Public Consultation on Share Capital, The Capital Maintenance Regime and and Statutory Amalgamation Procedure

Compendium of Responses

Table of Contents

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 in the fourth quarter of 2009, before the new Companies Bill is introduced into the LegCo in the second half of 2010.

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

Consultation

The third public consultation of CO Rewrite was conducted from 26 June 2008 to 30 September 2008. We invited comments and views on the proposals relating to Share Capital, the Capital Maintenance Regime and Statutory Amalgamation Procedure. During the consultation period, we conducted a consultation forum on 9 September 2008 and a focus group meeting on 30 September 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 40 pieces of written submissions from 40 deputations. This document integrates all comments we have collected during the consultation period.[1]

[1] One late submission is not reflected in the conclusion nor included in this compendium as it was not received in time for collation and analysis.

General Comments

Deputation	Comments
Tsao Yea Tann Simon	As I have previously reiterated, legal concepts are not something that you believe or I believe – it is what the general public believes and the yardstick is not from the professionals nor the Government, but the public.
Federation of Share Registrars Limited	We refer to the current Public Consultation on the Companies Ordinance and would like to take the opportunity to submit for consideration the following proposal on enhancing the existing procedures on replacement of lost share certificates under S.71A of the Companies Ordinance (Cap.32). RATIONALE Our submission is based on the following grounds: • Costs and time span for obtaining replacement certificates need to commensurate with value of shares covered by the lost certificates; • Time span for replacement of small value loss needs to be shortened; • Threshold on value of shares covered by lost certificates requiring multiple public notices in Gazette (as set out under S. 71A(3)) needs to be revised to reflect the current price index and justify publication costs. PROPOSAL Accordingly, the Federation proposes the following changes to S.71A: 1. Revising the threshold on value of shares covered by lost certificates as stipulated in S.71A(3) from HK$20,000 to HK$200,000; 2. Substituting publication of notices in Gazette with notices in recognized newspapers; 3. Shortening notice period and reducing the number of publications of Notice of Intention to Issue New Share Certificates. In addition, companies, in particular companies listed on the Hong Kong Stock Exchange, may from time to time issue other securities, such as registered warrants, we would like to request the SFC and the Team to consider the feasibility of incorporating in the Companies Ordinance explicit applicability of S.71A to such other securities so as to enhance clarity of the said section to market practitioners.

KPMG	Overall we are supportive of your proposals for reform in these areas of the Companies Ordinance. Our detailed responses to the questions you have posed are set out in an appendix to this letter.
MTR Corporation Limited	We welcome the decision by the Financial Services and the Treasury Bureau ("**FSTB**") to consult the public on legislative proposals to improve various provisions in the Companies Ordinance (Cap. 32 of the Laws of Hong Kong). We write in response to the Consultation Paper on Share Capital, the Capital Maintenance Regime and the Statutory Amalgamation Procedure (the "**Consultation**") issued by the FSTB in June 2008. In the process of reviewing the Consultation, we have considered any features unique to MTR Corporation Limited ("**MTR**") and whether MTR will be affected in any particular way by the amendments proposed by the Consultation. With reference to paragraph 2.18 of the Consultation, we note that under the proposed changes to the share capital of companies and the implementation of a no-par regime, FSTB proposes "to provide a legislative deeming provision for the amalgamation of the existing share capital amount with the amount in the company's share premium account (and also capital redemption reserve) immediately before the migration to no-par share capital". As a consequence and as set out in paragraph 2.19 of the Consultation, the existing share capital amount, the amount in a company's share premium account and its capital redemption reserve will become undistributable except in the limited circumstances when share capital is distributable. You will recall that, at the time of MTR's privatisation in 2000, Government set up in MTR a special reserve called the "capital reserve". This "capital reserve" may be used only to pay up unissued shares in MTR allotted as bonus shares. This was achieved by Section 42 of the Mass Transit Railway Ordinance (Cap. 556 of the Laws of Hong Kong) and Articles 132(d) to (f) of MTR's Articles of Association, as enclosed, and creates a unique position for MTR. Although paragraph 2.19 of the Consultation provides that "to avoid hardship to companies which would lose the permitted uses of share premium that they enjoyed prior to migration to no-par, we propose to preserve substantially the currently permitted uses of the share premium for the amount standing to credit of the share premium account before the migration to no-par", there is no proposal to "protect" in a similar way any other account akin to that of MTR's special "capital reserve". While we understand that more complete details relating to this proposal and the draft wording of the relevant legislative deeming provision are not currently available, we submit that when developing this proposal in the draft Bill for further public consultation, FSTB considers not only a proposal "to preserve substantially the currently permitted uses of the share premium for the amount standing to credit of the share premium account before the migration to no-par" but also any other account akin to that of MTR's special "capital reserve".

The Chinese General Chamber of Commerce	總括而言，本會支持特區政府就《公司條例》的股本、資本保存制度及法定合併程序等課題進行是次諮詢，並期望有關的重寫工作在進一步便利公司的運作和提升效率的同時，亦可將對董事、投資者、債權人和相關人士的影響減至最少，從而鞏固香港作為國際金融和商業中心的地位。
Mandatory Provident Fund Schemes Authority	While we do not have any comments on the proposals in the consultation paper, please keep us informed of the development of the proposals as they may necessitate consequential changes to the MPF legislation.
The Hong Kong Association of Banks	The consultation paper has set out different practices adopted by overseas jurisdictions, without detailing the rationale behind the Government's proposals for the commentators to understand its various considerations and assess whether there is a local demand for the proposed changes. Legislative changes should be a matter of whether there is a need for the changes rather than which jurisdiction we should follow. It would thus be more helpful if the consultation paper contains the considerations the Financial Services and the Treasury Bureau (FSTB) has undergone in making the recommendations being put forward for public consultation. Furthermore, we would like to comment on the specific proposals in the consultation paper which have particular relevance to our members as creditors.
The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies	I would like to let you know that our Association members have made no comments on the subject.
The Chinese Manufacturers' Association of Hong Kong	1. 「重寫《公司條例》諮詢文件」在參考海外地區進行公司法改革經驗的基礎上，提出了多項簡化、改善和放寬股本規則以及資本保存制度的建議。本會相信有關的改革有助於簡化公司的資本財務制度和減少企業的運作成本，並對諮詢文件提出的大部分的建議表示支持（有關本會對具體事項的意見，詳見附件）。 2. 本會特別歡迎在本港改行無面值股份制度，以及取消法定資本的規定；並認為應參照現行的作法，為合併及集團重整的溢價應撥入股份溢價賬提供適當的寬免安排。 3. 本會認為本港應保留現行的資本保存規則，無須更改目前常用的以現金流量為主的償債能力測試方法；亦不應把償債能力測試應用於所有分發方式，以免因此增加董事的潛在法律責任和引致額外的營運成本。

	4. 至於減少股本的安排，本會認為可以考慮為私人及非上市公眾公司引入非法院認許程序作為另一個選擇；但有關程序必須充分考慮對債權人的保障，特別是應確保債權人有足夠的知情權。本會亦贊成立法引入庫存股份制度；但是，為了避免助長投機及不規範的資本操作，本會不贊成修改現時禁止公司為收購其股份的第三者提供資助的規定。 5. 除了現有的法院認許程序外，本會亦認同香港應訂立不經法院的法定合併程序，以達到簡化程序和降低成本的目的。
CLP Holdings Limited	We support the FSTB's initiative to rationalise the share capital rules in the Companies Ordinance, notably the capital maintenance regime. Before going into the detailed comments on the various proposals set out in the Consultation Paper, we would like to make the following general observation. We understand the political difficulties arising from an uninformed, but widespread misconception that, somehow, share capital represents a locked-in cash reserve available to shareholders, including in the event of liquidation. However, we do not think that the policy behind capital maintenance regime should be dictated by political sensitivity which rests on misconception of purpose and importance of share capital. Instead of continuing an unsatisfactory and outdated regime, we believe that Government, with the support of the academics and industry professionals, and reference to the developed practices elsewhere, could and should tackle the job of explaining to legislators and opinion formers what is actually at stake and what is sought to be achieved. We also believe that preserving into a revised Companies Ordinance an outdated capital maintenance regime will contribute to frustrating one of the objectives of the current company law reform process – provide Hong Kong with a modern company law benchmarked against emerging global standards and attractive as a jurisdiction for incorporation.
The British Chamber of Commerce in Hong Kong	We are pleased to attach our submission on the captioned consultation which represents the views of our membership. We would underline the comment that there should be no legislative control over the setting of the issue price – there is no such control at the moment when shares are issued at a premium over par.
Hong Kong Monetary Authority	The present consultation covers share capital (Chapter 2), the capital maintenance regime (Chapter 3) and statutory amalgamation procedure (Chapter 4). From the perspective of banking supervision, the HKMA's objectives regarding an authorised institution's capital is that the overall level of capital should be adequate to absorb losses which are not covered by a sufficient volume of profits, thus ensuring the continuity of the institution and the protection of depositors. As set out in the Seventh Schedule to the Banking Ordinance (BO), maintaining financial resources which are adequate for an

	institution's nature and scale of its business is one of the criteria for continuing authorisation of the institution. In the case of locally incorporated authorised institutions (AIs), this criterion will mainly be satisfied by the institutions complying with the minimum capital adequacy ratio (CAR) requirement under section 98 of the BO and the Banking (Capital) Rules and Banking (Disclosure) Rules (the Rules collectively) made by the Monetary Authority (MA) under the BO. They are also required by section 69(2)(b) of the BO to notify the MA in writing if they make any reconstruction of their capital. In practice, we also rely on the current capital maintenance regime as set out in paragraph 3.3 of the consultation document to ensure that the AIs adhere to prudent capital maintenance principle. Our comments set out in the following paragraph mainly focus on the issues which may have implications on our current supervisory regime. We do not see the proposal of introducing a mandatory no-par value share regime for all companies under Chapter 2 will have any adverse impact on our capital adequacy regime as mentioned above. The BO and the Rules contain various references to paid-up share capital and balance of share premium account. Assuming a mandatory system of no-par value for shares is adopted, these references will need to be reviewed to see if any consequential amendment is required. Regarding Chapter 3, we agree that the current cash flow test-based solvency test requirement should be modified by including also a balance sheet-based test, given the arguments set out in the document. Nevertheless, we need to emphasise that if any reform options proposed in the consultation document is adopted, it would remain in our supervisory interest that AIs discuss with the MA their plans to reduce their capital or repurchase of their own shares so as to ensure that the AIs continue to maintain an adequate CAR after the proposed reduction or repurchase, in addition to their compliance with the solvency test requirements. We will also need to review the implications of any reform options adopted on our supervisory policy and guidance, particularly for those relating to the capital adequacy requirements, and consider clarifications where necessary. One example is the supervisory treatment of treasury shares under the Banking (Capital) Rules. Finally, we do not have any comment on the issues raised in Chapter 4.
The Hong Kong Institute of Chartered Secretaries	The Institute fully supports the initiatives taken by the Administration to modernize the current capital maintenance regime which may be somewhat out of date and not in par with international practices prevailing in other jurisdictions. That said, changes can only be effective if they are introduced and implemented in a gradual pace. A sufficient period of transformation will help facilitate learning and adaptation without causing confusion and resentment.
Consumer Council	It appears that the proposals in the Consultation Paper have no direct and imminent implications on general consumer interest. The Council therefore has no specific comment on the Paper. Nevertheless, the Council will be happy to be advised of the draft Bill which may contain more details when it is published.

Compendium of Responses

Question 1

Do you agree that Hong Kong should adopt a mandatory system of no-par for all companies with a share capital?	
Li & Fung Limited	Yes
Tsao Yea Tann Simon	We do not agree with the document stating that par value has no practical value. Every system should have its reference point and 'par' value' is such. To a layman, he can only recongnize the value as 'share capital' and that is the amount of his share and contribution to the investment. We must remember the six user groups of financial statements – the existing shareholders and management are not the paramount users but potential investors' interest should be taken into account, especially when we seek for a position as an international finance center, we should not be too flexible because it compromise our control over the potential threats of the companies being registered.
Swire Pacific Limited	No. We support a voluntary system, like those in Delaware and the British Virgin Islands. We believe that Hong Kong's companies legislation should be facilitative rather than prescriptive. One of the reasons for the success of Delaware (in which it is estimated that 60% of all US companies are incorporated) and the BVI in attracting incorporations is the flexibility which their non-prescriptive companies legislation offers. If Hong Kong wishes to encourage incorporations, we think it would be a backward step if companies which wish to could not opt to use par values. If the advantages of a no par value regime are as clear cut as the Consultation Paper suggests, legislation enabling companies to choose no par value if they wish should lead to most companies choosing it. If most companies choose it, the administrative burden of having two systems will not be great. If they do not, this will be evidence that the benefits of no par value may not be as clear cut as suggested. The articles of companies (like ours) whose share capital is divided into classes of shares having different par values typically provide (as do our articles) that dividends and winding up distributions are divided among members in proportion to the amounts paid up on their shares. Our company's share capital is divided into A shares of HKc60 par value each and B shares of HKc12 par value each. When we pay a dividend of, say, HKc10 on each A share, we must simultaneously pay a dividend of HKc2 on each B share. Abolishing par value would mean that we might no longer have the current basis (the par value of a fully paid share being the same as the amount paid up on it under present legislation, but it not being clear that paid up would have the same meaning under the amended legislation – it could include amounts paid up by way of share premium for example) for paying different dividends or different winding-up distributions to our A and B shareholders.

	This would result in a very substantial transfer of value from our A shareholders to our B shareholders and would be inequitable and wholly unacceptable. We note the intention in paragraph 2.9 of the Consultation Paper to introduce "legislative provisions to ensure that contractual rights defined by reference to par value …will not be affected by the abolition of par". If a mandatory no par regime is introduced, it is clearly essential (both for the reasons give above and in order to avoid a possible conflict with the protection afforded to private property rights by Article 105 of the Basic law) that the legislation preserves existing class rights like those of our shareholders as well as preserving ordinary contractual rights. In particular, the legislation must make it clear that references to amounts paid up on shares in articles of association and other documents are to the amounts paid up on the par value of the relevant shares before they were converted into no par value shares. For completeness, we should add that, if the legislation does not preserve our shareholders' class rights, we could not be sure that resolutions put to our shareholders designed to restore the status quo would be passed. As such resolutions would involve the amendment of class rights, they would have to be voted on and approved (by 75% majorities) by each class separately. Our B shareholders would have no economic incentive to vote in favour of resolutions which would deprive them of a windfall.
Cathay Pacific Airways Limited, Hong Kong Aircraft Engineering Company Limited	No. We support a voluntary system, like those in Delaware and the British Virgin Islands. We believe that Hong Kong's companies legislation should be facilitative rather than prescriptive. One of the reasons for the success of Delaware (in which it is estimated that 60% of all US companies are incorporated) and the BVI in attracting incorporations is the flexibility which their non-prescriptive companies legislation offers. If Hong Kong wishes to encourage incorporations, we think it would be a backward step if companies which wish to could not opt to use par values. If the advantages of a no par value regime are as clear cut as the Consultation Paper suggests, legislation enabling companies to choose no par value if they wish should lead to most companies choosing it. If most companies choose it, the administrative burden of having two systems will not be great. If they do not, this will be evidence that the benefits of no par value may not be as clear cut as suggested.
Gordon Jones	I agree that Hong Kong should adopt a mandatory system of no-par shares for all companies with a share capital for the reasons set out in paragraphs 2.3 to 2.8 of the paper. The overwhelming majority of companies formed and registered in Hong Kong have very small amounts of issued share capital and par value only introduces an unnecessary legal complication for these companies. All the principal common law jurisdictions, most of which are major commercial jurisdictions, either have moved or will move to no-par regimes and, if Hong Kong does not follow suit, we shall be out of step with other comparable commercial common law jurisdictions. Furthermore, par value is precisely the kind of anachronism which should be removed in the context of a major rewrite of the Companies Ordinance as its removal has not

	only structural implications for the Companies Ordinance but also implications for many other pieces of legislation and cannot be handled in the context of piece meal reform.
Arthur Lam & Co. CPA	No, we do not agree. We think the current par value has a long historical. We do not see the appearance advantage of the "no-par value" system over the "par value" system. We suggest the "no-par" may be a choice.
The Law Society of Hong Kong	Yes
KPMG	Yes, we agree with this proposal, for the reasons set out in paragraphs 2.3 to 2.8 of the Consultation Paper.
Clifford Chance	Given that jurisdictions such as Australia, New Zealand and Singapore have already adopted a no-par regime, and the UK and Malaysia will follow suit in the near future, we agree that Hong Kong should adopt a mandatory system of no-par for all companies with a share capital. Whilst we appreciate that non-Hong Kong companies carrying on business in Hong Kong will not be affected by the amended CO (as they will continue to be governed by the law of their respective places of incorporation), it would be essential that any HK legislation and rules that apply to non-Hong Kong companies e.g. the SFO and the Listing Rules be amended to cater for both par and no-par value shares. In particular, there are many listed companies incorporated outside Hong Kong (e.g. the Cayman Islands and Bermuda), where a par value shares regime is still in place.
Chartered Institute of Management Accountants Hong Kong Division	Yes. The adoption of mandatory no-par system would be simpler for all concerned. Other countries have adopted the no-par system with good results e.g. Singapore as from 30 January 2006.
The Chinese General Chamber of Commerce	本會認同諮詢文件第2.7段提及股份面值已引起包括使會計制度過分複雜、阻礙籌集新資本、為股份登記帶來不必要的工作和費用、以及誤導不成熟的投資者等實際問題。因此，本會贊成香港應強制所有有股本公司採用無面值股份制度，並相信此舉將可給予公司在股本安排上更大彈性。
Hermes Equity Ownership Services Ltd.	Yes. We do not object that Hong Kong adopt a mandatory system of no-par for all companies with a share capital as we agree that there is no essential difference between a share of no par value and one having a par value.
Ho Tak Wing	I absolutely disagree in this issue. Concerning no-par for all companies with a share capital, before Hong Kong is going to

	put it under a mandatory system, there are two issues to be further considered, namely (a) what will be the mechanism in determining the no par value of the share capital; and (b) what will be the basis in ascertaining the accuracy of the capital duty on the authorized share capital. If the capital duty is dispensed with, what will be the basis in determining issuing shares of the company?
Hong Kong Stockbrokers Association	Agreed.
The Hong Kong Association of Banks	We generally support the proposal of adopting a no-par regime in Hong Kong as it should enable simpler accounting since there will no longer be a need to segregate share capital and share premium accounts.
The Chinese Manufacturers' Association of Hong Kong	贊成香港強制所有有股本公司採用無面值股份制度。本會認為摒棄股份面值的概念可以簡化會計制度，方便公司的資本運作和財務安排，亦可以令投資市場更加清晰和簡單。
The Association of Chartered Certified Accountants	Share Capital – No-par system In view of the global trend, ACCA Hong Kong in principle supports the adoption of a mandatory system of no-par value for all companies with a share capital. However, we are of particular concern that the transition to such a mandatory no-par system will undoubtedly impose a burden on small companies which have only small scale operations. We suggest that concerns of small companies be addressed. As consequential amendments to all relevant rules and legislations such as the Securities and Futures Ordinance and the Listing Rules will be required, ACCA Hong Kong is of the view that the adoption of such a no-par system should be adopted subject to enactment of all these proposed amendments which on the other hand should go through proper consultation exercises. Sufficient time should also be ensured to allow education to the public so as to remove their confusion.
CCIF CPA Limited	No, we do not agree that Hong Kong should adopt a mandatory system of no-par for <u>all companies</u> with a share capital. The "no-par" system should be applicable only to newly incorporated companies and those existing companies which opt to migrate to it. Accordingly, the optional no-par system for the companies which have already been incorporated is proposed.

