

PART 5

TRANSACTIONS IN RELATION TO SHARE CAPITAL

Division 1 – Preliminary

5.1 Interpretation

(1) In this Part –

“Commission” (監察機關) means –

- (a) subject to paragraphs (b) and (c), the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571);
- (b) if any relevant transfer order made under section 25 of that Ordinance is in force, the recognized exchange company concerned or both the Securities and Futures Commission and the recognized exchange company concerned, in accordance with the provisions of that order; or
- (c) if any relevant transfer order made under section 68 of that Ordinance is in force, the recognized exchange controller concerned or both the Securities and Futures Commission and the recognized exchange controller concerned, in accordance with the provisions of that order;

“contingent buy-back contract” (待確定回購合約) means a contract entered into by a company relating to any of its shares –

- (a) that is not a contract to buy back those shares; but
- (b) under which the company may (subject to any conditions) become entitled or obliged to buy back those shares;

“distributable profits” (可分派利潤), in relation to the making of a payment by a company, means those profits out of which the company could lawfully make a distribution equal in value to the payment;

Note: Division 2 of Part 6 contains prohibitions and restrictions on a company in making distributions.

“redeemable shares” (可贖回股份) means shares that are to be redeemed, or are liable to be redeemed, at the option of the company or the shareholder;

“specified Chinese language newspaper” (指明中文報章) means a Chinese language newspaper that is specified under subsection (2);

“specified English language newspaper” (指明英文報章) means an English language newspaper that is specified under subsection (2);

“unlisted company” (非上市公司) means a company that does not have any of its shares listed on a recognized stock market.

(2) The Chief Secretary for Administration may specify Chinese language newspapers and English language newspapers for the purposes of this Part and must publish a list of the specified newspapers in the Gazette.

Division 2 – Solvency Test

5.2 Application of Division

This Division has effect for the following transactions –

- (a) a reduction of share capital by special resolution supported by a solvency statement under Subdivision 2 of Division 3;
- (b) a payment out of capital in respect of a share redemption or buy-back under Division 4;
- (c) the giving of financial assistance by a company under Subdivision 4 of Division 5.

5.3 Solvency test

A company satisfies the solvency test in relation to a transaction if –

- (a) immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and
- (b) either –
 - (i) if it is intended to commence the winding up of the company within 12 months after the date of the transaction, the company will be able to pay its debts in full within 12 months after the commencement of the winding up; or
 - (ii) in any other case, the company will be able to pay its debts as they become due during the period of 12 months immediately following the date of the transaction.

5.4 Solvency statement

(1) A solvency statement in relation to a transaction is a statement that each of the directors making it has formed the opinion that the company satisfies the solvency test in relation to the transaction.

(2) In forming an opinion for the purpose of making a solvency statement, a director must –

- (a) inquire into the company's state of affairs and prospects; and
 - (b) take into account all the liabilities of the company (including contingent and prospective liabilities).
- (3) A solvency statement –
- (a) must be in the specified form;
 - (b) must state –
 - (i) the date on which it is made; and
 - (ii) the name of each director making it; and
 - (c) must be signed by each director making it.

(4) Subsection (3)(a) does not apply to a solvency statement made for the purposes of the giving of financial assistance by a company under Subdivision 4 of Division 5.

5.5 Offences regarding solvency statement

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$150,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

5.6 Power to modify solvency test by regulation

- (1) The Chief Executive in Council may make regulations –
 - (a) modifying the solvency test or its application to any transaction or class of transactions; or
 - (b) modifying the matters that a director is required to take into account in forming an opinion for the purpose of making a solvency statement.
- (2) Regulations made under this section –
 - (a) may make different provision for different cases or classes of cases; and
 - (b) may contain any further consequential provisions, and any incidental and supplementary provisions, that the Chief Executive in Council thinks fit.
- (3) Regulations made under this section are subject to the approval of the Legislative Council.

Division 3 – Reduction of Share Capital

Subdivision 1 – General Provisions

5.7 Permitted reductions of share capital

(1) A company may, in accordance with the procedure specified in section 5.8, reduce its share capital under this Division in any way.

Examples:

1. A company may extinguish or reduce the liability on any of its shares in respect of share capital not paid up.
2. A company may, either with or without extinguishing or reducing liability on any of its shares –
 - (a) cancel any paid-up share capital that is lost or unrepresented by available assets; or
 - (b) repay any paid-up share capital in excess of the company's wants.

(2) However, a company must not reduce its share capital if, as a result of the reduction, there would no longer be any member of the company holding shares other than redeemable shares.

(3) This Division is subject to any provision of a company's articles that prohibits or restricts the reduction of the company's share capital.

5.8 Procedure for a company to reduce its share capital

The procedure for a company to reduce its share capital under this Division is –

- (a) by special resolution supported by a solvency statement under Subdivision 2; or
- (b) by special resolution confirmed by the Court of First Instance under Subdivision 3.

5.9 Offence if share capital is reduced in contravention of Division

(1) If a company reduces its share capital in contravention of this Division, the company, and every responsible person of the company, commit an offence and each is liable –

- (a) on conviction on indictment to a fine of \$1,250,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$150,000 and to imprisonment for 12 months.

(2) An offence is not committed under this section in relation to a reduction of share capital by a company only because one or more directors of the company commit an offence under section 5.5 in making a solvency statement for the purposes of the reduction of share capital.

(3) An offence is not committed under this section if the reduction of share capital occurs as a result of a share redemption or buy-back in accordance with Division 4 or as otherwise provided in this Ordinance.

Example: A reduction of share capital could occur as a result of an order of the Court of First Instance under Part 13.

5.10 Liability of members following reduction of share capital

(1) If a company's share capital is reduced under this Division, a past or present member of the company is not liable in respect of a share to a call or contribution exceeding in amount the difference (if any) between –

- (a) the issue price of the share; and
- (b) the aggregate of the amount paid up on the share (if any) and the amount reduced on the share.

(2) Subsection (1) is subject to section 5.28.

(3) Nothing in this section affects the rights of the contributories among themselves.

Subdivision 2 – Reduction of Share Capital by Special Resolution Supported by Solvency Statement

5.11 Special resolution for reduction of share capital

(1) A company may reduce its share capital by special resolution in accordance with this Subdivision.

(2) The special resolution and the reduction of share capital take effect when the return under section 5.20 or 5.21 in relation to the reduction is registered by the Registrar.

5.12 Solvency statement

(1) All directors of the company must make a solvency statement that complies with Division 2 in relation to the reduction of share capital.

(2) The special resolution for reduction of share capital must be passed within 15 days after the date of the solvency statement.

(3) If the special resolution is proposed as a written resolution, a copy of the solvency statement must be sent to every member of the company at or before the time when the proposed resolution is sent to them.

(4) If the special resolution is proposed at a meeting, a copy of the solvency statement must be made available for inspection by members at the meeting.

(5) The special resolution is not effective if subsection (3) or (4) (as applicable) is not complied with.

