UK Companies Act 2006 gives an express right to any person to inspect the index. In Hong Kong, there is no such express right. Section 45 of the new Ordinance requires the Registrar to make the Companies Register available for public inspection. The Companies Register is defined into s 2(1) as the records kept under s 27. Arguably therefore, s 45 does not apply to the Index of Company Names, since the Index is not a record kept under s 27. On the other hand, s 30 appears under Division 3 which is entitled 'Companies Register', so, presumably, the Index is to be considered as part of the Companies Register.

**Registration of Document****Subdivision 1****Preliminary****31. Unsatisfactory document**

(1) For the purposes of this Division, a document delivered to the Registrar for registration is unsatisfactory if—

- (a) the information contained in the document is not capable of being reproduced in legible form;
- (b) in the case of a document that is neither in English nor in Chinese, it is not accompanied by a certified translation of it in English or Chinese;
- (c) the requirements specified in relation to the document under section 32 are not complied with;
- (d) the document is not delivered in accordance with an agreement made under section 33, and any regulations made under section 34, in relation to it;
- (e) the applicable requirements of the Ordinance under which the document is delivered are not complied with;
- (f) the document is not accompanied by the fee payable for the registration;
- (g) the document, or any signature on, or any digital or electronic signature accompanying, the document—
  - (i) is incomplete or incorrect; or
  - (ii) is altered without proper authority;
- (h) the information contained in the document—
  - (i) is internally inconsistent; or
  - (ii) is inconsistent with other information on the Companies Register or other information contained in another document delivered to the Registrar;
- (i) the information contained in the document derives from anything that—
  - (i) is invalid or ineffective; or
  - (ii) has been done without the company's authority; or
- (j) the document contains matters contrary to law.

(2) In this section—



**applicable requirements** (適用規定), in relation to a document, means the requirements as regards—

- (a) the contents of the document;
- (b) the form of the document;
- (c) the authentication of the document; and
- (d) the manner of delivery of the document.

### [31.01] History

Parts of this section are derived from s 346(1)(a) and (b) and s 348(1), other parts are derived from the Australian Corporations Act 2001, s 1274(8) and the remaining parts are new.

For equivalent provisions:

1. UK: Companies Act 2006, ss 1072 to 1076;
2. Australia: Corporations Act 2001, s 1274.

### [31.02] Overview

The section deals with unsatisfactory documents. If a document is unsatisfactory, the Registrar may refuse to accept the document; or, after having accepted the document, exercise the powers specified in s 35(2) and (3). However, documents may be accepted by Registry staff who fail to notice that the document is unsatisfactory. Clearly, failure to pay the fee (see s 31(1)(f)) would be picked up by Registry counter staff, but other grounds for the document being unsatisfactory might be missed. In that situation, with the Registry having accepted the document, the Registrar may refuse under s 35 to register the unsatisfactory document and return it to the person who delivered it for registration or advise that the document be appropriately amended or completed or that a fresh document be delivered for registration in place of the unsatisfactory document.

The section sets out the factors for a document being unsatisfactory.

The threshold 'is ineffective' in s 31(1)(i)(i) is a high threshold and is only satisfied if there is a clear relevant defect and not simply where the alleged ineffectiveness remains the subject of conjecture or where the Registrar only thinks that the document may turn out to be ineffective if a certain internal dispute of the company is resolved against the presenter: see *China Capital Strategy Ltd & Ors v Registrar of Companies* [2016] HKCU 557 (unreported, HCMP 3275/2013, 9 March 2016).

See Companies Registry External Circular No 4/2014 (Major Changes in Filing Requirements), 6 January 2014; External Circular No 7/2014 (Rectification of Information on the Companies Register), 7 February 2014, in particular para 8.

### 32. Registrar may specify requirements (for section 31(1))

- (1) The Registrar may, in relation to any document required or authorized to be delivered to the Registrar under an Ordinance—
  - (a) specify requirements for the purpose of enabling the Registrar to make copies or image records of the document and to keep records of the information contained in it;
  - (b) specify requirements as to the authentication of the document; and
  - (c) specify requirements as to the manner of delivery of the document.
- (2) The Registrar may, in relation to any document authorized to be delivered to the Registrar for registration under section 41(3) for the purpose of rectification of an error, specify requirements as to—
  - (a) the delivery of the document in a form and manner enabling it to be associated with the document containing the error; and
  - (b) the identification of the document containing the error.
- (3) For the purposes of subsections (1) and (2), the Registrar may specify different requirements for different documents or classes of documents, or for different circumstances.
- (4) For the purposes of subsection (1)(b), the Registrar may—
  - (a) require the document to be authenticated by a particular person or a person of a particular description;
  - (b) specify the means of authentication; and
  - (c) require the document to contain, or to be accompanied by, the name or registration number, or both, of the company to which it relates.
- (5) For the purposes of subsection (1)(c), the Registrar may—
  - (a) require the document to be in hard copy form, electronic form or any other form;
  - (b) require the document to be delivered by post or any other means;
  - (c) specify requirements as to the address to which the document is to be delivered; and
  - (d) in the case of a document to be delivered by electronic means, specify requirements as to the



- hardware and software to be used and the technical specifications.
- (6) This section does not empower the Registrar—
- (a) to require a document to be delivered to the Registrar by electronic means; or
  - (b) to specify any requirement that is inconsistent with any requirement prescribed by an Ordinance as to—
    - (i) the authentication of the document; and
    - (ii) the manner of delivery of the document to the Registrar.
- (7) Requirements specified under this section are not subsidiary legislation.

### [32.01] History

Parts of this section are derived from s 346(1)(c) and (1A) and s 346A of the former CO (Cap 32) and s 1068(1), (3), (4), (6) and (7) of the UK Companies Act 2006; the remaining parts are new.

There are no equivalent provisions in Australia and Singapore.

### [32.02] Overview

The section provides the enabling power for the Registrar to specify requirements for the applicable requirements in s 31, as to content, form, authentication and delivery of documents, and other matters mentioned in this section, which determine whether a document delivered to the Registrar for registration is unsatisfactory with the consequences set out in s 35.

For example, section (1)(c) covers requirements as to the manner of delivery of a document.

Note that subsection (7) provides that such requirements are not subsidiary legislation.

See Companies Registry External Circular No. 4/2014 (Major Changes in Filing Requirements), 6 January 2014; External Circular No 8/2014 (Requirements for Documents Delivered for Registration), 7 February 2014.

## 33. Registrar may agree to delivery by electronic means (for section 31(1))

- (1) The Registrar may enter into an agreement with a company to provide that any document, or any class of document, that relates to the company, and is required or authorized to be

delivered to the Registrar under an Ordinance—

- (a) will be delivered by electronic means, except as provided for in the agreement; and
  - (b) will conform to the requirements—
    - (i) specified in the agreement; or
    - (ii) specified by the Registrar in accordance with the agreement.
- (2) An agreement with a company may also provide that any document, or any class of document, that relates to the company, and is required or authorized to be delivered by the Registrar to it under an Ordinance, will be delivered by electronic means.
- (3) The Registrar may specify a standard form for an agreement and the extent to which the form is to be used.
- (4) This section does not empower the Registrar to make any agreement that is inconsistent with regulations made under section 34.