Canadian Certified General Accountants Association of Hong Kong	We are indifferent to this issue since accounting professionals are well aware the nature of the share premium account. To a certain extent, a share capital account with par value may be clearer to investors of the number of shares (thus their proportion) without referring to the detailed notes.
CLP Holdings Limited	We agree that Hong Kong should adopt a mandatory system of no-par for all companies with a share capital.
The British Chamber of Commerce in Hong Kong	This is a difficult question. Hong Kong has over 650,000 companies on the register, who will need to operate under the proposed no-par regime, were it to become mandatory. The countries who have adopted no-par so have far fewer incorporations (i.e. Singapore, New Zealand , Australia) and all require an individual director to be resident in the jurisdiction (this is not something we suggest for HK, as raised in our previous submission relating to the second companies ordinance consultation). As long as existing companies, some of who have share premium accounts are properly catered for, it may be possible to move to a mandatory no-par share system. However, a mandatory no-par system is less flexible, in terms of there being less choice, than in a system which has both a par value and a no-par value regime open to individual choice. To move 650,000 companies to the proposed new no-par share regime when perhaps only 10,000 really need it is the big question. Is that the right thing to do? Furthermore certain companies may find that they have some use for share premium account and / or capital redemption reserve. We think it will take a long time to move to a no-par share regime in the UK, as they are waiting for an amendment to the EU capital rules.
Stephenson Harwood & Lo	We agree with the proposed adoption of a mandatory system of no-par for all companies with a share capital. **Our reasons are:** 1 **Increased flexibility**. Shares trading at a high market price can be easily sub-divided, thereby increasing marketability. Conversely, if the market price has dropped below the nominal value, capital can be raised at the market price without the problem of shares being issued at a discount. 2 **Simplified accounting and disclosure**. For instance: (i) there would be no need for a share premium account; and (ii) companies would not be restricted to an issue price at or above the par value. 3 **Less confusion**. Investors are primarily interested in the proportionate size of the investment and not an arbitrary monetary denomination. Creditors no longer rely on the nominal value as an indication of financial viability. Par

	value may lead to confusion and provides an out-dated measure of value. More important measures of value include measures such as earnings per share and net asset value. These are more accurate indicators of a company's value. 4 **Legal formality**. Par value has little commercial impact. In fact the concept has resulted in complicated rules such as the requirement for a share premium account and a prohibition on issuing shares at a discount. There is no reason why companies should be required either to issue shares at a fixed value, which may be substantially above their current market value, or be artificially constrained as to the number of shares it may issue. The adoption of a no par value system represents an important step in the modernisation of company law.
The Hong Kong Chinese Enterprises Association	贊成。
Arthur K.H. Chan & Co.	Yes
Tricor Services Limited	Yes, we agree that Hong Kong should adopt a mandatory system of no-par for all companies with a share capital. On a related issue, currently, there is no provision in the CO allowing a company to convert its share capital from one currency to another. In a no-par regime, could a company convert its share capital which was issued in one currency to another currency freely. If not, would SCCLR consider taking this opportunity to introduce the relevant provision into the CO allowing a company to convert its share capital from one currency to another in both the no par and par regime.
The Hong Kong General Chamber of Commerce	Yes.
Hong Kong Bar Association	The Bar supports this proposal for the reasons stated in §2.1 to §2.8 of the Consultation Paper.
The Society of Chinese Accountants & Auditors	Yes, we agree.
The Hong Kong Institute of Chartered	In general, the Institute favours that Hong Kong should adopt a mandatory system of no-par for all companies with a share capital. Such system is adopted by more countries in this world which represent the majority trend. Alongside with such

Secretaries	change, our company legislation should also contain provisions to allow conversion of share capital from one currency to another bearing in mind that Hong Kong is an international finance center attracting corporations and/or investors from all over the world. That part is lacking at the moment in our current legislation.
Hong Kong Institute of Certified Public Accountants	Yes, in principle, we support the proposal of adopting a mandatory system of no-par for companies with a share capital, for the reasons put forward in the consultation paper. We would tend to accept that the concept of "par value" of capital does not have any necessary connection with the financial strength of a company and it does not give a clear indication of the real value of the shares or the company. We also understand that, generally, the concept of par value, paid-up share capital, etc. may in practice no longer be relied upon by creditors and shareholders for their protection, and that they would look to other measures for assurance. However, we believe that there may still be perception by some members of the public that paid up share capital is an important indicator of a company's financial resources, which is given weight by the fact that capital requirements are still imposed on certain companies, such as those in regulated sectors (e.g., authorised institutions, pursuant to Schedule 7 of the Banking Ordinance (Cap. 155)). This being the case, if Hong Kong moves to a no-par regime, particularly if the existing capital maintenance regime is substantially altered a clear and adequate explanation of the background to, and the rationale for, this change needs to be given to the public. In addition to the more direct legislative changes that would be required if the no-par regime is to apply across the board, other consequential changes would need to be made to legislation, rules and regulations, such as: a. Securities and Futures Ordinance (Cap. 571) - with regard to determining the percentage level in relation to notifiable interests and short positions (s. 314) b. Stock Exchange Listing Rules - with regard to the basis for the calculation of the annual listing fee of listed issuers (Appendix 8)

Question 2

Do you agree that a period of about 12 months would be reasonable for companies to review their arrangements before migration to no-par? If you think another period more appropriate, please specify what that is and your reasons.	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	If, notwithstanding our view that migration to no par should be voluntary, the migration is compulsory, we would recommend a much longer migration period, say five years. A large company will need a considerable amount of time to (a) do sufficient due diligence to understand the consequences of the change and (b) address those consequences. As is rightly indicated in paragraph 2.10 of the Consultation Paper, companies may wish to make their own changes to documents affected by the change (notwithstanding any deeming provisions in the no par legislation). They may also have to make such changes where the deeming provisions do not apply (or do not apply satisfactorily) or the documents are not governed by Hong Kong law. Agreeing changes with contract counterparties could be a time consuming process.
Gordon Jones	I agree that a period of 12 months is a reasonable timeframe for companies to review their arrangements before the mandatory migration to a no-par regime.
Arthur Lam & Co. CPA	We think the 12-month period may be a sufficient time allowed for listed company. We propose a longer grace period to allow the private companies to make the transition, say 24 months or even 36 months.
The Law Society of Hong Kong	The period should be not less than 24 months. It is quite usual for businesses in Hong Kong to be carried out by a large number of single-purpose companies in a group under common control. For groups such as these, management will have to review the arrangements of each of the group companies before migration to no-par. In these situations, 12 months would not be adequate.
KPMG	Yes, we agree that a 12 month period seems a reasonable transition period, particularly if the new legislation assists the transition by including a statutory deeming provision, as is envisaged in paragraph 2.9 of the Consultation Paper.
Clifford Chance	We believe 12 months would be reasonable.
Chartered Institute of Management Accountants Hong Kong Division	We would recommend a slightly longer period of 18 to 24 months to enable companies including those with different accounting year end periods to cope with the work to change to non-par.
The Chinese General	本會同意給予 12 個月的時間是合理和適當的，這個期限應已足夠讓有關公司進行文件覆查、檢討安排和配合本身

Chamber of Commerce	需要作出相關的改動。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	Yes, agreed.
Hong Kong Stockbrokers Association	Agreed.
The Chinese Manufacturers' Association of Hong Kong	贊成給予公司約 12 個月的時間作為過渡時期。
CCIF CPA Limited	No, the time period given is better to be 18 months as the secretarial matters of certain small and inactive companies are addressed only on the filing of their annual returns. However, it is more appropriate to preserve the par value system as a choice available to the existing companies.
Canadian Certified General Accountants Association of Hong Kong	If the no-par share proposal is accepted, a transitional period of 12 to 24 months is appropriate.
CLP Holdings Limited	The migration from a par value share regime to a no-par value share regime requires amendments to the Memorandum and Articles of Association, which in turn require approval from shareholders of individual companies. In order to minimise the inconvenience and costs to companies in the migration process, it is recommended that companies be given 24 months to review their arrangements, including amending the Memorandum and Articles of Association for the purpose of conversion into no-par value share regime at the next annual general meeting following the mandatory conversion (instead of having the need to organise an extraordinary general meeting for the purpose of conversion).
The British Chamber of Commerce in	See our comments in 1 above – we would strongly prefer no-par to be optional rather than mandatory. 12 months is too short. 24 months allows time for companies with a long accounting period to be accommodated. This is anyway a very

Hong Kong	significant change to the regime affecting share capital in HK; we would also like time to consider in detail the drafting of the statutory deeming provision mentioned in the Consultation Document ("CD"). I.e. the concept that share capital and share premium (or, capital redemption reserve) will be merged into and treated as one, after the change to no-par.
Stephenson Harwood & Lo	We agree that the proposed 12 months is a reasonable period of time for companies to review their arrangements before migration to a system of no-par. This compares to some other jurisdictions, such as: (a) **Singapore**: The relevant provisions in the Companies (Amendment) Act 2005 were passed by the Parliament of Singapore on 16 May 2007 and the Act took effect on 30 January 2006, which was around 7.5 months later. No conversion period was provided, the change to a no par value system was deemed in law. For example, any memorandum of association that provided for par value and an authorised share capital was deemed deleted by law. (b) **New Zealand**: New Zealand introduced the change to a no-par value system through the enactment of the Companies Act 1993 on 28 September 1993 and the deeming provisions came into effect 9 months later on 1 July 1994.
The Hong Kong Chinese Enterprises Association	12 個月太短，18 個月比較適合。
Tricor Services Limited	We opine that 12 months would be too short an implementation duration given the underlying potential complexities for certain companies. Accordingly, a 2-3 years duration would be more appropriate.
The Hong Kong General Chamber of Commerce	We would suggest that the period for companies to review their arrangements before migration to no-par should be at least 24 months. We would not consider 12 months to be adequate time for companies to review their documents and make any necessary changes, given the number of companies involved, particularly in larger groups.
The Association of Chartered Certified Accountants	In terms of the transitional period for the migration to no-par, ACCA Hong Kong suggests that a timeframe for two consecutive annual general meetings should be allowed for all companies.
Hong Kong Bar Association	It is not entirely clear what it is intended the companies should do during the period of 12 months, or what consequence will follow if the companies fail to "review their documents before the conversion is effected" within that period. Subject to that, the Bar considers the proposed period of 12 months is reasonable for companies to review their arrangements before migration to no-par.
The Society of	Yes, we agree.

Chinese Accountants & Auditors	
The Hong Kong Institute of Chartered Secretaries	The change from a par value regime to a no-par value share regime requires amendments to the M&A of all concerned companies. That will take some time. 12 months seems to be too short. The Institute suggests that companies are to be given 24 months to implement the changes once the no-par value share regime is introduced.
Hong Kong Institute of Certified Public Accountants	We agree that a reasonable time should be allowed for companies to review their arrangements before migration to no-par. As mentioned in paragraph 2.10 of the consultation document, such period is "*to allow companies to tailor their own changes if they so prefer*". This may require conducting a general meeting of shareholders to approve relevant changes to a company's constitutional documents. In order to minimise any disruption to existing companies, sufficient time should be allowed for companies to seek shareholders' approval of the relevant changes at an annual general meeting. As such, we propose that a period of 24 months would be more appropriate. In addition, it would be helpful, in this regard, if more information could be provided as to the experience of other jurisdictions in this regard, e.g., Australia, New Zealand and Singapore.

Question 3

Do you agree that there should not be any legislative control over the setting of the issue price of the no-par shares?	
Li & Fung Limited	No
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes. We agree that there should be no such legislative control.
Gordon Jones	The question of whether there should be any legislative controls over the setting of the issue price of the no-par shares depends on, as stated in paragraph 2.16 of the paper, the efficacy of Hong Kong's governance systems. While there is now a whole raft of shareholders remedies under the provisions of the Companies (Amendment) Ordinance 2004, directors' fiduciary duties are not yet codified and, whether or not this happens, depends on the results of the consultation in the context of the second consultation paper. Furthermore, both Australia and Singapore, which are major commercial common law jurisdictions, have not introduced specific legislative controls and, precisely because they are major commercial jurisdictions, I would be more inclined to follow their precedents than the precedent of New Zealand which is not a major commercial jurisdiction. It should, however, be noted that, as both Australia and Singapore have codified directors' duties, their statutory governance systems are more developed than that in Hong Kong. Consequently, we are not completely comparing like with like and I would recommend that the need for specific legislative controls on the issue price should be kept under review in the context of whatever decision is made on the codification of directors' duties.
Arthur Lam & Co. CPA	If the no-par value system may be an alternative choice, the decision may be rested upon the company promoter.
The Law Society of Hong Kong	Yes. The existing rule against issue of shares below par value does not provide any safeguard against the issue of shares below what they are worth either. The move to a no-par regime is not a reason for legislating how share issue price is to be fixed. This should remain the responsibility of the board acting in the interests of the company.
KPMG	In respect of the pricing of new shares, concerns surrounding the codification of directors' duties and/or statutory protection for minority shareholders exist even under a par value regime, since par value is often considerably lower than an individual

	share's fair value. Therefore, we do not consider that the abolition of the par value regime in itself gives rise to a need to introduce legislative control over the setting of share prices.
Clifford Chance	We believe any legislative control over the setting of the issue price of the no-par shares will be unnecessary, and is against the principle of Hong Kong being a free trade economy.
Chartered Institute of Management Accountants Hong Kong Division	Yes. Any legislative control may involve setting arbitrary amounts or limits, which in most cases would hinder rather than facilitate the procedure. Let the market/management decide on the appropriate level of the issue price of the non-par prices.
The Chinese General Chamber of Commerce	由於董事仍須嚴格履行受信職責、謹慎職責等規定，本會認為無須就釐定無面值股份的發行價再作立法規管。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	There should not be any legislative control over the vetting of the issue price of the no-par shares. However, the Company Ordinance and/ or the Listing Rules Provisions should empower the statutory auditors to examine the relevant documents such as minutes, statutory declarations, or any other audit evidence to ascertain the validity of the basis in reaching such no-par value of the shares.
Hong Kong Stockbrokers Association	Agreed.
The Chinese Manufacturers' Association of Hong Kong	同意無須立法規管釐定無面值股份的發行價。
The Association of Chartered Certified	Share capital – Issue price In view of the recent development of corporate governance in Hong Kong where the fiduciary duty system and minority

Accountants	shareholders' protection have been brought in line with international standards, we consider that it is not necessary, at least for the time being, to impose legislative control over the setting of issue price of the no-par shares.
CCIF CPA Limited	Yes. The focus should be on the strengthening of the fiduciary duty system and minority remedies but not on the setting of the issue price of the no-par shares.
Canadian Certified General Accountants Association of Hong Kong	While there is no legislative control for the share premium or share discount, we do not think there is a need for any legislative control.
CLP Holdings Limited	We agree that there should not be any legislative control over the setting of the issue price of the no-par shares.
The British Chamber of Commerce in Hong Kong	If we move to no-par, there should be no legislative control. The share issue price would be a matter for the director(s). In practice the extensive number of HK shelf companies incorporated will probably continue to have 1 share issued at say HK$1. Shelf companies do not exist in the same way in Singapore, New Zealand or Australia, as in Hong Kong. Any problem regarding this area may mean that offshore shelf companies (ie British Virgin Island companies) will become more user friendly than Hong Kong companies. We would always prefer measures which encouraged the use of Hong Kong companies over companies from other jurisdictions
Stephenson Harwood & Lo	We propose that there should be no legislative control with respect to the determination of the minimum price at which a share can be issued. **Our reasons are:** • par value does not effectively protect shareholders; • par values have been reduced to meaningless low values. Fiduciary duties of directors are well developed and established in Hong Kong. In light of this system, giving directors the power to set the minimum value of a share provides sufficient protection to shareholders without the need for extra layers of regulation via legislation. There have been proposals to: (i) require directors to certify that the issue price is fair and reasonable to the company and all its existing shareholders; (ii) impose a criminal liability; and (iii) require a report setting out the reasons for a low issue price, amount to an additional burden, cost and liability that directors and companies will be reluctant to take on.

	We disagree with these proposals and feel no further safeguards beyond the current fiduciary duties are necessary. Given that par values are commonly low and (as observed above) usually do not reflect the value of the company, shareholders are effectively protected by directors' fiduciary duties already. Removing the par value limitation will not, in our view, materially change the current practical situation.
The Hong Kong Chinese Enterprises Association	同意，但宜對如何釐定發行價作出指引。
Arthur K.H. Chan & Co.	Yes
Tricor Services Limited	Yes, we agree that there should be no such legislative control.
The Hong Kong General Chamber of Commerce	We would not support any legislative control over the setting of the issue price of no-par shares. This should be left to the directors to decide in accordance with their fiduciary duties, as is the case now when directors determine the price at which shares are issued.
Hong Kong Bar Association	The Bar does <u>not</u> agree with the recommendation against legislating for any controls on the setting of issue price. The South African model discussed in §2.15 provides an objective and reasonable basis with regard to the minimum price upon which the shares can be issued. It also provides an important safeguard to the existing shareholders in that they will not find the value of their shares diluted or reduced without any satisfactory explanation put forward by the Board of Directors and without their consent on the issue. As an alternative to the South African model, the minimum price can also be set by reference to the net asset value per share at the time of the proposed issue, which is a fair and objective basis in assessing the value of the shares in a company.
The Society of Chinese Accountants & Auditors	Yes, we agree.
The Hong Kong Institute of Chartered Secretaries	Agree.

Hong Kong Institute of Certified Public Accountants	If the directors' fiduciary duty in these circumstances relates essentially to ensuring that the company receiving adequate consideration for the issue, as suggested in paragraph 2.13 of the consultation paper, then prima facie, there would seem to be an argument for some degree of control to ensure that the interests of any existing shareholders are also taken into account. However, without more information regarding the rationale for the different approaches adopted in New Zealand and South Africa in relation to equitable treatment for existing shareholders, it is difficult to comment upon these, or other possible options, except to say that the New Zealand approach appears to be more flexible.

Question 4

Assuming the abolition of par value while the existing capital maintenance rules are largely maintained, do you favour: **(a) The abolition of the merger relief; or** **(b) Its application to the amount in excess of the subscribed capital of the acquired company attributable to the shares acquired or cancelled; or** **(c) Some other alternatives (please specify)?** **Please provide reasons.**	
Li & Fung Limited	Yes 4(b)
Tsao Yea Tann Simon	As regards to merger and reconstruction reliefs, we believe it should be viewed as a tax issue rather than an accounting issue. The merged company or being acquired company which excess over the fair value of its assets being recognized as goodwill should not be distributed because it was based on an assumption of future earnings. Until this future benefits can be materialized, it is inappropriate therefore to distribute the future profits from the merged company. Likewise, if you are anticipating a loss in future profits by acquiring a company, we cannot see why the management should seek for an uncertain discount but not running a brand new business? The effect of goodwill and negative goodwill can lead to possible expropriation of assets for minority and therefore the proposed change is not favoured. The legislation is not only for enhancing value to existing shareholder nor relief of workload in business but moreover a protection of public interests.
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Merger relief should not be abolished, for the reasons stated in the consultation paper. If (b) is adopted, the subscribed capital of the acquired company will vary according to whether the relevant shares were issued with or without par value, so giving different results for transactions which have the same economic effect. It is difficult to see what other alternatives would make more sense.
Gordon Jones	It is not easy to answer this question (and Question 5) in the absence of information on how other jurisdictions which have reformed their share capital and capital maintenance legislation, such as Australia and Singapore, have dealt with the problem. The Australian and Singaporean precedents would provide particularly helpful guidance given that both jurisdictions have abolished par value but retained the capital maintenance rules for distributions which is, subject to the outcome of the discussion of the issues outlined in Chapter 3, precisely the route that Hong Kong is most likely to follow. However, if Hong Kong decided to dispense with the capital maintenance rules and adopt the solvency test, the issue would

	fall away since there would be no distinction between payment from capital or profits. The question is, therefore, to what extent merger relief should be reformed on the assumption that the capital maintenance rules are to be retained and distributions are to be made only from realized profits. Paragraph 2.22 of the paper states that it would be unduly harsh to abandon the concept of merger relief completely as this would mean that the full amount of the consideration received for issuing the shares (as opposed to only a portion under the existing law) would be classified as restricted capital. As section 48C was introduced to give relief on how the proceeds of share issues should be handled in the context of a merger, it would be an illogical and retrograde step to revert to the position prior to the enactment of section 48C, which would certainly be the case if all the proceeds were to treated as part of the undistributable capital. Furthermore, as corporate mergers, in the limited number of situations outlined in section 48C, will probably lead to a more efficient use of a company's financial resources, these should not be subject to the burden of tying up capital unnecessarily. Conversely, if the full amount of the consideration was subject to merger relief, no restricted capital would be recorded. This would enable the issuing company to increase its reserves by the whole of the consideration for the shares of the company in which it has at least a 90% equity holding. However, this could result potentially in a substantial erosion of the issuing company's capital post merger, compared with that of the two separate companies, without creditor safeguards, as the full amount would become distributable. I would therefore not support a complete relaxation of the existing rules which, as the paper states, would give relief beyond the legislative intent of section 48C and not be in the interests of creditors. In view of the above, I would support the retention of merger relief but, because par value will have been abolished, it will be necessary to recalibrate the formula for transferring a certain portion of the proceeds of a share issue to the company's reserves. The proposal in paragraph 2.22 may be a possible solution but care should be taken to ensure that this does not create unnecessary complexity bearing in mind that one of the fundamental principles of the rewrite exercise is to simplify company law. In Consultation Document No. 3 on Company Formation and Capital Maintenance issued by the UK Company Law Review Steering Group ('CLRSG') in October 1999, when the UK was considering the abolition of par value for private companies (but retaining it for public companies), it was suggested that a possible way forward would be to provide that the amount to be transferred to the subscribed capital of the merged company should be the amount of the book value of the capital and reserves attributable to the shares cancelled or acquired in the company being acquired (paragraph 3.23). In the event, the UK was unable to develop this option further as, given the constraints of the Second E C Commercial Directive, it was not possible to abolish par value and readjust the provisions on merger relief in the context of the

	Companies Act 2006. However, the Australian Corporations Act and Singaporean Companies Act may provide useful guidance for reasons already discussed while the views of relevant commercial and professional bodies, in particular the HKICPA, will be essential in deciding the most appropriate way forward.
Arthur Lam & Co. CPA	No comment.
The Law Society of Hong Kong	(a) No. The abolition of merger relief will be unduly harsh, and make Hong Kong incorporated companies largely inflexible as compared to companies incorporated elsewhere. (b) No. The merger relief should be applied to the amount of the consideration in excess of the fair value (or book value) of the acquired company attributable to the shares acquired or cancelled. The subscribed capital of the acquired company attributable to the shares acquired or cancelled does not represent the value of the acquired company. (c) None
KPMG	If the existing capital maintenance rules are largely maintained, we consider it is important to retain the merger relief concept for the reasons explained in paragraph 2.22. We would support the approach set out in part (b) of the question, as this would continue to facilitate the upwards distribution of the acquired company's distributable reserves through the acquirer and beyond to the original shareholders of the acquired company, which we assume was the original legislative intent of the merger relief provisions.
Chartered Institute of Management Accountants Hong Kong Division	We favour option (b) above assuming that the existing capital maintenance rules are largely retained. Under the non-par regime, the merger relief should be applied to the amount received in excess of the subscribed capital of the acquired company attributable to the shares acquired or cancelled. In this way, the merger relief would still be within the existing legislative intent of section 48C.
The Chinese General Chamber of Commerce	本會認為在保留現行資本保存的規則下，可考慮取消合併寬免。惟正如諮詢文件中提及，完全廢棄合併寬免概念似乎過分嚴苛，因為所有就發行股份所收到的代價將會歸入受限制的股本內。因此，保留寬免安排適用於超出被收購公司就被購或取消股份認購股本的款額，會是一個合適選擇。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	(a) On the assumption of abolition of par value and retention of existing capital maintenance. I am in favor of abolition of

	merger relief. (b) No comment (c) No comment
Hong Kong Stockbrokers Association	We prefer option (b) as this will approximate the effect of the existing merger relief available under S48C.
The Hong Kong Association of Banks	With a view to minimising the impact on the amount of restricted capital arising from the proposed change to a no-par regime in cases of merger or group reconstruction, we consider that options 4(b) and 5(b) should serve the purpose.
The Chinese Manufacturers' Association of Hong Kong	可參照現行的制度，採用方案(b)，即寬免安排適用於超出被購或取消股份之認購股本的款額。
CCIF CPA Limited	The right enjoyed before the migration to no-par should be preserved. (a) No. (b) Yes. (c) No.
Canadian Certified General Accountants Association of Hong Kong	We are in favour of (b) as it is within the current capital maintenance rules.
CLP Holdings Limited	Given the reasons set out in the Consultation Paper, we support (b). (i.e. the application of the merger relief to the amount in excess of the subscribed capital of the acquired company attributable to the shares acquired or cancelled.)
The British Chamber of Commerce in Hong Kong	We prefer (b). – Merger relief applied to the excess attributable to the shares acquired or cancelled, so excessive relief is not given.