5.13 Special resolution: exercise of voting rights

(1) If the special resolution for reduction of share capital is proposed as a written resolution, a member of the company holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(2) If the special resolution is proposed at a meeting, the resolution is not effective if –

- (a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and
 - (b) the resolution would not have been passed if the member had not done so.
- (3) For the purposes of subsection (2) –
 - (a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;
 - (b) any member of the company may demand a poll on that question; and
 - (c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(4) The special resolution is not effective if a demand for a poll referred to in subsection (3)(b) is refused.

(5) This section does not apply in the case of a reduction of share capital that applies equally to all issued shares in the company.

5.14 Public notice of reduction of share capital

(1) Within one week after the date of the special resolution for reduction of share capital, the company must publish a notice in the Gazette –

- (a) stating that the company has approved a reduction of share capital;
- (b) specifying the amount of share capital to be reduced and the date of the special resolution;
- (c) stating where the special resolution and solvency statement are available for inspection; and

(d) stating that a member of the company who did not consent to or vote in favour of the special resolution or a creditor of the company may, within 5 weeks after the date of the special resolution, apply to the Court of First Instance under section 5.16 for cancellation of the special resolution.

(2) Within one week after the date of the special resolution, the company must also –

(a) publish a notice to the same effect as the notice under subsection (1) in at least one specified Chinese language newspaper and at least one specified English language newspaper; or

(b) give written notice to that effect to each of its creditors.

(3) If the company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

(4) The company must deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company –

(a) publishes the notice under subsection (1); or

(b) if earlier, first publishes the notice or gives notice to creditors under subsection (2).

(5) If the company contravenes subsection (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

5.15 Inspection of special resolution and solvency statement

(1) The company must ensure that the special resolution for reduction of share capital and the solvency statement made in relation to it are kept at its

registered office or at a place prescribed by regulations made under section 12.125 for the period –

- (a) beginning on the day on which the company –
 - (i) publishes the notice under section 5.14(1); or
 - (ii) if earlier, first publishes the notice or gives notice to creditors under section 5.14(2); and
- (b) ending 5 weeks after the date of the special resolution.

(2) The company must permit a member or creditor of the company to inspect the special resolution and solvency statement without charge during business hours in that period.

(3) If the company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

(4) If the company contravenes subsection (2), the Court of First Instance may by order require the company to permit an immediate inspection.

5.16 Application to Court by members or creditors

(1) Subject to subsection (2), a member or creditor of the company may apply to the Court of First Instance, within 5 weeks after the date of the special resolution for reduction of share capital, for cancellation of the resolution.

(2) A member who consented to or voted in favour of the special resolution is not entitled to apply.

(3) An application may be made on behalf of the persons entitled to apply by any one or more of them appointed in writing by all of them for the purpose.

- (4) If an application is made under this section –
 - (a) the applicant must, as soon as possible, serve the application on the company; and

(b) the company must give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company.

(5) If the company contravenes subsection (4)(b), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

5.17 Power to adjourn proceedings

(1) The Court of First Instance may adjourn proceedings on an application under section 5.16 so that an arrangement may be made to the Court's satisfaction for the protection of the interests of dissentient members or dissentient creditors.

(2) The Court of First Instance may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

5.18 Court's power to confirm or cancel special resolution

(1) On an application under section 5.16, the Court of First Instance must make an order confirming or cancelling the special resolution for reduction of share capital, and may do so on any terms and conditions it thinks fit.

(2) If the Court of First Instance confirms the special resolution, it may by order alter or extend any date or period of time specified –

- (a) in the special resolution; or
- (b) in any provision of this Division applying to the special resolution or the reduction of share capital.

(3) If the Court of First Instance thinks fit, the order may –

- (a) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;

- (b) provide for the protection of the interests of members or creditors of the company;
- (c) make any alteration to the company's articles that may be required as a consequence;
- (d) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court of First Instance requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court of First Instance under this section do not limit its powers under section 5.17.

5.19 Company to deliver copy of court order to Registrar

(1) Within 15 days after the making of an order by the Court of First Instance under section 5.18, or within any longer period ordered by the Court, the company must deliver an office copy of the order to the Registrar for registration.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) 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 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

5.20 Registration of return if no court application

- (1) If –
- (a) no application is made under section 5.16 in respect of the special resolution for reduction of share capital; and
 - (b) the company delivers a return that complies with subsection (2) to the Registrar no earlier than 5 weeks and

no later than 7 weeks after the date of the special resolution,

the Registrar must register the return.

Notes:

1. The special resolution and the reduction of share capital take effect when the return is registered by the Registrar (see section 5.11(2)).
 2. The company is also required to send a copy of the special resolution to the Registrar within 15 days after it is passed (see section 12.86).
 3. If the company's articles are altered by the special resolution, the company is also required to notify the Registrar of the alteration within 15 days after it takes effect (see section 3.27).
- (2) The return –
- (a) must be in the specified form;
 - (b) must contain particulars of the reduction of share capital; and
 - (c) must contain a statement of capital, as at the time immediately after the reduction of share capital, that complies with section 4.69.

5.21 Registration of return if court application

- (1) If –
 - (a) an application is made under section 5.16 in respect of the special resolution for reduction of share capital;
 - (b) either –
 - (i) the Court of First Instance makes an order under section 5.18 confirming the special resolution; or
 - (ii) the proceedings on the application are ended without determination by the Court (for example, by the withdrawal of the application); and
 - (c) the company delivers to the Registrar a return that complies with subsection (2) –

- (i) within 15 days after the making of the order, or within any longer period ordered by the Court; or
- (ii) within 15 days after the proceedings are ended without determination by the Court or, if there are more than one such proceedings, the last of them are so ended,

the Registrar must register the return.

Notes:

1. The special resolution and the reduction of share capital take effect when the return is registered by the Registrar (see section 5.11(2)).
 2. The company is also required to send a copy of the special resolution to the Registrar within 15 days after it is passed (see section 12.86) and deliver an office copy of the order of the Court of First Instance to the Registrar within 15 days after the making of the order, or within any longer period ordered by the Court (see section 5.19).
- (2) The return –
- (a) must be in the specified form;
 - (b) must contain particulars of the reduction of share capital; and
 - (c) must contain a statement of capital, as at the time immediately after the reduction of share capital, that complies with section 4.69.

Subdivision 3 – Reduction of Share Capital Confirmed by the Court

5.22 Special resolution and application to Court for confirmation of reduction of share capital

(1) A company may pass a special resolution for reduction of share capital under this Subdivision and apply by petition to the Court of First Instance for an order confirming the reduction.

(2) Unless the Court of First Instance directs otherwise, section 5.23 (creditors entitled to object to reduction of share capital) applies if the proposed reduction of share capital involves either –

- (a) diminution of liability in respect of unpaid share capital; or
- (b) the payment to a shareholder of any paid-up share capital.

(3) The Court of First Instance may direct that section 5.23 is not to apply to any class or classes of creditors if the Court thinks it proper to do so, having regard to any special circumstances of the case.

(4) The Court of First Instance may direct that section 5.23 is to apply in any other case.

