

Hong Kong Bar Association's comments on
First Phase Consultation on the Subsidiary Legislation to be made under the
New Companies Ordinance

1. The Hong Kong Bar Association (“the Bar”) has previously given its comments on various matters of principle in the Companies Ordinance Rewrite exercise. The new Companies Ordinance has since been enacted. The present consultation focuses on the subsidiary legislation under the new Companies Ordinance, which concerns mainly issues of detailed drafting and practice. The Bar only wishes to draw attention to the following matters.

Annex 1 Companies (Summary Financial Reports) Regulation

2. The Bar has in its July 2007 comments indicated its support for expanding the scope of summary financial reports to unlisted companies but noted that the contents of such summary financial reports should be consistent with the disclosure obligations of unlisted companies and should not simply copy those designed for listed companies under the Companies (Summary Financial Report of Listed Companies) Regulations.
3. The Bar notes that the draft Annex 1 substantially reproduces the Companies (Summary Financial Report of Listed Companies) Regulations save for the requirements for business review and business projection (which the Bar objected to in its July 2007 comments). The Bar understands that most of these requirements are based on and tally with the revised disclosure obligations of the unlisted companies. To that end the Bar has no objection to their inclusion.

Annex 2 Companies (Directors' Report) Regulation

4. The Bar has 2 observations in this regard.
5. First (and this is outside the scope of Annex 2), the Bar notes that its objections to the requirement of a business review in the directors' report for all companies (listed and unlisted) in its July 2007 comments have only been partially taken on board (in relation to exemption by special resolution). The Bar reiterates its concerns as to the desirability of introducing such a requirement to all companies alike and to cater for exemption only by shareholders' agreement.

6. Secondly, the Bar has no objection to the proposed definition of “equity-linked agreement”. The Bar has previously indicated that the definition should preferably be with reference to the effect or likely effect of diluting existing shareholders’ interests, and notes that the proposed definition (“will or may result in the company issuing shares”) should be sufficient for that purpose.

Annex 5 Company Records (Inspection and Provision of Copies) Regulation

7. The Bar has no objection in principle to formalizing the procedures for requesting and carrying out inspection of “companies records” (as defined in s.654 of the new Companies Ordinance which do not include accounting records).
8. However the Bar notes that the proposed Regulation allows the requestor to dictate the date of inspection (“specified time”), which can be no more than 2 working days from the giving of notice (depending on circumstances). The company is obliged to permit inspection on such “specified date” (regulation 7(2)(a)), and failure to do so will have serious consequences in that the company and each of its responsible persons will have committed an offence and be liable to a fine (regulation 7(3)-(4)). The Bar is concerned that the lack of flexibility to permit the company to extend the time in a case where proper cause is shown, coupled with the serious consequences of any failure to comply, may create an unreasonable burden on the company and may be open to abuse in the context of shareholders’ disputes.

Annexes 3, 4, 6 and 7

9. The Bar has no comment on the same.

Hong Kong Bar Association

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