Public Consultation on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges

Compendium of Responses

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Background

The Companies Ordinance (CO) is one of the oldest and most complex pieces of legislation in Hong Kong. We have commenced a major exercise to rewrite the CO in mid-2006, with a view to modernising our legal infrastructure to strengthen Hong Kong's status as a major international business and financial centre.

The rewrite exercise is thus conducted in two phases: Phase I on provisions affecting over 700,000 live companies in Hong Kong and Phase II on winding-up related provisions in the CO. A draft Bill covering all Phase I provisions will be put for public consultation around mid-2009, before the new Companies Bill is introduced into the LegCo tentatively in the third quarter of 2010.

In the course of the rewrite, we will consult relevant professional bodies, the business community and company law academics, and leverage from company law developments around the world, particularly in the UK, Australia, Canada, New Zealand and Singapore. Topical public consultations will also be rolled out prior to the draft Bill to gauge views on more complex subjects.

Consultation

The second public consultation of CO Rewrite was conducted from 2 April 2008 to 30 June 2008. We invited comments and views on the proposals relating to Company Names, Directors' Duties, Corporate Directorship and Registration of Charges. During the consultation period, we conducted a consultation forum on 28 May 2008 and a focus group meeting on registration of charges on 29 May 2008, and attended several meetings/forums of other interested organisations.

In addition to verbal comments we have collected on these forums and meetings, we have received 61 pieces of written submissions from 59 deputations. This document integrates all comments we have collected during the consultation period.

General Comments

Deputation	Comments
International Management Association	Referred to your CO Rewrite public consultation, we would like to propose the following comments for you to re-enact the regulations in the Companies Ordinance. We find that in the TWELTH SCHEDULE, it shows the penalty or punishment to those who are liable for non compliance to all the sections of Company Ordinance. However, some of the simple mistakes, such like missing the lodgment of a document to Company Registry, may cause someone taken to court and with heavy penalty totaling up to about HK$255,500. In today's electronic and computerized world, too heavy workload for the officers or administrators in some Small and Medium sized Enterprises to handle all the documents. It is not hard to miss the filing one simple document to Company Registry. Besides, one person today may hold directorships or officer positions in several companies. It is very different from the old days, 20 years ago, for most of people, one person hold only one directorship and some more people operate within one company. Also, they are maybe too busy to concentrate on enhancing the productivity, creativity and traveling, and hence to make a mistake carelessly. I think the Ordinance need to keep reason warnings and reminders to those careless officers or directors but not to make a lot of trouble to them to run their daily busy operation in the very stiff business world against other countries. To counter balance the level of penalties and warning effect, we advice as follows, 1) The penalties to those default to carry out duties of directors in Private Companies and Listed Companies need to separate as the listed companies has the public interest. On the other hand, those mistake cause much slighter effect to the public or other people in the community. 2) All level of penalty need to review and the maximum amount of the total daily 3) Default fine must be greatly reduced. As there are too many rules and regulations to the private limited companies and SME, the too heavy penalties may cause much more workload and weaken the efficiency of business operation. The consequence lead to the fact the directors or main officers concerns about the penalties and compliance to the regulation rather than the productivity of a company or creativity of products and services. An example such like a simple disorder of a computer may cause missing the lodgment of Annual Return AR within restricted period 42 days (failing to comply with requirements for completing and filing annual returns Sections 109(4)). However, it may cause

	to a issue summons to those officers in a company, take them to court and liable to a heavy penalty with HK$700 daily fine. The possible penalty for one year is $700X364, totaling HK$254,800. We strongly believe that it is unreasonable to face a such possible heavy penalty. If you need to classify the proposals, it may involve the issues under the Section of "Directors' & Officers' Duties".
The Chinese General Chamber of Commerce	總括而言，本會支持特區政府全面開展重寫《公司條例》的工作，而當中的大原則是令《公司條例》的各項條文更趨精簡和清晰，讓相關的使用者更易於理解和操作，從而減輕公司的營商成本，進一步改善香港的營商環境和提升香港的競爭力。
Hong Kong Monetary Authority	The HKMA fully supports the Companies Ordinance (CO) rewrite exercise to modernise our company law to further enhance Hong Kong's status as a major international financial and business centre. We have no specific comments on the issues raised in the consultation document. Nevertheless, in connection with the proposal to expedite the company name approval procedure mentioned in paragraph 2.12 of the document, we would like to draw your attention to the restrictions on use of name "bank" under section 97 of the Banking Ordinance (BO). This section of the BO provides that any person, other than a bank which is authorized under the BO or central bank, without the written consent of the Monetary Authority - (a) uses the word "bank" or any of its derivatives in English, or any translation thereof in any other language, or uses the Chinese expression "ngan hong" (銀行), or uses the letters "b", "a", "n", "k" in that order, in the description or name under which such person is carrying on business in Hong Kong; or (b) makes any representation in any bill head, letter paper, notice, advertisement or in any other manner whatsoever that such person is a bank or is carrying on banking business in Hong Kong commits an offence. We therefore suggest that when designing the name approval system and the preliminary requirements, the Registrar of Companies would take into account the restrictions under section 97 of the BO.
Japan Electronics & Information Technology Industries Association	<u>Answer and Proposal in response to the Second Public Consultation on Companies Ordinance Rewrite (issued on 2 April, 2008), concerning Shadow Companies in Chapter 2 thereof</u> There have been a lot of problems (the "shadow company problem") in relation to Chinese counterfeiters registering in Hong Kong, without the permission of the right-holders, company names ("inappropriate registrations") that include worldwide Japanese trademarks, and producing and selling different types of merchandise in mainland China as if the counterfeiters were licensed by the Japanese companies as legitimate agents. Japan Electronics & Information Technology

	Industries Association (JEITA) applied to the Government of Japan for consultation about the shadow company problem with the Government of the Hong Kong Special Administrative Region in April 2005. Based upon this application, the Government of Japan held bilateral meetings four times (in November 2005, February 2006, November 2006, and July 2007). We appreciate and welcome that the Hong Kong Special Administrative Region recognizes the existence of the shadow company problem and is taking action to improve the related provisions of the Companies Ordinance in line with the request of the Government of Japan. Please see below for our answer to Question 1 in the proposal ("Proposal") of the Financial Services and the Treasury Bureau ("FSTB").
Cally Jordan	1. This initiative is good news for Hong Kong. Although the process of rewriting the Hong Kong Companies Ordinance (HKCO) has been a long one, the time has been well spent. Concepts and proposals have received a thorough airing, from a number of different perspectives and the HKCO has benefited from numerous amendments and adjustments over the last decade. 2. The following are brief comments which may be use in the ongoing consultations, first of a general nature, and then on certain of the specific questions raised by Consultation Paper 2. *Companies Act 2006 (UK)* 3. In particular, with the passage of the Companies Act 2006 (UK), Hong Kong has been able to draw directly upon the large body of studies prepared in the course of the Modern Company Law for a Competitive Economy initiative in the UK (the Modern Company Law Initiative). These studies, and the resulting legislation, are of obvious interest to Hong Kong, given the heritage of its legislation and its own place in the world as a major international financial centre. 4. The deliberations of the Modern Company Law Initiative, and the choices made in the final legislation, are of even more direct relevance to Hong Kong, given that the Review of the Hong Kong Companies Ordinance Consultancy Report 1997 (the HKCO Report 1997) was the starting point, in 1998, for the UK reforms themselves. The HKCO Report 1997, in fact, set the frame of reference for the subsequent UK reforms. So the Companies Act 2006 (UK) now provides an excellent resource for the CO Rewrite. 5. Nevertheless, there are a few caveats to use of the Companies Act 2006 (UK) as a model for the HKCO. UK legislation, as before, continues to be subject to the constraints imposed by European Commission Directives. The UK, thus, does not have the same autonomy as Hong Kong in fashioning optimal legislative solutions. 6. Optimal legislative solutions may also be impeded in the UK, as elsewhere, by the usual compromises associated with the legislative process and interest group politics. In addition, companies law in the UK has a long history, and

	demonstrates a high degree of "path dependency"; it can be highly resistant to change (see Bebchuk and Roe, "A Theory of Path Dependence in Corporate Ownership and Governance" (1999) 52 Stanford L.R.127). 7. In conclusion, the Companies Act 2006 provides an excellent point of reference for Hong Kong. However, discernment should be exercised in adopting or adapting the legislative solutions which it presents. For example, the statutory statement of directors duties in the UK has much to recommend it, but certain of its provisions may be coloured by European policy concerns of lesser significance in Hong Kong. *Corporations Act 2001 (Australia)* 8. On the other hand, great care must be taken when looking to the Australian Corporations Act 2001 (ACA 2001). A former Chief Justice of Australia has called Australian corporations legislation "indigestible and incomprehensible", a view recently reiterated by a leading Australian companies law judge. Unlike the Companies Act 2006 (UK), or for that matter, modern companies legislation in New Zealand, Canada and most of the United States, the Australian legislation has never been subject to a comprehensive reformulation. Very laudable efforts at modernisation and simplification of the Australian legislation in the 1990s (along North American and New Zealand lines), were truncated for various reasons. The legislation was never comprehensively reorganised and redrafted, as had originally been intended. 9. The result is legislation, which in addition to being voluminous and badly organised, is replete with internal inconsistencies and erratic drafting. Drawing ad hoc amendments from various sources at various times (US law, UK law, Canadian law, New Zealand law) together with idiosyncratic Australian innovations has unfortunately created legislation lacking in conceptual clarity. As well, the legislation, combining as it does most of capital markets and financial intermediary regulation together with companies law, is highly, some would say overly, regulatory in nature. (For a more detailled discussion of the difficulties associated with the Australian legislation, see "Unlovely and Unloved: Corporate Law Reform's Progeny", University of Melbourne Legal Studies Research Paper No. 325, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125542). *Registration of Charges* 23. With respect to registration of charges, it is unfortunate that the UK missed the opportunity to rationalise its system of creating security interests in personal property, and it is more unfortunate still that Hong Kong appears to have decided to follow the UK lead. The recommendations of the UK Diamond Report (ie follow the North American, preferably Canadian, model) ring as true today as they did nearly 20 years ago. UK academics have also expressed dismay at the reluctance of the UK to embrace an obviously superior system, well suited to information technology and increasingly the standard

	throughout the world. 24. The objections in the UK appear to have arisen among the City practitioners wedded to their arcane chattel mortgages and the intricacies and uncertainties of the floating charge. This is a classic case of path dependency and interest group politics. In Australia, the main impediment to adoption of a comprehensive registration system such as exists in New Zealand, has been constitutional. Australia is a federal state and New Zealand is not. My colleagues who specialise in this area in Australia (as I do not) tell me that Australian banks are strongly supportive of the introduction of the regime, although, like their London counterparts, some solicitors are reluctant to change the old ways, as inscrutable as they are. 25. It is true that the comprehensive registration systems proceed from a set of very different assumptions; they do not build upon the old common law cases, and that may be the underlying reason for the resistance to them in the UK (and perhaps, in Hong Kong). They appear unfamiliar and possibly unsettling, requiring the legal profession to grapple with new concepts and approaches. 26. Certainly, as one who has engaged in commercial practice in Hong Kong as well as in Canada and the United States, I can attest to the virtues of the comprehensive registration system over the old common law one. The effort involved in adapting to the new concepts is worth the candle. The comprehensive registration systems promote certainty, reduce transaction costs and increase the speed and efficiency of commercial transactions. All things to which Hong Kong aspires in commercial matters.
The Institute of Accountants in Management	With reference to the invitation for the views on the company law rewrite in respect of the four areas of company names, directors' duties, corporate directorship and registration of charges, we are of the general views that integrity of directors in the management of a company is of primary importance towards the success of Hong Kong as a city of international business centre and that unless there are substantial reasons for changes, the existing rules and regulations should be preserved.
The Chamber of Hong Kong Listed Companies	The Chamber of Hong Kong Listed Companies is pleased to submit our response to your current consultation on the Rewrite of Companies Ordinance relating to Company Names, Directors' Duties, Corporate Directorship and Registration of Charges. We represent 168 company members, the majority of which are listed on the Hong Kong Stock Exchange. As such, in our response we have focused on questions that have direct interest to listed entities and directors and their relationship with the market.
Lam Wai Hong	As learnt, one of the purposes of this Rewrite of Companies Ordinance ("CO") is to deal with abuses of company name registration regime by "shadow companies". Page 9 of the Consultation Paper revealed the obvious detriment impact on

	trademarks or service-marks by such abuses Hong Kong being a sound international centre. From the point of view on banking account under certain company names, I would like to reflect that there may be some cases on abuses of company names by foreign companies which simply apply for opening bank accounts in Hong Kong. Such offshore foreign companies are not applied under Part XI of CO (Chapter 32). They do have any place of business (as defined in Section 341(1) of CO), nor carry out any business in Hong Kong (under Business Registration Ordinance, Chapter 310). However, these types of companies infiltrate into the banking industry in Hong Kong without any public records that can be detected on its good standing status or even existence. Some of the companies are even confusingly similar with the company names being currently registered as non-HK Co. or incorporated. Although there are requirements on description of Co. name and its place of incorporation under Section 93 CO and Section 337(1)(c) respectively, those offshore foreign companies are not subject to it. Names identical with others not only infringe with trademarks, it also exposed risk of money laundering. Under the present HKMA's Guideline on Prevention of Money Laundering year 2000 (and Supplement Guideline effective 16 May, 2008). I shall be much obliged your allowing me to express personal ideas on the issue of Co. Name. Hopefully, it can extend a wider horizon to cover certain administrative measures on those offshore foreign companies engaging banking relationship with us. Thank you very much for your attention of my personal viewpoints.
The Society of Chinese Accountants and Auditors	We are pleased to see that the government has listened to our comments on the first consultation document, and with reference to your letter dated 2 April 2008, we would like to submit herewith our responses and comments relating to the second consultation document. Amongst the various proposals put forward in the second consultation document, we have quite a different view to that of the SCCLR on the issue of corporate directors. We are of the opinion that the abolishment of corporate directors will have a huge, although we are not able to quantify the exact financial losses, negative impact on both Hong Kong's being a leading financial centre in the world and also the business of professionals including practising accountants, lawyers and wealth management practitioners. According to the figures provided in the consultation paper, as at the end of 2007, there are 42,890 out of a total of about 660,000 private companies in Hong Kong have corporate directors. Although the 42,890 companies represent only about 6.5% of the total private companies in Hong Kong, we cannot ignore such a large number of companies which may represent a large number of genuine business operations in Hong Kong and also a significant amount of annual services fee to the related professionals. These concerns are further explained in more detail in our

	responses to your questions in the attached Appendix to this letter. As our profession does not often involve charges, we would like other deputations to express more on this area.
Clifford Chance	We note that the implementation of the amendments to section 91(1) in December 2007 was meant to obviate the need for the practice of "Slavenburg presentation". However, we understand that the Companies Registry is unwilling to give an assurance as to the maximum time lag in the publication (on the public database) of the registered particulars of non-Hong Kong companies registered under Part XI of the Companies Ordinance. The absence of such assurance has prompted some chargees and their counsel to continue with the practice of "Slavenburg presentation". Please refer to the correspondence between Clifford Chance Hong Kong and the Registrar of Companies ((25) and (33) in CR/HQ/8/1/59 (XIV)).
Szeto Ho Kwong	From the 2nd submission in order to facilitate searching the assets of a co., the office of the Land Registry and the Co. Registry should be put together, and perhaps better to be under one and only one dept head
KPMG	KPMG appreciates the opportunity to comment on the above consultation paper published by the Financial Services and the Treasury Bureau in April this year. Overall we are supportive of your proposals, with the exception of the proposal to codify directors' duties, where we have some concerns. Our detailed responses to the questions you have posed are set out in an appendix to this letter. We have appreciated the opportunity given to partners of our firm to work with the Government on this important project through the various working groups and look forward to working with you farther as this project develops. In the meantime, we trust that our comments are of assistance.
Hermes Equity Ownership Services Limited	Hermes is one of the largest pension fund managers in the City of London and is wholly owned by the BT Pension Scheme. We also respond to consultations such as this one on behalf of many other clients, including the BBC Pension Trust, Ireland's National Pension Reserve Fund, Netherlands' PNO Media Fund, Canada's Public Sector Pension Investment Board and Denmark's PKA. We have some $70 billion assets under management and over $98 billion assets under advice.* Hermes takes a close interest in matters of company law and regulation because they set the context for the exercise of our clients' rights as part owners of the companies in which they invest. We seek to safeguard our clients' current rights and also to enhance the transparency and accountability of companies and their directors to their long-term owners. By enhancing accountability, we hope to improve efficiency by addressing what economists call the agency problem. It is our fundamental belief that companies with concerned and involved shareholders are more likely to achieve superior long-

	term returns than those without. By helping make company directors accountable to company owners for the decisions they make and the actions that they take, we believe that over time we will encourage better decision-making and greater value-creation. We believe that this will benefit our clients, which need long-term real growth to meet their obligations to pension beneficiaries, and it will also make companies and economies as a whole more efficient. In pursuit of these aims Hermes supports a flexible regime which will: - encourage company accountability; - encourage responsible ownership by shareholders and fiduciaries; - ensure independence of those who audit and monitor company performance; and - ensure the measures used in reporting performance are relevant for owners Hermes very much appreciates the opportunity to comment on the rewrite of the Companies Ordinance. We provide responses to selected questions for consultation below.
Hutchison Whampoa Limited	**2. Registration of Charges** 2.1 The principal changes proposed to the registration of charges section reflect the provisions of the English Companies Act 2006. However, the English Companies Act 2006 has not yet reflected the recommendations of the English Law Commission Report on Company Security Interests (LAW COM No. 296) published in August 2005 ("2005 LawCom Report"). We understand that the non-incorporation by the English Companies Act 2006 of the recommendations of the 2005 LawCom Report is not an indication that they have been rejected. In fact, many legal practitioners in the UK believe that it is only a matter of time before these recommendations become law in UK. 2.2 The English Law Commission finds the UK registration system which is based on a scheme dating back to 1900 to be outdated and a overhaul is necessary. The principal recommendations of the 2005 LawCom Report include: (i) changing the registration system to a simple online system (ii) criminal sanction requiring companies to send information be abolished (iii) duty for registration be imposed on the interested party i.e. the secured lender rather than the company (iv) the Companies House will no longer be required to check through the details and send out a certificate of registration (v) the time limit for registration be removed and it will be possible to register in advance of the transaction

	2.3 Although, we feel that it may not be appropriate in the context of the Hong Kong charges registration system to adopt all of the recommendations of the 2005 LawCom Report we do believe it would be beneficial to adopt some of them, including: (a) On-line registration system involving a simple requirement of noting the assets being charged, the beneficiary of the charge and its date of creation. This satisfies the needs of modem financial transactions where the requirement on speed of execution is becoming more and more demanding. It also satisfies the objective of the registration system which is the avoidance of false wealth. As long as there is a public record that assets of a company is encumbered the counter party can (and should) do proper due diligence. No one would execute deals purely in reliance on the registered particulars and the details required in the current registration is really unnecessary. (b) Removal of sanctions on the chargor relating to failure to register in time. In practice, it is the chargee (being the interested party in the registration) which takes charge of the registration process and not the chargor. It would therefore seem unfair to the chargor to bear criminal sanctions and other consequences for something which the chargee did wrongly. 2.4 With a streamlined on-line registration system, one can envisage that registration can be completed in a very short time period. A 21 day requirement for registration would seem abundantly generous in such case. However, if the registration system were to continue as it is, then one does query whether the shortening of the period is beneficial having regards to the costs and inconvenience of reopening the registration. One must also bear in mind that the process undertaken by the English Companies Registry in vetting the prescribed particulars may not be comparable to the process in Hong Kong and it is not advisable to adopt the English timeline simply because the timeline is workable under the English system. 2.5 Legal practitioners in UK have expressed a clear disappointment in the missing of an opportunity in bringing the registration system up to modem requirements. When the White Bill for the new Companies Law in Hong Kong is not even expected to be issued until around mid-2009, what should be done if the English Companies Act takes up the changes recommended by the 2005 LawCom Report before then? Does the inclusion of the recommendations by the English Companies Act then give merits to the recommendations? We would urge you to examine more closely the recommendations in the 2005 LawCom Report in the context of the Hong Kong situation on their own merits instead of following the approach in the English Act 2006.

	We apologize for the slight delay in our submission. We are grateful for the opportunity to present our views on the modernization of our company law, one befitting Hong Kong's position as a major international financial and business centre and appropriate to our own business and financial environment.
The American Chamber of Commerce in Hong Kong	The AmCham Intellectual Property Committee has developed a position paper titled *Trade Name (a.k.a. Shadow Company) Infringement in Hong Kong* and I have the pleasure to present you a copy expressing AmCham's views and concerns on the issues raised in the document. AmCham commends the Government in taking concrete steps to engage the community in the revision process of the Companies Ordinance through public consultation exercises. We hope that through these active discussions and dialogues that the Government will develop a regulatory framework with sustainable policies complementary to the needs of our business community and investors in the long-term future. We value the opportunity to express our views and look forward to continue our participation. **TRADE NAME (a.k.a. SHADOW COMPANY) INFRINGEMENT IN HONG KONG** ***The Issue*** An AmCham position paper in June 2006 set out inter alia the concerns of AmCham's members over the registration of companies incorporated in Hong Kong with company names that include famous trade marks and brand names. Such "shadow companies" are then used to authorize their PRC counterparts to engage in various forms of infringing activities in the PRC, hiding behind their legally incorporated status in Hong Kong. ***Background*** Hong Kong government is proposing to rewrite the Companies Ordinance to cover a number of areas, including shadow companies, and this is now undergoing public consultation. The primary proposed solution to the issue is to enable the Companies Registrar to act on a court order and issue a direction to a shadow company to change its name, in default of which the Companies Registrar may change the name of the company to its company number. This is a welcome reform, which reserves to the courts the complex issue of defining what constitutes trade mark infringement. These amendments do not address the root problem since infringers can easily use another identity to set up a company the next day using the same brand name, as long as it is with a different descriptor. Secondly the Companies Ordinance will not be put into effect until perhaps 2011, meanwhile many more IP holders will be prejudiced by the current situation. The

	proposed solution reinforces current practice which is to solve the problem through litigation, which can be costly. ***Proposal*** a. Reject company names that include famous trade marks without authorization Forcing trade mark owners to litigate these issues merely drives up the cost of doing business. The government is urged to reject incorporation of companies with names that include famous trade marks without authorization at the outset. This would be the cleanest and simplest solution. This can be achieved by inserting in the company incorporation application forms a requirement that an applicant either certifies that he is the legal trademark owner or possesses and attaches a letter of authorization from the relevant trade mark owner whenever the company name incorporates a trade mark or brand name and the company is in the same business area as that of the trade mark/brand owner. The burden is then on the applicant, not the Registrar, to check whether the proposed company name is a registered trade mark and hence the current efficiency of the company incorporation regime can be maintained. Such a requirement will deter infringers from setting up shadow companies in Hong Kong at the outset. Secondly if a company breaches the application procedure then either of its own volition or on notice from a complainant, the Registrar could direct a company to change its name following the proposal currently under consultation. b. Use arbitration as an alternative solution Under the amendments, the burden of resolving shadow company problems is to remain with trade mark holders. Whilst the proposed solution does provide a clear remedy, it remains necessary for IP holders to use the Hong Kong courts to seek orders that infringement has taken place and to then enforce them. This is expensive, given that service of court documents are usually outside jurisdiction and in cases where fake addresses are provided, substituted service will be required. Further, very few shadow companies have any assets in Hong Kong and costs recovery is usually impossible. Ultimately, seeking to solve the problem through litigation increases the cost of doing business in Hong Kong and will continue to harm Hong Kong's reputation. We recommend use of an arbitration procedure whereby the Companies Registry's terms with registrants could include a requirement that disputes be referred to arbitration. In such a case, the Companies Registry may adopt similar procedures as used for resolving domain name disputes under the Uniform Domain Name Dispute Resolution Policy ("UDRP"). This is not the same as the company names adjudicator proposed under the Companies Act 2006 in the UK which will come into operation on 1 October 2008. We believe that the problem of shadow companies in Hong Kong is very different from that of hijacking a brand name, which is the situation in the UK.

	The basis for opposing registration might be that the company in question has no rights in the trade mark or brand name that has been incorporated and the company name was registered in bad faith. As in UDRP cases, the complainant will bear the administrative costs and the arbitration will be outsourced to the Hong Kong International Arbitration Centre (HKIAC) which is already experienced in this area. Trade mark owners and infringers are well-used to this internationally accepted system being used for domain names that conflict with trade marks. Due process can be ensured and there is no financial burden on the government. Such a system would not necessarily replace the court procedure, but offer an alternative, which is likely to be cheaper than litigating. The end result is to enable the Companies Registrar a power to issue a direction to the shadow company to change its name once the complainant obtains a court order or an arbitration ruling requiring the shadow company to do so. Since officers of shadow companies are similar to cyber squatters in the domain name context who are unlikely to respond to any proceedings, provided that narrow rules to protect genuine Hong Kong companies were adopted, then everyone would benefit. Further, given the speed of incorporating companies in Hong Kong, it is important for any such dispute to be resolved in a quick and inexpensive way. The Companies Registrar is urged to meet and discuss the possibility with the HKIAC. c. Broaden the scope of Companies Registry interpretations A further proposed amendment to the Companies Ordinance enables the Companies Registrar to refuse to register names which are the subject of an existing court order – i.e. to stop repeat offenders merely opening a new shadow company. It is unclear from the proposal if this is to be limited to the same name only. Court orders will typically be wider than merely the same name and will include similar names too, with the scope of the order typically being in trade mark law terms. Therefore in such repeat offender instances, the Companies Registrar should comply with court orders which are wider than merely the same name, but any names incorporating the same trade mark or brand name. Otherwise the effect of this amendment will be extremely limited if shadow company operators can change say one letter and force the IP holder back to court again. The Companies Registry has the power to direct a company to change its name under the Companies Ordinance within 12 months of incorporation, if it considers the name to be too similar to a name of an existing registered company. In practice, the Companies Registry takes an extremely narrow view of what is considered “too like”. The Companies Registry needs to adopt a broader approach, consistent with trademark law (the test of confusing similarity). Generic words such as “international”, “holdings”, “group”, “limited” etc. should be disregarded in determining whether two company names are

	"too like" and it should not matter whether such words are used alone or in groups. Further, in cases of striking out a dormant company under Section 291 of the Companies Ordinance, the Companies Registry should not accept a bare allegation from the defunct company that it is in operation as sufficient evidence to obstruct a striking out decision. The defunct company should be required to substantiate its allegation by submitting tax returns, business registration certificates, accounts reports and the like for such purposes. Illegal activities in the PRC should not be considered as "activities" by the Companies Registry, otherwise it is almost impossible to rely on this section to strike out these infringing Hong Kong companies.
Hong Kong General Chamber of Commerce	**5. Registration of Charges** The following comments on the proposed enhancements to Registrations of Charges are made with reference to recommendations in the UK's Law Commission Report on Company Charges (August 2005). **Recommendation 1: The charge will be registered using a simple online system** The Law Commission is of the view that the current system of registration involving paper prescribed particulars is a drain on the resources of the Companies Registry (which is required to incur cost in employing people to vet the correctness of the prescribed particulars) and an unnecessary cost for the Chargor in producing the prescribed particulars. A simple online registration would be more cost effective, since only a limited amount of data would suffice to meet the objective of the registration system (i.e. to alert people that certain assets of a company are affected by security). In practice, it is doubtful whether any person would do a deal on the basis of the prescribed particulars and it is sufficient for them to know that security does exists which should then prompt them to do due diligence on the actual documentation. The details required in the current registration regime do not appear necessary. **Recommendation 2: The criminal sanction requiring companies to send information will be abolished. It will be up to the Chargee to register the charge and ensure the details are correct.** This reflects what happens in practice. It is the lawyer acting for the Chargee who would invariably be the person who prepares the prescribed particulars and submit the same for registration. Since the Chargee is the person deriving the benefit from registration as agent of the Chargor and is indeed able to effect registration without assistance of the Chargor, it would seem sensible for that person to take charge of the registration. The current position is also unfair on the Chargor because it can end up with an accelerated loan for something which the Chargee and its lawyers have done wrong. **Recommendation 3: Companies House will no longer be required to check through the details and send out a certificate of registration**

	The logic in Recommendation 1 applies. **Recommendation 4: Companies House and Land Registry will stare information on registration of charges, so properties will only need to be registered once.** **and** **Recommendation 5: 21-day time limit for registration will be removed, and it will be possible to register in advance of the transaction.** Under current regime registration outside of the 5 week prescribed period requires a court order. This is an unnecessary drain on court time and resources. In the Law Commission Report, the Law Commission recommends the removal of the registration time limit and the creation of a priority system (note that the current registration system does not affect priority). The Law Commission's view is very clear that it considers the current registration scheme which dates back to 1900 as being inappropriate to modern needs and is inefficient. It is consistent with the objective of the rewrite exercise to look further into the future rather than adopting the current position of the Companies Act 2006 which is clearly in need of updating. The HK Government should therefore consider the Law Commission report and recommendations in more details and if anything follow the approaches there rather than the position in the Companies Act 2006. If in the future, the UK Government does decide to adopt the Recommendations then HK will always be playing the catch up game.
Asian Patent Attorneys Association, Hong Kong Group	I understand that the Intellectual Property Committee of the Hong Kong Law Society has made submissions to you on the above and I am writing to confirm that the Asian Patent Attorney Association Hong Kong Group fully agree with the views expressed therein and hereby confirm our endorsement thereof.
Consumer Council	**Introduction** 1. The Consumer Council is pleased to provide its submission on the Consultation Paper (the "**Consultation Paper**") published by the Financial Services and the Treasury Bureau on legislative proposals concerning company names, directors' duties, corporate directorship and registration of charges. 2. In this submission, the Council has directed its response to those proposals in the Consultation Paper that have direct relevance to the interest of consumers.
Association of Women Accountants	In response to the Consultation Paper on the Rewrite of the Companies Ordinance (Chapter 32) (the "CO") in respect of the abovementioned topics, we are pleased to submit the views of our Association. We support that the provisions of the CO

(Hong Kong) Limited	should be reviewed so that antiquated provisions can be streamlined and modernized through the rewrite to better fit businesses in Hong Kong nowadays by reducing compliance costs, using more information technology and strengthening corporate governance. More importantly, the rewritten provision should aim at reinforcing Hong Kong's role as an international financial and business centre by facilitating and attracting more business investments to Hong Kong. We agree that the company laws in the UK, Australia and Singapore are comparable to Hong Kong and can provide very good references for the rewrite. However, one must be mindful of the distinctive differences on economic environment, business systems and cultures in the business environment of Hong Kong so that practicable provisions can be tailored for businesses in Hong Kong. In addition, one should also look at the success ingredients of Hong Kong while we rewrite the CO.
The Chamber of Hong Kong Listed Companies	Questions 6-15 We do not have any particular view on the proposals relating to the registration of charges and will welcome and support any change of the law in this area that serves to modernize the language, remove any redundancy, clarify any ambiguity, expedite and enhance any administrative mechanism, and to place our regime in the same level playing field as compared with other international financial centres.
The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies	Our members found your proposal reasonable and have no alternative suggestions to make.
Szeto Ho Kwong	From the 16th submission in order to reduce unfair competition, i mean the labour, when employers like Li Ka Shing is recruiting employees or when LI initiated to employ one job but advert by Hutchison and Cheong Kong simultaneously, so as to arbitrage and to depress the wages i think the co law should do sth eg all co's A of A or M of A should incorporate sth regarding refraining f doing sth bearing unfair competition, some governance or xyz responsibility statement or ISO if so, Li Ka Shing's monopoly of HK econ will be dashed

	eg Wellcome, Mannings, estate dev (although not really monopoly but oligarchy) and agency, Pizza Hut, terminal, electricity and other infrastructure (perhaps not in HK) etc

Compendium of Responses

Question 1

(a) Do you agree that we need to amend the law to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period? **(b) If your answer to (a) is in the affirmative, do you agree that the Registrar should be further empowered to change a company's name to its registration number if the company does not comply with his direction to change its name within the specified period?** **(c) If your answer to (a) or (b) is in the negative, what other option(s) do you suggest and why?**	
Gordon Jones	(a) I agree that the law should be amended to empower the Registrar of Companies ('R of C'), upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period. This period should be kept as short as possible as the company has already been found by the court to be in breach of the law and should not be allowed to profit from its misuse of another company's name for any longer than is absolutely necessary to file the change of name application with the Companies Registry ('CR'). (b) The Consultation Paper is silent as to whether other jurisdictions which empower the R of C to change a defaulting company's name also empower the Registrar to change the name to its registration number. However, as such a measure would minimize the work of the staff in the CR in processing the application and ensure that the company 'name' was completely unique and could not be confused with another company name. Consequently, if it were decided that the best way of dealing with offending company names was through the substitution of one name for another, I agree that the method outlined in the Paper would be the best. (c) I am, however, not convinced that the method outlined in the Paper is the best way of dealing with the problem. The overwhelming majority of companies which are likely to be the subject of court orders will be 'shell companies' which exist only as paper entities in order to give 'legal' cover for commercial operations on the Mainland by another commercial entity. In all probability, the promoters of the company will have not complied with the disclosure obligations of the Companies Ordinance, in particular the requirement to file annual returns, which means that the company will sooner or later have to be struck off the register by the CR, quite irrespective of whether or not the company subsequently becomes the subject of a court order and a direction by the R of C to change its name. Given this, if such a company is the subject of a court order and a direction by the R of C to change its name, there is every likelihood that it will not comply with the direction thereby forcing the R of C to substitute the company's registration

	number for the offending company name. However, this very act will make the shell company totally unattractive from the point of view of the promoters as they will have lost the one thing of value which made them form the company in the first place, namely the company name. They will, therefore, abandon the company and fail to comply with the continuous disclosure obligations of the Companies Ordinance (assuming that they were complying with them in the first place, which is most unlikely), leaving the company to be struck off the register at some future date by the CR. As a consequence, the proposal to substitute the company's registration number for the offending company name is, in the overwhelming majority of cases, inevitably going to lead to the company being stuck off the register at some future date. Thus, while it will deal with the problem of intellectual property infringement, it will introduce an additional stage which will create unnecessary work for the CR given that striking off action will eventually have to be taken, sooner or later, in the case of the overwhelming majority of 'shadow companies'. In view of the above considerations, I would recommend that the option of striking off be considered as a more realistic alternative to substituting the company name with its registration number. Paragraph 2.11 of the Paper is unnecessarily dismissive of this option and the only reason given as to why it is not recommended does not hold water. As pointed out above, the overwhelming majority of companies which will be subject to court orders and directions by the R of C are shell companies, not commercially active companies with creditors. Given this, it is incorrect to state that striking off is not an option because it will adversely affect the interests of third parties such as creditors as these third parties will simply not exist in the overwhelming majority of companies which will be the subject of directions by the R of C. Furthermore, in the very unlikely event that there are creditors, there are well established legal mechanisms under section 291 of the Companies Ordinance to safe guard the interests of creditors in the case of any company which is scheduled to be struck off the register. In the first place, the striking off action is spread over a period of at least five months in the course of which two notices are published in the Gazette. This gives any interested parties, such as creditors, ample notice that the company will be struck off the register 'unless cause is shown to the contrary' (section 291(3)). Secondly, in the event that a company is struck off the register, under section 291(7), any aggrieved interested parties, such as creditors, can apply to the court for its restoration if the application is made within 20 years of the final gazette notification under section 291(5). Even if this time is shortened as a result of other proposals being made in the context of the rewrite exercise, any creditors will still have more than sufficient time to make appropriate representations.