5.23 Creditors entitled to object to reduction of share capital

(1) If this section applies (see section 5.22(2) and (4)), a creditor of the company is entitled to object to the reduction of share capital if the creditor is entitled, at the date fixed by the Court of First Instance, to any debt or claim that would be admissible in proof against the company if the company were to commence being wound up on that date.

(2) The Court of First Instance must settle a list of creditors entitled to object.

(3) For that purpose, the Court of First Instance –

- (a) must ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims; and
- (b) may publish a notice fixing a period within which, or a date by which, creditors not on the list are to claim to be entered on the list or are to be excluded from the right of objecting.

(4) If a creditor on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court of First Instance may,

if it thinks fit, dispense with the consent of the creditor on the company securing payment of the debt or claim.

(5) For that purpose, the debt or claim must be secured by appropriating (as the Court of First Instance directs) the following amount –

- (a) if the company admits the full amount of the debt or claim or, though not admitting it, is willing to provide for it, the full amount of the debt or claim; or
- (b) if the company does not admit, and is not willing to provide for, the full amount of the debt or claim, or if the amount is contingent or not ascertained, an amount fixed by the Court after an inquiry and adjudication as if the company were being wound up by the Court.

5.24 Offence in connection with creditors list

(1) An officer of a company –

- (a) must not intentionally or recklessly –
 - (i) conceal the name of a creditor entitled to object to the reduction of share capital; or
 - (ii) misrepresent the nature or amount of the debt or claim of a creditor; or
- (b) must not be knowingly concerned in any such concealment or misrepresentation.

(2) A person who contravenes subsection (1) commits an offence and is liable –

- (a) on conviction on indictment to a fine of \$150,000 and to imprisonment for 2 years; or
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

5.25 Court order confirming reduction of share capital

(1) On an application by petition under section 5.22, the Court of First Instance may make an order confirming the reduction of share capital on any terms and conditions it thinks fit.

(2) The Court of First Instance must not confirm the reduction of share capital unless it is satisfied, with respect to every creditor of the company who is entitled to object to the reduction of share capital under section 5.23, that –

- (a) the creditor's consent has been obtained; or
- (b) the creditor's debt or claim has been discharged, has determined or has been secured.

5.26 Registration of order, minute and return

- (1) If –
- (a) the Court of First Instance makes an order under section 5.25 confirming the reduction of share capital; and
 - (b) within 15 days after the making of the order, or within any longer period ordered by the Court, the company delivers to the Registrar –
 - (i) an office copy of the order;
 - (ii) a minute that complies with subsection (2) and that is approved by the Court; and
 - (iii) a return that complies with subsection (3),

the Registrar must register the order, minute and return.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) The minute must state, with respect to the company's share capital as altered by the order –

- (a) the amount of the share capital;
- (b) the total number of issued shares in the company;

- (c) the amount of each share; and
 - (d) the amount paid up and the amount (if any) remaining unpaid on each share.
- (3) The return –
 - (a) must be in the specified form;
 - (b) must contain particulars of the reduction of share capital (by reference to the order or minute, or otherwise); and
 - (c) must contain a statement of capital, as at the time immediately after the reduction of share capital, that complies with section 4.69.
- (4) The special resolution, as confirmed by the order, takes effect on registration of the order, minute and return by the Registrar.
- (5) Notice of the registration must be published in the manner directed by the Court of First Instance.

5.27 Certification of registration

- (1) The Registrar must certify the registration of an order, minute and return under section 5.26.
- (2) The certificate must be signed by the Registrar or bear the Registrar's printed signature.
- (3) The certificate is conclusive evidence –
 - (a) that the requirements of this Ordinance for the reduction of share capital have been complied with; and
 - (b) that the company's share capital is as stated in the minute.

5.28 Liability to creditors omitted from list of creditors

- (1) This section applies to a reduction of share capital confirmed by the Court of First Instance under section 5.25 if –

- (a) a creditor entitled to object to the reduction of share capital was not entered on the list of creditors because the creditor was not aware –
 - (i) of the proceedings for reduction of share capital;
 - or
 - (ii) of their nature or effect with respect to the creditor's debt or claim; and
- (b) after the reduction of share capital the company is unable to pay the debt or claim.

(2) A person who was a member of the company on the date of registration of the order confirming the special resolution for the reduction is liable to contribute for the payment of the debt or claim an amount not exceeding the amount that the person would have been liable to contribute if the company had commenced to be wound up on the day before that date.

(3) If the company is wound up, the Court of First Instance, on application by the creditor and proof of the creditor's lack of awareness referred to in subsection (1)(a), may, if it thinks fit –

- (a) settle a list of persons liable to contribute under this section; and
- (b) make and enforce calls and orders on them as if they were ordinary contributors in a winding up.

(4) Nothing in this section affects the rights of the contributories among themselves.

Division 4 – Share Redemptions and Buy-backs

Subdivision 1 – Redeemable Shares

5.29 Issue of redeemable shares

(1) Subject to subsections (2) and (3), a company may issue redeemable shares.

(2) A company's articles may prohibit or restrict the issue of redeemable shares.

(3) A company must not issue redeemable shares at a time when there are no issued shares in the company other than redeemable shares.

5.30 Terms, conditions and manner of redemption

(1) The directors of a company may determine the terms, conditions and manner of redemption of shares if they are authorized to do so –

- (a) by the company's articles; or
- (b) by resolution of the company.

(2) A resolution under subsection (1)(b) may be an ordinary resolution even if it amends the company's articles.

(3) If the directors are authorized under subsection (1) to determine the terms, conditions and manner of redemption of shares –

- (a) they must do so before the shares are allotted; and
- (b) any obligation of the company to state in a statement of capital the rights attached to the shares extends to the terms, conditions and manner of redemption.

(4) If the directors are not authorized under subsection (1), the terms, conditions and manner of redemption of shares must be stated in the company's articles.

Subdivision 2 – Share Buy-backs

5.31 General power of company to buy back its own shares

(1) Subject to subsections (2) and (3) and Subdivision 5, a company may buy back its own shares in accordance with –

- (a) for a listed company, Subdivision 3;
- (b) for an unlisted company, Subdivision 4.

(2) A company's articles may prohibit or restrict a buy-back by the company of its own shares.

(3) A company must not buy back its own shares if, as a result of the buy-back, there would no longer be any member of the company holding shares other than redeemable shares.

Note: Section 5.62(5) provides that a buy-back that contravenes subsection (3) is void.

5.32 Retention and inspection of share buy-back contracts

(1) This section applies to –

(a) a listed company that enters into a contract for the buy-back of its own shares that is authorized under section 5.35; and

(b) an unlisted company that –

(i) under an authorization under section 5.39, enters into a contract for the buy-back of its own shares;

(ii) under an authorization under section 5.42, agrees to a variation of a contract for the buy-back of its own shares;

(iii) under an authorization under section 5.46, agrees to release its rights under a contract for the buy-back of its own shares; or

(iv) under an authorization under section 5.49, agrees to a variation of an agreement to release its rights under a contract for the buy-back of its own shares.