Stephenson Harwood & Lo	We favour the partial abolition of merger relief, as discussed below. **Our reasons are:** ***Total Abolition of merger relief*** The complete abolition of merger relief potentially presents the simplest answer and seems the logical solution if one considers that the removal of par value makes the share premium account redundant. However as suggested by Financial Services and the Treasury Bureau, if the existing capital maintenance rules are largely maintained even in a no par value system, it would be harsh to abandon merger relief entirely. ***Partial abolition of merger relief*** Alternatively, merger relief could be partially abolished. Instead of using par value, the book value of the target could be used. Any excess over the book value of the target would constitute a premium. This would be similar to group reconstruction relief. This would mean an amount is specified and recorded in the capital account as being subject to different rules i.e. the amount of consideration paid over the book value of the target. We propose that the partial abolition of merger relief is the best option and the amount of consideration that the relief applies to should be based on the excess over the book value of the target. ***Extension of merger relief to the entire consideration*** This maintains the status quo as it means none of the consideration for the shares is recognised as subscribed capital. This is not a result we favour.
The Hong Kong Chinese Enterprises Association	採用(b)。
Tricor Services Limited	Merger relief should not be abolished for the reasons stated in the consultation paper. We favour (b) since it gives the same relief as the existing legislative intent of section 48C.
The Hong Kong General Chamber of Commerce	(a) Merger relief should not be abolished. It is a familiar concept under Hong Kong law and provides flexibility to Hong Kong companies in merger situations. (b)&(c) We do not have a firm view on which part of the proceeds from the issue of shares should qualify for merger relief as this is perhaps an area where the accountancy bodies would express a more informed view. However, we can see the advantage in applying the relief to the amount in excess of the subscribed capital of the acquired company

	attributable to the shares acquired as this would involve a straightforward calculation without the directors having to form a view on an appropriate allocation.
Hong Kong Bar Association	The Bar supports the proposal under Question 4(b), that is, the application of merger relief to the amount in excess of the subscribed capital of the acquired company attributable to the shares acquired or cancelled. The Bar agrees that it would be unduly harsh to abandon the concept of merger relief entirely as the full amount of the consideration received for issuing the shares would be included within the restricted capital in the no-par regime. This recommendation is consistent with the present approach under the Companies Ordinance ("**CO**").
The Society of Chinese Accountants & Auditors	We prefer (b) over (a) as we agree that the abolition of the merger relief on a no par system will give relief beyond the existing legislative intent of section 48C and (b) is more logical under the existing capital maintenance rule.
The Hong Kong Institute of Chartered Secretaries	Given the reasons set out in the Consultation Paper, the Institute supports (b).
Hong Kong Institute of Certified Public Accountants	The existing capital maintenance rules are regarded as being complex and somewhat piecemeal. However, if the same basic approach is largely retained under a no-par regime, then the concept of merger relief should not be abandoned entirely. Under these circumstances option (b) under question 4 would appear to have merit and should be studied further.

Question 5

Assuming the abolition of par value while the existing capital maintenance rules are largely maintained, do you favour: **(a) The abolition of the group reconstruction relief; or** **(b) Its application to the excess of the consideration for the shares over the base value of the assets transferred; or** **(c) Some other alternatives (please specify)?** **Please provide reasons.**	
Li & Fung Limited	Yes 5(b)
Tsao Yea Tann Simon	As regards to merger and reconstruction reliefs, we believe it should be viewed as a tax issue rather than an accounting issue. The merged company or being acquired company which excess over the fair value of its assets being recognized as goodwill should not be distributed because it was based on an assumption of future earnings. Until this future benefits can be materialized, it is inappropriate therefore to distribute the future profits from the merged company. Likewise, if you are anticipating a loss in future profits by acquiring a company, we cannot see why the management should seek for an uncertain discount but not running a brand new business? The effect of goodwill and negative goodwill can lead to possible expropriation of assets for minority and therefore the proposed change is not favoured. The legislation is not only for enhancing value to existing shareholder nor relief of workload in business but moreover a protection of public interests.
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Group reconstruction relief should not be abolished, for the reasons stated in the consultation paper. We favour (b), since this preserves the present position.
Gordon Jones	The way in which merger relief is to be treated under the successor section to section 48C should determine how it is to be treated under section 48D i.e. no flexibility, complete flexibility or some form of compromise, as it would not be logical to adopt different approaches. If it is to be retained, the proposal in paragraph 2.23 provides a possible basis for reform. Similarly, Consultation Paper No. 3 issued by the UK CLRSG (pages 127-128) suggested that, in a no-par environment, it would be necessary to replace sections 132(2), (3) and (4) of the Companies Act 1985 (which are the equivalents of sections 48D(2),(3) and (4) of the Companies Ordinance) with a provision that, in the situation described in subsection (1) (the issue of shares in return for consideration of non-cash assets between a holding company and wholly owned subsidiaries in a

	group reconstruction), the subscribed share capital was to be increased by the base value of the assets transferred as defined in section 132(5) of the Companies Act (section 48D(5) of the Companies Ordinance). Once again, it will be important to consider the Australian and Singaporean precedents and essential to obtain the views of the relevant commercial and professional bodies before a decision is taken on the most appropriate way forward in Hong Kong.
Arthur Lam & Co. CPA	No comment.
The Law Society of Hong Kong	(a) No (b) Yes, but suggest discussion with accountants as to whether the fair value of the assets transferred should be an alternative to the base value of the assets transferred. (c) None
KPMG	As with our answer to question 4, we consider that group reconstruction relief should be retained, with the method of calculation of the relief to be as per part (b) of the question.
Chartered Institute of Management Accountants Hong Kong Division	We favour (b) in the same spirit as for the merger relief so that the existing reconstruction relief is modified to cover the excess of the consideration for the shares over the base value of the assets transferred.
The Chinese General Chamber of Commerce	與問題 4 的考慮點相若，本會認為在保留現行資本保存規則的情況下，可考慮取消集團的重整寬免。不過，若要保留寬免安排，本會亦贊同諮詢文件中所建議修改寬免安排至適用於股份代價超出所轉讓資產底值的款額。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	(a) Again, on the assumption of abolition of par value and retention of existing capital maintenance, I am in favor of abolition of group reconstruction relief. (b) No comment (c) No comment

Hong Kong Stockbrokers Association	We prefer option (b) as this will approximate the effect of the existing merger relief available under S48D.
The Hong Kong Association of Banks	With a view to minimising the impact on the amount of restricted capital arising from the proposed change to a no-par regime in cases of merger or group reconstruction, we consider that options 4(b) and 5(b) should serve the purpose.
The Chinese Manufacturers' Association of Hong Kong	可參照現行制度，採用方案(b)，即寬免安排適用於股份代價超出所轉讓之資產底值的款額。
CCIF CPA Limited	The right enjoyed before the migration to no-par should be preserved. (a) No. (b) Yes. (c) No.
Canadian Certified General Accountants Association of Hong Kong	We are in favour of (b) as it maintains the current capital maintenance rules.
CLP Holdings Limited	Given the reasons set out in the Consultation Paper, we support (b). (i.e. the application of the group reconstruction relief to the excess of the consideration for the shares over the base value of the assets transferred.)
The British Chamber of Commerce in Hong Kong	We prefer (b), analogous to the position at 4.
Stephenson Harwood & Lo	We do not agree with the abolition of the relief and suggest that it be maintained. **Our reasons are:** As an amount equal to the base value of the asset transferred must go into the capital account, the risk of capital erosion is reduced and capital is maintained. Effectively, on a shift to a no par value system, there would be no impact on this type of relief as reference was always made to the base value of the asset and not to the par value of the

	shares. We welcome the proposal to maintain the section 48D relief. Complete abolition of the relief would unfairly prejudice companies transferring assets as companies would no longer be able to eliminate any goodwill arising from the transaction. If the relief is abolished, when the transferee issues shares, the full market price (including base value and premium) of those shares will be recorded in the capital account of the transferee. In addition, the received asset will be recorded under assets in the balance sheet at the book value and any excess above the book value to the market value will be recorded as goodwill. Therefore, the two problems are: 1 the entire amount is locked up in the capital account; and 2 goodwill will arise which must be amortised over a number of years or capitalised against profits. Both of the above are not desirable for companies, especially if they are within the same group of companies.
The Hong Kong Chinese Enterprises Association	採用(b)。
Tricor Services Limited	Reconstruction relief should not be abolished for the reasons stated in the consultation paper. We favour (b) since it gives the same relief as the existing legislative intent of section 48D.
The Hong Kong General Chamber of Commerce	(a) We would not be in favour of abolishing group reconstruction relief. (b)&(c) We can see the sense in applying such a relief to the excess of the consideration for the shares over the base value of the assets transferred, although again we would defer to the views from the accountancy bodies on whether this is an appropriate basis of calculation.
Hong Kong Bar Association	The Bar supports the proposal under Question 4(b), for the same reason set out in Question 4.
The Society of Chinese Accountants & Auditors	We choose (b) with the same argument as Q4.
The Hong Kong Institute of Chartered Secretaries	Given the reasons set out in the Consultation Paper, the Institute supports (b).
Hong Kong Institute	The existing capital maintenance rules are regarded as being complex and somewhat piecemeal. However, if the same basic

of Certified Public Accountants	approach is largely retained under a no-par regime, then the concept of group reconstruction relief should not be abandoned entirely. Under these circumstances option (b) under question 5 would appear to have merit and should be studied further.

Question 6

Do you agree with, or have any comments on, the proposals outlined above on: **(a) Capitalisation of profits with or without an issue of shares;** **(b) Issuance of bonus shares without the need to transfer amounts to share capital;** **(c) Consolidation and subdivision of shares; and** **(d) Redeemable shares.**	
Li & Fung Limited	Agreed
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	We have no comments on the proposals.
Gordon Jones	(a) I agree that the Companies Ordinance should be amended to allow companies to capitalize their profits with or without an issue of shares. (b) I agree that bonus shares can continue to be issued in a no-par environment. (c) I agree that companies should be able to effectively consolidate and subdivide shares in a no-par environment. (d) I agree that companies can continue to issue redeemable shares in a no-par environment.
Arthur Lam & Co. CPA	No comment.
The Law Society of Hong Kong	(a) Yes (b) Yes. This would effectively be a share subdivision. (c) Yes (d) We agree that it is possible to provide for redeemable shares in a fully no-par environment and the proposal to maintain them. We agree that payment for redeemable shares can continue to be computed by reference to the par value if that was

	the term of its issue prior to migration to no-par. However, additional provisions should also be introduced to deal with payment for redeemable shares which were issued at a premium prior to migration to no-par. Such provisions should reflect the intention of the current section 49A(2) in relation to payment of any premium payable on redemption, suitably adapted because the share premium account (and also capital redemption reserve) would be amalgamated with the share capital account immediately before the migration to no-par share capital under the legislative deeming provision proposed. (e) Despite the migration to no par, and the amalgamation of the share capital amount with the share premium amount, the expenses for issuing shares (which is now deductible from the share premium account) shall be allowed to be deducted from the share capital.
KPMG	We agree with the proposals.
Clifford Chance	We agree with the proposals.
Chartered Institute of Management Accountants Hong Kong Division	(a) Agreed to give more flexibilities to the companies without creating any adverse effect; (b) Agreed since shares can be issued without having to transfer an amount to the share capital account under the non-par regime; (c) Agreed both consolidation and reduction of shares would be facilitated without adverse impact on the company, the only changes being the number of shares; (d) Agreed payment for redeemable shares prior to migration to non-par would continue to be computed with reference to the par value and after migration to non-par according to the terms upon which the shares are issued.
The Chinese General Chamber of Commerce	(a) 本會同意准許公司在無面值制度下把利潤資本化，而無須一定要發行新股份。 (b) 此舉可增加公司在發行股份方面的彈性，本會贊成相關建議。 (c) 在無面值的制度下，由於公司無須再處理股份面值的問題，把股份合併以減少股數的程序將得以簡化，而對股本亦不會構成顯著影響。因此，本會認同在無面值制度下，公司仍可繼續有效地合併和再拆分股份。 (d) 本會同意即使全面實行無面值制度，也應保留可贖回股份，同時讓公司根據股份發行條款而訂定贖回安排，使公司在發行股份方面更具彈性與靈活性。
Hermes Equity Ownership Services	Hermes takes no formal view on Question 2-11

Ltd.	
Ho Tak Wing	(a) Under no par shares regime, profit can be capitalized or new shares can be issued. However, I strongly disagree with this proposal, as there will be no longer any basis on the issue of shares. (b) Disagreed (c) Disagreed (d) Disagreed
Hong Kong Stockbrokers Association	Agreed and no comment.
The Chinese Manufacturers' Association of Hong Kong	同意上述建議。
CCIF CPA Limited	(a) Yes. (b) Yes. (c) Yes. (d) Yes.
Canadian Certified General Accountants Association of Hong Kong	(a) Yes. (b) Yes. (c) Yes. (d) Yes.
CLP Holdings Limited	We agree with the proposals outlined in the Consultation Paper on capitalisation of profits with or without an issue of shares, issuance of bonus shares without the need to transfer amounts to share capital, consolidation and subdivision of shares, and redeemable shares.
The British Chamber of Commerce in	(a) We agree that profits should be able to be capitalised with or without an issue of shares. The capital reserve would not be distributable. Arguably the capital reserve arising from such capitalization of profits should be distributable subject

Hong Kong	to a solvency test (as for example is the contributed surplus for Bermuda companies). (b) We agree that bonus no-par value shares should be able to be issued without increasing share capital (this question does not really make sense in relation to par value shares). (c) We agree shares should be able to be consolidated or subdivided. (d) We agree that shares which are redeemable should be possible.
Stephenson Harwood & Lo	**QUESTION 6A** We welcome the proposal that companies should be permitted to capitalise profits with or without an issue of shares. This is one of the major advantages of a system of no-par value. **Our reasons are:** Currently, if a company has profits available to be capitalised, the process of capitalisation (i.e. converting profits into capital amounts) must entail a fresh issue of shares. This would normally be carried out by the company transferring reserves or profits to share capital account and issuing new shares against the reserves of profits that are being capitalised. If the shares had no par value under the proposed regime, the profits would be simply capitalised without any share issue. The preparation of share certificates and other administrative work associated with a share issue would not be needed. Investors would have fewer pieces of paper to safeguard and it will reduce unnecessary administrative costs involved. It will provide more flexibility and it will eliminate confusion with other jurisdictions (eg. the United States) which are allowed to capitalise profits without an issue of shares. **QUESTION 6B** We welcome this change as it makes the system simpler and, in most cases, cheaper. **QUESTION 6C** We agree. **Our reasons are**: The introduction of a no par system will help to simplify the process for the consolidation and subdivision of shares. For example, for a subdivision of shares, a company under a no par value system can effectively achieve the same results as that under the existing system by increasing the number of shares. Similarly for consolidation of shares, the number of shares will be reduced with no visible effect on the share capital. **QUESTION 6D**

	We agree. **Our reasons are**: One issue that arises from these changes is how is a company to account for any share premium payable on the redemption of redeemable preference shares issued before the changes. We suggest that transitional provisions may allow companies to apply the credit standing to the share premium reserves immediately before the application of the change to any premium payable upon redemption of such shares. This will mean that although the share premium reserve will be abolished, any company with an amount standing to the credit of its share premium reserve should keep a separate account of that amount.
The Hong Kong Chinese Enterprises Association	同意。
Tricor Services Limited	(a) We do not agree with the proposal whereby a company is allowed in a no-par environment to capitalize profits without an issue of shares, for the reasons given below:- (i) For listed companies, we believe that shareholders would prefer to receive bonus shares as they could sell the shares in the market if they so wish and pocket the proceeds. On the other hand, if bonus shares are not issued, they would be deprived of such a privilege. (ii) For private companies and unlisted public companies, even though shares are not so easily disposable as in the case of a listed company, we believe that shareholders would still prefer to receive bonus shares, as the cost of issuing bonus shares for private companies and unlisted public companies is relatively low, but the shareholders could receive share certificates for the bonus shares which they can keep as evidence of the capitalization of profits. Without the issue of shares, shareholders will have to rely on the companies to keep proper record of such transactions. Furthermore, the increased number of shares which they will hold would make it possible for shareholders to give away some to their family members if they wish. (b) This is not true in a case where bonus shares are to be issued by a capitalization of profits of a company. In such a case, the capitalization will involve the transfer of an amount from the company's profit and loss account into the company's share capital account. (c) We have no comments on the proposal outlined in paragraph 2.26 of the consultation paper.

	(d) We have no comments on the proposal outlined in paragraph 2.27 of the consultation paper.
The Hong Kong General Chamber of Commerce	We agree with all the proposals covered by this question.
Hong Kong Bar Association	The Bar agrees with the proposals outlined in Question 6(a) to (d), which are the advantages of a no-par regime.
The Society of Chinese Accountants & Auditors	We agree.
The Hong Kong Institute of Chartered Secretaries	(a) Whilst par or no-par value share regime may be more related to the legal concept of capital maintenance and the corresponding accounting entries, a share certificate merits special attention as it represents the contract and also evidence the relationship between a shareholder with the company. Hence the Institute does not agree with the proposal whereby a company in a no-par environment to capitalize profits without an issue of shares, more particularly so in the case of listed companies as shareholders might prefer to receive the bonus shares other than the record kept under CCASS so they can keep the shares themselves and dispose of the shares in the market or give them away as gift to say their family members subsequently. Without the issue of shares, shareholders will have to rely on the books and records of the companies to appraise the situation which may not be that convenient. (b), (c), (d) The Institute does not have particular comments on the proposals set out in the Consultation Papers.
Hong Kong Institute of Certified Public Accountants	(a) The views contained in the consultation paper would seem to be reasonable. (b) The views contained in the consultation paper would seem to be reasonable. (c) The views contained in the consultation paper would seem to be reasonable. (d) The views contained in the consultation paper would seem to be reasonable.

Question 7

Do you agree that the requirement for authorised capital should be removed?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes.
Gordon Jones	I agree that the requirement for authorized capital should be removed from the Companies Ordinance. As stated in paragraph 2.29 of the paper, it does not provide any protection against dilution of capital and, with the abolition of par value, it will not be possible to place a monetary value on authorized capital.
China Insurance Group Investment Holdings Co Ltd	I agree that "most companies are able to increase the authorized capital by an ordinary resolution" (paragraph 2.29 of page 14 of the current Consultation Paper). Section 53(1) CO provides that a company may increase its authorized capital if authorized by its articles, and Article 45 Table A provides that a company may do so by passing an ordinary resolution. However, if a company does not adopt Table A and its articles do not specifically permit alternation of its authorized capital, a special resolution is required to increase the company's authorized capital by first alteration of its articles. Therefore, minority shareholders, who in total hold more that 25 percent of a company's issued shares and the authorized capital of that company all has been issued, can effectively prevent the major shareholder from forcing them to increase their investment in that company by allotting new shares (or otherwise their percentage holding in the shares of that company would be diluted), simply by voting against the special resolution mentioned in the previous paragraph. I propose that the abovementioned method available to minority shareholders to prevent their being forced to increase investment in a company should be preserved after implementation of the "mandatory no-par value share regime."
Arthur Lam & Co. CPA	We agree. Share issuance could be very helpful for capital raising. Taking the steps to increase make little benefit to anyone but unneeded delay to the shareholders and the management.
The Law Society of Hong Kong	Yes

KPMG	Yes. As per our answer to question 8 below, we consider that it should be left up to the company's shareholders to decide whether or not specifying a maximum authorised capital will serve a useful purpose in their company's circumstances.
Clifford Chance	Given that: (1) the UK, Australia, New Zealand and Singapore have all removed the requirement for an authorised capital; and (2) the proposed removal can simplify the capital raising processes, we agree with the proposal.
Chartered Institute of Management Accountants Hong Kong Division	Yes. The concept of authorised share capital has created a lot of confusion and even UK that started this concept has abandoned it.
The Chinese General Chamber of Commerce	本會贊成取消法定資本的規定，讓公司的集資程序得以進一步簡化。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	Disagreed
Hong Kong Stockbrokers Association	Agreed.
The Chinese Manufacturers' Association of Hong Kong	贊成。取消法定資本的規定有助於簡化公司的集資程序。
The Association of Chartered Certified Accountants	Authorised capital We agree to the proposed removal of authorised capital on the ground that it is widely agreed that this concept serves no particular useful purpose. However, we reiterate our concerns for the burdens imposed on small companies for all alterations required for their constitutional documents under such mandatory requirement.
CCIF CPA Limited	Yes, the requirement should be removed.

Canadian Certified General Accountants Association of Hong Kong	Yes, we agree. However, there should be corresponding rules not to complicate the charge of Stamp Duty on the incorporation of a company or issuance of new shares.
CLP Holdings Limited	We agree that the requirement for authorised capital should be removed.
The British Chamber of Commerce in Hong Kong	We think companies should retain the option for the provision for authorised capital (in terms of number, not value, in the case of no-par value shares) in their Memorandum and Articles of Association, for the reason of flexibility.
Stephenson Harwood & Lo	We agree. **Our reasons are**: The authorised capital as a ceiling is largely artificial, as the company can simply get around the rule by setting a higher authorised capital.
The Hong Kong Chinese Enterprises Association	贊成。
Arthur K.H. Chan & Co.	Yes
Tricor Services Limited	We agree that the requirement for authorized capital should be removed as the original objective of this authorized capital provision is today superfluous. Currently, the capital fee to be paid to the Registrar is determined by the amount of authorized capital of the company. Once the concept of "authorized capital" is abolished, there would be a need to revise accordingly the basis of charging the capital fee, on the premise that such fee is to be retained. Otherwise, the adoption of any indirect mechanism to recoup the fee (i.e. in lieu of this capital fee) may be unequitable to those companies which do not require a large capital.
The Hong Kong General Chamber of Commerce	Yes.
Hong Kong Bar	The Bar supports this proposal.