Arthur Lam & Co. CPA	(a) We agree. (b) We agree. (c) No comment.
Paul Mok	(a) Yes (b) Yes (c) N/A.
CLP Holdings Limited	(a) We agree that the law should be amended to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period. (b) We agree that the Registrar should be further empowered to change a company name to its registration number if the company does not comply with his direction to change its name within the specified period. Such a measure would not only minimise the administrative work in the Companies Registry but also provide a unique company name which could not be confused with another company name. (c) Not applicable in view of the answers to 1(a) and 1(b).
The Chartered Institute of Management Accountants Hong Kong Division	(a) Yes, we think that it is necessary to do so. (b) Yes, we agree that the Registrar needs to be empowered to change a company's name to its registration number if the company does not comply with his direction to change its name within the specified period. (c) No further answer is necessary.
The Chinese General Chamber of Commerce	(a) 爲保障商標及商號持有人之權益，本會贊成修訂《公司條例》，指示被告公司在指定限期內更改其侵權名稱。 (b) 本會同意把沒有在指定限期內遵從指示的公司更名爲其註冊編號。此外，關於指定期限的定義，現時容許被指侵犯商標或商譽假冒的公司在註冊日期起計 12 個月內更改名稱，本會認爲此安排是過於寬鬆，建議修訂爲註冊成立後兩個月內作出更改較爲恰當。
Swire Pacific Limited, Cathay Pacific Airways	(a) Yes (b) Yes

Limited, Hong Kong Aircraft Engineering Company Limited	(c) Not applicable.
CCIF CPA Limited	(a) Yes, as it could tackle possible abuses of the company name registration regime by "shadow companies". (b) Yes, we agree as it is better than the strike-off alternative which may adversely affect the interests of third parties. (c) Not applicable.
Japan Electronics & Information Technology Industries Association	**Answer to Question l(a):** We basically agree with the Proposal. However, since the right-holders consider that the damages caused by the inappropriate registrations are expanding on a daily basis to an intolerable extent, they bring lawsuits to remove such inappropriate registrations, at considerable expense. Considering such efforts of the right-holders, the court order directing a defendant company to change its name should be realized at the Companies Registry ("CR") as soon as practicable without placing a burden on the right-holder. Therefore, we hereby request that the "a specified period" proposed to defendant companies in the direction of the CR shall be the shortest possible period and the burden such as costs of the application to the CR shall be minimized. **Answer to Question l(b):** We basically agree with the Proposal. It is obvious that to empower the CR to change the inappropriate registrations compulsorily without any actions by the defendant companies or their representatives is essential to resolve the shadow company problem. As we stated above, since the exploitation of the inappropriate registrations often takes place in mainland China, it is important to disseminate in mainland China the fact that the inappropriate registration has changed its registration number. Therefore, we hereby request that in the case of the inappropriate registration changing its registration number, this fact shall be disseminated by all appropriate means - for example, notification to the Government of China, in the Gazette, and on websites, such as the CR's website listing companies which have failed to comply with the directions of the Registrar of Companies ("Registrar") to change the company name issued under Section 22(2) of the Company Ordinance ("CO"). **Additional Comments 1:** As we stated, in "Answer to Question l(a)", since the court order directing a defendant company to change its infringing name should be realized at the CR as soon as practicable without placing a burden on the right-holders, we think the best

	method would be to empower the CR to change the "inappropriate registrations" immediately WITHOUT any CR's own direction to the defendant company to change its infringing name, as long as the court order has been issued and the judgment has become final and conclusive. As described in item 2.6(1) of the Proposal, since the shadow companies are formed by counterfeiters to carry out counterfeiting and passing-off activities, and almost all of the officers of the defendant companies do not attend the passing-off lawsuit filed against the shadow companies, it is unlikely that they would comply with the CR's direction in practice. From the viewpoint of the defendant companies, they shall be provided an opportunity to change their company name as long as they are given a notification which notifies that the company name has been changed. Under Japan's related law, the Legal Affairs Bureau (corresponding to the CR), is empowered to change company names without any direction to the defendant companies in the case that the plaintiff has applied to the bureau to change the infringing name with a certified copy of a final and conclusive judgment directing the defendant company to change its name. For the above reasons, we would appreciate it if the FSTB would consider the described system. **Additional Comments 2:** We basically agree with the proposals described in items 2.9 and 2.10 of the Proposal. With respect to item 2.9, we request that the Registrar be empowered to reject not only the registration which is identical to the company name as it was before (the "infringing name"), but also the registration that includes the distinctive parts of the infringing name. If it is difficult to reject such registration, the registration which is "too like" the infringing name should be rejected at the very least, considering that the registration which is "too like" the existing company names is rejected under the current Companies Ordinance. Although we truly understand the importance of shortening the incorporation time as described in item 2.12 of the Proposal, considering that the infringing name is likely to be exploited again, we would appreciate it if the FSTB would consider our proposal.
Hong Kong Trustees' Association Ltd	We support this proposition as it will be a more efficient way to deal with the infringement rather than having to rely on the company which may delay or take no action to change its infringing name despite a court order to do so. It would also avoid further legal proceedings.
Mayer Brown JSM	**A. Shadow Companies** 1. Over the years, we have acted for trade mark and trade name owners from a wide range of industries in a significant number of complaints against "shadow companies" in Hong Kong. We would like to draw on those experiences to highlight the issues involved and set out the proposals that we think will be beneficial. 2. As a whole, we share your view that there is a strong case for reforming and strengthening the company name

	registration regime to tackle the "shadow companies" problem. *Your proposals* 3. We concur with your proposal to amend the Companies Ordinance ("CO") to empower the Registrar to, upon receipt of a court order, direct a shadow company to change its company name within a specified timeline. This will avoid the present situation where a trade mark owner obtains an "empty" court order for change of name which the Registrar has no power to enforce. 4. We further agree that if the shadow company fails to comply within the prescribed time, the Registrar should be given a power under the CO to replace the infringing company name with its registration number. This will supplement the current criminal penalties under Section 22(6) (for default to comply with a name change direction), which are not very often invoked especially if the officers of the defaulting company reside overseas.
Hong Kong Chinese Enterprises Association (Submission A)	(a) Yes (b) Yes
Hong Kong Chinese Enterprises Association (Submission B)	(a) 贊成 (b) 贊成
Hong Kong Chinese Enterprises Association (Submission C)	(a) 贊成 (b) 贊成 (c) 不適用
The Law Society of Hong Kong	(a) Yes. The giving of such power to the Registrar should be adequate to address the issue created by the "shadow companies". The court order should be final with no right of appeal. (b) Yes. **Paragraph 2.5** 1. We agree that as a matter of policy and practicality, the option of prohibiting registration of a company name

	which is identical or similar to any trademark registered under the Trade Marks Ordinance is not viable. **Paragraph 2.6** **2. We note the Government does not recommend adoption of a system of company name adjudication similar to that introduced in the UK.** 2.1 We agree that the implementation of such system would require substantive consideration of the rules and procedures and cannot be introduced within a short time. In the UK, the system is not targeted to shadow companies but company name hijacking. Further, the system is yet to be tested in the UK and thus its effectiveness is yet uncertain. 2.2 However, we do not agree with the Government's reasoning as set out in paragraph 2.6 of the Paper. (1) The burden lies on the officers of the "shadow companies" to attend the proceedings before an adjudicator if the company has any valid defence/response to the complaint. If they fail to do so, we see no reason why the adjudicator cannot make a decision based on the complainant's submissions alone. (2) As in the cases of arbitration of domain name disputes, the administrative costs involved are generally lower than court actions. (3) There will not necessarily be duplication of efforts as the trademark owner may elect to pursue either through the adjudication system or the court. **Paragraph 2.7** **3. The proposal is to amend the CO to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period. If the company fails to comply with the direction, the Registrar may substitute its infringing name with its registration number.** 3.1 We welcome this additional power which would provide relieve trademark owners of the need to sue the individual shareholders which often entails service of proceedings outside of Hong Kong. **Paragraph 2.9** **4. The proposal is to grant the Registrar power to reject registration of any company name which is "*the same*" as an infringing name which the Registrar has previously directed a company to change and is the**

	subject of a court order. 4.1 We welcome the grant of this additional power to the Registrar. 4.2 The effectiveness of this power however requires an appropriate interpretation of the meaning of "the same" being adopted by the Registrar. 4.3 According to the Company Names Guidelines issued by the Companies Registry in 2007, in determining whether a company name is "the same as" another, the following factors shall be disregarded: 4.3.1 the definite article, where it is the first word of the same 4.3.2 the ending words or expressions "company", "and company", "company limited", "and company limited", "limited", "unlimited", "public limited company", their abbreviations, and the ending Chinese characters of "company", "company limited", "unlimited company" and "public limited company", 4.4 We propose that the current Guidelines be expanded as follows: (a) where the director(s) and/or shareholder(s) of the company sought to be registered are the same as those of the company which has previously been subject of a court order, the meaning of "the same" should give effect to the terms of the injunction granted against the earlier company. For example, where the injunction restrains use of the trademark "Panasonic" or any name confusingly similar thereto as a company name without restriction on the scope of business, the Registrar should be empowered to refuse any such name, irrespective of any qualifiers/identifiers in the remaining part of the company name. (b) where the director(s) and/or shareholder(s) of the company sought to be registered are any other third parties, the interpretation of "the same" should at least follow the meaning of "too-like" as adopted by the Registrar under section 22(2) of the CO. **Paragraph 2.10** **5. It is further proposed that the Registrar be empowered to change a company's name to its registration number if the company does not comply with his direction to change its name under section 22(2) of the CO.** 5.1 We agree with the proposal. 5.2 As to the time frame within which the company must change its name in compliance with the direction before the Registrar will exercise the power to change its name to its registration number, we understand the Registrar's

	current practice is to specify 6 weeks. We consider this to be a reasonable period. 5.3 As to what constitutes non-compliance with the Registrar's direction to change the name, we propose that where the company simply changes to another name that still incorporates the same trademark under complaint though with added non-distinctive identifiers, such should not be taken as having complied with the direction and the Registrar is still empowered to change the company's name to its registration number. 5.4 In determining the meaning of "too like" under section 22(2) of the CO, we propose that the Registrar should give consideration to evidence of actual or likelihood of confusion caused by the use of the company name in the light of all the relevant circumstances and the principle of "imperfect recollection" of an ordinary member of the public. 5.5 We propose that this same power should also be given where the company fails to comply with the Registrar's direction to change its company' name under section 22A of the CO. **Paragraph 2.11** **6. The paper has considered the alternative of empowering the Registrar to strike a company off the register if it fails to comply with a direction to change name but did not recommend it as it may adversely affect the interests of third parties such as creditors, and may result in uncertainties over liabilities and obligations of the company and its officers.** 6.1 Following a decision to strike a company off the register, the Registrar will publish notices in the gazette allowing any interested third parties to object to the decision. Notwithstanding, in practice it is doubtful that such notices would be brought to the attention of interested third parties. As such, we agree that it may not be a good alternative. **Paragraph 2.12** 7. The current processing of applications for incorporation of companies is 4 working days. We consider this a reasonable period. 7.1 We also agree to expedite the company name approval procedure. 7.2 The approval system contemplated under paragraph 2.12 of the Paper should examine not only certain preliminary requirements such as whether or not the name is not identical to another name already on the Registrar's register or contain certain words or expression on a specified list, but also incorporates a mechanism

	whereby the requirements under point 4.4 above will be taken into consideration, which should not be postponed to the further checking stage. (c) Not applicable.
Hong Kong Institute of Trade Mark Practitioners	(a) Yes (b) Yes 4. Paragraph 2.5- We note that the Government has considered whether the CR should not allow registration of a company name which is identical or similar to any trade mark registered under the Trade Marks Ordinance, and has decided this is not a viable solution. The difficulties of such approach are recognized and we agree it is not a viable solution. 5. Paragraph 2.6- We also note that the Government has considered the viability of introducing a company name adjudication system similar to that proposed to be introduced in the UK under the Companies Act 2006, but has rejected the idea. The Government's reasoning for not favoring an adjudication system is set out in paragraph 2.6 of the Consultation Paper. The Government prefers the current use of the court system to handle cases, supplemented with the proposal in Question 1(a). 6. Amongst our membership there are both proponents of the court system as proposed to be supplemented with the proposal in Question 1(a), and of an adjudication system. However, the adjudication system proposed to be introduced in the UK is not yet in force and has not been tested. There is also no current system in Hong Kong into which an adjudication system can be incorporated without substantial consideration being given to its rules, procedures and administration. In those circumstances, **we agree that the current proposal in Question 1(a) is the most appropriate way to proceed at present**. 7. Paragraph 2.9- We note the Government's proposal to grant the Registrar "a power to reject registration of any company name which is the same as an infringing name which the Registrar has previously directed the company to change and is the subject matter of a court order." 8. We believe that further clarification is required as regard the Government's proposal on this issue. In particular, we note the following: a) what is the meaning of " the same as" an infringing name? In our opinion, if a court order has been obtained against Company A preventing it from using the name "Rolex" (e.g. as part of Rolex Finance Holdings Limited), not only should this prevent Company A from doing so, but the CR should, as a matter of general practice, subsequently refuse

	to allow any further companies to be incorporated using the name "Rolex" (e.g. Rolex Strategy Limited), without the consent of the brand owner, and b) at the very least, the proposed law should empower the CR to prevent the directors and shareholders of Company A from incorporating any other company with the name "Rolex". c) We acknowledge that the CR's power in this regard may be dependent upon the terms of the Court order that is presented to it. 9. Paragraphs 2.10 and 2.11- it is noted that the proposal is for the CR to change the shadow company name to a name by reference to its company number rather than striking off the company. The reasoning for this is noted and understood and **we agree with the Government proposal to use the company number**. 10. Paragraph 2.12- The current time for incorporation of a company is four (4) working days, which appears to be a reasonable period. If there is pressure upon the CR to expedite its procedures so that the incorporation is achieved quicker, regard should be had to the checks that will need to be undertaken under the proposed powers to be given under paragraph 2.9 of the Consultation Paper. 11. Miscellaneous comment (1)- The Consultation Paper focuses upon the proposal to give the Registrar power to change a company's name if the company does not comply with the Registrar's direction to change its name under Section 22(2) of the CO. There is no mention of any proposal to give the Registrar similar power under Section 22A of the CO. We believe that a similar power should be invoked for Section 22A situations (and could potentially be invoked as means of enforcement in other areas of the CO where directions are given by the CR). 12. Miscellaneous comment (2)- Section 22(2), as currently drafted, provides that such powers of the Registrar may be exercised within twelve (12) months of incorporation date. This time is too short. Twelve (12) months does not, in many cases, allow sufficient time to discover the company, investigate it, make submissions to the CR, and enable the CR to make a final decision on the matter. 13. This Section 22 (2) time limit should either be removed (there is no equivalent time restriction in Section 22(A)) or should be amended to a time period of say thirty-six(36) months.
The Chinese Manufacturers' Association of Hong Kong	爲打擊「影子公司」可能濫用公司名稱制度進行僞冒商標的活動，本會贊成賦予公司註冊處處長權力，以便執行法庭要求被告公司更改其侵權名稱的命令;當被告公司不遵從更改名稱指示時，處長有權把其名稱更改爲註冊編號。

The Institute of Accountants in Management	Specifically, on the change of company name, we are of the view that once a plaintiff company has won its case in court and on the expiration of the period for further appeal, the right of the defendant company to maintain its name should no longer exist. The Registrar of Companies should be empowered to change the defendant company's name in numeric form without the need for a further court order. The proposed procedure to have a court order prior to the change of the defendant company name is a waste of the precious time of the court and of the plaintiff company.
The Chamber of Hong Kong Listed Companies	We agree to both a) and b) so as to empower the Registrar to direct a company to change its name upon receipt of a court order and to further empower the Registrar to change its name to its registration number if such comply does not comply with his direction to change its name within the specified period.
The Association of Chartered Certified Accountants	We note the concerns of "shadow companies" and agree that the Companies Registrar (the Registrar) should be empowered to direct a company to change its name within a specified period upon receipt of a court order requiring the company to change its name. We also agree to the proposal to further empower the Registrar to change a company's name to its registration number if the company does not comply with the Registrar's direction to change its name within the specified period.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes, we agree. It is a fair measure to deal with the issue effectively. (b) Yes, it would make the amended law easier to implement. (c) N/A
The Hong Kong Institute of Directors	We need to amend the law to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period. The Registrar should be further empowered to change a company's name to its registration number if the company does not comply with his/her direction to change its name within the specified period.
Hongkong and Shanghai Banking Corporation Limited	Questions 1(a) and 1(b) We agree to the recommendations as stated in the Paper.
The Society of Chinese Accountants and Auditors	In principle, we agreed to the proposals to empower the Registrar in enforcing the change of company's name as directed by court (a) Yes, we agree.

	(b) Yes, we agree.
The British Chamber of Commerce in Hong Kong	(a) We agree. This should be included in the CO. (b) We agree with this measure also. (c) N/A
Hong Kong Stockbrokers Association	(a) Agreed. (b) Agreed. (c) N.A.
The Hong Kong Association of Banks	(a) Yes. (b) Yes. (c) Not applicable.
The Hong Kong Institute of Chartered Secretaries	(a) Yes, we agree provided that the court order should be a final one i.e. the company has no more right of appeal. Further, since the company has already been ordered by the court to change its name, the period of notice to be given under the direction of the Companies Registrar ("CR") should be kept short. (b) Yes, as the numbered name will then be absolutely unique. However, we anticipate that a company which fails to pay due regard to a court order and the relevant direction of the CR is unlikely to be one which will comply with the continuous disclosure obligations under the Companies Ordinance ("CO") afterwards. Most of them are presumably shell companies which will become valueless after losing their original registered names. It would mean in the majority of cases, this type of defaulting companies will eventually be struck off the register by the CR in the near future. Hence, we consider that it may not be justified to introduce this transitional measure of granting a numbered name to a company which fails to comply with a court order and the subsequent direction by the CR. It is explained in the Consultation Paper that the option of striking off is not recommended because "it may adversely affect the interests of third parties, such as creditors and may result in uncertainties over liabilities and obligations of the company and its officers". We do not consider this a very convincing reason on the grounds that S.291 of CO has already provided adequate protection to creditors of the companies which are ordered to be struck off the register. After all, as noted above, most of these defaulting companies are shell companies which are not commercially active

	and most probably without creditors. Hence, striking them off is an option which should not be ruled out. (c) Please see paragraph 1 (b) above.
Ho Tak Wing	(a) In view of any infringement of the Company's name registration by the shadow company, the law should be amended to empower the Registrar of Companies, upon receipt of Court Order, to enforce the Company in question to have its abuse name changed within a specified period of time, say 1 month period from the date of issue of letter by the Registrar. (b) If the Company in question fails to comply with the instructions and directions issued by the Registrar of Companies, instead of change of the Company's name to its existing registration number, it is suggested that the name of the company in question should bear the wordings such as "To Be Deregistered" with the obligations that the Company's name is subject to change. Accordingly, the Company will be given the final written warning before its name to be deregistered in the Company's registry. (c) On the other hand, would the SCCLR consider whether the Companies, at the time of formation of incorporated companies, are required to submit a Reserve Name so that when the Company is found infringed, the Reserve Name will be employed accordingly? Further more, the Reserve name should be properly disclosed with its former name in bracket for a period of twelve months and with a penalty imposed.
KPMG	(a) We support the proposal. (b) We agree that this is an appropriate action for the Registrar to take in such circumstances. (c) n/a
Hong Kong Institute of Certified Public Accountants	(a) Yes. (b) Yes (c) N/A.
Hong Kong General Chamber of Commerce	**1. Shadow Companies (Question 1& 3)** (a) In view of the increasing abuse of the company name registration system in Hong Kong by "shadow companies" to carry out their counterfeiting activities and the lack of power of the Companies Registrar ("CR") to enforce a court order to change a company's name under the Companies Ordinance, we agree with the proposed amendment to empower the CR, upon receipt of a court order, to direct the company to change its name and to change a company's name to its registration number if the company does not comply with the CR's direction.

	(b) However, our view is that the role of the CR will still be very passive in combating the abuses by "shadow companies" even after the above measure is introduced. This is because the owners of a trademark or trade name will still need to take a legal action against a shadow company to obtain a court order. We would suggest that the CR should consider introducing a company names adjudication system similar to that introduced in the UK under the Companies Act 2006 ("CA 2006") which can provide the companies, especially SMEs, a cheaper alternative to enforce their rights. It can also lighten the court's burden by striking out claims in which the infringing companies simply have no reasonable prospect of success. Section 73 of the CA 2006 provides that the order made by the adjudicator may be enforced in the same way as an order of the High Court and we suggest that Hong Kong should also adopt this approach for efficiency. Our answer to Question 1 is: (a) Yes (b) Yes (c) We believe that adjudication should also be considered in parallel.
Tricor Services Limited	(a) Yes, in order that the Registrar can have the authority to take enforcement action upon receipt of such a court order, to direct a company to change its name. (b) Yes. As the registration number is a unique number given by the Companies Registry ("CR") to each company, the substitution of the infringing name of a company by its registration number should be feasible. (c) N/A.
Consumer Council	***Proposal to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change the name within a specified period and in case of non-compliance, to change the company's name to its registration number*** 3. The Council supports this proposal and believes that the grant of such power will improve the enforcement actions available against "shadow companies" which make use of their company names in carrying out counterfeiting and passing off activities and misleading consumers. 4. It is noted that the companies may also state their business names in the annual returns filed with the Companies Registry. In order to remove all records of infringing names at the Registry, the Council suggests that consideration should also be given to the need to extend this proposed power to allow the Registrar to act on a court order and direct

	a company to change its business name records (if any) at the Companies Registry and in case of non-compliance, to replace the business name records with its company registration number.
Hutchison Whampoa Limited	(a) Yes (b) Yes (c) Not applicable
Association of Women Accountants (Hong Kong) Limited	We agree to the proposal of amending the law to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period. We also agree that the Registrar should be further empowered to change a company's name to its registration number if the company does not comply with his direction to change its name within the specified period. We believe that these amendments would empower the Companies Registrar to handle disputes on shadow companies in a more effective manner.
Hong Kong Bar Association	**Question l(a)** 1. The Bar supports this recommendation. 2. Although, as the Court recognized in Hitachi Ltd v Hticahi Wei Chu (Hong Kong) Limited [2007] 4 HKC 602 at 609, there exists other avenues to enable a successful plaintiff in a passing-off action to bring about a change of the defendant's name, including (a) resort to s.22A of the Companies Ordinance ("**CO**"); (b) contempt proceedings; and (c) the plaintiff relying on an unpaid costs order to petition the winding up of the defendant, we do not believe these avenues provide an adequate answer for 2 reasons. First, they may not be available to the plaintiff. In the case of s.22A, the Registrar of Companies ("**Registrar**") may decline to give a direction. Also, contempt proceedings are only useful if the defendant is actually traceable – in many passing off cases the defendant simply does not surface and suffers judgment entered in default. Second, even in the case of the plaintiff relying on the unsatisfied costs order to petition the winding up of the defendant, this exercise would involve considerable time and expense on the part of the plaintiff. 3. Accordingly, the Bar considers it appropriate to empower the Registrar to act on a court order to direct a company to change its name within a specified period. **Question 1(b)** 4. The Bar also supports this recommendation. Under the current framework, default in compliance with directions given

	by the Registrar under ss.22(2) and 22A(1) of the CO would only attract a fine (and an additional default fine if the default persists), and in the case of s.22(2), the officers of the company may be liable for imprisonment. This is unsatisfactory, as in the case of continued non-compliance the Registrar has to go through the roundabout route of and to incur costs in using winding up proceedings to obtain the desired result. The power to order imprisonment is of no assistance in a case where the defendant and its officers cannot be traced. Accordingly, the Bar agrees that the Registrar should also be empowered to change a company's name to its registration number where the company has defaulted in complying with the direction of the Registrar.

Question 2

(a) Do you agree with the proposal that the law should be amended to provide the Registrar with a discretionary power to approve a "hybrid name" where the applicant can show to the satisfaction of the Registrar that there is a genuine business need? **(b) If so, what should constitute a "genuine business need"?**	
Gordon Jones	(a) I do not agree with the proposal that the law should be amended to provide the R of C with a discretionary power to approve 'hybrid names'. In the first place, as paragraph 2.15 states, there are no 'major problems' with the current arrangements e.g. 'hybrid names' are prohibited and there is no 'strong demand' for the registration of such names. Secondly, given the existing and growing problems with 'shadow companies', it would be irresponsible to approve 'hybrid names' as this will only exacerbate the existing problem. Thirdly, the R of C would be placed in a very difficult, if not impossible, position if he had the discretion to approve 'hybrid names' and the possibility of judicial review would be high. Fourthly, in practice, it would be virtually impossible to define what would constitute a 'genuine business need' and, even if it were, any definition would have to be so wide-ranging and flexible as to be impossible to administer in practice. (b) Not applicable in view of the answer to (a).
Arthur Lam & Co. CPA	(a) We think the "hybrid name" shall always available in view of the contemporary social culture and business environment. We think the choice shall be given even without any substantiation for a "genuine business need". (b) Not Applicable. Please refer to our answer 2 (a) above.
Paul Mok	(a) Yes (b) No comment.
CLP Holdings Limited	(a) We have reservations on the proposal that the law should be amended to provide the Registrar with a discretionary power to approve a hybrid company name where the applicant can show to the satisfaction of the Registrar that there is a genuine business need. It would be difficult to define what would constitute a "genuine business need" and, even if this could be done, there would be a number of grey areas which would make the applications practically difficult to administer. (b) Not applicable in view of the answer to 2(a).
The Chartered Institute of	(a) No, we do not agree as the amendment could create unnecessary confusion to the stakeholders as a result of the amalgamation of two different language systems.

Management Accountants, Hong Kong Division	(b) No further answer is necessary.
The Chinese General Chamber of Commerce	(a) 關於批准公司使用同時包含中及英文的"混合名稱"註冊，本會對此修訂表示同意。 (b) 對於何謂"真正商業需要"，本會認爲暫無需過早設下定義；日後若有任何申請以混合名稱註冊的公司不同意處長相關裁決，可將爭拗交由法庭作最終判決，讓法庭判例爲"真正商業需要"的定義提供適當的註釋。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) No. We consider that the proposal will cause confusion. We also think that it will be difficult to define what is meant by "a genuine business need". (b) Not applicable.
CCIF CPA Limited	(a) Yes, as there might be a genuine business need in some cases. (b) For instance, there are no Chinese equivalents to the English names.
Mayer Brown JSM	We are not aware of a strong demand for "hybrid" company names in Hong Kong. However, if the applicant can justify its desire for the hybrid name for genuine reasons, e.g. that the applied-for hybrid name relates to its business and cannot otherwise be replaced by an equivalent term in either the English or Chinese language, then we concur that the Registrar could have a discretion to consider such applications.
Hong Kong Chinese Enterprises Association (Submission A)	(a) Yes (b) the discretionary power should be strictly limited and the phrases used in a hybrid name should be widely used, e.g. X 光, 卡拉 OK, in the society, such that business had to use or adopt those phrases in its name for its business need
Hong Kong Chinese Enterprises Association (Submission B)	(a) 贊成 (b) 我認爲「真正商業需要」是：即兩者沒有直接的中文對應詞滙，且兩者都已在其他的法例中使用。
Hong Kong Chinese	(a) 贊成

Enterprises Association (Submission C)	(b) 需要爲包括但不限於其主營業務及／或業務、服務、品牌、商標所需
The Law Society of Hong Kong	(a) No. Company name is used to identify a unique legal entity which can take rights and obligations. Hybrid names can create confusion and give rise to difficulties in communicating with non-English speaking counterparties. Companies are allowed to use trade names in the conduct of their business and can use any fancy name they choose. It is difficult to see how a genuine business need for the use of hybrid name cannot be satisfied by the adoption of a hybrid trade name. There is also concern that allowing hybrid names will inevitably make it more difficult for trademark owners to complain against shadow company names whether pursuant to section 22(2), 22A of the Companies Ordinance or passing-off or otherwise. (b) Not applicable.
Hong Kong Institute of Trade Mark Practitioners	(a) Yes The HKITMP supports the idea of having a hybrid name where the CR is satisfied that the hybrid name should be permitted, provided that the principles applicable to striking off a shadow company are not thereby affected and are interpreted against the hybrid name in the same way as they would be against an ordinary single language company name. As to what should constitute a "genuine business need", as this is outside of the ambit of the HKITMP's consideration of company names, we do not propose to make any comment.
The Chinese Manufacturers' Association of Hong Kong	配合香港中西合璧、中英文並用的客觀情況，本會贊成賦予處長酌情權，可以按個別情況批准有其正需要的申請人以中英混合的公司名稱辦理註冊。另外，對於一些廣爲公眾接受、已成爲通用的詞語，例如「X光」和「卡拉OK」等，本會贊成在新《公司條例》中應容許使用這些詞語作爲公司名稱。
The Chamber of Hong Kong Listed Companies	We agree to what was spelled out in questions 4a in view of the changing times and the increasingly common use of mix languages, given the cross-culture characteristics of Hong Kong. Allowing "hybrid" names would be to follow the pace of society. For example, a lot of international companies are reducing their original company names into acronyms for ease of application across the globe. Requiring them to register a separate Chinese name for the purpose of Hong Kong would contradict their desire of having a unified branding platform.

	We do not have any particular view as to what will or should constitute a 'genuine business need' as each case will depend on its own merits. We suggest that in future, the Registrar should set out these needs by way of a guidance note so as to provide guidance to the market.
The Association of Chartered Certified Accountants	ACCA Hong Kong agrees that the law should be amended to provide the Registrar with a discretionary power to approve a hybrid name. We are of the view that Hong Kong does have its unique culture where both English and Chinese are generally and popularly adopted. It is also noted that languages generally used by the public in Hong Kong are "evolving" with invented terms consisting of both Chinese characters and English words, which may or may not be easily associated with "genuine business needs", "卡拉 OK" is a good example. As such, we do not consider it necessary for the applicant to show to the satisfaction of the Registrar that there is a genuine business need, which could be arguable and judgmental.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes. (b) When the name has a meaning to the applicant, such as the business has been using it for some time or the name reflects an idea of business or products.
The Hong Kong Institute of Directors	The law should be amended to provide the Registrar with a discretionary power to approve a "hybrid name" where the applicant can show to the satisfaction of the Registrar that there is a genuine business need. Association in a joint venture should constitute a genuine business need.
Hongkong and Shanghai Banking Corporation Limited	(a) We agree to the recommendation in the Paper. (b) As to what constitutes a "genuine business need", this should be left to the discretion of the Registrar.
The Society of Chinese Accountants and Auditors	Provide the Registrar with a discretionary power to approve a "hybrid name". We also suggested in our responses ways to improve the present name registration system in tackling "shadow companies". (a) Yes, we agree. (b) In our opinion, "genuine business need" constitutes the followings: λ the product or service is already existed; λ the hybrid name describing the product or service should have been accepted in consensus, even though may not be necessary by all, but at least by the people in the industry;
The British Chamber	(a) We think hybrid company names, i.e. including Chinese and English is impractical. Most software systems cannot

of Commerce in Hong Kong		incorporate both languages at the same time so it will be difficult to accurately write contracts, update name directories, search the internet etc. and there will be numerous other instances where the full company name cannot be shown or used properly. Furthermore, the possibility of hybrid company names could increase the possibility for a proliferation of confusingly similar (but not identical) company names and for unscrupulous individuals/businesses to seek to profit from this. Therefore this proposal should be withdrawn. Few other countries (in fact we cannot think of any) mix English and a local language in registered company name.
	(b)	This appears to be a gimmick rather arising from any genuine business need.
Hong Kong Stockbrokers Association	(a)	Agreed.
	(b)	"Genuine business need" should mean necessary to proper reflect the unique nature or characteristics its business or products and services to its stakeholders. The name also should be generally understood by the public.
The Hong Kong Association of Banks	(a)	Yes.
	(b)	This should be left in the discretion of the Registrar.
The Hong Kong Institute of Chartered Secretaries	(a)	No. We take the view that it will be extremely difficult if not impossible for the CR to set the criterion for establishing a "genuine business need". As stated in the Consultation Paper, there is no major problem with the current situation in Hong Kong nor is there any strong demand for registration of hybrid names. In the circumstances, we do not see the need for giving the CR such discretionary power, taking into account that it will inevitably result in greater confusion in company names and more serious problem of "shadow companies".
	(b)	N/A.
Ho Tak Wing	(a)	The law should be amended to empowered the Registrar of Companies to exercise his power to approve the application of any hybrid names if there is any genuine need. The most important factor to be considered is whether such hybrid names are misleading or not.
	(b)	Genuine business needs represent the trade mark, design, copyright or patent which are directly linked to the Intellectual Property. On the other hand, the hybrid names may involve the Fung Shui element as well. Let us look at the following examples: G2000 is a well known Company in the fashion industry, H2O is a famous shop in beauty and skin care industry.
KPMG	(a)	We support the proposal.