(2) The company must keep at its registered office or at a place prescribed by regulations made under section 12.125 –

(a) a copy of the contract or agreement if it is in writing; and

(b) if not, a memorandum of its terms.

(3) The copy or memorandum must be kept from the conclusion of the contract or agreement until the end of the period of 10 years beginning on the day on which the buy-back of all the shares under the contract is completed or the day on which the contract otherwise terminates.

(4) Subject to subsection (5), the company must make the copy or memorandum available during business hours for inspection without charge by –

(a) a member of the company; and

(b) any other person, in the case of a listed company.

(5) The company may, by resolution, impose reasonable restrictions on the making available of the copy or memorandum for inspection, as long as not less than 2 hours per day are allowed for inspection.

(6) If a company contravenes subsection (2) or (3), or if an inspection required under subsection (4) is refused, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

(7) In the case of a refusal of an inspection required under subsection (4), the Court of First Instance may by order compel an immediate inspection.

(8) In this section –
“contract” (合約) includes a contingent buy-back contract.

Subdivision 3 – Share Buy-backs: Listed Companies

5.33 Share buy-back under general offer

(1) A listed company may buy back its own shares under a general offer that is authorized in advance by resolution of the company.

(2) The company must include with the notice of the proposed resolution –

(a) a copy of the document containing the proposed general offer; and

(b) a statement, signed by the directors of the company, containing information that would enable a reasonable person to form a valid and justifiable opinion as to the merits of the offer.

(3) If, under the proposed general offer, a member of the company may be compelled to dispose of the member's shares under Division 5 of Part 13 (compulsory acquisition after general offer for share buy-back) –

(a) the company must appoint an independent investment adviser to advise members who may be affected by the compulsory disposal on the merits of the offer; and

(b) the resolution authorizing the offer must be a special resolution on which no non-tendering member votes.

(4) A person is eligible for appointment as an investment adviser under subsection (3)(a) only if –

(a) the person is a corporation licensed to carry on, or an authorized financial institution registered for carrying on, a business in advising on securities or advising on corporate finance under Part V of the Securities and Futures Ordinance (Cap. 571); and

(b) the person is not –

(i) a member, officer, shadow director or employee of the company making the general offer or of an associated company of that company; or

(ii) an associated company of the company making the general offer.

(5) For the purposes of a special resolution referred to in subsection (3)(b) –

(a) a non-tendering member is regarded as voting not only if the non-tendering member votes on a poll on the question whether the resolution should be passed but also if the

non-tendering member votes on the resolution otherwise than on a poll;

(b) any member of the company may demand a poll on that question; and

(c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(6) In this section –

“general offer” (公開要約) has the meaning given by section 13.40;

“non-tendering member” (不售股成員) has the meaning given by section 13.38.

5.34 Share buy-back on recognized stock market or approved stock exchange

(1) A listed company may buy back its own shares on a recognized stock market or on an approved stock exchange if the buy-back is authorized in advance by resolution of the company.

(2) The company must include a memorandum of the terms of the proposed buy-back with the notice of the proposed resolution.

(3) A resolution authorizing a buy-back under this section is valid for the period expiring on the date of the next annual general meeting of the company, and that period may be extended by the company at that annual general meeting until the date of the following annual general meeting.

(4) In this section –

“approved stock exchange” (核准證券交易所) means a stock exchange approved for the purposes of this section by notice published in the Gazette by –

(a) the Commission; and

(b) the recognized exchange company that operates the recognized stock market on which the shares concerned are listed.

5.35 Share buy-back otherwise than under section 5.33 or 5.34

(1) A listed company may buy back its own shares otherwise than under section 5.33 or 5.34 if the contract for buy-back of the shares is authorized in advance by special resolution of the company.

(2) A contract may take the form of a contingent buy-back contract.

(3) The company must include with the notice of the proposed special resolution –

(a) a copy of the proposed contract or, if it is not in writing, a memorandum of its terms; and

(b) a statement, signed by the directors of the company, after having made due and diligent inquiry of the members of the company holding the shares to which the proposed contract relates, containing information that would enable a reasonable person to form a valid and justifiable opinion as to the merits of the contract.

(4) A special resolution under this section is not effective if –

(a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(b) the resolution would not have been passed if the member had not done so.

(5) For the purposes of subsection (4) –

(a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

- (b) any member of the company may demand a poll on that question; and
 - (c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.
- (6) A special resolution under this section is not effective if a demand for a poll referred to in subsection (5)(b) is refused.

5.36 Exemptions

- (1) The Commission may exempt any listed company from any of the provisions of section 5.33, 5.34 or 5.35, subject to any conditions it thinks fit.
- (2) The Commission may –
 - (a) suspend or withdraw an exemption granted under subsection (1) on the ground that the conditions subject to which the exemption was granted have not been complied with or on any other ground the Commission thinks fit; or
 - (b) vary any condition imposed under subsection (1).

5.37 No assignment of right to buy back own shares

The following rights of a listed company are not capable of being assigned –

- (a) rights under a general offer authorized under section 5.33;
- (b) rights under a buy-back on a recognized stock market or on an approved stock exchange authorized under section 5.34;
- (c) rights under a contract authorized under section 5.35.

Note: A contract authorized under section 5.35 includes a contingent buy-back contract authorized under that section (see section 5.35(2)).

5.38 Release of right to buy back own shares

- (1) An agreement by a listed company to release its rights under a contract authorized under section 5.35 or under a general offer authorized under

section 5.33 is void unless the terms of the release agreement are authorized in advance by special resolution of the company.

(2) Section 5.35(3), (4), (5) and (6) applies to the authorization for a proposed release agreement as it applies to the authorization for a proposed contract under section 5.35.

Subdivision 4 – Share Buy-backs: Unlisted Companies

5.39 Share buy-back under contract

(1) An unlisted company may buy back its own shares under a contract that is authorized in advance by special resolution of the company.

(2) A contract may take the form of a contingent buy-back contract.

(3) The authorization for a contract may be varied, revoked or from time to time renewed by a special resolution of the company.

(4) A special resolution conferring, varying, revoking or renewing the authorization for a contract is subject to sections 5.40 and 5.41.

5.40 Resolution authorizing contract: disclosure of contract details

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a contract under section 5.39.

(2) A copy of the proposed contract (if it is in writing) or a memorandum setting out its terms (if it is not) must be made available to members –

(a) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(b) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section

12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed contract relates.

(4) A copy of a proposed contract made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed contract.

(5) The special resolution is not effective if the requirements of this section are not complied with.

5.41 Resolution authorizing contract: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a contract under section 5.39.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(b) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

(a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be

passed but also if the member votes on the resolution otherwise than on a poll;

(b) any member of the company may demand a poll on that question; and

(c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(b) is refused.

5.42 Variation of authorized contract

(1) An unlisted company may agree to a variation of a contract authorized under section 5.39 if the variation agreement is authorized in advance by special resolution of the company.

(2) The authorization for a variation agreement may be varied, revoked or from time to time renewed by special resolution of the company.