Association	
The Society of Chinese Accountants & Auditors	No, we do not agree. Please refer to our reasons on the covering letter. [From the covering letter] <u>Retain the existing requirement for authorized capital</u> We basically accept a mandatory no-par value share regime. However, we prefer to retain the existing requirement for authorized capital which in our opinion is having practical value for Hong Kong companies continue to be the best jurisdiction in investing in PRC. Under the present companies law in PRC, the registered capital (註冊資本) of PRC companies represents the amount of capital committed by shareholders and is permitted under the existing law to be paid up by installments within two (2) years. Therefore, in case a Hong Kong company is being used as the holding company of a newly formed PRC company, its capital can also be paid up gradually according to the same time frame of the PRC company. An authorized capital in monetary terms more or less equal to that of the registered capital of the PRC company serves well as an indication to PRC authorities that the Hong Kong holding company is financially prepared for the investment. This practice works well and allows financial flexibility to investors. If the existing requirement for authorized capital is removed or changed, the advantages of using Hong Kong company as a vehicle in investing in PRC will be diminished.
The Hong Kong Institute of Chartered Secretaries	Agree as such requirement does not serve any particular commercial purpose.
Hong Kong Institute of Certified Public Accountants	Paragraph 2.29 of the consultation paper states, amongst other things, that the protection against dilution that authorised capital is thought to provide is not absolute, as most companies can increase the authorised capital by an ordinary resolution. Nevertheless, although the protection may not be absolute, the existing requirement for an ordinary resolution, particularly in the case of more-widely-held companies, would still seem to provide some form of check against potential abuses. At the same time, we note that several jurisdictions have removed the requirement for authorised capital, citing simplification of procedures. Under the circumstances, we would suggest that more detailed discussion of the pros and cons of the proposal may be needed before coming to a position.

Question 8

Do you see value in companies having a choice whether to retain or delete the authorised capital from their Articles of Association?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes. On general grounds, Hong Kong's companies legislation should be facilitative rather than prescriptive.
Gordon Jones	If the concept of authorized capital is to be removed from the Companies Ordinance, I see no reason why companies should continue to retain a provision for authorized capital in their Articles of Association. In the first place, if the primary legislation will not make any provision for authorized capital, it does not seem logical for a company's Articles of Association to make any such provision. Secondly, with the abolition of par value, if there is to be any such reference to authorized capital, it can be only to the total number of shares to be issued, not their monetary value, which is not particularly useful information. Thirdly, as any such information will have to be included in a the company's Articles of Association consequential to the abolition of the Memorandum of Association, all companies will have to initiate (quite unnecessary) amendments to their Articles if they want to include this information which, at best, can be of only very marginal value. Fourthly, as all the other major common law jurisdictions e.g. the UK, Australia, New Zealand and Singapore, have provided for the deemed deletion of the authorized capital provision from the constitutional documents of companies in these jurisdictions, it would be very strange if Hong Kong did not follow suit.
Arthur Lam & Co. CPA	Although we think the removal of authorised capital provides constructive result to many companies, the company (especially private closely-held companies) may prefer a choice no to do anything to their Articles of Association.
The Law Society of Hong Kong	Yes. Shareholders of some companies may wish to restrict the issue of shares to a pre-determined maximum amount.
KPMG	Yes, as explained in our answer to question 7.
Clifford Chance	We believe it is desirable for the shareholders of the companies to have a choice as to whether they should impose a maximum limit on the amount of shares that can be issued. Any proposed issuance of shares in excess of the stated authorised share capital will require an ordinary resolution in general meeting raising the limit. For companies incorporated

	under the CO after the removal of the authorised capital requirement, we believe it is desirable for the founder members to have a choice to set out the authorised share capital in the Articles of Association.
Chartered Institute of Management Accountants Hong Kong Division	Yes. Companies should be given the choice to retain or delete the authorized capital from their AA.
The Chinese General Chamber of Commerce	本會認為，讓公司可選擇保留或刪除其組織章程細則中的法定資本條文，將可給予公司在制定組織章程細則時有更大的彈性。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	There is no real value given to the companies to have an option for retaining or deleting the authorized capital from their Articles of Association. It may cause problems for the Companies Registry to levy the Capital Duty on Authorized Capital, as well as to lose control on the maximum share capital which the company intends to raise. Likewise, in terms of share capital, the protection of creditors will be jeopardized.
Hong Kong Stockbrokers Association	We are of the view that the removal of authorised capital be mandatory.
The Chinese Manufacturers' Association of Hong Kong	贊成讓公司可選擇保留或刪除其組織章程細則中的有關法定資本的條文。此項安排有助於增加靈活性和減少公司的遵從成本。
CCIF CPA Limited	Yes.
Canadian Certified General Accountants Association of Hong	We do not see any value in it. It may confuse the public with different rules for different companies.

Kong	
CLP Holdings Limited	Yes, there is value in companies having a choice whether to retain or delete the authorised capital from their Articles of Association.
The British Chamber of Commerce in Hong Kong	Existing companies should be able to retain or delete the authorised share capital provision.
Stephenson Harwood & Lo	We agree with allowing companies to have a choice in whether to retain or delete the authorised capital from their Articles of Association. **Our reasons are**: We believe that existing companies are likely to want to make their own decisions as to whether to retain or modify the restriction on the number of shares they can allot. The members of an existing company may not want the directors to be able to allot new shares without limit and we do not wish to disturb what is in effect an existing bargain between the company's members. There are two ways to deal with the change: (a) Through transitional provisions, stipulate that at the date when the amendment comes into force the authorised share capital of an existing company should operate as a restriction in the company's articles as to the number of shares that the company can allot. This would mean that an existing company would not be permitted to allot shares in excess of the number of shares specified in its memorandum at the date the amendment comes into force (deemed to be a provision in its articles) unless it amends its articles to remove or modify this restriction; or (b) An alternative option would be to provide that when the amendment comes into force, authorised share capital would cease to have any effect for existing companies. Thus if companies wished to retain a restriction on the number of shares the directors could allot, it would be necessary to incorporate a restriction to that effect in the articles. However, given that the articles can only be amended by a special resolution, this option might expose minority shareholders who invested in reliance on the restriction on the company's ability to issue further shares. We lean towards the first opinion.
The Hong Kong Chinese Enterprises Association	沒有好處，既然沒有法定資本，就不需在章程中保留有關條文，以免誤導，宜強制性刪除。

Arthur K.H. Chan & Co.	Yes
Tricor Services Limited	No, as the provision of such a choice could potentially lead to confusion as to whether such a provision is required in the first instance.
The Hong Kong General Chamber of Commerce	Although we recognise that some companies having authorised capital and others not having authorised capital may lead to a certain degree of confusion, we think that companies should retain the right to have authorised capital, given that the shareholders may wish to place an overall limit on the number of shares which can be issued by the directors.
Hong Kong Bar Association	The Bar does <u>not</u> support this proposal. It is difficult to see what purpose is to be served by giving a choice to the companies to decide whether to retain or delete the authorised capital from their Articles of Association. It only serves to complicate rather than simplify the rules relating to share capital.
The Society of Chinese Accountants & Auditors	Yes, please see our reasons on the covering letter. [From the covering letter] <u>Retain the existing requirement for authorized capital</u> We basically accept a mandatory no-par value share regime. However, we prefer to retain the existing requirement for authorized capital which in our opinion is having practical value for Hong Kong companies continue to be the best jurisdiction in investing in PRC. Under the present companies law in PRC, the registered capital (註冊資本) of PRC companies represents the amount of capital committed by shareholders and is permitted under the existing law to be paid up by installments within two (2) years. Therefore, in case a Hong Kong company is being used as the holding company of a newly formed PRC company, its capital can also be paid up gradually according to the same time frame of the PRC company. An authorized capital in monetary terms more or less equal to that of the registered capital of the PRC company serves well as an indication to PRC authorities that the Hong Kong holding company is financially prepared for the investment. This practice works well and allows financial flexibility to investors. If the existing requirement for authorized capital is removed or changed, the advantages of using Hong Kong company as a vehicle in investing in PRC will be diminished.
The Hong Kong Institute of Chartered Secretaries	In line with our response to Question 7, the Institute does not see any particular value in companies having a choice whether to retain or delete the authorised capital from their Articles of Association. Quite the contrary, any provision allowing a choice would probably result in confusion instead if the requirement for authorised capital is removed.

Hong Kong Institute of Certified Public Accountants	Notwithstanding our response to question 7 above, were it decided to do away with the requirement for authorised capital, we would see little value in permitting companies to have the option of retaining the provision for authorised capital in their Articles of Association. Under such circumstances, we would suggest following the approach indicated under paragraph 2.30 of the consultation paper, to provide for the deemed deletion of the authorised capital provision from companies' constitutional documents. Otherwise, sufficient time should be allowed for companies to make the necessary changes in their Articles of Association (e.g., 24 months, as in our answer to question 2 above).

Question 9

Do you see value in retaining the option of having partly paid shares? Please provide reasons.	
Li & Fung Limited	No
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes. Partly paid shares can provide a convenient method of obliging shareholders to provide equity capital over a period when the whole of that capital is not immediately needed by the company.
Gordon Jones	While the abolition of partly paid shares may simplify the Companies Ordinance, I would support their retention as they provide a degree of flexibility to companies for raising capital. In this respect, it is noteworthy that other major common law jurisdictions like Australia and Singapore have also retained partly paid shares. Furthermore, it is interesting to note that in Consultation Document No. 5 issued by the UK CLRSG in March 2000, the issue of partly paid shares was never put out for consultation as (in the CLRSG's view) ' there is no reason to prohibit partly paid shares or to introduce new restrictions' (paragraph 4.156).
Arthur Lam & Co. CPA	Sometimes, some companies may prefer to let the "new comer" who is the owner-director have a transition period for paying one's shares in full in paces and the new comer may have difficulty in coming the capital at once. And after the "partial" paid shares are fully paid, the new comer can enjoy the full status as a fully paid shareholder. We saw this type of arrangements do work in practical case. So, there is a value for the system of "partly paid shares", though it is a private company case. We cannot rule out listed companies do want the "partial paid shares" owner to stay for good reason, especially the stock markets have changed so sudden in the last few years. The available of choice may serve some good value.
The Law Society of Hong Kong	Yes. The financing choice of partly-paid shares should not be removed. Some members favour removal of partly paid shares, except in the case of shares allotted under an employee share scheme. For partly paid shares allotted under an employee share scheme, they should not be transferable, unless and until the shares are fully paid. If the legislature removes partly paid shares, a migration period of say 12 months should be given for the shareholder to pay up the outstanding balance of the partly paid shares (except for those partly paid shares allotted under an employee share scheme).

KPMG	Yes, as we consider that the partly paid shares concept may provide some useful flexibility for an entity in securing sources of future funding.
Clifford Chance	We do see value in retaining the option of having partly paid shares, as liability for calls can be retained as well - the amount unpaid will be the difference between the issue price and that contributed by the shareholder.
Chartered Institute of Management Accountants Hong Kong Division	We do not see any value in retaining the option of having partly paid shares. Not only is this uncommon in Hong Kong it is also confusing and administratively cumbersome. There is no visible benefit for the costs involved.
The Chinese General Chamber of Commerce	本會認為保留可發行部分繳付股款的股份，可令公司在進行融資時有更大的選擇空間和彈性。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	One of the benefits of retaining the option of having partly paid shares is to enable the company to permit the potential shareholders to enhance their liquidity difficulties by paying up the uncalled shares capital later.
Hong Kong Stockbrokers Association	We are of the view that the retaining of partly paid shares provide a flexibility of financing.
The Chinese Manufacturers' Association of Hong Kong	保留可發行部分繳付股款的股份可以為公司融資提供更多的選擇。
CCIF CPA Limited	No. It is not common to have partly paid shares these days.
Canadian Certified General Accountants Association of Hong	No. It will confuse the investors and the public.

Kong	
CLP Holdings Limited	Yes, retaining the option of having partly paid shares would provide flexibility to companies in capital raising.
The British Chamber of Commerce in Hong Kong	It should still be possible to have partly paid shares.
Stephenson Harwood & Lo	We agree that there is value in retaining partly-paid shares. **Our reasons are**: There are circumstances when a company may need a certain amount of share capital now with the assurance that it will be able to call up further successive contributions of capital from members who are bound to make those contributions. The same result can be achieved by making a contract with an allottee, binding him to take up further issues of shares. However, the partly paid option is different because: (a) the liability would not be attached to the shares originally allotted and (absent a novation) a transferee of those shares would not be bound by a liability imposed by the CO; and (b) special provisions would be needed to bring about forfeiture of shares allotted in the event of failure to take up further issues of shares as agreed.
The Hong Kong Chinese Enterprises Association	有好處。
Tricor Services Limited	Yes, as partly paid shares can provide flexibility to shareholders as to the timing of payment in relation to their equity contribution to the company.
The Hong Kong General Chamber of Commerce	Yes, we do see value in retaining the option of having partly paid shares which gives companies another financing option.
Hong Kong Bar Association	The Bar does <u>not</u> support this proposal. We do not see any value in retaining the option of having partly paid shares. (1) We seldom in our practice came across a company having partly paid shares.

	(2) We do not see any reason why a shareholder who has been issued with shares in a company (and, therefore, enjoys all the right as a shareholder) should not be required to pay the full consideration at which he agrees to subscribe for the shares. (3) It will simplify the drafting of the relevant provisions without having to distinguish between fully paid and partly paid shares.
The Society of Chinese Accountants & Auditors	No, we do not see any value. In practice, partly paid shares are not common. Rather, partly paid shares may create complications to the issuing company when shareholders defaulted in paying up the unpaid amount. Actually, the value of using partly paid shares as a financing choice for company has been largely diminished with the popularity of the use of share call/put option and warrants.
The Hong Kong Institute of Chartered Secretaries	Yes, as partly paid shares can provide flexibility to both companies and shareholders in capital raising.
Hong Kong Institute of Certified Public Accountants	We consider that the option of having partly paid shares should be retained. Since partly paid shares and a no-par system are two different concepts, we do not see any need or reason for removing this financing choice for companies. The option of having nil-paid shares should also be retained (otherwise the concept of trading in nil-paid shares in a rights issue may need some further thought).

Question 10

Do you agree that the amount unpaid on partly paid shares should be defined by reference to the issue price, without a need to distinguish between shares issued before and after migration to no-par?	
Li & Fung Limited	No comment
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes.
Gordon Jones	I agree that the amount unpaid on partly paid shares should be defined by reference to the issue price without a need to distinguish between shares issued before and after the migration to no-par. The Australian and Singaporean provisions seem to introduce an unnecessary degree of complexity into the law without adding any particular value.
Arthur Lam & Co. CPA	We agree.
The Law Society of Hong Kong	We agree that the amount unpaid on partly paid shares should be defined by reference to the issue price. However, we see the merit of the requirement in Australia and Singapore to distinguish between shares issued before and after migration to no-par, in order to preserve the distinction in a par value environment between amounts outstanding on the par value (which is covered by statute) and that on the premium (which the liquidator must sue in contract for).
KPMG	Yes, as it would seem unnecessarily complex to make such a distinction.
Clifford Chance	We believe the approach adopted by Australia and Singapore, which distinguishes between shares issued before and after the migration to no-par by defining the amount unpaid on the former as that which is unpaid on the par value, should be adopted.
Chartered Institute of Management Accountants Hong Kong Division	Not relevant as we do not recommend to retain partly paid shares.

The Chinese General Chamber of Commerce	本會不贊同把部分繳付股款股份的未繳款額以發行價去界定，因這對舊股東並不公平，同時更可能引起不必要的法律訴訟。本會建議應採納在諮詢文件中所提及澳洲和新加坡的處理方法，把改制前未繳的股款界定為未按面值繳付的款額，藉以維持在有面值制度下按面值尚欠的款額與未繳足溢價的分別。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on Question 2-11
Ho Tak Wing	Yes, agreed.
Hong Kong Stockbrokers Association	Agreed.
The Chinese Manufacturers' Association of Hong Kong	贊成。
CCIF CPA Limited	Yes, if the option of having partly paid shares is retained.
Canadian Certified General Accountants Association of Hong Kong	Yes.
CLP Holdings Limited	We agree that the amount unpaid on partly paid shares should be defined by reference to the issue price, without a need to distinguish between shares issued before and after migration to no-par.
The British Chamber of Commerce in Hong Kong	The unpaid part would be by reference to the issue price for no-par value shares and by reference to the par value otherwise. There would be no need to distinguish partly paid shares issued prior to the change to no-par.
Stephenson Harwood & Lo	Yes, we do not see a need to distinguish between shares issued before or after migration. In most cases, partly paid shares are, even now, issued by reference to the issue price (rather than par value) because of the perceived benefit of having a low par value.

The Hong Kong Chinese Enterprises Association	贊成。
Tricor Services Limited	Yes.
The Hong Kong General Chamber of Commerce	Yes.
Hong Kong Bar Association	The Bar considers that in respect of the amount unpaid on partly paid shares, the distinction between shares issued before and after migration to no-par should be maintained.
The Society of Chinese Accountants & Auditors	In case unpaid shares are retained, we agree.
The Hong Kong Institute of Chartered Secretaries	Agree.
Hong Kong Institute of Certified Public Accountants	We would agree, in principle, to the concept that the amount unpaid on partly paid shares should be defined by reference to the issue price and the amount contributed by the shareholder. However, it would be helpful if more information could be provided on the reason why in Australia and Singapore it was decided to continue to distinguish between partly paid shares issued before and after the migration to no-par, unless it was simply to preserve the existing legal distinction referred to in paragraph 2.34 of the consultation paper.

Question 11

Where partly paid shares without a par value are subdivided, do you agree that there should be reallocation (by legislation) of the outstanding liability on existing shares to the new shares to maintain the pre-existing ratios?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes
Gordon Jones	I agree that, where partly paid shares without a par value are subdivided, there should be reallocation (by legislation) of the outstanding liability on existing shares to the new shares to maintain the pre-existing ratios.
Arthur Lam & Co. CPA	We agree. Otherwise, many unsophisticated may be unfairly treated without little knowledge.
The Law Society of Hong Kong	Yes
KPMG	Yes, we agree that this would seem a reasonable approach to maintaining the status quo in terms of relative interests.
Clifford Chance	We agree.
Chartered Institute of Management Accountants Hong Kong Division	Not relevant as we do not recommend to retain partly paid shares.
The Chinese General Chamber of Commerce	本會同意按固有比例，把現有股份的未履行責任重新分配予新股份。
Hermes Equity Ownership Services	Hermes takes no formal view on Question 2-11

Ltd.	
Ho Tak Wing	Yes, agreed.
Hong Kong Stockbrokers Association	Agreed.
The Chinese Manufacturers' Association of Hong Kong	贊成。
CCIF CPA Limited	Yes, if the option of having partly paid shares is retained.
Canadian Certified General Accountants Association of Hong Kong	No, if the partly paid shares without a par value are not fully paid up, there should be an option for the existing paid up shareholders, whose shares are fully paid up, that EITHER reallocating the outstanding liability on the forfeited shares to the new shares to maintain the pre-existing ratio of the fully paid up shares OR simply forfeit the shares failed to pay up by an ordinary resolution of shareholders, who are eligible to vote.
CLP Holdings Limited	We agree that, where partly paid shares without a par value are subdivided, there should be reallocation (by legislation) of the outstanding liability on existing shares to the new shares to maintain the pre-existing ratios.
The British Chamber of Commerce in Hong Kong	Where partly paid shares are subdivided it should be made clear by legislation that the unpaid part/liability is reallocated accordingly, to maintain pre-existing ratios.
Stephenson Harwood & Lo	We agree that there should be reallocation by legislation of the outstanding liability on existing shares to the new shares to maintain the pre-existing ratio if partly paid shares are kept. However, we suggest that some flexibility could be allowed so that companies could resolve to reallocate in a different way (by pro-rata or any other way) as they wish, so long as all shareholders are treated equally.
The Hong Kong Chinese Enterprises Association	不贊成，因（一）如前問題九所答，建議取消部分繳付股款，（二）如保留部分繳付股款，部分繳付股款的股份未繳款的，股份的價值已有變化。該等部分繳付股款未繳付的部分應按現股份價值重新發行，新舊股東另有約定的依其約定。現有部分繳付股款未繳付的股東並依股東協議（如有）對已全部依約繳付部分繳付股款的現股東承

	担責任。
Tricor Services Limited	Yes.
The Hong Kong General Chamber of Commerce	Yes.
Hong Kong Bar Association	The proposal under this Question is inapplicable, in light of our view on Question 9.
The Society of Chinese Accountants & Auditors	In case unpaid shares are retained, we agree.
The Hong Kong Institute of Chartered Secretaries	Agree.
Hong Kong Institute of Certified Public Accountants	Yes, we would agree that where partly paid shares without a par value are subdivided, there should be reallocation (by legislation) of the outstanding liability on existing shares to the new shares to maintain the pre-existing ratios. The same principle should apply where partly paid shares are consolidated.

Question 12

Do you agree that Hong Kong should NOT adopt the solvency test approach to creditor protection which applies to all forms of distribution? Please provide reasons.	
Li & Fung Limited	Yes
Tsao Yea Tann Simon	As what had been said in the previous paragraph, we do not favour the solvency test approach, mainly because they only cater for simplicity of management. This change can lead to outdated information being provided to other user groups such as potential investors, employees because you distribute reserve without going through court sanction. We care not only the creditors and existing shareholders but also the continuance of business by management and the proposed change clearly provide an exit for shareholders/management to move out of their existing business without court sanction, against the interests of the employees and the general public as a whole.
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	We do not agree. We think that a solvency test approach should be adopted. We are surprised that the consultation paper is recommending retention of the existing capital maintenance provisions, given that most other jurisdictions which have updated their companies legislation have moved towards a solvency based system. The arguments in favour of abandoning the present system have been well and succinctly put in paragraphs 3.5 to 3.7 of the consultation paper. We do not find the arguments for retention in paragraph 3.12 of the consultation paper convincing. We respond to them as follows, using the lettering in paragraph 3.12. (a) Compliance with the existing capital maintenance regime does not necessarily provide a safe harbour for directors of companies which become insolvent. Compliance with the distribution rules would not protect directors if, notwithstanding the availability of distributable profits, they caused their company to pay a dividend when to their knowledge it was unable to pay its debts as they fall due. (b) We doubt if additional professional advice will be needed. Different professional advice may be needed, but it will replace the need for professional advice on such notoriously difficult to interpret provisions of the Companies Ordinance as the financial assistance provisions. (c) The fact that the existing distribution rules have worked well is neither here nor there if a solvency based system would work equally well or better. There is no need to adopt the New Zealand system of dividend clawbacks. (d) This assumes that changing the law will lead to abuse. We are not clear why this should be true in Hong Kong when it must have been concluded in other jurisdictions with high corporate governance standards that it would not.