### [33.01] History

Subsections (1) and (2) of this section are derived from s 1070(1) and (2) of the UK Companies Act 2006. The other subsections are new.

### [33.02] Overview

This section relates to s 31(1)(d) which refers to such agreement as is mentioned in s 33 and any regulations made by the Financial Secretary pursuant to s 34. No standard form of agreement has yet been specified.

## 34. Financial Secretary may make regulations requiring delivery by electronic means (for section 31(1))

- (1) The Financial Secretary may make regulations requiring any document required or authorized to be delivered to the Registrar under an Ordinance to be delivered by electronic means.
- (2) The regulations are subject to the approval of the Legislative Council.



**[267.02] Overview**

The basic prohibition on a company acquiring its own shares in the predecessor s 58(1A) of the former Companies Ordinance (Cap 32) is now set out more prominently in a separate section in the new s 267. The prohibition reflects the capital maintenance doctrine, as to which, see the notes to s 203.

**[267.03] Redemptions**

This refers to the redemption of redeemable shares. Despite the basic prohibition in s 267, exceptions are set out in Subdivisions 2 and 6 of Division 4 of Part 5, allowing companies to issue and redeem redeemable shares (subject to compliance with those statutory provisions).

**[267.04] Buy-backs**

A buy-back of shares involves the company purchasing or buying back shares from its shareholders. As exceptions to s 267, a company may buy back shares in accordance with Subdivisions 5 and 6 of Division 4 of Part 5. The court also has power to order a company to buy out the shares of a shareholder under s 725 (pursuant to an unfair prejudice petition).

**[267.05] Subscription**

A person subscribes to shares in a company where the company allots and issues shares to that person. Section 267 has the effect that a company cannot issue shares to itself.

**[267.06] Effects of contravention**

Effects of contravention The consequences of contravention are similar to those under the predecessor s 58(1B), (1C) and (1D) of the former Companies Ordinance (Cap 32). An offence is committed by the company and every responsible person. (As to which, see s 3). Also, in the case of a buy-back by a listed company under a general offer, the non-tendering member (if any) commits an offence if that member knowingly permits the contravention. As to non-tendering members, see ss 238 and 705 and the notes thereto. As to the meaning of 'knowingly', see the notes to s 228.

As to civil consequences, a share redemption or buy-back is not invalid only because of a failure to comply with the requirements for redemptions and buy-backs in Division 4: sub-s (4). The subsection does not refer to subscriptions, and so it seems that any subscription by the company of shares in itself would be void under the common law for a breach of the capital maintenance doctrine. (See *Trevor v Whitworth* (1887) 12 App Cas 409).

**268. No redemption or buy-back of unpaid or partly-paid shares**

A company must not redeem or buy back its own shares unless they are fully paid.

**[268.01] History**

This section is derived from ss 49(3), 49B(3) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 691(1);
2. Australia: Corporations Act 2001, s 254K(a).

**[268.02] Overview**

This section provides that shares may only be redeemed or bought back if they are fully paid, and is the same as the position under the former Companies Ordinance (Cap 32). Shares are fully paid if the price at which the share was issued has been fully paid to the company: cf Model Articles (public companies) art 1(1).

For redemption of shares, see Subdivisions 2 and 6 of Division 4 of Part 5. For permissible buy-backs of shares, see Subdivisions 5 and 6 of Division 4 of Part 5.

**269. Effect of redemption or buy-back**

- (1) Shares redeemed or bought back under this Division are to be regarded as cancelled on redemption or buy-back.
- (2) On redemption or buy-back of its own shares, a company must—
  - (a) reduce the amount of its share capital if the shares were redeemed or bought back out of capital;
  - (b) reduce the amount of its profits if the shares were redeemed or bought back out of profits; or
  - (c) reduce the amount of its share capital and profits proportionately if the shares were redeemed or bought back out of both capital and profits,
 by the total amount of the price paid by the company for the shares.



**[269.01] History**

This section is derived from ss 49A(4), 49B(3) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 662 (public companies);
2. Australia: Corporations Act 2001, ss 254J(1), 258E;
3. Singapore: Companies Act (Chapter 50), s 76G.

**[269.02] Overview**

Subsection (1) has the same effect as the previous s 49A(4) of the former Companies Ordinance (Cap 32) in providing that the shares redeemed or bought back are treated as cancelled. The cancellation takes place immediately and automatically upon redemption or the buy-back being effected. Compare this to other jurisdictions where the redeemed or repurchased shares can be treated as 'treasury shares' held by the company (eg Singapore Companies Act (Chapter 50) ss 76H to 76K).

Subsection (2) is new. The capital redemption reserve under s 49H of the former Companies Ordinance (Cap 32) is abolished under the new Ordinance. For existing companies which have such a reserve immediately before the commencement of the new Ordinance, any amount standing to the credit of the capital redemption reserve becomes part of the company's share capital: Companies Ordinance (Cap 622) Sch 11 s 37. Accordingly, upon a redemption or buy-back, there is no longer a need to transfer amounts to a capital redemption reserve. Under s 269(2), if any profits of the company were used in funding the redemption or buy-back, then the amount of profits of the company are to be reduced by the profits so used. If any capital was used to fund the redemption or buy-back, then the company's issued share capital is to be reduced by the amount of capital so used.

As to the provisions on payment or funding of a share redemption or buyback, see s 257.

**270. Return of share redemption or buy-back**

- (1) A company that redeems or buys back any shares under this Division must, within 15 days after the date on which the shares are delivered to the company, deliver a return to the Registrar for registration.
- (2) The return—
  - (a) must be in the specified form;
  - (b) must state, for the shares of each class redeemed or bought back—
    - (i) the number of shares; and

- (ii) the date on which they were delivered to the company;
  - (c) must include a statement of capital, as at the time immediately after the redemption or buy-back, that complies with section 201;
  - (d) in the case of a listed company, must also state, for the shares of each class redeemed or bought back—
    - (i) the maximum and minimum prices paid in respect of the shares; and
    - (ii) the aggregate amount paid by the company for the shares; and
  - (e) in the case of a redemption or buy-back financed by a payment out of capital, must also state particulars of the payment including the date and amount of the payment.
- (3) Details of shares delivered to the company on different dates and under different contracts may be included in a single return. If this is done, the amount required to be stated under subsection (2)(d)(ii) is the aggregate amount paid by the company for all the shares to which the return relates.
  - (4) If the company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 6 and, in the case of a continuing offence, to a further fine of \$ 2,000 for each day during which the offence continues.

**[270.01] History**

This section is derived from ss 49G(1) to (3), (6) and 54 of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 689;
2. Singapore: Companies Act (Chapter 50), s 76B(9).