(3) A special resolution conferring, varying, revoking or renewing the authorization for a variation agreement is subject to sections 5.43 and 5.44.

5.43 Resolution authorizing variation: disclosure of details of variation

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.42.

(2) A copy of the proposed variation agreement (if it is in writing) or a memorandum giving details of the proposed variation agreement (if it is not) must be made available to members –

(a) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(b) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section 12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) There must also be made available to members in accordance with subsection (2) a copy of the original contract or memorandum, together with any variations previously made.

(4) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed variation agreement relates.

(5) A copy of a proposed variation agreement made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed variation agreement.

(6) The special resolution is not effective if the requirements of this section are not complied with.

5.44 Resolution authorizing variation: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.42.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

- (a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and
 - (b) the resolution would not have been passed if the member had not done so.
- (4) For the purposes of subsection (3) –
 - (a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;
 - (b) any member of the company may demand a poll on that question; and
 - (c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(b) is refused.

5.45 No assignment of right to buy back own shares

The rights of an unlisted company under a contract authorized under section 5.39 (as varied from time to time under section 5.42) are not capable of being assigned.

5.46 Release of right to buy back own shares

(1) An agreement by an unlisted company to release its rights under a contract authorized under section 5.39 (as varied from time to time under section 5.42) is void unless the terms of the release agreement are authorized in advance by special resolution of the company.

(2) The authorization for a release agreement may be varied, revoked or from time to time renewed by special resolution of the company.

(3) A special resolution conferring, varying, revoking or renewing the authorization for a release agreement is subject to sections 5.47 and 5.48.

5.47 Resolution authorizing release: disclosure of details of release

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a release agreement under section 5.46.

(2) A copy of the proposed release agreement (if it is in writing) or a memorandum giving details of the proposed release agreement (if it is not) must be made available to members –

(a) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(b) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section 12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) There must also be made available to members in accordance with subsection (2) a copy of the original contract or memorandum, together with any variations previously made.

(4) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed release agreement relates.

(5) A copy of a proposed release agreement made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed release agreement.

(6) The special resolution is not effective if the requirements of this section are not complied with.

5.48 Resolution authorizing release: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a release agreement under section 5.46.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(b) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

(a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(b) any member of the company may demand a poll on that question; and

(c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(b) is refused.

5.49 Variation of release of right to buy back own shares

(1) An unlisted company may agree to a variation of a release agreement authorized under section 5.46 if the variation agreement is authorized in advance by special resolution of the company.

(2) The authorization for a variation agreement may be varied, revoked or from time to time renewed by special resolution of the company.

(3) A special resolution conferring, varying, revoking or renewing the authorization for a variation agreement is subject to sections 5.50 and 5.51.

5.50 Resolution authorizing variation of release: disclosure of details of variation

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.49.

(2) A copy of the proposed variation agreement (if it is in writing) or a memorandum giving details of the proposed variation agreement (if it is not) must be made available to members –

(a) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(b) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section

12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) There must also be made available to members in accordance with subsection (2) a copy of the original release agreement or memorandum, together with any variations previously made.

(4) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed variation agreement relates.

(5) A copy of a proposed variation agreement made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed variation agreement.

(6) The special resolution is not effective if the requirements of this section are not complied with.

**5.51 Resolution authorizing variation of release:
exercise of voting rights**

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.49.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(b) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

- (a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;
 - (b) any member of the company may demand a poll on that question; and
 - (c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.
- (5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(b) is refused.

Subdivision 5 – Payment for Share Redemptions and Buy-backs

5.52 Payment for redemption or buy-back

- (1) If a company redeems or buys back its own shares, the shares must be paid for on redemption or buy-back.
- (2) Subject to subsections (3) and (4), a company may make a payment in respect of a redemption or buy-back of its own shares –
- (a) out of the company’s distributable profits;
 - (b) out of the proceeds of a fresh issue of shares made for the purpose of the redemption or buy-back; or
 - (c) out of capital in accordance with this Subdivision.
- (3) A listed company must not make a payment out of capital in respect of a buy-back of its own shares on a recognized stock market or on an approved stock exchange under section 5.34.
- (4) Subject to subsection (3), a payment referred to in subsection (5) may be made by a company only –
- (a) out of the company’s distributable profits; or
 - (b) out of capital in accordance with this Subdivision.

(5) Subsection (4) applies to a payment by a company in consideration of any of the following –

- (a) the company acquiring any right with respect to the buy-back of its own shares under Subdivision 3 or 4;
- (b) the variation of a contract authorized under Subdivision 4;
- (c) the release of any of the company's rights with respect to the buy-back of any of its own shares under Subdivision 3 or 4; or
- (d) the variation of the release of any of the company's rights with respect to the buy-back of any of its own shares under Subdivision 4.

5.53 Special resolution for payment out of capital

(1) Subject to section 5.52(3), a company may make a payment out of capital in respect of the redemption or buy-back of its own shares by special resolution in accordance with this Subdivision.

(2) Subject to section 5.58, the payment out of capital and the redemption or buy-back must be made no earlier than 5 weeks and no later than 7 weeks after the date of the special resolution.

Note: The Court of First Instance has power to alter or extend this period (see section 5.60).

5.54 Solvency statement

(1) All directors of the company must make a solvency statement that complies with Division 2 in relation to the payment out of capital.

(2) The special resolution for payment out of capital must be passed within 15 days after the date of the solvency statement.

(3) If the special resolution is proposed as a written resolution, a copy of the solvency statement must be sent to every member of the company at or before the time when the proposed resolution is sent to them.

(4) If the special resolution is proposed at a meeting, a copy of the solvency statement must be made available for inspection by members at the meeting.

(5) The special resolution is not effective if subsection (3) or (4) (as applicable) is not complied with.

5.55 Special resolution: exercise of voting rights

(1) If the special resolution for payment out of capital is proposed as a written resolution, a member of the company holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(2) If the special resolution for payment out of capital is proposed at a meeting, the resolution is not effective if –

(a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(b) the resolution would not have been passed if the member had not done so.

(3) For the purposes of subsection (2) –

(a) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(b) any member of the company may demand a poll on that question; and

(c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(4) The special resolution is not effective if a demand for a poll referred to in subsection (3)(b) is refused.

(5) This section does not apply to a buy-back by a listed company under a general offer in accordance with section 5.33.

5.56 Public notice of payment out of capital

(1) Within one week after the date of the special resolution for payment out of capital, the company must publish a notice in the Gazette –

- (a) stating that the company has approved a payment out of capital;
- (b) specifying the amount of the payment out of capital and the date of the special resolution;
- (c) stating where the special resolution and solvency statement are available for inspection; and
- (d) stating that a member of the company who did not consent to or vote in favour of the special resolution or a creditor of the company may, within 5 weeks after the date of the special resolution, apply to the Court of First Instance under section 5.58 for cancellation of the special resolution.

(2) Within one week after the date of the special resolution, the company must also –

- (a) publish a notice to the same effect as the notice under subsection (1) in at least one specified Chinese language newspaper and at least one specified English language newspaper; or
- (b) give written notice to that effect to each of its creditors.

