

Rewrite of the Companies Ordinance

Some Issues Relating to Directors and Company Secretaries

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Companies Registry
www.cr.gov.hk

Corporate Directorship in Private Companies

Corporate Directorship in Private Companies (1)

- Current position in Hong Kong
 - ◆ Section 154A of the Companies Ordinance (Cap 32) (“CO”) – prohibition of corporate directors only applies to
 - a non-private company, and
 - a private company which is a member of a group of companies of which a listed company is a member
 - ◆ Generally, a private company is exempted



Corporate Directorship in Private Companies (2)

- Other jurisdictions
 - ◆ UK – pre-Companies Act 2006, no prohibition against corporate directors
 - ◆ Australia and Singapore – corporate directors are not allowed



Corporate Directorship in Private Companies (3)

- Issue – Abolition of corporate directorship in private companies?
- Proposal upon public consultation – **clause 448** of the Companies Bill (“CB”)
 - ◆ Follow the UK Companies Act 2006 approach i.e. **requiring every private company to have at least one natural person as its director** while continuing to allow for corporate directors in private companies



Registrar’s Direction Requiring Appointment of Director and Company Secretary



Registrar's Direction Requiring Appointment of Director and Company Secretary (1)

- **Clauses 449 and 467** of the CB – new power to the Registrar to direct a company to comply within a specified period certain statutory requirements if there is a breach, for example,
 - ◆ A public company and a company limited by guarantee must have at least 2 directors



Registrar's Direction Requiring Appointment of Director and Company Secretary (2)

- ◆ A private company must have at least one director
- ◆ A private company (other than a private company that is a member of a group of companies of which a listed company is a member) must have at least one natural person director
- ◆ Every company must have a company secretary



Registrar's Direction Requiring Appointment of Director and Company Secretary (3)

- If a company contravenes the direction, the company and every responsible person of the company commit an offence

Directors' Duty of Care, Skill and Diligence

Directors' Duty of Care, Skill and Diligence (1)

- General duties of directors – two broad categories and mainly found in case law
 - ◆ Fiduciary duties
 - ◆ Duty of care, skill and diligence

Directors' Duty of Care, Skill and Diligence (2)

- Public consultation
 - ◆ Issue – Whether the general duties of directors should be codified?
 - ◆ Respondents' views
 - divided and finely balanced, slightly larger number of respondents disagreed with the codification of directors' general duties
 - some respondents suggested clarifying directors' duty of care, skill and diligence

Directors' Duty of Care, Skill and Diligence (3)

- Consultation conclusions
 - ◆ Codification of directors' general duties remains highly controversial
 - ◆ Premature to go down the route of comprehensive codification at this stage
 - ◆ To clarify the standard of directors' duty of care, skill and diligence

Directors' Duty of Care, Skill and Diligence (4)

- ◆ To adopt the mixed objective / subjective test in section 174 of the UK Companies Act 2006
- **Clause 456(1) and (2) of the CB**
 - “(1) *A director of a company must exercise reasonable care, skill and diligence.*

Directors' Duty of Care, Skill and Diligence (5)

- (2) *Reasonable care, skill and diligence mean the care, skill and diligence that would be exercised by a reasonably diligent person with –*
- (a) *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*
 - (b) *the general knowledge, skill and experience that the director has.”*

Residential Addresses and ID Numbers of Directors and Company Secretaries

Residential Addresses and ID Numbers of Directors and Company Secretaries (1)

- Current position
 - ◆ Directors and secretaries of companies incorporated in Hong Kong and registered non-Hong Kong companies are required to provide their residential addresses and ID numbers to CR for incorporation and registration purposes

Residential Addresses and ID Numbers of Directors and Company Secretaries (2)

- ◆ Information searchable on CR's public register
- ◆ Concerns over data privacy and possible misuse of personal data
- Issue – Whether residential addresses and ID numbers should continue to be disclosed on public register?

Residential Addresses and ID Numbers of Directors and Company Secretaries (3)

- Public consultation
 - ◆ The majority of the respondents opined that directors' residential addresses should not be disclosed and certain digits of the ID numbers should be masked on the public register, mainly for reasons of privacy and risk of abuse

Residential Addresses and ID Numbers of Directors and Company Secretaries (4)

- ◆ On the other hand, some respondents did not see any strong grounds for changing the current regime given that cases of abuse had been rare in Hong Kong and some cited the reason of law enforcement

Residential Addresses and ID Numbers of Directors and Company Secretaries (5)

- Proposal
 - ◆ Note the rising concerns over the protection of personal privacy and information
 - ◆ **Clauses 47 to 54** of the CB – introduction of new provisions for restricting access to
 - residential addresses of directors and company secretaries
 - full ID numbers of individuals



Residential Addresses and ID Numbers of Directors and Company Secretaries (6)

- The scheme
 - ◆ Company secretaries are only required to provide correspondence addresses
 - ◆ Directors are required to provide correspondence addresses in addition to residential addresses



Residential Addresses and ID Numbers of Directors and Company Secretaries (7)

- ◆ Directors' correspondence addresses will be shown on the CR's public register
- ◆ Only specified public authorities and other specified persons will be allowed access to the directors' residential addresses which will be kept on a confidential record of the CR



Residential Addresses and ID Numbers of Directors and Company Secretaries (8)

- ◆ Access by court order – application by creditor or member of the company concerned or any other person having a sufficient interest
- ◆ Similar provisions regarding the ID numbers of individuals
 - certain digits of an ID number will be masked on the CR's public register
 - access to the full ID numbers will be restricted



Residential Addresses and ID Numbers of Directors and Company Secretaries (9)

- ◆ Existing records bearing residential addresses of former and current directors and company secretaries and ID numbers of individuals will only be withheld from public inspection upon application



For details of the consultation papers and conclusions and the Companies Bill, please visit the following websites:

- (1) <http://www.fstb.gov.hk/fsb>
- (2) <http://www.cr.gov.hk>



Thank you