

**PART 20**  
**MISCELLANEOUS**

**Introduction**

1. Part 20 contains a number of miscellaneous provisions which may be classified into the following three categories generally:
  - (a) miscellaneous offences, namely the offences for false statements and for improper use of the words “Limited”, “Corporation” or “Incorporated”, based on sections 349 and 350 of the CO respectively;
  - (b) miscellaneous provisions relating to investigation or enforcement measures, including provisions based on sections 306, 351A, 351B and 352 of the CO, and a new power for the Registrar to compound certain offences under the CB; and
  - (c) other miscellaneous provisions which are based on sections 354, 355, 357, 358 and 359A of the CO.

- The significant changes to be introduced under this Part are highlighted below:
  - (a) **Widening the scope of the offence for false statements;**
  - (b) **Empowering the Registrar to compound certain offences; and**
  - (c) **Widening the categories of companies that the court may require security for costs in actions.**

**Significant Changes**

- (a) **Widening the scope of the offence for false statement**

*Background*

2. Section 349 of the CO creates a criminal offence of wilfully making a statement to the Registrar which is false in any material particular and

which the offender knows to be false. The offence arises in the context of false statements made in any return, certificate, balance sheet or other document which is required by, or for the purposes of, any provision of the CO. The requisite mental element of the offence requires proof of knowledge and wilful intent.

3. We consider that the ambit of the offence in section 349 could be too narrow as it might not cover, for example, the making of a misleading statement. In addition, the requirement to prove a “wilful” intent would leave out cases where false statements are delivered to the Registrar recklessly.
4. In other comparable common law jurisdictions, there are similar offences but their scope is much wider. In Australia and Singapore, it is an offence to make a false statement or to make a misleading statement. It is also an offence to authorise the making of a statement that is false or misleading, or to omit or authorise the omission of any matter or thing without which the document would be misleading<sup>1</sup>. In the UK, the offence covers any statement that is misleading, false, or deceptive in a material particular<sup>2</sup>.
5. Moreover, the requisite mental element is different in Australia and the UK. The proof of “wilful” intent is not required in Australia in prosecuting the offence. In the UK, the offence covers acts committed “knowingly or recklessly”.

### Proposal

6. **Clause 20.1** now provides for the matters currently covered by section 349 of the CO subject to the modifications that the offence is extended to cover “a statement that is misleading, false or deceptive in any material particular” and that the mental element covers acts committed “knowingly or recklessly”.

## **(b) Empowering the Registrar to compound certain offences**

### Background

7. Other than prosecution for non-compliance, the CR has implemented a range of administrative measures to encourage due compliance with the

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<sup>1</sup> Section 1308 of the ACA; section 401 of the SCA.

<sup>2</sup> Section 1112 of the UKCA 2006.

filing obligations under the CO. These include the publication of various information pamphlets, posters and external circulars to provide general guidelines on compliance. While information pamphlets are distributed to company promoters on incorporating or registration of companies, posters on compliance are placed in the public areas of the Registry. In addition, companies may also subscribe to an Annual Return e-Alert Service to receive email notifications on the filing of annual returns.

8. To further expand the repertoire of measures to encourage due compliance with the CO filing obligations and to optimise the use of scarce judicial resources, we propose to give the Registrar a new power to compound, at her discretion, certain offences under the CB<sup>3</sup>.

### Proposal

9. **Clause 20.5(1)** provides that the Registrar may, if she has reason to believe that a person has committed an offence specified in a schedule to be created in the CB, give the person a notice that contains the following:
  - (1) the allegation that the person has committed the offence and the particulars of the offence;
  - (2) the conditions upon which no proceedings will be instituted against the person in respect of the offence, including the amount of compounding fee to be paid and the period within which the conditions have to be complied with; and
  - (3) any other information that the Registrar thinks fit.
10. **Clause 20.5(2)** provides that the notice may be given only before the proceedings on the offence commences.
11. **Clause 20.5(3)** empowers the Registrar, by a further written notice, to extend the period within which the conditions as specified in the notice issued have to be complied with. It also specifies that such power of extension may be exercisable during, or after the end of, that period.

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<sup>3</sup> If a regulator is empowered to compound an offence, he may offer a person in default by giving a notice to him an opportunity to rectify the default by paying an amount to the regulator as a compounding fee and, where appropriate, remedying the breach constituting the offence within a specified period. If that person accepts and complies with the terms of the notice, no prosecution will be initiated against him for that offence.