	(e) We do not believe that the appeal of the solvency based approach is sensibly described as theoretical. We doubt that the jurisdictions which have adopted this approach (and which all have a pragmatic approach to commercial law reform) would have done so for theoretical reasons.
Gordon Jones	The thrust of the argument in Chapter 3 is that Hong Kong should not introduce an across the board solvency test for making payments out of capital. Question 12 has been structured in such a way to guide consultees away from this option as it asks them whether they agree that Hong Kong should not adopt this option and, if so, give reasons for this instead of asking (as it should have done) whether or not they agree with this approach. Paragraph 3.12 of the paper gives four reasons why the SCCLR recommended that it should not be adopted on an across the board basis which I shall consider seriatim. Reason (a) highlights the 'additional burden' which this would place on directors, particularly the directors of SMEs. However, it is arguable that this would, in fact, be the case for the following reasons:- • Paragraph 3.6 of the paper states that the capital maintenance principle has become less relevant nowadays and, as at the end of April 2008, around 80% of Hong Kong companies had no more than $10,000.00 issued share capital and 36 % had issued share capital of $100.00 or less. All the companies which fall into this category will be, by definition, SMEs. As these amounts of capital are so miniscule, the source of any distributions will have to be realized profits rather than the capital which will effectively remain intact in the overwhelming majority of cases. In view of this, even though the solvency test may be introduced making it theoretically possible to use the capital as well as profits for making distributions, in practice, the directors will make a distribution only if the level of realized profits makes this possible. Consequently, there would appear to be little change in practice even if the solvency test is introduced. It is, therefore, difficult to see how replacing the capital maintenance rules with the solvency test for the purpose of making distributions would lead to an increase in the potential liabilities of the directors of the overwhelming majority of SMEs. • The number of occasions on which the directors of SMEs would have to make decisions regarding the four situations outlined in paragraph 3.3 e.g. distributions, would be, generally speaking, very limited, if not non-existent, compared with the number of occasions on which the directors of public companies would have to make similar decisions. • As the directors of private companies i.e. SMEs, already have to apply the solvency test to share buy-backs, if capital is to be used, and financial assistance by their companies to buy their shares, it is difficult to see how the extension of the solvency test to cover distributions and reductions of capital would greatly increase their potential liabilities, particularly in the light of the above factors. In fact, it could be argued that, precisely because of this fact, they are

	more acclimatized than the directors of public companies to the application of the solvency test and would be better prepared for any possible extension of the test to other areas of the capital maintenance regime. Reason (b) regarding the increased costs to the company if the directors have to rely on professional advice more frequently is more valid. However, as directors have to rely increasingly on professional advice in many other instances e.g. the discharge of their fiduciary duties and duty of care and skill, corporate governance requirements, the preparation of financial statements etc. the fact that they would have to obtain increased professional advice if the solvency test were to be adopted across the board, is not a reason per se why the test should not be adopted; it is just another area where it will be necessary for them to obtain professional advice. Furthermore, the overwhelming majority of companies which will have to obtain professional advice on reduction of capital cases under a solvency test e.g. public and large private companies, will be precisely those companies which can afford the cost of such professional advice. It should also be noted that, if it was possible for New Zealand and the US to adopt the solvency test across the board for all distributions, it would be logical to assume that these jurisdictions also had to deal with similar issues raised by directors regarding increased liability and additional costs for professional advice. However, the fact that the company laws of these jurisdictions were amended to introduce the solvency test across the board presumably means that these issues were answered satisfactorily and what is currently in place is acceptable to the directors of these jurisdictions. Reason (c) provides stronger justifications for the retention of the current capital maintenance rules for making distributions. In particular, the current rules under which distributions should be payable only out of, and not exceed, realized profits have, as noted in the paper, worked well and provided certainty. The rules provide a clear-cut and, arguably, a more understandable and acceptable yardstick than a solvency test based on the subjective, albeit hopefully well-informed, judgment of directors to determine distributions. Having said this, I have to question the statement that the business community is likely to find the application of the solvency test to the distribution of dividends 'objectionable in particular'. This is just an impression formed by the SCCLR without any clear evidence that the business community would oppose the adoption of a solvency test. In fact, as we shall have no idea about whether or not the business community (and other relevant professional bodies) would support the introduction of a solvency test until after the conclusion of this consultation exercise, it is quite wrong to formulate question 12 in such a way as to suggest that the issue has already been prejudged and predetermined. Furthermore, if the reason why the SCCLR considers that the reason why the business community should find the solvency test 'objectionable' is because the current rules have 'worked well and provided certainty', it would theoretically not be possible to undertake much company law reform as many of the existing provisions in the Companies

	Ordinance also work reasonably well and provide certainty but that does not mean that they cannot be improved and modernized! With regard to reason (d), I agree that the court's involvement in most capital reduction cases is an important feature of the present capital maintenance regime. It provides a more objective and acceptable means for determining capital reductions than an insolvency test based on the judgment of directors and is far less likely to be challenged. In view of this, it should be retained. However the retention of this procedure, does not preclude the introduction of a statutory court-free alternative based on the solvency test as is, indeed, the case in other major common law jurisdictions such as the UK and Singapore. The clear trend in all the other principal common law jurisdictions, as outlined in Appendix II, is to adopt the solvency test for most if not all forms of distributions. The US and New Zealand have already adopted the full solvency test approach while Australia and Singapore have adopted it in the case of capital reductions, share buy-backs and financial assistance. While the UK has not adopted an across the board approach in the Companies Act 2006, this is due to the requirements of the Second E C Commercial Directive. However, it is also clear that, if these requirements were removed, it would be possible for the UK to consider the adoption of a more radical approach as the Interdisciplinary Group on Capital Maintenance has concluded that the focus of the law on creditor protection should be on maintaining a reasonable expectation of solvency as opposed to share capital. As a result, the statutory position in the UK is not static and further more radical reform can be anticipated at some future date. Consequently, it is quite possible that, if there is not a move to an across the board solvency test in the context of the rewrite exercise, we could have a situation where the provisions in the new Companies Ordinance could be found to be out of date in the event that the UK and other jurisdictions adopt more radical reforms. Conversely, it could be argued that we should not move in this direction until and unless there is evidence that other jurisdictions are also moving in this direction. However, as we are engaged in a major rewrite of the Companies Ordinance, not piecemeal reform, this is precisely the type of major reform which we should be seriously considering in the context of this exercise, particularly bearing in mind that we are formulating Hong Kong's company law for the 21st century. If we miss this opportunity, an opening for similar reform may not arise for many years to come. Furthermore, unlike the UK, Hong Kong has no supra-national constraints governing what it can and cannot do as far as company law is concerned. I understand that Advisory Group I endorsed the application of the solvency test across the board when it considered the detailed proposals. It is, therefore, disappointing that the SCCLR was not able to take a more long term view of the issue when it considered the detailed proposals and has apparently summarily rejected this option before the results of the

	consultation are known on the basis of not particularly strong arguments. In fact the authors of the paper appear to recognize that these arguments, by themselves, are inadequate as consultees have been asked to provide reasons why the solvency test should not be adopted across the board ! Having said this, I also recognize that this reform represents a significant change to the existing statutory arrangements and cannot be introduced until and unless the business community and professional organizations are prepared to accept it. In the event that the results of the consultation endorse this conclusion, I would recommend that, as a bare minimum, the existing capital maintenance rules on the payment of dividends are reformed on the basis of the reforms in Part 23 of the UK Companies Act 2006. An example of these reforms is section 845 which deals with the statutory amendments necessitated to deal with the issue in the case of *Aveling Barford v. Perion Ltd.* (1989 BCLC 626). These make clear that, where the transferring company has distributable profits, its assets can be transferred at book value. If the status-quo is to be essentially retained for making distributions, it will be necessary to try and distinguish this approach from the proposed approach for other principal elements of the capital maintenance regime, namely share buy-backs and financial assistance by a company for the purchase of its own shares, where the options for consultation in the paper include the introduction of a mandatory solvency test. Question 12 asks for reasons why the solvency test should not be adopted across the board. In response, it can be argued that the mandatory provisions regarding distributions are in a somewhat different category from the mandatory provisions regarding share buy-backs and financial assistance for a number of reasons as follows:- • First, distributions as defined in section 79A of the Companies Ordinance means every description of distribution of a company's assets to its members, whether in cash or otherwise e.g. shares, specific assets or debentures, except in four specific circumstances i.e. the issue of fully or partly paid bonus shares, share buy-backs, capital reductions and the distribution of the company's assets to its members on its winding-up. Distributions are, therefore, very wide-ranging in nature and payments consequential to distributions will, generally speaking, be of a greater magnitude than payments consequential to other aspects of the capital maintenance regime such as share buy-backs and financial assistance. • Secondly, as a consequence of this, there will be greater concern, not only on the part of creditors that proper controls are in place regarding the disposal of a company's assets, but also shareholders, particularly minority shareholders, that they do that they do not receive unequal treatment in the form of selective distributions. There is, therefore, a considerable corporate governance dimension to distributions and not inconsiderable potential for dispute and legal

	action regarding the administration of the relevant statutory provisions. In view of this, until and unless the consultation indicates that the solvency test has obtained broad acceptance in Hong Kong, it would be preferable to have more explicit and objective control provisions in the Companies Ordinance governing distributions rather than relying on the subjective judgement of directors in the context of the solvency test alone. Furthermore, for the time being at least, the UK (Part 23 of the Companies Act 2006), Australia and Singapore have retained the capital maintenance rules for making distributions. • Thirdly, the Companies Ordinance already permits private companies to fund share buy-backs out of capital in certain circumstances and give financial assistance for the purchase of their own shares subject to, inter-alia, satisfying a solvency test. Consequently, the extension of these procedures to cover all companies funding share buy-backs and giving financial assistance is effectively only the extension of existing procedures which have obtained market acceptance and have been in use for a not inconsiderable time. • Fourthly, although Australia and Singapore have retained the capital maintenance rules for making distributions, they have moved to the solvency test for payments regarding share buy-backs and financial assistance. There is, therefore, a precedent in two other major common law jurisdictions for a partial reform of the capital maintenance rules on the lines proposed in Hong Kong. • Fifthly, the rules on financial assistance are not really related to capital maintenance, should not affect a company's assets (if properly negotiated) and are no more likely than any other transaction to have implications for a company's share capital. In view of the above considerations, I consider that it would be possible to introduce more radical reforms to the law governing share buy-backs and financial assistance without this being incompatible with the retention of the current capital maintenance rules for distributions.
Arthur Lam & Co. CPA	We think the solvency test approach is a good approach.
The Law Society of Hong Kong	Yes. We agree with the same reasons set out in the SCCLR's recommendation in paragraph 3.12 of the Consultation Paper. However, some members consider that the solvency test approach has its attractions because creditor protection is now more focused on expectation of solvency, and this approach is worth re-exploring in future when the concept of corporate governance is more strongly embedded in the corporate culture in Hong Kong.

KPMG	We agree that the realised profits approach to distributions, together with the directors' general fiduciary duty to consider the company's ability to meet its debts as they fall due before making a distribution, are well understood and appear to have served Hong Kong well. However, we also consider that the restrictions on reductions in share capital and the use of the share premium account seem unnecessarily complex and burdensome when a company is clearly solvent. Therefore, on balance, while we see merit in a solvency test approach to capital maintenance, in general we support the current proposals in Chapter 3 of the Consultation Paper, which limit the reforms to the redemption and reduction of share capital, rather than introducing a wholly new regime which would apply to distributions generally.
Clifford Chance	We agree with the Government's observations set out in the Consultation Paper and accordingly we agree that Hong Kong should not adopt the solvency test approach to creditor protection which applies to all forms of distribution.
Chartered Institute of Management Accountants Hong Kong Division	In Hong Kong, creditors do not rely on solvency test as a form of protection. They would normally seek protection by asking for a lien on tangible assets such as real estate. Other form of creditors' protection would include a standby letter of credit. Bankers would usually have their own ways including imposing restrictive convenants to protect their interest. However, if solvency test approach is to be retained, we propose to include balance sheet solvency test in addition to cash flow solvency test.
The Chinese General Chamber of Commerce	本會認同諮詢文件中提及，採用償債能力測試可能會增加董事(特別是中小型企業董事) 的潛在法律責任，董事亦可能須經常尋求專業意見而增加公司的營運成本，而在分發股息方面或會造成極不明確的情況。加上現行資本保存制度已有對應措施，為防止公司作不當的分發提供甚佳保障，因此本會同意香港不應把償債能力測試應用於所有的分發方式。
Hermes Equity Ownership Services Ltd.	Yes. We agree that Hong Kong should not adopt the solvency test approach to creditor protection. We agree with SCCLR's recommendation that the current rules that the dividend should be declared out of distributable profits have worked well and provided certainty. We also believe that the example of the civil remedies under the New Zealand Companies Act where payment of a distribution that did not satisfy the solvency test is recoverable in the first instance from the shareholders who have received the payment would create great uncertainty for shareholders. As we believe that the current rules may provide better safeguard against improper distribution (e.g. court sanction is required in case of reduction of capital other than re-designation of the nominal value of shares to a lower amount), we therefore agree with SCCLR's recommendation.
Ho Tak Wing	No, Hong Kong should adopt the solvency test approach to the protection of creditors, in particular, when no par value of

	capital is introduced and implemented. Otherwise, the protection of stakeholders will be jeopardized.
Hong Kong Stockbrokers Association	We agree that Hong Kong should NOT adopt the solvency test approach as solvency test over rely on judgment of directors whom themselves often are also the controlling shareholders.
The Hong Kong Association of Banks	In arriving at the recommendation against across-the-board application of the general solvency test approach, the Standing Committee on Company Law Reform (SCCLR) considered, amongst others, that the current rules that dividend should be declared out of distributable profit have worked well and provided certainty and the business sector is likely to find the application of the solvency test to the distribution of dividends objectionable. Conceptually, 'dividend should be declared out of distributable profits' provides certainty. However, the definition of 'distributable profit', which is usually understood to mean realised profits, is often subject to interpretation in practice and can potentially be a problem area for directors and accountants, in particular with the development in accounting standards in recent years that brings about considerable changes in the determination of accounting profits. It is not clear from the consultation paper as to whether this issue has been considered in arriving at the reasoning of the SCCLR.
The Chinese Manufacturers' Association of Hong Kong	同意香港不應把償債能力測試應用於所有分發方式，以免因此而增加董事的潛在法律責任和引致額外的營運成本。
The Association of Chartered Certified Accountants	Capital Maintenance Regime We are of the view that Hong Kong should NOT adopt ONLY the solvency test approach across the board to all forms of distribution and both the cash flow solvency test and the balance sheet test should be equally acceptable bases for the making of distribution decisions. However, we see no ground how concerns of potential drawbacks of the general solvency test approach outweigh any benefits arising from its adoption as suggested under paragraph 3.12(e) of the consultation document. Directors should always be expected to make distribution decisions in the light of their overriding fiduciary duty to act in good faith and in the company's best interests.
CCIF CPA Limited	Yes, we agree that Hong Kong should not adopt the solvency test approach to creditor protection which applies to <u>all forms</u> of distribution as it may greatly increase the potential liabilities of directors of SMEs.
Canadian Certified General Accountants	Currently, there are some common law rules to protect creditors when a company is insolvent, such as fiduciary rule, misfeasance etc. Even though these rules sometimes are costly to enforce, the current capital maintenance rule regime

Association of Hong Kong	keeps the running costs low for most businesses, especially small and medium sized business. Moreover, creditors have a number of alternatives to protect their interests, such as requiring shareholders or directors' personal guarantee.
CLP Holdings Limited	We do not agree. For the reasons set out in paragraphs 3.5 to 3.9 of the Consultation Paper, we think that Hong Kong should adopt the solvency test approach to creditor protection which applies to all forms of distribution. Furthermore, the current rules on distribution of dividends require that dividend should be declared out of distributable profit. It would also be helpful if the definition of distributable profit, notably as to when it should be considered as "realised", could be better defined in the Companies Ordinance, to reflect the accounting treatment in the recognition of a company's profit or loss as a result of the convergence of the Hong Kong Financial Reporting Standards with the International Financial Reporting Standards. For example, it is not certain under the current rules whether valuation gains, such as mark-to-market gains of financial instruments booked for this year which can easily be turned into mark-to-market loss in the next year or vice versa, are considered "realised" and "distributable".
The British Chamber of Commerce in Hong Kong	We still like the Capital Maintenance Approach. At the end of the day investors like to know what they would get back, for their shareholding. We would note that the solvency test approach is also common in popular competitor jurisdictions to Hong Kong such as Bermuda, which allows both no-par and par value shares and which is not mentioned in the C.A.
Stephenson Harwood & Lo	We agree that Hong Kong should not adopt a uniform solvency test approach to creditor protection which applies to all forms of distribution.
The Hong Kong Chinese Enterprises Association	同意，因為股東也有權獲得股息；而使用償還能力測試將董事責任提高了風險，債權人有權就不當的償債能力測試向公司進行訴訟，加大了董事責任風險。
Tricor Services Limited	Yes. We fully concur with the rationale as set out in paragraph 3.12 of the consultation paper.
The Hong Kong General Chamber of Commerce	Yes, we agree that Hong Kong should not adopt the across-the-board solvency test approach to creditor protection for the reasons given by the SCCLR which we find persuasive.
Hong Kong Bar Association	The Question posed in this proposal is far too general. In any event, the Bar does not support the proposal. We do not see why a company should be allowed to pay dividends to its shareholder if it is insolvent, particularly if it is insolvent under the balance sheet test.

The Society of Chinese Accountants & Auditors	Yes, we agree not to adopt the solvency test to all forms of distribution. The existing use of capital maintenance regime on distribution of dividends out from distributable profits has worked well and the change to solvency test may create difficulties and uncertainty to directors in determining the amount of distributable profits especially to SME.
The Hong Kong Institute of Chartered Secretaries	Agree as the Institute adopts the reasoning set out in paragraph 3.12 of the Consultation Paper.
Hong Kong Institute of Certified Public Accountants	In principle, we consider that Hong Kong should adopt some form of "solvency test" approach to creditor protection and that, in the long run, this should apply to all forms of distribution. Members of the Institute's Restructuring and Insolvency Faculty point out that corporate insolvencies rarely, if ever, occur due to the failure of a company to maintain its issued capital and the maintenance of capital alone will not ensure protection for creditors. They see a solvency test as providing a more direct and relevant means of achieving the objective of greater protection for creditors. At the same time we note the concerns raised by the SCCLR and have the following comments on them: (a) A solvency test would make directors focus on whether what they were proposing to do was financially prudent and make them more responsible for their actions, which, in principle, should be seen as a positive development. As regards the concern about increasing the potential liabilities of directors of SMEs, in particular, consideration could be given to applying the solvency test only to "large" or listed companies. However the problem with excluding SMEs is that, as there is no public filing of private company accounts in Hong Kong, creditors dealing with private companies are less protected. For this reason, on balance, we would not favour excluding SMEs. (b) See the response to (a) above. (c) It is difficult to argue that a company should be able to pay a dividend in circumstances where it may be unable to pay its creditors. However, given the view reflected in the consultation paper that the existing rules have worked well and provided certainty, one option would be to extend the solvency test to additional forms of distribution but not, at the initial stage, to the payment of dividends, at least not until directors have become more accustomed to the practical application of the test. (d) Generally, the capital maintenance rules have become outdated, unduly complex and lacking in coherence. Furthermore, companies do not become insolvent as a result of capital reduction. (e) It is not clear that the concerns and potential drawbacks outlined by the SCCLR, which could in any event be partially addressed, would outweigh the benefits of adopting the solvency test more widely as the principal rule for the

	protection of creditors. Certainly there are jurisdictions with well-developed company law, where they have taken the view that a solvency test is the most appropriate approach.