(3) If the company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is

liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

(4) The company must deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company –

- (a) publishes the notice under subsection (1); or
- (b) if earlier, first publishes the notice or gives notice to creditors under subsection (2).

(5) If the company contravenes subsection (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

5.57 Inspection of special resolution and solvency statement

(1) The company must ensure that the special resolution for payment out of capital and the solvency statement made in relation to it are kept at its registered office or at a place prescribed by regulations made under section 12.125 for the period –

- (a) beginning on the day on which the company –
 - (i) publishes the notice under section 5.56(1); or
 - (ii) if earlier, first publishes the notice or gives notice to creditors under section 5.56(2); and
- (b) ending 5 weeks after the date of the special resolution.

(2) The company must permit a member or creditor of the company to inspect the special resolution and solvency statement without charge during business hours in that period.

(3) If the company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

(4) If the company contravenes subsection (2), the Court of First Instance may by order require the company to permit an immediate inspection.

5.58 Application to Court by members or creditors

(1) Subject to subsection (2), a member or creditor of the company may apply to the Court of First Instance, within 5 weeks after the date of the special resolution for payment out of capital, for cancellation of the resolution.

(2) A member who consented to or voted in favour of the special resolution is not entitled to apply.

(3) An application may be made on behalf of the persons entitled to apply by any one or more of them appointed in writing by all of them for the purpose.

(4) If an application is made under this section –

- (a) the applicant must, as soon as possible, serve the application on the company; and
- (b) the company must give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company.

(5) If the company contravenes subsection (4)(b), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

5.59 Power to adjourn proceedings

(1) The Court of First Instance may adjourn proceedings on an application under section 5.58 so that an arrangement may be made to the Court's satisfaction for the protection of the interests of dissentient members or dissentient creditors.

(2) The Court of First Instance may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

5.60 Court's power to confirm or cancel special resolution

(1) On an application under section 5.58, the Court of First Instance must make an order confirming or cancelling the special resolution for payment out of capital, and may do so on any terms and conditions it thinks fit.

(2) If the Court of First Instance confirms the special resolution, it may by order alter or extend any date or period of time specified –

- (a) in the special resolution; or
- (b) in any provision of this Division applying to the special resolution, the payment out of capital or the redemption or buy-back.

(3) If the Court of First Instance thinks fit, the order may –

- (a) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;
- (b) provide for the protection of the interests of members or creditors of the company;
- (c) make any alteration to the company's articles that may be required as a consequence;
- (d) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court of First Instance requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court of First Instance under this section do not limit its powers under section 5.59.

5.61 Company to deliver copy of court order to Registrar

(1) Within 15 days after the making of an order by the Court of First Instance under section 5.60, or within any longer period ordered by the Court, the company must deliver an office copy of the order to the Registrar for registration.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) 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 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

Subdivision 6 – General Provisions

5.62 General prohibition on acquisition of own shares

(1) Except as provided by this Ordinance, a company must not acquire its own shares, whether by redemption, buy-back, subscription or otherwise.

(2) If a company contravenes subsection (1), an offence is committed by –

- (a) the company;
- (b) every responsible person of the company; and
- (c) every non-tendering member of the company (as defined by section 13.38) who knowingly permits the contravention.

(3) A person who commits an offence under subsection (2) is liable –

- (a) on conviction on indictment to a fine of \$1,250,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$150,000 and to imprisonment for 12 months.

(4) Subject to subsection (5) and Division 2 of Part 14 (remedies for unfair prejudice to members' interests), a redemption or buy-back of shares by a company under this Division is not void only because of a failure to comply with this Division.

(5) A buy-back that contravenes section 5.31(3) is void.

5.63 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.

5.64 Effect of redemption or buy-back

(1) Shares redeemed or bought back under this Division are 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.

5.65 Fresh issue of shares before redemption or buy-back

(1) If a company is about to redeem or buy back its own shares, the company may issue shares up to the value of the shares to be redeemed or bought back as if those shares had never been issued.

(2) If new shares are issued before the redemption or buy-back of existing shares, the new shares are regarded for the purposes of the Eighth Schedule to the predecessor Ordinance as not having been issued under

subsection (1) unless the existing shares are redeemed or bought back within one month after the issue of the new shares.

5.66 Return of share redemption or buy-back

(1) A company that redeems or buys back any shares under this Division must, within 14 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 set out, for the shares of each class redeemed or bought back –
 - (i) the number of shares and the aggregate amount paid by the company for them; and
 - (ii) the date on which they were delivered to the company;
- (c) must contain a statement of capital, as at the time immediately after the redemption or buy-back, that complies with section 4.69;
- (d) in the case of a listed company, must also state the maximum and minimum prices paid in respect of the shares of each class redeemed or bought back; 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.

Note: If the redemption or buy-back results in an alteration of the company's articles, the company is also required to notify the Registrar of the alteration within 15 days after it takes effect (see section 3.27).

(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)(b)(i) 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.

5.67 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.

5.68 Effect on a 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 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 Provisions) Ordinance (Cap. 32)¹, 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

¹ Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

debts and liabilities for the purposes of subsection (5) include the liability to pay that interest.

5.69 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 –

- (a) may make different provision for different cases or classes of cases; and
- (b) may contain any further consequential provisions, and any incidental and supplementary provisions, that the Chief Executive in Council thinks fit.

(3) Regulations made under this section are subject to the approval of the Legislative Council.

Division 5 – Financial Assistance for Acquisition of Own Shares

Subdivision 1 – Preliminary

5.70 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
- (d) any other financial assistance given by a company if –
 - (i) the net assets of the company are reduced to a material extent by the giving of the assistance; or
 - (ii) the company has no net assets;

“liabilities” (負債) includes any amount retained as reasonably necessary for the purpose of providing for any liability or loss that is –

- (a) likely to be incurred; or
- (b) certain to be incurred but uncertain as to the amount or as to the date on which it will arise;

“net assets” (淨資產) of a company that gives any financial assistance under this Division, means the amount by which the aggregate of the company's assets exceeds the aggregate of its liabilities (taking the amount of both assets and liabilities to be as stated in the company's accounting records immediately before the financial assistance is given).

- (2) In this Division –

- (a) a reference to a person incurring a liability includes the person changing their financial position by making an agreement or arrangement (whether enforceable or unenforceable, and whether made on the person's own account or with any other person) or by any other means; and
- (b) a reference to a company giving financial assistance for the purpose of reducing or discharging a liability incurred by a person for the purpose of the acquisition of shares includes the company giving financial assistance for the purpose of wholly or partly restoring the person's financial position to what it was before the acquisition took place.

Subdivision 2 – General Prohibition on Financial Assistance for Acquisition of Own Shares

5.71 Prohibition on financial assistance for acquisition of shares or for reducing or discharging liability for acquisition

(1) If a person is acquiring or proposing to acquire shares in a company or its holding company, the company must not give financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition takes place, except as provided by this Division.