12. **Clause 20.5(4)** provides that the notice may not be withdrawn during the period specified in the notice or the extended period.
13. The proposal distinguishes between an offence constituted by a failure to do an act and an offence not constituted by a failure to do an act.
14. For the former category, **Clause 20.5(5)** provides that if, within the period specified in the notice or within the extended period, the person pays the Registrar the compounding fee specified in the notice and rectifies the act in default, no proceedings will be instituted against the person in respect of that offence. However, if within the period specified in the notice or within the extended period, the person has not paid the Registrar the compounding fee specified in the notice or has not rectified the act in default, proceedings may be instituted against the person in respect of that offence.
15. For the latter category, **Clause 20.5(6)** provides that if, within the period specified in the notice or within the extended period, the person pays the Registrar the compounding fee specified in the notice, no proceedings will be instituted against the person in respect of that offence. However, if within the period specified in the notice or within the extended period, the person has not paid the Registrar the compounding fee specified in the notice, proceedings may be instituted against the person in respect of that offence.
16. **Clause 20.5(7)** makes it clear that the payment of the compounding fee specified in the notice is not to be taken as an admission by the person of any liability for the offence alleged in the notice to have been committed by that person.
17. This proposal is targeted generally at offences which are (a) related to non-compliance with filing obligations and with obligations for affixing or publishing a company's name; (b) punishable only by a fine; and (c) triable summarily only. The compoundable offences will be set out in a Schedule to the CB<sup>4</sup> which may be amended by the FS by notice published in the Gazette, subject to negative vetting by the LegCo.

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<sup>4</sup> The Schedules of the CB are not included in the Consultation Draft.

**(c) Widening the categories of companies that the court may require security for costs in actions**

Background

18. Section 357 of the CO only applies to a limited company which is formed and registered under the CO or an existing limited company, i.e. one formed and registered under an earlier CO. Therefore, a plaintiff which is an unlimited company or a company incorporated outside Hong Kong would not be caught by the section.
19. In a number of Hong Kong cases involving applications for security for costs against companies incorporated outside Hong Kong<sup>5</sup>, the court recommended the amendment of section 357 of the CO to remove the anomaly that a company incorporated outside Hong Kong but having its central management and control in Hong Kong is immune from any security for costs as it is neither ordinarily resident out of the jurisdiction under Order 23 rule 1(1)(a) of the Rules of the High Court nor a company caught by section 357 of the CO. We agree that it is appropriate to widen the categories of companies that the court may require security for costs in actions.

Proposal

20. We consider that section 357 of the CO should be extended to all types of companies incorporated outside Hong Kong, irrespective of whether the company is a limited or unlimited company. It is reasonable and just to order a foreign plaintiff to give security for costs in view of the difficulties that a defendant may encounter in enforcing a judgment against a foreign party. This also covers the loophole under Order 23 rule 1(1)(a) in the situation where the plaintiff is a company incorporated outside Hong Kong but having its central management and control in Hong Kong.
21. However, we have reservations on the extension of section 357 to unlimited companies incorporated in Hong Kong. It is an established common law principle that the insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs. The only exception is in the case of a limited company under section 357 of the CO. It may be argued that

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<sup>5</sup> *Insurance Co of the State of Pennsylvania v Grand Union Insurance Co Ltd* [1988] 2 HKLR 541; *Charter View Holdings (BVI) Ltd v Corona Investments Ltd & Another* [1988] 1 HKLRD 469; *Akai Holdings Ltd v Ernst & Young* [2008] 5 HKLRD 133.

the policy behind section 357 of the CO is to impose a price for the privilege of limited liability and therefore the provisions were not extended to unlimited companies. As the liability of the shareholders of an unlimited company is without limitation, a costs order against an unlimited company may ultimately require payment from the shareholders.

22. **Clause 20.9** provides for the matters currently in section 357 of the CO subject to the modifications that any court having jurisdiction in the matter may require a plaintiff to give security for costs if the plaintiff is (a) a limited company incorporated in Hong Kong; or (b) a company incorporated outside Hong Kong.

### **Other Changes**

(a) **Clarifying the power of the Registrar to require a defaulting company or officer to make good the default**

23. Currently section 306 of the CO provides that where a company having made default in complying with any requirement of the CO, the Registrar may issue a compliance notice to the company or the officer concerned to comply with that requirement. If the company or the officer concerned fails to make good the default within 14 days after the service of notice, the Registrar or any member or creditor of the company may apply to the Court of First Instance for an order to compel a company or its officers to make good the default within the time specified by the court. Where a company or its officers fail to comply with the court order, the defaulting company or officer may be punished for contempt of court.
24. Section 306 is intended to facilitate enforcement of filing of information with the Registrar. However, the phrase “default in complying with any requirement of this Ordinance” used in that section may be perceived literally as covering all requirements in the CO.
25. **Clause 20.4** clarifies that the default being referred to is a default in complying with any requirement under the Ordinance to (a) deliver a document to the Registrar or (b) give notice to the Registrar of any matter.

(b) **Clarifying that the time limitation provision under section 351A of the CO only applies to summary offences and to prosecution made at the level of Magistrates' Courts**

26. **Clause 20.6** provides for the matters currently under section 351A of the CO with clarifications that:

(a) the time limitation as provided therein does not apply to an indictable offence and an offence triable either on indictment or summarily; and

(b) the limitation only applies to prosecution made in the Magistrates' Courts.

(c) **Extending the power given under section 352 of the CO to the District Court to direct the application of any fine imposed**

27. **Clause 20.7** provides for the matters currently under section 352 of the CO. Modification has been made to extend the power to the District Court to direct any fine imposed under the CB for paying the costs of proceedings or rewarding the informant etc.

(d) **Empowering the FS to make regulations**

28. As the FS is empowered to prescribe certain matters in the CB, **Clause 20.14** provides that the FS is empowered to make regulations in respect of any matter required or permitted to be prescribed by him under the CB.