	(b) We do not have any great concern over the registration of names which contain both English and Chinese characters and therefore do not see any need for "genuine business need" to be interpreted narrowly. For example, we would agree that in the circumstances described in paragraph 2.16 of the Consultation Paper, (i.e. when a name is predominantly Chinese but certain English words or alphabets are well known) it would be appropriate to allow such a name to be registered.
Hong Kong Institute of Certified Public Accountants	(a) We do not have any strong objection to the proposal but believe that the concept of "genuine business need" should be more clearly defined if the proposal is to be pursued. (b) As mentioned in paragraph 2.17 of the consultation paper, one possible scenario would be where there is no direct Chinese equivalent and the term is used in other legislation.
Hong Kong General Chamber of Commerce	**2. Hybrid Names (Question 2)** As noted in the Consultation Paper, the CR is unaware of any strong demand for the registration of hybrid names (58 applications in 2006 and 64 applications in 2007) and the permission for registration of hybrid names may aggravate the problem of "shadow companies". As such, we do not consider it necessary to amend the law to provide the CR with a discretionary power to approve a "hybrid name". However, for those phrases which have no direct Chinese equivalents and are used in other legislation, we agree that the new CO should permit companies to use those phrases in their company names. Our answer to Question 2 is: (a) No (b) N/A
Tricor Services Limited	(a) Yes, but what would constitute a "genuine business need" must be clearly defined in the law. (b) Suggest that the CR should review the previous applications for registration of hybrid names and identify the reasons given for such applications (if any), and ascertain whether it is possible to clearly define what should constitute a "genuine business need".
Consumer Council	***Proposal to provide the Registrar with a discretionary power to approve a "hybrid name" where the applicant can show to the satisfaction of the Registrar that there is a genuine business need*** 8. The Council worries that the permission of hybrid names, even if limited to the proposed cases of "genuine business need", may lead to huge increase in the number of misleading "shadow companies" and cause great confusion to the

	public, including consumers. The difficulty in defining and assessing the proposed criteria of "genuine business need" is also another issue of concern. 9. Further, the Council is not satisfied that there is any strong demand or justification for "hybrid names" in Hong Kong. Apart from the company names, traders are also free to use their well known trade names in their daily business. Accordingly, the Council finds this proposal not acceptable. ***Proposed general permission for company names containing the phrases "X 光" and "卡拉 OK" as exceptions to the general rule*** 10. The Council considers the proposed permission of company names containing the phrases "X 光" and "卡拉 OK" acceptable given there is no direct Chinese equivalents for these terms.
Hutchison Whampoa Limited	(a) Yes provided as qualified - that there is a genuine business need. (b) No specific views but should be a well considered definition to ensure fairness to all relevant parties.
Association of Women Accountants (Hong Kong) Limited	We agree that the CO shall be amended to provide the Registrar with a discretionary power to approve a "hybrid name" where the applicant can show to the satisfaction of the Registrar that there is a genuine business need.
Hong Kong Bar Association	**Question 2(a)** 5. The Bar agrees with the proposal set out in paragraphs 2.16 and 2.17 of the Consultation Paper. **Question 2(b)** 6. What constitutes a "genuine business need" is best left to be decided by the Registrar. Any attempt to define such a need will either be too general and therefore devoid of any meaningful indication or too narrow, which will have the effect of restricting the ability of the Registrar to consider whether a case of genuine business need has been made out by the applicant in the particular context of its business.

Question 3

Do you have further views on how the current company name registration system could be improved, particularly for the purpose of tackling the problem of "shadow companies"?	
Gordon Jones	The Paper covers all the major ways of improving the current company name registration system as regards tackling the problem of 'shadow companies'. I do not have any other comments except to mention that the CR and IPD should continue to enhance their joint publicity efforts as outlined in paragraph 2.3(1) of the Paper while people wishing to incorporate companies should be encouraged, through appropriate guidance in the CR's webpage, to consider whether or not the proposed company names could be considered to infringe the intellectual property rights of other companies.
Arthur Lam & Co. CPA	We understand that some overseas corporations have legitimate claim over the their problems from shadow companies. There shall be measure to check against the shadow companies. Meanwhile, we shall observe the liberty for choosing names. We shall know that the same company name or very similar company name may be selected by two different persons who for one's own business need not for taking advantage of the others. For examples, "Apple" can be a computer company in California--"Apple Inc.", or a multimedia company in New York--"Apple Corps" (which was founded by a British rock band called The Beatles), or could have been the company name of one of the best selling newspaper in Hong Kong (currently owned by a Hong Kong listed company--"Next Media Ltd"). There are two global insurance and financial services giant companies are called "Prudential". Prudential plc is a UK company. Prudential Financial, Inc. is a US company. Mandriva Linux (formerly called "MandrakeSoft"), once a popular open-source software vendor, was forced to change its name as there had been a "Mandrake the Magician" a comic figure before the Linux company has created. In Scotland, McDonald the international food chain-stores sued a Scottish café owner called McDonald. But that Scottish cafe owner have begun to run his business more than a century ago. How can we determine who the right to call itself the real "McDonald" in restaurant business. In addition, we shall observe that the trademark law has already provided a systematic way to protect the established trade-names being unfair treated or being abused for unauthorized used.
Paul Mok	Nil.
CLP Holdings Limited	No, we do not have further views on how the current company name registration system could be improved, particularly for the purpose of tackling the problem of shadow companies. The Consultation Paper has adequately covered this area.

The Chinese Manufacturers' Association of Hong Kong	本會亦認爲，有關機制應同樣適用於處長根據《公司條例》第 22(2)條要求名稱「過分相似」之公司改名的情況。
Chartered Institute of Management Accountants, Hong Kong Division	No further view is rendered.
The Chinese General Chamber of Commerce	就打擊"影子公司"問題上，請參閱本會在問題 1 的意見，其他方面暫無補充。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	No. We agree, for the reasons given in the consultation paper, that an adjudication system for dealing with disputes over entitlement to use particular company names would not be appropriate.
China Insurance Group Investment Holdings Co Ltd	There should be a section in the new Companies Ordinance to require The Companies Registry to have a complete list of special terms used in company names that either are prohibited or required to be duly approved in advance by a specified government department or other specified bodies. I have been told that the UK has such a list (Company and Business Names Regulations 1981). In 1999, I incorporated a company with the word "insurance" in its name, though the company did not do insurance business. About a week after I received the certificate of incorporation, I suddenly remembered that prior approval by the Insurance Authority was required to use "insurance" in a company name (s56A of Insurance Companies Ordinance, which, if my memory is correct, was passed in 1996). By that time, stationery bearing the company's name had been ordered and several contracts had been entered. After a sleepless night, I wrote a letter to the Insurance Authority to seek its approval.
CCIF CPA Limited	None.
Mayer Brown JSM	5. The proposal of giving a discretion to the Registrar to reject registration of a name which has previously been

	adjudicated by a court to be infringing is, in our view, a sensible one. *Our suggestions* 6. We, however, are of the opinion that the problem of shadow companies should preferably be dealt with at the administrative level, i.e. by the Registrar, rather than leaving the matter to the adjudication of the court and the subsequent enforcement by the Registrar. 7. From our experience, the Registrar interprets the "too like" criteria under Section 22 of the CO far too restrictively, even though it often turns out that the company name in question will subsequently be held to be infringing by a court. 8. This leaves the right owners essentially the only resort by bringing court proceedings. Court proceedings are expensive and time-consuming, especially when it is not infrequent that a right owner may have to sue a whole class of shadow companies which has adopted an infringing name. 9. It is far too common that those court proceedings would end up in default judgments in favour of the right owner with no or ineffective contest by the defendant shadow companies. In the end the right owner would have to resort to the court and/or the Registrar to enforce the default judgment. 10. The whole process goes a full circle and wastes resources of all the concerned parties which could be better spent elsewhere. 11. The Registrar's current proposal only addresses the enforcement part of the process. In our view, the problem can and should be dealt with at a much earlier stage. 12. By way of reference, we understand that the Trade Marks Registry has a current practice of conducting online searches to try to ascertain if an applied-for trade mark may be taken from another. While not suggesting that the Registrar should necessarily follow such practice, we propose that the Registrar should more robustly screen and deny attempts to pass off another's mark or name. The applicant may be allowed to appeal if the applied-for name is refused on such ground. 13. If however the Registrar is not inclined to implement a screening procedure at the registration stage, we would suggest the following changes which aim at empowering or encouraging the Registrar to act more pro-actively in handling a company name complaint on the "too like" ground: (A) Perfecting the "too like" criteria - by adding to Section 20(3) of the CO that in determining whether the names in question are "too like" each other, the Registrar can take into account whether the company name under

	complaint may contravene an earlier right in the name (in particular, by virtue of the laws of trade mark and passing off). This should not be controversial as the Registrar has already indicated in the "Company Names Guidelines 2007" that it will take account of all factors which may suggest confusing similarity between the names. By incorporating this into the CO, the relevance of trade mark/passing off considerations and the Registrar's power/duty to take that into account will be more clearly spelt out. Our proposal will not lead to a change of role or duplication of efforts between the Registrar and the court. Their roles will remain the same as under the existing practice, only that the Registrar will have a clearer set of criteria to work on. If a complainant is dissatisfied with the Registrar's decision, it can initiate court proceedings and/or apply for a judicial review as it has always been entitled to. (B) Further or alternatively, the Registrar should set out in its guidelines what a complainant is expected to adduce as evidence in order to succeed in a company name complaint on the "too like" ground. Under the current practice, it is not clear what sort of evidence is sufficient to invoke the Registrar's discretion to order a name change. We submit that the evidence required should not be more burdensome than that required of a plaintiff in a trade mark/passing off action based on the same facts. While naturally each case depends on its circumstances, in essence it should be sufficient to establish a case of complaint if a complainant can submit evidence showing: - prior rights in the name; - identity or similarity between the names; - likelihood of confusion between the names; - the company under complaint has no legitimate interests in/genuine use of the name, or - has been in bad faith in adopting or using the name. In assessing these criteria, the Registrar should take a purposive and pragmatic approach. A mechanical stance will not be reflective of the spirit behind the current legislative reform. 14. Under our proposal in Paragraph 13, the burden remains on the relevant right owner to monitor and take action against any potential infringing use of its name. Thus, our proposed changes will not create an undue burden on the Registrar's resources. Further, the evidential safeguard outlined above will minimise any abuse of the mechanism.

Hong Kong Chinese Enterprises Association (Submission C)	建議加強公司名稱審查機制，尤其爲與已在營運的公司名稱雷同者，需由申請人提供原公司、集團公司的同意函
The Law Society of Hong Kong	Please see the commentary in Question 2 (b) above: 8. The current limitation period of 12 months within which the Registrar may direct a company to change its name is too short. 8.1 We propose the time period be extended to say, 18 months, without causing the company too much inconvenience due to extended period of use of more than 18 months and before the company holds its first annual general meeting. 9. Section 291 of the CO gives the Registrar power to strike off the register a company that he has reasonable cause to believe is not carrying on business or in operation. 9.1 Whilst the section does not specify whether such business or operation should take place within Hong Kong, we consider that the intention of the legislature is that *at least part* of the business or operation has to be in Hong Kong because legislation is generally not intended to have extra-territorial effect unless expressly provided to be so. Further, it is obvious from section 291(1), (2) and (3) that the acts or steps expected to be taken by the Registrar to ascertain whether the company is carrying on business or in operation are to be carried out in Hong Kong and made known in Hong Kong. 9.2 It is almost impossible to make a worldwide investigation to find out whether a company carries on business or is in operation somewhere in the world. For this reason, we submit that if *prima facie* evidence that a company is not carrying on business or in operation in Hong Kong is submitted to the Registrar, this should be treated as "reasonable cause" for the Registrar to believe that the said company is not carrying on business or in operation and sufficient for the Registrar to invoke the procedure in section 291 (1). We further submit that the mere statement of objection to the striking off action, i.e. without any ground of the objection, or mere affirmation of business activities/ operation without any supporting evidence of the alleged business activities or operation, should not be sufficient to extinguish the Registrar's "reasonable cause" to believe that the said company is not carrying on business or in operation. The Registrar should require the company to produce evidence if its carrying on business or in operation, and provide such evidence to the complainant (i.e. the party submitting the prima facie evidence of no business or operation in Hong Kong) for comment within a reasonable time, before the Registrar makes a decision not to invoke the procedure in

	section 291(3).
Ho Tak Wing	It is suggested that Companies Registry should keep track of the Shadow companies and disclose the penalties imposed, in the website, with an aim to discouraging the public to make use of shadow companies any further.
KPMG	The proposals set out in 2.12 of the paper would appear appropriate responses to improve the system.
The Hong Kong Institute of Trade Mark Practitioners	Steps that the Government has adopted administratively as identified in paragraph 2.3 of the Consultation Paper are acknowledged and the HKITMP appreciates the efforts that the Government has made. We believe that the CR could consider being more flexible in the following ways: (a) reducing the CR's tolerance for late filing of documents following the initial incorporation of a company, or any late filing of a company's documents generally, in the circumstances of a complaint being made that the company is a "shadow company"; and (b) the CR could consider amending its Company Names Guidelines to extend the interpretation of "too like" to ignore indistinctive matter in circumstances where there is evidence of the company being used for counterfeiting activities.
Canadian Certified General Accountants Association of Hong Kong	The applicants should be required to declare that (i), to their best knowledge, the name is not a copy of an overseas company's name or an infringement of the trade name of others; (ii) they have no intention to carry out any passing off activities of other companies with similar names.
The British Chamber of Commerce in Hong Kong	Further training of persons operating in this area of the Companies Registry should be given. It often seems that no checking of names is made, except to an identical name match, by the Hong Kong registry. We realise it is difficult to monitor listed company names used throughout the world but some guidance and training may assist to stop basic errors occurring - such as the recent incorrect registration of companies with the word "insurance" in the title when in fact the companies were not actually authorised insurance companies.
Hong Kong Stockbrokers Association	N.A.
The Hong Kong Association of Banks	The Registrar should enhance its current process to ensure the accuracy of the particulars and basic information of a company (e.g. requiring the submission of documentary proof of the company's address, the identity and personal address of the directors and shareholders, etc.) at the time of incorporation since the information is important to third parties,

	notwithstanding that any subsequent changes may not be shown if the company does not initiate the update with the Companies Registry.
The Hong Kong Institute of Chartered Secretaries	No.
Hong Kong Institute of Certified Public Accountants	No specific views.
Tricor Services Limited	No further views, as the problem relating to "shadow companies" can be well taken care of if the Registrar is given the power as mentioned in Question 1(a) and Question 1(b) above.
Consumer Council	***Proposals under Paragraphs 2.9, 2.10 and 2.12 of the Consultation Paper*** 5. The Council supports the proposal of giving the Registrar a power to reject the registration of any company name which is the **same** as an infringing name that the Registrar has previously directed a company to change and is the subject matter of a court order. This could prevent similar infringing activities by the same or other applicants. 6. The Council also welcomes the proposed extension of the Registrar's power to change a company's name to its registration number to cases where the companies fail to comply with the Registrar's directions for change of name under S.22(2) of the Companies Ordinance. This will be a useful tool where the company in default has no real assets and the sole director is an overseas resident. 7. The new name approval system suggested in Paragraph 2.12 of the Consultation Paper causes great concerns on the Council's part. The Consultation Paper does not provide many details about the proposed new system. It is believed that the intention is to simplify and expedite the initial name approval procedures and to expand the circumstances under which a newly incorporated company may subsequently be asked to change its name e.g. on the ground that the name is offensive, likely to give the impression of a government connection or contrary to the public interest. Although the new system may reduce the time needed for incorporation of a new company, the increase in the number of grounds upon which the new company may be directed to change its name would probably lead to greater uncertainties and confusion to both the new companies and the public. Accordingly, the Council does not support this proposal.
Hutchison Whampoa	With Hong Kong as Asia's major financial centre, the Companies Registry must have a fully computerized system to effect

Limited	speedy searches (including detection of questionable company names) and all its other operational requirements.
Hong Kong Bar Association	**Question 3** 7. The Bar does not have any further input on this question.
The Chamber of Hong Kong Listed Companies	We have no further views.
The Society of Chinese Accountants and Auditors	In order to maintain the competitiveness of Hong Kong, any proposed system should satisfy the most important criteria, the present incorporation time cannot be prolonged. Therefore, we will not ask the Registrar to increase the extent of name check in order to screen out any suspected "shadow companies". Rather we suggest the Registrar to encourage the earlier involvements of the trade mark owners or other interested parties. Our proposal are as follows: 1. The Registrar creates a platform in their website in which the names of all new incorporation applications are published when they submit their applications and open for public to check until the company is legally incorporated; 2. Unless the Registrar accept the complaint and reject the proposed name within the normal incorporation time (of course the Registrar should have its own internal requirements before accepting a complaint), the incorporation should continue to proceed without delay; 3. The complaint party should go to the normal court procedures after the company is successfully incorporated. The above system is a prevention measure at the least resource from government. The success of the system is not laid on how many complaints actually received and accepted by the Registrar, it is the system that creates a feeling to the imitators that thousands of eyes are watching all the time. We believe that the better is the promotion of the system in the regions where complaints of "shadow companies" are mostly received; the better will be the prevention of the "shadow companies".
Association of Women Accountants (Hong Kong) Limited	recommend that a more detailed review be performed prior to approval of the names for incorporation so as to minimize the costs and disruption to businesses caused by the compulsory change of name after a certain period
Hong Kong General Chamber of	Our answer to Question 3 is: Please see above.

Commerce	
Companies Registry and Intellectual Property Practitioners Liaison Committee	***Extracted from the Notes of Fourth Meeting held on 3 June 2008*** Discussion on the Consultation Paper in respect of Company Names 2. The Chairperson invited Mr Leung to give a Powerpoint presentation regarding the consultation on company names issue. Members then raised questions on the following issues. (1) When is an intended name considered the same as an infringing name? 3. Mr Birt said that, according to paragraph 2.9 in Chapter 2 of the Consultation Paper, the Registrar of Companies ("the Registrar') would be granted with a power to reject registration of any company name which was the same as an infringing name which the Registrar had previously directed a company to change and was the subject matter of a court order. He asked how the "company name" which was the same as an infringing name would be interpreted. The Chairperson said that the whole company name would be compared with the whole infringing name. 4. Ms Koo said that the court order would normally provide a broader restriction on the use of the infringing name. She considered that interpretation of the term "the same as" should not be rigid. Ms Chua also considered that the scope of the court order is generally broad enough to prevent the same defendant from using another name which was very similar to the infringing name and "the same as" should give effect to the terms of the Court order. The Chairperson said that she was inclined to agree that rejection of the registration of a company name would depend on the wording of the court order. She envisaged that if the terms of the court order were broad enough, the Registry should act pursuant to the court order. 5. The Chairperson confirmed that the proposed restriction on the use of an infringing name would apply to anyone and not just the defendant. Ms Kennedy asked whether a name which was the same as the infringing name would be allowed if it was submitted by the original complainant. Mr Leung said that, in such a case, the Registrar would consider the application on a case-by-case basis. 6. Ms Mo considered that if the company which applied for the use of an infringing name carried on a business which was very different from the complainant's, it might be possible to allow the company to use the name. However, Ms

	Kennedy thought that the permission to use the infringing name would suggest that the complainant would have diversified business interests. The Chairperson pointed out that Ms Kennedy's concern was a trademark issue, which was outside the ambit of the Companies Ordinance. (2) Extent of the Registrar's power to change a company name 7. Mr Birt asked what action the CR would take to deal with a company under the proposed company name system, if the company was the subject of striking off action or had been ordered by the court to change its name but had failed to comply with the order. The Chairperson replied that a simple system of changing the company name to a company number would be adopted. Mr Leung added that the power to change the company name would be extended to cases in which a direction to change the company name had been issued by the Registrar but the company had failed to comply with the direction. In such a case, no court order would be required. The Chairperson said that this additional power would be considered in the public consultation exercise. (3) When the CR would reject a company name which is the same as an infringing name 8. The Chairperson informed members that the number of working days taken to incorporate a company had been reduced from 6 working days to 4 since the beginning of this year. She said that last year, the World Bank had commented that starting business in Hong Kong was lengthy and costly. The ranking of Hong Kong in starting business in the World Bank's "Doing Business" Report had dropped from the sixth to the thirteenth position. As a result of the criticism, the Registry had reviewed and streamlined its incorporation procedure. Owing to the streamlining, the performance pledge had improved. Nevertheless, she pointed out that the Registry had to strike a balance between the speedy incorporation of companies and problems caused by shadow companies. 9. Mr Birt asked whether the CR would focus on speeding up the incorporation procedure and would only consider the company name after incorporation of the company if the company's name was the same as an infringing name. The Chairperson said that, if the intended name was identical to the infringing name, the application would be screened out by the computer system and rejected. Other names would be accepted for registration, and if they were subsequently found to be "too like" an existing name, a direction to change the name would be issued. Mr Fong added that under the current practice, the company would normally be required to change its name within six weeks from the date of the direction.

	(4) Discussion on the name adjudication system 10. The Chairperson said that the CR had carried out research on the adjudication systems in the United Kingdom ("UK") and Hong Kong. It was noted that the company registration systems of the two jurisdictions were very different. The cost of setting up a name adjudication system in Hong Kong similar to the adjudication system recently set up under section 69 of the UK Companies Act 2006 would be very high. Moreover, the Registry had adopted an interpretation of the "too like" threshold with a view to placing more emphasis on the possibility of confusion. The Chairperson pointed out that the introduction of a name adjudication system similar to the UK system would require legislative amendment and the appointment of independent adjudicators. In view of the importance of company registration, it was likely that the Legislative Council would have reservations about introducing such a system. Ms Mo added that the name adjudication system of the United Kingdom was also the subject of criticism. If there was an appeal to the court after a decision had been made by an adjudicator, it was apparent that the relevant order by the adjudicator to change the company name would be suspended and until the appeal process was completed, the respondent would be able to continue using the name that was previously the subject of the order. Research showed that the proceedings under the UK's new adjudication system were likely to be very similar to court proceedings and it was thus unlikely that a company name adjudication system would be less costly and less complicated. 11. Ms Koo said that an appeal to the court by a defendant after a decision had been reached by an adjudicator was not a reason for not considering the introduction of an adjudication system. She explained that the IP Members had proposed the name adjudication system because the company name problem was very similar to the domain name problem and their experience with the domain name arbitration system was that such a system was not costly. 12. Ms Kennedy suggested making suitable amendments to the Companies Ordinance so that if there was a challenge to a company name, the CR could be empowered to refer the complaint to the Hong Kong International Arbitration Centre for a decision. The Chairperson said that if the IP Practitioners had any concrete framework to propose, the Government would be prepared to consider the issue further. IP Practitioners were invited to send in their views in writing. Mr Leung said that a statutory procedure was already in existence to cater for "too like" names. He was of the view that the Legislative Council would be unlikely to allow a private body to intervene in such an issue and considered that the UK adjudication system was aimed at tackling the unlawful use of registered trade marks owned by others, noting that the adjudicators under the UK system were trade mark practitioners. He thought that the UK adjudication system was intended to deal with problems which were different from the problems that Hong Kong was

	facing, i.e. the problem of shadow companies. As the Standing Committee on Company Law Reform ("SCCLR") considered that there would be a duplication of systems if such an adjudication system were to be established, the SCCLR had recommended not to pursue the idea for the time being. However, the IP Members considered that the situations in the UK and Hong Kong were not too different. 13. Ms Chua said that, in view of the foreseeable low percentage of response from defendant companies if an adjudication system were to be established, she thought that there would not be many cases which would end up on appeal. Ms Chua considered that the adjudication system could provide an additional avenue for dealing with shadow companies and was worth considering. 14. The Chairperson said that the establishment of an adjudication system would involve a major change in the present system for dealing with company names. Discussion with all stakeholders, such as the Intellectual Property Department and the Judiciary, would be required and it would take a long time to reach a decision. Therefore, for the time being, it would be more effective to consider tightening up existing enforcement measures. The Chairperson informed members that the CR's policy on the consideration of whether two names were "too like" had been modified. When the CR was now considering whether a company name was "too like" another, it would focus on the possible confusion in respect of the identities of the two companies which was likely to arise. The Chairperson therefore considered that, for the time being, it would be more effective to consider tightening up existing enforcement measures. Interpretation of section 22A 15. Ms Silkstone said that, so far, there was no case under section 22A of the Companies Ordinance which had been successful and only one in the UK under the corresponding provision of the UK Companies Act. With regard to the interpretation of section 22A, the advice of the Department of Justice had been sought, which had affirmed the CR's view that, before a direction under section 22A could be issued, both limbs of the section needed to be satisfied. She pointed out that, in cases involving shadow companies, it was difficult to prove that the harm was substantial and that the harm to the public had arisen as the term "public" would refer to the public at large and not just a section of the public. Comparison of two company names

	16. Ms Lo asked whether the CR would consider two names to be "too like" if they were differentiated by non-distinctive words such as "International", "Asia" etc. The Chairperson replied that the Company Names Guidelines had clearly stated that the presence of a weak qualifier would not be considered sufficient to distinguish the names. However, she pointed out that if there were a range of non-distinctive words in the company name, the situation would be more complicated and they had to consider it on a case by case basis. 17. The Chairperson also said that the complainants were encouraged to produce evidence of confusion for consideration. Striking off action 18. The Chairperson reported that the CR was prepared to consider to evidential requirement for striking off a shadow company flexibly. Mr Fong said that as the CR must be satisfied that the company in question was defunct, it would be helpful if the complainant could produce evidence showing that the company was defunct. Ms Chua said that she had one case which had been pending striking off for two years by reason of an objection from the Inland Revenue Department (IRD). The Chairperson replied that apparently the IRD had taken enforcement action against the company as it had some outstanding tax. Mr Fong added that, if the CR received an objection to a striking off action, they would suspend the action. Moreover, in some cases, the objection was raised by the company itself on the ground that it was still carrying on business. Ms Kennedy said that she had several cases in which striking off action had been subsequently suspended because the companies had filed annual returns. They, therefore, had no other alternative but to sue the companies. Ms Kennedy said that, although it was not difficult to bring a case to court, the concern was the expense involved. That was why the IP Members proposed an adjudication system similar to the domain name adjudication system. Apart from the lower costs involved, the domain name adjudication system was much faster in handling a case. Ms Kennedy said that the system only took about 40 to 60 days to reach a decision. 19. Ms Chua asked whether the CR would withdraw striking off action upon the submission of a mere statement of objection, i.e. without any ground of the objection, by a secretarial company. The Chairperson said that, as there must be reasonable cause for the Registrar to believe that the company was not carrying on business or in operation before the striking off action was taken, it would be difficult to establish such reasonable cause if such a statement had been submitted. However, if only a mere statement was given, the CR would consider asking the presentor for reasons of the objection and for evidence of "business" or "operation" of the company.

Question 4

(a) Do you agree that the general duties of directors should be codified in the Companies Bill? **(b) If your answer to Question (a) is in the affirmative, do you agree that the UK approach, including the duty to promote the success of the company for the benefit of its members as a whole having regard to such factors like the long-term consequences of a decision, the interests of employees, the impact of the company's operations on the community and the environment, etc., should be adopted? <u>OR</u>** **(c) If your answer to Question (a) is in the negative, do you have any views on how the directors' duties could be clarified or made more accessible?**	
Gordon Jones	(a) Directors' duties exist in many different forms and there is, in fact, a hierarchy of directors' duties. In the first place, the individual director has his own contract with his company. Secondly, the directors of an individual company's board are bound by the company's articles of association. Thirdly, there are common requirements for all directors in the statute law, in particular the requirements regarding the preparation of accounts and directors' loans, stock exchanges' listing rules (if the company is a listed company) and the common law fiduciary duties and duty of care and skill. However, whenever the question of codification of directors' duties is considered, it is considered only in the context of codifying the common law fiduciary duties and duty of care and skill. Given this, it is important to appreciate, as noted in paragraph 3.8 of the Paper, that 'codification' will only cover a certain area of directors' duties and there are very important directors' duties in the statute law and listing rules (where applicable) not to mention a company's articles of association and an individual director's contract with his company which, by definition, will not and cannot be subject to such codification. Having regard to this multi-layered and complex background, a primary, if not overriding, factor when considering the codification of the common law directors' duties is that such codification should not add a further layer of duties and increase the complexity of what is already a very complex and controversial area. As regards the merits of codification, the principal justification must be to make the duties clearer and more accessible. In this respect, while it could be argued that the existence of non-statutory guidelines, such as those promulgated by the CR, also has the effect of making the key directors' duties clearer and more accessible, such guidelines will, by definition, never have quite the same status and persuasiveness as duties codified in the statute law. This will be particularly important when cases involving alleged breaches of directors' duties come to court as the court will inevitably place more emphasis on the statute law than non-statutory guidelines. Furthermore, as the case law on what constitute the key directors' duties, such as those set out in sections 173 to 177 of the UK Companies Act 2006, has been settled for a considerable time, I do not

		see any problem with codifying these well-established principles. It should also be noted that the codification of certain directors' duties does not prevent the courts from developing additional directors' duties as part of the normal development of case law. However, if such duties were to be codified, it is also important that they replace the existing common law duties if confusion and the creation of a further layer of duties are to be avoided. Consequently, I would support the adoption of the UK approach in the Companies Act 2006 under which the new statutory duties replace the common law rules and equitable principles from which they are derived because, if this is not done, what is the point of codifying the law in the first place? Equally, given that the duties encapsulate basic broad principles of conduct which have to be applied by the courts to the facts of every given case, it is very important that the courts have the ability to interpret and develop the duties in the same way as they interpret and develop the common law rules which are to be replaced.
	(b)	In the event that directors' duties were codified, I would, however, not support the creation of a new duty for directors to promote the success of the company for the benefit of its members as a whole. In the first place, the inclusion of this particular duty in section 172 of the Companies Act 2006 was driven by the 'New Labour' agenda of making companies more socially responsible. However, in the final analysis, what does 'enlightened shareholder' value really mean? Furthermore, the list of parties and interests to which directors should have regard e.g. employees, suppliers, customers, the community, the environment etc. is so long and diffuse that it is impossible to see how a director can have equal regard to all these interests. For example, it may be that, in order to take one set of interests into account e.g. suppliers, it will be necessary to give less emphasis to another set of interests e.g. customers, and vice-versa. In that situation, would the customers or suppliers be able to sue the directors of a particular company under the new provision? In the final analysis, if a director has to have regard to a whole spectrum of what may be frequently conflicting interests, a situation will be created where the director is accountable to no-one which would, of course, be totally unacceptable. Directors simply cannot be accountable to everyone without the concept of accountability being diluted to such an extent that it completely loses its meaning. Rather, the basic principle should be that directors are accountable to their shareholders but have to take account of other interests. It is, in fact, good business sense for the directors of a company to have regard to their stakeholders such as suppliers and customers, the community within which they operate and the environment i.e. corporate social responsibility ('CSR'). Much of the reality of CSR is that it is plain risk management which involves limiting the damage to a company's brand and bottom line that can be inflicted by a bad press and consumer boycotts as well as dealing with the threat of legal action. One way of looking at CSR is that it is part of what businesses need to do to keep up with or

	possibly exceed society's fast changing expectations. It involves taking care of a company's reputation, managing its risks and gaining a competitive edge which is what good directors and managers should be doing in any case. Doing it well may simply involve a clearer focus and greater effort than in the past because information spreads much more quickly and companies feel the heat. Heightened societal and public expectations coupled with robust press reporting all have very important roles to play in this process. In the final analysis, paying attention to CSR is equivalent to enlightened corporate self-interest, something that will, over time, help to sustain profits for shareholders. The truly responsible business never loses sight of the commercial imperative as it is precisely by staying in business and providing products and services which people want that companies do the most good. If ignoring CSR is risky, ignoring what makes business sense is a certain route to corporate failure. In view of the above, I believe that CSR will happen in Hong Kong because it makes good business sense. As such, it will and should be largely market-driven although the Government can help (as it is doing) by the proposed statutory reporting requirements e.g. the proposed business review which will require companies above a certain size to report on stakeholder and environmental issues, while HKEx can make appropriate provision in the Listing Rules for listed companies. However, it will not happen just because the Companies Ordinance has been amended to include a provision regarding 'enlightened shareholder value'. Quite apart from creating the confusion outlined above, it will in all probability deter people from coming forward to offer their services as independent non-executive directors because of the potential litigation which they may have to face under such a provision. Given the alleged shortage/unwillingness of suitable good quality candidates willing to come forward to fill the posts of INEDs in companies, this is something which Hong Kong can ill afford if it wishes to enhance the overall standard of corporate governance in the SAR. Personally, I believe that the new UK provision will create a mine field for directors and a gold mine for corporate lawyers without achieving anything substantial in terms of enhancing CSR. As such, the introduction of such a provision into Hong Kong's company law must be resisted at all costs.
Arthur Lam & Co. CPA	(a) We agree. (b) We do not agree "the UK approach" is appropriate to the Hong Kong companies' circumstances. We think the "code" shall initially as simple as possible. Making pledge with "success", commitment to the "community" and "environment" may be too much for a small and medium-sized companies. We shall observe that UK and Hong Kong have different cultures. UK, a country with strong Christianity influence, may have a more merciful business culture.