Question 13

Should the solvency test currently used in Hong Kong (which is basically a cash flow test) be modified by including a balance sheet test?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	No. We agree with the Rickford Report. Proper application of the cash flow test renders the balance sheet test redundant. The directors must, in considering whether their company can pay its debts as they fall due, have regard to the availability of assets, present and future, to meet liabilities, present and future. The fact that making this judgement is difficult is irrelevant. Adding a balance sheet test will not dispense with the need to make the judgement or make doing so any easier.
Gordon Jones	I tend to agree that the combined balance sheet and cash flow test provide better protection for creditors for the reasons outlined in paragraph 3.19 of the paper. However, it should be noted that the jurisdictions which have moved to the combined solvency test, namely, the US, New Zealand, Singapore, South Africa and Malaysia have, in most instances, adopted the solvency test for many, if not most, of the areas previously covered by the capital maintenance rules. By way of comparison, if Hong Kong retains the existing capital maintenance rules with no change and introduces the combined solvency test to deal with share buy-backs and financial assistance by private companies, this would lead to an even greater tightening up of and greater complexity in an already restrictive and complex regime which would be both excessive and unnecessary in the case of private companies. Consequently, to compare Hong Kong with these other jurisdictions which have introduced the combined test is not to compare like with like. Furthermore, the paper gives no indication that the absence of the combined test in Hong Kong has caused any problems in practice in terms of inadequate creditor protection. I would, therefore, support the introduction of the combined test only if Hong Kong took steps to introduce a mandatory solvency test for all companies in more areas of its capital maintenance regime e.g. share buy-backs and financial assistance.
Arthur Lam & Co. CPA	We agree based on the prevailing business environment. Balance sheet test may be added to compliment the solvency test.
The Law Society of Hong Kong	No. We think adding the balance sheet test would give rise to undue hardship to companies. For instance, current accounting practices require revaluation of investment properties annually resulting in large fluctuation of asset values in the balance sheet. Such change of value of a company's long term assets normally does not affect a company's ability to meet its

	liabilities when due. Inclusion of a balance sheet test would impose undue restrictions on a company. Some members, however, favour the inclusion of a balance sheet test for they consider that it offers protection to creditors. This echoes the requirements of the US Revised Model Business Corporation Act and the New Zealand Companies Act.
KPMG	We would caution against introducing a balance sheet test into the solvency test. Although we have some sympathy for the views expressed in paragraph 3.19, we are concerned that the wide definition of "liability" (as opposed to "equity") under International Financial Reporting Standards (which have been adopted in Hong Kong as Hong Kong Financial Reporting Standards), and the changes from time to time that the International Accounting Standards Board may make to that definition, could cause any statutory balance sheet test based on a simple "excess of assets over liabilities" measure to be unduly restrictive, in a manner not originally intended by the legislator. In our view, if the directors give due regard to their fiduciary duties, this should be sufficient to ensure that the directors do not act impruduently or give unfair preference to shareholders over creditors. Furthermore, if a creditor seeks to have greater protection than is provided by the continuing profitability of the company's operations, then such creditors will generally seek to secure their loans with charges over specific assets. On this basis there does not appear to be a compelling need to strengthen the existing solvency test by introducing a balance sheet test.
Clifford Chance	We believe the present cash flow test should be modified by including a balance sheet test, as the balance sheet limb will provide safeguards in respect of whether long term liabilities of a company could be met.
Chartered Institute of Management Accountants Hong Kong Division	Yes. Cash flow test alone would be inadequate. A company may have a positive cash position with liquid assets. However, such company may also have a negative net worth. The cash flow test should be modified by including balance sheet solvency test.
The Chinese General Chamber of Commerce	目前，僅以現金流量測試以釐定公司的償債能力似乎並非十全十美的做法，而資產負債表亦是反映公司償債能力的重要參考。因此，本會贊同採用一個結合現金流量及資產負債表作為依據的償債能力規定，以取代現行根據現金流量的測試。
Hermes Equity Ownership Services Ltd.	No. We believe that a balance sheet test would add little value to the current cash flow test.
Ho Tak Wing	Yes, agreed.

Hong Kong Stockbrokers Association	We are of the view that solvency test be modified by including a balance sheet test.
The Chinese Manufacturers' Association of Hong Kong	無需更改香港現行使用的償債能力測試方法；因為在現金流量測試的基礎上加入資產負債表測試，其實際作用可能並不明顯，並且可能會對公司造成額外的困難。
CCIF CPA Limited	No. The balance sheet test fails to consider the quality of a company's assets and liabilities, etc. On the other hand, the protection for long term obligations is normally in the form of collateral, priority claim, covenant, and so on.
Canadian Certified General Accountants Association of Hong Kong	Yes, a combined approach has better protections to creditors.
CLP Holdings Limited	Yes, the solvency test currently used in Hong Kong (which is basically a cash flow test) should be modified by including a balance sheet test.
The British Chamber of Commerce in Hong Kong	Where a solvency test applies we think it should comprise both a cash flow test and a balance sheet test i.e. so that the company has a positive cash flow and a positive net worth before certain actions are taken.
Stephenson Harwood & Lo	We do not consider it appropriate to adopt the combined test and maintain that cash flow test should continue to be the solvency test. **Our reasons are**: First, the creditors would not necessarily have access to the balance sheet of the company because financial statements are not publicly filed in Hong Kong. Thus, a balance sheet test does not give a creditor much comfort. Second, the balance sheet is only a snapshot report of the affairs of the company as at a particular date. It does not reflect the assets coming into the company, for example, future revenue streams which may be adequate to pay long-term liabilities nor, equally, any expected deterioration of revenues.
The Hong Kong Chinese Enterprises	應該。

Association	
Arthur K.H. Chan & Co.	Yes
Tricor Services Limited	We do not agree that the solvency test be modified by including a balance sheet test. A balance sheet test is a mere mechanical and rigid application of a calculation of balance sheet net asset value without considering the quality of a company's assets and liabilities and their linkage over time. The conflicts between the theory of the accounting standards and the concept of creditor protection also make a balance sheet test undesirable.
The Hong Kong General Chamber of Commerce	We think, on balance, that the solvency test currently used in Hong Kong should not include a balance sheet test.
Hong Kong Monetary Authority	Regarding Chapter 3, we agree that the current cash flow test-based solvency test requirement should be modified by including also a balance sheet-based test, given the arguments set out in the document.
Hong Kong Bar Association	The Bar supports this proposal and agrees that the solvency test should be modified to provide for a combined solvency approach.
The Society of Chinese Accountants & Auditors	We agree the inclusion of a balance sheet test.
The Hong Kong Institute of Chartered Secretaries	Agree.
Hong Kong Institute of Certified Public Accountants	Yes, we consider that the existing solvency requirement in Hong Kong, which is basically a cash flow test, should be modified by including a balance sheet solvency test, covering both current and total assets/liabilities, to provide a more comprehensive and objective approach in the assessment of solvency and better safeguards for creditors. In the event of financial difficulties, creditors would also look to the assets on the balance sheet of a company for repayment, and not only to cash flows.

Question 14

Do you agree that reduction of capital should continue to be subject to judicial control and there is <u>no</u> need to introduce a court-free procedure as an alternative process in addition to the current rules?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	No. We think there should be an alternative court free procedure. Share repurchases out of capital are not subject to court control, so why should reduction of capital have to be so subject? The two procedures have the same economic effect on creditors.
Gordon Jones	I do not see any objections to introducing an alternative court-free process based on a solvency test to determine capital reductions bearing in mind that 80% of Hong Kong companies have very small amounts of share capital and what is proposed is an option which directors have the freedom to decide to adopt if they so wish. In addition, the introduction of such a provision would enable us to determine the take-up rate and assess how a solvency test would work in practice in certain well-defined circumstances, with a view to considering possible more radical reform at a future date.
Arthur Lam & Co. CPA	We would welcome a possible court-free procedure as an alternative process.
The Law Society of Hong Kong	Yes. We agree with the view of the SCCLR. However, some members consider that court sanction can be dispensed with: creditors' interest can be safeguarded by requiring notice of reduction and giving creditors the right to object via court process. In addition, share buyback has the same effect as reduction of share capital but the current rules do not require share buyback to be court sanctioned.
KPMG	In our view, if sufficient safeguards could be maintained to protect creditors, we consider that there is merit in introducing court-free procedures that may be used for the reduction of share capital, particularly in the circumstance identified in section 58(1)(c) of the Companies Ordinance i.e. where the company wishes to pay-off any paid-up share capital which is in excess of the wants of the company.
Clifford Chance	We believe it is desirable to have a court-free alternative for reduction of capital - the time and cost involved will be reduced.

Chartered Institute of Management Accountants Hong Kong Division	We recommend a court-free procedure in the interest of flexibility and simplicity to be available to SMEs as there is no public interest involved and these companies are mostly controlled by a small number of shareholders who are more often than not family members. For large companies involving more than a specified number of shareholders (to be defined) and listed companies, judicial control should continue to apply.
The Chinese General Chamber of Commerce	對一些非上市或較小型的私人公司而言，現時每次進行減少股本時均須獲取法院認許的程序過於繁複。本會認為應讓這些公司可選擇以非法院認許的途徑減少股本，藉以簡化相關程序和減少費用支出。
Hermes Equity Ownership Services Ltd.	Yes. We agree that there is no need to introduce a court-free procedure as an alternative process in addition to the current rules.
Ho Tak Wing	Yes, agreed.
Hong Kong Stockbrokers Association	We are of the view that reduction of capital should continue to be subject to judicial control for public companies and an option of a court-free procedure as alternative process.
The Chinese Manufacturers' Association of Hong Kong	本港可考慮引入非法院認許程序作為減少股本的另一個可供選擇的途徑；但有關程序中必須充分考慮對債權人的其他保障，特別是應確保債權人有足夠的知情權。
The Association of Chartered Certified Accountants	Reduction of share capital ACCA Hong Kong agrees that reduction of share capital should continue to be subject to judicial control and there is no need to introduce a court-free procedure as an alternative process in addition to the current rules. We note that in the UK, a court-free process based on solvency for capital reduction has been recently introduced, which was however motivated by widespread complaints that the court procedure was expensive and slow.
CCIF CPA Limited	No. As the court-free procedure is faster and cheaper, it may be of benefit to all parties in certain cases.
Canadian Certified General Accountants Association of Hong	No. The judicial control should be abandoned as it is costly.

Kong	
CLP Holdings Limited	We do not agree. We think that there is a need to introduce a court-free procedure as an alternative process in addition to the current rules for reduction of capital. On-market share repurchases, which is a form of reduction in capital, do not require court sanction under the current regulatory regime.
The British Chamber of Commerce in Hong Kong	We would like to see a Court free procedure for reduction of capital introduced, in addition to the Court based procedure which the directors could always choose in complex or uncertain cases, or where some of the directors cannot agree.
Stephenson Harwood & Lo	We welcome a court-free procedure as an alternative process, this will offer companies a flexibility and will also be faster and cheaper. Such a change will also make HK companies more competitive compared with vehicles in other countries.
The Hong Kong Chinese Enterprises Association	不同意，應有另一選擇。
Tricor Services Limited	The introduction of a court-free procedure as an alternative process in addition to the current rules could make certain more routine cases easier and possibly less costly to be processed, provided that adequate legislative safeguards are in place to protect the relevant stakeholders.
The Hong Kong General Chamber of Commerce	Yes, we agree that the reduction of capital should continue to be subject to judicial control and therefore concur with the views expressed by the SCCLR. Having said that, we do recognise the current anomalous situation where a private company can buyback its shares out of capital based on a solvency declaration by the directors without court sanction. However, on balance, we feel that it would still be beneficial to retain a court-sanctioned reduction of capital as it provides certainty as to the legality of the transaction and arguably provides more protection for the creditors.
Hong Kong Bar Association	The Bar supports this proposal and agrees with the concerns set out in §3.24. (1) In our experience, the companies which require the Court's confirmation of reduction of capital are generally substantial companies with high level of paid-up capital. The directors and the companies concerned prefer certainty on the legality of the transaction. Certainty will be guaranteed in a court-sanctioned reduction of capital. (2) The main purpose of requiring the companies to seek the sanction of the Court is to ensure that the companies are solvent and have sufficient funds to repay their debts as and when they fall due. (3) It is undesirable to replace the court sanction with the solvency declaration made by the directors. It is by no means

	certain that the directors making the declaration would necessarily have a correct understanding of the concept of solvency for the purpose of the relevant statutory provisions; even accountants' solvency test is different from the statutory (cashflow) test.
The Society of Chinese Accountants & Auditors	Yes, we agree. We don't see companies have strong expectation on a court-free procedure as reduction of capital is an extremely unusual exercise to companies. On the other hand, the loosening of control on reduction of capital decrease protection of creditors.
The Hong Kong Institute of Chartered Secretaries	The Institute considers that reduction of capital should continue to be subject to judicial control by and large but there should be a court-free procedure or a simplified procedure as an alternative process for certain simple routine cases which can be set out in detailed guidelines. Currently, the costs incurred for requiring court sanction do not justified in simple routine cases. It should be noted that on market share repurchases, which is a form of reduction of capital do not require court sanction under the current regime.
Hong Kong Institute of Certified Public Accountants	No, we do not agree that reduction of capital should continue to be subject to judicial control in all cases. We support the proposal for introduction of a court-free procedure as an alternative process in addition to the current rules, which would reduce the costs of a capital reduction exercise. We would suggest that a court-free procedure be subject to the following safeguards: a. approval by shareholders in general meeting, with a solvency declaration made by directors to be put before shareholders; b. adequate advertising and publicity; c. written notice to all creditors; d. provision for appeal to the court by aggrieved creditors and/or shareholders; e. penalties against directors if they abuse this procedure.

Question 15

If your answer to Question 14 is negative (i.e. you think that an alternative court-free process for reduction of capital should be introduced): **(a) Should it be available to all companies (whether listed or unlisted) or just private companies or private and unlisted public companies; and** **(b) Should all directors make the solvency declaration, or is it sufficient for the majority to do so?**	
Li & Fung Limited	N/A
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	(a) It should be available to all companies. (b) We think all directors should make the declaration (as they have to under the present rules where share purchases are made out of capital).
Gordon Jones	(a) I do not see why the alternative court-free procedure should not be open to all companies, bearing in mind that Singapore already makes it available to all companies and the principal reason why the UK did not follow suit is because of the requirements of the Second E C Commercial Directive. (b) As reductions in capital could be potentially controversial, the solvency declaration should be made by all the directors and not just a majority, having particular regard to the UK and Singapore precedents.
Arthur Lam & Co. CPA	(a) We think the "alternative" shall be available to all companies (whether listed or unlisted). And (b) we think "majority" of directors are sufficient; Otherwise, a prompt justified action may become a deadlock due some directors who are not the majority of the boards failed to show their intention or disagree.
The Law Society of Hong Kong	(a) For those members who favour the court-free process, they consider that this should be made available to all companies. The distinction between listed and non listed companies is not particularly relevant as a number of listed vehicles are incorporated in Bermuda, which allows for capital reduction without court sanction, subject to solvency test. (b) Those members who favour the court-free process agree that all directors should make the solvency declaration.
KPMG	We would consider that an alternative court-free process may be of benefit to both listed and unlisted companies, although

	we would expect that in the case of a listed company particular care would need to be taken to ensure that both the shareholders as a whole and the creditors would be treated with sufficient fairness and provided with sufficient protection. We would consider that it would be appropriate for the solvency declaration to be required to be made on behalf of the whole Board.
Clifford Chance	(a) The court-free process should only be available to unlisted companies (private or public). (b) A majority of the directors should make the solvency declaration (consistent with the financial assistance rules).
Chartered Institute of Management Accountants Hong Kong Division	Please refer to the answer to question 14.
The Chinese General Chamber of Commerce	(a) 由於上市公司涉及甚多股東以至公眾的利益，其減少股本的程序應受到較嚴謹的規限，故本會認為只讓私人公司或私人及非上市公眾公司採用非法院認許程序會較為適合。 (b) 本會認為，可規定必須由全體執行董事作出償債能力聲明，至於其他獨立非執行董事則可獲豁免。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on question 15-16
Ho Tak Wing	Not applicable
Hong Kong Stockbrokers Association	The court free alternative should available to private companies only and all directors should make the solvency declaration.
The Chinese Manufacturers' Association of Hong Kong	非法院認許程序可適用於私人及非上市公眾公司；過半數董事作出償債能力聲明已屬足夠。
CCIF CPA Limited	(a) It should be available to all companies, but the conditions of application and the relevant procedures could be different.

	(b) Yes, the solvency declaration should be made by all directors after making reasonable inquiry into the affairs of the company.
Canadian Certified General Accountants Association of Hong Kong	(a) It should apply to private companies only. (b) The solvency declaration can be made by the majority of directors unless the Articles of Association requires otherwise.
CLP Holdings Limited	(a) An alternative court-free process for reduction of capital should be available to all companies (whether listed or unlisted). (b) Our view is that it will be sufficient for the majority of directors to make the solvency declaration. In many cases, directors on the board might be representing different interests and there could be a potential risk that some directors might abuse the use of the unanimous approval requirement to trade their approval on one transaction against some other decisions that were in their interest. Furthermore, in reality, a unanimous decision on solvency confirmation might be difficult to be reached given the liability implications. However, it would also be unfair to hold those directors, who objected to giving the solvency confirmation, liable for the solvency certificate. Accordingly, we are in favour of a simple solvency certificate system with majority board approval and only those directors who signed would be liable.
The British Chamber of Commerce in Hong Kong	(a) The Court free procedure should be available to private and unlisted public companies only. (b) All directors should make the solvency declaration. If all directors do not, the Court procedure could then be adopted… This can be the subject of abuse where there is only one (unreliable) director so some safeguards are needed for this scenario.
Stephenson Harwood & Lo	We are of the view that an alternative court-free procedure should be available to all companies (whether listed or unlisted). **Our reasons are**: Since private companies can reduce their share capital easily by repurchasing their own shares, they have less need for an alternative court-free procedure than listed companies. The reduction of capital concerns the interests of creditors of the company and, from the creditors' view, the same level of protection should be provided to them regardless of whether the creditors have lent money to a listed company, unlisted company or even a private company. Although all directors are to be required to make the relevant solvency declaration in the UK and Singapore, we think that HK does not have to follow the same practice. By drawing an analogy in the voluntary winding up of a company, any one director can make the solvency certificate after the board meeting to approve. We suggest that only one director should be

	required to make the solvency declaration on behalf of the whole board following unanimous board approval to approve the capital reduction. As such, the solvency declaration can be evidenced by the relevant board resolution and the directors will be jointly liable for the solvency declaration.
The Hong Kong Chinese Enterprises Association	(a) 所有公司。 (b) 全體董事。
Tricor Services Limited	(a) It should be available to all companies. Notwithstanding this, it does not prevent more stringent requirements to be imposed on listed companies via other means governing the operation and governance of such companies such as the Listing Rules. (b) We are of the opinion that it is sufficient for a majority of the directors to make the solvency statement, if the giving of the financial assistance has been approved by a resolution passed by the board of directors in the first instance.
The Hong Kong General Chamber of Commerce	If it is decided to introduce an alternative court-free process for reduction of capital (which we do not support), then it should only be available to private companies and unlisted public companies and all the directors should have to make the solvency declaration. As a general point, we would be interested to know how many unlisted public companies exist in Hong Kong as our perception is that public companies are only used in connection with a listing.
Hong Kong Bar Association	Not applicable.
The Society of Chinese Accountants & Auditors	N/A.
The Hong Kong Institute of Chartered Secretaries	(a) It should be available to all companies. (b) All directors should make the solvency statement (same as in the case for a repurchase of shares out of capital). Duties of directors, whether executive or non-executive, are still the same and it is good governance to hold the same standard of duties on all directors.
Hong Kong Institute of Certified Public	(a) We are of the view that, as an alternative, a court-free process for reduction of capital should be available to all companies, whether listed or unlisted. In the case of listed companies, the regulators should be able to investigate

Accountants		cases of alleged abuse. For unlisted companies, aggrieved persons should have recourse to the court. The procedures should be subject to the safeguards indicated in our response to question 14, above.
	(b)	We believe that, for practical reasons, it should be sufficient for a majority of directors to make a solvency declaration, as it may be difficult to arrange for all directors to sign a document without causing delay. For reference, we note that under section 228A of the Companies Ordinance, a majority of directors is sufficient to form an opinion that the company cannot by reason of its liabilities continue its business and to commence a voluntary winding up procedure under that section.

Question 16

Should the current provisions on buy-backs in relation to protection of creditors be: **(a) retained;** **(b) amended to allow public companies (whether listed or unlisted) to fund buy-backs from capital subject to the solvency and other procedural requirements currently applicable to a buy-back out of capital by private companies; or** **(c) amended to allow all companies (whether listed or unlisted) to fund buy-backs (regardless of the source of funds) subject to a solvency requirement (in a manner similar to that of the SCA)?**	
Li & Fung Limited	No comment
Tsao Yea Tann Simon	Fro the purchase of own shares, we cannot see any control over the buy-back of shares by the Government. If you believe in the free economy regime, there is a lack of motivation for regulators allowing companies to purchase shares without going through proper channels. It caused not only confusion in the share price in case of listed companies but the valuation of the business will be affected. It went back to the question of share capital with no par. With the rapid flow of information in the efficient market, only those who are equipped with technology can take advantage over those un-equipped. Therefore if you allow such change, the future expenditure in social benefits will be escalating at a speed you cannot possibly imagine, and moreover, you **exempt the aliens from profits tax**. The clear demonstration in the May-end index closing illustrated the fact.
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	We recommend (c). Differentiating between listed and unlisted companies should, if justified, be a matter for the HKSE Listing Rules, not the companies legislation.
Gordon Jones	(a) As the current rules on share buy-backs in sections 49 to 49S of the Companies Ordinance are very complex and difficult to understand, I do not think that it would be acceptable not to have any reform given that we have embarked upon a major rewrite of the Ordinance. Furthermore, a number of other major common law jurisdictions such as Australia and Singapore have also introduced reforms. In view of these considerations, I do not agree that the current provisions should remain intact.