**[270.02] Overview**

Section 270 lays down a requirement to notify the Registrar whenever shares are redeemed or bought back under Division 4 of Part 5. The relevant form is Companies Registry Form NSC2. For redemption of shares, see Subdivisions 2 and 6 of Division 4 of Part 5. For permissible buy-backs of shares, see Subdivisions 5 and 6 of Division 4 of Part 5.



The disclosure requirements for listed companies are more onerous as sub-s (2)(d) makes clear.

Subsection (3) allows the particulars of shares delivered to the company on different dates and under different contracts to be included in a single return, presumably as long as they all fall within the same period of 15 days after the first delivery day.

### [270.03] Within 15 days

The general rule in cases where an act is to be done within a specified time is that the day from which it runs is not to be counted. (See *Goldsmiths' Co v West Metropolitan Rly Co* [1904] 1 KB 1 (CA); *Stewart v Chapman* [1951] 2 KB 792; [1951] 2 All ER 613; *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336; [1973] 1 All ER 617 (CA)). The court has no power to extend a period of time limited by an Ordinance for doing an act unless the statute so provides. (See *Kerridge v Lamdin* [1950] 2 All ER 1110 (CA) at 1114).

### [270.04] Date on which the shares are delivered

The wording, referring to the date of the 'delivery' of the shares, follows that used in s 49G(1) of the former Companies Ordinance (Cap 32) (though the period for registration is now 15 days after the date of delivery rather than 14 days beginning with the date of delivery). Shares are intangibles and cannot strictly be 'delivered'. It seems that the date of 'delivery' would be the date when the share certificate and transfer documents (in the case of buy-backs) are delivered to the company.

### [270.05] Default in delivery

Failure to make delivery to the Registrar of the return required by this section renders the company and any responsible person liable to a level 6 fine (HK\$ 100,000) and a daily default fine of HK\$ 2,000. As to 'responsible persons', see s 3.

## 271. Effect of company's failure to redeem or buy back

- (1) This section applies if, under this Division, a company—
  - (a) issues redeemable shares; or
  - (b) agrees to buy back any of its own shares.
- (2) The company is not liable in damages for any failure on its part to redeem or buy back any of the shares.
- (3) Subsection (2) is without prejudice to any right of the holder of the shares other than the right to sue the company for damages for the failure.
- (4) A court must not grant an order for specific performance of the terms of the redemption or buy-back if the company

shows that it is unable to make a payment in respect of the redemption or buy-back out of distributable profits.

### [271.01] History

This section is derived from s 49P(1) to (3) of the former Companies Ordinance (Cap 32).

For equivalent provisions in the UK, see Companies Act 2006, s 735(1) to (3).

### [271.02] Overview

Section 271 deals with the situation where a company has failed to redeem or buy back shares after it has issued redeemable shares or has entered into a buy-back agreement. The company is not liable in damages for the failure: sub-s (2). Also, the court must not grant an order for specific performance if the company can establish that it has insufficient distributable profits to meet the cost of redeeming or purchasing the shares in question: sub-s (4). These provisions uphold the capital maintenance doctrine by ensuring that the company cannot be compelled to return capital to its members.

As to the position after the company has commenced winding up, see s 272.

### [271.03] Issued redeemable shares

For the power of a company to issue redeemable shares, see Subdivisions 2 and 6 of Division 4 of Part 5.

### [271.04] Agrees to buy back any of its own shares

For the power of a company to purchase its own shares, see Subdivisions 5 and 6 of Division 4 of Part 5.

### [271.05] Distributable profits

For the meaning of this see s 203 and see also s 297. As to payment for a redemption or buy-back out of profits, see s 257.

### [271.06] Redeemable preference shares issued before 1 September 1991

Section 271 does not apply to redeemable preference shares issued before 1 September 1991 (which was the date of commencement of s 49P of the former Companies Ordinance (Cap 32), from which s 271 is derived): Companies Ordinance (Cap 622) Sch 11 s 45. This preserves the effect of the former s 49P(1).



**272. Effect on winding up of company's failure to redeem or buy back**

- (1) This section applies if—
  - (a) a company—
    - (i) issues redeemable shares under this Division; or
    - (ii) agrees to buy back any of its own shares under this Division;
  - (b) the company is wound up; and
  - (c) at the commencement of the winding up any of those shares have not been redeemed or bought back.
- (2) The terms of the redemption or buy-back may be enforced against the company.
- (3) Subsection (2) does not apply if—
  - (a) the terms of the redemption or buy-back provided for the redemption or buy-back to take place at a date later than that of the commencement of the winding up; or
  - (b) during the period—
    - (i) beginning on the day on which the redemption or buy-back was to have taken place; and
    - (ii) ending on the commencement of the winding up,
 the company could not at any time have lawfully made a payment in respect of the redemption or buy-back out of distributable profits.
- (4) Shares are to be regarded as cancelled when they are redeemed or bought back under subsection (2).
- (5) The following must be paid in priority to any amount that the company is liable under subsection (2) to pay in respect of any shares—
  - (a) all other debts and liabilities of the company (other than any due to members in their capacity as such); and
  - (b) if other shares carry rights (whether as to capital or income) that are preferred to the rights as to capital attaching to those shares, any amount due in satisfaction of those preferred rights.
- (6) Subject to subsection (5), any amount payable under subsection (2) must be paid in priority to any amounts due to

members in satisfaction of their rights (whether as to capital or income) as members.

- (7) If, under section 264A of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), a creditor of a company is entitled to payment of any interest only after payment of all other debts of the company, the company's debts and liabilities for the purposes of subsection (5) include the liability to pay that interest.

**[272.01] History**

This section is derived from s 49P(4) to (7) of the former Companies Ordinance (Cap 32).

For equivalent provisions in the UK, see Companies Act 2006, s 735(4) to (6).

**[272.02] Overview**

Section 272 deals with the situation where a company has issued redeemable shares or has entered into a buy-back agreement, and the company has failed to redeem or buy back the shares by the time when the company has commenced winding up. The terms of the redemption or buy-back may be enforced against the company on a winding up unless the terms provided for redemption or buy-back on a date later than the commencement of the winding up, or if during the period from the agreed date of redemption or buy-back to the commencement of the winding up the company could not have lawfully paid for the redemption or buy-back out of distributable profits: sub-ss (2) and (3). The priority of payments for which a company is liable on a winding up under sub-s (2) is after all other debts of the company and the preferred rights of other shares but in priority to other amounts due to shareholders in satisfaction of their rights as members: sub-ss (5) and (6).

As to the position before the company has commenced winding up, see s 271.

**[272.03] Issued redeemable shares**

For the power of a company to issue redeemable shares, see Subdivisions 2 and 6 of Division 4 of Part 5.

**[272.04] Agrees to buy back any of its own shares**

For the power of a company to purchase its own shares, see Subdivisions 5 and 6 of Division 4 of Part 5.



**[272.05] Commencement of winding up**

For the time of commencement of winding up of a company, see ss 184 and 230 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

**[272.06] Distributable profits**

For the meaning of this see s 203 and see also s 297. As to payment for a redemption or buy-back out of profits, see s 257.