	Would the legal responsible to promote the "success" of the company to be interpreted as an excuse for the directors to squeeze the grass-root workers and to make "barely-pass" quality products and services. It may be vague to state a company's duty to the community and the environment. (c) Not Applicable.
Arthur K. H. Chan & Co.	(a) Yes (b) No
Paul Mok	(a) Yes, I support codification that can improve clarity and certainty for company management and members. (b) I do not agree with the UK approach for the following reasons: 1. The duty to promote the success of the company is not well defined. It is not clear how different the new duty is to the previous duty to act in good faith in the best interests of the company, on which there is a wealth of case law. The then Attorney-General in the UK, Lord Goldsmith, had said that for commercial companies, success would normally mean "long-term increase in value". Still, the concept surrounding the duty to promote the success of the company is too vague. 2. It is not clear how far the previous case law under the old common law fiduciary duty to act in the best interests of the company can be applied to the construction of the new duties. The judiciary will inevitably be posed with a challenge of how to apply the existing case law to new statutory duties which are similar, but not identical, to the previous duties as set out in the case law. 3. The UK approach will entail the application of the seven general duties to all UK-incorporated companies. If the UK approach is adopted in Hong Kong, the directors of all Hong Kong companies, big and small, public and private, listed and unlisted, will have to comply with the seven general duties. This will impose a disproportionate burden on the directors of the vast majority of Hong Kong companies, i.e. small, private companies, especially when they have to discharge their duty to promote the success of the company by considering the six factors as listed out in S172(1) of the CA 2006. This is not something the small companies' directors are geared up to do, unlike some of the big listed companies which may have already taken such considerations into account in their decision making. Smaller companies, lacking in resources, will find it difficult to put in place the procedures to demonstrate compliance with the change in directors' duties. 4. Codifying directors' duties to the level of details as in the UK will lead to increased bureaucracy in all companies to order to demonstrate compliance, resulting in more box-ticking in the preparation of board

	minutes. Companies will have to establish a paper trail in the form of board minutes to evidence in detail that all relevant factors have been taken into account in decision making so as for the directors' to discharge their duty to promote the success of the companies. 5. The UK approach of codifying directors' duties in a detailed, rule-based manner will provide a convenient stage for shareholder activist groups to be unreasonably obstructive. It will pave the way for shareholder activist groups to buy one share of a listed company and then take a director to court for perhaps not having due regard to the environment or the community. 6. The UK approach imposes on directors an explicit obligation to consider six factors when discharging their duty to promote the success of the company. There is no guidance on how any conflict between the six factors is to be resolved or what weight should attach to them. Such detailed codification may result in each factor becoming an absolute obligation in its own right rather than simply being a matter to be considered in the decision making process of the board of directors. In particular, the non-exhaustive list of "other stakeholders" under the duty to promote the success of the company will introduce an unnecessary and untested complexity to the implementation and interpretation of the new duties. (c) N/A.
CLP Holdings Limited	(a) We do not agree that the general duties of directors should be codified in the Companies Bill. In fact we strongly disagree with this proposition. As noted in paragraph 3.8 of the Consultation Paper, the statutory duties do not cover all the duties that a director may owe to the company. Many duties are imposed elsewhere in the legislation as well as the Listing Rules, not to mention the Company's Articles of Association and individual director's contract with his company. A broad statement of principles will not assist directors to clearly identify the extent of their duties, nor would it help directors to determine how they should behave in any given set of circumstances. If directors' duties are partially codified, a director might be confused to discover that he was subject to other duties not set out in the statutory statement. If however directors' duties are stated in general terms, the statute may have to be interpreted by the courts. As a result, the law may be less accessible than it is at present. It should also be noted that fiduciary duties cannot be codified without being stated in detailed terms, in which case there will be a loss of flexibility. (b) Notwithstanding our answer to 4(a) above, in the event that directors' duties were codified, we do not agree that the UK approach should be adopted. We firmly oppose the creation of a new duty for directors to promote the success of the company for the benefit of its members as a whole. The new requirement for directors to take account various

	new factors relating to corporate social responsibility when making decisions will make it more difficult for directors to manage the affairs of their companies. The UK model attempts to modernise the law by introducing the principle of "enlightened shareholder value" under the duty to promote the success of the company. It was however not clear what does "enlightened shareholder value" really mean. The list of parties to which directors should have regard such as employees, suppliers, customers, community, environment etc. is unlimited and their interests are so differing that it is impossible to see how a director can have equal regard to all these parties and their interests. In short the proposed application of the principle of "enlightened shareholder value" rests on at least three fundamental misconception: (1) That there is some duty on directors to do something other than deliver financial returns to shareholders through the efficient conduct of their business in accordance with the laws and regulations laid down by governments which represent societies – there is not. (2) That the notion of enlightened shareholder value is capable of definition and application – it is not. (3) That the notion of enlightened shareholder value is constant and shared by all shareholders (and other stakeholders) – it is not. We believe it is more appropriate to maintain the basic principle that directors are accountable to their shareholders but have to take account of other interests. (c) Continued education of directors on their duties and promotion of the Non-statutory Guidelines on Directors' Duties in Hong Kong would help to clarify directors' duties and made them more accessible.
香港工會聯合會權益委員會	**董事職責** 在「董事職責」方面，權委贊成把董事的一般職責以成文法則納入《公司條例草案》。而權委建議政府採用澳洲或新加坡的做法，即是將法定職責及現有的普通法規和衡平法原則並行。訂立成文法使董事職責更易於理解及清晰化，亦可透過案例闡明法則。同時，成文法可納入企業社會責任的原則，使董事行爲有一套標準進行監察。 另一方面，權委建議跟隨英國的做法，引入「開明股東價值」的原則，要求董事促進公司成功經營時，必須顧及各種與「企業社會責任」有關的因素。權委認爲，當局必須指明「企業社會責任」有關「公司僱員的利益」，包括：

	• 基於社會公義，所有賺錢的企業，都應該增加工人的工資； • 支付最低工資，設立標準工時； • 應對員工及其家庭生活加以關懷，如推行五天工作制、彈性上班時間、男性侍產假等； • 主動投入資源，聘請足夠人手，爲員工提供支援服務； • 提供安全健康的工作環境及設備； • 加強勞資雙方理性的溝通，建立和諧的關係等。
Chartered Institute of Management Accountants, Hong Kong Division	(a) Yes, we agree that general duties of directors should be codified in the Companies Bill. (b) It is our view that the UK approach, especially the inclusion of corporate social responsibilities, is relevant and should be adopted. However, we think that there should be clarifications with respect to "duty to promote the success of the company" in specifying certain items, such as "long-term" and "impact of the company's operations on the community and environment", in order to ensure clear understanding. (c) No further answer is necessary.
The Chinese General Chamber of Commerce	(a) 無論以判例或成文法則規管一般董事職責，其約束力基本上是相同的，惟後者的好處是令董事職責有更清晰明確的界定，更符合公眾利益：例如讓中小企業老闆和管理層更容易理解有關的董事職責，或對於將來逐步發展董事責任保險等均有明顯幫助。因此，本會贊同把董事的一般職責以成文法則納入《公司條例草案》。 (b) 本會同意採用英國的做法，引入英國對一般董事職責的法定陳述，使之更爲清晰明確。
Hong Kong Investment Funds Association	"On the issue of whether Director's duties should be codified (i.e. listed in the Ordinance instead of relying on common/case law and precedent), we believe that care would need to be taken to ensure the rules do not add to what we would submit are already onerous obligations of directors of Hong Kong companies under common law. If HK were to adopt the UK approach to include the duty to promote the success of the company (i.e. duty requiring a director to act in a way which (s)he considers in good faith, would be most likely to promote the success of the company for the benefit of members as a whole having regard to such factors like the long-term consequences of a decision, the interest of the employees, the impact of the company's operations on the community and the environment etc.) then this could be more onerous than the current case law position applying in Hong Kong and may make directors' duties extremely difficult to properly discharge."

Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) No. We do not agree that the law relating to directors' duties lacks clarity (in the sense of being confused or unclear), although, being largely derived from case law, it may be inaccessible and misunderstood. Inaccessibility and misunderstanding are best countered by non-statutory guidelines and explanatory notes, which can be amended as the courts continue to develop the relevant law, and by education. Codification will achieve little if the codified statements are very general (since the courts will in practice continue to have to interpret the statements in the same way as they now interpret the legal principles derived from case law). If the codified statements are very detailed, this will reduce flexibility, since the codified statements will only be amendable by legislation, whereas the present case based law can be adjusted by the courts in the light of changing circumstances. (b) If, notwithstanding our response in (a), it is decided to codify the law, we do not agree that the UK approach should be adopted. We consider that directors will not, notwithstanding the apparent continued primacy of the interests of the members, have a clear basis for reaching decisions when the interests of other identified groups are prima facie in conflict with those of the members or indeed where the interests of one identified group (employees for example) are in conflict with those of another identified group (the community as a whole for example). The legislature should reconcile differing interests within the community, not boards of directors. (c) We do not agree that directors' duties need clarification, since they are not unclear. Accessibility is best dealt with by continued promotion of non-statutory guidelines and by education. The existing efforts to promote non-statutory guidelines referred to in note 29 to the consultation paper are commendable and should be strengthened.
CCIF CPA Limited	(a) No, as the codification is limited to the "general" nature of the directors' duties. This may inevitably require expert opinion to interpret the exact applications to the specific cases and hence defeat the purpose that the law is made clearer. (b) Not applicable. (c) Yes, we recommend the professionalism of directorship. For example, directors are required to attend training courses unless they have already been familiar with their duties under the company law.
Cally Jordan	11. The first observation here would be not to refer to a statutory statement of directors duties as a "codification", which may imply a somewhat alien approach to the nature, scope or application of directors duties. There is a lot of confusion as to what "codification" actually entails, especially in a common law jurisdiction. "A statutory statement of directors duties", as appears on page 17 of Consultation Paper 2 with reference to the Companies Act 2006 (UK), would be a more accurate, and more neutral, phrase.

	12. I would strongly endorse the UK approach to a statutory statement of directors' duties, without necessarily endorsing entirely the specific content of the statutory statement as found in the Companies Act 2006 (UK). The UK, like Hong Kong, has wrestled with this issue for a very long time. The UK has now made the choice, long accepted elsewhere in a number of common law jurisdictions, after considerable reflection and consideration. There is a good deal of experience, by the judiciary, practitioners and business people in common law jurisdictions with statutory statements of directors' duties and no need to fear untoward consequences. 13. That being said, it should be noted that the state of Delaware, the preeminent jurisdiction for incorporation of large, listed corporations in the United States, does not have a statutory statement of directors' duties. The judiciary in Delaware has retained the prerogative of determining the sometimes changing boundaries of directors' duties. But Delaware is highly exceptional. It has a specialised, sophisticated judiciary devoted almost exclusively to corporate and commercial law matters involving large, publicly traded corporations. In addition, the highly litigious environment in the United States means that issues get publicly considered by the judiciary and resolved on a regular basis. 14. Secondly, care should be taken with the Australian model of a statutory statement of directors' duties. The Australian approach is highly unsatisfactory, representing as it does a compromise position adopted in the face of the same debates as have occurred in the UK and Hong Kong. The statutory directors' duties in the Australian CA 2001 have been interpreted as giving rise only to civil, and sometimes criminal, penalty provisions enforceable at the behest of the regulator (note there is some nuance in this). All of the common law, the general law, continues unaffected. (See "Unlovely and Unloved", above, for a discussion of this issue). 15. This bifurcation of directors' duties in Australia, as between the statutory duties and the general law, has added to the complexity of determinations, without bringing the clarity and benefits otherwise associated with a statutory statement of directors' duties. The courts in Australia have rather pragmatically stated that the content of the statutory duty and the duty at general law is the same (when on its face, it is demonstrably different), in an effort to preclude a divergence in standards. 16. As to the content of the UK statutory statement of directors' duties, Hong Kong should consider the extent to which it wishes to require consideration of what is now sometimes referred to as "corporate social responsibility" or "corporate responsibility" issues by directors. The European view of the role of the corporation in society, its responsibilities and privileges, are somewhat different from that traditionally associated with the Anglo-American company. Here is an area where the UK has likely been influenced by these European debates as well as by so-called "constituency statutes" in the United States. 17. Constituency statutes in the US have sometimes been confused with corporate social responsibility *per se*.

	Constituency statutes appeared in state legislation in the United States as a means of permitting directors to engage in anti-takeover tactics in the face of a hostile out-of-state bidder, without being considered to be in breach of their duty to maximise shareholder value. They are protectionist measures cloaked in the language of corporate social responsibility. They are also permissive, management friendly and not mandatory. 18. Hong Kong might consider broadening the strictness of the principles laid down in the old common law cases (such as *Parke v. The Daily News*) without necessarily adopting a mandatory list of factors such as now appears to be the case in the UK. 19. One further deviation from the content of the Companies Act 2006 (UK) in this area might be dropping the "proper purpose" element of the duty. This also appears in the Australian statutory statement of directors duties but not in the Canadian (which followed the advice of Professor Gower in his Ghana Code and eliminated the concept). The "proper purpose" doctrine is intimately tied to the *ultra vires* doctrine, and a great deal of legislative effort has gone into eliminating the latter in the interests of commercial certainty. The continued survival of the proper purpose doctrine requires judicial consideration and weighing of directors' motives, a difficult endeavour at the best of times. The proper purpose doctrine developed as an early shareholder protection mechanism, was adapted to use in the takeover context. But has now largely been overtaken by alternative remedies and procedures for the protection of shareholders. Courts may still exercise their equitable jurisdiction without becoming entangled in the intricacies of the proper purpose doctrine. 20. It is also true, as noted in Consultation Paper 2, that these statutory directors' duties do not cover all the duties that a director may be under. But most of the other statutory duties incumbent on directors are not directors' duties in the traditional sense, ie they are not duties owed to the "company", but rather are part of the regulatory framework imposed on companies themselves by virtue of their activities in the larger society. 21. One further substantive directors' duty (in the traditional sense) might be considered. That is the duty to be informed. This is somewhat different from the UK duty to exercise independent judgment (s. 173 Companies Act 2006 (UK)), which arises from trust law principles. The duty to be informed is one aspect of the duty of care and its origins are usually attributed to the 1985 Delaware case of *Smith v. Van Gorkom*. This case is considered to be one of the landmark corporate law cases of the 20th C. 22. In conclusion, I strongly endorse the UK approach to a statutory statement of directors' duties, but would suggest tailoring the content of the duties.
Hong Kong	We are of the view that some general description of the duties is desirable. However, we would caution against the UK

Trustees' Association Ltd	approach of including "the duty to promote the success of the company for the benefit of its members as a whole……" as being too much of a mission statement rather than making any concrete recommendations.
Hong Kong Chinese Enterprises Association (Submission A)	(a) Yes (b) Yes
Hong Kong Chinese Enterprises Association (Submission B)	(a) 不贊成 (c) 我的意見是：參照以前的條例制作相應的守則作指引
Hong Kong Chinese Enterprises Association (Submission C)	(a) 贊成 (b) 原則上同意
Hermes Equity Ownership Services Limited	(a) Yes, we agree that directors' general duties should be codified in the statute in Hong Kong because we believe that codification would improve clarity, certainty and accessibility for company management and members. (b) Yes, we agree that the UK approach should be adopted in the Companies Bill. The United Kingdom Companies Act 2006 attempts to modernise the law by introducing the principle of "enlightened shareholder value" under the duty to promote the success of the company. This perspective fits very well with Hermes' views on the role of companies in this regard, namely that they will only succeed in creating long-term shareholder value if they manage effectively relationships with their employees, suppliers and customers and with others who have a legitimate interest in the company's activities. Companies should behave ethically and have regard to the environment and society as a whole.
The Law Society of Hong Kong	(a) No. Fiduciary duties which encompass all the common law developments cannot be codified unless written in great detail. This will result in a loss of flexibility as the expectations of directors' responsibilities are constantly evolving especially as corporate governance develops. A codification which summarises only the broad principles as in the UK is inadequate unless such codification co-exists with common law, and this will create new uncertainties. (b) Not applicable. (c) The approach of publishing and revising non-statutory guidelines from time to time by the Companies Registry should

	be maintained. Directors to take initiatives in gaining an understanding of the common law duties.
Szeto Ho Kwong	<u>From the 2nd submission</u> a co. domiciled in HK should at least have one director without foreign passport <u>From the 4th submission</u> all executive directors should receive formal political education, declare any political affiliation, and abide by the Basic Law and submit annual returns of any political donations <u>From the 8th submission</u> annual CPD training program for 2nd generation bastar (salaried) directors - who get their shares f their fathers, or trust
The Chinese Manufacturers' Association of Hong Kong	本會認爲，本港無需將一般董事職責以成文法則納入《公司條例草案》。香港的一般董事職責主要源於判例；這種做法奉行多年並且行之有效，目前並無改弦更張的必要性和迫切性。另一方面，即使採用法定職責來代替相關的普通法規則，其立法的根源和詮釋方法仍然必須以普通法規則和衡平法原則爲依歸;故此，將董事職責編纂爲成文法則並無太大的實質意義。 至於是否在董事需促進公司成功經營的職責之下加入更廣泛的因素，例如僱員，供應商和客戶的利益、以及公司運作對環境的影響等，本會認爲本港不宜參照英國的做法而將董事責任擴大化。事實上，目前已有專門的法例對企業在僱傭關係、環境保護等方面的責任和行爲作出詳細的規定，故在董事職責中引入這些因素恐會導致重複甚至過度規管。另一方面，擴大董事職責更可能會抑制企業特別是中小企業營商的靈活性，引發新的不明確情況。
The Institute of Accountants in Management	On the question of codification of the duties of directors, we are of the view that no matter how the duties are codified in the statute, it is within the court's power to interpret the codes, which would be part of our statute, in case of disputes or litigations. Codification of the duties of the directors will not reduce litigations on the observance of the duties by the directors. Nor will the codification of the duties further clarify the scope and nature of the duties because interpretation of the codes by court will bring further meanings on those duties. Therefore, we are of the view that it is not necessary to codify the duties of the directors in the statute.
The Chamber of Hong Kong Listed Companies	a) The general duties of directors, as they now stand, are based on equitable principles that are developed from the common law, the beauty of which is that they are flexible and are able to change and update themselves in line with market expectation. If such duties are to be codified, they will become rigid and restrictive. Given that the current regime is working well, and is fully understood by all directors and the market, we therefore prefer maintaining the

	status quo. b) Although our view to question 4a is not in the affirmative, we would still want to comment on question 4b whose contents are akin to requiring companies to adopt good Corporate Social Responsibility (CSR) practices. While as a Chamber we support CSR and have been advocating our members to observe CSR principles in their business, we believe CSR is an evolving concept and its substances might change over time and tend to become more complex. Therefore it is hard to spell it out in a clear and exhaustive manner in codified languages. It is to our view that promoting CSR spirit and behaviour is best left to education.
The Association of Chartered Certified Accountants	ACCA Hong Kong concurs that codifying directors' duties in legislation provides a clear guidance to directors themselves, in particular for companies of smaller scale. We also, in principle, support the attempt to widen the scope of directors' responsibilities so as to require them to take account of an expanded conception of corporate social responsibility. However, we are of the concern that "the duty to promote the success of the company for the benefit of its members as a whole having regard to such factors like the long-term consequences of a decision, the interests of employees, the impact of the company's operations on the community and the environment, etc" could potentially lead to considerable legal argument as in the way it is drafted. There is no definition of the phrase "have regard to" which makes it unclear as to what directors are expected to do in relation to each of the specified factors. There are no definitions for "the community" or "the environment". In addition, the list of factors which they "must have regard to" is inexhaustive. All these ambiguities are inconsistent with the stated aim of achieving greater clarity and understandability. ACCA Hong Kong recommends that to make the law practical, in drafting the legislation, the following could be further considered. • All directors should be required to act in good faith and in what they consider to be the best interests of their company. • Their decisions as to whether matters are in the best interest of their company could be subject to the requirement for directors to act in accordance with due diligence and skill and care. • Wordings of this particular provision should be more specific so as to ensure that the legislation is clear and concise. In considering the best interests of the company, directors could be expected to have considered, in particular, the implications for those interests of "the impact of the company's operations on the natural environment", "the company's standards of business conduct", "the company's relationship with its employees, suppliers and customers", and "the rights of the company's members and creditors". These could be considered in the drafting of the provision.

	We also consider that practice notes and guidelines could be released to help the interpretation and a better understanding of directors' duties.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes, but the codification must be based on those well-established common law rules. (b) Even though we agree to codify the general rule in (a), we have reservations on this specific "rule" as the proposed amendments still rely on the common law rules to interpret. Most of the concepts are difficult, if not impossible, to codify. "Good faith", "reasonable care", "success" and "benefit" need the court to interpret. Codifying these concepts would not help clarify the directors' duties. (c) N/A
The Hong Kong Institute of Directors	HKIoD believes that directors' duties should not be codified at this time. Codification of directors' duties is very controversial. It is a process combining art and science, unlike engineering. For example, the test of "reasonable care" of directors has been interpreted by case law, which has captured both principles and evolving practices. Therefore, we need to have more debate on the subject. One significant issue that we need to take into consideration is the impact on the supply of quality independent non-executive directors as a result of codification. The experienced professionals may be driven away, having weighed the increased risk against the minimal directors' fees they receive. As an international financial centre, Hong Kong needs professionals to run the companies. If we were not able to find sufficient capable individuals to serve as independent non-executive directors, the quality of Hong Kong as an international market would be affected. This is a common view shared amongst listed companies. The consultation paper should also take into account the qualification of directors. For instance, it may need to specify what the requirements of directors and what training requirements are. Another issue is the principle of enlightened shareholder value, which is in contrast to the traditional bona fide principle. In the case the enlightened shareholder value contradicts with the existing bona fide principle, it should be clearly specified which one prevails. While the UK approach suggests that directors must promote the success of the company for the benefit of shareholders, it has not addressed the profile of employees. Different stakeholders may have different expectations towards risk-reward trade-off of a company. For instance, for those employees who focus on retirement benefits, short to medium term profitability may not be their priority. They would, instead, looking for long-term profitability. Last but not least, the proposed codification of directors has an implication on directors' liabilities and insurance coverage,

	which need to be discussed in order to evaluate the pros and cons of such a codification on a cost-benefit basis. To clarify and make directors' duties, more accessible, HKIoD suggests that principles and rationales derived from case law can be documented in a user-friendly manner for public access from website.
Hongkong and Shanghai Banking Corporation Limited	(a) We believe that the standard of care, skill and diligence required to be exercised by directors should be codified, but not the other general duties which can be left to Guidelines such as those issued by the Companies Registry. (b) We do not agree that the UK approach of the "Enlightened Shareholder Value" should be adopted. This will potentially give rise to conflicts for directors as between other duties that they owe. It is also unclear how far the duty will extend, and in practice will be difficult to apply.
The Society of Chinese Accountants and Auditors	We are in the opinion that the codifying of directors' duties in the Companies Ordinance is of little value and even cause ambiguity. (a) No, we do not agree. (b) No, we do not agree. (c) We think that the directors' duties could be further clarified and made more accessible through education and promotion by professional bodies and regulatory organizations.
Tricor Services Limited	(a) No. We do not agree that the general duties of directors should be codified, as codification has the following limitations. If codification is done by a broad statement of principles, the broad statement may not necessarily assist directors to clearly identify the extent of their duties nor would it help directors to determine how they should carry out their duties in certain circumstances. If directors' duties are partially codified, a director might be confused to discover that he is subject to other non-modified duties as well. Therefore, codification may not lead to clarity and certainty. On the other hand, if directors' duties are stated in general terms, the statute may still have to be interpreted by the courts. As a result, the law may not be much more accessible than it is at present. In general, we agree with the views set under the column "against" in Appendix IV of the Consultation Paper. (b) If directors' duties were to be codified, we do not agree that the UK approach relating to the introduction of the principle of "enlightened shareholder value" under the duty to promote the success of the company, should be adopted. This duty requires a director to act in the way which he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so should also have regard to a list of wider factors, such as the interests of employees, suppliers and customers and the impact of the

	company's operations on the community and the environment. While the directors should pay attention to the interest of employees, foster business relationships with suppliers, customers and others, and take care of the community and the environment in which the company operates as part of its corporate social responsibilities, there is no need to codify these responsibilities as law, as in the normal commercial world, the directors are bound to consider these factors in operating their companies. The absence of codification would enable the directors to have more flexibility in allocating priorities and emphases as appropriate across the different areas as guided by what is best for their companies. (c) Directors' duties could be clarified or made more accessible by promoting continuous training for directors on their duties.
The British Chamber of Commerce in Hong Kong	(a) We are happy with the status quo; the common law on directors' duties is fairly clear and there does not appear to be a real need to codify such requirements. By way of negative comparison, the recent UK provisions are very new and have caused a lot of controversy and uncertainty. Furthermore, if is not clear that such provisions have proved effective in their aim of providing a clear and definitive statement of directors' duties, as yet - e.g. there has been much legal debate about whether the codified statements of directors' duties (such as that stated in Question 4(b) below) actually have the effect of increasing the scope of the common law duties. (c) There is already a non statutory guide to directors' duties which can be made available or sent out with all new Certificates of Incorporation and to newly appointed directors.
Hong Kong Stockbrokers Association	(a) No. The general duties of directors namely fiduciary duties and duties of care and skill can not be codified without detailed terms. Any attempt of codification will only result in greater uncertainty. (b) N.A. (c) More timely update of the Non-statutory Guidelines in light if latest case law or judicial interpretation.
Hutchison Whampoa Limited	**1. Codification of Directors' Duties** As set out in paragraph 3.2 of the Consultation Paper, we understand that the legislative intention .of the codification of the duties of directors is to improve <u>clarity and certainty</u> for company management and members. We are of the view that the codification exercise should not be undertaken because, for the following reasons, the proposed exercise is incapable of achieving its legislative objective: (a) <u>Codification</u>: The proposed codification exercise goes beyond a mere codification of the current common law position

	on directors' duties. If the approach in the English Companies Act 2006 is to be followed, it would involve a legislative amendment to the common law position (in particular the incorporation of the concept of "enlightened shareholder value"). Contrary to the express legislative intention of the codification exercise, the imposition of novel concepts by legislation rather than by common law evolution would reduce (rather than improve) clarity and certainty. (b) Clarity: The English Companies Act 2006 imposes a concept of "promoting the success of the company" (which includes the "enlightened shareholder value" concept). There is no case law or guidance as to how such concept is to be interpreted. Indeed, as these concepts are imposed by legislations this entails a judicial interpretation of the legislative intent rather than an evolution of the laws of directors' duties through the common law system. (c) Certainty: The certainty typically attributed to statutory laws does not apply to these provisions. The English Companies Act 2006 approach is for the relevant provisions to be interpreted in the same way as common law rules and equitable principles. It is also the legislative intention of the English Companies Act 2006 that the courts will continue to develop the duties as though they are common law rules (i.e. an exception to the notion of legislative supremacy where legislation can only be amended by the legislature and not by the courts). As a result, the relevant provisions of the Companies Ordinance post codification may not at all time reflect the then current legal position and a director may inadvertently breach his or her duty even after having considered the provisions of the Companies Ordinance. Although it is appreciated that in order to retain the flexibility required in this area of law, the provisions of the Companies Ordinance could give an erroneous impression that they represent current law. This highlights the conceptual incompatibility of statutory codification of this area of law and the objective of certainty and clarity. (d) Accessibility: Accessibility (including the use of plain English in statutes) is meant to allow all walks of life to find out for themselves what the law is, even in the absence of lawyers. In view of the uncertainty highlighted in (c) above, accessibility without certainty may not be beneficial. We believe that clarity and accessibility are better achieved by continuing with the current practice of the Companies Registry's issuance of Non-statutory Guidelines on Directors' Duties from time to time. Answers to Question 4 (a) No, please see reasoning in Paragraph 1 in our cover letter. (b) Not applicable (c) Continuation of the Companies Registry's practice of issuing guidelines reflecting the common law duties from time to time. On-going education programmes through institution such as Hong Kong Management Association.

The Hong Kong Association of Banks	(a) We note that the arguments for and against codification of directors' duties are finely balanced, and given the fact that in the U.K., Australia and Singapore codification is relatively recent, there seems a case for deferring codification until more experience in those jurisdictions is available for assessment. In practice, however, there have been case decisions which suggested that determination of the standard of care is based on a subjective test, whilst some other cases suggested, the application of an objective test (i.e. taking into the director's knowledge, skill and experience). We support the Companies Registry to review its Non-Statutory Guidelines to provide clearer guidance on directors' duties of standard of care, skill and diligence as an interim solution. (b) We consider that the principle of enlightened shareholder value should not be adopted in Hong Kong since it would give rise to conflicts for directors as between other duties that they owe and it is unclear how far the duty would extend. Ultimately, it could be construed to extend to a company into a philanthropic body which is contrary to the normal commercial nature of a corporate body. Furthermore, adopting this principle is likely to result in a rise in litigation. (c) Not applicable.
The Hong Kong Institute of Chartered Secretaries	(a) No. We do not find it necessary to codify the general duties of directors. Codification has the advantage of enhancing clarity only if the statues are drafted in very great details. This will however result in a loss of flexibility and amendments to the laws will have to be made frequently as the case law evolves. On the contrary, if the duties are set out in very general and broad terms such that reference to the common law is still required for ascertaining the exact meanings of such statutory duties, this will only lead to greater uncertainty and complexity which totally defeats the purpose of codification. To improve the clarity of directors' general duties for the benefit of company directors and management, we take the view that more guidelines, interpretation notes and practice notes should be issued by the Companies Registry to update companies and the public on the development of the case law related to directors' general duties. The Non-statutory Guidelines on Directors' Duties in Hong Kong issued by the Companies Registry (as revised in October 2007) ("Non-statutory Guidelines") are useful reference for company directors. The Companies Registry should consider issuing further guidelines quoting recent case laws to illustrate what constitute breaches of directors' duties and breaches of the principles set out in the Non-statutory Guidelines. (b) If directors' general duties were to be codified, we do not support the adoption of the UK approach, particularly the creation of a duty for directors to promote the success of the company for the benefit of its shareholders having regard

	to the interests of its other stakeholders. We believe that the introduction of this duty in the UK is driven by the government's intention of making the companies more socially responsible. We are in full support of the notion that companies should be socially responsible and corporate social responsibility ("CSR") is something which is worth pursuing as it will help enhance the goodwill of the company, its competitiveness and its shareholders value ultimately. However, we believe that it is something to be undertaken by the companies on a voluntary basis. It is likely that the interests of different groups of stakeholders might differ and be actually in conflict with each other. To impose a statutory duty on the directors to give regard to the interests of different groups of stakeholders implies that they should be accountable to all of them. It is too onerous a duty on the directors and might have the unintended consequence of discouraging potential independent non-executive directors from taking up the posts. After all, we believe that CSR should be achieved via encouragement rather than legal requirement. (c) We believe that the directors' duties are best illustrated and clarified by non-statutory guidelines, interpretation notes and practice notes as suggested above.
Ho Tak Wing	(a) Yes, agreed. In addition, in the light of the Corporate Governance issue, the general duties of the directors should be codified. At present, the non-statutory guidelines issued by the Companies Registry, stating the principles of law in Hong Kong in relation to the directors' duties, as well as the directors' duties under the equitable principles highlighted in Note 21 of Page 16 of the Consultation Paper, should all be codified in the Companies Bill. (b) Unlike United Kingdom, approximately eighty percent of the companies in Hong Kong is family dominated or family owned. As a result, I got reservation in this issue. (c) No comments
KPMG	(a) No. We do not see a need to include these general duties in the law. Furthermore, we are concerned that codifying the duties could add further complexity to the current status quo. For example, interpretative case law surrounding the wording of the codified general duties may develop in addition to case law on the duties that will continue to exist under common law. (b) n/a (c) We note the UK codification, as set out in Appendix III to the paper contains more interpretative detail than the existing Hong Kong Code, as set out m Appendix II to the consultation paper. We suggest that directors' duties could

	be clarified by expanding the current code to take account of this additional material.
Low Chee Keong	a. I **AGREE** with the proposal that the general duties of directors should be codified in the *Companies Bill*. b. Rather than adopt the provisions as set out in the English *Companies Act 2006* I would advocate a more holistic approach which may be achieved with the introduction of an **objective standard of care** for directors complemented by a **statutory business judgment** rule. The reasons for the foregoing are set out in the two articles that I now enclose namely: 1. **A Road Map for Corporate Governance in East Asia** (2004) Vol 25 No 1 *Northwestern Journal of International Law and Business* 165-203 especially the section titled "Modernising the Standard of Care of Directors" at pages 182-185; and 2. **Balancing the Scales: A Statutory Business Judgment Rule for Hong Kong?** (2004) Vol 34 Part 2 *Hong Kong Law Journal* 303-320 I note the concerns that have been expressed in paragraph 3.3 at page 16 as well as in Appendix IV of the Consultation Paper. My response to these reservations is that we are not setting out to define the law in a single sweep as the objective must be to allow for the common law to develop over time with some statutory guidance. It is an anomaly that while directors are given almost unfettered control of the affairs of the company their duties are not statutorily prescribed. The introduction of legislative changes is both more effective and expedient as opposed to waiting for definitive judicial pronouncements to be made. Paragraph 3.11 at page 16 concludes that "until there is case law in relation to the new duties directors are left with the uncertainty as to how the courts will interpret the new statutory statement." While I would not disagree with this statement I nonetheless do not share its pessimism for two principal reasons namely: i. the starting point as regards the standard of care as set out in my response is benchmarked against what is expected of a reasonable person. In short in assessing potential liability we should empower the learned judges to reflect on what might reasonably be expected of ordinary people given the prevailing circumstances rather than to refer to a check list of items as advocated in the United Kingdom; and ii. the foregoing approach is no different from the common law development of the tort of negligence as evident from the evolvement of the principle of 'reasonable foreseeability' with the effluxion of time. Despite the anticipated swings in the pendulum when seemingly opposing decisions are handed down we should nonetheless have more confidence in

	the quality of our judiciary and of the talent of our legal fraternity to do what is right in interpreting the requisite standard expected of our directors. Last but certainly not least we should learn from the Australian experience and ensure that our regime of statutory directors' duties is one that is premised strictly and exclusively on civil liability with no reference to any criminal sanction. It is my belief that the latter introduces unnecessary dimensions to the issue of directors' duties with the result being the unfortunate encumbering of what should essentially be dealt with by two relatively straight forward questions namely in the circumstances: a. did the director do what is reasonably expected of an ordinary person? b. should he or she be reasonably excused under the Business Judgment Rule?
Hong Kong Institute of Certified Public Accountants	(a) In response to a similar proposal put forward in Phases I and II of the Standing Committee of Company Law Reform's Corporate Governance Review, the Institute expressed support, in principle, for the proposal to codify in the Companies Ordinance ("CO") the basic principles of directors' fiduciary duties and duties of care and skill. This remains our position. We consider that a statutory codification would serve the following purposes: ➢ create more certainty as to the basic expectations in relation to directors' duties; ➢ give more weight to the principles; ➢ remind directors of the existence of the legal requirement to exercise fiduciary duties and an appropriate standard of skill and care; ➢ facilitate monitoring and enforcement by minority shareholders of these duties. While it would not be possible for all directors' duties to be encapsulated in the statute, a provision could be added in the CO to make it clear that the statement of directors' duties contained in it is not exhaustive. (b) We do not support adopting the UK approach to include a duty for directors to promote the success of the company, having regard to a list of factors like the interests of employees, suppliers and customers and the impact of the company's operation on the community and the environment, etc. As the concept of the duty to promote the success of the company is not well defined and there is a lack of information about how it should be interpreted, codifying such a duty in the statute could make it difficult for directors to manage the affairs of the company. It is unclear, for example, what evidence would need to be adduced to demonstrate that a

	director has considered the various factors. Furthermore, besides the interest of the shareholders of the company, the list of parties and interests to which directors should have regard, e.g. employees, suppliers, customers, the community, the environment, etc., is so diverse that it would be very difficult, if not impossible, to see how directors could have equal regard to all these interests when discharging their duty to promote the success of the company. There is no guidance as to how any conflict between the different interests should be resolved or what weight should attach to each of them. In addition, the non-exhaustive list of other stakeholders under the duty to promote the success of the company will introduce an unnecessary and untested complexity to the implementation and interpretation of the new duties. (c) We suggest that, in addition to codifying the general duties of directors in the statute, directors' duties could be clarified or made more accessible through education and training, and through non-statutory guidance developed and promulgated by government, regulatory and professional bodies. As regards education and training, we suggest that reference could be made to the Code of Corporate Governance Practices (Appendix 14 of the main board listing rules and Appendix 15 of the GEM listing rules). Under the Code Provisions (paragraph A.5.1) every newly appointed director of a listed company should receive a comprehensive, formal and tailored induction, and subsequently such briefing and professional development as is necessary, to ensure that, inter alia, he/she is fully aware of his/her responsibilities under statute and common law, applicable legal requirements and other regulatory requirements. It is also a recommended best practice (paragraph A5.5) that directors should participate in a programme of continuous professional development to develop and refresh their knowledge and skills.
Hong Kong General Chamber of Commerce	**3. Director's Duties (Question 4)** We consider that the standard of care, skill and diligence required to be exercised by a director of a company should be codified in the Companies Bill, but not for the other general duties of directors introduced under the CA 2006, including the duty to promote the success of the company and the duty to declare interest and avoid conflicts of interest. We believe that Hong Kong should consider adopting the same wording as that stated in section 174 of the CA 2006 (duty to exercise reasonable care, skill and diligence) and that such duties should be interpreted and applied in the same way as common law rules or equitable principles. The main reasons for supporting the codification of the standard of care, skill and diligence are to improve the corporate governance in Hong Kong and to provide clarification of the standard against which the directors will be measured under

	the common law. It is noted in **Law Wai Duen v Boldwin Construction Co Ltd** [2001] 4 HKC 403 that the director's duties in Hong Kong remain the same as those laid down in **Re City Equitable Fire Insurance Co. Ltd.** [1925] Ch 407 which held that "a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected of a person of his knowledge and experience". The above wording is also repeated in Rule 3.08 of the Main Board Listing Rules of the Stock Exchange of Hong Kong[1]. Some case law has argued that the subjective element (the knowledge and experience the director has) in Re City Equitable's ruling overrides the objective element (reasonableness) in measuring the director's standard of care and skill towards the company. As a result, the less the knowledge and experience possessed by the director, the lower the standard of care and skill required, and that more informed directors will be subject to a higher risk of being sued. However, recent case law in UK suggested that a more objective approach in assessing the director's standard of care towards the company (i.e. taking into account the knowledge, skill and experience that may reasonably be expected of a person carrying out his function) should be adopted. We are concerned that the judicial decisions applying or distinguishing the rulings in various circumstances have created uncertainty and sometimes inconsistencies for directors' guidance. In UK, the above uncertainty on standard of care has now been clarified under section 174 of the CA 2006. It is also noted that the standard of care imposed on the directors is also codified in Australia, Singapore and Malaysia[2]. As noted by

1 3.08(f) of the Listing Rules provides that a director must, in the performance of his duties as a director, apply such degree of skill, care and diligence as may reasonably be expected of a person of his knowledge and experience and holding his office within the listed issuer.