	(b) Option (b) has the advantage of adopting a gradualist approach to reform as it would extend the existing provisions regarding share buy-backs by private companies to all companies. Capital would be used to fund share buy-backs only in the event that there were insufficient distributable profits or proceeds of a fresh issue. Consequently, as the solvency test would be used only if it was necessary to use capital, it would come into play only in certain limited circumstances. However, given the more radical approach proposed under question 18 regarding financial assistance (which appears to be the preferred option in the paper), it has to be asked why a different, more conservative, approach should be adopted for share buy-backs as both involve situations where a company purchases its own shares either with or without financial assistance. Furthermore, none of the other principal common law jurisdictions which have reformed their laws regarding share buy-backs have adopted a gradualist approach. (c) Having regard to the above, I would, on balance, support option (c) which allows all companies, whether listed or unlisted, to fund share buy-backs, irrespective of the source of funds, subject to a solvency requirement similar to that in the Singaporean Companies Act. In this respect, it is noted from Appendix II that a similar approach has been adopted in Australia, New Zealand and the US and, if Hong Kong does not follow suit, it will be out of step with four of the principal common law jurisdictions in the world. Furthermore, it is noted that the UK would also like to adopt a similar approach but is prevented from doing so by the Second EC Commercial Directive. Personally, I do not see why this should 'add a burden' to companies purchasing their own shares, particularly as a mandatory solvency requirement would be required if the option under question 18 regarding financial assistance by a company for the purchase of its own shares were to be adopted. If a solvency requirement is not regarded as a burden in the context of the latter, why should it be regarded as a burden in the context of the former? Such a reform would also enable us to determine how an across the board solvency test would work in practice before considering its possible future application to distributions.
Arthur Lam & Co. CPA	No comment.
The Law Society of Hong Kong	(a) Yes (b) No. Public companies require more protection than private companies. (c) No
KPMG	We would agree that the current requirements on buy-backs of shares are fairly complex and may make it unduly difficult for an entity to return capital to the shareholders when that capital is no longer needed by the company. We would therefore

	recommend reform in this area, along the lines proposed by part (c) of the question.
Clifford Chance	Option (b). In the context of mutual funds, we recommend that the Government re-consider the proposal of introducing open-ended investment companies ("**OEIC**s") in Hong Kong, the shares of which could be freely and regularly redeemed on a NAV basis without the need to comply with the stringent set of provisions in the CO regulating share redemption. OEICs have been introduced in the UK since 1996 and also in Singapore.
Chartered Institute of Management Accountants Hong Kong Division	We consider that the current provisions on buy-back in relation protection of creditors be amended in line with option (c) above. The rules on buy-backs should be relaxed to provide operational efficiency and flexibility to all companies allowing such buy-backs from whatever source of funds subject to the combined solvency tests and approval by shareholders.
The Chinese General Chamber of Commerce	為確保香港營商環境的吸引力，並使之能繼續與新加坡競爭，本會認為現行有關保障債權人的股份回購條文應予以修訂，准許所有公司如新加坡般可利用任何來源的資金回購股份，但必須符合類似新加坡《公司法》所訂的償債能力規定。此外，本會建議應多加一項條款，列明上市公司必須在不抵觸《上市規則》的情況下方可進行相關的股份回購。
Hermes Equity Ownership Services Ltd.	Hermes takes no formal view on question 15-16
Ho Tak Wing	(a) The current provisions on buy-backs in relation to protection of creditors should be retained. (b) Yes, agreed (c) Yes, agreed
Hong Kong Stockbrokers Association	We are of the view that the current provisions on buy-backs in relation to protection of creditors be retained.
The Chinese Manufacturers' Association of Hong	贊成方案(c)，准許所有公司撥款回購股份，但必須符合類似新加坡《公司法》所訂的償債能力規定。

Kong	
The Association of Chartered Certified Accountants	Purchase of own shares ACCA Hong Kong supports the proposal to allow public companies (whether listed or unlisted) to fund buy-backs from capital subject to the solvency and other procedural requirements currently applicable to a buy-back out of capital by private companies, which are reasonable and generous as they stand.
CCIF CPA Limited	(a) No, they should be amended as the current rules are fairly complex. (b) Yes. (c) Yes, provided that the buy-backs are carried out on a fair basis by reference to the respective interests of the shareholders.
Canadian Certified General Accountants Association of Hong Kong	We are in favour of (c) as the buy-backs provisions should be relaxed and should not be limited to public companies.
CLP Holdings Limited	We agree that the current provisions on buy-backs in relation to protection of creditors should be amended to allow public companies (whether listed or unlisted) to fund buy-backs from capital subject to the solvency and other procedural requirements currently applicable to a buy-back out of capital by private companies.
The British Chamber of Commerce in Hong Kong	We would prefer the current position to apply i.e. (a).
Stephenson Harwood & Lo	To provide flexibility to the both private companies and public companies without derogating the public interests (particularly for the listed companies), a two-pronged strategy should be considered: ***Public companies***: The existing legislation should be amended to allow public companies (whether listed or unlisted) to fund buy-backs from capital subject to the solvency and other procedural requirements currently applicable to a buy-back out of capital by private companies. ***Private companies***: Thee current provisions should be relaxed to allow private companies to fund shares buy-backs irrespective of the source of funds (including borrowing) subject to current solvency and procedural requirements.

The Hong Kong Chinese Enterprises Association	(b) ◦
Tricor Services Limited	We favour (b), as the solvency test would only be required in the case of buy-backs from capital, but not in the case of buy-backs out of distributable profits or the proceeds of a new issue of shares as proposed in (c).
The Hong Kong General Chamber of Commerce	(a) The current provisions on buy-backs in relation to protection of creditors should be retained. (b) The provision should apply to private companies and unlisted public companies but not to listed public companies where there are public shareholders who require greater protection. (c) No.
Hong Kong Bar Association	The Bar supports the proposal under Question 16(b).
The Society of Chinese Accountants & Auditors	Our reason in agreeing the proposal to add a balance sheet test to the existing solvency test used in Hong Kong for Q13 is based on a view that the interests of creditors should be safeguarded. Hence, based on the same principle, we prefer to retain the current provisions on buy-backs of shares since the other two proposal (b) and (c) will decrease the capital of the company.
The Hong Kong Institute of Chartered Secretaries	The Institute supports the proposal in (b).
Hong Kong Institute of Certified Public Accountants	While we are not aware of any problem with the current provisions on buy-backs, option (b) would give public companies greater flexibility to fund buy-backs. However, if this option is further pursued, we would suggest adopting a standard form of solvency test (for both public and private companies), which, as we indicate in response to question 13 above, should include a balance sheet solvency test.

Question 17

Is there a case for legislating for treasury shares for all companies (as in Singapore)?	
Li & Fung Limited	No comment
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes, if only to provide flexibility.
Gordon Jones	It has not been possible to access the relevant SFC documents mentioned in footnotes 39 and 40 as they have been deleted from the SFC's website, doubtless because they are no longer current documents. In view of this, it will be difficult, if not impossible, for members of the public to comment in depth on this proposal unless they have hard copies of the original consultation document and the responses by consultees. However, as treasury shares will be more relevant to public, in particular listed, companies, the impetus for any reform in this area will have to come from the market/regulatory requirements for this group of companies. In this respect, it is noted that sections 724 to 732 of the UK Companies Act 2006, which introduce treasury shares, apply only to companies listed on a recognized stock exchange. Furthermore, the Companies Ordinance does not apply to over 80% of listed companies which are domiciled outside Hong Kong. Consequently, any proposal to introduce treasury shares needs to be considered in the context of the Listing Rules rather than the Companies Ordinance if it is to have any impact. The SFC last consulted on the subject nearly 10 years ago in 1999 but I doubt if the market would wish to change the existing 'block listing regime', which seems to be working well and, even if this were to be the case, the changes will need to be made in the context of the Listing Rules rather than the Companies Ordinance. It would, however, have been helpful if the paper could have included some information on how treasury shares have worked in New Zealand and Singapore as regards private companies.
Arthur Lam & Co. CPA	We think all company may entitle to use treasury shares.
KPMG	We have no objection to the proposal but cannot comment on whether companies feel a need for change in this regard.
Clifford Chance	Yes. We believe it is good to have treasury shares, as it would provide more flexibility.

Chartered Institute of Management Accountants Hong Kong Division	No. We do not consider it necessary to introduce treasury shares for all companies. The introduction of treasury shares would likely require certain legislative controls to counter the risks of abuse including sales of treasury shares during "price sensitive times". Shares that are repurchased will either be reissued or cancelled within a specified period of time. There seems no reasonable ground to create treasury shares, which will have no voting rights and are not entitled to dividend.
The Chinese General Chamber of Commerce	本會贊成有需要立法，為所有公司引入庫存股份制度。
Hermes Equity Ownership Services Ltd.	No. We do not see a strong need for the introduction of treasury shares. However, should a decision be taken to introduce treasury shares in Hong Kong, we would note that we believe that the protection of shareholders' rights is required as follows: - Voting rights on treasury shares should be suspended - Dividend on treasury shares should be suspended - Treasury shares are also excluded for the purposes of calculating per share ratios, such as earnings or dividends per share - Prohibition on resale of treasury shares at certain times (In particular, a company may not purchase shares during the black-out periods before the preliminary announcement of the company's annual results or the publication of the interim report) - Re-sales of treasury shares should only be conducted on-market - Pre-emption rights should be given to existing shareholders when the company re-sells the treasury shares
Ho Tak Wing	No comments
Hong Kong Stockbrokers Association	We favour the "block listing regime" over treasury shares.
The Chinese Manufacturers' Association of Hong Kong	建議立法為所有公司引入庫存股份制度。

CCIF CPA Limited	No. As the issue and listing of new shares after the repurchase and cancellation can be expeditious nowadays.
Canadian Certified General Accountants Association of Hong Kong	We cannot see the benefits of legislating for treasury shares. It would complicate the accounts and the laws.
CLP Holdings Limited	Yes, there is a case for legislating for treasury shares for all companies (as in Singapore).
Respondent A	We support to hold the repurchased shares in treasury as this will give the company the ability to reissue them quickly and cost effectively while providing additional flexibility in the management of the company's capital base. Since it is not currently possible under the Hong Kong Listing Rules or the Companies Ordinance for a company to hold shares in treasury, we suggest the SCCLR to liaise with the Hong Kong Stock Exchange simultaneously to proceed with modifying the Listing Rules to enable all listed companies in Hong Kong to hold treasury shares and not automatically cancel their listing after share repurchase.
The British Chamber of Commerce in Hong Kong	Companies should have the option to have Treasury shares, i.e. buy back shares and not cancel them. Treasury shares are useful in a number of cases. (e.g. for employee share schemes). Choice would be the key here. But it should not be for all companies, as most companies would not need this in Hong Kong.
Stephenson Harwood & Lo	We believe that the benefits of treasury Shares far outweigh the disadvantages, and that the treasury share regime should be put into place for all companies as is the case in Singapore.
The Hong Kong Chinese Enterprises Association	沒有需要。
Tricor Services Limited	No. We believe the conclusions as previously reached in the "Consultation Paper on Treasury Shares Consultation Conclusions" issued by the SFC in July 1999 appear to still stand today. Accordingly, consideration could be given to the adoption of the "block listing regime" as described in the Consultation Conclusions, which involves amendments to the Listing Rules to enable all listed companies in Hong Kong to expedite the listing of new shares that are reissued following a repurchase and cancellation, as an alternative approach.
The Hong Kong	Hong Kong should permit treasury shares for all companies, subject to appropriate safeguards.

General Chamber of Commerce	
The Law Society of Hong Kong	No. We agree with the SFC decision in its Consultation Conclusions in July 1999. Some members favour legislating for treasury shares as in Singapore for this allows companies to deal with repurchased shares more effectively. Safeguards such as suspended dividends and voting rights should be implemented to prevent abuse.
Hong Kong Bar Association	Yes. The Bar takes the view that an option should be given to the companies to hold the shares bought back in treasury, rather than requiring all shares bought back by the companies be cancelled.
The Society of Chinese Accountants & Auditors	We do not support for legislating for treasury shares for all companies as we also worry about the dangers of abuse of the treasury shares in falsifying the stock market.
The Hong Kong Institute of Chartered Secretaries	The Institute does not object to such a case but considers it to be not immediately necessary and can be considered later after the introduction of the no-par share regime.
Hong Kong Institute of Certified Public Accountants	We have no specific view on this.

Question 18

Should the current financial assistance provisions be streamlined in a manner similar to the NZCA?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	No. We do not think the New Zealand provisions are particularly streamlined and we think that adopting them will just substitute one complicated system for another.
Gordon Jones	**Questions 18 and 19** The basic policy behind the prohibition of financial assistance by companies to buy their own shares, except in certain limited circumstances, remains sound, namely that the resources of a target company and its subsidiaries should not be used directly or indirectly to assist a purchaser financially to make the acquisition of the target company. However, the current provisions regarding financial assistance by companies to buy their own shares in sections 47A to 48 of the Companies Ordinance are amongst the most complex and impenetrable in the Ordinance for the reasons outlined in paragraph 3.36 of the paper. Furthermore, one of the overriding objectives of the rewrite exercise is to try and simplify Hong Kong's company law. In view of this, I do not agree with the option outlined in question 19(a) that the current provisions be retained. As regards possible reform, one of the options suggested is to abolish the prohibition of financial assistance in the case of private companies as in the case of the UK. However, it should be noted that the UK has only been able to do this because it was considered that any abusive transactions in private companies could be controlled in other ways e.g. through the provisions on directors' duties in the Companies Act 2006 or the wrongful trading and market abuse provisions which have come into force since the Companies Act 1985. In the Hong Kong context, however, it is not certain whether or not the new Companies Ordinance will contain statutory directors' duties, as this is the subject of separate consultation, while the concept of wrongful trading does not exist in Hong Kong company law and is not being considered in the context of the current rewrite exercise. In view of these considerations, I do not agree with the option outlined in question 19(b). Another option for reform is to follow the Singaporean model but, as pointed out in the paper, this has only resulted in adding a further layer of complexity to already excessively complex provisions. In view of this, I also do not agree with the

	option outlined in question 19(c). Having regard to the above, I would support the reform of the current financial assistance rules on the lines of the New Zealand Companies Act as outlined in paragraph 3.38 of the paper. This would not only enable the existing rules on capital maintenance to be significantly simplified and streamlined but also protect creditors' interests. Such a reform would also enable us to determine how an across the board solvency test would work in practice before considering its possible future application to distributions.
Arthur Lam & Co. CPA	No comment.
The Law Society of Hong Kong	No. Some members consider that the current regime on financial assistance is complex and burdensome. They favour the New Zealand legislative approach to regulate financial assistance.
KPMG	The NZCA provisions, as described in the Consultation Paper, appear to be a reasonable balance of safeguards and enabling legislation.
Clifford Chance	Yes.
Chartered Institute of Management Accountants Hong Kong Division	We oppose to the concept of providing financial assistance to a third party for the purpose of acquiring shares in the company. The disadvantages of doing so would by far out- weight any advantages putting the creditors and minority shareholders at risk.
The Chinese General Chamber of Commerce	本會認同有需要簡化現行提供資助的條文，惟是否必須完全跟隨新西蘭《公司法》的所有規定，如資助額不超過股東資金的 5%等細節，則可再作詳細的探討，使其更符合香港公司的實際需要和整體利益。
Hermes Equity Ownership Services Ltd.	No.
Ho Tak Wing	Yes, agreed.
Hong Kong Stockbrokers	We consider the current financial assistance provisions be streamlined in a manner similar to the NZCA.

Association	
The Chinese Manufacturers' Association of Hong Kong	不贊成簡化現行提供資助的條文，以免助長投機及不規範的行為。
The Association of Chartered Certified Accountants	Financial assistance To be consistent with other restrictions in the capital maintenance regime, ACCA Hong Kong considers that the prohibition provisions should be retained, making solvency an additional exception. In this regard, ACCA Hong Kong suggests that where the financial assistance exceeds 5% of the total paid-up capital and reserves of the company, a majority, say 75% of shareholders' approval will be required. We are of the view that the requirement for unanimous shareholder approval means that it is likely to work only in the case of small, closely-held companies and will therefore not be practically feasible for all companies.
CCIF CPA Limited	Yes.
Canadian Certified General Accountants Association of Hong Kong	Yes, it is acceptable.
CLP Holdings Limited	Yes, we support that the current financial assistance provisions should be streamlined in a manner similar to the NZCA.
The British Chamber of Commerce in Hong Kong	No. We do not see a need to follow the New Zealand approach on financial assistance provisions, here.
Stephenson Harwood & Lo	We disagree. **Our reasons are**: A two-fold solvency test seems too strict and may result in making it even more difficult for a company to give FA than at present. It will result in an increase in potential liabilities for directors and may add to costs as directors will need professional advice just as much as before. Our experience is that the financial assistance rules introduce complexity to transactions without much corresponding

	protection to creditors (often for the reasons mentioned in the Consultation Paper – the capital itself is usually very small). We prefer a UK style abolition of the rule in order to simplify the law.
The Hong Kong Chinese Enterprises Association	不應該。
Arthur K.H. Chan & Co.	Yes
Tricor Services Limited	No. In the first place, consideration could be given to abolish the prohibition of financial assistance in respect of private companies, as it is far too complex (and hence costly) a process for private companies. Moreover, it would appear that there are sufficient safeguards already in place through other provisions for the protection of minority shareholders.
The Hong Kong General Chamber of Commerce	Given the complexity of the rules on financial assistance and the compliance cost, we support the view that the provisions should be streamlined at least for private companies. Whether the NZCA approach is the right one remains to be seen but we do feel that for private companies this whole area requires further consideration.
Hong Kong Bar Association	The Bar supports this proposal principally because the current financial assistance provisions are far too complicated.
The Society of Chinese Accountants & Auditors	We support reform similar to that of NZCA. The streamlined financial assistance rules should only apply to private companies and should be able to strike a balance between flexibility in raising capital and inviting special shareholder such as key employees and protection of creditors. In our opinion, a reasonable ceiling amount of financial assistance based on a percentage to shareholders funds similar to that of NZCA is essential in striking a balance.
The Hong Kong Institute of Chartered Secretaries	The Institute supports the proposal but also reminds that current 3 exceptions contained in section 47C(4) of the CO, which do not appear in the NZCA legislation, should be retained.
Hong Kong Institute of Certified Public Accountants	Streamlining the current financial assistance provisions along the lines of the provisions in the New Zealand Companies Act ("NZCA"), as set out under paragraph 3.38 of the consultation paper, merits further consideration. However, if this option is to be pursued, we would suggest adopting a standard form of solvency test, which, as we indicate in response to question 13 above, should include a balance sheet solvency test.

Question 19

If your answer to Question 18 is in the negative, would you prefer instead: **(a) the current provisions be retained;** **(b) the prohibition of financial assistance be abolished in respect of private companies (as the UK has done); or** **(c) making solvency an additional exception to the prohibition for all companies (whether listed and unlisted) in a manner similar to the SCA?**	
Li & Fung Limited	N/A
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	We favour (b), for the reasons given by the UK CLRSG and referred to in paragraph 3.37 of the consultation paper, but see no reason for distinguishing between public and private companies. We assume that the UK distinction may have been influenced by the perceived incompatibility between abolition for public companies and relevant EU law.
Gordon Jones	**Questions 18 and 19** The basic policy behind the prohibition of financial assistance by companies to buy their own shares, except in certain limited circumstances, remains sound, namely that the resources of a target company and its subsidiaries should not be used directly or indirectly to assist a purchaser financially to make the acquisition of the target company. However, the current provisions regarding financial assistance by companies to buy their own shares in sections 47A to 48 of the Companies Ordinance are amongst the most complex and impenetrable in the Ordinance for the reasons outlined in paragraph 3.36 of the paper. Furthermore, one of the overriding objectives of the rewrite exercise is to try and simplify Hong Kong's company law. In view of this, I do not agree with the option outlined in question 19(a) that the current provisions be retained. As regards possible reform, one of the options suggested is to abolish the prohibition of financial assistance in the case of private companies as in the case of the UK. However, it should be noted that the UK has only been able to do this because it was considered that any abusive transactions in private companies could be controlled in other ways e.g. through the provisions on directors' duties in the Companies Act 2006 or the wrongful trading and market abuse provisions which have come into force since the Companies Act 1985. In the Hong Kong context, however, it is not certain whether or not the new Companies Ordinance will contain statutory directors' duties, as this is the subject of separate consultation, while the

	concept of wrongful trading does not exist in Hong Kong company law and is not being considered in the context of the current rewrite exercise. In view of these considerations, I do not agree with the option outlined in question 19(b). Another option for reform is to follow the Singaporean model but, as pointed out in the paper, this has only resulted in adding a further layer of complexity to already excessively complex provisions. In view of this, I also do not agree with the option outlined in question 19(c). Having regard to the above, I would support the reform of the current financial assistance rules on the lines of the New Zealand Companies Act as outlined in paragraph 3.38 of the paper. This would not only enable the existing rules on capital maintenance to be significantly simplified and streamlined but also protect creditors' interests. Such a reform would also enable us to determine how an across the board solvency test would work in practice before considering its possible future application to distributions.
Arthur Lam & Co. CPA	No comment.
The Law Society of Hong Kong	(a) Yes (b) No (c) No
KPMG	n/a
Clifford Chance	N/A.
Chartered Institute of Management Accountants Hong Kong Division	We would prefer to retain the current provisions i.e. options (a) and (c) with the added restriction that the balance sheet solvency test be added in addition to the cash flow solvency test.
The Chinese General Chamber of Commerce	鑒於本會同意簡化現行提供資助的條文，此問題不適用。
Hermes Equity Ownership Services Ltd.	We prefer (a), that the current provisions be retained, though we would be willing to accept (b) pursued as an appropriately deregulatory step.

Ho Tak Wing	(a) Not applicable (b) Not applicable (c) Not applicable
Hong Kong Stockbrokers Association	N.a
The Chinese Manufacturers' Association of Hong Kong	保留現行條文。
CCIF CPA Limited	Not applicable.
Canadian Certified General Accountants Association of Hong Kong	Not applicable.
CLP Holdings Limited	Not applicable in view of the answer to 18.
The British Chamber of Commerce in Hong Kong	We prefer (b) – that the prohibition on financial assistance be abolished in the case of all private companies, as is now the case in the UK.
Stephenson Harwood & Lo	We prefer the UK approach. The current rules support the maintenance of capital principle. However, the current rules are too complex resulting in a lot of time and money being spent trying to avoid giving FA or following the whitewash procedure and are often a commercial deterrent. An alternative option is to follow the UK where the rules on FA have recently been reformed to allow private companies to give FA without going through the whitewash procedure. The prohibition remains for public companies (amendment expected to come into force later this year). This provides more flexibility for private companies and eliminates a lot of the

	time and costs incurred in carrying out the whitewash procedure. There are still certain checks in place for private companies such as directors' fiduciary duties and minority protection of shareholders and it is still difficult for public companies to give FA. Whilst abolition may go against the principal of capital maintenance and seemingly provide less protection for creditors, capital maintenance is not very significant today. A creditor's main concern is solvency and most creditors (if they want protection) will seek contractual protection or security. We do not think creditors find much comfort in the rules of capital maintenance. For these reasons, we recommend adopting the UK approach in Hong Kong.
The Hong Kong Chinese Enterprises Association	(a) ◦
Tricor Services Limited	As noted in our response to Q18 above, option (b) is preferred. To this end, it should be noted that in the event that option (b) could not be implemented for one reason or another, consideration could be given to streamlining the existing provisions as an interim solution via the removal of the requirement that assistance must be provided out of distributable profits (i.e. by deleting s47E(2))
The Hong Kong General Chamber of Commerce	(a) We would support the current provisions being retained for listed public companies. (b) We do not think that the prohibition on financial assistance should be abolished altogether for private companies but consideration should be given to streamlining the provisions. (c) We would not support making solvency an additional exception to the prohibition for all companies.
Hong Kong Bar Association	Not applicable.
The Society of Chinese Accountants & Auditors	N/A.
The Hong Kong Institute of Chartered Secretaries	Not applicable.
Hong Kong Institute of Certified Public	N/A

Accountants	

Question 20

Do you consider that there is a need for Hong Kong to have a court-free statutory amalgamation procedure, in addition to the existing court-sanctioned procedure?	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes. We are not sure how much demand for such a procedure there is, but consider in any event that the legislation should facilitate it.
Gordon Jones	As mergers and amalgamations are not uncommon in Hong Kong for commercial or economic reasons, it is very important that this process should be facilitated as much as possible, commensurate with the need to provide adequate protection for creditors and shareholders, if Hong Kong is to further enhance its reputation as a business friendly jurisdiction. As a logical consequence, it is equally important that there should be an adequate legal framework to facilitate this process. In this respect, it would have been useful if the paper could have included some reference to the existing legal mechanisms which companies use for this purpose as an alternative to the existing statutory procedure in sections 166 to 167 of the Companies Ordinance given that most companies do not use this procedure but there are a not insignificant number of amalgamations and mergers. Having said this, it is clear that, as this framework is not adequate, it would be useful to consider the possible introduction of a court-free statutory amalgamation procedure as an alternative. It will then be up to companies contemplating a merger or amalgamation to decide whether to use the court-based or court-free procedures depending on the nature and complexity of the transactions in question. In the final analysis, however, the introduction of a statutory court-free procedure will depend very much on whether the market considers in the context of the consultation that there is a need for one. I would also sound a note of caution as only two jurisdictions in the world appear to have introduced such a procedure. While Singapore is an important commercial jurisdiction, New Zealand is not and, as such, not a particularly persuasive influence. Furthermore, major commercial jurisdictions such as Australia, the UK and US do not have such a procedure.
Arthur Lam & Co.	Yes, we think there should a court-free procedure alternative.