**[272.07] Redeemable preference shares issued before 1 September 1991**

Section 272 does not apply to redeemable preference shares issued before 1 September 1991 (which was the date of commencement of s 49P of the former Companies Ordinance (Cap 32), from which s 272 is derived); Companies Ordinance (Cap 622) Sch 11 s 45. This preserves the effect of former s 49P(1).

**273. Power to modify by regulation**

- (1) The Chief Executive in Council may make regulations modifying any of the provisions of this Division with respect to—
  - (a) the authorization required for a company to buy back its own shares;
  - (b) the authorization required for the release by a company of its rights under a contract for the buy-back of its own shares, including a contingent buy-back contract; and
  - (c) the information to be included in a return by a company to the Registrar in relation to a share redemption or buy-back.
- (2) Regulations made under this section are subject to the approval of the Legislative Council.

**[273.01] History**

This section is derived from s 49Q of the former Companies Ordinance (Cap 32).

For equivalent provisions in the UK, see Companies Act 2006, s 737.

**[273.02] Overview**

Section 273 gives the Chief Executive in Council wide powers to modify, by enacting regulations, any provision of Division 4 of Part 5 in the matters specified in sub-s (1).

Draft regulations made under this section must be laid before the Legislative Council and be approved by resolution of the Legislative Council: sub-s (2). The positive vetting procedure under Interpretation and General Clauses Ordinance (Cap 1) s 35 applies instead of the negative vetting procedure under s 34 of that Ordinance.

**[273.03] Regulations made under this section**

As at the date of writing, no regulations have been made under this section.

**Division 5****Financial Assistance for Acquisition of Own Shares****Subdivision 1****Preliminary****274. Interpretation**

- (1) In this Division—

**financial assistance** (資助) means—

- (a) financial assistance given by way of gift;
- (b) financial assistance given—
  - (i) by way of guarantee, security or indemnity (other than an indemnity in respect of the indemnifier's own neglect or default); or
  - (ii) by way of release or waiver;
- (c) financial assistance given—
  - (i) by way of a loan or any other agreement under which any of the obligations of the person giving the assistance are to be fulfilled at a time when in accordance with the agreement any obligation of another party to the agreement remains unfulfilled; or
  - (ii) by way of the novation of, or the assignment of rights arising under, a loan or other agreement referred to in subparagraph (i); or



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).

### [486.01] History

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

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

### [486.02] Overview

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

1. 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);
2. (b) the prohibition on payments for loss of office of directors cover payments made to entities connected with the director (s 516(3)); and
3. (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.

### [486.03] 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.

### [487.01] 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).

### [487.02] 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 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(i)(e), is an entity connected with the director or former director.

#### [488.01] 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).

#### [488.02] 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.

A body corporate which is associated with a director is an entity 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.

Under s 488(1), there are two categories of body corporate which are 'associated' with a director. The first (in para (a), as supplemented by sub-s (2)), is based on voting power of the director (together with persons specified in sub-s (3)) in the body corporate concerned. The second (in para (b)), is based on actual power or influence of the director (or a connected entity) exercised in respect of the affairs of the body corporate. For the meaning of entities connected with a director, see s 486.

#### [488.03] Accustomed to act in accordance with the directions or instructions

This concept is similar to that used in the definition of 'shadow director' in s 2(1). Accordingly, if the director or a connected entity of the director is a shadow director of the body corporate in question, or if the director or connected entity was a de jure or de facto director of the body corporate and exercised similar control or authority over the body corporate's board, then the director would be 'associated' with the body corporate for the purpose of s 488.

#### 489. Company subject to more than one prohibition

- (1) If a company is prohibited by more than one provision of this Part from doing something without the approval of the members of the company, or of the members of a holding company of the company, specified in each provision, the company is prohibited from doing the thing without all those approvals.
- (2) Subsection (1) does not require a separate resolution for the purposes of each of the provisions.

#### [489.01] History

This section is new.

For an equivalent provision in the UK, see Companies Act 2006, s 225.



**[489.02] Overview**

The prohibitions and restrictions in Part 11 (as to which, see the notes to s 484) are generally subject to approval by members of the company (or of the holding company). This section confirms that where a particular transaction or matter requires such approval under different provisions, then all the provisions must be complied with. However, it is possible for the one resolution of the members to be given for the purpose of each of the provisions instead of requiring the approvals to be given by separate resolutions.

**490. Application to transaction or arrangement despite its governing law**

Application to transaction or arrangement despite its governing law for the purposes of this Part, it is immaterial whether or not the law (apart from this Ordinance) that governs a transaction or arrangement is the law of Hong Kong.

**[490.01] History**

This section is new.

For an equivalent provision in the UK, see Companies Act 2006, s 259.

**[490.02] Overview**

Principles of private international law (or conflict of laws) may provide that the transaction or arrangement in question is governed by the law of a place outside Hong Kong. For example, a contract entered into by a Hong Kong company with a person outside Hong Kong could potentially be governed by a foreign law, where the 'proper law of the contract' is a foreign law. The proper law of a contract governs matters such as the effect, interpretation and discharge of a contract. Section 490 confirms that the provisions in Part 11 apply to the contract or other transaction or arrangement regardless of the proper law of the contract or the fact that a foreign law also applies in respect of the transaction or arrangement.

## Division 2

## Loan, Quasi-loan and Credit Transaction

## Subdivision 1

## Preliminary

**491. Interpretation**

In this Division—

- (1)
  - director** (董事) includes a shadow director;
  - guarantee** (擔保) includes indemnity;
  - land** (土地) includes any estate or interest in land, buildings, messuages and tenements of any nature or kind;
  - services** (服務) means anything other than goods or land;
  - specified company** (指明公司) means—
    - (a) a public company; or
    - (b) a private company or company limited by guarantee that is a subsidiary of a public company.
- (2) For the purposes of this Division, a body corporate is not to be regarded as a shadow director of any of its subsidiaries by reason only that the directors, or a majority of the directors, of the subsidiary are accustomed to act in accordance with its directions or instructions.

**[491.01] History**

This section is derived from s 157H(10), (11)(c) of the former Companies Ordinance (Cap 32).

For an equivalent provision in the UK, see Companies Act 2006, s 251 (shadow director).

**[491.02] Overview**

This section sets out certain definitions for the purpose of Division 2, which contains prohibitions on a company providing loans or quasi-loans to, or entering into credit transactions with, its directors. The definitions in this section are the same as those in the predecessor s 157H of the former Companies Ordinance (Cap 32), with the exception of the term 'specified company': see further the notes below.

**[491.03] Director**

The section 2(1) definition of director covers persons appointed as director (de jure directors), as well as persons who act in the position of director though not appointed as such (de facto directors). For the purpose of Part 11, 'director' also covers shadow directors. For the definition of shadow director, see s 2(1). However, s 491(2) provides a carve-out that all but excludes the possibility of a holding company being regarded as a shadow director of any of its subsidiaries for the purpose of Division 2. This is similar to the position in the UK, under Companies Act 2006 s 251(3). For the meaning of subsidiary, see ss 13 to 15.