2 In UK, CA 2006 provides that a director must exercise care, skill and diligence that would be exercised by a reasonably diligence person with (i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company and (ii) the general knowledge, skill and experience that the director has.
In Australia, section 180 of the Corporations Act 2001 provides that a director must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they (i) were a director or officers of a corporation in the corporation's circumstances, and (ii) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
In Singapore, section 157 of the Companies Act provides that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
In Malaysia, section 132 of the Companies Act 1965 provides a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
Please note that the statutory duties provided under the laws of Australia, Malaysia and Singapore are in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors of a company.

	Rogers V.P. in Law Wai Duen case, the standard which described as being required of a director under Re City Equitable "is, if anything, open to review in present day circumstances as, perhaps, being too low". In order to bring the legal duties of directors more into line with today's demand of corporate governance and to provide clarity and certainty, we would suggest that the standards of care, skill and diligence required from the directors be codified. Whereas for the other general director's duties stated in the CA 2006, it is suggested that they replace in several aspects the common law rules on authorization, waiver, ratification and condonation of directors' breach of duty[3]. Given that the Non-Statutory Guidelines on Directors Duties provided by the CR in Hong Kong have to date provided a clear and accessible description of director's duties and can provide more flexibility, we believe that the other general duties of directors need not be codified in the Companies Bill. Our answer to Question 4 (a) (b) and (c) is: No, but please see above.
Simmons & Simmons	(a) My view is that it is possible for Hong Kong to take advantage of the learning from the UK in order to update its voluntary guidance and only to codify the standard of care in a way that does not require a statutory codification of directors' overall duties in Hong Kong. The position on directors' disclosure of interests and conflicts needs further assessment as to whether it can be made more modern and clearer, but without statutory backing. *No overall codification* ● I am not in favour of the statutory codification of Hong Kong directors' overall duties (other than in relation to the standard of care). My reasons are:- ○ The non-statutory guidelines issued by the Company Registry are sufficiently accessible and more flexible than a statutory statement. But, I do think this guidance would benefit from some up-dating and indeed they would have to be updated if the standard of care is codified. ○ The main advantage of a statutory statement would be to implement the concept of "enlightened shareholder value". But, I am not convinced that this concept would necessarily have overwhelming support in the Hong Kong business community. *Codification of the standard of care* ● I am in favour of the codification of the care, skill and diligence required of a director in line with the UK

[3] For instance, the critics argued that the CA 2006 does not impose a fiduciary duty to avoid sell-dealing but only a duty to disclose an interest (s. 177) and that this is a move away from the common law position.

	approach. In other words, I am in favour of a subjective/objective approach which has the effect of minimum standards of care for all directors. I am aware of the Hong Kong decision in Law Wai Duen v. Boldwin Construction Co. Ltd. (and others) to the effect that the degree of skill expected of a director is that which can be reasonably expected of a person of his or her knowledge and experience (i.e. a subjective test). ● But, Hong Kong directors, as do they in the UK, can face legal claims for negligence. Part of the legal claim in the UK by Equitable Life against its former directors was that they had been 'negligent' (i.e. they were alleged to have failed to meet an objective standard of reasonable care). I think it is difficult to state categorically the standard of care, skill and diligence that a Hong Kong court would require. It seems to me that, at the very least, an argument would be raised in the HK courts that the English case of D'Jan of London Ltd should be followed and a subjective/objective test applied. I think it is desirable to have more certainty and consistency given to directors about the standard of care required of them and therefore the underlying business proposition that all directors should have a minimum, objective standard of conduct is, I think, sound. (c) *Updating the current guidance* ● I do think that the Companies Registry Guidance could benefit from some up-dating/modernisation. In a sense I think that this follows from taking the view that a statutory codification (other than in relation to standard of care) is not necessary. If taking this view, it is logical then to ask "well, is the current form of voluntary guidance sufficient?". Here, I can identify some particular areas where I think the Guidance would benefit from being updated. *Wider business factors* ● First, there is the issue of whether directors should be guided (rather than required) to have regard to wider business factors (such as the community, employees, reputation and the like) expressly or whether this should be left to be decided by directors as is implicitly necessary for them, in good faith and acting with the requisite standard of care, to act in the interests of the company. The current Guidance is silent on these wider business factors. But, I believe that it is a business reality, and increasingly so, that directors do commonly take into account these wider business factors in determining what is best for a company. Assuming this to be reality and the need to take them into account is increasing and not reducing then it is better to give express guidance to directors to take account of these factors than to leave it implicit or unclear. I suspect that Hong Kong law is not absolutely clear on the point but it seems to me clear that as a matter of Hong Kong or English law a director who

	fails to give any consideration to any wider business factors relevant to what is in the interests of the company seriously risks being in breach of his or her director's duties to act in the interests of the company or may fail to meet the required standard of care or to have been negligent. To that extent it is advantageous to directors to be given explicit guidance and I feel that their decisions, if anything, become less vulnerable to legal challenge where it is clear that they have considered relevant wider business factors. This, I think, is one of the key benefits of the UK approach, as it eventually turned out and despite some earlier high level concerns and discussions. *Avoiding a pluralist approach* ● I am not therefore advocating a 'pluralist approach', where directors have duties to others as well as the company (except in relation to the limited extent to which they owe duties to creditors when insolvency nears). Nor am I advocating at all that directors have a duty of due process to consider wider business factors and that this duty is a separate duty from their duty to act in the interests of the company or (in UK terms) to promote its success or purpose. *Disclosure of interests/Clearance of conflicts* ● Second, another key area in which the existing Guidance could benefit from updating is in relation to disclosure of interests and on clearance of conflicts. I think the outcome of UK legislation is to produce a clearer and more certain approach to directors' conflicts of interests and the ability of independent directors or shareholders to permit those conflicts. It needs further consideration to ascertain whether the UK style of provisions could be achieved without a statutory codification of directors' duties in Hong Kong. It may well be that much can be achieved by having the relevant provisions in a company's constitution. *The subjective test of acting in the interests of a company* ● Third, a note of caution in relation to the objective/standard of care as it affects the duty to act in the interests of the company (using the Hong Kong concept). One could (perhaps) read the current Hong Kong Guidance (but not necessarily the underlying law) as an objective requirement to act in the interests of the company. The UK version is now clearer that it is the director's own, personal assessment of what he/she 'considers, in good faith, would be most likely to ... etc.'. UK Perspective Some observations about the UK experience may help by way of perspective:-

	Pluralist v. enlightened shareholder value ● In the UK there were some who wanted to introduce a pluralist form of directors' duties whereby directors owed duties not just to the company but also to employees and community interests, among others. For others, the enlightened shareholder value approach represented a better and more acceptable alternative. Others, myself included, genuinely believed that the enlightened shareholder value concept was better, more modern, more aligned with modern business practice and needs and hence, in the way that the UK codification has actually been done, better protects directors. *A 'toxic' cocktail* ● Earlier versions of the UK statutory codification caused very high level concerns. One leading counsel described one version of the codification as a 'toxic cocktail'. The poison was, however, mainly focused around the issue as to whether there was a separate duty to promote the success of the company and a separate duty to have regard to the wider business factors and which in effect could be regarded as a duty of due process giving rise to a separate cause of action. The final wording of the UK version (supported by Government statements at the time) is clear that it is intended and in my view has the effect that there is a single duty to promote the success of a company and, in so doing, for directors to have regard to the wider business factors. (At one stage the language had two 'musts': a 'musts' promote the success of the Company and a 'must' have regard to the statutory factors, giving rise to the concern that there were two, separate duties. The final version only has one 'must' and is clearly designed as a single duty.) *The impact of codification* ● Inevitably a codification produces challenges because it is new and because it is trying to capture very wide circumstances. A lot of concern in the UK over the codification was about this sort of effect. Some raised considerable concerns about the impact on board meetings and whether it would lead to a different approach to board minutes reciting the statutory factors to the point where business making was paralysed. We, S&S, took a robust view that this was not the effect of the legislation nor necessary or desirable. Our overall view on the UK statutory statement of codification was summarised by our view that 'the responsible and well advised director should welcome, not fear, the statutory statement of directors' duties [in the UK]'. Conclusion My view is that it is possible for Hong Kong to take advantage of the learning from the UK in order to update its voluntary

	guidance and only to codify the standard of care in a way that does not require a statutory codification of directors' overall duties in Hong Kong. The position on directors' disclosure of interests and conflicts needs further assessment as to whether it can be made more modern and clearer, but without statutory backing.
Association of Women Accountants (Hong Kong) Limited	Different opinions have been received on the subject matter. Some of our members believe that presenting the general duties of directors in the CO would make the directors of companies aware of their duties and any non-compliance could be penalized so that interests of company shareholders could be protected. On the contrary, some members objected with a view that directors' duties could be promoted through education by professional bodies instead of codification in the CO. In light of various views obtained, we suggest that the duties of directors could be codified in a more generic terms, e.g. their fiduciary duties to the company and its shareholders, duties of statutory reports including preparing financial statements in accordance with accounting standards, and reporting duties to Companies Registry including all necessary filing of forms and relevant documents etc.
Hong Kong Bar Association	**Question 4(a)** 8. Whilst the Bar recognizes the trend in various commonwealth jurisdictions is gearing towards codification of director's duties, the Bar has reservations as to whether there is any need to do so in Hong Kong. 9. As the Bar understands, what codification aims to achieve is essentially two-fold: (a) to improve accessibility of the director's duties to the general public and (b) reform. The Bar takes the view that these aims could be (and indeed in some case have been) achieved without codification. (1) On the question of accessibility, the Bar has reservations as to whether codification would lead to any substantial change. First, the court would still retain a central role in the exposition and application of the statutory duties, as it does in the case of common law and equitable duties. Thus, the public would still have to look to the case law to ascertain the scope and nature of the statutory duties. Second, currently the major common law and equitable duties have been set out in non-statutory guidelines which are widely distributed and the directors are required to sign an acknowledgement of receipt and perusal of the same when submitting a company's annual return. That already serves the purpose of informing the general public and directors of the duties owed. (2) On the question of reform, the Bar notes that the court has no difficulty in adapting the common law and equitable duties to the changing circumstances of the world. Unless there is to be a radical change in the nature or content of director's duties (which the Bar does not understand to be the proposal), it may be preferable to

	follow the common law to allow the law to be developed on a case-by-case basis, taking into account the new demands arising from changing circumstances. (3) The Bar also notes that the UK has introduced a modern version of "duty to act in the best interest of the company" by incorporating the concept of "enlightened shareholder value" ("ESV"). This reform has not found its way into the Australian and Singaporean codification. The Bar takes the view that it is premature and inappropriate to introduce ESV into Hong Kong company law. Unlike the UK, where concepts of corporate social responsibility and ESV have been mooted for some time (see e.g. www.csr.gov.uk), these concepts have yet to take root in Hong Kong. Further consideration, promotion and consultation should be undertaken for the purpose of deciding whether ESV should be incorporated into our company law. 10. The Bar also takes the view that codification, depending on its scope, may also bring about confusion. For instance, whether codification is to be complete or partial will have an effect on the application and relevance of existing case law as well as future judicial determinations. If Hong Kong is to follow the UK approach (statutory duties replacing common law/equitable duties), questions may arise as to whether the court, in construing the statutory duties, should have regard to the existing common law/equitable principles, or whether the legislature should stipulate the factors which the court should take into account in its construction exercise. Alternatively, if Hong Kong is to adopt the Australian and Singaporean approach that the statutory duties are only additional or supplemental to the common law/equitable duties, problems may arise from having 2 separate regimes. The problems would be particularly pronounced if the codification also introduces new remedies for breach of the statutory duties. The public would have no means to know all the duties a director is charged with, which is the principal purpose of codification. 11. If, however, it is considered appropriate to codify the directors' duties, we consider it appropriate to follow the Australian / Singapore approach which have the flexibility of allowing further development of directors' duties under common law.

Question 5

(a) Do you agree that corporate directorship should be abolished altogether in Hong Kong, subject to a reasonable grace period? **(b) If your answer to Question (a) is in the negative, do you agree that the UK approach (i.e. a company should be required to have at least one natural person as its director), subject to a reasonable grace period, should be adopted?** **(c) If your answers to both Questions (a) and (b) are in the negative, do you have any suggestion on how to improve the enforceability of directors' obligations and to solve the difficulty of pursuing corporate directors?**	
The Sovereign Group	We would strongly urge the government to keep the ability to appoint corporate directors to the board of an Hong Kong company. The ability to appoint corporate directors facilitates the smooth administration of Hong Kong companies and is of particular importance to the corporate secretarial industry which, we believe, contributes substantial income to the Hong Kong economy and makes Hong Kong a user friendly base in which to site holding, investment and trading companies for doing business around the region. We can see no reason to remove this useful facility in Hong Kong except, perhaps, for an argument that the ability to appoint corporate directors in some way shields the directors of the corporate director from direct liability for their actions on behalf of the subject company which has appointed the corporate director. We believe that the existing laws in this area give adequate protection to anybody dealing with the subject company and that the courts would have little hesitation in finding the directors of the corporate director liable for the actions taken on behalf of the subject company as if those directors were acting in their personal names. However, if clarification of this is needed then perhaps an adjustment to the Companies Ordinance can be made to make this absolutely clear. We believe that this would be a better way of proceeding than abolishing the ability to appoint corporate directors altogether.
Mandatory Provident Fund Schemes Authority	After reviewing the consultation paper, we find the following proposals relevant to the work of the Mandatory Provident Fund Schemes Authority (MPFA) and are in support of them: (a) Proposal to abolish corporate directorship The proposal, if implemented, will facilitate the MPFA's enforcement work against defaulting corporate employers by enabling the individuals responsible for the business to be identified. Attaching criminal and civil liability to individuals can achieve a greater deterrent effect.
Gordon Jones	(a) The whole concept of corporate directorships is the antithesis of good corporate governance as, by their nature, they

	negate the two fundamental corporate governance principles of accountability and transparency. There have been two previous attempts to abolish corporate directors, in 1991 and 2002 but, on both occasions, the proposals were not supported because of the alleged 'business implications'. In this respect, it is noteworthy that, during the last time, in 2002, when professional bodies and stakeholders were consulted on the proposed abolition of corporate directors, all the government departments and public and statutory bodies concerned with law enforcement, tax administration and corporate regulation e.g. the CR, ORO, SFC, Police, Judiciary, D of J, IRD etc., stated that corporate directorships should be abolished as soon as possible because, inter-alia, in cases involving fraud and money laundering, it was not possible to determine the responsible parties if the directors of the company were corporate directors. Furthermore, I was informed by a gentleman, who previously worked in a very prominent commercial position in Hong Kong and subsequently for one of the very large company formation and corporate secretarial firms, stating that, on the basis of his experience, corporate directors were vehicles for fraud and malpractice. Furthermore, it was his considered opinion that, although the abolition of corporate directors might have the effect of driving some companies and business out of Hong Kong, this was business which Hong Kong was well rid of! It should also be stressed that virtually all the other major commercial common law jurisdictions in the world e.g. Australia, Singapore, Canada, New Zealand, Malaysia, the US (under the Model Business Corporations Act) etc., have abolished corporate directors leaving the UK and certain off-shore jurisdictions such as the British Virgin and Cayman Islands as the only common law jurisdictions which still retain them. While the paper refers to the 'current flexibilities' in corporate directorships as the reason why the UK has decided to retain them, subject to at least one director being a natural person, it is silent as to the nature of these 'flexibilities'. Furthermore, it is misleading to compare the UK with Hong Kong, if this is going to be put forward as an argument to retain corporate directorships as this is not comparing like with like. In this respect, even though the UK proposes to retain corporate directors in private companies, subject to the one-natural-person requirement, the Companies Act requires all private companies, irrespective of whether or not they have corporate directors, to file audited accounts with Companies House. Consequently, although the identities of the majority of the directors in a private company with corporate directors may not be known, the company still has to disclose its financial affairs publicly. In Hong Kong, however, there is currently no statutory requirement for private companies to file audited accounts with the CR thereby creating a double layer of opaqueness as far as private companies with corporate directors are concerned i.e. not only are the identities of the directors unknown but also the financial affairs of the companies are unknown. Given this, any decision to follow the UK model in respect of corporate directors must also have regard to the long standing statutory requirement in the UK for all private companies

	to file audited accounts. It is not without significance that Hong Kong's great competitor, Singapore, abolished corporate directors a considerable time ago, but this does not seem to have had any adverse impact whatsoever on the island republic's ability to attract world-class companies and businesses. In addition, the absence of corporate directors also does not seem to have had any adverse consequences on the ability of corporate secretarial firms in Singapore, Malaysia, Australia and New Zealand to form companies quickly and cheaply. Against this background, Hong Kong should have no hesitation about abolishing corporate directors. Furthermore, such a decision will certainly not affect Hong Kong's ability to attract business as this is dependent on many other far stronger reasons e.g. the rule of law, a robust and independent judiciary, clean and efficient government, low tax base, excellent transport and telecommunications infrastructure etc. Finally, as stated in the Paper, there is now very significant international pressure from bodies such as the Financial Action Task Force ('FATF') to abolish corporate directors as the lack of transparency inherent in such legal persons and arrangements means that entities with corporate directors could be used as vehicles for money laundering. Hong Kong is a world class financial and business centre with a very significant reputation to maintain. Under no circumstances should this be tarnished by the continued existence of corporate directors whose very existence undermines the corporate governance standards which the Government so frequently and publicly states that it is determined to enhance. I therefore strongly support the recommendation that all corporate directors should be phased out subject to a reasonable grace period of, say, two years. (b) I do not agree that the UK approach should be adopted for the reasons outlined above. (c) Not applicable in view of the answers to (a) and (b).
Arthur Lam & Co. CPA	(a) We do not agree that corporate directorship should not be abolished. (b) We do not agree the UK approach too. We think there are reasonable needs for the Hong Kong business environment to allow the corporate directorship to do most of the routine works. For instance, there are property-holding or investment-holding owners (who may spend most of one's life time overseas) want the corporate directorship (which have perpetual life) to handle one's paperworks. (c) We may enact a provision to deem the major shareholder to be responsible as a director if and only if the companies are made up of solely with corporate directorships and when the corporate directorship have failed to be accountable for its acts. And there shall be provisions when a corporate directorship is involved, all shareholders shall be reminded

	for this risk.
Arthur K. H. Chan & Co.	(a) Yes
Paul Mok	(a) No, I do not agree that corporate directorship should be abolished altogether in Hong Kong. (b) I agree that the UK approach of having at least one natural person as its director be adopted. (c) N/A.
China Insurance Group Investment Holdings Co Ltd	I suggest adoption of the UK practice. Macau also permits appointment of corporate directors. It is not necessary to insist that all directors of a company must be real persons. It is sufficient that one must be.
CLP Holdings Limited	(a) We agree that corporate directorship should be abolished altogether in Hong Kong subject to a reasonable grace period. The abolishment of corporate directorship is in line with many other common law jurisdictions such as Australia, Singapore, Canada, New Zealand, Malaysia and the US. Due to the lack of transparency inherent in corporate directors, it is not easy to detect whether such corporate directors are being used as vehicles for illegal purposes such as money laundering. The continued existence of corporate directors will undermine the corporate governance standards in Hong Kong. Therefore we do not believe that such a decision to abolish corporate directorship would affect Hong Kong's ability to attract business. On the contrary, the abolishment of corporate directorship will help maintain Hong Kong's reputation as a world-class financial and business centre. (b) Not applicable in view of the answer to 5(a). (c) Not applicable in view of the answer to 5(a).
香港工會聯合會權益委員會	**法團出任董事** 權委建議完全禁止法團出任董事，以增加董事對僱員權益的問責性。在處理勞資糾紛的過程中，工會前線同事不時發現僱主以法團身分擔任董事，大爲增加僱員追討合法權益的難度。 當工會代表對欠薪公司進行查冊時，經常發現公司董事是由海外註冊(如英屬處女島、百慕達群島)的法團擔任。如此，工會及欠薪僱員無法查出法團背後的負責人，幕後黑手亦不用負上刑事責任。 縱使參考英國的做法，自 2006 年起規定最少須有一名董事是自然人，然而這只能揪出代罪羔羊，而公司真正

	的負責人往往逍遙法外，令經歷漫長追討欠薪過程的僱員爲之氣餒。
Chartered Institute of Management Accountants, Hong Kong Division	(a) Yes, we agree that corporate directorship should be abolished altogether in Hong Kong, subject to a reasonable grace period. (b) No further answer is necessary. (c) No further answer is necessary.
The Chinese General Chamber of Commerce	(a) 現時，只有非上市的中小型私人公司，仍可繼續由法團出任董事，而有關公司的數目僅佔很少比例；本會並未看到此舉會對公司管治水平構成任何嚴重影響。 相對而言，目前本港有不少會計師、律師等均有提供委任法團董事之相關顧問服務，如全面禁止法團出任董事，或會對這些專業服務的業務帶來影響；此舉亦會削弱海外或內地投資者來港開設公司的吸引力。因此，本會認爲並不需要全面禁止法團出任董事。 (b) 本會同意採用英國模式的建議，以便當公司出現問題時，確保公司有人承擔有關責任。 據本會了解，其他國家亦有要求自然人董事爲當地居民，本會認爲香港亦可以此作爲借鑒，規定自然人董事爲本港居民，以便在有需要時保證可以迅速有效地確認有關公司負責人。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) Yes, although we see no objection to companies being formed for reasons of convenience with corporate directors, with the corporate directors having to be replaced by human beings as soon as the companies start to enter into transactions other than those needed to maintain their existence. (b) Not applicable. (c) Not applicable.
CCIF CPA Limited	(a) No, as it is not only harmful to those companies which make use of current flexibilities in corporate directorship for entirely legitimate reasons but also harder to trace if some improper individuals are used to replace such corporate directors. (b) No, as such a natural person may also be improper as mentioned in (a) above. (c) None.
Cally Jordan	10. I would strongly support the SCCLR position that corporate directorships be abolished altogether in Hong Kong, subject to a grace period, in the interests of transparency and accountability. Hong Kong is not an offshore financial centre;

	the UK's position smacks of interest group politics and compromise.
Hong Kong Trustees' Association Ltd	On this issue, we are of the view that corporate directorships should not be abolished in Hong Kong for the following reasons: (i) It provides Hong Kong with a competitive advantage over other jurisdictions which require at least one natural person to be appointed as director of a company and may thus make Hong Kong a more attractive place to certain sectors for establishing a company. (ii) Corporate directorships are less expensive than individual directorships: corporate service providers would have to provide greater insurance coverage for their staff who act as individual directors and this cost is likely to passed on to the customers/ultimate beneficial owners in higher fees. (iii) Liabilities are restricted to the corporate directorship and do not attach to the individual directors. (iv) The high turnover of staff in the corporate services industry would require a high degree of filing of updates of the resignation of former directors and the appointment of new directors at the Companies Registry, which is both time and cost consuming. (v) Corporate directorships allow for more than one person to be the authorized signatory/representative under the corporate director while an individual director would always need to be available to sign documents/ perform other duties. (vi) Corporate directorships make a significant contribution to the corporate secretarial industry which contributes substantial income to the Hong Kong economy. (vii) To address the concern that directors of the corporate director may shield from direct liability for their actions on behalf of the subject company which has appointed the corporate director, an adjustment to the Companies Ordinance can be made to attribute responsibility and perhaps even liability to the individual who executes or participates in the act of the corporate director. This would be a preferable option to abolishing the ability to appoint corporate directors altogether and still achieve enhanced corporate governance. (viii) A mandatory requirement to have at least one individual director is no guarantee that an appropriately qualified person of good standing and character would be appointed to the position. (ix) There are sufficient compliance and transparency requirements and safety checks already built into the system to combat money laundering and other illegal movements of money – there is no guarantee that abolishing

	corporate directorships will substantively support these existing monitors.
Hong Kong Chinese Enterprises Association (Submission A)	(a) Yes
Hong Kong Chinese Enterprises Association (Submission B)	(a) 不贊成 (b) 不贊成 (c) 無
Hong Kong Chinese Enterprises Association (Submission C)	(a) 贊成 (b) 不適用
Hermes Equity Ownership Services Limited	(a) Yes, we agree that corporate directorship should be abolished in Hong Kong. We believe that corporate directors can only ever carry out their duties through individuals, and that it is therefore those individuals who should be seen as the directors, and face the same burden of responsibility as other members of the board. Since individuals must clearly take on these responsibilities, abolishing corporate directorships seems to us a sensible step.
The Law Society of Hong Kong	(a) No. Corporate directors are now only allowed for private companies. If corporate directorship is to be abolished, this will encourage an exodus of companies to other jurisdictions, such as BVI, that permits corporate directorship. (b) No.
Szeto Ho Kwong	From the 17th submission to remove the existing corporate veil, all properties held by unnatural form / organisation (UFO), ie. corporate persons, co, trust, foundations, should have the natural person behind the screen, the ultimate beneficiary announced existing anonymous holdings to be disposed of can be given, say, some 3-5 yrs grace period
The Chinese Manufacturers' Association of Hong	爲了在提高企業管治透明度以及維持商業運作靈活性之間取得平衡，本會認爲本港暫時無須全面禁上法團出任董事，但可考慮在一段合理的寬限期後，採用英國的模式，規定每間公司最少須有一名自然人出任董事。

Kong	
The Institute of Accountants in Management	On the question of corporate directorship, we are of the view that corporate director should not exist. The legal protection on a company as a separate person distinct from the directors and shareholders of the company is good enough to individuals who are desirous to carry on business in Hong Kong.
The Chamber of Hong Kong Listed Companies	For private companies, we think they should be given the flexibility to retain the current corporate director regime. Having said that, we do agree that a company is required to have at least one natural person to be its director, subject to a grace period which must not be less than 2 years so as to permit the existing companies to re-arrange their corporate affairs and structures.
The Association of Chartered Certified Accountants	With the increasing emphasis on good corporate governance, ACCA Hong Kong is of the view that corporate directorship should be phased out. However, we also share the concern that abolition of corporate directorship could undermine attractiveness in business opportunities in Hong Kong. We therefore agree that the UK approach of requiring a company to have at least one natural person as a director should be adopted, subject to a reasonable grace period.
The Hong Kong Institute of Directors	HKIoD fully supports that corporate directorship should be abolished altogether in Hong Kong, subject to a reasonable grace period.
Canadian Certified General Accountants Association of Hong Kong	(a) In principle, we agree to abolish corporate directorship, but there is a commercial need in Hong Kong e.g. some professional firms may need corporate directorship to provide nominee director service or some employees may only represent their corporate employers to manage the subsidiary or associate companies. (b) Yes, that would strike the balance of the need and the corporate governance, like that of limited partnership structure. (c) N/A
Hongkong and Shanghai Banking Corporation Limited	Question 5(a) and (b) We support the UK approach.
The Society of Chinese Accountants and Auditors	(a) No, we do not agree. (b) No, we do not agree. <u>Genuine needs</u> We collected the followings from our members some of the genuine needs that justify the existence of corporate directors:

	1. Corporate directors are widely used in wealth management industry since it is the financial institution that client trusts but not the employee or any individual. Furthermore, natural person will have perpetual problem such as resignation in case of employee and death. The abolishment of corporate directors or requirement of at least one natural person to be a director may cause huge problem to this industry. 2. Parent company acts as a corporate director of its subsidiaries to facilitate group cohesion. 3. Overseas client needs professionals in handling their business matter promptly in Hong Kong because they only trust professionals. It will not rational for professionals to do in bare hands if corporate directors are abolished. <u>Money laundering and terrorist financing</u> We fully understand this concern but we can not persuade ourselves without proof by statistical figures that these kinds of criminals involved mostly of companies with corporate directors. As we know, the anti-money laundering and terrorist financing measures in the Hong Kong banking system is being effective. At present, it is not possible for a private company to open a bank account in Hong Kong without identifying the ultimate beneficiary. In reality, it is not difficult for gangsters or terrorists to find "dummy natural person" to act as director and they can open bank account in a comparatively easier way and cover up better their criminal transactions. (c) We understand that there are practical problems in the enforceability of directors' obligations and to solve the difficulty of pursuing corporate directors. However, we know that the Registrar is also encountered similar situations in the case of non resident directors. This problem is a matter of costs and flexibility.
The British Chamber of Commerce in Hong Kong	(a) Corporate directors should be retained in Hong Kong because the alternative of using corporate directors for oversees companies is too easy to use instead. We would prefer to encourage the use of Hong Kong companies rather than overseas companies fn Hong Kong., Many overseas companies do not register, as they should, under part XI of the Companies Ordinance, so are not made accountable for what they do In Hong Kong; this may be the real reason for the proposal that corporate directors should be phased out. We also think the number of Hong Kong companies with corporate directors as quoted in the Consultation document seems too low; if the real number is that low then presumably the Government need not be overly concerned with the matter? In practice many corporate service providers use corporate directors for practical purposes; as do many large groups. (b) If it is decided to include one natural person as a director, then in our view it should not be a requirement that is a Hong Kong resident individual. If the concern is that corporate directors are less accountable; then a system of registering corporate service providers and their nominee director companies should go a long way towards resolving

	this issue. (c) It is time to register corporate service providers in Hong Kong. It is the only major jurisdiction where corporate service providers are not registered; and there is no check on whether "fit and proper" persons are behind the corporate services businesses here.
Hong Kong Stockbrokers Association	(a) Agreed. (b) N.A. (c) N.A.
The Hong Kong Association of Banks	(a) The arguments for and against corporate directorship are well put forward in the consultation paper. While from the banking sector's perspective, we support abolition of corporate directorship but we recognize a degree of flexibility may be preferred by some companies for legitimate reasons. On balance, we have no strong objection to continue to allow corporate directorship in Hong Kong (see also our comments below). (b) We support the U.K. approach, subject to a reasonable grace period. This approach satisfies the flexibility aspect and personal accountability issue while enhancing compliance by authorized institutions in respect of connected lending (pursuant to section 83 of the Banking Ordinance) and statutory guidelines relating to the prevention of money laundering and terrorist financing activities. (c) Not applicable.
The Hong Kong Institute of Chartered Secretaries	(a) In principle, we agree that after a reasonable grace period, corporate directorship should be abolished. Undeniably, it can enhance the accountability and transparency of the company taking into account the increasing international concerns about the use of companies with corporate directors for money laundering and terrorist financing. Nevertheless, we also appreciate that there are some companies which have proper and genuine needs for corporate directors. For example, it is very common that directors have to take business trips on a frequent basis. It will be more convenient and flexible if a corporate director is used so that other directors of the corporate director can also sign the necessary documents whenever another director is out of town. Hence, instead of abolishing corporate directorship altogether, we suggest maintaining this as an option on the condition that (i) the corporate director should be a Hong Kong company or a non-Hong Kong company registered under Part XI of the CO or a company incorporated in a place where public search of the company can be obtained; and (ii) all directors of the corporate director should be natural persons. In other words, there will be no multiple or infinite layers of corporate directorships.