(2) If –

- (a) a person has acquired shares in a company or its holding company; and
- (b) any person has incurred a liability for the purpose of the acquisition,

the company must not give financial assistance directly or indirectly for the purpose of reducing or discharging the liability, except as provided by this Division.

(3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine of \$150,000 and to imprisonment for 12 months.

5.72 Consequences of failing to comply with Division

If a company gives financial assistance in contravention of this Division, the validity of the financial assistance and of any contract or transaction connected with it is not affected only because of the contravention.

Note: Offences may be committed by the company and a responsible person of the company for contravention of certain provisions of this Division (see for example section 5.71(3)).

Subdivision 3 – Exceptions from Prohibition

5.73 General exceptions

This Division does not prohibit any of the following transactions –

- (a) the distribution of a company's assets –
 - (i) by way of dividend lawfully made; or
 - (ii) in the course of winding up the company;
- (b) the allotment of bonus shares;
- (c) the reduction of a company's share capital in accordance with Division 3;
- (d) the redemption or buy-back of a company's own shares in accordance with Division 4;
- (e) anything done in accordance with a court order under Division 2 of Part 13 (arrangements and compromises);
- (f) anything done under an arrangement made under section 237 of the Companies (Winding Up Provisions) Ordinance (Cap. 32) (power of liquidator to accept shares, etc, as consideration for sale of property of company);

- (g) anything done under an arrangement made between a company and its creditors that is binding on the creditors because of section 254 of the Companies (Winding Up Provisions) Ordinance (Cap. 32) (arrangement, when binding on creditors).

5.74 Principal purpose exception

This Division does not prohibit a company from giving financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition if –

- (a) either –
 - (i) the company's principal purpose in giving the assistance is not to give it for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition; or
 - (ii) the giving of the assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition is only an incidental part of some larger purpose of the company; and
- (b) the assistance is given in good faith in the interests of the company.

5.75 Exception for money lending businesses

Subject to section 5.78, this Division does not prohibit the lending of money by a company in the ordinary course of business if the lending of money is part of the ordinary business of the company.

5.76 Exception for employee share schemes

- (1) Subject to section 5.78, this Division does not prohibit –
- (a) the giving by a company, in good faith in the interests of the company, of financial assistance for the purposes of an employee share scheme; or
 - (b) the giving of financial assistance by a company for the purposes of, or in connection with, anything done by the company or another company in the same group of companies for the purposes of enabling or facilitating transactions in shares in the company or its holding company between, and involving the acquisition of beneficial ownership of those shares by –
 - (i) persons employed or formerly employed in good faith by that company or another company in the same group of companies; or
 - (ii) spouses, widows, widowers, or minor children of persons referred to in subparagraph (i).

- (2) In this section –

“children” (子女) includes step-children and illegitimate children;

“employee share scheme” (僱員股份計劃) 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);

“minor children” (未成年子女) means children who are under 18 years of age.

5.77 Exception for loans to employees

(1) Subject to section 5.78, this Division does not prohibit the making by a company of loans to its eligible employees for the purpose of enabling them to acquire fully paid shares in the company or its holding company to be held by them by way of beneficial ownership.

(2) In this section –

“child” (子女) includes step-child and illegitimate child;

“eligible employees” (合資格的僱員), in relation to a company, means persons employed in good faith by the company, other than –

- (a) a director of the company;
- (b) a director’s spouse;
- (c) a director’s child who is under 18 years of age;
- (d) a trustee of a trust (other than an employee share scheme as defined by section 5.76(2) or a pension scheme) –
 - (i) the beneficiaries of which include a person referred to in paragraph (a), (b) or (c); or
 - (ii) the terms of which confer a power on the trustees that may be exercised for the benefit of a person referred to in paragraph (a), (b) or (c); or
- (e) a partner of a person referred to in paragraph (a), (b) or (c) or of a trustee referred to in paragraph (d).

5.78 Special restriction for listed companies

Section 5.75, 5.76 or 5.77 applies to a listed company only if –

- (a) the company has net assets that are not reduced by the giving of the financial assistance; or
- (b) to the extent that those assets are reduced, the assistance is provided by a payment out of distributable profits.

Subdivision 4 – Authorization for Giving Financial Assistance

5.79 Financial assistance not exceeding 5% of shareholders funds

(1) A company may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for the purpose of such an acquisition if –

- (a) the directors resolve, before the assistance is given, that –
 - (i) the company should give the assistance;
 - (ii) giving the assistance is in the best interests of the company; and
 - (iii) the terms and conditions under which the assistance is to be given are fair and reasonable to the company;
- (b) on the same day on which the directors pass the resolution, the directors who vote in favour of it make a solvency statement that complies with Division 2 in relation to the giving of the assistance;
- (c) the aggregate amount of the assistance and any other financial assistance given under this section that has not been repaid does not exceed 5% of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company (as that aggregate amount is disclosed in the most recent audited financial statement of the company);
- (d) the company receives fair value in connection with the giving of the assistance; and
- (e) the assistance is given not more than 12 months after the day on which the solvency statement is made under paragraph (b).

(2) The resolution of the directors under subsection (1)(a) must set out in full the grounds for their conclusions as to the matters referred to in subsection (1)(a)(i), (ii) and (iii).

(3) Within 15 days after giving financial assistance under this section, the company must send to each member of the company a copy of the solvency statement made under subsection (1)(b) and a notice containing the following information –

- (a) the class and number of shares in respect of which the assistance was given;
- (b) the consideration paid or payable for those shares;
- (c) the name of the person receiving the assistance and, if a different person, the name of the beneficial owner of those shares;
- (d) the nature, the terms and, if quantifiable, the amount of the assistance.

(4) If the company contravenes subsection (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

5.80 Financial assistance with approval of all members

(1) A company may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for the purpose of such an acquisition if –

- (a) the directors resolve, before the assistance is given, that –
 - (i) the company should give the assistance;
 - (ii) giving the assistance is in the best interests of the company; and

- (iii) the terms and conditions under which the assistance is to be given are fair and reasonable to the company;
- (b) on the same day on which the directors pass the resolution, the directors who vote in favour of it make a solvency statement that complies with Division 2 in relation to the giving of the assistance;
- (c) the giving of the assistance is approved by written resolution of all members of the company before the assistance is given; and
- (d) the assistance is given not more than 12 months after the day on which the solvency statement is made under paragraph (b).

(2) The resolution of the directors under subsection (1)(a) must set out in full the grounds for their conclusions as to the matters referred to in subsection (1)(a)(i), (ii) and (iii).