**[491.04] Specified company**

This is a new term used in Division 2, and is defined to cover public companies and their subsidiaries. The prohibitions in respect of specified companies are more onerous compared with other companies: see ss 501 to 503. For the meaning of public company, see s 12. For private company, see s 11. For company limited by guarantee, see s 9. For the meaning of subsidiary, see ss 13 to 15.

**492. Body corporate controlled by director**

- (1) For the purposes of this Division, a body corporate is controlled by a director if—
- (a) the director is entitled to exercise, or control the exercise of, more than 50% 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 the director.
- (2) In subsection (1), a reference to voting power the exercise of which is controlled by a director includes voting power the exercise of which is controlled by another body corporate if the director is entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that other body corporate.

**[492.01] History**

This section is derived from s157H(10), (11)(c) of the former Companies Ordinance (Cap 32).

For an equivalent provision in the UK, see Companies Act 2006, s 251 (shadow director).

**[492.02] Overview**

The predecessor s 157H (2), (3), (4) of the former Companies Ordinance (Cap 32) extended the prohibitions on loans to directors to loans given to any body corporate controlled by a director; and in the case of listed companies (and companies in a group in which any company is listed), the prohibitions on quasi-loans and credit transactions also extended to bodies corporate controlled by the director. The concept of 'controlling interest' for the purpose of those provisions was not defined in the former Ordinance. Section 492 in the new Ordinance now provides a definition of the concept of a body corporate controlled by a director, for the purpose of the prohibition on loans (as set out in s 500). The provisions on quasi-loans and credit transactions (ss 501 to 503), which apply to 'specified companies' (as defined in s 491(1)), do not refer to bodies corporate

controlled by a director. However, those provisions apply to 'entities connected with a director', which covers 'associated' bodies corporate and hence effectively covers any body corporate controlled by a director: see ss 486 and 488 and the notes thereto.

**[492.03] Accustomed to act in accordance with the directions or instructions**

This concept is similar to that used in the definition of 'shadow director' in s 2(1). Accordingly, if the director is a shadow director of the body corporate in question, or if the director or connected entity was a de jure or de facto director of the body corporate and exercised similar control or authority over the body corporate's board, then the body corporate would be controlled by the director for the purpose of s 492.

**493. Quasi-loan**

- (1) For the purposes of this Division, a person makes a quasi-loan to a director or an entity connected with a director if the person—
- (a) agrees to pay, or pays otherwise than pursuant to an agreement, a sum for the director or connected entity—
    - (i) on terms that the director or connected entity (or another person on behalf of the director or connected entity) will reimburse the person; or
    - (ii) in circumstances giving rise to a liability on the director or connected entity to reimburse the person; or
  - (b) agrees to reimburse, or reimburses otherwise than pursuant to an agreement, expenditure incurred by another person for the director or connected entity—
    - (i) on terms that the director or connected entity (or another person on behalf of the director or connected entity) will reimburse the person; or
    - (ii) in circumstances giving rise to a liability on the director or connected entity to reimburse the person.
- (2) For the purposes of this Division, if a person makes a quasi-loan to a director or an entity connected with a director, the director's or connected entity's liabilities under the quasi-loan include the liabilities of any other person who has



agreed to reimburse the person on the director's or connected entity's behalf.

#### [493.01] History

This section is derived from s157H(10), (11)(b) of the former Companies Ordinance (Cap 32).

For an equivalent provision in the UK, see Companies Act 2006, s 199.

#### [493.02] Overview

This section defines 'quasi-loans' for the purpose of the prohibitions in ss 501 and 502 which apply in relation to 'specified companies' (as defined in s 491(1)). The concept of a quasi-loan is essentially the same as that under the predecessor s 157H of the former Companies Ordinance (Cap 32), though the wording of the definition is not precisely the same. An example of a quasi-loan provided by a company to a director is where the company makes payments for certain expenses of a director on terms that the director will later reimburse the company.

### 494. Credit transaction

(1) For the purposes of this Division, a person enters into a credit transaction as creditor for a director or an entity connected with a director if the person—

- (a) supplies goods to the director or connected entity under a hire-purchase agreement;
- (b) sells goods or land to the director or connected entity under a conditional sale agreement;
- (c) leases or hires goods or leases land to the director or connected entity in return for periodical payments; or
- (d) otherwise supplies goods or services or disposes of land to the director or connected entity on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred.

(2) In this section—

**conditional sale agreement** (有條件售賣協議) means an agreement for the sale of goods or land under which—

- (a) the purchase price or part of it is payable by instalments;
- (b) the property in the goods or land is to remain in the

seller until the conditions regarding the payment of instalments, or other conditions, specified in the agreement are fulfilled; and

- (c) despite such reservation of property, the buyer is to be in possession of the goods or land before the fulfilment of those conditions;

**hire-purchase agreement** (租購協議)

means an agreement for the bailment of goods under which the bailee may buy the goods, or under which the property in the goods will or may pass to the bailee.

#### [494.01] History

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

For equivalent provisions in the UK, see Companies Act 2006, ss 202, 1173.

#### [494.02] Overview

This section defines 'credit transaction' and when a person enters into the transaction as creditor, for the purpose of the prohibitions in s 503 which apply in relation to 'specified companies' (as defined in s 491(1)). The concept of a credit transaction is essentially the same as that under the predecessor s 157H of the former Companies Ordinance (Cap 32), though the wording of the definition is not precisely the same.

#### [494.03] Hire purchase agreement

The supply of goods under a hire-purchase agreement (as defined in sub-s (2)) is one of the four types of credit transaction within sub-s (1). Typically, a hire-purchase agreement involves the leasing of goods to a person who is given a right to purchase the goods outright at the end of the lease period.

#### [494.04] Conditional sale agreement

The sale of goods or land under a conditional sale agreement (as defined in sub-s (2)) is also one of the four types of credit transaction within sub-s (1). A conditional sale agreement involves the purchase of the goods or land with payments made by instalments, but with title not passing until full payment has been made. However, the purchaser is given possession of the goods or land before full payment.



**[748.02] Overview**

The Registrar may apply to the Court of First Instance for a company to be struck off the register and dissolved on the ground that the company has no assets or other appropriate reasons.

Application is made by originating summons: RHC Ord 102, r 2(1) and (2).

A director, creditor or member aggrieved by the striking off has the right to apply to the Court for restoration of the company under s 765.

The section was originally added to the former Companies Ordinance (Cap 32) in 1984 following the recommendation of the Companies Law Revision Committee Second Report, 1973, para 8.66. The Jenkins Report had indicated that their attention had been brought to cases which did not fall within s 291 of the former CO (see now ss 744 to 746), but where the existence of the company should be terminated though it assets did not justify the expense of a winding up. According to the Jenkins Report and the Companies Law Revision Committee Report, this power should only be used in exceptional circumstances.

The provision is rarely used in Hong Kong. In 2006, there were four orders made under the section.

**Division 2****Deregistration****749. Interpretation****(1) In this Division—**

**company** (公司) excludes—

(a) a public company; and

(b) a company specified in subsection (2).