		If corporate directorship is abolished altogether, more people will set up companies in places like British Virgin Islands and Cayman Islands where corporate directorship is allowed and then register the companies in Hong Kong under Part XI of the CO. In those cases, such companies are still able to operate in Hong Kong with corporate directors.
	(b)	Please see our views set out in paragraph 5 (a).
	(c)	Please refer to paragraph 5 (a) above.
Ho Tak Wing	(a)	Corporate directorship should be abolished. The presence of the corporate directorship only brings problems to the company. For instance, whenever the returns are required to be signed, only the natural person has to be arranged to sign the documents concerned, not the corporate directorship. Therefore, for the sake of convenience, it is suggested that the corporate directorship should be abolished by the end of 2009 through the SCCLR.
	(b)	Yes, agreed
	(c)	No comment
KPMG	(a)	We do not see the need to abolish corporate directorships altogether as we consider that there may be legitimate business reasons for such arrangements.
	(b)	Yes, we agree that this would be an appropriate response to the concerns surrounding corporate directorships.
	(c)	n/a
Hong Kong Institute of Certified Public Accountants	(a)	While we are aware of the corporate governance and transparency arguments for the abolition of corporate directorships, there are still a significant number of companies that have corporate directors. We would have some reservations about complete abolition without a clearer understanding of the circumstances in which they are currently being used and whether the facility for corporate directors is, in practice, a significant point of attraction for legitimate businesses wishing to set up in Hong Kong.
	(b)	In view of the reservations that we express above, in our view, it would be preferable, as a first step towards enhancing transparency, to adopt the UK approach and require every company to have at least one natural person as a director, rather than to abolish corporate directorships altogether at this stage. We note, however, that the relevant provisions in the UK are not due to take effect until October 2008, according to the consultation paper. Therefore, if this approach were to be adopted, a review of the UK experience after implementation should be carried out first. It is also noted that there may be an increased risk for a sole natural person director on a board of several directors to

	become a target in the event of legal action against the company and its directors. If a natural person director is not, in practice, to assume a disproportionate share of responsibility for defaults, given the greater difficulty in pursuing corporate directors, the introduction of proportionate liability for directors should also be considered. (c) N/A.
Hong Kong General Chamber of Commerce	**4. Corporate Directorship (Question 5)** It is noted that corporate directorship has been abolished in many other common law jurisdictions (e.g. Australia, Singapore, Canada, New Zealand, Malaysia and the US). Those in favour of abolishing corporate directorship are of the view that it is difficult to know who is responsible for the conduct of the business of a company with corporate directors and it is also difficult to attach liability to the delegation of acts prejudicial to the company. However, we acknowledge that corporate directorship does provide flexibility commercially, and to improve accountability and corporate governance at the same time, we would suggest that Hong Kong should adopt the UK's approach to requiring every company to have at least 1 director who is a natural person to be held accountable for the company's actions. Our answer to Question 5 is: (a) No (b) Yes (c) N/A
Tricor Services Limited	(a) No. If corporate directorship is not allowed in Hong Kong, investors may go to other offshore jurisdictions where corporate directorship is still allowed (e.g. BVI) to incorporate instead of incorporating in Hong Kong. These offshore companies can then be registered under Part XI of the Companies Ordinance and can still operate here with corporate directors. As there is no sound evidence that the use of corporate directorship would result in a deterioration of the corporate governance standard in Hong Kong, we do not agree that corporate directorship should be abolished altogether in Hong Kong. Moreover, the prohibition of corporate directors would take away investors' flexibility in conducting business in Hong Kong via the use of corporate directors. (b) No. (c) We would suggest to amend the law to require a corporate director to be either a company incorporated in Hong Kong or a non-Hong Kong company registered under Part XI of the Companies Ordinance, and that all directors of the corporate director must be natural persons. A statement can be given in the Form of Consent and in the particulars of

	the corporate director to be included in every annual return that the directors of the corporate director are all natural persons.
Consumer Council	***Proposed abolition of corporate directorship for private companies in Hong Kong subject to a reasonable grace period*** ***Alternative proposal of adopting the UK approach (i.e. a company should have at least one natural person as its director), subject to a reasonable grace period*** 11. The Council firmly supports an amendment to the Companies Ordinance to disallow corporate directors for private companies in Hong Kong. 12. In its attempts to secure redress for consumers and to mediate disputes, the Council is always concerned about the difficulty in identifying the actual persons responsible for the acts of companies. In many cases, the ability to identify such persons would likely assist in settling some issues and achieving redress for consumers. Removal of corporate directors would certainly be helpful in this respect. 13. In fact, the worldwide trend towards abolition of corporate directorship also shows the increasing demand in advanced economies, similar to that of Hong Kong, towards greater accountability and transparency in corporate governance. The proposal is an important step in modernizing the company law of Hong Kong. The Council believes that the increased levels of accountability and transparency would increase Hong Kong's attractiveness as a centre for doing business, rather than diminishing it.
Hutchison Whampoa Limited	(a) Yes (b) Not applicable (c) Not applicable
Association of Women Accountants (Hong Kong) Limited	We do not agree that corporate directorship should be abolished altogether in Hong Kong. One has to look at the present business environment in Hong Kong and our business ingredients before taking any steps to change the present environment. In Hong Kong, majority of companies in Hong Kong are private family owned businesses. In addition, Hong Kong has annual mandatory audit requirements for companies registered under the CO. This is one of the best tool for corporate governance. Auditors are required to know their clients under the auditing standards. Throughout the years, corporate directorship of Hong Kong companies facilitates investors doing businesses in Hong Kong. Investors resided outside Hong Kong doing business in Hong Kong may require professional firms to assist in physical

	signing of documents, or managing their businesses in Hong Kong. These professional firms or financial institutions will assign their staff to perform such duties whom are delegated the authority of a director while these employees would not take up the director position as a natural person. These professional firms and financial institutions are governed by professional by-laws and code of conduct and they are trusted to provide services legally and in good faith for their clients. Abolishing corporate directorship of Hong Kong companies would restrict professional firms and financial institutions to provide relevant services to their clients and such restriction would impede investors to invest and carry on business in Hong Kong or make it feasible, some investors would look for anyone off the streets without any professional training to take up the position of directors on their behalf. Moreover, the latest version of Incorporation Form (Company Limited by Shares) requires companies to provide the details of individuals for corporate directors. This requirement has already eliminated the risk of inexistent corporate directors' matter. In reality, it is not difficult for gangsters or terrorists to find someone to act as director and they can open bank account in a comparatively easier way and hide their criminal transactions. They can still use these ways to commit money laundering and terrorist financing. Therefore, abolishing corporate directorship is not an operative solution for money laundering and/or terrorist financing problem.
Hong Kong Bar Association	**Question 5(a)** 12. The Bar supports the recommendation set out in paragraph 4.5 of the Consultation Paper. The Bar does not believe that abolishing corporate directorship for private companies would necessarily have the effect of reducing the attractiveness of Hong Kong as a place for doing business. The Bar believes that the corresponding enhancement in corporate transparency and accountability (in particular in the ability to identify a particular person or group of persons as being in control of the company, as opposed to a postal number in, say, the BVI) would increase the level of confidence in dealing with Hong Kong companies.

Question 6

(a) Do you agree that the changes listed in Appendix V should not be adopted in Hong Kong? **(b) If not, please specify which of the changes you think should be introduced in Hong Kong and the reasons.**	
Gordon Jones	(a) I agree that the changes to the charges registration regime listed in Appendix 5 should not be adopted in Hong Kong. In this respect, it appears that there has been no demand for change from Hong Kong practitioners, in particular the banks, and, unless and until there is such a demand, the existing regime should remain largely in place subject to the sensible administrative and procedural reforms mentioned later on in Chapter 5. The existing 'invisibility' problem resulting from the lapse of time between the creation of a charge and its registration on the public register (which is often used as one of the justifications for the introduction of a provisional registration system) will be addressed by the recommendations later on in Chapter 5 to further streamline and shorten the registration process in the CR and the reduction of the time to register a charge from five to three weeks which will further shorten the period of 'invisibility'. (b) Not applicable in view of the answer to (a).
Arthur Lam & Co. CPA	(a) We think the Appendix V should not be adopted in Hong Kong. (b) No comments.
Paul Mok	(a) Agree. (b) N/A.
Deacons	Agreed for parts (A)-(F) inclusive. For (G) and (H), I note that it is (fairly) standard practice in Hong Kong to register assignments of insurance policies and charges over shares on the marginal grounds that they may constitute/include charges over book debts (in the case of share charges, because of the inclusion of dividends in the security which some people argue are book debts). The Companies Registry accepts these securities for registration usually without question. If the policy is that these are not registrable, then perhaps practice should reflect that. For this reason, serious consideration should be given specifically to excluding registration of assignments of insurance policies and security over shares. This could be dealt with in the definition of book debts (which may be problematic because of "knock on" implications of the amended definition) or by simply stating that insurance assignment type security and share charge type security (including all rights deriving from shares such as dividends, warrants, other distributions "etc") are not registrable.

CLP Holdings Limited	(a) Given the reasons set out in the Consultation Paper, we support that the changes to the charges registration regime listed in Appendix V should not be adopted in Hong Kong. (b) Not applicable in view of the answer to 6(a).
Chartered Institute of Management Accountants, Hong Kong Division	(a) Yes, we agree that the changes listed in Appendix V should not be adopted in Hong Kong due to the complication involved. (b) No further answer is necessary.
The Chinese General Chamber of Commerce	(a) 鑒於特區政府已研究過載於諮詢文件附件四的一些英國或其他司法管轄區曾考慮或採納的修改，結論是有關修改就香港的情況而言是不必要或不合適；因此，本會亦贊成香港不應採納有關的修改建議。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) We agree that the changes should not be adopted. (b) Not applicable.
The Hong Kong Federation of Insurers	After consulting our member companies, we agree with your proposal that there should be no change in the law with regards to insurance policies, i.e. charges on insurance policies are not registrable.
CCIF CPA Limited	(a) Yes, we agree as the existing regime has been working well. (b) None.
Hong Kong Trustees' Association Ltd	We are of the view that the existing system works well and it is preferable to have a list in the Companies Ordinance as to the specific charges that are required to be registered to avoid any ambiguity rather than only listing out those which are not required to be registered.
Clifford Chance	(a) Agree (b) Not applicable
Hong Kong Chinese	(a) Yes

Enterprises Association (Submission A)	
Hong Kong Chinese Enterprises Association (Submission B)	(a) 贊成
Hong Kong Chinese Enterprises Association (Submission C)	(a) 贊成
The Law Society of Hong Kong	(a) No, they should not be adopted. The existing framework is well understood and has worked well for many years. (b) Not applicable.
Mayer Brown JSM	(a) (G) registering insurance policies <u>JSM Comments</u> The SCCLR is of the view that charges on insurance policies are not registrable under the current Hong Kong legislative regime because in the English case of *Paul and Frank Ltd v Discount Bank (Overseas) Ltd [1967] Ch 348*, it was argued unsuccessfully that a letter of authority which authorised the payment of the proceeds of an insurance policy to the defendant amounted to a charge on book debts. In that case, it was held that one would not describe as a "book debt" the right under a contingency contract before the contingency had occurred and on the accountancy evidence the insurance proceeds would not in practice be entered in the books of the plaintiff company. In short, the rationale is that where the subject matter of the charge is the benefit of a contract and at the date of the charge, the benefit of the contract does not comprehend any book debt, that contract cannot be brought within the registration regime as being a book debt merely by reason that the contract may ultimately result in a book debt. However, in practice in Hong Kong, assignments of insurance proceeds are submitted and accepted by the Companies Registry for registration as charges on book debts under section 80(2)(e) of the Companies Ordinance (the "**CO**"). It is therefore anomalous that a charge on insurance policy is theoretically not registrable while an assignment of insurance

	proceeds is accepted for registration. We are of the view that the current law and practice are unsatisfactory. It seems that the practice of the Companies Registry may not be consistent with the law as it accepts particulars of a charge for registration even though such charge may not fall within any of the registrable heads under section 80(2) of the CO. This practice of the Companies Registry results in many charges being submitted for registration even though they may not, strictly speaking, be registrable, for example, charges over shares. This creates uncertainty. The current law is also unclear on whether an assignment of proceeds under certain types of contracts, for example, building contracts and sale contracts, are registrable or not. The proceeds deriving from these types of contracts can properly be described as "book debts", but the CO is unclear on whether "charge" includes "assignment". We therefore suggest that: (a) the Companies Ordinance makes it clear that "charge" includes "assignment by way of security"; and (b) the Companies Registry only accepts for registration those charges that fall within section 80(2) of the CO. For the sake of clarity, insurance policies/proceeds and share dividends can be made expressly excluded from the registration requirement.
The Chamber of Hong Kong Listed Companies	We do not have any particular view on the proposals relating to the registration of charges and will welcome and support any change of the law in this area that serves to modernize the language, remove any redundancy, clarify any ambiguity, expedite and enhance any administrative mechanism, and to place our regime in the same level playing field as compared with other international financial centres.
Canadian Certified General Accountants Association of Hong Kong	(a) No. (b) Basically, we agree most of the instruments in Appendix V are not required to register but we should consider registering the charge on shares. It would protect the potential buyers of private companies.
Hongkong and Shanghai Banking Corporation Limited	Question 6(a) and (b) We agree that the changes should not be adopted in Hong Kong.
The British Chamber of Commerce in	(a) Rather than corporates registering their own charges, banks/the lender should also be able to register the charge so that delays in registration do not occur, as in the United States. We also recognize that most lenders require the company

Hong Kong		to employ a law firm to arrange the registration of the charge. This would be a major development and the other matters in Appendix V are not then necessary.
	(b)	See 6(a)
Hong Kong Stockbrokers Association	(a)	Agreed only floating charge over shares is registrable.
	(b)	N.A.
The Hong Kong Association of Banks	(a)	Save in respect of retention of title clauses and codifying the law on priorities (see below), we suggest that the changes should not be adopted in Hong Kong.
	(b)	We believe that retention of title clauses should be carved out from the requirement to register given that these arise under a large number of standard form conditions of sale, that enforcement would in any event be difficult once the asset has been delivered to the purchaser and that they are essentially similar to trust receipts in respect of which it is agreed that there should be no registration. Also, we believe that there is merit in codifying the law on priorities where there is more than one charge over the same property created by a company so that the company, creditors and other interested third parties are able to know their position upon the creation of a particular charge.
The Hong Kong Institute of Chartered Secretaries	(a)	Based on reasons set out in Appendix V of the Consultation Paper, we agree that they should not be adopted in Hong Kong.
	(b)	N/A.
Ho Tak Wing	(a)	I agree that the changes listed in Appendix V should noted be adopted in Hong Kong except item (E) Pledges as more clearly stated in Q.6 (b) below.
	(b)	With regard to item (E) to Appendix V, it concerns pledges. I wonder why it should not fall within the scope of the registration requirements. For example, in the statutory books of the Company, should the pledge of assets whether non current assets or not be recorded in the Register of charges? If so, I would like to include pledges, if any, in the registration procedures, for the benefits of the public as a whole.
KPMG	(a)	We have no objection to these proposals.
	(b)	n/a
Hong Kong Institute	(a)	Generally, we agree that the existing system does not suffer from any major problems and does not require any

of Certified Public Accountants	substantial changes. Therefore, the changes listed in Appendix V of the consultation paper should not be adopted in Hong Kong. Our answers to the other questions below also reflect the fact that generally the present system seems to work satisfactorily and, therefore, changes should be made only if a genuine need can be shown. (b) N/A.
Tricor Services Limited	(a) We agree that the changes listed In Appendix V should not be adopted in Hong Kong. (b) N/A.
Hutchison Whampoa Limited	(a) No, some of the changes warrant more consideration for adoption. (b) The following areas warrant further consideration: (i) Comprehensively Codifying the Law on Priorities: The original scheme on registration does not affect priority, it is an avoiding provision so that normal common law of priorities apply independent of the registration provisions. As recommended by the UK Law Commission, if the rule on the period of registration is to be abolished then it may be necessary to consider codifying certain aspects of priority rules. (ii) Sale or Absolute Assignment of Book Debts: Priorities of such assignments of choses in action are not by any means clear. In practice, priorities and perfection of such assignments are established by notices. This is less than ideal in that there is no clarity on the timing of the notice and indeed that notice is given at all. A registration system for assignments of choses in action is something which should be considered and the fact that the English Companies Act did not adopt the UK Law Commission recommendation of the same is not an answer that this issue should be ignored. (iii) Trust Receipts: Trust Receipts constitute constructive possession of the assets concerned and therefore certain assets of a company in its possession may indeed not belong to it. Does this not sound like "false wealth" and if so why should Trust Receipts not be considered when it is a document creating a security interests in the assets. (iv) Shares: There is no logic behind the non registrability of shares taking into account of the objective of avoiding creation of “false wealth” especially in the modern day environment where it is common for assets to be held though multiple layers of intermediate holding companies.
Hong Kong Bar Association	**Question 6** 13. The Bar supports the proposal not to adopt the possible changes described in paragraphs (A), (B), (C), (D) and (G) of Appendix V.

	14. However, the Bar considers there is merit in adopting the changes described in paragraphs (E), (F) and (H) of Appendix V. 15. Paragraph (E) Pledge: So far as pledge is concerned, it seems that there is merit in requiring registration of pledge of shares and other marketable securities. It is not uncommon to find companies in particular those engaging in financial business, holding substantial shares and other marketable securities as their assets. If the value of the shares and marketable securities is substantial, their status (i.e. whether encumbered or not) will be highly material to the financial state of the companies. However, any persons or entities dealing with the company will have no independent means to find out whether the shares and marketable securities are encumbered. 16. Paragraph (F) Trust receipts: the Bar does not agree with the analysis regarding trust receipts. As stated in paragraph 19 below, the nature of security created by a trust receipt is an equitable charge. The use of trust receipt is also not uncommon in trade financing. 17. Paragraph (H) Shares and Other Marketable Securities: There is no logical reason why fixed charge on shares and marketable securities should not be registered. It seems that the Australian model is a commendable way to deal with registration of fixed charge on shares and other marketable securities.

Question 7

Do you agree that charges on aircrafts and interests in them should be made registrable?	
Gordon Jones	I agree that charges on aircraft and interests in them should be made registrable.
Arthur Lam & Co. CPA	Yes, we agree. In substance, this amendment would keep up with what the registration provisions intended to do.
Paul Mok	Agree.
Deacons	Yes.
CLP Holdings Limited	We will leave this question to the aviation industry to comment, since we are not engaged in the aviation business.
Chartered Institute of Management Accountants, Hong Kong Division	Yes, we agree that charges on aircrafts and interests in them should be made registrable.
The Chinese General Chamber of Commerce	現時，《公司條例》僅規定船舶或船舶任何股份的押記須予登記；考慮到航空運輸在經濟活動的重要性，本會贊成擴大清單的涵蓋範圍，加入飛機及與飛機有關的權益爲須予登記押記的項目。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	We do not agree that charges over aircraft (still less over interests in aircraft, in view of the difficulty of defining interests) should be made registrable. Aircraft mortgages must be notified to the Hong Kong Civil Aviation Department. The airline industry is in any event moving towards an international system of registration under the Cape Town Convention on International Interests in Mobile Equipment. Requiring registration of security over aircraft under the Hong Kong companies legislation would be burdensome and unnecessary.
CCIF CPA Limited	Yes, as a charge on a ship is already registrable.
Clifford Chance	Agree
Hong Kong Chinese Enterprises Association	Yes

(Submission A)	
Hong Kong Chinese Enterprises Association (Submission B)	(a) 贊成
Hong Kong Chinese Enterprises Association (Submission C)	(a) 贊成
The Law Society of Hong Kong	Yes. There should be no distinction between ships and aircrafts.
Canadian Certified General Accountants Association of Hong Kong	Yes, since it has no significant difference from ships.
Hongkong and Shanghai Banking Corporation Limited	We agree that charges on aircrafts (and other similar devices) and interests in them should be made registerable. There is a suggestion that the register for this purpose should be kept separately, as in other jurisdictions, as the registration is on the aircraft rather than the company, and the aircraft is of more relevance to the creditors. Although not covered in the Paper, there are circumstances where charges over Partnership assets also are charges which are registerable over the Partners assets. Where these are Limited Liability Partners, and the shares are fully paid, the amount of indebtedness is nil. An exception for requiring registration under these circumstances should be introduced.
The British Chamber of Commerce in Hong Kong	Yes, such charges should be registrable by the lender.
Hong Kong Stockbrokers Association	Agreed.

The Hong Kong Association of Banks	Yes.
The Hong Kong Institute of Chartered Secretaries	We will leave this question to the aviation industry to comment.
Ho Tak Wing	Yes, agreed.
KPMG	We have no objection to this proposals.
Hong Kong Institute of Certified Public Accountants	Yes, we agree that charges on aircrafts and interests in them should be made registrable.
Tricor Services Limited	We will leave this question to the aviation industry to comment.
Consumer Council	***Proposal to make charges on aircrafts and interests in them registrable*** 14. The Council welcomes this proposal since there is no reason for different treatments between aircrafts and ships.
Hutchison Whampoa Limited	Yes.
Hong Kong Bar Association	**Question 7** 18. The Bar supports this proposal.

Question 8

Should section 80(2)(a) of the CO requiring the registration of a charge for the purpose of securing any issue of debentures be deleted on the ground that it is redundant?	
Gordon Jones	I agree that section 80(2)(a) of the CO requiring the registration of a charge for the purpose of securing any issue of debentures should be deleted on the ground that it is redundant.
Arthur Lam & Co. CPA	We think the Section 80(2)(a) of the CO shall be deleted, we consider the registration of this provision is outdated.
Paul Mok	Agree.
Deacons	Yes.
CLP Holdings Limited	We support that section 80(2)(a) of the Companies Ordinance requiring the registration of a charge for the purpose of securing any issue of debentures should be deleted on the ground that it is redundant.
Chartered Institute of Management Accountants, Hong Kong Division	We concur that section 80(2)(a) of the CO requiring the registration of a charge for the purpose of securing any issue of debentures should be deleted on the ground that it is redundant.
The Chinese General Chamber of Commerce	由於此條例（連同第 80(7)和(8)條）與一些其他須登記押記項目出現重覆，本會同意將之刪除。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	Yes.
CCIF CPA Limited	Yes, it is redundant.
Clifford Chance	Agree that section 80(2)(a) should be deleted; however, we are not sure whether it is accurate to describe such sub-section as “redundant”. Our agreement to its deletion is driven by the fact that the other charges in section 80(2) are categorized by

	either (i) type of secured property; or (ii) type of security, not by the nature of the secured obligations.
Hong Kong Chinese Enterprises Association (Submission B)	應刪除
Hong Kong Chinese Enterprises Association (Submission C)	贊成
The Law Society of Hong Kong	Yes it is redundant.
The Institute of Accountants in Management	Finally, we agree to the view that registrable charges should include aircrafts and the interests in them. The omission of including such items in the past should be corrected.
Canadian Certified General Accountants Association of Hong Kong	Yes.
Hongkong and Shanghai Banking Corporation Limited	We agree that requiring registration of charges securing the issue of debentures should be deleted on the grounds that it is redundant.
The British Chamber of Commerce in Hong Kong	Yes it is redundant so can be deleted.
Hong Kong Stockbrokers Association	No comment.

The Hong Kong Association of Banks	Yes.
The Hong Kong Institute of Chartered Secretaries	Yes, we agree.
Ho Tak Wing	As long as the floating charge or fixed charge concerning issue of debentures is registrable, there is no objection for the deletion of the requirements set out in Section 80(2)(a) of the Companies Ordinance.
KPMG	If the requirement is redundant then we agree it should be deleted.
Hong Kong Institute of Certified Public Accountants	It is not clear to us that section 80(2)(a) is totally redundant, as not enough information is provided on whether it has been invoked in the past and, if so, how frequently, and whether all charges relating to issues of debentures are registrable and, in fact, are registered, under other categories of charges. In view of this, and given that the existing system does not seem to be causing any problems, we would query whether this subsection should be deleted at this stage. If, as suggested, there is doubt about the definition of "debenture" and whether the issue of a single debenture is caught, this point could be clarified in the legislation.
Tricor Services Limited	Yes.
Hutchison Whampoa Limited	Yes, it should not be registrable unless the charge falls under the other heads of registrability.
Hong Kong Bar Association	**Question 8** 19. The Bar supports this proposal.

Question 9

Would you prefer the reference to "bills of sale" in section 80(2)(c) of the CO to be: **(a) retained as is;** **(b) retained but clarified along the lines of section 262(3) of the ACA; or** **(c) deleted?**	
Gordon Jones	(a) I do not agree that section 80(2)(c) of the CO should be retained in its present form for the reasons pointed out in the Paper. First, Bills of Sale under the Bills of Sale Ordinance are almost obsolete. Secondly, charges on goods, in the corporate context, may not exist in isolation as they are usually coupled with a charge over the company's entire undertaking. Thirdly, it is not clear what is encompassed by a Bill of Sale given the long list of exceptions. (b) In view of the above, I do not see any point in clarifying the provision along the lines of section 262(3) of the ACA which appears to duplicate the provisions of the Australian bills of sale legislation. Furthermore, if the concept of a 'Bill of Sale' is still considered useful (which does not appear to be the case), any improvements to the definition should be made in the context of this ordinance, not the Companies Ordinance. (c) I do not see any point in retaining section 80(2)(c) of the CO and agree with the SCCLR that it should be deleted.
Arthur Lam & Co. CPA	We think the Section 80(2)(c) of the CO shall be deleted, we consider the registration of this provision is outdated.
Paul Mok	No comment.
Deacons	Charges on chattels only are quite common. I would support clarification of the meaning of chattels on the lines of the Australian wording. Perhaps aircraft could be expressly included in the definition of a chattel thereby dealing with Question 7 at the same time. Taking the point to its logical (?) conclusion, perhaps the answer is to amend Section 80(2)(h) which makes charges over ships registrable so that it includes ships, aircraft and all other chattels. It needs to be made very clear that charges over chattels do not include pledge security.
CLP Holdings Limited	We would prefer the reference to bills of sale in section 80(2)(c) of the Companies Ordinance to be deleted as the reference is out of date.
Chartered Institute of Management Accountants, Hong	Yes, we would prefer the reference to "bills of sale" in section 80(2)(c) of the CO to be (c) <u>deleted</u>.

Kong Division	
The Chinese General Chamber of Commerce	考慮到現時香港已極少需要作賣據登記的情況，爲免出現混淆，本會屬意對"賣據"的提述予以刪除。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	We would prefer the reference to be deleted.
CCIF CPA Limited	We prefer deletion as the term is out of date and normally a floating charge is created over a company's entire undertaking.
Clifford Chance	Of the three listed options, our preference is (b), (a) and, lastly, (c). Consideration should also be given to the possibility of tracking the relevant language in the Sale of Goods Ordinance.
Hong Kong Chinese Enterprises Association (Submission B)	予以保留，但應釐清或予以刪除
Hong Kong Chinese Enterprises Association (Submission C)	屬意上述(b)項方式
The Law Society of Hong Kong	(a) Yes, even though a bill of sale is rarely used as a form of security over a company's assets, it may still be of relevance if these assets consist of artworks or other valuable jewellery which are not generally covered by a floating charge. (b) No. (c) No.
Mayer Brown JSM	<u>JSM Comments</u> The SCCLR is of the view that the reference to "bills of sale" is superfluous in the company context since charges on goods

	may not exist in isolation and are usually coupled with a floating charge over a company's entire undertaking. We do not agree to this assumption made by the SCCLR as we do have clients instructing us to prepare charges over equipment without being coupled with any other security. Such stand alone charges are currently registrable under section 80(2)(c) of the CO. We agree to deleting the reference to "a bill of sale" in section 80(2)(c) of the CO, but replacing it with a reference to "a charge on a personal chattel", as used in section 262(1)(d) of the ACA. Such reference should further be clarified along the lines of section 262(3) of the ACA.
Canadian Certified General Accountants Association of Hong Kong	(a) No. (b) Yes (c) No.
Hongkong and Shanghai Banking Corporation Limited	We agree that the reference to "bills of sale" is outdated, but feel that there is a need for personal chattel mortgages to be covered by the registration requirement and would suggest that this forms the basis of an amendment to Section 80(2)(c).
The British Chamber of Commerce in Hong Kong	(c) We feel this reference can be deleted as it is archaic.
Hong Kong Stockbrokers Association	No comment.
The Hong Kong Association of Banks	We agree that the reference to "bills of sale" can be deleted but there is merit in registering mortgage/charge over chattels, plant, machinery and equipment.
The Hong Kong Institute of Chartered Secretaries	We prefer the reference to be deleted as it has become obsolete and given the long list of exceptions, it is unclear as to what "bills of sale" actually cover under the section.
Ho Tak Wing	(a) I agree that the reference to the "bills of sales" in Section 80(2)(C) of the Companies Ordinance is no longer to be

	retained. (b) No comments (c) In view of relatively small number of only 10 registration entries, as shown in Note 52 on Page 28 to the consultation paper, I agree that requirements in Section 80(2) (c) should be deleted.
KPMG	We have no preference regarding this issue.
Hong Kong Institute of Certified Public Accountants	As the consultation paper points out (at paragraph 5.14), charges over goods continue to be registrable in other comparable jurisdictions. Given also that the existing system does not seem to be causing any problems, we do not see any strong reasons for deleting section 80(2)(c). The alternative might be to try to update it, but the specific provision in section 262(3) of the Australian Corporation Act 2001, referred to in the consultation paper, which includes, for example, "a charge on a fixture or a growing crop that is charged separately from the land to which it is affixed or on which it is growing", would not seem to be entirely suitable. On balance, it may be better to retain section 80(2)(c) and make amendments, if necessary, in conjunction with a review of the Bills of Sale Ordinance (Cap. 20).
Tricor Services Limited	We would prefer the reference to "bills of sale" in section 80(2)(c) of the Companies Ordinance to be deleted as the reference is out of date.
Hutchison Whampoa Limited	Retained but clarified.
Hong Kong Bar Association	**Question 9** 20. The discussion in paragraph 5.14 of the Consultation Paper assumes that charges on goods may not exist in isolation, but usually coupled with a floating charge over a company's entire undertaking. This assumption is not entirely correct. The creation of a charge over goods often arise in the context of trade financing, most notably through the use of trust receipt and cargo receipt. It was held in Re Far East Structural Steelwork Engineering Limited (in liquidation), HCCW 354/2001, 27 October 2004, per Kwan J, at para. 40 that the security created by the trust receipt and cargo receipt is an equitable charge and falls within the meaning of a "bill of sale". This holding was not challenged on appeal in Re Far East Structural Steelwork Engineering Limited (in liquidation), CACV 348/2004,15 June 2006, although the Court of Appeal by a majority came to a different conclusion and held that the charge created by the trust receipt and cargo receipt comes within the exception under s.2 of the Bills of Sale Ordinance. 21. It is neither unusual nor uncommon for a charge to be created over goods. It has certainly been used by merchants to

	conduct trade financing. There is no good reason why the reference to "bill of sale" in section 80(2)(c) of the CO should be deleted. The Bar considers that the provision should be retained but with clarification along the lines of section 263(3) of ACA.

Question 10

(a) Would you prefer the term "book debts" to be statutorily defined or left to the courts to define? **(b) If your preference is for a statutory definition, would you agree to a definition along the lines of section 262(4) of the ACA, or some other (please specify)?** **(c) Do you agree that a lien on subfreights and cash deposits should be expressly excluded from the registration requirement?**	
Gordon Jones	(a) The Paper does not give any indications of how section 262(4) of the ACA has worked in practice. However, the definition appears complex, referring to, first, not only known future debts payable to the company at the time of the creation of the charge but also unknown future debts **'of the same nature'** (emphasis added) and, secondly, a list of exemptions. In particular, the potential for argument over what constitutes unknown future debts of the same nature could be significant requiring court intervention to interpret the provision in a particular given situation. In view of this, I would prefer the definition of 'book debt' to be left open for the courts to define. (b) I do not agree that there should be a statutory definition of 'book debt' for the reasons given under (a). (c) I agree that a lien on subfreights and cash deposits should be expressly excluded from the registration requirement for the reasons given in the Paper.
Arthur Lam & Co. CPA	(a) If the term "book debts" is defined in the CO, it would reduce the uncertainty in the interpretation of the term. (b) We agree to the definition along the lines of Section 262(4) of the ACA. (c) We agree that a lien on subfreights and cash deposits should be expressly excluded from the registration requirement.
Paul Mok	(a) No comment. (b) No comment. (c) Yes
Deacons	(a) I think it is preferable not to define "book debts" but to leave it to the courts to do so. (c) I agree that liens on sub-freights and charges over cash deposits held with the chargee (charge-backs) should be expressly excluded. As you propose to do this for these types of security I think you should expressly exclude insurance assignments and share security too (see Q.6 above). One area you have not identified is where a cash deposit with a bank is charged to a third party chargee (i.e. not a charge-back). I think these types of charge should not be excluded as there will be some value in giving notice to the public that the account is subject to a security interest in favour of a third party.

