

# The New Companies Ordinance

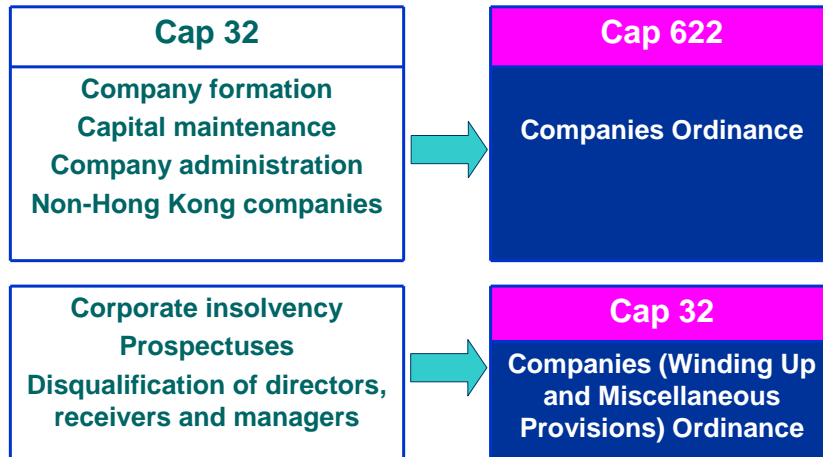
## - What Directors Need to Know

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Registrar of Companies  
17 March 2014

## The New Companies Ordinance

- Passed by the Legislative Council on 12 July 2012
- 12 pieces of subsidiary legislation – legislative process completed on 17 July 2013
- Commenced on 3 March 2014

## The Change



## Four major objectives

- Enhancing Corporate Governance
- Facilitating Business
- Ensuring Better Regulation
- Modernising the Law



## At least one individual acting as director

- As at 31 December 2013
  - 67,370 corporate directors for local companies
  - About 3.55% of the total number of directors of local companies
- The new Companies Ordinance (“new CO”) requires at least one individual to act as a director of a private company [section 457] (grace period of 6 months from commencement for existing companies).



## Directors' duty of care, skill and diligence (1)

- A director of a company must exercise reasonable care, skill and diligence [section 465(1)].
- Mixed objective and subjective test [section 465(2)] –  
Reasonable care, skill and diligence that would be exercised by a reasonably diligent person with
  - objective test – the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions of the director in relation to the company; and
  - subjective test – the general knowledge, skill and experience that the director has.

## Directors' duty of care, skill and diligence (2)

- Subjective test : existing common law position in Hong Kong.
- Objective test : new law in Hong Kong.
- Any breach ? A director's conduct will be considered by applying both the objective and subjective tests.



## Indemnification of directors against liabilities to third parties

- Rules clarified [sections 467 & 469].
- Indemnification permitted provided the indemnity does not cover –
  - criminal fines;
  - penalties imposed by regulatory bodies;
  - defence costs of criminal proceedings where the director is found guilty;
  - defence costs of civil proceedings brought against the director by the company or an associated company in which judgment is given against the director;
  - costs of unsuccessful applications to the court by the director for relief.
- Need to disclose indemnity provision in directors' report [section 470].

## Fair dealings by directors (1) – Loan transactions

- For public companies and its subsidiaries, expanded the prohibitions on loans and similar transactions to cover a wider category of persons connected with a director [sections 486 to 488, 491(1), 502 & 503].
- Extended members' approval as a general exception to all companies i.e. relaxation in respect of public companies [sections 500 to 504].

## Fair dealings by directors (2) – Loan transactions

- Decriminalisation – Removing the criminal sanction under section 157J of the old Companies Ordinance for breach of prohibition of loans provisions.
- Two new exceptions to the prohibitions –
  - loan, quasi-loan and credit transaction of value not exceeding 5% of net assets or called-up share capital [section 505];
  - funds to meet expenditure, incurred or to be incurred by a director, on defending proceedings or in connection with an investigation or regulatory action [sections 507 & 508].

## Fair dealings by directors (3) – Loss of office payments

- Prohibitions on loss of office payments extended to cover –
  - payments to an entity connected with the director;
  - payments to a person made at the direction of, or for the benefit of, the director or an entity connected with the director.

[section 516(3)]

## Fair dealings by directors (4) – Long-term employment

- New provisions requiring members' approval where the guaranteed term of the employment of a director exceeds or may exceed 3 years [sections 531 and 534].
- Disinterested members' approval is required for public companies

(Note : The same applies to loans and similar transactions and payments for loss of office).

## Disclosure in directors' report (1)

- Directors' report must include –
  - business review;
  - information on equity-linked agreements;
  - a summary of the reasons for resignation or refusal to stand for re-election of a director.

[sections 388, 390, 391, 470, 543 and Schedule 5]



## Disclosure in directors' report (2) – Business review

- Business review should cover the following information –
  - a fair review of its business;
  - a description of its principal risks and uncertainties;
  - particulars of any important events affecting it which have occurred since the end of the financial year;
  - an indication of likely future development in its business;

## Disclosure in directors' report (3) – Business review

- a discussion on its environmental policies and performance that have a significant impact on the company;
- an account of its key relationships with employees, customers, suppliers and others that have a significant impact on the company and on which its success depends.

[section 388 and Schedule 5]

## Disclosure in directors' report (4) – Equity-linked agreements

- An agreement that will or may result in the company issuing shares, or an agreement requiring the company to enter into such an agreement (e.g. an option to subscribe for shares), entered into by the company –
  - in a financial year; or
  - in the past but subsisting at the end of the financial year.

[section 6 of Companies (Directors' Report) Regulation  
(Cap. 622D)]



## Disclosure in directors' report (5) – Reasons for resignation

- Disclosure is required if –
  - director resigned or refused to stand for re-election in a financial year; and
  - company received written notice from director specifying that the resignation or refusal is due to reasons relating to the affairs of the company (whether or not other reasons are specified).

[section 8 of Cap. 622D]

## Disclosure in directors' report (6) – Reasons for resignation

- The directors' report for the financial year must contain a summary of the reasons relating to the affairs of the company.
- Not applicable to a company falling within the reporting exemption for the financial year.

## Facilitating simplified reporting

- Facilitating more SMEs to prepare simplified financial and directors' reports –
  - a private company that qualifies as a “small private company” and the holding company of a group of companies that qualifies as a “group of small private companies” will qualify for simplified reporting [sections 359(1)(a) & 361; sections 359(2) & 364].
- Making the summary financial reporting provisions more user-friendly and extending their application to all companies.



## Facilitating business operations

- Allowing companies to dispense with AGMs by unanimous shareholders' consent.
- Introducing a court-free statutory amalgamation procedure for wholly owned intra-group companies.
- Making the use of a common seal optional.
- Permitting a general meeting to be held at more than one location using electronic technology.



## Implementation

- Letters have been sent to all companies
- Information pamphlets, External Circulars, Guidelines have been issued
- A series of seminars on the new Companies Ordinance have been conducted
- Hotline set up for answering enquiries
- Visit the CR's website for briefing materials
  - [www.cr.gov.hk](http://www.cr.gov.hk)



## Thank You

### Companies Registry :

[www.cr.gov.hk](http://www.cr.gov.hk)

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Enquiry email : [cr.nco@cr.gov.hk](mailto:cr.nco@cr.gov.hk)