**(2) The company is—**

(a) an authorized institution as defined by section 2(1) of the Banking Ordinance (Cap 155);

(b) an insurer as defined by section 2(1) and (2) of the Insurance Companies Ordinance (Cap 41);

(c) a corporation licensed under Part V of the Securities and Futures Ordinance (Cap 571) to carry on a business in any regulated activity as defined by section 1 of Part 1 of Schedule 1 to that Ordinance;

(d) an associated entity, within the meaning of Part VI of the Securities and Futures Ordinance (Cap 571), of a corporation mentioned in paragraph (c);

- (e) an approved trustee as defined by section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap 485);
  - (f) a company registered as a trust company under Part VIII of the Trustee Ordinance (Cap 29);
  - (g) a company having a subsidiary that falls within paragraph (a), (b), (c), (d), (e) or (f); or
  - (h) a company that fell within paragraph (a), (b), (c), (d), (e), (f) or (g) at any time during the 5 years immediately before the application under section 750 is made.
- (3) The Financial Secretary may, by notice published in the Gazette, amend subsection (2).

**[749.01] History**

This section is adapted from s 291AA(16) and the Sixteenth Schedule of the former Companies Ordinance (Cap 32).

**[749.02] Overview**

The section sets out the categories of companies which are not eligible to apply for deregistration as a defunct company under s 750.

The categories of the businesses of the companies excluded are the same as in the Sixteenth Schedule of the former CO (Cap 32) with the addition of trust companies under Part VIII of the Trustee Ordinance (Cap 29), and their holding companies (see subs (2)(f) and (g)).

Companies limited by guarantee are now eligible to apply under this Division, as it was considered that it could be costly for them to commence a members' voluntary winding-up: see Companies Registry Briefing Notes on Part 15.

**750. Application for deregistration**

- (1) A company, or a director or member of a company, may apply to the Registrar for deregistration of the company.
- (2) An application must not be made unless, at the time of the application—
  - (a) all the members agree to the deregistration;
  - (b) the company has not commenced operation or business, or has not been in operation or carried on business during the 3 months immediately before the application;



- (c) the company has no outstanding liabilities;
  - (d) the company is not a party to any legal proceedings;
  - (e) the company's assets do not consist of any immovable property situate in Hong Kong; and
  - (f) if the company is a holding company, none of its subsidiary's assets consist of any immovable property situate in Hong Kong.
- (3) An application—
- (a) must be in the specified form;
  - (b) must be accompanied by the prescribed fee; and
  - (c) must be accompanied by a written notice from the Commissioner of Inland Revenue stating that the Commissioner has no objection to the company being deregistered.
- (4) If the applicant is a company, it must nominate in the application a natural person to be given notice of the deregistration.
- (5) The applicant must give the Registrar any further information that the Registrar may request in connection with an application.
- (6) A person who, in connection with an application, knowingly or recklessly gives any information to the Registrar that is false or misleading in a material particular commits an offence and is liable—
- (a) on conviction on indictment to a fine of \$300,000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

Note—

Please also see section 873 which empowers the Registrar to require the production of records or documents, and the provision of information or explanation in respect of the records or documents, for the purpose of enquiring into whether any act that would constitute an offence under subsection (6) has been done.

### [750.01] History

This section is derived from s 291AA of the former Companies Ordinance (Cap 32).

For similar provisions:

1. UK: Companies Act 2006, s 1003;
2. Australia: Corporations Act 2001, s 601AA.

### [750.02] Overview

The section provides for the voluntary deregistration of defunct private companies without going through the winding up process.

A private company or a company limited by guarantee except those companies specified in s 749, or any of its directors or members may apply to the Registrar to deregister the company if the following conditions are met:

1. all the members of the company agree to the deregistration;
2. the company has never commenced business (or operation) or has ceased to carry on business (or ceased operation) for more than 3 months immediately before the application;
3. the company has no outstanding liabilities;
4. the company is not a party to any legal proceedings;
5. the company's assets do not consist of any immovable property situate in Hong Kong;
6. if the company is a holding company, none of its subsidiary's assets consist of any immovable property situate in Hong Kong: subs (1) and (2)

In response to the potential abuse of the deregistration process, (For example by companies who were parties to legal proceedings or who were in possession of immovable property in Hong Kong or being holding companies owning subsidiaries' assets which consist of immovable property in Hong Kong with high maintenance costs or encumbrances attached: see Overview to s 753) thereby potentially causing an adverse impact on third parties and the Government, three additional conditions for deregistration were added to the existing conditions stated in the former Companies Ordinance (Cap 32), namely:

1. that the company is required to confirm that it is not party to any legal proceedings;
2. that it has no immovable property in Hong Kong; and
3. that (in the case of a holding company) none of its subsidiaries' assets consist of any immovable property in Hong Kong: subs (2)(d) to (f).

The application should be made by using the specified form NDR1 'Application for Deregistration of Private Company or Company Limited by Guarantee'. It should also be accompanied by a notice from the Commissioner for Inland Revenue stating that the Commissioner has no objection to the deregistration: subs (3). Section 88B of the Inland Revenue Ordinance (Cap 112) authorises the Commissioner to issue such a notice on payment of a fee of HK\$270.



If the applicant is a company, it must nominate a natural person to receive the notice of deregistration: subs (4).

There is a mandatory requirement on the applicant to provide the Registrar with any further information requested by him in connection with the application: subs (5).

For offences under subs (6), a level 6 fine means a maximum of HK\$100,000 (see Sch 8 of the Criminal Procedure Ordinance (Cap 221)).

The Registrar also has additional powers under s 873 in relation to enquiries as to whether an offence under subs (6) has been committed.

### 751. Registrar may deregister company

- (1) On receiving an application under section 750, the Registrar must publish in the Gazette a notice of the proposed deregistration unless the Registrar is aware of a failure to comply with subsection (2), (3), (4) or (5) of that section.
- (2) The notice must state that unless an objection to the deregistration is received within 3 months after the date of publication of the notice, the Registrar may deregister the company.
- (3) If, at the end of those 3 months, the Registrar has not received any objection to the deregistration, the Registrar may deregister the company by publishing in the Gazette another notice declaring it to be deregistered on the date of publication of that other notice.
- (4) A company is deregistered on the date of publication of the notice under subsection (3).
- (5) On the deregistration of a company, the Registrar must give notice of the deregistration to the applicant, or to the person nominated in the application to be given the notice.
- (6) A company is dissolved on deregistration.

#### [751.01] History

This section is derived from s 291AA(7) to (11) of the former Companies Ordinance (Cap 32).

#### [751.02] Overview

Upon receipt of an application to deregister a company under s 750, if the Registrar is not aware of a failure to comply with any of the requirements stated in s 750(2)–(5), the Registrar must proceed to publish a notice of the proposed

deregistration in the Gazette: subs (1). In 2015, 46,898 companies were deregistered (see Companies Registry Annual Report 2014-15 Appendix A).