CLP Holdings Limited	(a)	The proposed definition of "book debts" is complex, referring to not only known future debts payable to the company at the time of the creation of the charge but also unknown future debts of the same nature. Combined with a number of exemptions to be considered, the definition of "book debts" is subject to vigorous debate. We would therefore prefer the term "book debts" to be left to the courts to define.
	(b)	Not applicable in view of the answer to 10(a).
	(c)	We agree that a lien on subfreights and cash deposits should be expressly excluded from the registration requirement for the reasons given in the Consultation Paper.
Chartered Institute of Management Accountants, Hong Kong Division	(a)	Yes, we prefer the term "book debts" to be statutorily defined.
	(b)	Yes, we think that there should be a definition similar to the lines of section 262(4) of the ACA.
	(c)	Yes, we agree that a lien on subfreights and cash deposits should be expressly excluded from the registration requirement.
The Chinese General Chamber of Commerce	(a)	"帳面債項"基本上可包含很多不同的情況，要爲此一詞設立法定定義，是一項相當繁複的工作；對中小型的私人公司而言，爲每一項帳面債項進行押記登記，將會導致公司的運作成本顯著增加。因此，本會認爲把界定"帳面債項"的工作交由法庭處理，是最爲適當的做法。
	(b)	本會並無屬意設立法定定義，此問題不適用。
	(c)	對於把轉租合約下運費的留置權及現金存款豁除於登記規定的適用範圍，本會同意有關修訂，並希望能減輕登記押記所帶來的不便。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a)	We would prefer the term to be left to the courts to define. We doubt whether statutory definition of the type in the ACA will in practice reduce the need for the courts to intervene in any event, particularly given that the types of security which might fall within the definition evolve with commercial practice over time.
	(b)	Not applicable.
	(c)	Yes.
CCIF CPA Limited	(a)	Better to statutorily define "book debts" to make the law clearer.
	(b)	Yes.
	(c)	Yes.

Clifford Chance	(a) We would prefer to continue with the present approach of leaving the courts to determine what constitutes "book debts". We also have difficulty in understanding the argument set out in paragraph 5.18. (b) Not applicable (c) No
Hong Kong Chinese Enterprises Association (Submission B)	(a) 交由法院界定 (c) 贊成
Hong Kong Chinese Enterprises Association (Submission C)	(b) 屬意(b)項方式 (c) 贊成
The Law Society of Hong Kong	(a) The term "book debts" can and should be given a statutory definition. (b) The ACA definition can be adopted. (c) Subfreight should be excluded as it lacks the proprietary characteristic of a charge. Cash deposits should not be excluded as it can be charged in favour of a party other than the depository bank.
Mayer Brown JSM	(c) <u>JSM Comments</u> *Lien on subfreights* Lord Millett in *Agnew and Kevin James Bearsley v The Commissioner of Inland Revenue and Official Assignee for the estate in bankruptcy of Bruce William Birtwhistle and Mark Leslie Birtwhistle [2001] UKPC 28*, a Privy Council decision correctly states, by way of obiter, that the lien on subfreights is not a floating charge as it is incapable of crystallisation. The so called lien cannot be enforced against the recipient of subfreights, because there is no proprietary interest of the person granting the lien in the subfreights. Lord Millett concluded that *In re Welsh Irish Ferries Ltd [1986] Ch 471* was incorrectly decided. However his remarks were obiter and therefore *In re Welsh Irish Ferries Ltd* is still the law. Hong Kong should follow the United Kingdom and reverse the effect of In re Welsh Irish Ferries Ltd as has been done by section 396 (2)(g) of the Companies Act 1985. *Cash deposits*

	We are of the view that cash deposits are no different from any other kind of assets and should not therefore be excluded from the registration regime. A company should disclose that its cash deposits are being charged in the same way as charges on its other assets so that its creditors are being put on notice and will not be misled by its false wealth.
Canadian Certified General Accountants Association of Hong Kong	(a) It should be statutorily defined. (b) Yes. Sec 262(4) of the ACA looks fine. (c) Yes.
Hongkong and Shanghai Banking Corporation Limited	(a) Since codification of the definition of "book debts" cannot be exhaustive in view of its complexity, we prefer the term to be left to the court to define. (b) Not applicable (c) We agree that a lien on subfreights and rights of set-off creating charges over credit balances should be excluded from the registration requirement.
The British Chamber of Commerce in Hong Kong	(a) In a common law system this should be left to the courts and precedent so that flexibility can be maintained overtime, to accommodate changing financial markets. (b) We have no preference for such a statutory definition. (c) We do not see any major additional benefit in the registration of subfreights and cash deposits; especially in relation to the latter as most deposit holding banks will have set off rights and this will likely be appreciated by other chargees.
Hong Kong Stockbrokers Association	(a) Should be statutorily defined. (b) Along the lines of section 262(4) of ACA. (c) No comment.
The Hong Kong Association of Banks	(a) We suggest that this be left to the courts to define. Meanwhile, there is merit in clarifying whether a charge on rent or other periodical sum issuing out of land can be registered under section 80(2)(e) and also whether share dividends and distributions derived from shares under a charge can be registered. There is also merit in clarifying whether assignments / charges over chose in action such as assignments of proceeds under insurance contracts and documentary credits can be registered under the head of "book debts" or other head

		specifically stated in clause 80(2) of the Companies Ordinance. (b) Not applicable. (c) Yes. Rights are set-off creating charges over credits balances should also be excluded from the registration requirement.
The Hong Kong Institute of Chartered Secretaries	(a) (b) (c)	We prefer the term to be left to the courts to define so as to allow its meaning to evolve through future case law. We find the definition of "book debts" in the ACA too complicated for adoption in Hong Kong. N/A. Based on the reasons stated in the Consultation Paper, we agree that it should be excluded.
Ho Tak Wing	(a) (b) (c)	I prefer that the term "book debts" should be statutory defined in the Companies Ordinance in broad term. No comments Yes, agreed.
KPMG	(a) (b) (c)	We consider it would bring clarity if the Ordinance included some interpretation as to the intended meaning of "book debts" as this is not a term found in generally accepted accounting principles. We have no preference regarding this issue, other than presumably the definition should encapsulate the intended meaning of "book debts", or at least reflect the current generally accepted interpretation, so far as application of this section is concerned. We have no preference regarding this issue.
Hong Kong Institute of Certified Public Accountants	(a) (b) (c)	We consider that the term "book debts" should be left open for the courts to define. N/A. While we have no strong view as regards expressly excluding liens on subfreights and cash deposits from the categories of registrable charge, it would be helpful if more information could be provided on the current practice in relation to these two items. Are there existing registrations of liens on subfreights or cash deposits and, if so, what will happen to these? If there are none, and have been none in the past, we would doubt whether this is really a problem that requires amendment to the CO?
Tricor Services Limited	(a) (b)	We would prefer the term "book debts" to be left to the courts to define. The definition of "book debts" under section 262 (4) of the ACA appears to be complex. Therefore, the preference is

	not to go for a statutory definition along the lines of section 262(4) of the ACA. (c) Yes, based on the reasons given in the Consultation Paper.
Hutchison Whampoa Limited	(a) Yes, a definition of book debt is appropriate in particular including a list of matters which are not book debt for this purpose should be set out. (b) On the basis that the objection of the registration regime is the avoidance of the creation of false wealth, book debt should mean what the accounts of the company refer to as book debt so that when the lender reads its account it can ascertain whether book debt set out in the accounts is real or false wealth. This also allows for future flexibility in case of changes in accounting policy. (c) Yes and dividends and other distributions under securities should also be excluded.
Hong Kong Bar Association	**Question 10** 22. The Bar considers it appropriate not to define the term "book debts" for the reasons set out in paragraphs 5.16 of the Consultation Paper. 23. The Bar supports the proposal under Question 10(c).

Question 11

Do you agree that the automatic statutory acceleration of repayment in section 80(1) of the CO should be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time?	
Gordon Jones	I agree with the reasons given in the Paper that the automatic statutory acceleration of repayment in section 80(1) of the CO should be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time.
Arthur Lam & Co. CPA	We agree.
Paul Mok	Agree.
Deacons	Automatic acceleration is in fact often forgotten. I have no strong feelings either way but have a mild preference for retaining it. I assume that by "problems for banks" you mean the triggering of cross-default provisions. In fact, "relaxation" of the provision in the way you suggest may have little practical effect in practice as cross-default provisions are usually widely drafted so that even though the acceleration is not automatic, they will still trigger a cross-default.
CLP Holdings Limited	For the reasons given in the Consultation Paper, we support that the automatic statutory acceleration of repayment in section 80(1) of the Companies Ordinance should be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time.
Chartered Institute of Management Accountants, Hong Kong Division	Yes, we agree that the automatic statutory acceleration of repayment in section 80(1) of the CO should be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time.
The Chinese General Chamber of Commerce	本會認爲，貸款人應有權利選擇對其批出的抵押貸款須予立即償還或免除加快還款的法定規定。事實上，銀行一般已爲貸款業務訂定詳細的條款細則；因此，本會贊同作出修訂，讓貸款人有權但不一定要求未能在指定時間內登記押記的公司，立即償還藉押記保證的貸款。
Swire Pacific Limited, Cathay Pacific Airways	Yes.

Limited, Hong Kong Aircraft Engineering Company Limited	
CCIF CPA Limited	Yes, this can resolve the problems associated with the automatic statutory acceleration of repayment.
Clifford Chance	Agree
Hong Kong Trustees' Association Ltd	We also support the amendment to the Companies Ordinance to provide the lender with the entitlement (rather than a duty) to demand immediate repayment of the amount secured by the charge should the company fail to register the charge within the prescribed time, in order to allow for more flexibility.
Hong Kong Chinese Enterprises Association (Submission A)	Yes
Hong Kong Chinese Enterprises Association (Submission B)	贊成
Hong Kong Chinese Enterprises Association (Submission C)	贊成
The Law Society of Hong Kong	Yes. Automatic statutory acceleration is often not the intention of the lender.
The Association of Chartered Certified Accountants	We understand that the current automatic statutory acceleration of repayment as provided in section 80(1) of the Companies Ordinance could create practical problems. We agree that the Ordinance should be amended to provide the lender a right instead of a duty to demand immediate repayment of the amount secured by the charge should a company fail to register a charge within the prescribed time.
Canadian Certified	Yes.

General Accountants Association of Hong Kong	
Hongkong and Shanghai Banking Corporation Limited	We agree that the automatic statutory acceleration of repayment in Section 80(1) should be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time.
The British Chamber of Commerce in Hong Kong	The lender should be able to register the charge.
Hong Kong Stockbrokers Association	No comment.
The Hong Kong Association of Banks	Yes.
The Hong Kong Institute of Chartered Secretaries	Yes, we agree as the lender may not wish to demand immediate repayment.
Ho Tak Wing	By virtue of Section 80(1) of the Companies Ordinance, the automatic statutory acceleration of repayment should be amended to give the right of the lender to demand immediate repayment of the amount secured by the charge if the company fails to register a charge within the specified period of 5 weeks. In addition, it is suggested that the directors of the Company should be held liable to penalties for non compliance with Section 80(1).
KPMG	We support this proposal.
Hong Kong Institute of Certified Public Accountants	Again it is not clear that there is a genuine practical problem with the existing provision. Although, under section 80(1), any money secured by a void charge becomes immediately payable, is it necessarily the case that, in practice, it will be paid immediately, regardless of whether the charge holder requires immediate repayment? While it is suggested in the consultation paper that the existing provision may create problems for banks, it is not indicated that, for example, the Hong Kong Association of Banks has called for such a change to be made. In any case, section 80(1) is presumably also subject

	to the provision, under section 86, for an extension of time for registration to be granted by the court.
Tricor Services Limited	Yes, based on the reasons given in the Consultation Paper.
Hutchison Whampoa Limited	Acceleration right should be left as a matter of contract between the lender and the company, but at the least the non-registration should not be an automatic acceleration because (i) the registration is in practice done by the lender and why should the law penalize the company for something which the lender has done wrong, (ii) it may not be in the interest of the lender that the debt becomes automatically due as the reversal of the process after the registration is rectified may be problematic and (iii) there may be cross default implications on the company for non payment of an amount due.
Hong Kong Bar Association	**Question 11** 24. The Bar has no objection in principle to the proposal in paragraph 5.20 of the Consultation Paper. However clarification may be required for limitation purposes – logically, it would appear that time should begin to run as from the expiry of the prescribed time, as opposed to when the lender makes a formal demand for repayment.

Question 12

(a) Do you agree that both the instrument of charge and prescribed particulars should be registrable and open to public inspection? **(b) Do you agree that the Registrar should no longer issue a certificate of due registration, but a receipt showing the particulars submitted for registration, as well as the date on which the instrument of charge (if required) and the particulars are submitted for registration?**	
Gordon Jones	(a) I support the proposed simplification of the charge registration process and agree that the particulars of a charge submitted for registration should be prepared by the company as opposed to the CR. However, while I can see the value in requiring the submission and registration of the charge instrument, would make some observations about this. First, charge instruments are, typically, very lengthy, if not bulky, documents, and their registration and availability on the public record could be contemplated only if the CR was in a position to accept, process and make available these documents electronically. This is an essential precondition as the registration and processing of paper charge instruments would lead to substantial administrative issues regarding storage and imaging. Secondly, as the business community seems to be content with the current arrangements under which only the particulars of a charge are registered, it is not clear if there is a demand for substantially more information on company charges to be made available on the public register. Thirdly, the Paper is silent on whether or not other jurisdictions register the charge instrument as opposed to the particulars of a charge. However, it states that, in Singapore, only the particulars of the charge require registration and, as far as I am aware, this is the practice in all other common law jurisdictions including the UK. (b) For the reasons stated in the Paper, I agree that the R of C should no longer be responsible for issuing a certificate of due registration but a receipt showing the particulars submitted for registration as well as the date on which the instrument of charge (if required) and the particulars were submitted for registration.
Arthur Lam & Co. CPA	(a) We think that both the instrument of charge and prescribed particulars should be registrable and make available to public inspection at nominal fee. (b) We think a certificate of due registration is not necessary. A receipt for that effect should be suffice.
Arthur K. H. Chan & Co.	(a) Yes (b) Yes
Paul Mok	(a) On balance, from a company's points of view, I tend to believe that the benefits of giving constructive notice to the

	world of the contents of a charge instrument resulting from registering both the instrument of charge and prescribed particulars will outweigh (marginally though) the disadvantages of disclosing information, which may be commercially sensitive, in the instrument to the public. (b) Yes, provided the instrument of charge will become registrable as in (a) above.
Deacons	(a) I think only prescribed particulars should be registrable. (1) Charge documents are confidential to the parties to them and the parties to them may not want their commercial arrangements to be open to the public. It is not realistic to expect parties to keep their specific commercial arrangements in separate documentation and this may place an undue burden on the way they document their transactions. (2) It would be unfair to impose a burden on the public to review the entire security document to discover the extent of the security particularly for laymen. Some security is highly complex and beyond the comprehension even of some lawyers! (3) The existing system of filing particulars must be retained with some refinements/simplifications to the form. (b) I would support the Registrar continuing to issue a certificate. If there is a concern about liability then references to "due" registration could be removed. I don't think the Registry should be concerned about the fact that it is called a "certificate". It is "certifying" that it has registered a security document. There shouldn't be a problem with that because that is what has happened.
CLP Holdings Limited	(a) We agree that both the instrument of charge and prescribed particulars should be registrable and open to public inspection. We also support that the particulars of a charge submitted for registration should be prepared by the company as opposed to the Companies Registry. (b) For the reasons provided in the Consultation Paper, we agree that the Registrar should no longer issue a certificate of due registration, but a receipt showing the particulars submitted for registration, as well as the date on which the instrument of charge (if required) and the particulars are submitted for registration.
Chartered Institute of Management Accountants, Hong Kong Division	(a) Yes, we agree that both the instrument of charge and prescribed particulars should be registrable and open to public inspection. (b) Yes, we agree that the Registrar should no longer issue a certificate of due registration, but a receipt showing the particulars submitted for registration and the date.
The Chinese General Chamber of	(a) 目前，押記文書本身沒有載於登記冊，因而不能透過登記冊供公眾查閱。隨著提交存檔電子化的實施，登記押記文書及指定詳情將更爲容易，並且更有效率；在增加透明度的大前提下，本會贊成押記文書及指定詳情

Commerce	均須予登記及公開讓公眾查閱。 (b) 本會同意諮詢文件所指，公司及押記持有人有責任填寫指定表格及根據押記文書對所填報的資料加以核實；處長對有關交易的情況別無所知，而公司註冊處只擔當該等詳情的保管人而非核實者。因此，本會贊成處長無須再發出登記證明書，改爲只須發出收據的相關建議，這將有助簡化整個登記程序，並加快讓第三者取得押記的資料。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) No. The effect of this change in practice would simply be that the instrument of charge would contain solely (i) what is necessary to constitute or evidence the charge (and a negative pledge, if the parties have agreed to one) and (ii) the prescribed particulars. All other information would be included in a non-registrable document. No material additional information will be made public. (b) Yes.
CCIF CPA Limited	(a) Yes, as the prescribed form contain simple particulars only and does not include some essential terms, e.g. negative pledge clauses. (b) No, we consider that the certificate of due registration should be retained.
Clifford Chance	(a) Agree (we assume that it would be a certified copy (instead of the original) of the instrument of charge which will be registrable and open to public inspection). (b) Agree
Hong Kong Chinese Enterprises Association (Submission A)	(a) Yes (b) Yes
Hong Kong Chinese Enterprises Association (Submission B)	(a) 贊成 (b) 不贊成
Hong Kong Chinese Enterprises	(a) 贊成

Association (Submission C)	(b) 贊成
The Law Society of Hong Kong	(a) Yes. The Registrar should not have to undertake the responsibility for checking the correctness of the particulars. (b) The system of issuing certificate of registration should be retained. Non-registration will have legal consequences. There should be some official proof of due registration.
Mayer Brown JSM	(b) <u>JSM Comments</u> We are of the view that the Companies Registry currently plays an important role in ensuring that the particulars submitted for registration are in order. This has a crucial benefit of maintaining the accuracy of the register, without which any person who in the future wants to search the register may be left helpless if he finds out that the particulars previously submitted for registration by a company were inaccurate, insufficient or incomplete. Accordingly, if the Companies Registry no longer verifies the details of the particulars submitted for registration and merely serves as the depository, then either (a) the instrument of charge will be required to be registered and open to the public for inspection (but there may be much opposition to this); or (b) the company submitting the particulars for registration will be required to file a statutory declaration verifying the accuracy of the particulars and there will be stringent and adverse consequences imposed on the company in failing to submit accurate particulars for registration.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes. (b) Yes
Hongkong and Shanghai Banking Corporation Limited	(a) We agree that both the instrument of charge and prescribed particulars should be registerable and open to public inspection, though the volume of documents appearing in the register will be increased substantially. The Form M1 of the Registry should be simplified to avoid duplication of effort. (b) We agree that the Registrar should issue a receipt showing the particulars submitted for registration, as well as the date on which the instrument of charges and the particulars are submitted for registration.
The British Chamber of Commerce in Hong Kong	(a) Yes; these should all be available for inspection. (b) A receipt will be sufficient if the matters at 12(a) are available for inspection.

Hong Kong Stockbrokers Association	(a) Agreed. (b) Agreed.
The Hong Kong Association of Banks	(a) Yes. (b) Yes.
The Hong Kong Institute of Chartered Secretaries	(a) Yes, we agree and also support the proposal that the particulars of charge should be prepared by the company instead of the CR. The company should be responsible for verifying the accuracy of the particulars. (b) Yes, since the CR will no longer be responsible for checking the particulars, we agree that a receipt rather than a certificate of due registration should be issued by the CR.
Ho Tak Wing	(a) Both the instrument of charges and prescribed particulars should be registrable and be open to the public for inspection. In the meantime, the accuracy of the charge should be verified by the directors of the Company before submitting the same to the Companies Registry. Any discrepancies, if any, should be rectified by the Company within a period, say, 2 weeks. On the other hand, attention should also be drawn on the e-filing procedures. (b) The Companies Registry should continue to issue a Certificate of Registration upon receipt/ filing of instrument of charge.
KPMG	(a) We support this proposal. (b) We support this proposal.
Hong Kong Institute of Certified Public Accountants	(a) While we consider the present system has, generally, been working satisfactorily, we note that, under the Singapore system, referred to in paragraph 5.24 of the consultation paper, whilst only the prescribed particulars are required to be filed, the registration office may require the instrument of charge to be produced for inspection, although this is not done as a matter of course. In order to consider this possible option more fully, it would be helpful to know under what circumstances the instrument of charge may be required to be produced. (b) We understand the arguments for simplifying and speeding up the registration process. We note, however, under the proposal, it seems that the register will cease to provide conclusive evidence from a legal point of view that a charge has been validly registered and, instead, the responsibility for ensuring that the particulars are in order and have been properly registered would be transferred to the company or charge holder. As, prime facie, this would represent a

	fairly significant change of approach in terms of the reliance that could be placed on the register, we would suggest that the implications of this proposal be explained more fully in the context of any future discussions on it, and that further information be provided as to how this process would work in practice, particularly if it is ultimately decided that the full instrument of charge should not be filed.
Tricor Services Limited	(a) Yes. We agree that both the instrument of charge and prescribed particulars should be registrable and open to public inspection. (b) Yes. based on the reasons given in the Consultation Paper.
Consumer Council	***Proposal to make both the instrument of charge and prescribed particulars registrable and open to public inspection Further proposal that the Registrar should no longer be required to verify the particulars submitted and should just issue a receipt showing the particulars, as well as the date on which the charge instrument (if required) and the particulars are submitted for registration*** 15. The Council supports the recommendation for registration of both the charge instrument and the prescribed particulars so that the whole instrument will be available for public inspection at the Companies Registry. This will enable the public to have better access to the financial information of companies. 16. The proposals that the Registrar should no longer be required to verify the correctness of the particulars entered in the registration form and should just issue a receipt (instead the current certificate of due registration) showing the said particulars and the date of submission are however not agreeable to the Council. If the Registrar does not verify the filed particulars, the public (including consumers) may, in some cases, find the particulars misleading, incomplete, confusing or even inaccurate. As such, they would have to compare the particulars with the complicated charge instrument, usually in English, by themselves in order to verify their correctness. 17. In the case of Land Registry, the Land Registrar is required to check the correctness of the particulars entered in the Memorial boxes. There seems no reason why the Registrar of Companies should be exempted from such responsibility. Therefore, the Council considers that the existing practice of the Registrar in verifying the correctness of the particulars submitted and issuing certificates of due registration should be retained. 18. It is also noted that the proposed new registration form is much simpler and only contains some basic information about the company concerned, the particulars of the chargee and the date of the charge. It seems that under the new system, the party who lodges the charge instrument for registration would no longer be required to enter, in the registration form, particulars concerning the amount secured and the property charged, which are no doubt key and

	important information about the charge. The public (including consumers) would again be left with the duty to identify such essential information from the complicated charge documents by themselves. The Council finds this proposal not acceptable.
Hutchison Whampoa Limited	(a) No they should not be open to public inspection, it is sufficient for the public to have notice of the identities of the charger and the lender and the asset concerned, it is not necessary for the instrument of charge to be open to public inspection. (b) Yes
Hong Kong Bar Association	**Question 12(a)** 25. The Bar supports the proposal for registration of both the instrument of charge and the prescribed particulars so that the public can apprise of the extent to which the company's assets have been encumbered. Even under the present regime, certain instruments of charge are required to be registered (see sections 80(3) and 82(1) of CO and regulation 5 of Companies (Forms) Regulations). There is no logical distinction as to why certain instrument of charge should be registered while others do not have to be registered. 26. If there is any confidential information which the parties to the instrument do not want to disclose, they can be set out in a side letter which is not registrable. **Question 12(b)** 27. The Bar does not supports the proposal for replacing the certificate of due registration with a receipt. The legislative purpose of the certificate and its conclusiveness have been the subject of extensive judicial consideration In re C.L. Nye Ltd. [1971] Ch 442; In re Yolland, Husson & Birkett Ltd. [1908] 1 Ch 152; National Provincial and Union Bank of England v. Charnley [1924] 1 KB 431; In re Eric Holmes (Property) Ltd. (in liquidation) [1965] 1 Ch 1052; In re Mechanisations (Eaglescliffe) Ltd. [1966] 1 Ch 20; R v Registrar of Companies, ex p Central Bank of India [1986] 1 QB 1114; Re Lin Securities (Pte) Ltd. [1988] SLR 340; Exeter Trust Ltd. v. Screenways Ltd. [1991] BCLC 888; and United Overseas Bank Ltd. v. The Asiatic Enterprises (Pte) Ltd. [1999] 4 SLR 226 and most recently by Kwan J in Re Moulin Global Eyecare Holdings Limited, HCCW 470/2005, 4 June 2008, at paras. 129 to 132. The certificate was for the protection of the chargee rather than members of the public or the company concerned. It should not lightly be displaced because of administrative convenience. If the certificate is replaced by a receipt, a principal purpose of the certificate, which is to provide certainty on the particulars registered, will be defeated. 28. If the proposal under Question 12(a) is implemented, the instrument of charge will be registered and available to the

	Registrar, who can readily verify the information from reviewing the instrument. Still further, if it is considered desirable to enhance the accuracy of the particulars provided by the company, criminal sanction may be imposed for providing incorrect particulars to the Registrar, which is presently lacking under section 81 of CO.

Question 13

If the charge instrument is not registrable as an answer to Question 12(a), should the charge holder be precluded from relying on rights to the security in excess of those referred to in the particulars submitted for registration?	
Gordon Jones	I agree that, if the charge instrument is not to be registrable, it would be useful to have a provision which precludes the charge holder from relying on rights to the security in excess of those referred to in the particulars submitted for registration.
Arthur Lam & Co. CPA	We agree.
Deacons	I think such a clause may be of assistance "for the avoidance of doubt". In practice the chargeholder couldn't claim rights in excess of those he actually has.
Paul Mok	N/A.
CLP Holdings Limited	We agree that, if the charge instrument is not registrable, the charge holder should be precluded from relying on rights to the security in excess of those referred to in the particulars submitted for registration.
Chartered Institute of Management Accountants, Hong Kong Division	Yes, we agree that the charge holder should be precluded from relying on rights to the security in excess of those referred to in the particulars submitted for registration.
The Chinese General Chamber of Commerce	承如諮詢文件所述，由於查冊者通常是銀行及法律專業人員，他們應可自行根據押記文書核實有關詳細的資料；因此，本會認爲無需特意禁止押記持有人依賴超越已呈交登記詳情所提述的抵押權利，以確保呈交登記的詳情準確無誤。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	Yes. Given that charge holders in practice arrange for registration, it is for them to ensure that the particulars accurately describe the security to which they are entitled.
CCIF CPA Limited	Yes, as this measure can enhance the accuracy in the particulars delivered for registration.

Clifford Chance	The charger should not be precluded from relying on rights to security in excess of those referred to in the particulars submitted for registration.
Hong Kong Chinese Enterprises Association (Submission C)	不適用
The Law Society of Hong Kong	Agree.
Mayer Brown JSM	We do not agree to this approach as the consequences would be too drastic and the responsibility placed on lawyers preparing the particulars for registration would be unduly onerous.
Canadian Certified General Accountants Association of Hong Kong	Yes.
The British Chamber of Commerce in Hong Kong	(to check the views of a typical lender)
Hong Kong Stockbrokers Association	N.A.
The Hong Kong Association of Banks	Not applicable.
The Hong Kong Institute of Chartered Secretaries	Yes, we agree.
Ho Tak Wing	No comments

KPMG	This seems a reasonable proposal and should encourage fuller disclosure of particulars.
Hong Kong Institute of Certified Public Accountants	It would be helpful to know why a similar provision in the UK Companies Act was not implemented and was subsequently removed. However, generally, we see no pressing need to change the present arrangement.
Tricor Services Limited	No, as this may not be fair to the charge holder if for some reason, the particulars as filed contain errors affecting the rights of the charge holder to the securities. Also, if an amended form is allowed to be filed correcting the errors in the form originally filed, then the question here may no longer be an issue to be considered. In any case, we are in favour of registering the instrument of charge. By doing so, searchers should themselves be able to verify the information in the particulars against the instrument of charge.
Consumer Council	***If the charge instrument is not registrable, the alternative proposal of precluding the charge holder from relying on rights to the security in excess of those referred to in the particulars submitted for registration*** 19. In view of the Council's support of the recommendation for registration of the charge instrument, this proposal is not applicable.
Hutchison Whampoa Limited	No.
Hong Kong Bar Association	**Question 13** 29. The Bar does not support this proposal. It is difficult to see how this proposal can be justified bearing in mind that the primary obligation to register the charge (which will not be changed, see paragraph 5.19 of the Consultation Paper) is on the company holder, though the charge holder can also effect registration on its own volition under s.81(2) of CO. The sanction would be disproportionate and unjustified in a case where the incorrect particulars are submitted by the company and the charge holder failed to check the register and to apply for consequential rectification.
The Hongkong and Shanghai Banking Corporation Limited	Not applicable

Question 14

(a) Do you agree that the period to register a charge should be shortened? **(b) If so, do you think that 21 days is an appropriate period?**	
Mandatory Provident Fund Schemes Authority	After reviewing the consultation paper, we find the following proposals relevant to the work of the Mandatory Provident Fund Schemes Authority (MPFA) and are in support of them: (b) Proposal to make information on charges available sooner The proposal, if implemented, will facilitate the MPFA's work on enforcement of judgements in cases where charging orders are being considered.
Gordon Jones	(a) I agree that the period to register a charge should be shortened. (b) I agree that 21 days is an appropriate period to register a charge.
Arthur Lam & Co. CPA	(a) We agree. (b) We think the 21 days proposal is appropriate, though a shorter period is even more desirable.
Paul Mok	(a) Yes (b) Yes
Deacons	(a) No – retain 5 weeks. I am pretty sure that having a 5 week period does not in any way give the impression that Hong Kong is not efficient. The other concern about it being unfair to subsequent chargees who register their charges more quickly/efficiently is not in my view relevant. First, this happens very rarely in practice. Secondly, the first chargee will probably have a negative covenant prohibiting the second charge anyway. Thirdly, if the time to register is 5 weeks then that should be the time that parties have to register. Everyone is aware of the time limit and should adjust their business affairs accordingly. Just because you are quick doesn't mean that you should somehow obtain an advantage.
CLP Holdings Limited	(a) We agree that the period to register a charge should be shortened. (b) We agree that 21 days is an appropriate period to register a charge.
Chartered Institute of Management Accountants, Hong	(a) Yes, we agree that the period to register a charge should be shortened. (b) Yes, we think that 21 days is an appropriate period.

Kong Division	
The Chinese General Chamber of Commerce	(a) 根據現行規定，公司有責任在押記設定日期起計五個星期內呈交押記的詳情以作登記，本會認爲公司呈交押記詳情的實際程序無需如此長的時間，故贊成縮短登記押記的期限，以加快整個押記登記流程和提升效率。 (b) 雖然本會贊成縮短現時登記押記所設定的五個星期期限，惟諮詢文件所建議的 21 天期限，在實際操作上可能會較爲緊迫，因此，本會建議把有關期限設定爲 30 天應較爲合適。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) Yes (b) Yes
CCIF CPA Limited	(a) Yes. (b) Shorter is better, say, 14 days.
Clifford Chance	(a) Agree (b) We agree that 21 days is an appropriate period.
Hong Kong Chinese Enterprises Association (Submission A)	(a) Yes (b) Yes
Hong Kong Chinese Enterprises Association (Submission B)	(a) 不贊成
Hong Kong Chinese Enterprises Association	(a) 贊成 (b) 合適

(Submission C)	
The Law Society of Hong Kong	(a) Yes (b) Yes
Mayer Brown JSM	<u>JSM Comments</u> If the answer to Question 12(b) above is yes and the Companies Registry no longer verifies the details of the particulars submitted for registration, then we do not object to shortening the registration period. However, if the Companies Registry continues to verify the details of the particulars submitted for registration, we do not agree to shortening the registration period. Sometimes the Companies Registry may request for further information after we have submitted the particulars for registration, in which case more time may be needed to allow us to accommodate the request of the Companies Registry.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes. (b) Yes, 21-day is appropriate
Hongkong and Shanghai Banking Corporation Limited	Question 14(a) and (b) Subject to a procedure being implemented which allows for late registration without having to seek court approval, we agree that the registration period should be reduced to 21 days.
The British Chamber of Commerce in Hong Kong	(a) It should be shortened to 21 days; in practice most bank compliance departments register charges urgently in western countries - in the UK they are registered (as a matter of best practice) on the same day as the charge documents are executed and in the US they may even be registered before the charge documents are executed. We think this should also be possible in Hong Kong, so that banks can be on notice of other lenders involvement. (b) Yes; and please refer to 14 (a) above.
Hong Kong Stockbrokers Association	(a) Agreed. (b) Yes.
The Hong Kong Association of Banks	(a) Yes. (b) Yes.

The Hong Kong Institute of Chartered Secretaries	(a) Yes, we agree. (b) Yes, we consider this is a reasonable period.
Ho Tak Wing	(a) The period to register a charge should definitely be shortened. (b) Registration of a charge should be made within two weeks time (under existing arrangement - 5 weeks).
KPMG	(a) We support this proposal. (b) This seems a reasonable period.
Hong Kong Institute of Certified Public Accountants	(a) We consider that a reasonable time should be allowed to register a charge given that, for example, documentation may need to be obtained from overseas. The current five-week period is a maximum period and charge holders/companies could be encouraged to complete the necessary requirements earlier than this. (b) The possibility of shortening the period for the registration of charges to 21 days appears to be dependent upon implementation of the changes in procedure explained in paragraphs 5.21 - 5.25 of the consultation paper. In this regard, we would refer you to our response to Question 12 above.
Tricor Services Limited	(a) Yes. (b) Yes.
Consumer Council	***Proposal of shortening the time limit for registration of a charge instrument under the Companies Ordinance to 21 days*** 20. The Council welcomes the proposed shortening of the time limit for registration of a charge instrument under the Companies Ordinance from 5 weeks to 21 days.
Hutchison Whampoa Limited	(a) If an on-line simplified registration system is adopted then, yes. If not then no. (b) This follows the UK system and Hong Kong should assess itself what the appropriate time period is. If an on-line simplified registration system is adopted then 5 days is sufficient, if not then there seems to be no justifiable reason to shorten of the period
Association of Women Accountants (Hong Kong) Limited	We agree that the period to register a charge could be shortened and 21 days is an appropriate period. The due notification of a charge would prompt the relevant parties to request for further information from the company.