5.81 Financial assistance by notice to members

(1) A company may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for the purpose of such an acquisition if –

- (a) the directors resolve, before the assistance is given, that –
 - (i) the company should give the assistance;
 - (ii) giving the assistance is in the best interests of the company and is of benefit to those members of the company not receiving the assistance; and
 - (iii) the terms and conditions under which the assistance is to be given are fair and reasonable to

the company and to those members not receiving the assistance;

- (b) on the same day on which the directors pass the resolution, the directors who vote in favour of it make a solvency statement that complies with Division 2 in relation to the giving of the assistance;
- (c) the company sends to each member of the company a copy of the solvency statement made under paragraph (b) and a notice containing the following information –
 - (i) the nature and terms of the assistance and the name of the person to whom it will be given;
 - (ii) if it will be given to a nominee for another person, the name of that other person;
 - (iii) the text of the resolution of the directors;
 - (iv) any further information and explanation that would be necessary for a reasonable member to understand the nature of the assistance and the implications of giving it for the company and the members; and
- (d) the assistance is given –
 - (i) not less than 28 days after the day on which the notice and copy of the solvency statement are sent to members under paragraph (c); and
 - (ii) not more than 12 months after the day on which the solvency statement is made under paragraph (b).

(2) The resolution of the directors under subsection (1)(a) must set out in full the grounds for their conclusions as to the matters referred to in subsection (1)(a)(i), (ii) and (iii).

5.82 Application to court for restraining order

(1) Within 28 days after the day on which a company sends a notice and copy of a solvency statement to members under section 5.81(1)(c), a member of the company or the company may apply to the Court of First Instance for an order restraining the giving of financial assistance on the ground that –

- (a) the giving of the assistance is not –
 - (i) in the best interests of the company; or
 - (ii) of benefit to those members of the company not receiving the assistance; or
- (b) the terms and conditions under which the assistance is to be given are not fair and reasonable to –
 - (i) the company; or
 - (ii) those members not receiving the assistance.

(2) If an application is made under this section –

- (a) the applicant must, as soon as possible, serve the application on the company (unless the company is the applicant); and
- (b) the company must give the Registrar notice in the specified form of the application –
 - (i) within 7 days after the day on which the application is served on the company; or
 - (ii) if the company is the applicant, within 7 days after the day on which the application is made.

(3) If the company contravenes subsection (2)(b), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

5.83 Power to adjourn application

(1) The Court of First Instance may adjourn proceedings on an application under section 5.82 so that an arrangement may be made to the Court's satisfaction for the protection of the interests of dissentient members.

(2) The Court of First Instance may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

5.84 Court's power to confirm or restrain giving of financial assistance

(1) On an application under section 5.82, the Court of First Instance must make an order confirming or restraining the giving of financial assistance, and may do so on any terms and conditions it thinks fit.

(2) If the Court of First Instance confirms the giving of financial assistance, it may by order alter or extend any date or period of time specified –

- (a) in the directors' resolution under section 5.81(1)(a); or
- (b) in any provision of this Division applying to the giving of financial assistance.

(3) If the Court of First Instance thinks fit, the order may –

- (a) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;
- (b) make any alteration to the company's articles that may be required as a consequence;
- (c) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court of First Instance requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court of First Instance under this section do not limit its powers under section 5.83.

5.85 Company to deliver copy of court order to Registrar

(1) Within 15 days after the making of an order by the Court of First Instance under section 5.84, or within any longer period ordered by the Court, the company must deliver an office copy of the order to the Registrar for registration.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) 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 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

Division 6 – Transitional and Saving

5.86 Redeemable shares issued before commencement

Any redeemable preference shares issued before the commencement of the Companies (Amendment) Ordinance 1991 (77 of 1991) and any redeemable shares issued after that commencement but before the commencement of section 5.29 (issue of redeemable shares) may be redeemed in accordance with this Ordinance.

5.87 Effect of company's failure to redeem or buy back

Sections 5.67 (effect of company's failure to redeem or buy back) and 5.68 (effect on a winding up of company's failure to redeem or buy back) do not apply in relation to any redeemable preference shares issued before the commencement of the Companies (Amendment) Ordinance 1991 (77 of 1991).

5.88 Reduction of share capital confirmed by the Court

(1) Despite their repeal, sections 58 (so far as it relates to a reduction of share capital), 59, 60, 61, 61A, 62 and 63 of the predecessor Ordinance continue to apply in relation to a resolution for reducing share capital that was passed under section 58(1) of the predecessor Ordinance before the commencement of Subdivision 3 of Division 3 of this Part.

(2) Division 3 of this Part does not apply to a reduction of share capital referred to in subsection (1).

5.89 Share buy-backs

(1) An authorization by a listed company that was in force under section 49BA(2)(a) or (7) of the predecessor Ordinance immediately before the commencement of section 5.33 (share buy-back under general offer) continues in force and has effect as if it were an authorization under section 5.33.

(2) An authorization by a listed company that was in force under section 49BA(2)(b) of the predecessor Ordinance immediately before the commencement of section 5.34 (share buy-back on recognized stock market or approved stock exchange) continues in force and has effect as if it were an authorization under section 5.34.

(3) An authorization by a listed company that was in force under section 49BA(5) or 49E(2) of the predecessor Ordinance immediately before the commencement of section 5.35 (share buy-back otherwise than under section 5.33 or 5.34) continues in force and has effect as if it were an authorization under section 5.35.

(4) An authorization by a listed company that was in force under section 49F(3) of the predecessor Ordinance immediately before the commencement of section 5.38 (release of right to buy back own shares) continues in force and has effect as if it were an authorization under section 5.38.

(5) An authorization by an unlisted company that was in force under section 49D or 49E(3) of the predecessor Ordinance immediately before the

commencement of section 5.39 (share buy-back under contract) continues in force and has effect as if it were an authorization under section 5.39 and may be varied, revoked or from time to time renewed accordingly.

(6) An authorization by an unlisted company that was in force under section 49F(2) of the predecessor Ordinance immediately before the commencement of section 5.46 (release of right to buy back own shares) continues in force and has effect as if it were an authorization under section 5.46 and may be varied, revoked or from time to time renewed accordingly.

5.90 Payment out of capital for share redemption or buy-back

(1) Despite their repeal, sections 49I, 49J, 49K, 49L, 49M, 49N, 49O and 58(1A), (1B), (1C) and (1D) of the predecessor Ordinance continue to apply in relation to a payment out of capital for the redemption or purchase by a private company of its own shares if the directors' statement under section 49K of the predecessor Ordinance was made before the commencement of Subdivision 5 of Division 4 of this Part.

(2) Subdivision 5 of Division 4 of this Part does not apply to a payment out of capital referred to in subsection (1).

5.91 Financial assistance by unlisted company for acquisition of its own shares

(1) Despite their repeal, sections 47E, 47F, 47G and 48 of the predecessor Ordinance continue to apply in relation to the giving of financial assistance by an unlisted company if the directors' statement under section 47E(6) of the predecessor Ordinance was made before the commencement of Subdivision 2 of Division 5 of this Part.

(2) Subdivision 2 of Division 5 of this Part does not apply to the giving of financial assistance referred to in subsection (1).

5.92 Specified newspapers

Until the Chief Secretary for Administration publishes a list of Chinese language newspapers and English language newspapers in the Gazette under section 5.1(2), a Chinese language newspaper or an English language newspaper specified in the list of newspapers last published under section 71A(3)(a) of the predecessor Ordinance is taken to be a specified Chinese language newspaper or a specified English language newspaper (as the case may be) for the purposes of this Part.