The notice must state that unless an objection is received within 3 months of the date of publishing the notice, the Registrar may deregister the company. When the 3-month period expires, if no objection has been received, the Registrar may deregister the company by publishing another notice in the Gazette declaring the company to be de-registered on the date of that notice: subs (2) to (4). The Registrar must then give notice of deregistration to the applicant, or the person nominated in the application to be given the notice: subs (5).

Month means 'calendar month': Interpretation and General Clauses Ordinance (Cap 1), s 3. In calculating the period that has elapsed after the occurrence of the specified event when the relevant period is a month or a specified number of months after the event, the general rule is that the period ends on the corresponding date in the appropriate subsequent month, ie the day of that month that bears the same number as the day of the earlier month on which the event occurred: *Dodds v Walker* [1981] 2 All ER 609 (HL) at 610 ('corresponding date rule').

The company is dissolved on deregistration: subsection (6). For foreign company and the default rule see s 746 and [746.02]. For the effect of dissolution on litigation and the need for reinstatement under s 291AB of the former Companies Ordinance (Cap 32), see *Good Home Supermarket Co Ltd v Hsu Chien Feng* [2007] 1 HKLRD 40.

### Division 3

#### Property of Dissolved Company and Other Miscellaneous Matters

### 752. Dissolved company's property vested in Government

- (1) If a company is dissolved under this Part or section 226A, 227, 239 or 248 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), every property and right vested in or held on trust for the company immediately before the dissolution is vested in the Government as bona vacantia.
- (2) Subsection (1) has effect subject to the possible restoration of the company to the Companies Register under—
  - (a) Division 4; or
  - (b) section 290 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).
- (3) If any property or right is vested in the Government under subsection (1), the property or right remains subject to the liabilities imposed on the property or right by law and does not have the benefit of any exemption that it might otherwise have as a property or right vested in the Government.



- (4) Despite subsection (3), the Government is only required to satisfy those liabilities out of the property or right to the extent that it is properly available to satisfy those liabilities.
- (5) In this section—
- (a) a reference to a property or right vested in or held on trust for a company includes a leasehold property but excludes a property or right held by the company on trust for any other person; and
  - (b) a reference to a liability imposed on a property or right by law includes a liability that—
    - (i) is a charge or claim on the property or right; and
    - (ii) arises under an Ordinance that imposes rates, taxes or other charges.

### [752.01] History

This section is derived from s 292(1) and (2) of the former Companies Ordinance (Cap 32). The phrase 'without prejudice' that was present in s 292 has been removed from subs (2) of this section, though the effect under subs (2) would be the same.

For the equivalent provision in the UK, see Companies Act 2006, s 1012.

### [752.02] Overview

Upon dissolution, the property and rights of the company are deemed to be *bona vacantia* and belong to the Government of the Hong Kong Special Administrative Region: subs (1). However, this is subject to the application for administrative restoration of the company to the Companies Register under s 760 of the Ordinance or restoration by the court under s 767 of the Ordinance or s 290 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32): subs (2). A reference to property or rights under this section will include a leasehold property, but excludes a property or right held by the company on trust for any other person: subs (5).

On 'rights', see *Good Home Supermarket Co Ltd v Hsu Chien Feng* [2007] 1 HKLRD 40. On the dissolution of a property development company which has disposed of all the units in a building, any 'rights' it might have had under the Deed of Mutual Covenant cease and there is nothing to pass as *bona vacantia* to the Hong Kong Government and the rights reverted to the owners of the building, see *Incorporated Owners of Cheong and Cheong Wai Mansion v HKSAR* [2001] 1 HKLRD 483.

On 'liabilities', in the context of an order for sale under a charging order and for joinder of Registrar of Companies, see *Yang Zhenhong v Registrar of Companies* [2015] HKCU 2984 (unreported, HCMP 3115/2013, 23 November 2015).

On property held on trust by the company, which is excluded from the section, see *Re CA Pacific Securities Ltd* [2009] HKCU 1113 (unreported, HCCW 1998, 24 July 2009).

For transitional and saving provisions, see Sch 11 s 131.

### 753. Disclaimer of dissolved company's property

- (1) If any property or right, other than immovable property situate in Hong Kong, is vested in the Government under section 752(1), the Registrar may, on his or her own initiative or on written application by a person interested in the property or right, disclaim the Government's title to the property or right by a notice of disclaimer.
- (2) If the Registrar disclaims the Government's title to any property or right on his or her own initiative, the Registrar must do so within 3 years after the date on which the fact that the property or right is vested in the Government under section 752(1) first came to the Registrar's notice.
- (3) If the Registrar disclaims the Government's title to any property or right on application by a person, the Registrar must do so within 3 months after the Registrar's receipt of the application.
- (4) A notice of disclaimer is of no effect if it is signed after the end of the period within which the Government's title to the property or right must be disclaimed under subsection (2) or (3).
- (5) If a notice of disclaimer contains a statement that—
  - (a) the fact that the property or right is vested in the Government under section 752(1) first came to the Registrar's notice on a date specified in the statement; or
  - (b) no application for a disclaimer with respect to the property or right was received by the Registrar before a date specified in the statement,
 the statement is sufficient evidence of the matter stated in it unless the contrary is proved.
- (6) The Registrar—
  - (a) must register a notice of disclaimer;
  - (b) must publish in the Gazette a copy of the notice; and
  - (c) must send a copy of the notice to the person who



made the application for the purposes of subsection (1).

- (7) The right to disclaim under this section may be waived by or on behalf of the Government either expressly, or by taking possession or other act showing an intention to waive the right.

### [753.01] History

This section is adapted from s 290C of the former Companies Ordinance (Cap 32).

For the equivalent provision in the UK, see the Companies Act 2006, s 1013.

### [753.02] Overview

The section gives the Government, through the Registrar, the right to disclaim the Government's title to property or rights vested in it, other than immovable property: subs (1). Disclaimer may be upon the Registrar's own initiative or on application by an interested person.

When disclaimer is made by the Registrar on his own initiative, he must do so within 3 years after the date on which he received notice of the fact that the property or right had vested in the Government: subs (2). Where disclaimer is made upon application by an interested person, the Registrar must do so within 3 months of his receipt of the application: subs (3). A notice of disclaimer signed after the relevant time limits have expired will be of no effect: sub (4).

The Government is allowed to waive its right to disclaim property or rights under subs (7).

It is rather odd that immovable property cannot be disclaimed since such property may well be encumbered with onerous obligations. It is not the case under the UK Companies Act 2006; and see *Re Fivestar Properties Ltd* [2016] 1 WLR 1104(Ch) at 1109-1110, [2015] EWHC 2782 on the effect of disclaimer of freehold property in the UK.

Some companies have in the past abused the deregistration process by allowing the company to be deregistered to avoid onerous obligations, eg land which includes a slope with maintenance obligations. Paragraphs (d) to (f) in s 750(2) are new and (e) and (f) are intended to deal with such abuse.

For the transitional and saving provision for disclaimer of property vested in the Government under the predecessor Ordinance, see Sch 11 s 128.