CPA	
The Law Society of Hong Kong	In relation to intra-group amalgamation other than listed companies, this may be considered. However, amalgamation of two or more companies not being of the same group of companies, and intra-group amalgamation involving listed companies, should be implemented by the existing court-sanctioned procedure. Section 166 of the CO is used quite frequently for takeovers and mergers of listed companies where court sanctions provide the necessary supervision and protection. Some members are however of the view that the court-free statutory amalgamation procedures may be extended to inter-group amalgamation between companies (other than listed companies)
KPMG	We would expect that such a procedure would prove useful to companies, particularly when seeking to rationalise group structures.
Clifford Chance	We believe there is a need for Hong Kong to have a court-free statutory amalgamation procedure, in addition to the existing court-sanctioned procedure.
Chartered Institute of Management Accountants Hong Kong Division	We consider that in the interest of commercial and economic efficiency there is a need for intra-group amalgamation to have a court-free statutory procedure as long as these are not listed companies. Where there is a proposed amalgamation of two or more companies not of the same group of companies, the current court-sanctioned procedures should continue to apply.
The Chinese General Chamber of Commerce	本會認為有需要訂立不經法院的法定合併程序，為有意進行合併的公司提供較具彈性、成本較低、程序相對較簡單的選擇。
Hermes Equity Ownership Services Ltd.	Yes. We accept the arguments in favour of a court-free statutory amalgamation procedure in Hong Kong, provided that there are sufficient provisions to protect shareholders' interests. We agree that the viability of a court-free procedure depends very much on whether there are sufficient built-in measures to protect the interests of relevant stakeholders (e.g. minority shareholders and creditors) and to prevent the procedure from being abused by the management.
Ho Tak Wing	Disagreed
Hong Kong Stockbrokers Association	Yes.

The Chinese Manufacturers' Association of Hong Kong	贊成訂立不經法院的法定合併程序。
CCIF CPA Limited	Yes. This can make the amalgamation procedure less complex and costly.
Canadian Certified General Accountants Association of Hong Kong	Yes.
CLP Holdings Limited	Yes, there seems to be a need for Hong Kong to have a court-free statutory amalgamation procedure in addition to the existing court-sanctioned procedure.
The British Chamber of Commerce in Hong Kong	Yes we prefer flexibility – there should be a Court free statutory amalgamation procedure available, in addition to the possibility of instead choosing the court-sanctioned procedure. We would note that there is no concept of "amalgamation" or "merger" per say under Hong Kong law or common law and hence we assume that the question is referring to a statutory scheme of arrangement procedure.
Stephenson Harwood & Lo	Yes. The need may not be too common, but a tool like this may be useful in some cases.
The Hong Kong Chinese Enterprises Association	不需。
Tricor Services Limited	Yes, in particular pertaining to the less complicated cases including those between holding and wholly-owned subsidiaries, and between wholly-owned fellow subsidiaries.
The Hong Kong General Chamber of Commerce	It may be appropriate to have a court-free statutory amalgamation procedure for intra-group transactions but, in relation to public companies, the existing court-sanctioned procedure should be maintained.
Hong Kong Bar Association	Question 20 and Question 21 The Bar does not agree with the analysis in Chapter 4.

	First and foremost, the suggestion in §4.1 that there is no court-free procedure for amalgamation of companies is incorrect. In fact, section 168 and the Ninth Schedule to the CO together provide the mechanism for court-free merger and amalgamation of companies. Most of the merger and amalgamation in Hong Kong is done under section 168. Under section 168, the merger and amalgamation can be done if consent from 90% of the shareholders can be secured. This will be followed by a compulsory purchase of the shares held by the minority shareholders. If the dissenting shareholders do not wish to be bought out, they can challenge the proposed merger and amalgamation by making an application to the Court under paragraph 4 of the Ninth Schedule. Only on rare occasions when the acquirer anticipates that he would obtain less than 90% of the shares of the target company that section 166 procedure would be invoked in which case the Court, because of the lower threshold of 75%, would have to adjudicate on the fairness of the scheme. Secondly, it appears from the discussions in §§4.14-4.19 that the rationale for proposing a court-free merger and amalgamation is the concern that the present court-sanctioned scheme of arrangement under sections 166 and 167 is too complex and costly. If it is thought that the complications and costs were generated because of the need to comply with the requirements under section 166 and 167, it is wrong. The scheme documents nowadays become so lengthy (recently over 400 pages for English section alone), complicated and costly is <u>not</u> because of the need to comply with the requirements under section 166 and 167 or, for that matter, the Court. It is overwhelmingly attributed to the need to satisfy the requirements of the Securities Futures Commission ("**SFC**") and The Stock Exchange of Hong Kong Limited ("**HKEx**") including their requirements for updated financial information, property valuer's report and appointment of independent financial advisors who, in turn, will be advised by their own legal advisors. It normally takes one to three months to prepare and obtain the approvals of the SFC and HKEx. The <u>statutory</u> explanatory statement normally runs to only 20 or 30 pages and much of it is filled with information required by the SFC and HKEx. We estimate that over 95% of the contents of the scheme documents are prepared to satisfy the requirements of the SFC and HKEx, particularly the Listing Rules and the Code on Takeovers and Mergers. Thus, much of the costs incurred in the preparation of the scheme documents and the engagement of professional advisors will still have to be incurred even in a court-free procedure. Many of the take-over and privatisation schemes involve hundreds of millions of dollars of which total legal (solicitors' and barristers') fees incurred by the applicant company in going through the statutory procedures seldom exceed a couple of million dollars. The costs of a "short form amalgamation" of China Light & Power Co. Ltd. and of a "long form amalgamation" of the takeover by PCCW of Cable & Wireless HKT Limited were HK$345 million and HK$1,012 million respectively as shown in their scheme documents. In the latter case, the legal costs of solicitors and counsel representing Cable & Wireless HKT

	Limited for obtaining sanction of the scheme were about HK$5 million or 0.49% of the total costs! The most recent "long form amalgamation" of China Unicom Limited and China Netcom Group Corporation (Hong Kong) Limited was RMB 100 million and the legal costs for the applicant in the court process was most probably less than 5% and this amount, like all other section 166 applications, is incurred primarily in drafting and settling the scheme documents to the satisfaction of the authorities. Once the above misconceptions are cleared, it is difficult to see what advantages can possibly be gained by introducing the court-free procedure similar to the Singapore and New Zealand models. **Long form amalgamation** §§4.5-4.10: The procedure described is complicated and can easily be abused. The suggestion that the solvency statement has to be accompanied by a report from its auditor is not workable in practice as it is difficult to see any auditors in particular the big four would give their support to the scheme in the manner suggested in §4.5. This is recognised to be the case in §4.16. **Short form amalgamation** §§4.11-4.13: This form of amalgamation can be voted down by the shareholders. Thus, any dissenting shareholders can stop the scheme from going ahead whereas under section 166, the scheme can be implemented if consent from 75% of the shareholders present and voting can be secured. The fairness or otherwise of the scheme is under the scrutiny of the Court, which will review the scheme to ensure that the interests of the minority shareholders or members of the class will not be prejudiced. We note that short form amalgamation is the procedure used for all back door listing. The Singapore model and the requirement as to solvency discussed in §§4.16-4.18 should <u>not</u> be followed. In an amalgamation or merger, it is the interests of the minority shareholders or the class which have to be looked after, hence the requirements of 90% shareholders' consent (in a court-free procedure under section 168) whereby dissenting minorities may appeal to the court and 75% shareholders present and voting and sanction by the Court in a court-sanctioned scheme under section 166. It is normally not a matter which concerns the creditors, as their interest will not be affected by the merger or amalgamation unless it is a merger of insolvent companies in which case the class may consist of creditors. In fact, the present statutory scheme does <u>not</u> require the scheme documents to be provided to the creditors and their consents to the scheme are not necessary. Hence, the whole basis for introducing the requirements as to solvency, which is to protect the interest of the creditors, is flawed. On the contrary, the Singapore model has omitted the most important legal criterion for deciding whether or not a scheme is fair on the members or creditors as established long ago in England (<u>In re National Bank Ltd</u> [1966] 1 WLR at 829) and followed in Hong Kong (<u>Re South China Strategic Ltd</u> [1997] HKLRD 131 at 135 and

	China Light & Power Co Ltd [1998] l HKLR 158 at l68). The suggestion in §4.19 to eliminate the right for dissenting shareholders to veto the scheme is clearly wrong. There is no logical reason or basis in support of this suggestion. As discussed above, the main purpose of the present statutory scheme is to protect the interest of the minority or dissentient shareholders. For the above reasons, the Bar strongly disagrees with the proposals under Questions 20 and 21.
The Society of Chinese Accountants & Auditors	We also see more mergers and amalgamations by companies in Hong Kong either to increase competitiveness or to be more cost effective. Therefore, we consider there is a need to have a court-free statutory amalgamation procedure.
The Hong Kong Institute of Chartered Secretaries	Similar to our response in Question 14, the Institute considers that it should continue to be subject to judicial control by and large but there should be a court-free procedure or a simplified procedure as an alternative process for certain simple routine cases which can be set out in detailed guidelines, for example, amalgamation amongst wholly-owned subsidiaries within the same group.
Hong Kong Institute of Certified Public Accountants	Yes, we would support the introduction of a simplified, court-free statutory amalgamation procedure, in addition to the existing court-sanctioned procedure.

Question 21

If your answer to Question 20 is positive, should the court-free statutory amalgamation procedure be based on the elements outlined in Table A above? If you think that there should be alternative or additional elements, please explain.	
Li & Fung Limited	Yes
Swire Pacific Limited; Cathay Pacific Airways Limited; Hong Kong Aircraft Engineering Company Limited	Yes.
Gordon Jones	It would have been helpful to have had some information on how the Singaporean and New Zealand provisions have worked in practice, particularly the New Zealand provisions which have been in operation since 1994. This is important as, if the proposal survives the consultation and is incorporated into the new Companies Bill, this will be precisely the question asked by the LegCo Bills Committee. While the key elements of the proposed statutory amalgamation procedure seem to be reasonably comprehensive and logical, I would like to make the following points:- • As, under the short form amalgamation, the terms and conditions of the amalgamation must conform with those stipulated in the Companies Ordinance, which are essentially based on provisions in the 1929 and 1948 UK Companies Acts, it will be important to review the current statutory terms and conditions to ensure that they are up-to-date and compatible with commercial requirements in the 21st century. • As the directors of the holding company and the wholly owned subsidiaries, in many cases of short form amalgamations, are likely to be the same individuals, care should be taken that the number of board meetings required to make the necessary solvency statement are kept to the minimum necessary. • I would query the need to convene a general meeting in the case of short form amalgamations. In the first place, as the companies in question will be holding companies and wholly-owned subsidiaries, the need for shareholder involvement and approval is arguably not as great as in the case of two totally unrelated companies. Furthermore, if listed companies are involved, as is likely to be the case where a holding company merges with a wholly owned

	private subsidiary or subsidiaries, a considerable amount of time, effort and documentation will be required to convene an arguably unnecessary meeting involving all members. • The relationship between stages 6, 7 and 8 in both long and short form amalgamations needs to be clarified. If the shareholders approve the amalgamation/merger by special resolution in stage 6, the special resolution needs to be registered with the Registrar of Companies ('R of C') within 15 days of the resolution being passed by virtue of section 117(1) of the Companies Ordinance (which will presumably have an equivalent in the new Companies Ordinance). Subsequently, under stage 8, the R of C will register the special resolution and issue a certificate of amalgamation. However, in the meantime, a dissident creditor or shareholder may well have applied to the court for relief but, as this process is likely to take a not inconsiderable amount of time, in all probability, the R of C would have issued a certificate of amalgamation before the court makes a ruling. In view of this possibility, there needs to be a statutory mechanism to cover this eventuality. This could take the form of a requirement that any dissident creditors/shareholders must notify the R of C in a specified form within 15 days of the passing of the special resolution that theyintend to apply to the court for relief and the specified form is placed on the public record along with the registered special resolution. Once the court approved, amended or disapproved the amalgamation/merger, a further notice would need to be filed by (?) the court indicating the court's decision which would be placed on the public record. In the event that the court approved the amalgamation, the R of C would issue the certificate of amalgamation. Once again, it would have been helpful if there could have been some information on how New Zealand and Singapore have addressed this eventuality (assuming that this is available).
Arthur Lam & Co. CPA	We think prescribed procedures would promote consistent understanding among the business community. A case-by-case implement would cost the applicant unnecessary timely study on each set of rule from each company.
The Law Society of Hong Kong	In relation to intra-group amalgamation, the court-free statutory amalgamation procedure outlined in Table A is acceptable.
KPMG	The elements set out in Table A appear reasonable.
Clifford Chance	We agree generally with the elements outlined in Table A.
Chartered Institute of Management Accountants Hong	We agree that the elements outlined in Table A are adequate for both Short and Long Form Amalgamation. We would like to add that the solvency test should include both cash flow and balance sheet solvency test.

Kong Division	
The Chinese General Chamber of Commerce	在簡化公司合併程序的大前提下，本會原則上同意以諮詢文件中附件 A 所概述有關“一般合併”和“簡易合併”程序的組成部分，作為訂立法定合併程序的基礎。至於有關的具體程序則有待日後正式編制後再作詳細的討論。
Hermes Equity Ownership Services Ltd.	Yes. We believe that the key element which should be included in the court-free statutory amalgamation procedure is that any such proposal must be approved by a special resolution of members of each of the amalgamating companies at a general meeting either in case of short-form or long-form as we understand to be proposed within Table A.
Ho Tak Wing	Not applicable
Hong Kong Stockbrokers Association	Yes.
The Chinese Manufacturers' Association of Hong Kong	贊成以諮詢文件中附表 A 所概述的程序作為基礎。
CCIF CPA Limited	Yes, the procedure as set out in Table A is acceptable. We also think that an auditor's report based on a review or agreed upon procedures engagement may offer greater protection to the stakeholders. Such type of engagement may reduce the extent of auditor compromising professional independence when giving a fairness opinion (as stated in paragraph 4.16)
Canadian Certified General Accountants Association of Hong Kong	Table A looks fine.
CLP Holdings Limited	We agree that the court-free statutory amalgamation procedure should be based on the elements outlined in Table A of the Consultation Paper.
The British Chamber of Commerce in	The court-free procedure can be based on the approach set out in Table A in the CD.

Hong Kong	
Stephenson Harwood & Lo	We agree to a court-free statutory amalgamation procedure in Hong Kong based on the elements outlined in Table A and along the lines of the Singapore model, but we propose that several elements should be improved or added to address certain issues as follows: 1 **Date of solvency statement on amalgamating company (long form amalgamation)** **Issue**: Table A does not stipulate when a solvency statement on the amalgamating company shall be made. Under Singapore law[2], the solvency statement is on the amalgamating company's solvency at the date of the statement, not the date when the amalgamation takes effect. There is no requirement for the solvency statement to be made within a specified time before the amalgamation becomes effective. **Our recommendation**: It is not clear why a solvency statement on the amalgamating company is only required in a long form but not short form amalgamation. If a solvency statement on the amalgamating company is required under Hong Kong, we think that it should be made closer to the effective date of the amalgamation. We suggest that Hong Kong law should depart from the Singapore model to require that solvency statement to be made within a specified time after the general meeting and before the effective date of the amalgamation. 2 **Members' consent in short form amalgamation** **Issue**: In a short form amalgamation, table A does not appear to give members any right to information. The board of each amalgamating companies is not required to prepare and send to its members an amalgamation proposal. **Our recommendation**: Hong Kong law should require amalgamating companies to furnish to their members information sufficient to permit them to form a reasoned judgement concerning the amalgamation. They should be sent (or be entitled to see) the amalgamation proposal. 3 **Effect of amalgamation** Based on the Singapore model[3], one of the effects of an amalgamation is such that all the rights, properties, liabilities and obligations of each of the amalgamating companies are transferred to the surviving company.

[2] Section 215I(1) of the Singapore Companies Act
[3] Sections 215G(c) and (d) of the Singapore Companies Act

	The Delaware provision on the effect of amalgamation is comprehensive, albeit lengthy[4]. It makes it extremely clear that a surviving company continues as the embodiment of the amalgamating companies without the need to imply any assignment or transfer of rights or obligations from the amalgamating companies to the surviving company. On the other hand, the corresponding Canadian, New Zealand and Singaporean provisions are not as comprehensive as the Delaware provision but, arguably, they are sufficiently clear to convey the intention of the respective legislators that a surviving company should step into the shoes of the amalgamating companies. Substantial litigation has taken place in Canada, although less so in New Zealand, over the question on whether an amalgamation involves an assignment or transfer of the assets and liabilities of the amalgamating company (that ceases to exist after the amalgamation) to the surviving company[5]. It has been held in New Zealand[6] that a surviving company is not to be treated as a different entity or as a new party to the contractual arrangements but is to stand in the same position as each of the amalgamating companies in respect of all their rights and obligations. **Our recommendation**: Hong Kong law should expressly provide that the assets and liabilities of the amalgamating company become vested in the surviving company and there is no assignment or transfer of assets and liabilities involved. Similarly in the context of personal contracts e.g. employment contracts, the rights and liabilities of personal contracts shall be transferred to the surviving company without the consents that are necessary under common law, e.g. consent of employees. It is possible for a contracting party to protect itself against being bound to a new party without its consent, such as including a control change clause in its contract with an amalgamating company. 4 **Security granted over property of the amalgamating company** After an amalgamation, a secured creditor will continue to enjoy the security granted over the property of the amalgamating company, which is now vested in the surviving company. This does not create a problem if a fixed charge is taken over fixed assets. Difficulty may arise where the charge is taken over circulating assets, especially where a floating charge is taken over the amalgamating company's entire undertaking. If an amalgamating company's charged assets are co-mingled with those of another amalgamating

[4] Delaware General Corporation Law Title 8 (US), S259(a)
[5] Amalgamation of Companies (2008) 20 SAcLJ 146
[6] Carter Holt Harvey Ltd v McKernan [1998] 3 NZLR 403 (CA)

	company, the charge will now extend to cover all the commingled assets, since it is impossible to separate the business and assets of the amalgamating company in the fused company. Priority issues may arise where the amalgamating companies have both granted charges over similar circulating assets. **Our recommendation**: Amalgamations involving companies with charges over circulating assets may be an example of the more complex case that should be excluded from the amalgamation procedure.
The Hong Kong Chinese Enterprises Association	不適用。
Tricor Services Limited	Yes.
The Hong Kong General Chamber of Commerce	If a court-free statutory amalgamation procedure were to be introduced (for intra group transactions), the elements outlined in Table A above would provide a satisfactory basis for such a procedure.
Hong Kong Bar Association	[Please refer to the comments of Question 20]
The Society of Chinese Accountants & Auditors	We have no comments on Table A.
The Hong Kong Institute of Chartered Secretaries	Agree.
Hong Kong Institute of Certified Public Accountants	We would agree that the court-free statutory amalgamation procedure for "Short Form Amalgamation" should be based on the elements outlined in Table A of the consultation paper. As such a procedure would apply to intra-group amalgamations, there would not appear to be any likelihood of outsiders being disadvantaged. Subject to the modification indicated below, we would agree that, as an alternative to the existing court-sanctioned procedure, the court-free statutory amalgamation procedure for "Long Form Amalgamation", applicable to an amalgamation of corporate entities not being of the same group of companies, should be based on the elements outlined

	in Table A. However, we are not entirely clear why a buy-out provision for minority shareholders that disagree with the amalgamation, as contained in the NZCA, is considered to be unnecessary for Hong Kong. It may not be realistic to assume that dissenting minority shareholders will be bought out as part of the negotiation process and, if they are not, the current proposal puts the onus on them to apply to the court for relief on the ground of being unfairly prejudiced. This could be expensive and make life difficult for minorities while assisting for those who might want to abuse the process. It is suggested, therefore that a buy-out right, as in the NZCA, would provide an added safeguard against abuses for dissenting minority shareholders in a court-free statutory amalgamation procedure.

Comments Received at Consultation Forums and Meetings

Comments Received at Consultation Forums and Briefings	
By a participant at the Society of Chinese Accountants and Auditors forum on 17 September 2008	The reform proposals impose less control and will create problems. For example, there will be less control if we solely rely on a director's fiduciary duty to set the issue price of no-par shares in good faith, without a clear penalty in case of breach. Also, what would be the remedy in case the issue price is not issued at a fair value? Who will be responsible for the loss? Another example is the introduction of a court-free process for reduction of capital which means less protection to creditors.

Note

1. Respondent A has has requested that its identity as respondent to the captioned consultation exercise be kept confidential.