Hong Kong Bar Association	**Questions 14(a) and (b)** 30. The Bar supports the proposal in paragraph 5.27 of the Consultation Paper and agrees that 21 days would be an appropriate period. The Bar notes that the time limit for registration under Land Registration Ordinance (Cap. 128) is only 1 month.

Question 15

(a) What are your views on the viability and desirability of introducing an administrative mechanism for late registration of charges? **(b) If you think an administrative mechanism is desirable, what should be its essential features?**	
Gordon Jones	(a) I consider that the introduction of an administrative mechanism for the late registration of charges would be both undesirable and unnecessary for a number of reasons. First, paragraph 5.33 of the Paper outlines the principal concerns with such an mechanism, namely that it would introduce uncertainty i.e. it will no longer be possible to rely on the register of charges as a completely accurate register of all effective charges as at a current date, while the current discretionary power exercised by the court, which enables each individual application for late registration to be judged on its own merits, would vanish. Secondly, as there are only about 10 applications each month to the court for the registration of late charges and the present system seems to be working smoothly, there is no obvious administrative necessity for this function to be transferred to the CR. Thirdly, given that one of the main purposes of the proposed reforms to the charges registration regime is to simplify procedures, it does not seem logical to introduce a provision which would complicate the existing law and place a further burden on the CR staff. (b) Not applicable in view of the answer to (a).
Arthur Lam & Co. CPA	(a) We think the administrative mechanism proposal is an improvement to all parties involved in a charge. (b) We think adding a provision to deem the late registration ineffective if the late registration is made by a related party and connected person in event of a pending liquidation is in process or the person or person's principal know or, reasonably know, or has constructive notice to the fact.
Deacons	(a) An administrative mechanism is a good idea. (b) A substantially higher late registration fee should be imposed – say, HK$25,000. I agree with the points in paragraph 5.31 and 5.34 of the Consultation Paper.
Paul Mok	(a) No comment. (b) No comment.
CLP Holdings Limited	(a) For the reasons given in paragraph 5.33 of the Consultation Paper, we do not think that it is desirable to introduce an administrative mechanism for late registration of charges. (b) Not applicable in view of the answer to 15(a).
Chartered Institute of	(a) We believe that think that there should be an administrative mechanism to enable more efficient and effective

Management Accountants, Hong Kong Division	handlings of any late registration of charges. (b) We believe that it is essential that a newly introduced administrative mechanism should be legally enforceable, effective in its execution, transparent in terms of its procedures, and at the same time cost-effective. There should also be appropriate penalties in place to alter behavior or tendency to register beyond the required deadlines.
The Chinese General Chamber of Commerce	(a) 現時，所有沒有在規定時限內進行登記押記的公司，均須向法院提交批准逾時登記的申請；本會相信，這些逾時沒有登記的情況多是屬於意外或無心之失，對於一些中小型私人公司而言，動輒要向法院作申請亦甚爲繁瑣，同時亦會增加法院的工作量。因此，本會同意引入行政機制，自動處理逾時登記押記的申請，以取代由法院審批的程序，藉以提升處理申請的效率。 (b) 本會認爲，有關機制必須就逾時登記的個案設定一個合理的寬限期(例如逾時不得超過目前所容許登記押記的五個星期期限，或本會於問題 14 所建議的 30 天)，若逾期登記的申請已超過了預設的寬限期，有關公司必須在繳付逾時登記費的同時，額外繳交罰款，甚至把逾期太久的個案轉交法院處理。
Swire Pacific Limited, Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	(a) For the reasons given in 5.33 of the consultation paper, we do not think that a case has been made out for changing the current arrangements. Accordingly we do not think it is desirable to introduce an administrative mechanism for late registration of charges. (b) Not applicable.
CCIF CPA Limited	(a) We concur with the idea of replacing the court procedure for late registration by an administrative one. (b) The administrative mechanism should be subject to the two provisos as stated in paragraph 5.31 of this consultation paper.
Clifford Chance	We are of the view that the present philosophy of section 80 - that, within its context, a company's file maintained by the Companies Registry sets out a comprehensive list of the company's charges - should be preserved. We therefore believe that the existing court procedure should be retained: if the court regards it as burdensome, perhaps the fee(s) should be increased.
Hong Kong Chinese Enterprises Association	(a) 我的看法是：認爲可行。 (b) 我的看法是：較法院程序，相對較快。

(Submission B)	
Hong Kong Chinese Enterprises Association (Submission C)	(a) 不擬贊同
The Law Society of Hong Kong	(a) No. Registration out of time should still require sanction from the court since it affects creditors' rights. Once the process of registration has been simplified, there should be no good reason for registration out of time. In case of registration out of time, the court should intervene to negate irregularities. (b) Not applicable.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes, it is viable and would simplify the procedure and save costs. (b) In addition to a late registration charge, the applicant for late registration is needed to declare in a statement that it is not undergoing a winding-up process, either voluntary or involuntary subject to the proviso of para. 5.31(1) and (2).
Hongkong and Shanghai Banking Corporation Limited	(a) We agree that the present requirement to obtain a court order to allow late registration is cumbersome, and hence should be streamlined by implementing the administrative mechanism outlined in the Paper. (b) In similar manner to the progressive late filing fee for annual returns, an increased fee should be payable for late delivery of particulars. The provisos under 5.31 under which the granting of late filing becomes automatic seem reasonable.
The British Chamber of Commerce in Hong Kong	(a) There shouldn't be an official system for late registration of charges. It will encourage late registration and Hong Kong; which is already much slower than many other major jurisdictions. (b) N/A
Hong Kong Stockbrokers Association	(a) Agreed to the introduction of an administrative mechanism for late registration of charges. (b) Features should include reason for late filing, whether company is liquidation or in imminent liquation.
The Hong Kong Association of Banks	(a) Yes. (b) There should be an increased fee to act as a disincentive to late delivery of particulars and late registration should be made without prejudice to parties with the rights against the property the subject matter of the charge which acquired

		those rights before the charge is actually registered. This reflects the current practice of the courts and acts to protect subsequent chargees who have obtained their security before the late registration is permitted. The more sophisticated variations to this referred in Clauses 5.31(2) and 5.34 might give rise to difficulties in practice.
The Hong Kong Institute of Chartered Secretaries	(a)	We do not find it desirable to adopt an administrative mechanism for late registration. It introduces uncertainty and the public will not be able to rely on the register of charges. The proposed mechanism is rather complicated. Further, the present system of making application to the court for consent for late registration seems to work well and we do not find it necessary to introduce the proposed change.
	(b)	N/A.
Ho Tak Wing	(a)	The proposal for the administrative mechanism for late registration of charge in terms of its viability and desirability is set out in Appendix I. [see Appendix A of this compendium]
	(b)	The essential features of introducing an administrative mechanism are of two-folds, namely (1) to clarify whether the Company is solvent when there is any late registration of charge; and (2) to hold the directors of the Company liable for failing to register the charge.
KPMG	(a)	It would seem appropriate to introduce an administrative process if the courts in practice react almost uniformly when approached in cases of late registration.
	(b)	The administrative mechanism should essentially perform those functions which the Court is currently covering in a uniform manner, whilst including sufficient safeguards to deal with those situations where the courts have either refused the application or applied unusual conditions. At a minimum, the Companies Registry should be empowered to refer the application for late registration to the court's discretion if it feels this is appropriate.
Hong Kong Institute of Certified Public Accountants	(a)	We do not favour replacing the court procedure for late registration of charges by an administrative mechanism, in view of the principal concerns about such a mechanism set out in paragraphs 5.33 and 5.34 of the consultation paper. We consider that it should remain within the court's jurisdiction to sanction late registration, as this enables each application for late registration to be judged on its own merits. As the current system seems to be working smoothly, we do not see any obvious necessity to introduce any change.
	(b)	N/A.
Tricor Services Limited	(a)	Based on the reasons given in paragraph 5.33 of the Consultation Paper, we do not think it is desirable for the CR to administer the late registration of charges via the introduction of an administrative mechanism as described in the

	Consultation Paper. (b) N/A.
Hutchison Whampoa Limited	(a) It would be beneficial to have an administrative mechanism as the current system through the court is inconvenient and costly and not a very efficient use of court time. (b) Its essential features should be (i) an ability to ensure that no creditors are unduly affected by the late registration (ii) efficiency in terms of speed of rectification and (iii) minimization of costs.
Hong Kong Bar Association	**Question 15(a) and (b)** 31. The Bar does not support the proposal of introducing an administrative mechanism to replace the current framework of court approval for late registration of charges. 32. The Bar takes the view that the current framework has the following advantages:- (1) Approval is not automatic but depends upon the applicant's satisfying the court that there is a proper reason for allowing late registration. (2) In so doing, it emphasizes and reinforces the importance of registering charges in time. Automatic grant of extension would send out the wrong message that companies and/or charge holders need not be vigilant in ensuring timely registration. (3) Though the applications are often made *ex parte*, the court would still have the opportunity to consider, on the basis of materials presented, whether, and if so how, its discretion should be exercised. In particular, the court would be able to consider what conditions would be apposite in any given case – for instance, a Re Charles order ([1935] WN 15) is only appropriate where the solvency of the company is in doubt or liquidation is imminent. The flexibility is lost in the case of automatic extension with standard conditions. (4) The grant of extension is valid until set aside (whether as provided for in a Re Charles order or otherwise) and the charge registered pursuant thereto would likewise be valid. This would provide certainty over the proposed scheme where the late registered charge might be deemed ineffective after a period of time on the contingency of the company going into liquidation.

Comments Received at Consultation Forums and Meetings

Comments Received at Consultation Forums and Briefings	
At Hong Kong Institute of Directors forum on 15 May 2008	**Directors Duties** The vast majority of attendees did not support codification of directors' duties. Main concerns were: • Difficult to set out clearly all the directors' duties in the statute, especially in the case of partial codification. • The insurance premium of directors will likely increase. • Concern about competency, training and supply of quality directors, especially independent non-executive directors. For those who supported codification: • Codification will make directors' duties clearer and more accessible. Other specific issues • Enlightened shareholder value ✧ For the duty to promote the success of the company, one of the factors is to consider the interest of the employees. Given that employees have different age profile, it is difficult to strike a balance among different interests of the employees. Similar concern arises when company need to take into account the interests of its shareholders. Different shareholders (e.g. hedge funds vs ordinary shareholders) have different concerns and expectations about profit (short term profits vs long term profits). ✧ The principle of "enlightened shareholder value" seems to be in contrast with the traditional principle of "bona fide". • Related party transactions ✧ Issues concerning related party transactions (directors have a duty to declare interests)
At the Society of Chinese Accountants and Auditors forum on 27 May 2008	**Directors' Duties** • Whether codification of directors' duties will be principle-based or rule-based. If they are principle-based, directors will still need to seek professional advice to interpret the duties. In this case, codification may not be able to help clarify directors' duties. • Concern about the qualification and competency of directors. • The principle of "enlightened shareholder value" may not be useful to safeguard business conduct of a company. Moreover, UK only lists out a number of factors for consideration but not "how" these factors should be considered and put into practice. The requirement is not clear and is difficult to comply.

	Corporate Directorship • Over two thirds of the attendees' companies have provided corporate director services. • There is a genuine business need to retain corporate directors, especially for non-Hong Kong companies whose members are not residing in Hong Kong. Corporate directors are also common tool for that administration services. • If a company seeks loans from a bank, the bank usually requires the company to provide information about directors who is a natural person before granting the loan. This could address the concern over the difficulty to identify the person who is responsible for the conduct of a business. • The majority of corporate directors in Hong Kong are banks, professional firms such as law firms or accounting firms. Therefore, the issue regarding the enforceability of directors' obligations should not be a major concern. **Registration of charges** • Some companies have registered charges over cash deposit even though this is not a statutory requirement under the Companies Ordinance. It is not clear how these companies can "cancel" such registration in the event that the lending institution becomes insolvent.
By a participant at the public consultation forum on 28 May 2008	• The proposal is said to take care of SMEs. If a SME registers a name and someone subsequently registers a very similar name, the SME should not be asked to spend money to apply a court order for protecting its rights. The adjudication system should be further pursued.
By a participant at the public consultation forum on 28 May 2008	• Some registered names in the CR are very similar, e.g. singular and plural forms of the same word. The CR should do more to protect the interests of the infringed companies. • The registration of a company name which is in plural form of another company name has serious practical consequences. For example, when a company is set up, it can open a bank account within one week. It can then put a "s" on the name of the payee of a cheque and deposit the "revised" cheque into its bank account. This is a fraud which is a serious matter. • The accuracy of the information submitted is more important than abolishing corporate directors. One simple way to ensure accuracy is to establish a registration system for service providers on company incorporation so that the source of information can be traced more easily. This can also tackle the issues concerning money laundering.
By a participant at the public consultation forum	• CR has not prevented companies to be formed by simply adding an additional letter to an existing company name which comprises a trademark. • If the company name adjudication system is introduced, the following issues should be considered –

on 28 May 2008	✧ It appears that the UK company name adjudication system cannot reduce the cost incurred by infringed companies. A more innovative solution is needed. ✧ The ".hk" domain name registration dispute resolution procedures have been around for several years and they generally work well. While domain names are different from company names and may be simpler to deal with, it is worth making reference to their procedures.
By a participant at the public consultation forum on 28 May 2008	• Normally, disputes in relation to company names arise after the company name is registered. A businessman who wants to set up a company will not be able to know in advance whether the name of the new company may possibly be an infringing name and may eventually be forced to change its name. Is it possible for the CR to post those proposed new company names on websites / discussion forum and allow those companies which consider that the new company names may infringe their interests to raise their objection so that new companies can spend less time and money to make changes afterwards?
By a participant at the public consultation forum on 28 May 2008	• It does not seem that there are many prosecutions at present. While following the UK approach to codify directors' duties is desirable, more examples or some sort of practice notes should be provided to illustrate how they would be interpreted. • The consultation paper states that some 42,890 companies have corporate directors. It appears to be fewer than the actual number and may be wrong. • On one hand, it is mentioned that the Financial Action Task Force (FATF) is concerned about the corporate directorship. On the other hand, only less than 10% of companies have corporate directors. It does seem to be a bit of a contradiction. • Corporate directors should be continued although you may have a requirement of having at least one natural person as director. • The natural person need not be a HK resident (unlike the requirement in Singapore where a company needs to have a Singaporean named as a director) because of practical business considerations; HK has a very multinational business environment where corporate directors may be needed. Also HK has many large groups of companies, so the situation is quite different from Singapore.
By a participant at the public consultation forum on 28 May 2008	• It will be more important to strengthen the verification of the accuracy of the information provided than to abolish or restrict corporate directorship. Most of the time, when one looks at the information about directors in the register, many directors are from the Mainland. The information provided e.g. identity card number, passport number or even the address, by the Mainlanders or even people in HK may be fake.

	• Many multinational companies do not prefer to appoint an individual as a director as they think appointing corporate directors makes the operation of the company more flexible. • As the accuracy of information is more important, why is there no monitoring system to ensure the accuracy of the information provided by the service providers on company incorporation?
By a participant at the public consultation forum on 28 May 2008	• Having corporate directors is one of the selling points that HK has and is one of the reasons why people choose to incorporate in HK, not in Singapore or Malaysia. • Regarding the problem of money laundering, most of the time, these activities involve capital which is linked to bank accounts. When people set up a bank account, they have to disclose the ultimate beneficiaries. Thus, the bank should have such information to facilitate investigate when necessary.
By a participant at the public consultation forum on 28 May 2008	• If it is proposed to strengthen the duties of a director in general, why should corporate directors be retained because no individual person is going to be personally responsible for the act of a corporate director? • A company can have 5 weeks to register its charges. During this period, the company can create another charge / floating charge over the same asset. That could lead to loss to the lender. This problem has not been fully or properly addressed. The onus is being put on the bank / the lender who accepts the security. The US system where the priority is determined by the date of registration of charges is indeed a good system. The FSTB should take a good look at the current system which has existed for a long time and which has in the past created lots of problems for the banking community. • Our CO is based on the 1929 UK Companies Act. The language itself is quite antiquated. From the perspective of a user of the ordinance, when the statute is going to re-written, it should be written in plain and simple English so that people can easily understand. For example, in Australia, since 1990 when the Australian government enacted the new banking legislation, they placed the onus on the banks to provide simple and comprehensible security documents and facility agreements. Banks even hired teams of people to write the security documents and facility agreements, which turned out to be fantastic. They are even better than some of the ones you can find in the UK.
By a participant at the public consultation forum on 28 May 2008	• Dealing with directors' duties, we are talking about both duties and accountability. Corporate directors not only lead to transparency problems, but also accountability problems (i.e. who will ultimately be responsible when the directors make a decision that is either harmful to minority shareholders or in terms of overall corporate responsibilities).
By a participant at the public	• Regarding the comment that HK may possibly rely on the due diligence by the banks in terms of KYC ("know your client") in tackling money laundering. From a bank's perspective, it is not easy to do KYC if there are layers of

consultation forum on 28 May 2008	corporate directorship so we should not rely on the banks to do that. • Regarding FATF, it will be disastrous if HK is rated poorly or as "non-compliant".
By a participant at the public consultation forum on 28 May 2008	• In HK, there are a lot of companies incorporated in other jurisdictions, e.g. British Virgin Island, etc, where corporate directors are allowed. • If HK no longer allows corporate directors, a lot of businesses will then become offshore companies. Many large public groups already include offshore companies in their group structure, with corporate directors. Even if corporate directorship is abolished, we may not achieve more accountability as originally intended. HK's situation is different from that of the UK or Singapore as they do not have a lot of offshore companies. • The invisibility period where a charge is "invisible" to these parties does give rise to concerns for banks.
By a participant at the public consultation forum on 28 May 2008	• It is recommended that charges on cash deposits should be excluded from registration. • From the point of view of banks / creditors, that means no public disclosure and it is not possible to see the financial status of the company. Most of the time, when a bank reviews the credit of a company, it looks at whether the company's cash deposits have been charges to other parties.
By a participant at the public consultation forum on 28 May 2008	• The US system is not administered by the Corporations Department. This is why they can have individual, partnership or whatever other charges. Hence, it would be beyond the CR's purview to adopt the US system.
At the Hong Kong Institute of Certified Public Accountants seminar on 29 May 2008	**Directors' Duties** • The majority of the attendees supported the Australian approach of codification of directors' duties. Some attendees supported the UK approach and a few supported maintaining the status quo. • Should take into consideration creditors' interest in the course of codification of directors' duties. **Corporate directorship** • The majority of the attendees supported the UK approach (i.e. a company should be required to have any least one natural personal as its director), subject to a reasonable grace period. Some attendees supported total abolition of corporate directorship and a few supported maintaining status the quo.
By a participant at the focus group meeting on 29 May 2008	• CR actually has no statutory duty currently to check particulars; they just assume the extra duty themselves. It is the duty of the presenter to check. • It is the standard practice in HK for practitioners to register share charges and CR accepts this registration. The argument practitioners give is that a charge over shares usually contains a charge over dividends and that dividends

	arguably are book debts which need to be registered. It is necessary to make a decision on whether a dividend or other distributions should be registrable. The CR also needs to address the issue where share charges which are unregistrable are in fact registered by the CR when submitted. • If charges over personal chattels are registered, that may bring in pledges as security interest. Therefore pledges should be expressly excluded as registrable security. That is why reference to "bills of sale" is used as it would clearly exclude a pledge. • The whole instrument of charge should not be made available to the public for the following reasons – (i) It may place an onerous duty upon other parties to check the instrument; (ii) The instrument may contain highly confidential commercial transaction information so there may be resistance in disclosing the instrument. • The best approach is to simplify the particulars to be submitted so that particulars could be completed easier. For those complex charges, the particulars should state precisely what is covered by the security. May also consider putting negative pledge clause in the particulars. • Support retaining the registration period of 5 weeks and also support adopting the administrative mechanism for late registration of charges.
By a participant at the focus group meeting on 29 May 2008	• CR has registered charges which are not legally registrable. That is why practitioners continue to submit such charges to the CR. CR should reject registration of charges that are not legally registrable. • The definition of book debt is unclear. • It is suggested that insurance policy is not registrable. However, assignment of insurance proceeds has previously been submitted for registration and has been accepted by the CR. It is therefore unclear whether assignment is registrable. Charges are found to include mortgage but nothing indicates that they also include assignment. It is suggested that charges should include mortgage by way of security. • If the instrument of charge is also registered and available for public inspection, there is no need for CR to continue to check the particulars submitted. If CR does not check the particulars and the instrument of charge is not registered, then it will not be safe for third parties to rely on the particulars submitted. • Regarding the Bills of Sale Ordinance, although it is an old piece of legislation, practitioners do submit charges over equipment for registration. There are clients who have charges over equipment that are stand-alone securities without other floating charges or anything. If charges under section 80(2)(c) are not registrable, charges over equipment will not be registrable. • If it is the current practice of practitioners to submit assignment, insurance & share mortgages for registration and CR

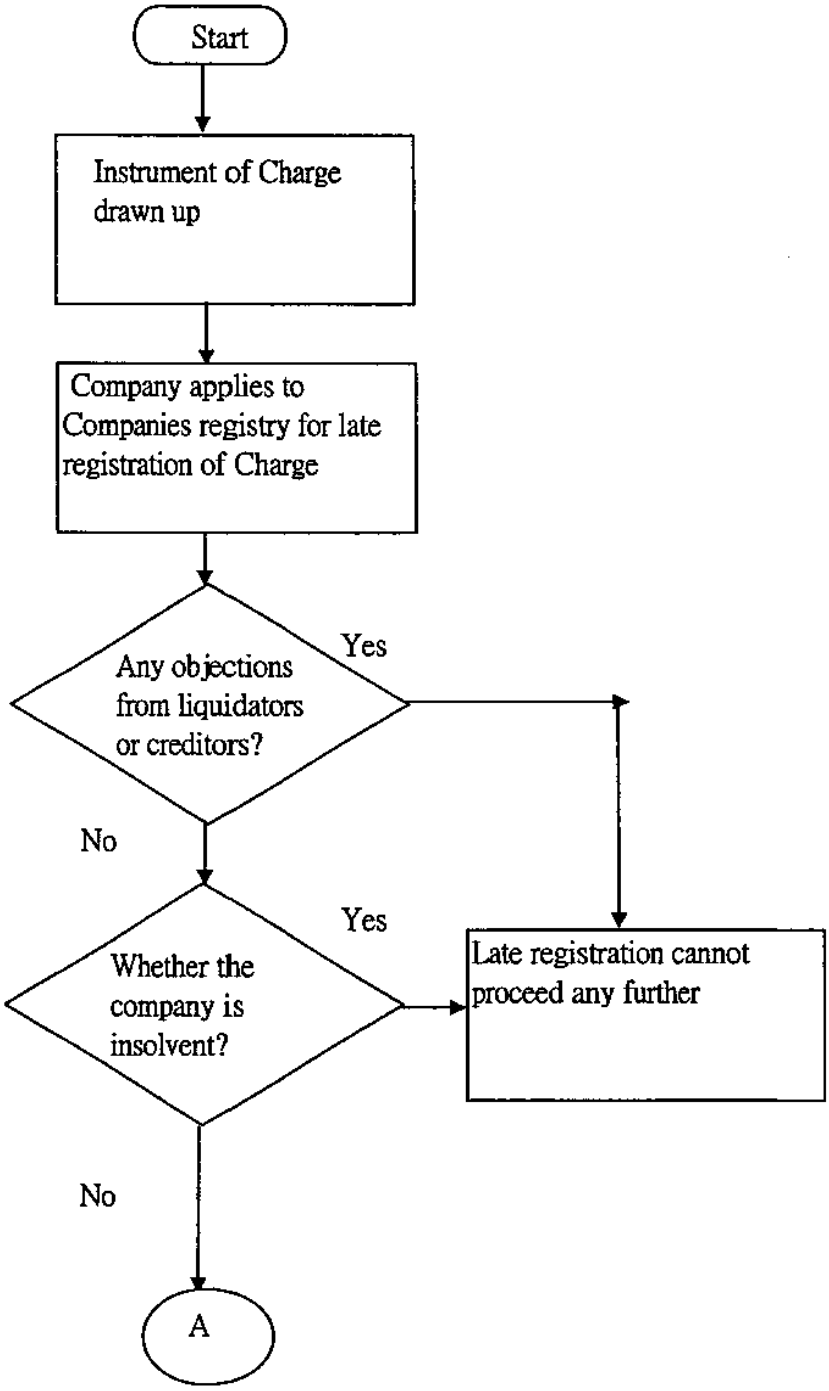
	accepts them for registration, it is for consideration if they should be made registrable so that people with no legal representatives will not lose out just because they do not know what should be filed.
At the Law Society of Hong Kong seminar on 5 June 2008	• Concerns over compliance after codification of directors' duties.
At the Trade and Industry Department Small and Medium Enterprises Committee Meeting on 6 June 2008	• 林劉淑英女士歡迎是次重寫《公司條例》，認爲有利香港長遠發展。就董事職責方面，她支持採用法定職責及現有普通法規則並行的做法；並贊同香港引入「開明股東價值」的原則，認爲這會有助企業更重視社會責任。就法團出任董事方面，爲配合國際間打擊清洗黑錢活動，她認爲政府應考慮逐步禁止法團出任董事。她亦同意文件中有關影子公司及混合名稱的建議。 • 鄧燾先生說，政府在重寫《公司條例》時，應小心釐定對上市公司及一般公司的要求，避免對中小企做成太多管制。他同意將董事職責編纂爲成文法則，但反對引入「開明股東價值」的原則，認爲「企業社會責任」的概念不夠清晰，故不適合以成文法則規管。他對賦予處長酌情權，容許公司採用混合名稱註冊的建議有所保留。 • 陳秀清女士支持以法定董事職責取代普通法規則的做法，認爲兩者同時並行的做法會產生混淆。就公司名稱方面，她認爲酌情容許公司採用混合名稱註冊，在執行上有一定難度。她亦贊成逐步禁止法團出任董事，以確定公司負責人的身份。 • 查逸超博士認爲在董事職責方面，將法定職責與普通法規則並行的做法較具彈性。他亦支持在法定職責中引入「開明股東價值」原則。他指出，香港不少出任董事的法團屬於家族基金，其日常運作一般交由外界專業人士管理，完全禁止社團出任董事的做法會影響它們的運作，當局需要在考慮有關課題時作出平衡。 • 馬桂榕先生希望政府在重寫《公司條例》時，要在規管及方便營商兩者中取得平衡。 • 鄧燾先生、陳秀清女士、馬桂榕先生、馬塘宜先生和顏吳餘英女士均贊成賦予公司註冊處處長權力，爲不遵守法庭命令的影子公司更名。 • 馬塘宜先生認爲除了清楚列明董事職責外，政府亦應加強教育，令董事了解他們的責任。他和鄧燾先生、顏吳餘英女士均支持保留法團出任董事，但須規定每間公司須最少有一名董事是自然人。

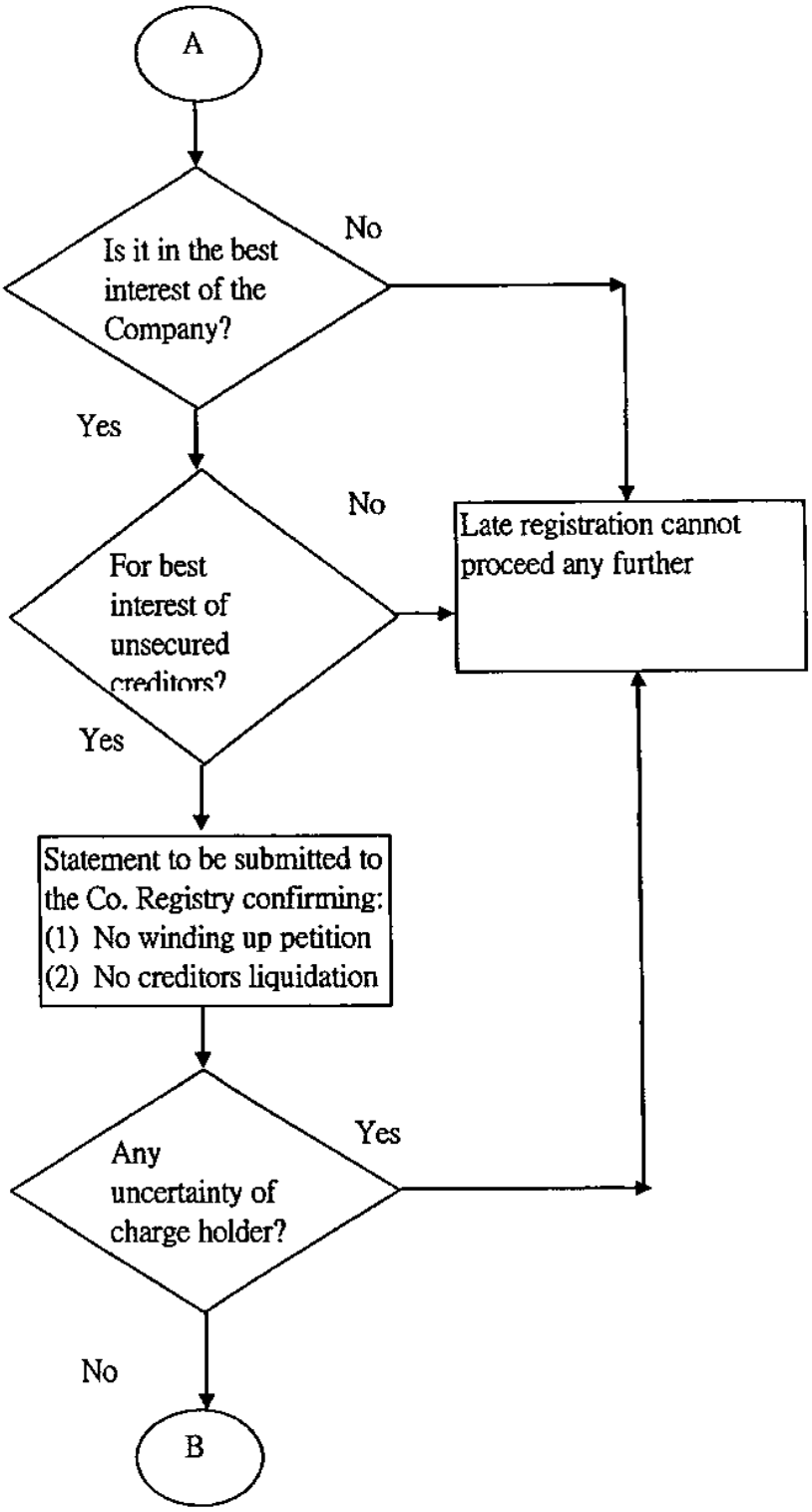
Note

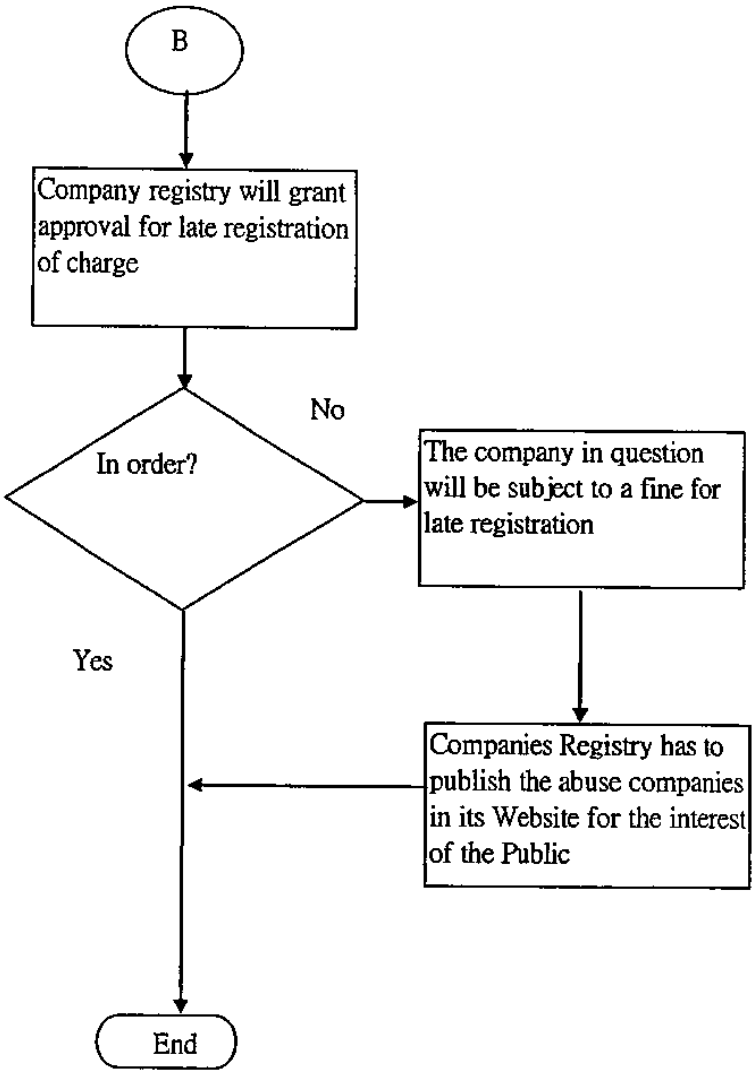
1. Paul Mok stated in his submission that the response represented his personal views only.

Appendix A

Proposed new administrative mechanism for late registration of charge




A
Is it in the best interest of the Company?
No
Yes
For best interest of unsecured creditors?
No
Late registration cannot proceed any further
Yes
Statement to be submitted to the Co. Registry confirming:
(1) No winding up petition
(2) No creditors liquidation
Any uncertainty of charge holder?
Yes
No
B



Flowchart showing the proposed administrative mechanism for late registration of charge