### 754. Effect of disclaimer

- (1) If the Registrar disclaims the Government's title to any property or right under section 753, the property or right is to be regarded as not having been vested in the Government under section 752(1).
- (2) A disclaimer—
- terminates, with effect from the date of the disclaimer, the company's rights, interests and liabilities in or in respect of the property or right disclaimed; and
  - except so far as is necessary for the purpose of releasing the company from any liability, does not affect any other person's rights or liabilities.

### [754.01] History

This section is taken from s 290D of the former Companies Ordinance (Cap 32).

For equivalent provisions in the UK, see the Companies Act 2006, ss 1014 and 1015.

### [754.02] Overview

The section sets out the effect of a disclaimer by the Registrar under s 753.

### 755. Court may make vesting order

- (1) On application by a person who—
- claims an interest in any property or right disclaimed under section 753; or
  - is subject to a liability in respect of such property or right that is not discharged by the disclaimer,
- the Court may make an order for the vesting of the property or right in, or its delivery to, a person entitled to it, or a person subject to the liability mentioned in paragraph (b), or a trustee for a person so entitled or subject.
- (2) An order may be made on the terms that the Court thinks fit.
- (3) An order for the vesting of a property or right in, or its delivery to, a person subject to a liability mentioned in subsection (1)(b), or a trustee for the person, may only be made if it appears to the Court that it would be just to do so



for the purpose of compensating the person in respect of the disclaimer.

- (4) On the making of an order for the vesting of a property or right in, or its delivery to, a person, the property or right is vested in the person without conveyance, assignment or transfer.

### [755.01] History

This is a new provision.

For the equivalent provision in the UK, see the Companies Act 2006, s 1017.

### [755.02] Overview

This section gives the Court of First Instance power upon the application of a person claiming an interest or subject to a liability in the disclaimed property the right to make a vesting order in that person or a trustee: subs (1). Application is made by originating summons: see RHC Ord 102, r 2(1) and (2).

A vesting order will only be made where the Court considers that it would be just to do so for the purpose of providing compensation to such person in respect of the disclaimer: subs (3).

For vesting orders generally for a dissolved company, see s 45(b) (i) of the Trustee Ordinance (Cap 29).

## 756. Liabilities of directors etc. of dissolved company continue

Even though a company is dissolved under this Part, the liability (if any) of every director, manager and member of the company continues and may be enforced as if the company had not been dissolved.

### [756.01] History

This section is derived from s 291(6) of the former Companies Ordinance (Cap 32).

### [756.02] Overview

Notwithstanding the dissolution, the liability of directors, managers and members shall continue and may be enforced. The term 'manager' (see s 2(1)) has replaced 'managing officer' in s 291(6) of Cap 32.

## 757. Registrar may act as dissolved company's or liquidator's representative

(1) This section applies if—

- (a) a company has been dissolved under—
  - (i) this Part;
  - (ii) section 226A, 227, 239 or 248 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32); or
  - (iii) section 291, 291A or 291AA of the predecessor Ordinance; and
- (b) it is proved to the Registrar's satisfaction that—
  - (i) the company, if still existing, would be legally or equitably bound to carry out, complete or give effect to a dealing, transaction or matter; and
  - (ii) in order to carry out, complete or give effect to the dealing, transaction or matter, a purely administrative act, that is not discretionary, should have been done by or on behalf of the company, or should be done by or on behalf of the company if still existing.

- (2) The Registrar may do the act, or cause the act to be done, as the company's or the liquidator's or provisional liquidator's representative.
- (3) The Registrar may execute or sign any relevant instrument or document, adding a memorandum stating that the Registrar has done so as the company's or the liquidator's or provisional liquidator's representative.
- (4) An instrument or document executed or signed by the Registrar under subsection (3) has the same effect as if the company, if still existing, had executed the instrument or document.

### [757.01] History

This section is derived from s 291B of the former Companies Ordinance (Cap 32).

For the equivalent provision in Singapore, see Companies Act (Chapter 50), s 345.



**[757.02] Overview**

The section allows the Registrar of Companies to act as representative of a dissolved company for administrative matters, without the need for an application to the Court.

The section was originally added in the former Companies Ordinance (Cap 32) in 1984 following the recommendation of the Companies Law Revision Committee Second Report, 1973, para 8.67. It was sometimes found after dissolution that title to property was in the name of the company but it had no beneficial interest in the property. *Re Strathblaine Estates Ltd* [1948] Ch 228; [1948] 1 All ER 162 is an example of this situation. Application to the court was then necessary in order to obtain a vesting order vesting the property in a new trustee.

In *Re Toyota Tsusho Corp* [2011] HKCU 2304 (unreported, HCMP 2072/2011, 23 November 2011), K, a company which was co-owner of a property, merged with T, the applicant company, and was dissolved; T sought and obtained a vesting order in it of the interest pursuant to s 45(b)(iii) of the Trustee Ordinance; the former s 291B was not mentioned, though it seems the section could have been used to avoid the court application.

Section 757 does not have an equivalent of s 291B (3) of the former Companies Ordinance (Cap 32), which provided an exclusion that the Registrar should be liable, and no civil action or other proceedings should lie against him, in respect of acts properly done by him. However, the Registrar has immunity pursuant to s 63 in Part 2 of the new Ordinance.

**758. Former director must keep dissolved company's books and papers for 6 years**

- (1) If a company is dissolved under this Part or section 226A, 227, 239 or 248 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), every person who was a director of the company immediately before the dissolution must ensure that the company's books and papers are kept for at least 6 years after the date of the dissolution.
- (2) Subsection (1) does not apply to the books and papers that are otherwise required to be kept by another person under this Ordinance or any other Ordinance.
- (3) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 3.
- (4) If a person is charged with an offence under subsection (3), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person—
  - (a) was charged with the duty of ensuring that subsection (1) was complied with; and

- (b) was in a position to discharge that duty.

**[758.01] History**

This section is derived from s 292(3) to (5) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 1012.
2. Singapore: Companies Act (Chapter 50), s 346.

**[758.02] Overview**

A person who was a director of a company immediately before its dissolution must ensure that all the books and papers of the company are kept for not less than 6 years after the dissolution: subs (1).

The time period is extended from 5 years under the former Companies Ordinance (Cap 32) to 6 years under this Ordinance. The section also sets out a defence to a person charged under subs (3), which was not present in the former Companies Ordinance (Cap 32).

This provision does not however apply to books and papers that are required to be kept by another person under other provisions of the Companies Ordinance or under any other Ordinance: subs (2).

As to contravention, a level 3 fine is up to HK\$10,000; see Sch 8 of the Criminal Procedure Ordinance (Cap 221).

A defence is available to a person who can show that they had reasonable grounds to believe and did believe that a competent and reliable person was in charge of the duty of ensuring the company's books and papers were kept for at least 6 years after the date of the dissolution and that person was in a position to discharge such duty: subs (4).

**759. Court's power to wind up dissolved companies**

The Court's powers under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) to wind up a company are not affected by the fact that—

- (a) the company's name has been struck off the Companies Register under section 746 or 747 and the company is dissolved under that section; or
- (b) the company has been deregistered, and is dissolved, under section 751.