

Discussion paper 2

DEVELOPMENT OF COMPANIES REGISTRATION IN LESOTHO

COMPANY LAW ISSUES

1 Re-registration

1.1 The Draft Companies Act (s. 4) requires that existing companies apply to be re-registered. This provision was presumably included to cope with a situation where it was perceived that the register included a large number of defunct companies which ought to be removed. This situation can however be adequately dealt with through computerisation of the register with an active programme of annual return pursuit and automatic removal of defunct companies.

1.2 In the circumstances, the requirement for re-registration seems an unnecessary burden on existing companies. It is suggested that this requirement be removed.

1.3 There may be a need to recognise differences between existing and new companies. For instance, an existing company will have a memorandum and articles of association whereas a new company will have a single constitutional document (s. 20). It seems appropriate to recognise existing memoranda and articles as valid, but to require that, should it be necessary to change these, they should be replaced by a new-style constitutional document.

2 Financial year

2.1 The Draft Companies Act makes reference to the financial year in s. 2(1) (definition of 'accounting period'), stating that for all companies this shall end on 31 March. This appears to conflict with s. 146A, which specifies the year-end as '31 March or such other date as the board of the company may adopt as the company's financial year'.

2.2 If there is to be an option for a date other than 31 March (which has some merit), there should probably be a provision for this date to be notified to the Registrar.

3 Annual return date

3.1 The annual return is currently tied to the annual general meeting, which causes problems for the Registrar in that the date of the AGM is not known and a company is therefore only known to be in default after the latest possible date (31 December for the AGM, meaning that the annual return should be delivered by 14 February).

3.2 The Draft Companies Act ties it to the financial year (s. 169). This also gives rise to problems in that it means that all annual returns will be due at the same time of year. It would be preferable if they could be spread throughout the year. Currently, the preferred option is to say that an annual return should be made up to a date within 12 months of incorporation and thereafter within 12 months of the previous return. The UK Companies Act may provide a model.

4 Annual return contents

4.1 s. 169 requires that the annual return shall be in the prescribed form. There is a case for simplifying the current annual return. There is also a case for saying that this, along with other forms, may be defined by the Registrar.

4.2 This is especially so since consideration is being given to a procedure whereby the Registrar issues a form to each company shortly before the due date with the information currently held by the Registry pre-printed on the form. The company would then be able to confirm or amend this information.

5 Forms

5.1 s. 2(1) states that 'prescribed form' means a form prescribed by regulations made under the Act. This applies to various information delivered to the Registrar. It would be preferable if information delivered to the Registrar could be in a form determined by the Registrar. This would not only facilitate minor changes to format and content, but also allow for the determination of the format of information delivered electronically when this option becomes available.

6 Removal

6.1 There are concerns about certain aspects of the procedure set out in s. 242. These are:

- (a) The Registrar may publish a Gazette notice if he '*is satisfied that the company has ceased to carry on business*'. There is no requirement for formal inquiry or notification to the company.
- (b) There is no requirement to publish information about the fact that a company has actually been removed from the register.

6.2 It is suggested that, where the Registrar has reason to believe that a company is not carrying on business (most probably, as a consequence of the company's failure to deliver an annual return), he should write formally to the company stating that it appears that the company is no longer carrying on business and, unless cause is shown to the contrary (usually by delivering an annual return), he intends to remove the company from the register.

6.3 Failure to deliver an annual return is a prosecutable offence, but there are doubts about the practicality of bringing a significant number of cases to court. One possibility is that the Registrar should be enabled to remove a company which has, despite warnings, failed to deliver a return, even though it claims to be active. If this course is adopted, there should probably be some safeguards: possibly the procedure should only be invoked more than one return is overdue and the company has received a formal warning.

6.4 This does not apply in the case of a company which appears to be defunct, either because it says that it has ceased business or because it fails to respond to the Registrar's letter regarding its failure to deliver an annual return. Such cases can proceed directly to the Gazetting stage.

6.5 It is suggested that there should be a second Gazette notice when a company is actually removed from the register.

7 Business names

7.1 There is concern that the Ministry of Trade and Industry, Cooperatives and Marketing is implicitly authorising the use of a business name (that is, a name other than the name of the proprietor of the business) as part of the licensing process, since it seeks information about the name under which the business will be trading.

7.2 Ideally, no business should be allowed to use a name which is the same as a company name and no company should be registered with a name identical to that already used by an existing business. The practicalities of merging the companies and business names registers are being considered, but this issue may also have implications for s. 15(2) of the Draft Companies Act.

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